JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
13 December 1995 *

In Case T-109/94,

Windpark Groothusen GmbH & Co. Betriebs KG, a company governed by German law, established at Groothusen-Krummhörn (Germany), represented by Professor Detlef Schumacher, Bremen, and Benno Grunewald, Rechtsanwalt, Bremen,

applicant,

v

Commission of the European Communities, represented by Jürgen Grunwald, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission's decision of 13 January 1994 refusing the applicant financial support under the 1993 Thermie programme and for a direction to the Council to take a new decision,

* Language of the case: German.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: H. Kirschner, acting for the President, A. Kalogeropoulos and V. Tiili, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 20 September 1995,

gives the following

Judgment

Legislative background and the facts giving rise to the dispute

1 On 26 June 1990 the Council adopted Regulation (EEC) No 2008/90 concerning the promotion of energy technology in Europe (Thermie programme) (OJ 1990 L 185, p. 1: 'the Thermie Regulation'). The Thermie programme covers a total of 17 sectors of application, including wind energy.

2 In accordance with Article 8 of the Thermie Regulation, the procedure for the selection of eligible projects is initiated by the Commission, which must publish an

invitation to submit projects in the *Official Journal of the European Communities*. For the selection of projects with a total cost exceeding ECU 500 000, the Commission is assisted by a committee composed of the representatives of the Member States ('the Thermie Committee'), which delivers an opinion on the draft of the measures to be taken which is submitted to it by the Commission. If the measures adopted by the Commission are not in accordance with the Thermie Committee's opinion, the Commission must communicate them to the Council. Pursuant to Article 10(1) of the Thermie Regulation, the Council may then take a different decision from the Commission.

For 1993, the Commission published in the Official Journal of 16 July 1992 (OJ 1992 C 179, p. 14) a communication of the provision of financial support to projects for the promotion of energy technology (Thermie programme). It invited interested parties to submit, before 1 December 1992, projects for possible selection to receive financial support in 1993. It also specified, in accordance with Article 8(2) of the Thermie Regulation, the sectors to be given priority, that is to say, 'low energy, low CO_2 buildings' and 'integrated urban traffic management systems'. In addition, the Commission stated that a document giving details of the procedure for the submission of proposals and information on the eligibility conditions, selection criteria and other relevant information could be obtained from it.

The applicant is a company whose object is to construct and operate a wind park in the Groothusen area, near Emden in Germany.

On 27 November 1992 the applicant submitted to the Commission an application for aid of ECU 1 933 495 for the construction of a wind park.

The Commission received approximately 700 proposals. In March 1993 the Directorate-General for Energy drew up a document appraising those projects. On 5 April 1993 they were examined by the technical committee for wind energy and

on 3 and 4 June 1993 by the Thermie Committee. The Commission thus established, pursuant to Article 9(2) in conjunction with Article 10(1) of the Thermie Regulation, the priorities for invitations to submit projects in accordance with the so-called 'committee' procedure.

7 On 19 July 1993 the Commission decided to grant financial support to a total of 137 projects. By the same decision, it also drew up a 'reserve list' of 49 replacement projects. Of the 52 projects in the field of wind energy, eleven were granted financial support and eight were entered on the reserve list. A brief communication concerning that decision was published in the Official Journal of 24 July 1993 (OJ 1993 C 200, p. 4).

8 On 5 August 1993 the Commission informed the applicant that its project had been placed on 'a supplementary list of projects which may be granted financial support before 31 December 1993 if sufficient budgetary credits become available, particularly if some of the projects which have already been granted financial support have not been carried out'. According to an annex to that letter, the maximum amount of financial support for the project had been fixed at ECU 918 028. The Commission emphasized that it was in no way bound by the fact that the project had been placed on the supplementary list and disclaimed all responsibility for any consequences which might ensue from a definitive decision not to grant the applicant financial support.

9 By fax of 9 August 1993, addressed to the Commission, the applicant requested further information and authorization to commence work. The European Communities Liaison Office of the *Land* of Lower Saxony thereupon informed the applicant that its project was on the reserve list and that a decision concerning possible financial support would be taken some time after the beginning of September 1993.

10 By letter of 13 January 1994, addressed to the applicant, the Commission stated that the applicant's project could not be granted financial support in 1993, owing to the lack of appropriate budgetary credits.

