JUDGMENT OF THE COURT

18 June 2002 *

In Case C-242/00,

Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, assisted by R.M. Bierwagen, Rechtsanwalt,

applicant,

v

Commission of the European Communities, represented by K.-D. Borchardt and J. Macdonald Flett, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of Commission Decision 2001/272/EC of 14 March 2000 on the redefinition of assisted areas under the joint Federal Government/*Länder* scheme for improving regional economic structures in Germany for the period 1 January 2000 to 31 December 2003 — West Germany and Berlin (OJ 2001 L 97, p. 27),

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken and N. Colneric (Presidents of Chambers), C. Gulmann, D.A.O. Edward, J.-P. Puissochet (Rapporteur), M. Wathelet, R. Schintgen, V. Skouris and C.W.A. Timmermans, Judges,

Advocate General: J. Mischo,

Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 22 January 2002,

after hearing the Opinion of the Advocate General at the sitting on 12 March 2002,

gives the following

Judgment

1 By application lodged with the Court Registry on 16 June 2000, the Federal Republic of Germany sought, pursuant to Article 230 EC, annulment of Commission Decision 2001/272/EC of 14 March 2000 on the redefinition of

assisted areas under the joint Federal Government/*Länder* scheme for improving regional economic structures in Germany for the period 1 January 2000 to 31 December 2003 — West Germany and Berlin (OJ 2001 L 97, p. 27) ('the contested decision') in that the decision held certain regional aid to be compatible with the common market only in so far as it related to regions corresponding to 17.73% of the German population.

The Community provisions

2 Article 92 of the EC Treaty (now, after amendment, Article 87 EC) concerns aids granted by States. Article 92(3)(a) and (c), first sentence, of the Treaty, the wording of which is identical to that of Article 87(3)(a) and (c) EC, provides as follows:

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

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

...

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

3 Paragraph (1) of Article 93 of the EC Treaty (now Article 88 EC), the wording of which is identical to that of Article 88(1) EC, provides:

'The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.'

4 On 16 December 1997 the Commission adopted guidelines on national regional aid (OJ 1998 C 74, p. 9) ('the guidelines on regional aid') drawn up in collaboration with the Member States. Annex III to these guidelines sets out the method for determining the ceiling on the population of regions eligible for such aid.

5 At the Community level, the Commission fixes an overall ceiling on coverage for this type of aid, expressed in terms of population, which is then distributed among the Member States. A maximum percentage of eligible population is thus fixed for each State.

6 Pursuant to Article 92(3)(a) of the Treaty, the Community ceiling automatically covers all regions corresponding to a geographical unit of level II of the

Nomenclature of Statistical Territorial Units ('NUTS') having a per capita gross domestic product ('GDP'), measured in purchasing power standards ('PPS'), not exceeding 75% of the Community average.

7 The total population figure selected under Article 92(3)(c) of the Treaty is obtained by deducting the population of the regions selected under Article 92(3)(a) of the Treaty from the overall ceiling fixed for the whole of the Community. This is then distributed among the Member States in the light of the relative socio-economic situation of the regions within each Member State, assessed in the context of the Community.

8 The population figure taken into account under Article 92(3)(c) of the Treaty is distributed under the following conditions. An initial distribution key makes it possible, in regard to each NUTS level III region, to evaluate, over three years and on the basis of the statistical data provided by Eurostat regarding the unemployment rate and the per capita GDP/PPS, the disparity confirmed *vis-à-vis* the Community basic thresholds of these indicators, that is to say, 115 for the unemployment rate and 85 for the GDP. Account may be taken in this regard of those regions which present a significant disparity *vis-à-vis* at least one of the two basic thresholds. All regions of the Member States which have not already been selected under Article 92(3)(a) of the Treaty and which meet that condition are added together, which makes it possible to determine the relative portion of each Member State in the overall scheme.

9 It should be noted, however, that the results obtained may be corrected, 'if necessary', to take account of the following mandatory requirements: first, the population covered by Article 92(3)(c) of the Treaty must be at least equal to 15%, and must not exceed 50%, of the population not covered by Article 92(3)(a) of the Treaty; second, all the regions which lose entitlement to Article 92(3)(a) eligibility, together with the regions of low population density, must be brought under Article 92(3)(c); third, the reduction of the total coverage under Article 92(3)(a) and (c) of the Treaty may not exceed 25%.

