

JUDGMENT OF THE COURT (Full Court)

29 June 2004^{*}

In Case C-110/02,

Commission of the European Communities, represented by F. Santaolalla Gadea, D. Triantafyllou and V. Di Bucci, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by J. Carbery and F. Florindo Gijón, acting as Agents,

defendant,

supported by

Portuguese Republic, represented by L. Fernandes and I. Palma, acting as Agents, with an address for service in Luxembourg,

* Language of the case: French.

and

French Republic, represented by G. de Bergues and F. Million, acting as Agents,

interveners,

APPLICATION for the annulment of Council Decision 2002/114/EC of 21 January 2002 authorising the Government of Portugal to grant aid to Portuguese pig farmers who were beneficiaries of the measures granted in 1994 and 1998 (OJ 2002 L 43, p. 18),

THE COURT (Full Court),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, C. Gulmann, J.-P. Puissochet and J.N. Cunha Rodrigues, Presidents of Chambers, A. La Pergola, R. Schintgen, F. Macken, N. Colneric, S. von Bahr and K. Lenaerts (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 11 December 2003,

gives the following

Judgment

- 1 By an application lodged at the Registry of the Court of Justice on 25 March 2002, the Commission of the European Communities sought the annulment, pursuant to Article 230 EC, of Council Decision 2002/114/EC of 21 January 2002 authorising the Government of Portugal to grant aid to Portuguese pig farmers who were beneficiaries of the measures granted in 1994 and 1998 (OJ 2002 L 43, p. 18).

- 2 By orders of the President of the Court of Justice of 16 and 19 September 2002, the Portuguese Republic and the French Republic were each granted leave to intervene in support of the Council, the latter, however, being authorised to submit observations only in the event of oral proceedings taking place.

Legal background

3 Article 88(2) and (3) EC provide:

‘(2) If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 226 and 227, refer the matter to the Court of Justice direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

(3) The Commission shall 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 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

The contested decision and its context

- 4 By Decree-Law No 146/94 of 24 May 1994 (*Diário da República* I, series A, No 120, of 24 May 1994; 'the Decree-Law of 1994'), the Portuguese Republic established an aid scheme setting up lines of credit for reducing the debt burden on intensive stock farms and assisting the recovery of pig farming. That aid system was not notified to the Commission.
- 5 Acting under the first paragraph of Article 88(2) EC, the Commission adopted Decision 2000/200/EC of 25 November 1999 concerning an aid scheme implemented by Portugal with a view to reducing the debt burden of intensive stock farms and assisting recovery in the pig-farming sector (OJ 2000 L 66, p. 20). Under Article 1(1) of that decision, it declared the credit line for reducing the debt burden on intensive stock farms incompatible with the common market in cases where, together with the investment aid received, the grant equivalent exceeded 35% in farming areas other than less-favoured farming areas. Article 1(2) declared the credit line for assisting recovery in the pig-farming sector incompatible with the common market. Repayment of the aid already unlawfully paid to the beneficiaries, with interest, was ordered under Article 3 of that decision.

- 6 By Decree-Law No 4/99 of 4 January 1999 (*Diário da República* I, Series A, No 2, of 4 January 1999; ‘the Decree-Law of 1999’), the Portuguese Republic further introduced a moratorium extending by one year the period for repayment of certain loans contracted by pig farms which produced, fattened and slaughtered pigs in a closed cycle, and also introduced short-term financing for such farms by means of loans at favourable rates. Although those measures were notified to the Commission, they were put into effect before the Commission stated its position in respect of them.
- 7 Those aid measures were declared incompatible with the common market, and their repayment was ordered by Commission Decision 2001/86/EC of 4 October 2000 on the aid scheme implemented by Portugal in favour of the pigfarming sector (OJ 2001 L 29, p. 49).
- 8 On 23 November 2001, the Portuguese Republic requested the Council of the European Union to adopt, on the basis of the third subparagraph of Article 88(2) EC, a ‘decision authorising it to grant aid to Portuguese pig farmers obliged to repay the aid granted in 1994 and 1998 and [declaring] that aid compatible with the common market’.
- 9 Acceding to that request, the Council adopted the contested decision, Article 1 of which is worded as follows:

‘Exceptional aid by the Portuguese Government to the Portuguese pig sector involving the grant of aid to beneficiaries covered by the Commission Decisions of 25 November 1999 and 4 October 2000, totalling not more than EUR 16,3 million, equivalent to the amounts which those beneficiaries must reimburse under those Decisions, shall be considered compatible with the common market.’

