

JUDGMENT OF THE COURT

15 June 1993 *

In Case C-225/91,

Matra SA, a company incorporated under French law, whose registered office is in Paris, represented by Mario Siragusa, of the Rome Bar, and Antoine Winckler, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Antonio Abate, Principal Legal Adviser, and Michel Nolin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Portuguese Republic, represented by Rui Chancerelle de Machete, of the Lisbon Bar, and Luis Inês Fernandes, Director of the Legal Service of the Directorate General for European Community matters at the Ministry of Foreign Affairs, acting as Agents, assisted by Pedro Manuel Pena Chancerelle de Machete, of the Lisbon Bar, with an address for service in Luxembourg at the Portuguese Embassy, 33 Allée Scheffer,

Ford of Europe Inc., a company incorporated under the law of the State of Delaware (United States of America), with a branch in Brentwood (United Kingdom), and **Ford-Werke AG**, a company incorporated under German law,

* Language of the case: French.

whose registered office is in Cologne (Federal Republic of Germany), represented by Wolfgang Schneider, Rechtsanwalt, Frankfurt am Main (Federal Republic of Germany), with an address for service in Luxembourg at the Chambers of Dupong and Konsbruck, 14a Rue des Bains,

and

Volkswagen AG, a company incorporated under German law, whose registered office is in Wolfsburg (Federal Republic of Germany), represented by Rainer Bechtold, Rechtsanwalt, Stuttgart (Federal Republic of Germany), with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 8 Rue Zitthe,

interveners,

APPLICATION for the annulment of the Commission's decision, notified to the Portuguese authorities on 16 July 1991 and to Matra SA on 30 July 1991, not to raise any objection in relation to an aid scheme of the Portuguese Republic for a joint venture between Ford of Europe Inc. and Volkswagen AG to set up a manufacturing unit for multi-purpose vehicles at Setúbal (Portugal),

THE COURT,

composed of: O. Due, President, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

Advocate General: W. Van Gerven,
Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 February 1993,

after hearing the Opinion of the Advocate General at the sitting on 28 April 1993,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 6 September 1991, Matra SA (hereinafter 'Matra') brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of a decision of the Commission, notified to it on 30 July 1991, not to raise any objection in relation to an aid scheme of the Portuguese Government for a joint venture between Ford of Europe Inc. (hereinafter 'Ford') and Volkswagen AG (hereinafter 'VW') to set up a manufacturing unit for multi-purpose vehicles at Setúbal (Portugal).
- 2 It is apparent from the case file that on 26 March 1991 the Portuguese Republic, in accordance with Article 93(3) of the Treaty and the Community framework on State aid to the motor vehicle industry (OJ 1989 C 123, p. 3), notified to the Commission an aid scheme for Newco, an undertaking set up by Ford and VW in equal shares, for the establishment of a factory for multi-purpose vehicles at Setúbal for the period from 1991 to 1995.
- 3 The aid notified amounts to ESC 97 440 million against a total investment cost of ESC 454 000 million, of which ESC 297 000 million confers entitlement to aid. It consists of a regional subsidy of ESC 89 100 million paid under the Sistema de Incentivos de Base Regional (SIBR), the Portuguese regional aid system approved by the Commission in 1988, and tax reliefs of ESC 8 340 million granted as from 1997. Also envisaged are a training programme for employees organized jointly by the Portuguese Government and Newco, costing ESC 36 000 million, of which 90% is to be financed by the Portuguese Government, and various investments in infra-structure relating to road construction, water and electricity supply and waste-processing.
- 4 Following a complaint lodged by Matra on 26 June 1991 alleging infringements of Article 92 et seq. of the Treaty by the Portuguese Government and of Article 85 of the Treaty by Ford and VW, a meeting took place between the Commission and Matra at which the latter was heard and the Commission explained why the procedure under Article 93(2) of the Treaty had not been initiated.

- 5 On 16 July 1991 the Commission informed the Portuguese Government that it had no objections to the aid scheme notified.
- 6 On 30 July 1991 the Commission sent Matra, for information, the decision of 16 July 1991.
- 7 By order of 4 December 1991 (Case C-225/91 R *Matra v Commission* [1991] ECR I-5823), the President of the Court dismissed Matra's application for suspension of operation of the decision whose annulment is sought in the present application.
- 8 By orders of 8 April 1992 the Portuguese Republic and Ford of Europe Inc., Ford-Werke AG and Volkswagen AG were given leave to intervene in the proceedings in support of the form of order sought by the Commission.
- 9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

- 10 The interveners Ford-Werke AG and the Portuguese Republic argue that the application is inadmissible on the ground that Matra cannot claim that the contested decision is of direct and individual concern to it. The Commission, on the other hand, while stating that the decision is not addressed to Matra, does not dispute that it is of direct and individual concern to the applicant.

