# JUDGMENT OF THE COURT (Sixth Chamber)
24 October 1996 *

In Joined Cases C-329/93, C-62/95 and C-63/95,

**Federal Republic of Germany,** represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent, and Michael Schütte, Rechtsanwalt, Berlin,

and

**Hanseatische Industrie-Beteiligungen GmbH,** whose registered office is at 34 Martinistraße, 28195 Bremen, represented by Gerhard Wiedemann, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Guy-Harles, 8-10 Rue Mathias Hardt, 2010 Luxembourg,

and

**Bremer Vulkan Verbund AG,** whose registered office is at 110 Lindenstraße, 28755 Bremen, represented by Hans-Jürgen Rabe, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the Chambers of Turk and Prum, 13 P Avenue Guillaume, 1651 Luxembourg,

applicants,

* Language of the case: German.

**Commission of the European Communities,** represented by Ben Smulders and Jürgen Grunwald, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision 93/412/EEC of 6 April 1993 concerning aid awarded by the German Government to Hibeg and by Hibeg via Krupp GmbH to Bremer Vulkan AG, facilitating the sale of Krupp Atlas Elektronik GmbH from Krupp GmbH to Bremer Vulkan AG (OJ 1993 L 185, p. 43),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, C. N. Kakouris (Rapporteur) and P. J. G. Kapteyn, Judges,

Advocate General: G. Cosmas,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 8 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 28 March 1996,

gives the following

## Judgment

By application lodged at the Court Registry on 25 June 1993 the Federal Republic of Germany brought an action under the first paragraph of Article 173 of the EEC Treaty for annulment of Commission Decision 93/412/EEC of 6 April 1993 concerning aid awarded by the German Government to Hibeg and by Hibeg via Krupp GmbH to Bremer Vulkan AG, facilitating the sale of Krupp Atlas Elektronik GmbH from Krupp GmbH to Bremer Vulkan AG (OJ 1993 L 185, p. 43, hereinafter 'the contested act') (Case C-329/93).

2 By applications lodged at the Court Registry on 28 June 1993 and 1 July 1993, Hanseatische Industrie-Beteiligungen GmbH (hereinafter 'Hibeg') and Bremer Vulkan Verbund AG (hereinafter 'BV') brought actions under the second paragraph of Article 173 of the EEC Treaty for annulment of that decision.

3 Following the enlargement of the jurisdiction of the Court of First Instance by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), the two latter actions were transferred to the Court of First Instance by order of the Court of Justice of 27

September 1993. When the Court of First Instance declined jurisdiction under the third paragraph of Article 47 of the EC Statute of the Court of Justice, the actions were transferred to the Court of Justice by order of 23 February 1995 (Cases C-62/95 and C-63/95).

4 By order of the President of the Court of 16 November 1995, the three cases were joined for the purposes of the oral procedure and the final judgment, in accordance with Article 43 of the Rules of Procedure.

## The contested act

5 According to the contested act, the German Government notified the Commission on 17 December 1991 of a guarantee given to banks by the Freie Hansestadt Bremen (hereinafter 'Land Bremen') in favour of Hibeg, a company established in Land Bremen.

6 The aim of the guarantee was to enable BV, a company established in Bremen, to buy from Krupp GmbH (hereinafter 'Krupp') Krupp Atlas Elektronik (hereinafter 'KAE'), a subsidiary of Krupp.

7 On 6 May 1992 the Commission initiated, with respect to the guarantee, the examination procedure provided for in Article 93(2) of the EEC Treaty, following which it adopted the contested act.

