

ORDER OF THE PRESIDENT OF THE COURT
4 December 1991 *

In Case C-225/91 R,

Matra SA, a company incorporated under French law, having its registered office in Paris, represented by M. Siragusa, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 4 Avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by A. Abate, Principal Legal Adviser, and M. Nolin, a member of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION primarily for the suspension of the operation of the Commission's decision, communicated by letter of 16 July 1991 to the Portuguese authorities and by letter of 30 July 1991 to Matra SA, authorizing a programme of State aid to a joint venture between Ford Motor Company Inc and Volkswagen AG for the setting up of a plant for the manufacture of multi-purpose vehicles in Setúbal (Portugal),

the President of the Court of Justice of the European Communities makes the following

* Language of the case: French.

Order

- 1 By application lodged at the Court Registry on 6 September 1991, Matra SA (hereinafter referred to as 'Matra'), sought, pursuant to the second paragraph of Article 173 of the EEC Treaty, the annulment of the Commission decision communicated by letter of 16 July 1991 to the Portuguese authorities and by letter of 30 July 1991 to Matra, by which the Commission authorized a programme of State aid, notified by the said authorities, to a joint venture between Ford Motor Company Inc and Volkswagen AG for the setting up of a plant for the manufacture of multi-purpose vehicles in Setúbal (Portugal).
- 2 By a separate document, lodged at the Court Registry on the same day, Matra also made an application, pursuant to Articles 185 and 186 of the EEC Treaty, for interim relief seeking to obtain the suspension of the operation of the abovementioned decision and seeking an order that the Portuguese authorities refrain from paying any of the aid in question and, as was stated at the hearing, an order that those authorities recover amounts already paid.
- 3 The Commission submitted its written comments on the application for interim relief on 8 October 1991 and the parties were heard in their oral submissions on 4 November 1991.
- 4 Before examining whether the application for interim relief is well founded, it is appropriate to set out briefly the background to the proceedings.
- 5 The Community framework on State aid to the motor vehicle industry (Official Journal 1989 C 123, p. 3), which was adopted by the Commission pursuant to Article 93(1) of the EEC Treaty and entered into force on 1 January 1989, requires the Member States to give prior notification, pursuant to Article 93(3) of the Treaty, of all aid under consideration within an aid scheme already authorized by the Commission when the aid is being granted to an undertaking in the motor vehicle industry and when the cost of the project to be aided exceeds ECU 12 million.

- 6 As regards aid granted within the context of a scheme of aid authorized as regional aid, the Commission acknowledges, in that Framework, the valuable contribution to regional development which can be made by the implantation of new motor vehicle production facilities in disadvantaged regions and declares that it has a generally positive attitude towards investment aid granted in order to help to overcome structural handicaps in those regions. However, the prior notification of such aid is intended to enable the Commission to assess the regional development benefits against possible adverse effects on the motor vehicle sector as a whole (such as the creation of important overcapacity).
- 7 In accordance with that Framework, the Government of the Portuguese Republic, by letter of 16 April 1991, supplemented by letter of 31 May 1991, notified to the Commission the programme of aid referred to in the contested decision, which it intended to grant, in particular, under the Portuguese scheme of regional aid ('Sistema de Incentivos de Base Regional').
- 8 It is apparent from the contested decision that the undertaking benefiting from the aid is a joint venture between Ford Motor Company Inc and Volkswagen AG, set up with equal participation by those two motor vehicle manufacturers in order to develop and produce a multi-purpose vehicle for independent distribution in individualized versions through their respective commercial networks. The contested decision indicates that the total cost of the project amounts to ECU 2 550 million.
- 9 The joint venture envisages the construction between 1991 and 1995 of a plant for manufacturing multi-purpose vehicles in Setúbal. The planned plant is to begin production at the end of 1994 and from 1996 onwards is to produce 830 units per day, or 190 000 units per year, directly employing 5 020 persons.
- 10 According to the contested decision, the Portuguese authorities considered that an investment of ECU 1 668 million was eligible for State aid and decided to grant direct aid of ECU 500 million under the Portuguese regional aid scheme.