10 Application of these corrections may have the effect of increasing the population ceiling taken into account for each Member State, which means that final adjustments between States may be necessary to ensure that the overall population ceiling fixed previously at Community level is not exceeded.

Facts of the dispute

11 By a decision taken on 16 December 1997, that is to say, on the day on which the guidelines on regional aid were adopted, the Commission fixed the ceilings for regional aid coverage, for the years 2000 to 2006, at 42.7% of the Community population (19.8% under Article 92(3)(a) of the Treaty and 22.9% under Article 92(3)(c) of the Treaty) as against the previous figure of 46.7% (22.7% under Article 92(3)(a) and 24% under Article 92(3)(c)).

12 The reasons for this reduction lay, first, in the improvement in the economic and social situation in certain regions, which meant that they were no longer eligible under Article 92(3)(a) of the Treaty, and, second, in the desire to impose more stringent criteria on Article 92(3)(c) aid by concentrating it on regions perceived to be experiencing the greatest difficulties, in such a way as to ensure that this aid would not impact adversely on intra-Community trade but would still remain effective and coherent *vis-à-vis* structural fund activities. The prospect of Community enlargement during the period from 2000 to 2006 was also invoked to justify this reduction.

13 The Federal Republic of Germany was notified of this decision of 16 December 1997 fixing ceilings on coverage by a letter of 24 February 1998, in which the Commission also pointed out that 35.7% of the German population could be covered by regional aid pursuant to Article 92(3) of the Treaty, that is to say,

17.4% under Article 92(3)(a) and 18.3% under Article 92(3)(c). In that letter the Commission called on the Federal Republic of Germany, as it had called on all Member States, to adapt its national rules on regional aid to bring them into line with the guidelines on regional aid as from 1 January 2000 and to forward to the Commission, before 31 March 1999, a map of the regions which would be eligible as from 1 January 2000, together with the level of the aid and the maximum rates of cumulation applicable in the eligible regions.

14 By a letter of 23 April 1998, the German Government approved in part these 'appropriate measures' proposed by the Commission under Article 93(1) of the Treaty but formally challenged the method by which the population ceiling had been calculated for the eligible regions.

15 Bearing in mind the possibility that a formal examination procedure might be opened and the risk that, in the absence of Commission authorisation, it might be temporarily unable to grant any regional aid, the German Government, by letter of 24 August 1998, finally approved the appropriate measure consisting in the adaptation, on 31 December 1999, of existing aid schemes, while at the same time expressing anew its opposition to the method for calculating the ceiling for eligible regions.

16 By a further letter of 30 December 1998 the Commission informed the Federal Republic of Germany that the ceiling updated on 16 December 1998 for that Member State was to be fixed henceforth at 34.9% of its population, that is to say, 17.3% pursuant to Article 92(3)(a) of the Treaty and 17.6% on the basis of Article 92(3)(c) thereof. Annex A to that letter indicated that the Commission had initially fixed this latter figure at 23.4% and that the reduction resulted from a compensatory adjustment to take account of corrections made in favour of other Member States.

17 On 21 January 1999 a Commission document entitled 'National ceilings for regional aid coverage under the derogations provided for in Article 92(3)(a) and (c) of the Treaty for the period 2000 to 2006', in which a ceiling of 34.9% was set for Germany, was published in the *Official Journal of the European Communities* (OJ 1999 C 16, p. 5). This document indicates that those ceilings are fixed '[o]n the basis of the provisions contained in the guidelines on national regional aid'.

18 By letter of 30 March 1999 the German Government forwarded to the Commission the draft map of regional aid, proposing regions representing 17.6% of the German population under Article 92(3)(a) of the Treaty and 23.4% of that population pursuant to Article 92(3)(c) of the Treaty (in the *Länder* of West Germany and in Berlin).

19 By letter of 17 August 1999 the Commission accepted that the drafts presented for the regions coming under Article 92(3)(a) of the Treaty were compatible with the common market, but raised objections and instituted the formal examination procedure set out in Article 93(2) of the Treaty for the regions coming under Article 92(3)(c) thereof with regard to their extent and several features of the aid proposed in the *Länder* of West Germany and Berlin.

