OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 20 September 2001 [1]

1. By application lodged on 24 May 2000 pursuant to the second subparagraph of Article 88(2) EC, the Commission seeks a declaration that the Federal Republic of Germany has failed to comply with Commission Decision 2000/392/EC of 8 July 1999 (hereinafter the 'Decision') [2] on aid granted to the public bank Westdeutsche Landesbank-Girozentrale (hereinafter 'WestLB'). In its application, the Commission complains in particular that Germany has failed to adopt within the prescribed time-limit the measures necessary to recover the aid unlawfully granted to the aforementioned bank and that Germany has therefore failed to comply with the obligations imposed by the fourth paragraph of Article 249 EC and Article 3 of the Decision.

Facts and procedure

The Decision

2. The Decision giving rise to the present case concerns an operation carried out by the Land of North Rhine-Westphalia (hereinafter 'Land NRW') by the Law of 18 December 1991, for the purpose essentially, according to the Decision, of increasing the own funds of a public bank, WestLB, and thereby enabling that bank to maintain high operating margins from which it would otherwise have been precluded by national and Community rules regulating credit institutions.

3. In particular, the operation involved transferring (by means of incorporation) to WestLB another public body, namely the Wohnungsbauförderungsanstalt des Landes Nordrhein-Westfalen (hereinafter 'Wfa'), wholly owned by Land NRW and having the institutional aim of granting finance to promote the construction of housing. The transfer did not involve Land NRW taking an increased shareholding in the incorporating bank, but merely provided that, as from January 1992, the Land would receive as consideration remuneration for the capital provided, equal to 0.6% of WestLB's annual profits after tax.

4. The operation caused great concern amongst German private banks which, through one of their associations (the

1 — Original language: Italian.
2 — OJ 2000 L 150, p. 1.

Bundesverband deutscher Banken) in March 1993 and May 1994, submitted two complaints to the Commission alleging infringement of Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions,[3] and infringement of the Community rules on State aid. With regard to the second complaint, the Commission decided on 1 October 1997 to initiate the procedure laid down in Article 88(2) EC, concluded by the Decision of 8 July 1999, which defined the contested operation as unlawful State aid incompatible with the common market, simultaneously ordering its recovery.

5. In short, the Commission contested the fairness of the payment made to Land NRW as consideration for the transfer of Wfa, given that, in its opinion, remuneration in line with market value should have been 9.3% of annual profits, after tax, for one part of the assets transferred to WestLB and 0.3%, also after tax, for another part. With reference to the period 1992/1998, the difference between the market value remuneration and that paid to Land NRW was estimated by the Commission to amount to a total of DEM 1 579 700 000 (EUR 807 700 000), which figure has been referred to as the total amount of aid.

3 — OJ 1989 L 124, p. 16.

6. The operative part of the Decision provides:

'*Article 1*

The State aid which Germany has implemented for Westdeutsche Landesbank-Girozentrale in the years 1992 to 1998, amounting to DEM 1 579.7 million (EUR 807.7 million), is incompatible with the common market.

Article 2

1. Germany shall take all necessary measures to discontinue and recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to the beneficiary.

2. Recovery shall be effected in accordance with the procedures of national law. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 3

Germany shall inform the Commission, within two months of notification of this decision, of the measures taken to comply with it.

...'

Proceedings brought against the Decision

7. Against this Decision, which it alleged was unlawful and seriously damaging to its interests, the Federal Republic of Germany brought a claim for annulment before the Court of Justice on 7 October 1999 (Case C-376/99) alleging, in particular, the Commission's lack of competence, the infringement of formal procedures and the infringement of the EC Treaty and rules of law governing its application. However, following proceedings brought at almost the same time (12 October 1999) by WestLB and Land NRW against the Decision before the Court of First Instance (Cases T-228/99 and T-233/99), the proceedings before the Court were suspended by order of 8 February 2000. Meanwhile, the Federal Republic of Germany intervened in the cases before the Court of First Instance in support of the claims submitted by the applicants.

