

JUDGMENT OF THE COURT

15 February 2001 *

In Case C-99/98,

Republic of Austria, represented by W. Okresek, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by V. Kreuzschitz and P.F. Nemitz, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision SG(98) D/1124 of 9 February 1998 to open a formal investigation procedure under Article 93(2) of

* Language of the case: German.

the EC Treaty (now Article 88(2) EC) in respect of State aid C 84/97 (ex N 509/96) in favour of Siemens Bauelemente OHG, established in Villach, Austria,

THE COURT,

composed of: C. Gulmann, President of the Sixth Chamber, acting as President, A. La Pergola, M. Wathelet and V. Skouris (Rapporteur), (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón and R. Schintgen, Judges,

Advocate General: F.G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 28 March 2000, during which the Republic of Austria was represented by M. Dossi, acting as Agent, and M. Krassnigg, Rechtsanwalt, and the Commission by V. Kreuzschitz,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2000,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 7 April 1998, the Republic of Austria brought an action, pursuant to Article 173 of the EC Treaty (now, after amendment, Article 230 EC), for annulment of Commission Decision SG(98) D/1124 of 9 February 1998 (hereinafter ‘the contested decision’) to open a formal investigation procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC) in respect of State aid C 84/97 (ex N 509/96) in favour of Siemens Bauelemente OHG (hereinafter ‘Siemens’), established in Villach, Austria.

- 2 It is apparent from the documents before the Court that on 26 April 1996 the Commission learned from a press article reporting a statement made by a director of the Siemens group that Siemens was planning to invest ATS 4 563.7 million in a site at Villach, following a written promise of aid totalling ATS 371 million from the Austrian Federal Government, the *Bundesland* Kärnten and the municipality of Villach. It is also clear that on 5 April 1995 a daily newspaper had already published the news that the Austrian Chancellor ‘had given a promise in principle’ regarding the grant of such aid to Siemens.

- 3 The written promise of aid to Siemens was made in the form of a letter dated 18 April 1996 and signed by the Federal Minister for Finance on behalf of the

Federal Government, and by representatives of the government of the *Bundesland* Kärnten and of the municipality of Villach. The letter stated as follows:

‘[T]he Republic of Austria will, in the forthcoming weeks, notify this aid proposal to the European Union authority responsible for competition matters. A binding promise of aid, up to the permitted maximum, may be given once full or partial clearance has been obtained from those authorities.’

4 By letter of 13 May 1996 the Commission called upon the Austrian Government to inform it of its plan to grant the aid in question.

5 The Austrian Government responded by letter of 5 June 1996 setting out Siemens’s thoughts regarding a ‘research project in the field of power semiconductors of importance to the European semiconductor industry’. In the letter, it also stated:

‘Details of the project and of the aid are currently being drawn up. Once that preparatory work has been completed, the incentive measure proposed will of course be notified to the European Commission in accordance with the rules of the European Union governing aid.’

6 On 21 June 1996 the Austrian Government notified the Commission of the aid in question in a letter which included a technical specification running to 14 pages. According to the notification, the aid was destined for a project developed by Siemens in the field of power semiconductors. Confirming the press reports on the subject, the notification indicated that the total project cost of ATS 4 563.7 million would be covered to the extent of ATS 371 million by State aid provided

partly by the federal authorities and partly by the *Bundesland* Kärnten and the municipality of Villach. The biggest portion of the notified aid, some ATS 348.2 million, was reserved for research and development, whilst the remainder was earmarked for environmental protection measures (ATS 17 million) and training (ATS 5.8 million).

- 7 By letter of 26 July 1996 (hereinafter 'the Commission's first letter') the Commission, seeking more detailed information, put a series of questions to the Austrian Government. It justified its request for further information on the ground that the Austrian Government's notification of 21 June 1996 did not contain all the information it needed in order to form an opinion of the compatibility of the aid in question with the Treaty.

- 8 On 2 January 1997 the Austrian Government replied to the Commission's first letter, providing technical explanations.

- 9 By letter of 17 February 1997 (hereinafter 'the Commission's second letter') the Commission asked the Austrian Government further questions seeking clarification of certain information contained in the Austrian Government's letter of 2 January 1997.

- 10 The Austrian Government answered the questions raised in the Commission's second letter on 19 March 1997.