Furthermore, the authorities decided, under the terms of the Portuguese tax legislation, to grant the joint venture a five-year tax exemption on the companies' income, as from 1997, for a total amount which was not to exceed ECU 47 million.

- 11 In its decision, the Commission states, first, that the intensity of the aid, amounting to a total of ECU 547 million, is only 27.1% in terms of equivalent net subsidy, whereas when it authorized the Portuguese regional aid scheme, the Commission accepted an aid intensity of up to 75% in terms of equivalent net subsidy for the region of Setúbal, whatever the size of the project to be aided.

- 12 As regards the regional development advantages, the Commission emphasizes the great significance of the project for the economic development of the Setúbal region for both employment and infrastructure. The Commission states that locating the project in Setúbal involves serious structural handicaps for it, notably the geographical remoteness from the principal markets and the relative economic backwardness of the region involving very high costs for transport, storage, expatriate personnel and infrastructure. Although those structural handicaps are partially offset, in particular through cheaper manpower, the Commission considers that the net disadvantages in terms of costs and the need to give an additional incentive to attract investment to that disadvantaged region justify aid of the level and intensity envisaged.

- 13 As regards the consequences of the project for the motor vehicle sector as a whole, the Commission states that the market forecasts for multi-purpose vehicles indicate a continuing and significant growth in demand, with sales of those vehicles expected by 1995 to account for 2 or 3% of the European market for passenger vehicles, that is to say 300 000 to 400 000 units per year. Although the project in question provides the joint venture with a considerable share of Community production capacity, according to the Commission, there is little evidence of

problems of overcapacity arising in the near future, even taking into account projects currently being implemented or studied by other manufacturers for multi-purpose vehicles.

- 14 Further, it appears from the contested decision that the Portuguese authorities plan to implement a major training programme costing ECU 202 million, 90% of which is to be financed by those authorities. The programme comprises various training activities to be carried out, in particular, in a training centre to be set up in conjunction with the planned plant and to be managed and financed jointly with the joint venture. The Commission considers, however, that that programme does not constitute aid to the project in question since the training envisaged is not intended to satisfy exclusively the needs of the joint venture and will be accessible to other operators in the motor vehicle sector. The Commission takes the same view as regards certain local infrastructure investments being considered by the Portuguese authorities since those infrastructures would be accessible to all industrial users or the joint undertaking would be charged for their use at market rates.
- 15 Matra is an independent automobile manufacturer which on 26 June 1991 made a complaint to the Commission against the aid programme envisaged by the Portuguese authorities. The Commission rejected that complaint in its decision. Matra has designed and developed a multi-purpose car under the name 'Espace' which it has produced in France since 1986 in a purpose-built plant. The vehicle is marketed by the Renault Group and currently has a market share of approximately 50% of the Community market for multi-purpose vehicles which in 1991 is estimated at approximately 95 000 units.
- 16 Matra claims that the Commission decision infringes Article 93 of the Treaty. The decision could not lawfully have been adopted, as it in fact was, under the terms of Article 93(3). The Commission should have initiated the 'interlocutory' procedure provided for in Article 93(2) and should have given notice to the parties concerned to submit their comments before taking a decision. The Commission is obliged to initiate such a procedure when it has doubts regarding the compatibility of notified aid with the rules of the Treaty. The length of the bargaining which took place

and the changes made to the initial aid programme show that that was indeed the case. The Commission should also have had serious doubts about the compatibility with the competition rules of the Treaty of the joint venture and its project. The agreement between the two major manufacturers creating the joint venture falls, as the Commission states in its decision, within the scope of the prohibition laid down in Article 85(1) of the Treaty. The decision infringes both that provision and the rules adopted for its implementation and the Commission cannot lawfully, in a decision on aid, state its intention to grant an exemption under Article 85(3) to such an agreement, without complying with the preliminary procedure governing such a decision and before the procedure has even been started.