8. It must be pointed out that, notwithstanding the three pending claims just mentioned, no party has requested that implementation of the contested Decision be suspended pursuant to Article 242 EC.

Measures taken by the German authorities to implement the Decision

9. The German Government was notified of the Decision on 4 August 1999. Exactly two months later, on 4 October 1999, the Federal Republic of Germany informed the Commission of the implementing measures which Land NRW intended to adopt. However, by letter of 1 December 1999, the Commission objected to those measures, arguing that they would not eliminate the distortions of competition caused by the contested aid. Noting that assessment, on 15 March 2000 the German Government proposed alternative measures for implementing the Decision, which were also rejected by the Commission by letter of 29 March 2000. Further information on the matter was subsequently forwarded by the German authorities on 5 April 2000.

10. The implementing measures drawn up by the German authorities and the positions adopted by the Commission towards

those measures may be summarised as follows:

(a) The measures communicated on 4 October 1999

11. The measures in question (resulting from an agreement between the 'guarantors' of WestLB,[4] forwarded to the Commission in the annex to the letter of the German authorities) provided that, in the event of the liquidation of WestLB or any change in share ownership, an additional share of the capital gains made by the bank between 1992 and 1998 would be reserved for Land NRW. In addition to the portion accruing to Land NRW by virtue of its shareholding in WestLB, Land NRW would have in fact obtained a further share, equal to 22.1% of the total distribution, as consideration for Wfa. Given that, according to Land NRW's calculations, that surplus would have amounted to DEM 10 thousand million for the period 1992-1998, the additional share of 22.1% would have provided Land NRW with some DEM 2.21 thousand million, thereby offsetting the aid contested by the Decision.

12. The measures communicated by the German authorities also provided, for the period following 1998, for the transformation of Wfa's special reserves into a 'non-participating shareholding' of Land NRW, the features of which, however, were not specified. The shares in the company's capital were to remain unchanged, but in the event of future capital growth Land NRW would have the right to subscribe to a quota converting part of its own non-participating shareholding at a rate fixed unanimously from time to time by the guarantors.

13. Finally, it was envisaged that the agreement between the guarantors of WestLB would be annulled with retroactive effect whether the Community Courts annulled the Decision, finally confirmed it or ruled that the agreement did not allow for correct implementation of the Decision. In the latter two cases, the guarantors would decide by common agreement on the appropriate measures for implementing the Decision.

14. By letter of 1 December 1999, the Commission informed the German Federal Government that, in its opinion, the meas-

4 — 'Guarantors' of WestLB are in practice public owners of the bank. In that respect, it emerges from the Decision that the bank 'is 100% publicly owned. The largest single stake in the nominal capital is held by the Land (43.2%). Other shareholders are the municipal associations (Landschaftsverbände) of Rheinland and Westfalen-Lippe (11.7% each) as well as the associations of local public savings banks... of Rheinland and Westfalen-Lippe (16.7% each).... As a public-law institution, WestLB benefits from two forms of guarantees from its public owner: "institutional responsibility" (Anstaltslast) and "guarantor liability" (Gewährträgerhaftung). Anstaltslast means that the owners of WestLB are responsible for securing the institution's economic basis and operability for the entire duration of its existence. This guarantee does not create a liability on the part of the owners vis-à-vis the creditors of the bank, but merely defines the relationship between the public authorities and the bank. Under the terms of the Gewährträgerhaftung, the owners meet all the bank's liabilities which cannot be satisfied from its assets. It establishes a liability on the part of the guarantor vis-à-vis the creditors of the bank. Both guarantees are limited neither in time nor in value' (recitals 15 and 16).

ures communicated did not constitute a correct implementation of the Decision. Indeed, the Commission maintained that altering the shareholdings in WestLB into shares in its capital gains would have had no impact on the bank's costs: the proposal would in practice have resulted in the other shareholders forgoing part of the bank's assets in favour of Land NRW, without, however, offsetting the distortion of competition caused by the aid contested by the Decision.