11 The applicant responded by letters of 9 and 23 February 1994, expressing its disappointment and asking the Commission to 'review carefully [your] notice of January 13, 1994 and the selection procedure which preceded it'. On 16 March 1994 the Commission replied, confirming the content of its letters of 5 August 1993 and 13 January 1994.

Procedure and forms of order sought by the parties

12 Those were the circumstances in which, by application registered at the Court of First Instance on 17 March 1994, the applicant brought the present proceedings.

13 The written procedure followed its normal course and terminated on 12 September 1994. The Court of First Instance adopted certain measures of organization of procedure.

14 At the hearing on 20 September 1995, the parties presented oral argument and answered questions put to them by the Court.

15 The applicant claims that the Court should:

— annul the Commission's decision of 13 January 1994 and direct the Commission to take a new decision in accordance with the legal principles laid down by the Court of Justice;

— order the Commission to pay the costs.

16 The Commission claims that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Admissibility

17 In its application, the applicant sought only annulment of the Commission's decision of 13 January 1994. However, the applicant indicated in its reply that, in so far as its complaints relate to earlier decisions taken by the Commission, its action should also be regarded as contesting those decisions, particularly the decision of 19 July 1993.

18 In those circumstances, the Court considers it necessary to examine first the various measures adopted in this case, in order to ascertain to what extent the present action is admissible.

Summary of the arguments of the parties

19 The applicant submits that, in the decision of 19 July 1993 on the granting of financial support under the 1993 Thermie programme, the Commission considered its project to be, in principle, eligible. The applicant accordingly believed that its project was on a 'supplementary list' and that the situation was promising. It maintains that the letter of 5 August 1993 imposed no conclusive restrictions, save in so far as it limited financial support to ECU 918 028. It was only upon reading the Commission's letter of 16 March 1994 (see paragraph 11, above), and the defence that the applicant learned that the 'supplementary list', on which its project had been placed, was a 'reserve list'. At the hearing, the applicant stressed that it had not understood that the letter of 5 August 1993 amounted in effect to a refusal of financial support for its project under the 1993 Thermie programme.

20 The applicant also asserted at the hearing that it was by the decision communicated by letter of 13 January 1994 that the Commission definitively refused it financial support under the 1993 Thermie programme. In response to an oral question put to it by the Court, the applicant stated that only that decision actually produced legal effects. For that reason, it claims that it had to await that measure before bringing proceedings before the Court.

21 The Commission maintains, first, that it is necessary to take account of the circumstances in which the letter of 13 January 1994 was written. The applicant did not raise any legal objection concerning the letter of 5 August 1993, even though it was that letter which informed it of the project's precarious position on the reserve list.

At the hearing, the Commission explained that the decision taken in July 1993 was definitive in so far as certain projects were thereby ruled out from financial support. The letter of 13 January 1994 merely informed the applicant that budgetary credits were not available. In the present proceedings, according to the Commission, the applicant is in fact contesting the decision contained in the letter of 5 August 1993, against which no action may now be brought since it would be out of time.

Findings of the Court

22 In the Court's view, a distinction must be made between, on the one hand, the Commission's decision of 19 July 1993 granting financial support of ECU 129 182 448 to 137 projects for the promotion of energy technology (Annex I) and drawing up a reserve list of 49 replacement projects (Annex II) and, on the other hand, the act contained in the letter of 13 January 1994, addressed to the applicant by the Commission.

23 The Court considers that the Commission's decision of 19 July 1993 is a definitive decision so far as concerns the examination and selection of projects to be supported under the 1993 Thermie programme. No re-examination of the projects was undertaken at the end of 1993, when the only question which arose was whether there were still funds available or whether the projects which had been granted financial support had all been carried out and the available credits thereby exhausted. Even though the Commission accordingly stated in its letter to the applicant of 5 August 1993 that it retained the right to amend its decision, subject to the availability of budgetary credits, it must be concluded that at that time the applicant's project was not one of the 137 projects selected, which means that the Commission's decision in that regard was definitive. Furthermore, the Court notes that, at the hearing, the parties agreed that the available credits had been fixed by the decision of 19 July 1993.

24 The Court finds that the decision of 19 July 1993 was not published as such. Only a Commission communication appeared in the Official Journal of 24 July 1993 (see paragraph 7 above), which stated:

'The Commission has recently decided as follows:

— an amount of ECU 129 182 448 has been awarded under the *Thermie* programme as financial support to 137 projects for the promotion of energy technology (Annex I),

— a reserve list of 49 replacement projects is established (Annex II).