- 11 On this point, it must be noted that under the third paragraph of Article 37 of the Protocol on the Statute of the Court of Justice of the EEC, submissions made in an application to intervene are limited to supporting the submissions of one of the parties. Moreover, under Article 93(4) of the Rules of Procedure, the intervener must accept the case as he finds it at the time of his intervention.
- 12 It follows that the interveners have no standing to raise a plea of inadmissibility and the Court is thus not obliged to examine the pleas put forward by them (see the judgment in Case C-313/90 *CIRFS v Commission* [1993] ECR I-1125).
- 13 However, since this is an objection of inadmissibility based on public policy, the admissibility of the application must be examined of the Court's own motion under Article 92(2) of the Rules of Procedure (see *inter alia* the judgments in Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport v Commission and Council* [1990] ECR I-2945 and in *CIRFS v Commission*, cited above).
- 14 It is settled case-law that persons other than those to whom a decision is addressed may claim to be concerned within the meaning of the second paragraph of Article 173 only if that decision affects them by reason of certain attributes which are particular to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed (judgment in Case 25/62 *Plaumann v Commission* [1963] ECR 95).
- 15 In order to establish whether those conditions are fulfilled in the present case, the aim of the procedures provided for in Article 93(2) and 93(3) of the Treaty should be borne in mind.
- 16 As the Court has already held (see, as the most recent authority, Case C-198/91 *Cook v Commission* [1993] ECR I-2487), the preliminary stage of the procedure

for reviewing aid under Article 93(3) of the Treaty, which is intended merely to allow the Commission to form a *prima facie* opinion on the partial or complete conformity of the aid in question, must be distinguished from the examination under Article 93(2) of the Treaty. It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments.

- 17 Where, without initiating the procedure under Article 93(2), the Commission finds on the basis of Article 93(3) that an aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision by the Commission before the Court.
- 18 The parties concerned, within the meaning of Article 93(2) of the Treaty, have been defined by the Court as the persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations (see, in particular, the judgments in Case 323/82 *Intermills v Commission* [1984] ECR 3809, paragraph 16, and *Cook v Commission*, cited above, paragraph 24).
- 19 In the present case, it cannot be disputed that as Matra is the leading Community producer of multi-purpose vehicles and a future competitor of Newco, its interests are affected by the grant of the aid at issue and that consequently it is an interested party within the meaning of Article 93(2) of the Treaty.
- 20 It follows that the application by Matra must be held to be admissible.

Substance

- 21 In support of its application, Matra puts forward three pleas in law: manifest error of assessment of the aid in question, breach of procedural rules, and failure to have regard to certain general principles of law.

The plea of manifest error of assessment

- 22 In connection with this plea for annulment, Matra relies on three complaints alleging manifestly erroneous assessment by the Commission of the risk of creating excess production capacity and of the regional handicap, and manifestly erroneous classification of the infrastructure and training aids.

- 23 It should be noted at the outset, with a view to examining those complaints, that in the context of an action challenging legality, the Court's function is solely to ascertain whether the contested decision is vitiated by one of the grounds of unlawfulness set out in Article 173 of the Treaty, and the Court cannot substitute its own assessment of the facts, especially in the economic sphere, for that of the author of the decision.

- 24 Furthermore, it is settled law that, as regards the application of Article 93(3) of the Treaty, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context (see *inter alia* the judgment in Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 34).

- 25 In its review of legality, the Court must therefore restrict itself to determining whether the Commission has exceeded the scope of its discretion by a distortion or manifest error of assessment of the facts or by misuse of powers or abuse of process.