10 After setting out the particular circumstances and features of the Portuguese pig farming industry which had led the Portuguese Republic to adopt the Decree-Laws of 1994 and 1999, the grounds for the contested decision state, in paragraph 9, that '... as the pattern of trade shows, [the aid instituted under those Decree-Laws] did not have any particular effect on intra-Community trade and consequently did not cause any distortion of competition'.

11 According to paragraphs 12 to 14 of the grounds for the contested decision:

'(12) In its decisions of 25 November 1999 and 4 October 2000, the Commission held that the measures in question were not compatible with the common market. Pursuant to those decisions, the Portuguese authorities initiated a procedure to recover the aid granted.

(13) However, refunding the aid granted threatens the economic viability of not a few beneficiaries and would have extremely damaging social effects in certain regions because 50 % of the pig herd is concentrated in less than 5 % of the territory.

(14) Exceptional circumstances therefore exist, making it possible to consider such aid, by way of derogation and to the extent strictly necessary to remedy the imbalance which has arisen, to be compatible with the common market on the terms specified in this Decision.'

The action

- 12 The Commission makes five pleas in law in support in its action, claiming that the Council did not have the power to adopt the contested decision, misuse of powers and procedure, infringement of the EC Treaty and various general principles, manifest error of assessment, and failure to state sufficient reasons for the contested decision.

The first plea

Arguments of the parties

- 13 The Commission argues in its first plea that the Council did not have the power to adopt the contested decision, and its reasoning in that respect is in two stages.
- 14 First, the Commission argues that the contested decision has effects identical to a revocation or annulment of Decisions 2000/200 and 2001/86, whereby the Commission declared the aid paid under the Decree-Laws of 1994 and 1999 incompatible with the common market and ordered it to be repaid.
- 15 By authorising the payment to the Portuguese pig farmers concerned of aid equivalent in amount to that which they had to repay in accordance with those Commission decisions, the contested decision nullified the effects of the latter. It

prevented the effective withdrawal of aid which the Commission had declared incompatible with the common market and the return to the status quo required by the first subparagraph of Article 88(2) EC in order to preserve the market from distortions of competition.

16 According to the Commission, the contested decision effectively amounted to an authorisation of the initial aid, which the Commission had previously declared incompatible.

17 Secondly, the Commission argues that it is clear from the wording of Article 88 EC that the Treaty intended to confer upon it, as a monopoly, the tasks of controlling and managing State aids. That, it maintains, is explained by the fact that only a body totally independent of Member States is capable of examining aid measures adopted by the latter with the required objectivity and impartiality, and of ensuring that competition is not distorted to an extent contrary to the common interest.

18 As for the power conferred on the Council under Article 88(2) EC, the Commission argues that that is exceptional in character. That is clear from the wording both of the third subparagraph of that provision, which refers to 'exceptional circumstances', and of the fourth subparagraph, which lays down a period during which the Member State's application is to suspend the procedure before the Commission, at the expiry of which period the Commission recovers its power to 'give a decision', that is to say decide definitively on the aids concerned. The granting to the Council of such a power of decision, taking precedence over that of the Commission for a limited period, would, moreover, be devoid of meaning if the Council's decision could prevail over that of the Commission in all circumstances.

19 It follows, in the Commission's view, that the Council does not have the power to adopt a decision on the basis of the third subparagraph of Article 88(2) EC where an

aid has been declared incompatible with the common market by a Commission decision. Nor, to that extent, did the Council have the power to override the effects of such a decision, by authorising the grant of aids designed to compensate the beneficiaries of the aid declared incompatible for the repayment which that decision obliged them to make.

20 The Council argues, first, that the Commission's reasoning is based entirely on the premiss that the contested decision annulled or revoked Decisions 2000/200 and 2001/86. In reality, the Council argues, the contested decision did not call into question the repayment obligations under those decisions, since it was, on the contrary, in the context of the full implementation of those obligations, and taking account of the social and economic consequences which such implementation would have, that the Council decided to authorise the new aid which the Portuguese Government was proposing to grant.

21 What counts as new aid, the Council argues, depends on formal and objective considerations. In this case the aid authorised by the contested decision consisted of an entirely new payment, arising from a national provision other than the Decree-Laws of 1994 and 1999, corresponding to different eligibility and payment conditions from those which applied to the aids granted under those Decree-Laws.

