JUDGMENT OF THE COURT
14 January 1997 *

In Case C-169/95,

Kingdom of Spain, represented by Alberto José Navarro González, Director-General of the Institutional and Community Legal Service, and Gloria Calvo Diaz, Abogado del Estado, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

applicant,

v

Commission of the European Communities, represented by Francisco Enrique González Díaz and Paul Nemitz, 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 95/438/EC of 14 March 1995 concerning investment aid granted by Spain to the company Piezas y Rodajes SA, a steel foundry located in Teruel province (Aragon), Spain (OJ 1995 L 257, p. 45),

* Language of the case: Spanish.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, J. C. Moitinho de Almeida, J. L. Murray, L. Sevón (Presidents of Chambers), P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet (Rapporteur), G. Hirsch, P. Jann and M. Wathelet, Judges,

Advocate General: G. Tesauro,
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 10 September 1996,

after hearing the Opinion of the Advocate General at the sitting on 24 October 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 1 June 1995, the Kingdom of Spain brought an action under Article 173 of the EC Treaty for annulment of Commission Decision 95/438/EC of 14 March 1995 concerning investment aid granted by Spain to the company Piezas y Rodajes SA, a steel foundry located in Teruel province (Aragon), Spain (OJ 1995 L 257, p. 45).

2 It appears from the documents before the Court that, by decision of 26 May 1987 (see Notice 88/C 251/04, OJ 1988 C 251, p. 4), the Commission authorized the general regional aid scheme in Spain, the plan for which had been notified to it by the Spanish Government on 30 January 1988 in accordance with Article 93(3) of the Treaty. That aid scheme, authorized under Article 92(3)(a) of the Treaty, provided in particular for the award of regional aid in the Province of Teruel, up to a ceiling fixed by that decision.

3 In that province, in the municipality of Monreal del Campo, Piezas y Rodajes SA ('PYRSA') embarked on a PTA 2 788 300 000 investment programme for the construction of a foundry to produce sprockets (toothed wheels that engage with a chain, used chiefly in the mining industry) and GET parts (used in the construction of earth-moving and excavation equipment). The following aids were granted in respect of that programme:

— a subsidy of PTA 975 905 000 from the Spanish Government, not in issue in the present proceedings;

— a non-repayable subsidy of PTA 182 000 000 from the Autonomous Community of Aragon;

— a donation in the form of land worth PTA 2 300 000 from the municipality of Monreal del Campo;

— a loan guarantee for PTA 490 000 000 from the Autonomous Community of Aragon; and

— interest-rate subsidies on the aforesaid loan, from the Province of Teruel.

4 In a complaint submitted to the Commission on 14 January 1991, the British company William Cook plc ('Cook'), which produces steel castings and GET parts, challenged the compatibility of those aids with the common market.

5 In response to that complaint, the Commission informed Cook, by letter of 13 March 1991, that the aid of PTA 975 905 000 had been granted by the Spanish Government under the general regional aid scheme and was therefore compatible with Article 92 of the Treaty. That letter referred, so far as the other aids were concerned, to the opening of an investigation with the Spanish authorities.

6 Following that investigation, the Commission informed Cook, by letter of 29 May 1991, of its decision 'to raise no objections' to the aids granted to PYRSA. Attached to that letter was Decision NN 12/91, addressed to the Spanish Government, in which the Commission concluded that those aids fell within the scope of Article 92(3)(a) of the Treaty, according to which aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered to be compatible with the common market. That decision was based on two grounds, one of which was that there were no problems of overcapacity in the sprockets and GET parts sub-sector.

7 Cook brought an action against that decision and, by judgment of 19 May 1993 (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487) the Court annulled it in so far as it related to aids other than the subsidy of PTA 975 905 000 granted by the Spanish Government. In that judgment, it was stated in particular that, since the Commission sought to rely on the absence of overcapacity in the sub-sector in question, it should have initiated the procedure under Article 93(2) of the Treaty in order to ascertain, after obtaining all the requisite opinions, whether its assessment — which gave rise to serious difficulties — was correct.

8 Following that judgment, the Commission decided to open the procedure in question here (see Notice 93/C 281/07 — OJ 1993 C 281, p. 8). On completion of that procedure, it adopted the contested decision, notified to the Spanish Government on 29 March 1995 and published on 27 October 1995, by which it declared the aid in question to be unlawful and incompatible with the common market and therefore ordered it to be abolished and the sums paid out to be repaid, with interest calculated from the date on which the aid was paid until the date on which it is actually reimbursed.