- 11 The Commission states in its defence that, on 28 April 1997, its Directorate-General with responsibility for competition matters at the time (hereinafter 'DG IV') sent a note to the competent Member of the Commission informing him

of the plan to grant aid to Siemens. The Commission states that, in that note, DG IV expressed doubt, after consulting an independent expert, as to whether the aid fitted within the framework of Community aid for research and development. DG IV also questioned the need for the aid, particularly as Siemens had already announced, as early as summer 1995, its plan to make an investment in the Villach site. It therefore proposed, on the basis of a draft decision, to consult the Commission's other Directorates-General regarding the opening of a procedure under Article 93(2) of the Treaty. The memorandum also mentioned the fact that a small part of the proposed aid might be dependent upon an Austrian guideline that had not been notified to the Commission, entitled Richtlinie zur Förderung von generellen betrieblichen Schulungsmaßnahmen (Guideline on the promotion of general in-house training measures), which is one of the measures implementing the Arbeitsmarktförderungsgesetz (Austrian law on the promotion of the employment market).

- 12 The Commission also mentions in its defence 'comprehensive and very complex discussions' between various departments in the Commission and within the college of Commissioners on draft decisions regarding several national aid projects in favour of semiconductor producers, including the aid project at issue. According to the Commission, those discussions lasted from May to December 1997.
- 13 After receiving the Austrian authorities' reply to its second letter on 24 March 1997, the Commission sent the Austrian Government a letter dated 2 May 1997 (hereinafter 'the Commission's third letter') in which it asked whether the part of the notified aid reserved for training was to be granted pursuant to the Arbeitsmarktförderungsgesetz and its implementing measures.
- 14 By letter of 13 June 1997, the Austrian Government informed the Commission that the part of the notified aid reserved for training was not based upon the Arbeitsmarktförderungsgesetz or its implementing measures.

- 15 By letter of 6 August 1997 (hereinafter ‘the Commission’s fourth letter’), the Commission put three further questions to the Austrian Government, seeking to establish whether the aid was still necessary. The first question enquired about the project’s state of progress and the costs incurred to date. The other two questions concerned the preparatory work carried out between October 1995 and January 1996, and the construction, begun in June 1996, of the ‘clean room’ which was to form the nucleus of the power semiconductor centre.
- 16 The Austrian Government replied to those question by letter of 4 September 1997, received by the Commission on 10 September 1997.
- 17 Still in doubt as to whether the aid from the *Bundesland* Kärnten had been properly included in the notification of the plan to grant aid, the Commission asked the Austrian Government by letter of 10 November 1997 (hereinafter ‘the Commission’s fifth letter’) to clarify the point.
- 18 On 20 November 1997 the Austrian Government sent the Commission a letter in which it pointed out that the answer to the Commission’s fifth letter had already been given in its letter of 2 January 1997 answering the Commission’s first letter. The Commission could thus no longer be in any doubt about the fact that the total amount notified covered all of the proposed aid, including that financed by the federal government and the *Bundesland* Kärnten, and that provided by the municipality of Villach. According to the Austrian Government, the notification of the aid in question was complete, the aid ought therefore to come under the system of existing aid, and the Austrian Republic was free to put it into effect.
- 19 By an undated facsimile letter sent to the Austrian Government in late November 1997, the Commission confirmed its view that the question asked in its fifth letter was necessary and objected to the Austrian Republic’s plan to put the aid into

effect without prior authorisation from the Commission, adding that it anticipated adopting a decision on the notified aid proposal.

- 20 By letter of 10 December 1997, the Austrian Government reiterated the point of view expressed in its letter of 20 November 1997 and stated that the Commission's objection could not be regarded as a valid one.

- 21 By facsimile letter of 16 December 1997, the Commission informed the Austrian Government that, by decision taken that day, it had opened a formal examination procedure under Article 93(2) of the Treaty with regard to Austria's plan to grant aid.

- 22 Confirmation of the opening of that procedure was given to the Austrian Republic by letter of 9 February 1998.

- 23 That letter stated as its object 'State aid No C 84/97 (ex N 509/96) — Austria, Measures in favour of Siemens Bauelemente OHG'.

- 24 After describing the background to the matter, the undertaking concerned and the proposed aid, and giving its assessment of the legality of the aid, the Commission gave the contested decision, which it concluded as follows:

'On the basis of the above assessment, the Commission has serious doubts at this stage as to the compatibility of the proposed State aid with the common market within the meaning of Article 92(3) of the EC Treaty. Specifically, the Austrian authorities have not demonstrated the incentive effect of the proposed R & D aid,

[have] not demonstrated that the aid is necessary, and [have] not demonstrated that the project is eligible for funding as “precompetitive development activity”. [As f]or the environmental and training aid proposals, these have to be assessed against the criteria mentioned above.