(b) The measures proposed on 15 March 2000

15. Although not sharing the position adopted by the Commission, the German Government proposed other measures to implement the Decision on 15 March 2000.

16. According to that proposal, instead of a sum of money, WestLB would pay Land NRW compensation in kind in the form of a non-participating shareholding which was to be assigned following approval by the Commission with retroactive effect from 1 January 2000. The German authorities maintained that the share value (equal to DEM 2.2 thousand million) would have been equivalent to the amount of aid allegedly granted between 1 January 1992 and 31 December 1999, including interest up to that date.

17. It was intended that the non-participating shareholding would cover the bank's losses in full and would earn annual interest on its book value at the market rate in force at the time it was assigned, subject to possible losses. However, that interest, to be entered as expenditure on the bank's final balance, would not be paid to Land NRW, but would be retained by WestLB until such time as the Community Courts delivered a final ruling on the Decision and would be added annually to the non-participating shareholding. Should the Decision be annulled, Land NRW would return the non-participating shareholding to WestLB with the interest without receiving any compensation. It was also intended that the Land could transfer, in whole or in part, the non-participating shareholding to third party investors; to that end, WestLB would issue a nominal share certificate.

18. Thus, the German Government stated that the proposal in question gave due consideration to the observations set out by the Commission in its letter of 1 December 1999. The text of the proposal did in fact point out that the recovery in kind of aid by means of granting a non-participating shareholding would have satisfied the stated requirement of bearing down on WestLB's costs, given that it would have led to the entry of exceptional expenditure (in the sum of DEM 2.2 thousand million) in the final balance which the bank would have been required to publish for the year 2000.

19. However, that proposal was also regarded as inadequate by the Commission, which rejected it by letter of 29 March

2000. That letter contested, in particular, the fact that the repayment of the aid was linked to its being immediately reinvested by Land NRW in the form of the purchase of a non-participating shareholding in WestLB. Indeed, such reinvestment could in turn have constituted a State aid and should therefore have been notified to the Commission under Article 88 EC in order to allow the Commission to verify whether that operation complied with the established market economy private investor principle and, if it did not, to verify its compatibility with the common market. Since the Commission's verification procedure would have required the initiation of contested proceedings, which would probably have continued for some time, the solution proposed by the German authorities would in practice have paralysed the recovery procedure, thereby negating the immediately enforceable nature of the Decision. For that reason, the Commission stated it was not acceptable.

20. The Commission also observed that the information communicated by the German authorities did not enable it to exclude the possibility either that the non-participating shareholding accepted by the Land might constitute new aid to WestLB, or that such aid might be incompatible with the common market. In that respect, the Commission pointed out that the letter from the German authorities contained no indication of the effective yield of the non-participating shareholding and that it was quite difficult to verify whether such a share complied with normal market conditions because of:

— the particular nature of the transaction;

— the fact that, until a final ruling was delivered by the Community Courts, the proceeds of the non-participating shareholding would be retained by WestLB and capitalised;

— the difficulty in establishing whether the non-participating shareholding could be included in WestLB's own funds and, thus, the resultant uncertainty as to the bank's situation in that respect;

— the contingent nature of the non-participating shareholding which, should the Decision be annulled, would have to be returned to WestLB, thereby impinging on the practicality of transferring that shareholding to third parties.

21. As indicated, following that negative reply, the German authorities provided on 5 April 2000 certain details of their proposal to implement the Decision. In particular, they stated that in order to comply with normal market conditions, the non-

participating shareholding should yield for the Land interest at 5.804%, equal to the Euribor 12-month rate in force at the time (4.304%), increased by a percentage corresponding to the operational risk (1.5%).

22. The exchange of correspondence referred to was followed by various meetings between the parties, during which they attempted to adapt the proposal of the German authorities to comply with the Commission's stated requirement of a rapid and correct implementation of the Decision. It appears that during these meetings the Commission essentially restated the need for recovery of the aid and the reinvestment to be carried out in two separate phases in order to enable it to assess the possible presence of an element of aid and, should it do so, the compatibility of such aid with the common market. For its part, the German Government noted that immediate repayment of the aid, without creating at the same time a hidden reserve to maintain the bank's solvency, would seriously jeopardise WestLB's stability; to avoid that danger, it proposed, inter alia, notifying the Commission of a new measure concerning the creation of a hidden reserve to be kept in place until such time as the Commission itself reached a decision on the reinvestment of the aid.