Copies of Annexes I and II may be obtained on request in writing to: ...'

25 The Court notes that the publication of that communication in the Official Journal did not enable interested parties to gain precise knowledge of the content and grounds of the act in dispute enabling them to exercise their right of action. Nor did the Commission's letter of 5 August 1993 addressed to the applicant, informing it that its project had been placed on the supplementary list.

26 It is settled law that, where the act in dispute is not published or notified, the period within which proceedings are to be instituted cannot start to run until the third party concerned has precise knowledge of the content and grounds of the act in question, always provided however that he asks, within a reasonable period, for the full text of the act in question (see Case T-465/93 *Murgia Messapica* v *Commission* [1994] ECR II-361, paragraph 29, and the order of the Court of Justice of 5 March 1993 in Case C-102/92 *Ferriere Acciaierie Sarde* v *Commission* [1993] ECR I-801, paragraph 18).

27 The applicant had been informed of the existence of the decision selecting the projects to be awarded financial support for 1993 since August 1993, when it received the Commission's letter of 5 August 1993. In response to an oral question put to it by the Court, the applicant admitted that at the time it had neither sought the full text of the decision nor an individual explanation, *inter alia* since it erroneously considered its situation to be promising. At the hearing, the applicant also explained that it had not understood that the letter of 5 August 1993 amounted to a refusal, since the Commission had told it that its project had been placed on a 'supplementary' list. On the contrary, it believed that financial support was not ruled out. The Commission, for its part, asserted at the hearing that it would have provided an individual explanation if the applicant had expressly asked for one.

28 It must be concluded that the applicant did not take the opportunity to request either the full text or an individual explanation with respect to the decision to exclude its project from the 137 projects which were awarded financial support in 1993. It brought proceedings before the Court against that decision on 17 March 1994, that is to say, more than seven months after it had learned, in August 1993, of the contested act. It follows from the rule referred to above that, since it brought proceedings against that act out of time, the applicant cannot escape its claim being time-barred. Consequently, in so far as it is directed against the decision of 19 July 1993, the action is inadmissible.

29 As regards the letter of 13 January 1994, by which the Commission notified the applicant that its project could not receive financial support in 1993, since the appropriate budgetary credits were not available, the Court notes the applicant's assertion that it received that letter on 19 January 1994. That is not contested by the Commission. Bearing in mind also that the time-limit for bringing proceedings — two months from the date of notification — may be extended on account of distance, it must be held that in the present case the procedural time-limits have been complied with and that, in so far as it contests the decision contained in the letter of 13 January 1994, the action is therefore admissible.

Substance

30 The applicant has put forward three pleas in law: (1) failure to comply with an essential procedural requirement in that the decision was not accompanied by an adequate statement of reasons; (2) breach of the fundamental rules of law governing the application of the Treaty in that the applicant's right to a hearing was infringed; and (3) a misuse of power in that its application was refused for no apparent reason.

The plea alleging an inadequate statement of reasons

Summary of the arguments of the parties

31 In the applicant's view, the decision refusing to grant it financial support was not accompanied by an adequate statement of reasons in so far as it does not explain the grounds for giving preference to other projects. In particular, the applicant maintains that it is entitled to require a reasoned explanation as to why there were no funds available for its project whereas there were for other projects. It asks why its project was not selected, when it was one of the projects apparently eligible and the budgetary funds already allocated amounted to ECU 942 937 on average for each of the 137 projects sponsored. The failure to inform it of the grounds on which the decision was based constitutes a material defect in the reasoning.

32 In its reply, the applicant claims that at that stage it still did not know whether the Commission had actually consulted the committee referred to in Article 10 of the Thermie Regulation and taken its opinion into consideration. It submits that the Commission should have explained to what extent it had acted in accordance with the Thermie Committee's evaluation.

33 Furthermore, the applicant submits that, in the light of Article 190 of the EC Treaty, there are no grounds for drawing a distinction between the administration

in the performance of its public service duties ('Leistungsverwaltung'), on the one hand, and the administration in the exercise of its prerogatives as a public authority ('Eingriffverwaltung') as proposed by the the Commission, which questions whether its decisions concerning aid granted by the Community administration in the performance of its public service duties should be subject to the same requirements regarding the statement of reasons as have been laid down with respect to decisions adopted by the administration in the exercise of its prerogatives as a public authority, which limit the rights of those subject to its administration. The applicant claims that decisions addressed to an undertaking by the administration in the performance of its public service duties have, in the common market, implications at least as important as decisions taken in the exercise of its prerogatives as a public authority.