The Commission has therefore decided to open the procedure under Article 93(2). The Commission hereby gives the Austrian Government the opportunity to present, within one month of the receipt of this letter, any comments and further relevant information.

The Commission reminds the Austrian authorities that under Article 93(3), the Member State concerned [must] ... not implement the proposed aid until the procedure allowed for in Article 93(2) has resulted in a final decision. ...’

- 25 That is the decision against which the Republic of Austria brought the present action.
- 26 By its application, the Republic of Austria maintains that its notification of the aid in question to the Commission was complete after the Commission had received Austria’s answers to the questions asked in its second letter or alternatively, at the very latest, when the Commission received the answers to the questions asked in its fourth letter; that is to say either on 24 March 1997 or 10 September 1997, and that the period of two months laid down in the case-law of the Court (see, in particular, the judgments in Case 120/73 *Lorenz* [1973] ECR 1471, Case 121/73 *Markmann* [1973] ECR 1495, Case 122/73 *Nordsee* [1973] ECR 1511, and Case 141/73 *Lohrey* [1973] ECR 1527, hereinafter ‘the *Lorenz* case-law’), in which the Commission must either authorise the aid or open the formal examination procedure in accordance with Article 93(2) of the Treaty, has therefore expired. Consequently, in accordance with the *Lorenz* case-law, the aid became existing aid within the meaning of Article 93(1) of the Treaty and the notice given by the Republic of Austria on 20 November 1997 announcing its

intention to put the aid into effect was validly given. The Commission was therefore no longer entitled to open the formal examination procedure under Article 93(2) of the Treaty and the contested decision wrongly classifying the aid as new aid, the payment of which is prohibited, must be annulled on the ground that it was adopted in breach of the Treaty and essential procedural requirements, and represented a misuse of power on the part of the Commission.

- 27 The Commission, on the other hand, maintains that the Republic of Austria may not rely on the system for existing aid. In its defence, it puts forward in this connection one principal plea in law and three subsidiary pleas. The principal plea is that the aid in question was put into effect before it was notified. The first subsidiary plea is that the period of time referred to in the *Lorenz* case-law for completion of the preliminary aid-examination phase had not expired by 20 November 1997 when the Republic of Austria informed the Commission of its plan to implement the aid. The second subsidiary plea is that the period of time referred to in *Lorenz* cannot be interpreted as being strictly two months, that length of time merely being an indication of the proper period. By its third subsidiary plea, the Commission maintains that it was entitled to object to implementation of the aid in question.

The relevant law

- 28 In view of the pleas put forward by the parties, it is appropriate at the outset to mention the legislation and case-law applicable to the facts of the case.
- 29 At the relevant time, no rules of procedure had yet been adopted on the basis of Article 94 of the EC Treaty (now Article 89 EC) for the purpose of determining precisely how Article 93(3) of the Treaty is to be applied. Thus the procedural rules applicable to the facts of the case are those derived from Article 93 of the Treaty, as interpreted in the case-law of the Court of Justice. Those rules vary according to whether the aid in question is existing or new aid.

- 30 As far as existing aid is concerned, Article 93(1) of the Treaty empowers the Commission, in cooperation with the Member States, to keep such aid constantly under review. In the context of such review, the Commission may propose to the Member States measures that must be taken as a result of the continuing development or functioning of the common market. Article 93(2) of the Treaty goes on to provide that, if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid is not compatible with Article 92 of the EC Treaty (now, after amendment, Article 87 EC) or that aid is being misused, it must decide that the State concerned must abolish or alter the aid within such period of time as it determines.
- 31 As regards new aid, Article 93(3) of the Treaty lays down a system of preventive control: the Commission must be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92 of the Treaty, it must without delay initiate the procedure provided for in Article 93(2) of the Treaty. If it does so, under the last sentence of Article 93(3) of the Treaty, the Member State concerned is prohibited from putting its proposed measures into effect until the procedure has resulted in a final decision.
- 32 In the *Lorenz* case-law, and in later judgments (see, for example Case 84/82 *Germany v Commission* [1984] ECR 1451, paragraphs 11 and 12), the Court recognised that the preliminary stage of the procedure for reviewing aid under Article 93(3) is intended merely to allow the Commission to form a *prima facie* opinion of the partial or complete conformity with the Treaty of the aid schemes notified to it. The purpose of that provision, which seeks to prevent the implementation of aid contrary to the Treaty, requires that the prohibition laid down in that respect by the last sentence of Article 93(3) should be effective during the whole of the preliminary stage. That is why, in order to take account of the interest of Member States in being informed of the position quickly in spheres where the necessity to intervene may be of an urgent nature, the Commission must act diligently. If, after being informed by a Member State of a plan to grant aid, the Commission fails to initiate the contentious procedure within a reasonable period of time, the Member State may, after giving prior notice to the Commission, put the aid in question into effect, whereupon it will come under the system for existing aid. Guided by Articles 173 and 175 of the EC Treaty