20 Following extensive correspondence, and at the insistence of the Federal Republic of Germany, the Commission acknowledged, at the end of 1999, that it would consider closing the procedure for the examination of that portion of the regions coming under Article 92(3)(c) of the Treaty and representing 17.7% of the German population, on the ground of the similarity between that percentage and

that laid down by the Commission in its letter of 30 December 1998. This, however, presupposed an accurate demarcation of the regions in question which would be stricter than that contemplated by the Federal Republic of Germany inasmuch as it would exclude 5.7% of the population and would take account of certain Commission requirements regarding the definition of the geographical units of the proposed areas.

21 The German Government informed the Commission on 2 February 2000 of how far the measures required for this purpose had progressed and forwarded a list of regions representing 17.73% of the German population, while at the same time confirming that it was maintaining its position in law with regard to the figure of 23.4%.

22 The contested decision, dated 14 March 2000, was adopted on the basis of these latter factors. Article 1 of that decision states that '[t]he regional aid map for the period 1 January 2000 to 31 December 2003 in relation to the regions eligible under Article 87(3)(c) [EC] is compatible with the common market, subject to the conditions set out in Article 2'. Article 2 of that decision states *inter alia* that 'Germany shall introduce at national level measures which quite clearly distinguish those regions which are eligible under Article 87(3)(a) [EC] from those regions which are eligible under Article 87(3)(c) [EC] and which clearly establish that only these regions are entitled to receive regional aid within the meaning of the guidelines on national regional aid'.

The admissibility of the application

23 In its defence, the Commission raises, as its main submission, an objection of inadmissibility. It takes the view that the application, which seeks essentially to challenge the level of the population ceiling covered by Article 92(3)(c) of the Treaty, is inadmissible on two grounds.

24 First, the Commission submits that the contested decision, which declared the list of regions notified by the Federal Republic of Germany on 2 February 2000 to be compatible with the common market, is in reality favourable to that Member State and does not adversely affect it. That being so, the action serves no purpose.

25 Second, the Commission argues, in the alternative, that the contested decision should be construed as an implied rejection of a further request by the Federal Republic of Germany that an additional 5.67% of its population be taken into account. This part of the contested decision, the Commission argues, merely confirms its earlier decision fixing the ceilings for coverage, taken on 16 December 1997 and updated on 16 December 1998, which was not the subject of a legal challenge and therefore became definitive. The present action, it submits, is thus invalid on the ground that it was brought out of time.

26 Examination of this objection of inadmissibility will involve the Court in ruling on the precise nature and scope of the contested decision.

27 It should be noted at the outset that, in the exercise of the powers conferred on it by Articles 87 EC and 88 EC, the Commission may adopt guidelines designed to indicate how it intends, under those articles, to exercise its discretion in regard to new aid or in regard to existing systems of aid.

28 When they are based on Article 88(1) EC, those guidelines constitute one element of the regular and periodic cooperation under which the Commission, in conjunction with the Member States, must keep under constant review existing systems of aid and propose to them any appropriate measures required by the progressive development or by the functioning of the common market (Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraphs 36 and 37, and Case

C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraphs 62 to 65). In so far as these proposals for appropriate measures are accepted by a Member State, they are binding on that Member State (*IJssel-Vliet*, cited above, paragraphs 42 and 43).

29 Moreover, the Community legislature in its turn adopted the principles laid down by the case-law cited in the previous paragraph by setting out, in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), an Article 19(1) worded as follows: 'Where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding and inform the Member State thereof. The Member State shall be bound by its acceptance to implement the appropriate measures.'

