

JUDGMENT OF THE COURT
20 September 1990*

In Case C-5/89,

Commission of the European Communities, represented by Bernhard Jansen, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Martin Seidel, Ministerialrat, and Albert Bleckmann, acting as Agents, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 avenue Émile-Reuter,

defendant,

APPLICATION for a declaration that, by not implementing Commission Decision 88/174/EEC of 17 November 1987 concerning aid which the *Land* of Baden-Württemberg provided to BUG-Alutechnik GmbH, an undertaking producing semi-finished and finished aluminium products (Official Journal 1988 L 79, p. 29), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty,

* Language of the case: German.

THE COURT

composed of: F. A. Schockweiler, President of Chamber acting for the President of the Court, M. Zuleeg (President of Chamber) and G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and F. Grévisse, Judges,

Advocate General: M. Darmon

Registrar: D. Louterman, Principal Administrator,

having regard to the Report for the Hearing and further to the hearing on 21 March 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 May 1990,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 6 January 1989, the Commission of the European Communities brought an action under the second subparagraph of Article 93(2) of the EEC Treaty for a declaration that, by not implementing Commission Decision 88/174/EEC of 17 November 1987 concerning aid which the *Land* of Baden-Württemberg of the Federal Republic of Germany has provided to BUG-Alutechnik GmbH, an undertaking producing semi-finished and finished aluminium products (Official Journal 1988 L 79, p. 29), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

- 2 The aid in question had not been notified to the Commission. On 21 May 1985, on the basis of articles in the press, the Commission sent a letter to the Federal Government enquiring whether it was true that the *Land* of Baden-Württemberg had granted BUG-Alutechnik GmbH subsidies and credit guarantees with a view to its acquisition by Kaiser Aluminium Europe Inc. By verbal note dated 24 June 1985, the Federal Government confirmed that the aid had been granted to that

undertaking and, by two further verbal notes dated 8 August and 2 October 1985 in response to further enquiry by the Commission, gave additional details of the transaction.

- 3 By a letter of 22 December 1987, after the completion of the procedure laid down in Article 93(2) of the EEC Treaty, the Commission notified Decision 88/174/EEC, cited above, to the Federal Republic of Germany. Article 1 of that decision provides that the aid in question 'is illegal as it was provided in violation of the provisions of Article 93(3) of the EEC Treaty' and that, moreover, 'it is incompatible with the common market'.
- 4 Article 2 of the decision provides: 'The said aid shall be withdrawn by way of recovery and the Federal German Government shall inform the Commission, within two months of the date of the notification of this Decision, of the measures it has taken to comply herewith'.
- 5 The German Government did not contest that decision. By verbal note dated 19 April 1988, the German Government sent the Commission a communication dated 13 April 1988, in which it set out a number of criticisms concerning certain of the findings and appraisals on which the decision was based. The Commission did not consider those arguments relevant and, by letter of 11 July 1988, called upon the Federal Republic of Germany to implement the decision.
- 6 By verbal note dated 9 December 1988, the German Government sent the Commission a communication dated 2 December in which it proposed to await the judgment in the Alcan case (*Case 94/87 Commission v Germany* [1989] ECR 175) in which the legal issues were similar. By letter of 23 December 1988, the Commission informed the German Government that it did not consider it appropriate to wait any longer, and brought the present proceedings.
- 7 Reference is made to the Report for the Hearing for a fuller account of the background to the dispute, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

- 8 It is common ground that no steps have been taken by the Federal Republic of Germany to recover the aid as required by Decision 88/174/EEC.
- 9 The German Government claims, however, that it is absolutely impossible to implement the decision by reason of the principle of the protection of legitimate expectations, which is embodied in particular in Paragraph 48 of the *Verwaltungsverfahrensgesetz* (Law on Administrative Procedure) of the *Land* of Baden-Württemberg, which is applicable to the present case.
- 10 In particular, it claims that, in accordance with that paragraph and the principles of German constitutional law, a public authority may not revoke an unlawful administrative measure granting a benefit without first weighing up the various interests involved. In the circumstances of the present case, therefore, the national authority is obliged to give the protection of the legitimate expectations of the undertaking which received the aid greater weight than the public interest of the Community in having the aid recovered.
- 11 Lastly, the German Government argues that recovery of the aid is also prevented by the prohibition in Paragraph 48 of the *Verwaltungsverfahrensgesetz* of the revocation of an administrative measure granting a benefit more than one year after the administrative authority became aware of the circumstances constituting grounds for revocation.
- 12 As the Court has ruled, *inter alia* in its judgment in Case C-142/87 *Belgium v Commission* [1990] ECR I-959, in principle the recovery of aid unlawfully paid must take place in accordance with the relevant procedural provisions of national law, subject however to the proviso that those provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible (paragraph 61).
- 13 The Court has also acknowledged that, since the principle of the protection of legitimate expectations is part of the legal order of the Community, the fact that national legislation provides for the principles of the protection of legitimate expectations and assurance of legal certainty to be observed in a matter such as the

recovery of unduly paid Community aids cannot be considered contrary to that same legal order (judgment in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor GmbH and Others v Federal Republic of Germany* [1983] ECR 2633, paragraph 30).

- 14 The same approach must be taken with regard to the recovery of national aid granted contrary to Community law. However, it must be noted that, 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 may not, 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 businessman should normally be able to determine whether that procedure has been followed.
- 15 In that regard, it must be pointed out that, by a communication published in the *Official Journal of the European Communities*, the Commission informed potential recipients of State aid of the risk attaching to any aid granted them illegally, in that they might have to refund the aid (Official Journal 1983 C 318, p. 3).
- 16 It is true that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid. If such a case is brought before a national court, it is for that court to assess the material circumstances, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice.
- 17 However, 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 recipients 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 decisions taken by the Commission under provisions of the Treaty of their effectiveness.

- 18 Finally, the German Government may not rely, as making it absolutely impossible to implement the Commission's decision, on the obligations to which the competent administrative authority is subject under the particular rules governing the protection of legitimate expectations in Paragraph 48 of the *Verwaltungsverfahrensgesetz* with regard to the weighing up of the interests involved and the period within which an administrative act granting a benefit may be revoked. As the Court has consistently held, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law.
- 19 In particular, a provision laying down a time-limit for the revocation of an administrative act must, like all the relevant provisions of national law, be applied in such a way that the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration.
- 20 It follows from the foregoing that the Court must hold, in accordance with the Commission's application, that the Federal Republic of Germany has failed to fulfil its Treaty obligations.

Costs

- 21 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- (1) Declares that, by not implementing Commission Decision 88/174/EEC of 17 November 1987 concerning aid which the *Land* of Baden-Württemberg of the Federal Republic of Germany has provided to BUG-Alutechnik GmbH, an undertaking producing semi-finished and finished aluminium products, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty;
- (2) Orders the Federal Republic of Germany to pay the costs.

Schockweiler

Zuleeg

Mancini

O'Higgins

Moitinho de Almeida

Rodríguez Iglesias

Grévisse

Delivered in open court in Luxembourg on 20 September 1990.

J.-G. Giraud

Registrar

F. A. Schockweiler

President of Chamber

acting for the President of the Court