22 According to the Council, the fact that the aid authorised by the contested decision constitutes new aid is also demonstrated by the definition of 'new aid' in Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1) as 'aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. The term 'existing' implies that the aid in question has already been authorised, which is precisely not the case with the aid to which the contested decision relates.

- 23 Moreover, the third subparagraph of Article 11(2) of Regulation No 659/1999, which allows the possibility of authorising the Member State to accompany repayment of the illegal aid with an aid to rescue the undertaking concerned, also confirms that it is possible to adopt divergent decisions concerning State aids granted successively to the same operators. The same applies to Community case-law, which, the Council argues, has implicitly acknowledged that the Commission may make the payment of new aid declared compatible with the common market subject to the recovery of earlier aid declared incompatible (Joined Cases T-244/93 and T-486/93 *TWD v Commission* [1995] ECR II-2265; Case C-355/95 P *TWD v Commission* [1997] ECR I-2549).
- 24 Finally, the Council argues that neither decisions of the Commission declaring an aid incompatible with the common market nor any other text constitute a prohibition against the beneficiaries of such aid receiving other aid sooner or later. The principle that each successive aid is to be examined individually should be complied with in all circumstances (Case C-441/97 P *Wirtschaftsvereinigung Stahl v Commission* [2000] ECR I-10293, paragraph 55). If the contested decision had not been taken, the aid which it authorised, which had, moreover, been notified to the Commission by the Portuguese Republic, would have had to have been examined by the Commission and to have given rise to a decision by the latter.
- 25 Concerning, secondly, the scope of Article 88(2) EC, the Council argues that the three-month period referred to in the fourth subparagraph of that provision is laid down for purely suspensive purposes. It follows, in the Council's submission, that it remained at liberty to authorise the aid concerned notwithstanding the expiry of that period.
- 26 As for the conflict capable of arising in that respect between a previous decision of the Commission, finding aid incompatible with the common market, and a subsequent decision of the Council, authorising that aid, the Council argues that the principle to be applied when dealing with incompatible rules, in the absence of a hierarchy between them, is that the later rule derogates from the previous one.

- 27 The Portuguese Republic essentially shares the analysis of the Council. The aid authorised by the contested decision was a new aid, distinct from those established by the Decree-Laws of 1994 and 1999, having been notified as new aid to the Commission. Portugal adds that the fact that the third subparagraph of Article 88(2) EC empowers the Council to rule not only on aid which a Member State ‘intends to grant’ but also on aid which it ‘is granting’ confirms that the Council is empowered to authorise aid even where the Commission has already expressed its view on it. Article 88(3) shows that any granting of aid requires prior examination by the Commission, with the result that the aid cannot be granted unless there has been a favourable decision by the Commission in that regard.

Findings of the Court

- 28 In order to rule on the Commission’s first plea in support of its action, it first needs to be determined whether, as the Commission has argued, Article 88(2) EC must be interpreted in such a way that, where the Commission has adopted a decision finding aid incompatible with the common market, the Council no longer has the power to decide, on the basis of the third subparagraph of that provision, that that aid must be regarded as compatible with the common market.
- 29 In that respect, it should be noted that the intention of the Treaty, in providing through Article 88 EC for aid to be kept under constant review and supervised by the Commission, is that the finding that aid may be incompatible with the common market is to be arrived at, subject to review by the Community judicature, by means of an appropriate procedure which it is the Commission’s responsibility to set in motion. Articles 87 EC and 88 EC thus reserve a central role for the Commission in determining whether aid is incompatible (Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505, paragraphs 9 and 14).

- 30 As is clear from its very wording, the third subparagraph of Article 88(2) EC covers an exceptional case (Case 156/77 *Commission v Belgium* [1978] ECR 1881, paragraph 16). According to that provision, the Council acting unanimously, 'on application by a Member State', may decide that aid which that State is granting or intends to grant must be regarded as compatible with the common market 'in derogation from the provisions of Article 87 or from the regulations provided for in Article 89', if such a decision is justified by 'exceptional circumstances'.
- 31 It follows that, as the Commission has rightly pointed out, the power conferred upon the Council by the third subparagraph of Article 88(2) EC is clearly exceptional in character.
- 32 In such a context, the further provisions in the third and fourth subparagraphs of Article 88(2), whereby, on the one hand, application to the Council by a Member State suspends examination in progress at the Commission for a period of three months, and, on the other, in the absence of a decision by the Council within that period, the Commission is to give a ruling, undeniably indicate that, where that period has expired, the Council is no longer competent to adopt a decision under that third subparagraph in relation to the aid concerned. The taking of decisions the operative parts of which might prove contradictory is thereby avoided.
- 33 The enactment of a temporal limitation of that kind on the Council's competence where the Commission has already opened the procedure under the first subparagraph of Article 88(2) EC, without, however, yet having adopted a decision declaring the aid incompatible with the common market, and the fact that, at the end of the three-month period laid down by the fourth subparagraph of that provision, the Commission alone retains the competence to rule on the aid concerned, also demonstrate that, if the Member State concerned has made no application to the Council under the third subparagraph of Article 88(2) EC before