30 On 16 December 1997 the Commission adopted the guidelines on regional aid, introduced in connection with the 'appropriate measures' referred to in Article 93(1) of the Treaty. By a separate decision of the same date, the Commission fixed the ceilings for regional aid coverage as percentages of population for the whole of the Community and for each Member State with regard to the period 2000 to 2006. Those guidelines and the content of that decision were notified to the Federal Republic of Germany by a letter of 24 February 1998 in order to allow that Member State to examine its existing systems of aid and to submit to the Commission a regional aid map taking account, from 1 January 2000, of the new ceilings thus defined. The coverage ceiling fixed for the Federal Republic of Germany, as for the other Member States, was updated on 16 December 1998 to ensure that the conditions governing the distribution of aid for the period 2000 to 2006 would be based on the most recent statistical indicators. The ceilings for the Member States were thus fixed definitively only as from this updating. The ceilings were notified to the Member States by letter of 30 December 1998 and published in the *Official Journal of the European Communities* on 21 January 1999. As a result, the Member States were required to adapt the content of their proposals and the

Federal Republic of Germany was in a position to notify, on 30 March 1999, those regional aid plans and to provide details of their levels and geographic extent.

31 The Commission submits that the decision of 16 December 1997 on coverage ceilings and that contained in the letter of 30 December 1998 updating that decision are separate decisions in law and do not come within the scope of 'appropriate measures' as referred to in Article 93(1) of the Treaty. Those decisions, taken pursuant to the guidelines on regional aid but distinct from them, proceed upon the discretionary power of the Commission in determining whether regional aid schemes are compatible with the common market. Unlike the guidelines, which constitute one facet of cooperation between the Commission and the Member States, the binding nature of those decisions does not depend on the consent of the Member States.

32 For its part, the Federal Republic of Germany submits that these decisions could, in regard to it, only be preparatory in nature and amounted to intermediate measures. As an integral part of the guidelines on regional aid, they were consistently the subject of express reservations on the German Government's part and for that reason could not, by themselves, have acquired any binding force.

33 It must be noted in this connection that these 'decisions' were the necessary complement to the guidelines on regional aid, even though they are substantively distinct from them and the second of those decisions was taken more than one year later. It was not until notification of the figures pertaining to it, by the letter of 30 December 1998, that the Federal Republic of Germany was effectively informed of the ceiling of eligible population resulting from those guidelines, which formed the essential criterion in the Commission's assessment. Only when it received that letter and Annex A thereto, setting out in detail the method for calculating those ceilings and, in particular, the effect of the 'corrections' provided for in Annex III to those guidelines, was that Member State in a position to appreciate the true effect of those guidelines for it and to prepare its submission of the map of eligible regions.

34 Further, as the Commission itself acknowledges, those 'decisions' were not preceded by any formalised adoption procedure. Indeed, they are not intended to assess the compatibility with the common market of aid measures already notified to the Commission. They constitute one of the stages in a process designed to lay down the general conditions governing Community examination of regional aid schemes.

35 That being so, those 'decisions' should be construed as forming an integral part of the guidelines on regional aid and as having, in themselves, binding force only on condition that they have been accepted by the Member States (see *IJssel-Vliet*, paragraphs 42 and 43).

36 It is clear from all of the correspondence between the Commission and the German Government in the present case, in particular from the German Government's letters of 23 April and 24 August 1998, that the Federal Republic of Germany had consistently expressed reservations in regard to the method of calculation and the figure for the ceiling on coverage pertaining to it. It expressed its opposition to the fixing of a ceiling equivalent to 17.7% of its population when it forwarded to the Commission, on 30 March 1999, a map of eligible regions representing 23.4% of its population. This refusal was repeated during discussions held on 12 November and 2 December 1999 between representatives of the Commission and of the German Finance Ministry and was also confirmed in the German Government's letter of 2 February 2000. Consequently, the part of the guidelines on regional aid relating to the method of calculating the ceiling on coverage and the resulting figure could not, by themselves, be directly enforced against the Federal Republic of Germany.

37 Contrary to the Commission's assertion, the first decision binding in its effects on the Federal Republic of Germany is thus indeed the decision under challenge in the present action, in which the Commission declared a map of the regions representing 17.7% of the German population to be compatible with the common market, and not the intermediate measures of 16 December 1997 and of 30 December 1998.

38 That being so, it is necessary to dismiss the objection that the action is inadmissible as being directed against a decision confirming previous Commission measures which, not having themselves been the subject of an action brought by the Federal Republic of Germany, had become definitive.