23. Not any more convinced by the new proposals drawn up by the German authorities, the Commission informed them accordingly, at a meeting held on 3 May 2000, that if they had not complied with the Decision at the end of two weeks, the Commission would be obliged to make a referral to the Court of Justice pursuant to Article 88(2) EC. On 24 May 2000, since the German authorities had not adopted any provision, the Commission therefore decided to initiate the present proceedings.

24. On 9 August 2000, the German Government submitted its counter-claim, thereby concluding the written phase of the procedure, since the Commission did not submit a reply. However, the parties had the opportunity to expand further upon their arguments during the hearing held on 7 June 2001.

Legal analysis

Preliminary considerations

25. As noted above, in the present case the Court has been requested to rule on the failure to implement a decision, the lawfulness of which is still under consideration by the Court of First Instance and which must subsequently be re-examined by the Court of Justice. Thus, it cannot be ruled out that

the Court of Justice may end up censuring the failure to implement a decision or the incorrect implementation of a decision which might subsequently be annulled.

26. However, this procedural overlap is not entirely new, given that it has occurred in a case similar to the present one (Case C-404/97 *Commission* v *Portugal*[5]), in which the Court was obliged to point out the independent nature of the two sets of proceedings. Indeed, as Advocate General Ruiz-Jarabo Colomer observed in that case, 'if, in an action brought by the Commission under the second subparagraph of Article 93(2), the Court of Justice were unofficially to stay the proceedings and wait until the Court of First Instance had delivered judgment so as to hear the case at the same time as the action for annulment brought by the Member State, or as the appeal of the undertaking this would, in practice, amount to suspension of the implementation of the contested act when neither the undertaking nor the Member State had applied to the Community judicature for the adoption of provisional measures, even though they could have done so' (point 37 of the Opinion).

27. In the present case, as we have seen, the Decision requires the German authorities to recover without delay the aid granted to WestLB and to communicate to the Commission, within two months of notification of the Decision, the provisions adopted to comply with that Decision. Although they have contested the Decision, the German Government, Land NRW and WestLB have not requested its interim suspension under Article 242 EC, with the result that the contested act continues to have full effect, as indeed expressly acknowledged by the German Government in its abovementioned communications of 4 [October] 1999 and 15 March 2000.

28. However, the German Government has asserted the need to identify 'reversible' measures for implementing the Decision, pointing out that WestLB would otherwise suffer irreparable damage should the Decision be annulled.[6] Indeed, that need referred to by the German Government is quite understandable; it is also consistent with the principle whereby Member States have a margin of discretion in implementing a Commission decision and may therefore choose, if there are various procedures for recovering unlawful aid, those procedures which may most easily be revoked should the decision be annulled. It should also be borne in mind that, according to settled case-law, 'in the absence of provisions of Community law concerning the recovery of amounts unduly paid, the recovery of aid improperly granted must

5 — In that case (Case C-404/97 [2000] ECR I-4897) the Court was also required to rule on the failure to recover aid in respect of which proceedings were pending before two courts (before the Court of Justice, which stayed the procedure, and the Court of First Instance) on the lawfulness of the decision requiring recovery, against which no application for suspension of operation had been made.

6 — This statement was made particularly with reference to the comments of the Commission in its abovementioned letter of 29 March 2000 on the need to recover in two separate stages the aid and the subsequent reinvestment of the relevant amount.

be carried out in accordance with the rules and procedures laid down by national law', [7] and that that direction in the case-law has been confirmed by Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, [8] Article 14(3) of which specifically provides that 'recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned'.