9 That is the decision whose annulment the Kingdom of Spain seeks in its present application, in support of which it puts forward four pleas in law:

— infringement of Article 92(3)(a) of the Treaty;

— manifest error in the assessment of the facts;

— breach of the principles of proportionality and of protection of legitimate expectations by requiring reimbursement; and

— breach of the same principles by requiring payment of interest.

10 The Commission contends that the Court should dismiss the action.

The first plea in law

11 The Spanish Government claims that the Commission has misapplied Article 92(3)(a). That provision, it claims, concerns not sector-based aid but regional aid, and the aid in issue is necessarily part of a general regional aid scheme.

Aid covered by Article 92(3)(a)

12 The Kingdom of Spain considers that Article 92(3)(a), which does not contain the proviso contained in Article 92(3)(c) to the effect that the aid concerned must not adversely affect trading conditions to an extent contrary to the common interest, merely requires that the aid in issue must be intended to promote the development of the areas under consideration. Whilst it cannot be said that such a condition does not entail assessment of any sectoral impact of the aid, the purpose of that assessment can only be, in the applicant Government's submission, to determine whether, having regard to the situation in the sector, the aid is or is not capable of promoting the economic development of the area.

13 The Commission claims that the difference in wording between Article 92(3)(a) and Article 92(3)(c) cannot justify a failure to assess the sectoral impact of aid granted to an undertaking operating in a less-favoured area. It points out that, according to the case-law of the Court, the exercise of its discretion involves economic and social assessments which must be made in a Community context.

14 Article 92(3) of the Treaty provides:

'The following may be considered to be compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

...

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. ...

...'

15 As the Court has held, a programme of regional aid may fall within one of the derogations in Article 92(3)(a) and (c). In that respect the use of the words 'abnormally' and 'serious' in the derogation contained in Article 92(3)(a) shows that it concerns only areas where the economic situation is extremely unfavourable in relation to the Community as a whole. The derogation in Article 92(3)(c), on the other hand, is wider in scope inasmuch as it permits the development of certain areas in a Member State which are less favoured in relation to the national average without being restricted by the economic conditions laid down in Article 92(3)(a), provided such aid 'does not adversely affect trading conditions to an extent contrary to the common interest' (see Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 19).

16 Conversely, the absence of that condition in the derogation under Article 92(3)(a) implies greater latitude in granting aid to undertakings in regions which do meet the criteria laid down in that derogation.

17 Nevertheless, that difference in wording cannot lead to the conclusion that the Commission should take no account of the Community interest when applying Article 92(3)(a), and that it must confine itself to verifying the regional specificity of the measures involved, without assessing their impact on the relevant market or markets in the Community as a whole.

18 It has consistently been held that Article 92(3) gives the Commission a discretion the exercise of which involves economic and social assessments which must be made in a Community context (see, in particular, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 24, and Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18).

19 The Commission has on a number of occasions informed the Member States of the policy which, in accordance with the powers thus vested in it by Article 92 et seq. of the Treaty, it intended to apply with respect to regional aid schemes — *inter alia* in its 1988 communication on the method for the application of Article 92(3)(a) and (c) to regional aid (Communication 88/C 212/02 — OJ 1988 C 212, p. 2), referred to in its decision to initiate the procedure in respect of the aid in issue in the present case (see Notice 93/C 281/07, cited above).

20 It is clear from that policy that the application of both Article 92(3)(a) and Article 92(3)(c) presupposes the need to take into consideration not only the regional implications of the aid covered by those provisions but also, in the light of Article

92(1), its impact on trade between Member States and thus the sectoral repercussions to which it might give rise at Community level.

21 It is true that, as the Spanish Government points out, the conditions set out in that regard in point I.6 of Communication 88/C 212/02 concern more specifically certain categories of operating aid which the Commission may, by way of derogation, authorize under Article 92(3)(a) if aid linked to an initial investment is not suitable or sufficient.

22 Nevertheless, as the Commission recalled in its decision to initiate the procedure, regional aid should not give rise to a sectoral overcapacity at Community level. It is clear, in that regard, that the second indent of the second paragraph of point I.6 of Communication 88/C 212/02, to the effect that aid must 'be designed to promote a durable and balanced development of economic activity' and not give rise at Community level to a 'sectoral problem ... more serious than the initial regional problem', may apply to any regional aid, whatever its nature. Such assessments are not incompatible with the aim pursued by Article 92(3)(a). To accept the contrary would encourage the achievement of economically precarious initiatives which, because they do no more than aggravate the imbalances affecting the markets concerned, are ultimately not suited to provide an effective and lasting solution to development problems in the areas concerned. The fact, pointed out by the Commission, that PYRSA has currently suspended payments despite the aid received shows that such a risk is not merely theoretical.