34 The applicant also points out, referring to the judgment of the Court of Justice in Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, that deficiencies in the statement of reasons cannot be justified by a duty to preserve professional secrecy.

35 The Commission asserts that, even assuming that the plea alleging an inadequate statement of reasons is admissible, it is in any event unfounded.

36 The Commission claims that the scope of the duty to state reasons must be in proportion to the effects of the legal act concerned. In the case of financial support programmes, the requirements and criteria of the basic legal act constitute important elements in the reasoning. In selection procedures involving the participation of committees, the statement of reasons normally required would be largely superfluous. In any event, the communication of the results of the selection procedure constitutes an essential element in the reasoning.

37 The Commission emphasizes the difference existing, in its view, between decisions concerning aid granted by the administration in the performance of its public service duties and decisions limiting individuals' rights taken by the administration in

the exercise of its prerogatives as a public authority. It asserts that, according to the case-law, the duty to provide an adequate statement of reasons must be subject to different requirements depending on the degree to which the addressee is concerned or on the nature of the legal act in dispute (see *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*).

38 The Commission refers to Case 195/80 *Michel* v *Parliament* [1981] ECR 2861 and the guidance given by the Court of Justice with regard to the statement of reasons for decisions of the selection board in competitions where the number of candidates is very high. According to that judgment, it is acceptable for the selection board initially to send candidates merely information on the criteria for selection and the outcome of the selection process and to give individual explanations only later to those candidates who expressly request them. The Commission maintains that, in the present case, it followed that rule.

39 The Commission submits that the Thermie programme does not give rise to any right to financial support. Consequently, where financial support is not possible, no damage is caused to candidates, nor do they have grounds for complaint. The fact that the applicant satisfied the conditions for eligibility merely permitted it to take part in the selection procedure. Thus, for the statement of reasons to be sufficient, a candidate need only be informed that its project has been examined and that a decision has been taken in that regard under the prescribed procedure. The candidate is not entitled, however, to a comparative analysis of its project in relation to the other projects.

40 As regards the disputed letter of 13 January 1994, the Commission claims that it does indeed state reasons, namely, the lack of the necessary funds.

41 The Commission also invokes the obligation of professional secrecy with regard to information about undertakings, laid down by Article 214 of the EC Treaty. In

view of that obligation, the applicant cannot demand comparative information on the various projects which have been selected in preference to its own.

42 Lastly, as regards the expressions 'supplementary list' and 'reserve list', the Commission points out that its communication in the Official Journal of 24 July 1993 already contained the expression 'reserve list'.

Findings of the Court

43 The Court notes first that it has already held that a distinction must be made between, on the one hand, the decision of 19 July 1993 and, on the other hand, the decision in the letter of 13 January 1994 addressed to the applicant by the Commission, and that the applicant's action is admissible only in so far as it contests the latter decision.

44 In order to arrive at the decision in the letter of 13 January 1994, the only question for the Commission was whether there were still budgetary funds available or whether the projects which had been granted financial support had all been carried out and the available credits thus exhausted. Although funds were indeed still available under the budget for the Thermie programme in July 1993 — after the decision had been taken to finance certain projects — according to the Commission, they had been awarded during the last months of 1993 to certain 'targeted' projects. Consequently, at the end of 1993 there were no longer any funds available.

45 In those circumstances, the Court considers that the Commission's communication to the applicant of 13 January 1994 contains a sufficient and proper statement of reasons, namely, the exhaustion of the funds available at that time, so that no aid could be granted to the applicant's project. The applicant's plea alleging inadequacy

of the statement of reasons, in so far as it concerns the second letter, of 13 January 1994, must therefore be rejected as unfounded.

The plea alleging infringement of the right to a hearing

Summary of the arguments of the parties

6 The applicant complains that, in the whole course of the procedure, the Commission did not hear its views or give it an opportunity to comment on factors likely to affect the decision concerning it.

7 In response, the Commission contends that the procedure provided for by the Thermie Regulation, in particular Article 8, is an exclusively written procedure. It is also a single-stage procedure, in which the candidate can be invited only once to propose and to explain its project. The Commission adds that, for an infringement of the right to be heard to result in an annulment, it must be established that, had it not been for that irregularity, the outcome of the procedure might have been different (see Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 48). The Commission submits that, in the present case, no other outcome was conceivable.