8 According to the contested act, in order further to diversify out of shipbuilding BV bought a 74.9% share in KAE from Krupp. The agreed price of DM 350 mil-

lion was not paid in cash but with newly issued shares in BV. The following transactions took place:

— 17 October 1991: the general meeting of shareholders of BV decided to increase the share capital by issuing new shares;

— 21 November 1991: Land Bremen gave a guarantee of DM 126 million to Hibeg, a public company owned by Land Bremen;

— 26 November 1991: a share-swap between Krupp and BV, whereby BV issued 2.8 million new BV shares (total value, according to BV, DM 350 million, i. e. DM 125 per share) to Krupp in exchange for a 74.9% holding in KAE;

— 26 November 1991: Krupp and Hibeg together founded a civil law company (Gesellschaft bürgerlichen Rechts, hereinafter 'the GbR');

— 31 December 1991: Krupp and Hibeg both brought their agreed holdings into the GbR. Krupp contributed the 2.8 million BV shares and Hibeg contributed DM 350 million in cash, financed by a bank credit;

— 31 December 1991: on the basis of the agreement establishing the GbR, the GbR gave a DM 350 million advance to Krupp. Hibeg was given an irrevocable entitlement to sell the BV shares to third parties at a minimum price of DM 125 per share. Every share sold reduced the holding of the two partners in the GbR, by effecting both a reduction of the balance owed on the advance to Krupp and a repayment of the credit brought in by Hibeg;

— 28 February 1994 at the earliest and 31 December 1994 at the latest: the GbR was to be dissolved, the remaining BV shares being transferred to Hibeg with Krupp holding the balance of the advance. Hibeg had the option, agreed upon with the creditor banks, of repaying part of the credit by selling the BV shares to those banks for DM 80 per share at the end of the credit term.

9 According to the contested act, this meant that BV bought a 74.9% share in KAE by paying Krupp 2.8 million BV shares. Within the framework of the GbR Krupp exchanged those shares with Hibeg and received DM 350 million. At the time of the transaction BV shares were quoted on the stock market at about DM 80 per share, so that the total value of the 2.8 million shares was DM 224 million. Land Bremen supported Hibeg with a guarantee of DM 126 million, the difference between the agreed purchase price of the holding in KAE and the current market value of the shares, thereby allowing the sale of KAE to BV to take place.

10 The Commission considered that the Land Bremen guarantee constituted aid in favour of BV, on the basis of the following considerations.

11 The average share price for BV shares in November and December 1991, when the most important transactions took place, was around DM 80 per share (DM 84.90 in November and DM 75.40 in December). Since it reflects the situation of the individual company in the context of general national and international trends, the share price on the stock market is the only factor to be taken into account. In this case the price of DM 80 already allowed for the depressive effects which are generally caused by the issue of new shares. It was therefore the maximum price that could have been asked in a public issue of new BV shares. That was confirmed by the fact that the banks were prepared to accept the shares which remained unsold at the term of the credit at a price of DM 80 per share, and by the fact that from late 1991 until February 1993 the price of BV shares had fluctuated around DM 80.

12 Consequently, according to the contested act, Hibeg, which was wholly owned by Land Bremen and could thus be regarded as a public undertaking, was able to obtain the bank credit and exchange DM 350 million for the new BV shares in the framework of the GbR only because Land Bremen covered the risk by a guarantee of DM 126 million. That sum represented exactly the difference between DM 350 million (the total credit) and DM 224 million (the value of the shares on the basis of a stock market price of DM 80 per share).

13 As regards the amount of the aid, the Commission reached the conclusion, in the contested act, that the difference between the DM 350 million paid for KAE and the DM 224 million which the new BV shares were worth, in other words DM 126 million, could not be accounted for by commercial motives. The total of that difference, which was equal to the total guarantee given to Hibeg, consequently had to be regarded as aid.

14 As to the recipient of the aid, the contested act states that at the time of the initiation of the procedure provided for in Article 93(2) of the Treaty it was not possible to identify the recipient. The answer to that question depended on the assessment of the real commercial market price for KAE. If the value of 74.9% of KAE was only DM 224 million, then all the aid went to Krupp. If that value was DM 350 million, all the aid went via Hibeg to BV to make it possible for BV to acquire 74.9% of KAE. If the real market value of 74.9% of KAE was between those two values, the aid was split between BV and Krupp accordingly. Following the examination procedure, the Commission concluded that DM 350 million reflected the real market value of 74.9% of KAE, so that the final recipient of the aid was BV. Since the aim of the whole arrangement was the diversification of BV through the purchase of KAE, although it was Krupp which received the cash payment directly from Hibeg within the GbR, it was BV which effectively improved its financial position through the cash contribution by Hibeg and the State guarantee.