(now Article 232 EC), the Court has held that a reasonable delay should not exceed two months.

- 33 Furthermore, according to that same case-law, the Commission must inform the Member State concerned if, after its preliminary examination, it comes to the conclusion that the system of aid notified is compatible with the Treaty. If, after notification of a positive decision by the Commission, the aid in question is implemented, it will become 'existing aid' and, as such, subject to the constant review provided for by Article 93(1). If, on the other hand, the Commission considers the aid to be incompatible with the common market, it must without delay initiate the procedure provided for by Article 93(2), which involves the obligation to give the parties concerned notice to submit their comments.

Whether the aid was implemented before being notified to the Commission

- 34 The principal plea put forward in the Commission's defence is that, because of its unconditional and legally binding promise to Siemens to grant it the aid in question, the Republic of Austria is prevented from relying on the *Lorenz* case-law. By making that promise, the Austrian authorities in effect implemented the aid even before notifying it to the Commission in accordance with Article 93(3) of the Treaty. The Commission argues that 'implementation' is to be understood as meaning not only the action of granting aid to a recipient, but also the setting up — in accordance with the constitutional rules of the Member State concerned — of a legislative mechanism enabling aid to be granted without the need for further formalities to be completed.
- 35 According to the Commission, the written promise to grant aid given in this case by the Austrian authorities produced, under Austrian law, the same effects as would legislation instituting a system of aid, because it imposed a legal obligation upon those authorities to grant the aid promised. On the view that, because of the unconditional and legally binding promise, the aid was implemented before its

notification, the Commission was entitled to regard it as new aid the payment of which must be suspended.

36 In support of that plea, the Commission points out that it was unaware of the existence of the plan to grant aid, which dates back to 1995, until it came across the press articles mentioned in paragraph 2 of the present judgment. The Republic of Austria thus failed to notify the Commission of the aid of its own accord, even though the Austrian authorities had already given a binding promise of aid in their letter of 18 April 1996, mentioned in paragraph 3 of the present judgment. That was the reason why the Commission itself invited the Republic of Austria, on 13 May 1996, to inform it of the plan to grant aid. It follows that the Austrian authorities had already implemented the aid in question before notifying it on 21 June 1996. In addition, the Commission refers to the press reports of 5 April 1995 and 26 April 1996, and to an internal memorandum dated 16 February 1996 sent within Siemens, in which the managers of Siemens's semiconductor unit referred to the recommendation made by the competent Austrian authorities to the Federal Minister for Finance to grant aid of some ATS 370 million and asked their board of directors to release the necessary funds for the investment at Villach.

37 The Commission's arguments cannot be accepted.

38 The press articles upon which the Commission relies did not emanate from the Austrian Government or the undertaking concerned and therefore do not have sufficient probative value to establish the truth of the Commission's assertion that the Austrian authorities gave an unconditional and legally binding promise to grant the aid in question. Even assuming that the press articles might have a certain probative value, they do not indicate that the promise given to Siemens by the Austrian authorities was an unconditional one.