23 Accordingly, when deciding on the compatibility of a particular general regional aid scheme, the Commission indicates, as it did in its decision of 26 May 1987 concerning the general regional aid scheme in Spain, that implementation of the scheme is subject to the Community rules and provisions concerning certain sectors of activity.

24 Moreover, as noted in paragraph 6 above, the Commission's initial decision to raise no objections to the aid in issue was based on two grounds, one of which was specifically that there were no problems of overcapacity. When the Court said, at paragraph 38 of its judgment in *Cook*, that the Commission should have initiated the procedure under Article 93(2) of the Treaty in order to ascertain, after obtaining all the requisite opinions, whether its assessment in that regard was correct, that was an implicit acceptance that such assessment might relate to such a problem.

25 It is clear from all of the considerations set out above that, by declaring the aid in issue incompatible with the Treaty by reason of the overcapacity existing in the sector of activity concerned, the Commission did not exceed its powers of appraisal.

The linking of the aid in issue to a general regional aid scheme

26 The Kingdom of Spain submits that the aid in issue, even though it was not approved prior to being granted, has the characteristics of regional aid and was granted on the basis of national rules subsequently authorized as a general regional aid scheme by a Commission decision of 29 January 1992 (see Communication 92/C 326/05, Aid No NN 169/91 — OJ 1992 C 326, p. 5). Thus, it contends, that aid fulfils all the conditions for it to be considered compatible with the common market under Article 92(3)(a) of the Treaty.

27 The Commission considers, however, that the aid cannot be linked to that general regional aid scheme and that, in view of the Community framework established for the sector in question, the Spanish authorities should either have refrained from granting it or have notified it at the planning stage. Moreover, since *ad hoc* aid was involved, the Kingdom of Spain should have established, in accordance

with the judgment in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, that the aid in question actually fulfilled the criterion of regional specificity, which was not done.

28 By Communication 88/C 320/03 (OJ 1988 C 320, p. 3), the Commission established a framework for certain steel sectors not covered by the ECSC Treaty. It is clear in particular from the second paragraph of point 3 of that communication that, with the sole exception — itself excluded in certain cases — of aid granted under an 'existing general [...] regional scheme [...] authorized by the Commission', Member States are obliged under Article 93(3) of the Treaty to give prior notification of aid granted in the sectors concerned.

29 It is not in dispute that the aid in issue concerns one of those sectors, namely steel foundries, and was granted without prior notification. Even if it could be linked to national rules subsequently authorized as a general regional aid scheme by the Commission, it cannot in any event be regarded as having been granted under an existing general regional scheme authorized by the Commission.

30 As regards the regional specificity of the aid, it need merely be noted that the ground on which the contested decision found the aid to be incompatible with the common market was not that it did not relate to an area which could qualify for the derogation provided for by Article 92(3)(a) of the Treaty but that it contributed to a further worsening of the overcapacity existing in the sector in question. As has been stated at paragraph 25 above, such a reason could lawfully justify a decision taken under Article 92(3)(a) or (c) of the Treaty.

31 The first plea in law must therefore be dismissed.

The second plea in law

32 The Kingdom of Spain considers that the sectoral assessment on which the Commission based its decision is founded on mere hypotheses extrapolated from unrepresentative data relating to years later than those which could be taken into account.

33 The Commission, however, contends that its assessment is based on sufficiently representative and objective data, confirmed, moreover, by the opinion of an independent technical expert.

34 It must be borne in mind first of all that, where the Commission enjoys a significant freedom of assessment, as is the case when it is applying Article 92 of the Treaty, the Courts, when examining the lawfulness of the exercise of such freedom, cannot substitute their own assessment of the matter for that of the competent authority but must restrict themselves to examining whether the assessment of the competent authority contains a manifest error or constitutes a misuse of power (see, in particular, Case 57/72 *Westzucker* v *Einfuhr- und Vorratsstelle für Zucker* [1973] ECR 321, paragraph 14).

35 It is therefore necessary to examine the circumstances in which the contested assessment was made in order to determine whether it contains a manifest error.

36 As noted in paragraph 8 above, it was in accordance with the judgment in *Cook* that the Commission decided to initiate the procedure laid down in Article 93(2) of the Treaty. It appears from Notice 93/C 281/07, cited above, that it invited the Spanish Government, the other Member States and other interested parties to submit their comments on the question whether there was overcapacity or not in the

sub-sectors concerned. That procedure enabled the Commission to obtain comments from a number of firms located in the United Kingdom, France, Germany, Italy and Spain, as indicated in Part III of the contested decision.