29. However, the freedom that Member States are thus recognised as having is obviously limited by the requirement to implement the Commission's Decision correctly and without delay. Furthermore, it is precisely for this reason that the above-mentioned case-law also provided that 'the application of national law must not affect the scope and effectiveness of Community law. In other words, the application of the national rules must not make it impossible in practice to recover the sums irregularly granted...'. [9] Article 14(3) of Regulation No 659/1999, cited above, provides that national procedures are to apply only 'provided that they allow the immediate and effective execution of the Commission's decision'.

30. Thus, in cases like the one under consideration, recourse to 'reversible' implementing measures on the part of the German authorities is, in principle, entirely legitimate. However, it is clear that where such measures are not possible, or where the interested parties did not wish or were not able to obtain provisional measures under Article 242 EC, the danger of suffering serious and irreparable damage could not authorise the German authorities not to implement the Decision in full without delay.

31. That said, I will now proceed to assess whether the measures drawn up by the German authorities were suitable for the purpose of implementing the Decision correctly. In view of the complexity of those measures, I must therefore note that the examination I am now embarking upon would have had a more solid and secure base if, during the stage prior to the judicial proceedings, the parties had provided a more structured and detailed analysis than that which can be inferred from the case-file, particularly with regard to the direct and indirect implications of those measures.

The measures communicated on 4 October 1999

32. As already stated, on 4 October 1999, two months after notification by the Commission, the German Government communicated to the Commission the implementing measures which Land NRW

7 — Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 82. In the same vein see, inter alia, Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 12; Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 61; and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 24.

8 — OJ 1999 L 83, p. 1.

9 — *Siemens* v *Commission*, cited above, paragraph 82.

intended to adopt. Essentially, these consisted of:

(i) granting the Land the right to obtain, in the event of WestLB's liquidation or a change in its company structure, an additional share of the capital gains made by the bank between 1992 and 1998;

(ii) for the period following 1998, transferring Wfa's special reserves into a non-participating shareholding of Land NRW, the features of which however were not specified.

33. Before examining those measures, it should be pointed out that, during the hearing, the parties discussed at length the nature of the agreement of WestLB's guarantors annexed to the Federal Government's communication of 4 October 1999 in order to establish whether it involved measures adopted for the purpose of implementing the Decision, as the German Government maintains, or was merely a proposal for its implementation, as the Commission contends. Essentially, this discussion turned on, primarily, the fact that the measures under (i) had been approved by WestLB's guarantors 'subject to the agreement of the board' (the nature of that condition not being clear); and, secondly, the fact that the measures under (ii) constituted merely the 'main points' of an agreement which the guarantors had yet to conclude. The parties assessed those factors differently and, taking account also of the relevant national regulations, reached conflicting conclusions on the nature of the agreement.

34. However, the solution to this question does not seem to me a decisive factor for purposes of the present case. Indeed, as I have stated, the Commission rejected the measures communicated by the German Government on the ground that they were not such as to ensure that the Decision would be implemented correctly. Accordingly, in bringing these proceedings, the Commission seeks to establish that the defendant Member State did not adopt the *necessary* measures to implement the Decision. Thus, even if it were to be accepted that the contested measures could be regarded as having been correctly adopted, the merits of those measures should be assessed for the purpose of establishing whether or not they would allow the aid unlawfully granted to WestLB to be recovered.

35. Accordingly, in considering those measures, I note that, according to the Commission, the Land's majority share in the bank's capital gains would not have resulted in the correct implementation of the Decision because it would have involved other public shareholders in WestLB forgoing a portion of the bank's assets in favour of Land NRW, without any bearing on the company's costs. However, in the Commission's opinion, by taking

such action the competitive advantage obtained by WestLB as a result of the aid would not have been offset. By contrast, the German Government contends that, in light of the market economy private investor criterion, the contribution made at the time by the Wfa would not have been tantamount to aid if Land NRW's shareholding had been adequately increased in line with the value of WestLB's assets. The result of this is that if that increase had occurred *a posteriori*, but with retroactive effect, the aid would effectively have been eliminated.