- 39 On the contrary, it is clear from the letter of 18 April 1996 mentioned in paragraph 3 of the present judgment that the Austrian authorities were conscious of their obligations under Community law because, in that letter, they both stated that the plan to grant aid would be notified to the Commission and made the grant of the aid conditional upon their obtaining full or partial clearance from the Commission. It follows that the Austrian authorities did not bind themselves unconditionally with regard to Siemens.
- 40 Furthermore, the fact that the promise made by the Austrian authorities was a conditional one had already been drawn to the attention of the undertaking concerned. As is clear from Siemens' internal memorandum of 16 February 1996, to which the Commission refers and which states that 'notification to the European Union' is a precondition of the grant of the aid, Siemens had already been informed by the Austrian authorities of the conditions imposed by Community law in matters of State aid.
- 41 That attitude on the part of the Austrian authorities is confirmed by the letter of 5 June 1996 from the Austrian Government, mentioned in paragraph 5 of the present judgment. In that letter, the Austrian Government expressly stated that the planned aid was to be notified to the Commission in accordance with the applicable law.
- 42 Those findings are corroborated by the fact that the Commission itself, both during the preliminary administrative procedure and in the contested decision, gave indications suggesting that it regarded the aid in question as being notified aid, in that it registered the aid with the letter 'N', used to denote notified aid, rather than 'NN', used for non-notified aid.
- 43 It follows from the foregoing considerations, taken as a whole, that the Commission has not produced to the Court any evidence enabling it to find that the aid in question was promised unconditionally before it was notified. The

Commission's principal plea must therefore be rejected, without its being necessary to define in any greater detail the meaning of 'implementation'.

- 44 That being so, the Republic of Austria is not precluded from relying on the *Lorenz* case-law applicable to notified aid.

The date on which the two-month period began

- 45 By the first subsidiary plea put forward in its defence, the Commission submits that, even if the Republic of Austria is entitled to rely on the *Lorenz* case-law, the period of two months specified in that case-law had not yet expired on 20 November 1997, the date on which the Republic of Austria informed the Commission of its intention to implement the proposed aid. According to the Commission, notification of the aid in issue was still incomplete on that date.
- 46 In support of that plea, the Commission maintains, first, that the two-month period begins once it has received a complete notification of the proposed aid. According to the Commission, a notification is complete when it contains all the information the Commission needs in order to form a view of the compatibility of the planned aid with the Treaty.
- 47 Next, the Commission maintains, first, that, in the event of incomplete notification, and in view of the broad discretion it enjoys in such matters, it has a duty to request further information and, second, that any such request cancels the period allowed for processing the notification, in such a way that a fresh period begins to run when the requested further information is received. In this connection, the Commission contends that all its letters, including its fifth letter dated 10 November 1997, were necessary to enable it to assess the

compatibility of the aid in question with the Treaty. Thus, each time it received a reply from the Austrian Government, a new two-month period began to run.

48 Lastly, the Commission maintains that, because of the wide discretion it enjoys in determining what questions it needs to ask and the content of those questions, any judicial review of the relevance of its questions must be limited to ascertaining any infringement of essential procedural requirements or misuse of powers.

49 The Republic of Austria does not dispute the fact that only a complete notification will cause the two-month period to begin, or the Commission's right to request further information, or its margin of discretion in such matters, or the effect of such a request on the commencement of that period.

50 None the less, it maintains that, because of the nature of the preliminary examination procedure, the question whether a notification is complete and, consequently, whether the Commission is entitled to request further information, must not be construed in such a way as to impose upon the Member State at that stage an obligation to provide exhaustive information. According to the Republic of Austria, it would, in any event, be unacceptable for the Commission, although it had sufficient information to carry out its pre-examination, artificially to prolong that preliminary procedure by repeatedly asking new irrelevant questions, particularly if it does so on each occasion shortly before expiry of the two-month period.

51 That, according to the Republic of Austria, is what happened in the present case. With its reply of 19 March 1997 to the Commission's second letter, or at the very latest, with its reply of 4 September 1997 to the Commission's fourth letter, the Republic of Austria completed its notification of the aid, with the result that no subsequent letter from the Commission was necessary to enable the pre-examination procedure to be closed. The Commission, it maintains, could have,

and should have asked the questions contained in its third, fourth and fifth letters at an earlier stage in the procedure.