15 The Commission then considered, in the contested act, that the guarantee did not fulfil the requirements of the Bürgschaftsrichtlinien (Guidelines on guarantees) of Land Bremen, which it had approved on 28 October 1991. Firstly, those guidelines provided in principle for deficiency guarantees, whereas the guarantee at issue was a joint-liability guarantee. On this point, the Commission in the contested act did not accept the German Government's position that the term 'in principle' used in the guidelines also permitted joint-liability guarantees and that, as Hibeg was State-owned, a deficiency guarantee was inappropriate from an economic point of view. Secondly, in the Commission's view, the guidelines required securities to be given as collateral and a premium of 0.5% of the guarantee to be paid on delivery and 0.5% annually; in fact Hibeg had not been asked to provide collateral or pay premiums. Finally, it could not be accepted, on the basis of the facts supplied, that there was a normal relationship between the proceeds of the investment in the GbR and the funds needed to service the loan, as was required by the guarantee scheme.

16 Since the guarantee at issue did not comply with the approved Land Bremen scheme, the German Government should, in the Commission's opinion, have notified it in advance in accordance with Article 93(3) of the Treaty. The German Government in fact notified the aid after the guarantee had been given and after Krupp had sold and BV bought 74.9% of KAE and after Hibeg and Krupp had founded a GbR. That provision of the Treaty had therefore been infringed. The aid thus had to be regarded as unlawful from the date on which it was granted.

17 In order to examine the question whether the aid distorted competition and affected trade between Member States within the meaning of Article 92(1) of the Treaty, the Commission, in the contested act, examined the field in which KAE operated. It found that KAE's activities lay mainly in the fields of marine and defence electronics (echo-sounding techniques and signal and data processing), that there was competition in the Community between producers in those fields, and that there was trade between Member States in the products involved. The

contested act referred to statistics on KAE's exports as a proportion of its total turnover, and concluded that the aid in question affected trade between Member States and distorted competition between marine and defence electronics manufacturers.

18 Finally, the Commission looked at the possibility of applying the derogations provided for in Article 92(3) of the Treaty. It considered that the intervention at issue was not intended to promote the economic development of an area where the standard of living was abnormally low or where there was serious unemployment (Article 92(3)(a)); that it was not intended to promote a project of common European interest or to remedy a serious disturbance in the German economy (Article 92(3)(b)); and that it had no Community sectorial justification and was not part of an approved regional scheme, but was an investment aid to help BV buy an already existing company (KAE), not to create new production facilities or employment (Article 92(3)(c)).

19 Accordingly, Article 1(1) of the contested act found that the aid in favour of BV, totalling DM 126 million, was unlawful and incompatible with the common market; Article 1(2) found that the aid in favour of Hibeg, granted by Land Bremen in the form of a guarantee of DM 126 million, was likewise unlawful and incompatible with the common market.

20 Article 2(1) ordered the Federal Republic of Germany to ensure that the aid granted to BV was fully recovered and paid to Hibeg within two months of notification of the contested act, in accordance with the procedures and provisions of national law. Article 2(2) ordered Germany to abolish the guarantee referred to in Article 1(2) within the same period of two months.

## The pleas in law put forward by the applicants

21 In support of their applications for annulment, the applicants plead that each section of the contested act is vitiated by a defective statement of reasons. They also put forward pleas alleging breach of the Treaty rules on State aid, infringement of the right to a fair hearing, breach of the principle of the protection of legitimate expectations and of the principle of proportionality, and misinterpretation of the Land Bremen guidelines on guarantees.

22 The plea alleging an inadequate statement of reasons in each section of the contested act should be examined first, since only if the act is adequately reasoned will it be possible to consider whether the other pleas are well founded. It is settled case-law that the statement of the reasons for a decision adversely affecting a person must be such as to enable the Court to exercise its power of review and to provide the person concerned with the information necessary to enable him to ascertain whether or not the decision is well founded.