- 26 As regards the evaluation of the risk of creating excess production capacity, it must be stated, as the Advocate General pointed out in paragraphs 13 to 15 of his Opinion, that the Commission carried out a subtle and detailed examination of this question before concluding that no such risk exists. In that examination it referred in particular to market analyses produced by independent experts which envisaged a considerable expansion of the multi-purpose vehicle market until the mid-1990's, and to foreseeable developments relating to the production of the various manufacturers concerned, and concluded that the aid in question was not likely to have a substantial effect on the balance of supply and demand.
- 27 With respect to the assessment of the regional handicap, the Commission also undertook an examination and an evaluation of the various aspects of the disadvantages arising from an investment in the Setúbal region. It noted in particular the geographical remoteness of the Setúbal site from the principal markets and the relative economic backwardness of that region, factors which increase the cost of transport, storage, non-local employees and infrastructure, and found that that disadvantage was compensated for only in part by lower labour and construction costs. Furthermore, the aid granted falls considerably short of the rates authorized under the SIBR scheme approved by the Commission.
- 28 In those circumstances, the arguments put forward by Matra, based on analyses carried out by the latter of the development of the market and the assessment of the regional handicap, are not such as to establish that the Commission based its decision on a manifestly incorrect assessment of the economic data.
- 29 With respect to the investment in infrastructure and the training programme, it must be emphasized that the Commission found in the contested decision that the infrastructure and training measures would not benefit the joint venture exclusively, enabling it to conclude that the financial assistance granted by the Portuguese Republic should not be regarded as State aid.

30 Matra has thus been unable to demonstrate that, in that analysis and in its consequential appraisal of the financial assistance, the Commission carried out a manifestly erroneous assessment of the economic data.

31 The first plea in law must therefore be rejected.

The plea alleging breach of procedural rules

32 Matra submits that in view of the serious difficulties involved in assessing the compatibility with the common market of the aid at issue, the Commission was under an obligation to initiate the procedure under Article 93(2) of the Treaty, and should not have adopted a decision without awaiting the outcome of the procedure initiated under Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) with regard to the agreement between Ford and VW. Matra also submits that the Commission did not provide an adequate statement of reasons in the contested decision.

33 As regards the complaint alleging failure to initiate the procedure under Article 93(2) of the Treaty, it is settled case-law (see, as the most recent authority, the *Cook* judgment, cited above, paragraph 29) that that procedure is essential whenever the Commission has serious difficulties in determining whether an aid is compatible with the common market. The Commission may thus restrict itself to the preliminary examination under Article 93(3) when taking a decision in favour of an aid only if it is able to satisfy itself after an initial examination that the aid is compatible with the Treaty. If, on the other hand, an initial examination leads the Commission to the opposite conclusion, or does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 93(2).

- 34 Accordingly, the Court must ascertain whether in this case the assessments on which the Commission relied gave rise to difficulties of such a kind as to justify the initiation of that procedure.
- 35 The serious difficulties of assessment encountered by the Commission include, according to Matra, the scale of the project and the substantial amount of the aid, the risk of creating excess production capacity and the need to request the Portuguese Republic to amend the initial aid scheme.
- 36 It must be stated that the size of an investment or aid cannot in itself constitute a serious difficulty, as otherwise the Commission would be obliged to initiate the procedure under Article 93(2) whenever the investment or aid exceeded a certain level, which would moreover have to be defined. Besides, the decisive factor is not the amount of the aid so much as its impact on intra-Community trade. Finally, the intensity of the aid is considerably below the percentages authorized by the Commission under the SIBR scheme.
- 37 As regards the assessment of the risk of creating excess production capacity, the Court has already stated, in paragraph 26 above, that the Commission carried out an economic analysis of that question, relying in particular on a study by independent experts, and that it did not exceed the bounds of its discretion to assess economic data.
- 38 As regards the course of the procedure, the Commission rightly states that the Portuguese Government did no more than supplement the scheme originally notified with information and details which cannot be regarded as substantial amendments complying with conditions imposed by the Commission. Matra has thus failed to show that, in keeping with its contention, the use of the infrastructure by

third parties and the availability of the training programme to undertakings other than Newco were introduced at the request of the Commission. Finally, it must be stated that the production by the Portuguese Republic of an annual report is intended solely to enable the Commission to examine whether that Member State has complied with the terms for granting aid, and cannot therefore be regarded as evidence pointing to the existence of serious difficulties of assessment.

39 In those circumstances, it must be held that the Commission did not act unlawfully by considering that it faced no serious difficulties in assessing whether the aid was compatible with the common market, and that consequently it was not obliged to initiate the procedure under Article 93(2) of the Treaty.

40 Matra further criticizes the Commission for deciding not to object to the aid in question, without awaiting the outcome of the procedure under Regulation No 17, cited above, with respect to the agreement between Ford and VW, thereby disregarding the link between Articles 85 and 92 of the Treaty.