37 The Spanish Government and the Commission disagree as to whether those firms are representative of the sector: the Spanish Government maintains that their total production capacity is no more than some 3 to 4% of available steel foundry capacity, whereas the Commission claims that they represented 15% of Community production in the sector in 1990.

38 The Commission collated information from all the firms which submitted observations in the context of the procedure initiated for that purpose and furthermore obtained the opinion of an independent expert, who confirmed the information. It cannot, therefore, be concluded that the information on which the Commission based its assessment was not representative or objective.

39 The parties further disagree as to whether the products manufactured by PYRSA belong to a specific sub-sector of activity. In particular, the applicant claims that the defendant based its assessment on a single opinion.

40 As to those points, the framework for certain sectors not covered by the ECSC Treaty provided for in Communication 88/C 320/03, cited above, which concerns a number of sectors and sub-sectors, does not distinguish between any sub-sectors within the steel foundries sector and, further, all the firms which submitted comments and the independent expert expressed the opinion that there was no specific sub-sector for sprockets and GET parts. The Spanish Government cannot, therefore, claim that the Commission took only a single opinion as the basis for its position on that point.

41 As regards the reference years, it is true that the most detailed information taken into account by the Commission relates to 1990 and subsequent years, whereas the aid in issue was granted on the basis of decisions taken, according to the Spanish Government, between 1988 and 1990.

42 However, it is clear from point 2.1.9 and the second indent of the third paragraph of point 3 of Communication 88/C 320/03 that there are problems of overcapacity and serious economic and financial difficulties in the steel foundries sector. The conclusions derived from the information collected for 1990 and subsequent years therefore merely confirmed a finding which had already, in 1988, justified specific measures in that sector.

43 In the light of all the foregoing considerations, the Commission committed no manifest error when it considered in the contested decision that the aid in issue contributed to a further worsening of the overcapacity observed in the sector in question.

44 The second plea in law must therefore be dismissed.

The third and fourth pleas in law

45 The Kingdom of Spain considers that the requirement that the aid granted must be repaid and the method of calculating the interest thereon are disproportionate and contrary to the principle of the protection of legitimate expectations; the circumstances in which the aid in issue was granted to PYRSA were such as to cause it to entertain expectations which are entitled to judicial protection.

46 The Commission, however, contends that those circumstances can have no bearing on the obligation flowing from the illegality and incompatibility of the aid in issue.

47 It must be borne in mind first of all that abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful. Consequently, the recovery of State aid unlawfully granted, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aids (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 66). The same applies to the charging of interest in respect of the period between the payment of the aid and its actual repayment.

48 Moreover, a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 93 may not rely on the legitimate expectations of the recipient undertaking in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 92 and 93 of the Treaty would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive of their effectiveness decisions taken by the Commission under provisions of the Treaty (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 17).

49 It is true that the Spanish Government's plea alleging frustration of the recipient undertaking's legitimate expectations is submitted not so much in order to avoid the obligation entailed in implementing the Commission's decision as to challenge the validity of that decision before the Court.

50 In the light of the circumstances of the case, however, such a plea is unfounded.

51 As the Court held at paragraph 14 of its judgment in *Commission* v *Germany*, cited above, in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which an aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent operator should normally be able to determine whether that procedure has been followed.

52 In this case, it is not contested that, contrary to the obligations imposed on the Member States by Article 93(3) of the Treaty, the aid in question was granted without prior notification.

53 The fact that the Commission initially decided not to raise any objections to the aid in issue cannot be regarded as capable of having caused the recipient undertaking to entertain any legitimate expectation since that decision was challenged in due time before the Court, which annulled it. However regrettable it may be, the Commission's error cannot erase the consequences of the unlawful conduct of the Kingdom of Spain.

54 The contested decision cannot therefore be regarded, either in so far as it requires repayment of the aid in issue or in so far as it requires payment of interest thereon, as frustrating the legitimate expectations of the recipient undertaking.

55 The third and fourth pleas in law must therefore be dismissed.

56 Since none of the pleas in law put forward by the Spanish Government has been upheld, the application must be dismissed in its entirety.

Costs

57 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 Kingdom of Spain has been unsuccessful, it must be ordered to pay the costs, as the Commission asks.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the Kingdom of Spain to pay the costs.

Rodríguez Iglesias Moitinho de Almeida Murray

Sevón Kapteyn Gulmann

Edward Puissochet Hirsch

Jann Wathelet

Delivered in open court in Luxembourg on 14 January 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President