- 52 In view of the foregoing, before ascertaining the date on which, in the circumstances of the present case, the two-month period commenced, it is necessary to establish the extent of the information that is required in order for notification of a plan to grant aid to be complete for the purposes of the pre-examination procedure.
- 53 In this connection, it must be borne in mind that, as is clear from the case-law referred to in paragraph 32 of the present judgment, the preliminary stage of the procedure for reviewing aid under Article 93(3) is intended merely to allow the Commission a sufficient period of time for reflection and investigation so that it can form a *prima facie* opinion of the partial or complete conformity with the Treaty of the aid plans notified to it.
- 54 It follows that it is sufficient if the Commission has at its disposal, during that preliminary phase, all such information as will enable it to conclude, without any extensive review being called for, whether a given State measure is compatible with the Treaty or raises doubt as to its compatibility.
- 55 Thus the purpose of the information contained in the initial notification or provided by the Member State in response to questions raised by the Commission is to enable the Commission to close the preliminary phase either by concluding that the plan to grant aid is compatible with the Treaty, in which case the Member State concerned will be informed and the aid will become existing aid, or by expressing doubt as to the compatibility of the aid, in which case, according to the case-law referred to in paragraph 33 of the present judgment, the Commission will be required to initiate the next phase, being the contentious procedure under Article 93(2) of the Treaty, by giving notice to the parties concerned to submit their comments.

- 56 Consequently, for the purposes of the preliminary phase, in order for a notification to be regarded as complete and thus cause the two-month period to begin to run, it is sufficient if it contains, either from the beginning or once the Member State has replied to questions raised by the Commission, such information as will enable the Commission to form a *prima facie* opinion of the compatibility of the aid with the Treaty.
- 57 In order to establish the date on which, in the circumstances of the present case, the two-month period began to run, it is necessary to examine the content of the correspondence between the Republic of Austria and the Commission, having regard to the criteria set out in paragraphs 53 to 56 of the present judgment.
- 58 The Republic of Austria does not dispute that replies to the questions put in the Commission's first two letters were necessary to complete the notification of the aid in question. On the other hand, it maintains that its notification was completed by its reply of 19 March 1997 to the Commission's second letter or, at the very latest, by its reply of 4 September 1997 to the Commission's fourth letter, which were received on 24 March 1997 and 10 September respectively. Thus, it maintains that the two-month period began to run on 24 March 1997 or, at the latest, on 10 September 1997, with the result that, by 20 November 1997, it had already expired.
- 59 The Commission, on the other hand, maintains that its third, fourth and fifth letters contained questions which were necessary for the aid in question to be assessed. It therefore claims that the notification was still not complete on 20 November 1997 and that, consequently, the two-month period had not yet expired.
- 60 The Commission's reasoning cannot be accepted.

- 61 It is clear from the Commission's first three letters that, whilst the questions raised in the first two relate to statements made by the Republic of Austria in its initial notification and in its reply to the Commission's first letter, and are aimed at obtaining clearer information about the principal component of the aid plan, namely the aid for research and development, the single question contained in the Commission's third letter relates solely to a subsidiary aspect of the plan, namely the aid for training, which represents less than 2% of the total investment. The sole purpose of that question was to establish if the training should be regarded as specific or general professional training and whether the aid was to be granted on the basis of the Arbeitsmarktförderungsgesetz and its implementing measures.
- 62 Clearly, the answer to the question formulated in the Commission's third letter, was, given its very limited scope, not necessary in order to enable the Commission to form a *prima facie* opinion on the compatibility of the whole of the proposed aid with the Treaty.
- 63 That finding is, moreover, corroborated by the Commission's timing in sending its third letter to the Republic of Austria and by the circumstances surrounding the dispatch of that letter.
- 64 Whilst the Commission did, in its internal memorandum of 28 April 1997, to which it itself refers (see paragraph 11 of the present judgment), express doubt regarding aspects of the aid for training, which was to be the subject of its third letter, it was merely making a minor point. The main subject of that memorandum was whether the notified aid fitted within the framework for State aid for research and development and the need for the aid. Those two issues are wholly unconnected with the question raised in the Commission's third letter. Moreover, it is clear from paragraph 12 of the present judgment that the Commission itself mentioned 'comprehensive and very complex discussions' between its various departments and within the college of Commissioners, which lasted from May to December 1997 and concerned not only the Austrian plan to grant aid but also other national plans to grant aid in favour of semiconductor producers.

- 65 Those findings justify the conclusion that the part of the aid destined for professional training was not one of the Commission's major concerns on 2 May 1997, the date on which it sent its third letter. In reality, the purpose of the Commission's third letter was not to obtain clarification of matters raised in its second letter, but to gain for the Commission extra time in which to consider other aspects of the plan to grant aid. The additional time which the Commission sought to gain in that way therefore amounted to an artificial extension of the preliminary review phase.
- 66 It follows that the two-month period began to run on 24 March 1997 at the latest.
- 67 That being so, there is no need to examine the content of the Commission's fourth and fifth letters.