36. I also believe, along with the Commission, that in reality such an operation would essentially have involved other public shareholders forgoing a portion of WestLB's capital gains in favour of Land NRW with the result, I further believe, of recompensing the latter for waiving repayment of the aid. However, I am not entirely convinced that such an operation should be regarded *in itself* as unfeasible. On the contrary, I believe that, had it been done in accordance with normal market conditions, it could have constituted an investment by WestLB's public shareholders intended to finance the rescheduling of the debt for the purposes of recovering the aid. Accordingly, to that end it would have been necessary to assess, as the German Government proposed, whether the conduct of Land NRW and WestLB's other public shareholders was consistent with the market economy private investor criterion. It would thus have been necessary to determine:

— whether, on the one hand, a private shareholder in the bank would have agreed to forgo credit equal to the amount of aid granted with the transfer of Wfa in exchange for a greater share in the capital gains made by the bank in the period 1992/1998, noting in particular that such a share would have been realised only in the event of the bank's liquidation or a change in its company structure;

— on the other hand, whether the bank's private shareholders would have agreed to forgo part of their own share of capital gains in favour of another shareholder in exchange for the latter's waiving of credit equal in the amount of aid to be recovered;

— whilst having regard, in both cases, to the shareholders' specific interest in the bank's increase in value which, clearly, would entail an increase in the value of their shares.

37. If the result of the private investor test had proved negative, the operation would clearly have been unacceptable, in the absence of express authorisation on the part of the Commission, as it would in

practice have achieved the recovery of the aid by means of new aid; however, in the alternative case, the compensation obtained by the Land might well have allowed the aid granted to WestLB to be recovered. In that case, in fact, it could not have been contended, as it was by the Commission, that the operation would not have had an effect on the bank's costs, given that the investment made by the bank's public shareholders, instead of financing its activity (as could have happened but for the Commission's Decision), would have been earmarked for rescheduling the debt in relation to the recovery of the aid. Thus, earmarking the investment in that way would have absorbed considerable resources from the bank, clearly affecting the bank's management costs.

38. That general point having been made, it should nevertheless be noted that the Decision required Germany to adopt the measures *necessary* to recover the aid granted to WestLB and to communicate those measures to the Commission. It was therefore the Member State's responsibility to communicate to the Commission the measures adopted (or which it intended to adopt) to recover the aid and to demonstrate that they were suitable for the purpose of achieving the object prescribed by the Decision. Indeed, I consider that, whilst it is true that, in principle, it falls to the Commission to prove that a Member State has granted unlawful aid, it is equally true that it falls to the Member State in question to demonstrate that it has implemented in full and without delay any decision requiring recovery of aid, notwithstanding of course, in either case, the duty of mutual cooperation referred to in Article 10 EC.

39. If the Member State therefore decides not to recover the aid by means of a simple cash payment, but opts for alternative measures, it is obliged to demonstrate that those measures can achieve the result required by the decision in question. Thus, where the State decides to finance the payment of the debt relating to the recovery of aid by a new investment (to give an example that can be grasped immediately, one can imagine a *debt/equity swap* operation designed to convert the debt owed to the State into share capital in the beneficiary company), it must demonstrate that such an operation can achieve the recovery required by the Decision without involving the granting of new aid.

40. It follows that in the case in question the German Government should have furnished evidence designed to demonstrate that the granting to Land NRW of an additional share of WestLB's capital gains would allow the recovery required by the Decision to be achieved and would not involve the granting of further aid. However, it does not seem to me, at least in light of the evidence brought to the attention of the Court, that such a demonstration has been given.

41. First, the German Government has not demonstrated that a private shareholder

would have forgone a guaranteed due payment equal to the sum of the aid to be recovered in exchange for the right to obtain, in the event of WestLB's liquidation or alteration in its company structure (thus, at some uncertain point in the future), an additional share of the bank's capital gains. Furthermore, the German Government has not managed to demonstrate that the action of other public shareholders in forgoing a share of capital gains in order to recompense Land NRW for its waiving of payment in connection with the recovery of the aid is compatible with the private investor criterion.