39 The Commission, however, argues that the application is inadmissible on a separate ground inasmuch as it seeks annulment of a decision which declared the list of regions notified on 2 February 2000 to be compatible with the common market and which therefore does not adversely affect the Federal Republic of Germany. Against this, the German Government contends that it maintained throughout the examination procedure its initial notification on 30 March 1999 of a map of regions representing 23.4% of the German population and that, in so far as it declares a map of regions representing only 17.73% of the population to be compatible with the common market, the contested decision ruled implicitly but necessarily in unfavourable terms on that notification.

40 First, it must be stated that the contested decision is indeed based, as the Commission states, on the list of regions which the German Government forwarded to the Commission on 2 February 2000.

41 Thus Paragraph 15 of the grounds of the contested decision states that: '[o]n 2 February 2000, after the procedure had been initiated, Germany submitted a list comprising 41 labour market regions and the city of Berlin' and that 'these regions have a total population of 14 546 097 inhabitants, accounting for 17.7% of the total German population ... and are considered by Germany to be the regions with the highest regional policy priority'. Paragraph 35 deals with 'Germany's notification of 2 February 2000, amended in relation to the Article 87(3)(c) areas'. Paragraph 49 states that '[d]uring the course of the procedure, so as to bring the notification into line with the guidelines, Germany

provided a list of regions that was reduced to the population ceiling set by the Commission'. Paragraph 50 adds that 'Germany ... has a population ceiling of 17.7% for the assisted areas coming under Article 87(3)(c) of the EC Treaty' and that 'the proposed regions ... account for 17.7% of the total German population and can be declared compatible with the common market'. The operative part of the contested decision, cited in paragraph 22 of the present judgment, is thus based on the facts available to the Commission on 2 February 2000 and recognises the regional map, as amended on that date, as being compatible with the common market.

42 Second, while the Federal Republic of Germany argues that the list notified on 30 March 1999 could be amended only by a decision of the Joint Federal Government/*Länder* Planning Committee, which had not yet been taken on 2 February 2000, that fact has no bearing on the scope of the contested decision.

43 The documents on the case-file disclose that, after maintaining its initial notification in letters of 17 September and 4 October 1999, the Federal Republic of Germany, during discussions at the end of 1999 with the Commission's services, itself proposed to forward to the Commission a revised list of regions representing 17.7% of the German population. The German Government thus wished to secure a decision recognising the compatibility of that first list with the Treaty, while reserving to itself the possibility of submitting, at a later date, an additional list going beyond the ceiling of 17.7%. The letter of 2 February 2000 also points out that the proposal forwarded relates 'initially' to a list of regions taking account of that ceiling. As the Commission notes, the Federal Republic of Germany was running the risk, had it not made this new proposal, of being bound by a decision ruling that a map detailing regions covering 23.4% of the population was totally incompatible, as the Commission would itself have been unable to establish the order of regional priorities for intervention in compliance with the ceiling resulting from the guidelines on regional aid. The German Government cannot therefore validly argue that its request in regard to the ceiling on coverage should be reflected, until the adoption of the contested decision, in the maintenance of the terms of the notification given on 30 March 1999.

44 However, since the Commission has never ruled, either in the non-binding measures of 16 December 1997 and 30 December 1998 or in the contested decision, on the initial request by the Federal Republic of Germany that it be allowed to grant aid to regions representing 23.4% of its population, that Member State might still notify an additional list of regions covering 5.67% of its population. It would then be for the Commission to examine whether that proposal was compatible with the Treaty.

45 It follows, both from the content of the contested decision and from the context of its adoption, that that decision had neither the purpose nor the effect of rejecting implicitly a request by the Federal Republic of Germany concerning an additional list of regions representing 5.67% of its population.

46 That being so, the action brought against that decision, which does not by itself have a scope unfavourable to the Federal Republic of Germany and thus does not adversely affect it, must be dismissed as being inadmissible.

Costs

47 Under Article 69(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. As the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT,

hereby:

1. **Dismisses the action;**

2. **Orders the Federal Republic of Germany to pay the costs.**

Rodríguez Iglesias	Jann	Macken
Colneric	Gulmann	Edward
Puissochet	Wathelet	Schintgen
Skouris	Timmermans	

Delivered in open court in Luxembourg on 18 June 2002.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President