the Commission declares the aid in question incompatible with the common market and thereby closes the procedure referred to in the first subparagraph of Article 88 (2), the Council is no longer authorised to exercise the exceptional power conferred upon it by the third subparagraph in order to declare such aid compatible with the common market.

34 It may be observed on that latter point that, in Case C-122/94 *Commission v Council* [1996] ECR I-881, the contested decision of the Council did not follow a Commission decision declaring aid incompatible with the common market, the Commission in that case having merely taken the view on the basis of Article 88(3) EC that the aid project in question was not compatible with the common market and opened the procedure laid down by the first subparagraph of Article 88(2).

35 As the Commission has rightly pointed out, the interpretation adopted in paragraphs 32 and 33 of this judgment, which makes it possible to avoid the same State aid being the subject of contrary decisions taken successively by the Commission and the Council, contributes to legal certainty. It should be noted in particular that the definitive nature of an administrative decision which is acquired on the expiry of reasonable time-limits for bringing an action or by the exhaustion of remedies contributes to such certainty (Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paragraph 24).

36 As for the argument of the Portuguese Government that the third subparagraph of Article 88(2) EC also authorises the Council to rule on aid which a Member State is 'granting', whereas in accordance with Article 88(3) any 'grant' of aid requires precisely that the Commission should have expressed a view on it first, so that the Council has the power to rule on aid which has already been the subject of a previous decision by the Commission, the Court finds that this argument arises from a contradiction in terms. It cannot concomitantly be argued that an aid which a Member State is 'granting' within the meaning of the third subparagraph of Article

88(2) EC is an aid which must necessarily have been previously declared compatible with the common market by the Commission, pursuant to the provisions of Article 87 EC, and that the Council has the power subsequently to declare such an aid compatible with the common market in derogation from those provisions.

37 Secondly, the Court has to determine whether the fact that the Council does not have the power to rule on the compatibility with the common market of an aid in relation to which the Commission has already definitively ruled implies, as the latter argues, that the Council also lacks the power to rule on an aid measure whose aim is to allocate to beneficiaries of the illegal aid previously declared incompatible by a Commission decision an amount designed to compensate for the repayments which they are obliged to make pursuant to that decision.

38 It should be noted first in that respect, contrary to what the Council maintains, that it cannot be inferred from the case-law of the Court of Justice that, in relation to such aid, the Community institutions retain full liberty to make such a ruling without being required to pay due regard to the previous decision of the Commission finding the aid originally granted to the persons concerned incompatible with the common market.

39 The Court has, on the contrary, held that when the Commission considers the compatibility of a measure of State aid with the common market, it must take all the relevant factors into account, including, where relevant, the circumstances already considered in a prior decision and the obligations which that previous decision may have imposed on a Member State (see, in particular, Case C-261/89 *Italy v Commission* [1991] ECR I-4437, paragraph 20; *TWD v Commission*, paragraph 26). The Court deduced in particular that, where the Commission has not been informed of any new fact allowing it to assess whether the aid in question might have the benefit of a derogation under the Treaty, it is justified in basing its decision on the assessments it has already made in its previous decision and the failure to comply with the condition it has imposed thereby (*Italy v Commission*, paragraph 23).