Findings of the Court

8 The Court notes, first, that the Commission explained the procedure for the submission of projects for financial support under the Thermie programme in the information brochure referred to in the communication inviting interested parties to submit projects, published in the Official Journal on 16 July 1992 (see paragraph 3 above). That document states: 'Once the proposal has been submitted, proposers are invited not to submit any supplementary information to the

Commission unless specifically requested by the Commission services'. Furthermore, it is in accordance with the procedure in financial support programmes for candidates for such support not to be given a hearing during the selection procedure, which is conducted on the basis of the documentation submitted by them. That procedure is appropriate in situations where hundreds of applications must be evaluated and it therefore does not constitute an infringement of the right to a hearing.

49 In the Court's view, since the applicant did not request further information from the Commission following the publication in the Official Journal of 24 July 1993 of the communication regarding the Commission's decision granting financial support to 137 projects or following its letter of 5 August 1993, the Commission was not under a duty to give the applicant an opportunity to make known its views before the Commission sent the letter of 13 January 1994. From that point of view also, the right to a hearing has not been infringed.

50 The facts in the present case are quite different from those underlying the judgment of the Court of First Instance in Case T-450/93 *Lisrestal* v *Commission* [1994] ECR II-1177, relied on by the applicant. In that case, the Court ruled that, where the Commission intends to reduce the financial assistance originally granted, the beneficiary must be placed in a position in which it can effectively make known its views on the evidence relied on against it to justify the decision reducing the assistance. In the present case, no financial support had been granted to the applicant which had merely been placed on a reserve list of possible beneficiaries of Community financial support.

51 Consequently, the plea alleging infringement of the right to a fair hearing must also be rejected.

The plea alleging misuse of power

Summary of the arguments of the parties

The applicant submits that there are sound reasons in favour of its project and that the Commission has not taken the relevant factors into consideration. In so far as the Commission took its decision without balancing all the various factors concerned, that decision is vitiated by a misuse of power.

The Commission contends that the applicant has not put forward any argument in support of its allegation. The Commission emphasizes that, like the committees provided for by the rules, it enjoys a wide measure of discretion in this area, comparable to its discretion in relation to recruitment of officials and competition procedures.

The Commission also submits that qualitative requirements are particularly high for large projects like the one proposed by the applicant and that, for projects of such magnitude, the collaboration of at least two undertakings from different Member States is normally required, a condition not met by this project.

Lastly, the Commission observes that the Community judicature has no jurisdiction to substitute its own value judgment for the assessments made by the institution itself (see Joined Cases 27/64 and 30/64 *Fonzi* v *Commission* [1965] ECR 481).

Findings of the Court

The Court finds that, at their meeting on 5 April 1993, the technical experts who are independent of the Commission merely placed the applicant's project on the

reserve list. The documents before the Court also disclose that the Commission did not depart from the Thermie Committee's opinion.

57 The Court also notes that the Commission enjoys a wide discretion regarding the existence of conditions justifying the grant of Community financial assistance and that the Court itself cannot undertake a detailed re-examination of the project in question during proceedings before it (see the judgment in *Murgia Messapica* v *Commission*, paragraph 46).

58 Lastly, the Court considers that the applicant has not adduced any matter of fact or law showing that the assessment of its project by the Commission, in conjunction with the Thermie Committee, was vitiated by manifest error or misuse of power.

59 Consequently, the third plea put forward by the applicant, alleging a misuse of power, must also be rejected.

60 Since all the pleas put forward by the applicant in support of its claim for annulment have been rejected, that claim must be dismissed.

61 It should be added that, as regards the applicant's claim that the Court should direct the Commission to 'take a new decision in accordance with the legal principles laid down by the Court of Justice', this Court is not entitled, when exercising judicial review of legality, to issue directions to the institutions. It is for the administration concerned to adopt measures to implement a judgment given in proceedings for annulment (see Joined Cases T-432/93, T-433/93 and T-434/93 *Socurte and Others* v *Commission* [1995] ECR II-503, paragraphs 54 and 55). Consequently, that claim must also be rejected.

62 The application must therefore be dismissed in its entirety.

Costs

63 Under Article 87(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 applicant has failed in its submissions, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Kirschner Kalogeropoulos Tiili

Delivered in open court in Luxembourg on 13 December 1995.

H. Jung H. Kirschner

Registrar For the President