## The statement of the reasons for the contested act

### *The value of the new BV shares*

23 Whether the intervention at issue constitutes aid depends, first, on the answer to the question whether the total value of the new BV shares corresponded to the value of 74.9% of the share capital of KAE which BV acquired. If the two values coincide, the intervention cannot be described as aid. If, on the other hand, the total value of the new BV shares was less than the value of 74.9% of KAE, a second question then arises, according to the Court's case-law, namely how a private

investor, pursuing a structural policy — whether general or sectorial — and guided by prospects of profitability in the longer term, would have behaved, having regard to all the circumstances and all the relevant factors (Case C-305/89 *Italy* v *Commission* ('*Alfa Romeo*') [1991] ECR I-1603).

24 With respect to the first question, the parties are in disagreement, first, as to what is the relevant time for the purposes of the comparison of the two values and, secondly, as to the factors and circumstances to be used as criteria of assessment.

25 It should be noted that, as the documents in the case show, the negotiations which started in early 1991 between Krupp and BV on the acquisition by BV of part of KAE's share capital led to the signature of a memorandum of understanding on 12 July 1991. That memorandum, which was not to take effect until it had been approved by the parties' supervisory organs, provided for an increase in BV's capital by 2.8 million new bearer shares, to which Krupp would subscribe. In consideration of the acquisition of those shares, Krupp was to transfer to BV its 74.9% holding in KAE. The two parties to the agreement valued their contributions at DM 350 million each, which means that the new BV shares were valued at DM 125 each. Krupp's contribution was to take effect from 1 July 1991.

26 The applicants submit that the decisive factor in valuing the new BV shares is the agreement of 12 July 1991 between Krupp and BV, as set out in the memorandum. That date is the relevant one for the purpose of the valuation, since the agreement was binding on the parties as to its various terms, in particular with respect to each party's contribution. On that date Krupp's contribution and BV's contribution were both valued at DM 350 million.

27 Moreover, the applicants submit, the parties to the agreement had taken into account, in valuing the new BV shares, not only the stock market price at the time, which was DM 101.20, but also other factors bearing on the intrinsic worth of BV,

such as recent movements in the stock market price of BV shares, the additional value contributed by the block of 2.8 million shares, which represented 19.13% of BV's share capital after the increase, and the beneficial effects on the share value of unifying Systemtechnik Nord GmbH (hereinafter 'STN') — a subsidiary of BV operating in the same field as KAE — with KAE, under BV's management.

28 The Commission considers, on the other hand, that the only relevant criterion in the present case is the stock market price of the BV shares. The value of the shares is determined by the market, and the market for shares is the stock exchange. The stock exchange price is therefore the only valid criterion for determining the real value of shares. That price also reflects the market's fears and hopes for the future.

29 As to the point in time to be used for the valuation, the Commission considers that that is during the period of the guarantee at issue, namely late November and early December 1991. At that time the BV share price was around DM 80.

30 It should be observed that if the Commission considered that the relevant time for the valuation in question was the time when Land Bremen decided to give the guarantee, that was clearly because that was when the competent authority carried out the final assessment of the factors and circumstances on the basis of which it gave the guarantee. On this point the contested act contains an adequate statement of reasons.

31 It should next be borne in mind that, according to the Court's case-law, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the act in question (see in particular Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19).

32 It follows that in the present case the Commission had to take account of all the circumstances and all the relevant factors of the case.

33 As well as the stock market price of the BV shares, such factors might reasonably be the past movement of that price, the agreement of 12 July 1991, the intrinsic worth of BV as an undertaking, the additional value which may have been contributed by the block of 2.8 million shares, the synergy effects expected from the merger of KAE and STN in accordance with the situation of the market, the inside information the parties to the agreement had on the market in question and on the situation of the competing undertakings, and the forecasts of how the BV share price would develop, having regard in particular to the situation of the market on which the undertaking operates.