42. Since the German Government has not demonstrated that the operation formulated by it was compatible with the private investor criterion and that that operation therefore allowed for the proper recovery of the aid, it cannot be contended that Germany adopted without delay and communicated to the Commission suitable measures for implementing the Decision.

43. Similarly, I take the view that the German Government has not demonstrated that transforming, as from 1998, Wfa's special reserves into a non-participating shareholding of Land NRW was capable of yielding adequate remuneration for the Land (*pro futuro*) in return for transferring Wfa to WestLB. Moreover, the extremely vague nature of that operation should be noted, as no details concerning the non-participating shareholding to be assigned to the Land have been provided.

44. Nevertheless, apart from these considerations, I must note that, because of their extremely precarious nature, the measures in question do not appear to me appropriate for purposes of implementing the Decision. As observed by the Commission, the guarantors of WestLB had established that the agreement reached by them would be annulled with retroactive effect, not only in the event that the Community Courts annulled the Decision or declared the agreement inadequate to implement it, but also even if the Decision were finally confirmed judicially. Thus, in any event, irrespective of the outcome of the pending cases, the measures in question would not have been implemented. Consequently, I do not see how it can be contended that those measures would enable the aid granted to WestLB to be recovered.

45. I am likewise unconvinced by the German Government's argument that the measures in question had been selected solely because of their 'reversible' nature, with the intention, should the Decision be confirmed definitively, of replacing them by 'irreversible' but less onerous measures for WestLB's shareholders. This argument does not in fact overcome the objection based on the extremely precarious nature of the measures in question which, in any case, were intended to be annulled with retroactive effect and were therefore inappropriate for the purpose of implementing the Decision.

46. In light of the preceding considerations, I therefore consider that the measures communicated to the Commission on

4 October 1999 were not appropriate to guarantee implementation of the Decision.

The measures proposed on 15 March 2000

47. The measures proposed on 15 March 2000 essentially involved, as I have previously noted, granting Land NRW a non-participating shareholding in WestLB, freely transferable to third parties, with a value of DEM 2.2 thousand million. It was envisaged that this shareholding would cover the bank's losses in full (even though no details had been provided in that respect) and would earn annual interest on its book value, at the market rate in force at the time it was established (subsequently fixed at 5.804%), subject to possible losses. However, that interest would not be paid immediately to the Land, but would be retained by the bank and capitalised until such time as a final ruling was delivered by the Community Courts on the actions for annulment of the Decision. Should those actions succeed, the Land would return to the bank the non-participating shareholding with the interest earned up to that point, without obtaining any compensation.

48. According to the Commission, those measures would not have been adequate to guarantee effective implementation of the Decision because the immediate reinvestment of the amount to be repaid, in the form of a purchase of a non-participating shareholding, would have concealed a new State aid. That operation should therefore have been notified under Article 88(3) EC to enable the Commission to verify whether it complied with the market economy private investor criterion and whether the aid in question was compatible with the common market, which would have required, in all probability, long-drawn-out proceedings being initiated under Article 88(2) EC. In order not to delay implementation of the Decision, it would therefore have been necessary to distinguish two separate successive stages for the recovery of the aid and its reinvestment. The Commission has also expressed serious doubts, on the basis of the information forwarded by the German authorities, about the compatibility of the operation in question with the private investor criterion and, consequently, about the possible payment of new aid to WestLB. Finally, the Commission contends that the German authorities had not indicated clearly that in future any element of aid relating to the proceeds of Wfa's assets transferred to WestLB would have been eliminated.

49. The German Government, for its part, contended that the operation in question, being fully compatible with the private investor criterion, would not have involved the granting of new aid, and therefore would not have needed to be notified under Article 88(3) EC; consequently, the Commission's request that the operation be carried out in two separate stages (the recovery of the aid and its subsequent reinvestment) was not justified. As regards the elimination of aid in the future the counter-claim states that even if the pro-

posal in question made no provision in that respect, that problem would nevertheless have been resolved as a result of the application of the measures — still valid — communicated on 4 October 1999, on the basis of which Wfa's special reserves would have been transferred into a non-participating shareholding of the Land.