41 It must be noted in this respect that while the procedure provided for in Articles 92 and 93 leaves a wide discretion to the Commission, and under certain conditions to the Council, in coming to a decision on the compatibility of a system of State aid with the requirements of the common market, it is clear from the general scheme of the Treaty that that procedure must never produce a result which is contrary to the specific provisions of the Treaty (judgment in Case 73/79 *Commission v Italy* [1980] ECR 1533, paragraph 11). The Court has also held that those aspects of aid which contravene specific provisions of the Treaty other than Articles 92 and 93 may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately (judgment in Case 74/76 *Iannelli v Meroni* [1977] ECR 557).

- 42 That obligation on the part of the Commission to ensure that Articles 92 and 93 are applied consistently with other provisions of the Treaty is all the more necessary where those other provisions also pursue, as in the present case, the objective of undistorted competition in the common market.
- 43 When adopting a decision on the compatibility of aid with the common market, the Commission must be aware of the risk of individual traders undermining competition in the common market.
- 44 Nevertheless, the procedure under Article 85 et seq. and that under Article 92 et seq. of the Treaty are independent procedures governed by specific rules.
- 45 Consequently, when taking a decision on the compatibility of State aid with the common market, the Commission is not obliged to await the outcome of a parallel procedure initiated under Regulation No 17, once it has reached the conclusion, based on an economic analysis of the situation and without any manifest error in the assessment of the facts, that the recipient of the aid is not in breach of Articles 85 and 86 of the Treaty.
- 46 In the present case, the Commission did observe the inter-relationship between those two procedures. In the contested decision it accordingly examined the extent to which competition in the common market might be affected. In the notice (91/C 182/07) pursuant to Article 19(3) of Regulation No 17 (OJ 1991 C 182, p. 8), published before the contested decision was adopted, the Commission announced its intention to take a favourable decision on the agreements between Ford and VW in application of Article 85(3) of the Treaty. Finally, in the letter

forwarding the contested decision to Matra, the Commission also expressed the view that the joint venture in question fulfilled the conditions for exemption under Article 85(3) of the Treaty.

47 In those circumstances, Matra is wrong to criticize the Commission for adopting the contested decision without awaiting the outcome of the investigation procedure carried out under Regulation No 17.

48 Finally, with respect to the complaint alleging the statement of reasons in the contested decision to be defective, it suffices to note that a decision not to initiate the procedure under Article 93(2) of the Treaty, which is taken in a short space of time, need contain only the reasons why the Commission considers that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the common market. Furthermore, the statement of reasons for the contested decision must be assessed in the context of the SIBR and of the criteria laid down by the Community framework on State aid to the motor vehicle industry.

49 In the light of the foregoing considerations, the contested decision must be regarded as containing an adequate statement of reasons.

50 Accordingly, the second plea in law must also be rejected.

The plea alleging breach of certain general principles of law

51 In this plea in law, Matra puts forward two complaints alleging breach of the rights of the defence and failure on the part of the Commission to observe the principle of sound administration.

- 52 As regards the first complaint, it must be noted that, as the Court has stated in paragraph 16 of this judgment, the Commission is obliged to allow the undertakings concerned to submit their comments only in the context of the examination under Article 93(2) of the Treaty.
- 53 The Treaty does not, on the other hand, lay down any such obligation where the Commission is able lawfully to restrict itself to finding that aid is compatible in the preliminary stage provided for by Article 93(3) of the Treaty.
- 54 In those circumstances, since it is clear that the Commission was entitled not to initiate the procedure under Article 93(2) of the Treaty, Matra is not justified in pleading a breach of the rights of the defence.
- 55 As regards the complaint alleging an infringement of the principle of sound administration, Matra reiterates the charge that there was a failure to initiate the procedure under Article 93(2), and it suffices to refer in that respect to paragraph 32 et seq. of this judgment.
- 56 In those circumstances, the third plea in law must also be rejected.
- 57 Since none of Matra's pleas has been upheld, the application must be dismissed in its entirety.

Costs

- 58 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including the costs of the proceedings for interim measures.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;
2. Orders the applicant to pay the costs, including the costs of the proceedings for interim measures.

Due	Zuleeg	Murray	Mancini	
Schockweiler	Moitinho de Almeida	Grévisse	Díez de Velasco	Kapteyn

Delivered in open court in Luxembourg on 15 June 1993.

J.-G. Giraud

O. Due

Registrar

President