The nature of the time-limit specified in the *Lorenz* case-law

- 68 By the second subsidiary plea put forward in its defence, the Commission argues that, even if the period specified in the *Lorenz* case-law had already commenced on the date suggested by the Republic of Austria, it is not to be understood as being strictly a two-month period, that length of time being no more than a guideline. The Commission maintains that its duty was thus to act with diligence and within a reasonable period of time. Since that period may vary, it can be shorter or longer than two months, depending on the circumstances and the complexity and difficulty of the case. The Commission contends that, in the present case, having regard to the complexity of the matter and the need for it to be discussed within the college of Commissioners, it did act with diligence and did not prolong its pre-examination of the aid plan beyond what was reasonable. In support of that plea, the Commission puts forward a number of arguments.

- 69 First of all, the Commission refers to the *Lorenz* judgment itself, in the operative part of which no particular time-limit is laid down. Paragraph 4 of the grounds of the judgment merely mentions the Commission's obligation to act 'with proper diligence' and to 'define its attitude within a reasonable period'. That same paragraph confirms, according to the Commission, the fact that the period mentioned is merely offered as a guideline, in that it states that '[i]t is appropriate in this respect to be guided by Articles 173 and 175 of the Treaty which, in dealing with comparable situations, provide for a period of two months'. According to the Commission, it follows that the Court of Justice merely wished to draw guidance from that two-month period, without, therefore, intending to apply it strictly to the pre-examination procedure.
- 70 Secondly, according to the Commission, to interpret the period mentioned in the *Lorenz* case-law as constituting a strict deadline, would amount to imposing excessive formality on relations between the institutions and the Member States, whereas it must be possible to shorten the period, as well as extend it, if the complexity of the matter so requires, as it does in the present case, or if the particular circumstances of the case call for a pre-examination of more than two months' duration.
- 71 Thirdly, the Commission raises one main and one subsidiary argument. By its main argument, it submits that, in any event, at no time during the preliminary review phase of the plan to grant aid did the Republic of Austria intimate that the matter was urgent. According to the Commission, the case cannot have been urgent, because the planned investment was made without the Republic of Austria waiting for a decision from the Commission on the plan to grant aid. The Commission also makes the subsidiary point that the chronology of the events reveals that the Austrian authorities did not always reply promptly to the questions raised by the Commission and that they are not, therefore, entitled to rely on the two-month time-limit, given that they themselves contributed to the delay in completing the pre-examination of the aid.
- 72 Having regard to those arguments, it should be observed at the outset that, whilst it is true that the operative part of the judgment in *Lorenz* speaks of 'a period sufficient to enable the aid to undergo a preliminary examination' and paragraph 4 of the grounds of the judgment mentions a 'reasonable period', the Court nevertheless held in that same paragraph that it was appropriate to assess that period at two months.

- 73 By drawing guidance from Articles 173 and 175 of the Treaty, and by thus assessing the maximum duration of the period at two months, the Court intended to remove a legal uncertainty manifestly contrary to the objective of the preliminary stage of the procedure for examining State aid under Article 93(3) of the Treaty. That objective, which is to offer Member States the legal certainty they require by informing them quickly as to the compatibility with the Treaty of a particular aid, which may be a matter of urgency, would be jeopardised if the period were to be regarded as merely indicative. Moreover, the legal uncertainty that would result could be aggravated if the preliminary examination phase were artificially prolonged.
- 74 That is why the more recent case-law of the Court refers to a maximum time-limit of two months (see, for example, *Germany v Commission*, cited above, paragraph 11, Case C-312/90 *Spain v Commission* [1992] ECR I-4117, paragraph 18, and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 38). The Commission's first argument must therefore be rejected.
- 75 As for the Commission's second argument, based on the possibility of shortening the period in certain cases, suffice it to observe that the fact that the Commission may in some cases voluntarily impose a restriction on its own margin of action, so as to take action within a period of less than two months does not imply that it may, without the consent of the Member State concerned, set a time-limit of more than two months and thus deprive the Member State of the advantages of the time-limits laid down by Community law.
- 76 As regards the Commission's third main argument alleging a lack of urgency in the present case, it must be pointed out that the time-limit formulated in the *Lorenz* case-law was set at two months in view of the interest of the Member States in obtaining clarification quickly in spheres where there may be an urgent need to take action (see *Germany v Commission*, cited above, paragraph 11). Bearing that interest in mind, it follows that the preliminary examination of a planned aid must, in principle, be regarded as an urgent matter, unless the Member State concerned expressly agrees to an extension of the time allowed for that examination. It is clear that no such consent may be inferred from the conduct of the Republic of Austria.