50. For my part, I note that the Commission's concern to avoid unlawfully granted aid being recovered by means of granting new aid, seems to me well founded in the instant case. Indeed, as I noted above, in order to finance the recovery of aid with new investments, the Member States must demonstrate that the prospective operations are adequate to implement the Commission's decisions and do not amount to the payment of new aid. Where such proof is effectively provided, and the Commission is therefore able to verify the practicability of the solutions chosen, there does not appear to me to be any need to have two separate stages for the recovery of the aid and its subsequent reinvestment. However, should the information provided by the Member States not preclude the payment of new aid, then the Commission's request that provision be made for the immediate recovery of unlawfully granted aid, in order that implementation of its decisions not be delayed, seems to me justified.

51. In the instant case, the German authorities should therefore have demonstrated to the Commission that the measures communicated on 15 March 2000 would have enabled the Decision to be implemented without granting new aid to WestLB. To achieve that, they would in practice have had to demonstrate that, in Land NRW's position, a private shareholder in the bank would have been prepared to forgo a guaranteed due payment of a sum equal to the amount of aid to be recovered in exchange for the granting of a non-participating shareholding, having regard in particular to:

— the interest accrued thereon;

— the effect of possible bank losses on the value of the shareholding and on its yield;

— the possibility of having the shareholding reimbursed and any conditions necessary for that purpose;

— the practicality of transferring that shareholding to third parties.

52. However, it does not seem to me that that proof has been furnished by the German authorities, which, in practice, merely observed that the non-participating shareholding would not constitute new aid to WestLB because it would be granted under market conditions. The fact that the non-participating shareholding would have

earned interest for the Land in line with the market rate does not in fact establish that a private shareholder in the bank would have agreed to forgo a payment equal to the amount of aid to be recovered in exchange for the granting of such a shareholding.

53. Furthermore, I note that, as pointed out by the Commission and implicitly acknowledged by the German Government itself, the information provided by the German authorities was not sufficient to establish whether the measures in question would allow the aid granted to WestLB to be eliminated in the future. In that regard, the same can be said of the observations formulated in the counter-claim on the possible application of the measures communicated on 4 October 1999 and, in particular, on the possibility of performing the envisaged transfer, as from 1998, of Wfa's special reserves into a non-participating shareholding of the Land: in that respect, it is in fact sufficient to refer back to what was previously said on the extremely vague nature of the operation in question (paragraph 43) and, in more general terms, on the extremely precarious nature of the measures communicated on 4 October 1999, which were intended in any case to be annulled with retroactive effect (paragraphs 44 and 45).

54. Accordingly, since it has not been demonstrated that the measures proposed on 15 March 2000 complied with the private investor criterion and that they therefore would allow for the correct recovery of the aid, it also cannot be contended in this case that the German Government adopted without delay and communicated to the Commission measures appropriate for the purpose of implementing the Decision.

Concluding observations

55. Finally, while not ruling out, in principle, the possibility that the aid granted to WestLB might have been recovered through the complex operations involving new investments on the part of the bank's public shareholders, I nevertheless consider that, in the instant case, the various measures formulated for that purpose by the German authorities could not be construed as valid measures for implementing the Decision. Thus, although I do not share completely the objections raised by the Commission to such measures, the fact remains that the Federal Republic of Germany has not correctly implemented the Decision, with the result that the present action must be upheld.

Costs

56. Pursuant to Article 69 of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for costs, and in light of what I have just said on the admissibility of the claim, I consider that that application should be accepted.

Conclusion

57. For the reasons stated above, I therefore propose that the Court:

(1) declare that, by not complying with Commission Decision 2000/392/EC of 8 July 1999 on a measure implemented by the Federal Republic of Germany for Westdeutsche Landesbank-Girozentrale, the Federal Republic of Germany has failed to fulfil the obligations imposed on it by the fourth paragraph of Article 249 EC and Article 3 of the aforementioned Decision;

(2) order the Federal Republic of Germany to pay the costs.