34 It may be noted here that the stock market price of BV shares was DM 101.20 on 12 July 1991, was around DM 100 in October 1993 and even reached DM 106 in January 1994. The applicants refer, moreover, without being contradicted, to a case of an undertaking in which a large block of shares was bought at a much higher price than that quoted on the stock exchange.

35 In the present case, the Commission did not found its decision on grounds derived from an analysis, even an approximate one, of the above factors; in particular, it did not address the question whether the valuation of the 2.8 million new BV shares at DM 350 million, made on 12 July 1991 by Krupp and BV, two undertakings which had no legal or economic links, was to be regarded as unreasonable in the light of the above factors and by reference to the criterion of the substantial private investor guided by prospects of profitability in the longer term, or regarded as fictitious, having regard to the assurances Krupp might have been given as to the payment of that sum by means of the establishment of a civil law company and the provision of a guarantee by Land Bremen. In any event, no proof of such assurances was adduced.

36 Instead of assessing all those factors, the Commission, in the contested act, merely stated, without adequate explanation, that the stock market price is the sole determining factor in valuing shares. That view is too formal, rigid and restrictive. To apply that criterion absolutely and unconditionally, to the exclusion of all other elements, constitutes a purely mechanical exercise which can scarcely be reconciled with the system of the market economy and the economic choices made in the present case by undertakings of substantial size guided by prospects of profitability in the longer term.

37 On this point, therefore, the contested act lacks an adequate statement of reasons.

38 It follows that the contested act must be annulled in its entirety on the ground of lack of an adequate statement of reasons.

39 The Court will nevertheless consider the pleas in law concerning the contested act's statement of reasons on other points.

*Council Directive 90/684/EEC*

40 The applicants argue that even if the intervention at issue were to be regarded as aid, the Commission should have examined the question whether it was compatible with the provisions of Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27, hereinafter 'the Seventh Directive'), in particular Articles 5 and 6(3).

41 They contend that BV is a shipbuilding undertaking. Its main activities are in the shipping industry, to the extent of 64.4% of its total turnover for 1991; moreover, modern shipbuilding concerns the construction of a 'system ship', starting with the assembly of the metal parts and ending with the installation of the electronic systems, and the Seventh Directive is not limited to shipbuilding *stricto sensu*.

42 They state that in the course of the procedure for examination of the intervention at issue, that point of view was put to the Commission on several occasions, but the Commission did not accept it, without explaining the reasons for which it considered that the case did not come under the Seventh Directive.

43 The Commission replies that, as can be seen from BV's annual report for 1991, the total share of shipbuilding in the BV group's overall results for 1991 was 42.4%. It is thus not correct to say that BV was active principally in the shipbuilding sector. Furthermore, the conditions for the application of Articles 5 and 6(3) of the Seventh Directive were not satisfied in this case. The reasons for its decision thus did not have to refer to provisions which were neither relevant nor applicable.

44 In that regard, it should be noted that Bremer Vulkan Verbund AG, one of the largest shipyards in the Community, is generally known as an undertaking whose main activity is orientated towards shipbuilding.

45 Article 5 of the Seventh Directive, entitled 'Other operating aid', provides that aid to facilitate the continued operation of shipbuilding and ship conversion companies may be deemed compatible with the common market on certain conditions. Moreover, Article 6, entitled 'Investment aid', which forms part of Chapter III, 'Restructuring aid', provides in paragraph 3 that investment aid may be deemed

compatible with the common market, on condition *inter alia* that the amount and intensity of the aid are justified by the extent of the restructuring involved.

46 It follows that if those conditions were satisfied the aid allegedly granted to BV could have been deemed to be compatible with the common market.

47 In the light of the foregoing considerations, the Commission was obliged to specify in the contested act the activities which were nowadays to be regarded as belonging to shipbuilding, the undertakings which were to be regarded as belonging to that sector, and the reasons for which BV was to be excluded. The Commission was also obliged to explain in its decision why it had reached the conclusion that those provisions of the Seventh Directive were not applicable in the present case.