- 77 As far as concerns the subsidiary argument that the Republic of Austria contributed to the delay in the pre-examination of the aid in question, suffice it to observe that Article 93 of the Treaty does not impose any obligation upon Member States other than to notify the aid plan in good time and to refrain from putting the planned aid into effect until the procedure under Article 93(2) has resulted in a final decision. The Treaty does not also require the Member States to reply swiftly to any requests for further information made by the Commission. It is merely in their interests to reply promptly, without their being required to do so. A Member State is not, therefore, precluded from relying on the *Lorenz* case-law where it has failed to answer such requests promptly.
- 78 It follows from the foregoing that the Republic of Austria may avail itself of the two-month time-limit even though it failed to answer the Commission's questions promptly.

The Commission's right of objection

- 79 By the third subsidiary plea raised in its defence, the Commission claims that, after a State has given it prior notice of its intention to put the aid measures into effect, it is entitled, within a short time, to object to such implementation, with the result that the aid cannot be granted and has not become existing aid. To deny it any right of objection would, according to the Commission, have grave consequences for the operation of the system governing aid instituted by the Treaty. The Commission maintains the view that, in the present case, it exercised its right of objection promptly, with the result that the Republic of Austria is precluded from putting the aid into effect and the aid is prevented from becoming existing aid.
- 80 The Commission argues that the right of objection and the consequences flowing from it ensue, first of all, from paragraph 5 of the judgment in *Lorenz*, which states that aid implemented 'during the Commission's silence', after a period

necessary for its preliminary examination is subject to the regime governing existing aid.

- 81 Next, according to the Commission, the Member States' obligation to give the Commission prior notice of its intention to put aid into effect makes little sense unless the Commission has a right of objection enabling it to forestall the negative consequences of the application of the *Lorenz* case-law to State aid schemes.
- 82 Lastly, the Commission adds that, if it had no right of objection, it would be deprived of its power to administer the procedure under Article 93 of the Treaty, because it would be sufficient for a Member State to give prior notice of its intention to implement aid in order for the power to determine the conduct, scope and outcome of the procedure to be transferred to it, which would be contrary to Article 93 of the Treaty. That would happen even if the time-limit were miscalculated or if, due to some error in its transmission, for example, the prior notice did not arrive at the Commission. In all those cases, the aid would become existing aid, if the Commission had no right of objection.
- 83 The Republic of Austria denies that the Commission has any right of objection. It maintains, as a subsidiary argument, that, even if the Commission were accorded such a right, it exercised the right out of time in the present case.
- 84 In this connection, and in the light of the procedural rules mentioned in the *Lorenz* case-law, it must be pointed out that the conversion of notified aid into existing aid is subject to two conditions only, which are sufficient and both necessary. The first is that the Member State must give the Commission prior notice of implementation of the planned aid; the second is that the Commission must not initiate the contentious procedure under Article 93(2) of the Treaty in the two months following complete notification of the aid. It is that second condition, and not any right of objection, as the Commission argues, that is

referred to in paragraph 5 of the *Lorenz* judgment by the words ‘during the Commission’s silence’.

85 To accord the Commission a right of objection would amount to adding to the procedural system which governed State aid at the material time a third condition quite contrary to that system, which would re-introduce into a mechanism designed to provide legal certainty, legal uncertainty as to the form and legal effects of, and the time-limit applicable to such a right of objection, and would create doubt as to the date from which the aid came under the system governing existing aid. It follows that the Commission has no right of objection.

86 Given that the Commission enjoys no right of objection, there is no need to examine whether or not any such right was exercised out of time.

87 It follows from the foregoing considerations that the contested decision was adopted after the two-month period had expired and must therefore be annulled.

Costs

88 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Republic of Austria has applied for costs to be awarded against the Commission and since that institution has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Annuls Commission Decision SG(98) D/1124 of 9 February 1998 to open a formal investigation procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC) in respect of State aid C 84/97 (ex N 509/96) in favour of Siemens Bauelemente OHG;
2. Orders the Commission of the European Communities to pay the costs.

	Gulmann		La Pergola
Wathelet	Skouris	Edward	Puissochet
Jann		Sevón	Schintgen

Delivered in open court in Luxembourg on 15 February 2001.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President