- 40 Similarly, the Court has held that a transitional system maintaining the effects of a State aid scheme not notified to the Commission and declared incompatible with Community law by a Commission decision — without, however, the Commission demanding repayment of the aid concerned — had to be interpreted as far as possible in such a way as to ensure its compatibility with that decision, namely in such a way that it does not authorise the granting of new State aid after the abrogation of the aid scheme censured by that Commission decision (order of 24 July 2003 in Case C-297/01 *Sicilcassa* [2003] ECR I-7849, paragraph 44).
- 41 It has, moreover, consistently been held that the abolition, by means of recovery, of State aid which has been unlawfully granted is the logical consequence its being found unlawful (Case C-142/87 *Belgium v Commission (Tubemeuse)* [1990] ECR I-959, paragraph 66; Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 98).
- 42 The aim of obliging the State concerned to abolish aid found by the Commission to be incompatible with the common market is to restore the previous situation, and that objective is attained once the aid in question, increased where appropriate by default interest, has been repaid by the recipient. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (see, in particular, Case C-350/93 *Commission v Italy* [1995] ECR I-699, paragraphs 21 and 22, and Case C-310/99 *Italy v Commission*, paragraphs 98 and 99).
- 43 In those circumstances, to hold that a Member State is able to grant to beneficiaries of unlawful aid, which has previously been declared incompatible with the common market by a Commission decision, new aid in an amount equivalent to that of the unlawful aid, intended to neutralise the impact of the repayments which the beneficiaries are obliged to make pursuant to that decision, would clearly amount to

thwarting the effectiveness of decisions taken by the Commission under Articles 87 EC and 88 EC (see, by analogy, Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraph 17; Case C-310/99 *Italy v Commission*, paragraph 104).

- 44 Finally, it should be noted that, as is clear from paragraphs 33 and 35 of this judgment, where a decision finding an aid incompatible with the common market has been adopted by the Commission, the Council cannot paralyse the effectiveness of that decision by itself declaring the aid compatible with the common market on the basis of the third subparagraph of Article 88(2) EC.
- 45 Nor, therefore, can the Council thwart the effectiveness of such a decision by declaring compatible with the common market, in accordance with that provision, an aid designed to compensate the beneficiaries of the unlawful aid declared incompatible with the common market for the repayments they are required to make pursuant to that decision.
- 46 In such circumstances, moreover, the aid granted in the second instance is so indissolubly linked to that previously found by the Commission to be incompatible with the common market that it appears largely artificial to claim to make a distinction between those aids for the purposes of applying Article 88(2) EC.
- 47 It follows from the whole of the above considerations that, on a proper interpretation of the third subparagraph of Article 88(2) EC, the Council cannot, on the basis of that provision, validly declare compatible with the common market an aid which allocates to the beneficiaries of an unlawful aid, which a Commission decision has previously declared incompatible with the common market, an amount designed to compensate for the repayments which they are required to make pursuant to that decision.

- 48 In this case, it is undisputed that the Portuguese Republic has not applied to the Council under the third subparagraph of Article 88(2) EC for a declaration that the aids granted by the Decree-Laws of 1994 and 1999 are compatible with the common market. It is also undisputed that those aids have been declared incompatible with the common market and that their recovery has been ordered by Decisions 2000/200 and 2001/86.
- 49 As for the contested decision, it is obvious from the very wording of its title, and from the wording of Article 1 thereof, that the aid which it sought to declare compatible with the common market was specifically designed to grant to the beneficiaries of the aids previously declared incompatible with that market, by Decisions 2000/200 and 2001/86, an amount intended to allow them to meet the repayments which they are required to make pursuant to those two decisions.
- 50 As is clear from paragraph 47 of this judgment, the Council could not validly adopt such a decision.
- 51 It follows that the Commission's first plea in support of its action, arguing that the Council lacked the competence to adopt the contested decision, is well founded, and that the latter must therefore be annulled.

The second, third, fourth and fifth pleas

- 52 Since the Commission's first plea has been accepted, and the contested decision must be annulled on that account, it is not necessary to examine the Commission's other pleas in support of its action.

Costs

- 53 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 Commission has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. Pursuant to the first paragraph of Article 69(4), the Portuguese Republic and the French Republic must bear their own costs.

On those grounds,

THE COURT

hereby:

- 1. Annuls Council Decision 2002/114 /EC of 21 January 2002 authorising the Government of Portugal to grant aid to Portuguese pig farmers who were beneficiaries of the measures granted in 1994 and 1998;**

2. **Orders the Council of the European Union to pay the costs;**

3. **Orders the Portuguese Republic and the French Republic to bear their own costs.**

Skouris	Jann	Timmermans
Rosas	Gulmann	Puissochet
Cunha Rodrigues	La Pergola	Schintgen
Macken	Colneric	von Bahr
	Lenaerts	

Delivered in open court in Luxembourg on 29 June 2004.

Registrar

President

R. Grass

V. Skouris