- 17 Moreover, Matra maintains that the decision is vitiated by manifest errors of assessment. It is wrong to accept that the project aided will not lead to production overcapacity. The optimistic assessment of market trends for multi-purpose vehicles relied on by the Commission is not shared by many experts and the production capacities currently announced for 1995 by the various European manufacturers, including the joint venture, already amount to more than 450 000 units a year, a figure which does not take account of imports. The appraisal of the structural handicaps inherent in the location selected is unrealistic and the aid granted, which corresponds to a subsidy of FF 4 000 to 7 000 for each vehicle produced, is disproportionate to the additional transport costs involved. Moreover, the Commission breached the rules of Article 92(3) including in its calculation a premium to attract investments to disadvantaged regions. Lastly, the Commission wrongly considered that the major training scheme and very large infrastructure investments which the Portuguese authorities are implementing do not constitute aid to the project.

- 18 It should be noted that, under Article 83(2) of the Rules of Procedure, for an order to be made for the suspension of the operation of any decision or for interim measures, there must exist circumstances giving rise to urgency and the pleas of fact and law must establish a *prima facie* case for the suspension or the interim measures applied for.

- 19 The Court has consistently held that the urgency of an application for suspension or for interim measures must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the suspension or interim measures. That party must prove that it cannot wait until the conclusion of the proceedings on the substance without suffering damage which would have serious and irreparable consequences for it.
- 20 In that regard, Matra claims that the subsidies authorized by the Commission will lead to the market for multi-purpose vehicles being disrupted. The joint venture, backed by the two most powerful sales networks in the Community and being given massive aid, will in the short term be in a position, having artificially reduced production costs, to saturate the market. The harmful effects will be directly felt by Matra which, in the motor vehicle sector, produces only multi-purpose vehicles and will jeopardize the current development of a new model of the 'Espace'. The harmful effects will appear immediately since the aid in question will probably be paid from the beginning of the implementation of the subsidized project. The joint venture will thus have its development and financing costs considerably reduced. The financial markets, moreover, have already reacted by revising their estimates of Matra's future results, thus causing a fall in Matra's share prices. Lastly, the damage will be irreparable as there can be no refund of an aid which the Commission has authorized even though it did so wrongly.
- 21 It should be stated at the outset that Matra recognizes that the projects concerning multi-purpose vehicles which have been set up by various European manufacturers and are currently being implemented will necessarily lead to a progressive reduction of its market share. But it also accepts that the joint Ford/Volkswagen project will be implemented even without the contested aid, although, in that case probably on a smaller scale.
- 22 Further, according to the programme of aid notified to the Commission by the Portuguese authorities, 5% of the contested aid will be paid upon the signature of the contract, 20% on 31 January 1992, 12.5% on 30 June 1992, 12.5% on 28 February 1993, 25% on 30 December 1993 and the remaining 25% on 30 December 1994.

- 23 It is also apparent from the documents in the case that the plant planned by the joint venture will begin production at the end of 1994 and will not reach full output until 1996. The alleged disturbance of the market cannot therefore arise until after 1994.
- 24 In those circumstances, it should be observed that it is not until after the foreseeable conclusion of the main proceedings that the major part of the aid will be paid and that the possibility arises of the market being disturbed. Moreover, as the Commission pointed out, the applicant is disputing not the legality of regional aid to the project in question generally, but solely the part of the aid which, in its view, constitutes overcompensation for the structural handicaps inherent in the locality chosen.
- 25 It follows that, without its being necessary to rule on the applicant's argument concerning the impossibility of recovering the amounts paid prior to the conclusion of the main proceedings, it has not been established that the applicant, in the absence of interim measures, is likely to suffer serious and irreparable damage.
- 26 Since the condition relating to urgency is not met, the application for interim measures must be dismissed.

On those grounds,

THE PRESIDENT

hereby orders:

- 1. The application for interim measures is dismissed;**
- 2. The costs are reserved.**

Luxembourg, 4 December 1991.

J.-G. Giraud
Registrar

O. Due
President