48 Since the contested act does not at any point in its statement of reasons deal with the applicability of the Seventh Directive, it must be held that in that respect it is vitiated by a complete failure to state reasons. Nor can that defect be remedied by the Commission's considerations and assertions on this point before the Court.

*Distortion of competition and effect on trade between Member States*

49 For the purpose of determining whether the aid allegedly given to BV distorted competition and affected trade between Member States within the meaning of Article 92(1) of the Treaty, the Commission referred in the contested act to ΚΑΕ's

field of activities. It found that they were principally in the fields of marine and defence electronics (echo-sounding techniques and signal and data processing), that there was competition in the Community between producers in those fields, and that there was trade between the Member States in the products involved.

50 The Commission also referred in the contested act to the volume of KAE's exports to other Community countries in comparison with its total turnover (DM 45 million out of DM 689 million in 1991), quoted various figures on imports, by Member States, of products of Community origin and falling under three tariff headings, and concluded that the aid at issue affected trade between Member States and distorted competition between producers of marine and defence electronic equipment.

51 It must be stated, firstly, that even if the Commission was entitled to restrict itself to examining the position of KAE in order to determine whether aid allegedly granted to BV was compatible with the common market, the assertions in the contested act and the data quoted there do not constitute adequate reasons to support the conclusions it reached.

52 While it is settled case-law that the relatively small size of an undertaking's turnover in the Community does not a priori exclude the possibility that State intervention in its favour constitutes aid (Case C-142/87 *Belgium* v *Commission* ('*Tubemeuse*') [1990] ECR I-959, paragraph 43), and while in certain cases the very circumstances in which the aid has been granted may show that it is liable to affect trade between Member States and to distort or threaten to distort competition, the

Commission must at least set out those circumstances in the statement of the reasons for its decision (*Netherlands and Leeuwarder Papierwarenfabriek*, paragraph 24).

53 In the present case the contested act contains no information whatever as to the situation on the market in question, KAE's share of that market or the position of competing undertakings. As to the trade flows between Member States in the products concerned, the Commission does no more than cite the Member States' imports of products falling under three tariff headings, without determining KAE's share of those imports.

54 Secondly, the Commission in any event restricted itself to examining the situation of KAE, without giving in its decision any reasons for this. Since BV was named as the recipient of the alleged aid, the Commission ought to have examined how the acquisition of 74.9% of KAE strengthened its competitive position in the fields of shipbuilding and marine and defence electronics, having regard in particular to the fact that BV already owned STN, which operated in the same sector as KAE, and having regard to the situation of the markets in question and the competing undertakings.

55 Consequently, on this point too, the contested act lacks an adequate statement of reasons.

*The aid allegedly given to Hibeg*

56 In the grounds of the contested act Hibeg was presented as an intermediary which was a conduit of State aid in favour of BV, the final recipient. It was therefore said

to have acted merely as an instrument of Land Bremen. In the operative part of the contested act, however, Hibeg was named, without any explanation, as the independent recipient of a separate aid granted by Land Bremen in the form of a guarantee of DM 126 million. The Commission did not explain what benefit Hibeg was supposed to have obtained from the public intervention in question.

57 Consequently, the contested act lacks an adequate statement of reasons in that respect.

58 In the light of all the above considerations, it must be held that the contested act fails in several respects to satisfy the requirement to state reasons laid down in Article 190 of the EEC Treaty. It must therefore be annulled for infringement of essential procedural requirements, and there is no need to consider the other pleas in law put forward by the applicants.

## Costs

59 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Annuls Commission Decision 93/412/EEC of 6 April 1993 concerning aid awarded by the German Government to Hibeg and by Hibeg via Krupp GmbH to Bremer Vulkan AG, facilitating the sale of Krupp Atlas Elektronik GmbH from Krupp GmbH to Bremer Vulkan AG;**

2. **Orders the Commission of the European Communities to pay the costs.**

Mancini Kakouris Kapteyn

Delivered in open court in Luxembourg on 24 October 1996.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber