JUDGMENT OF THE COURT
10 July 1986 *

In Case 234/84

Kingdom of Belgium, represented by the Minister for Foreign Relations, acting through R. Hoebaer, Director at the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent, assisted by J. F. Bellis, of the Brussels Bar, with an address for service in Luxembourg at the Belgian Embassy, Résidence Champagne, 4 rue des Girondins,

applicant,

v

Commission of the European Communities, represented by A. Abate, one of its Legal Advisers, acting as Agent, assisted by J. Delmoly, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Decision No C (84) 496 of 17 April 1984 on aid which the Belgian Government has granted to an undertaking at Tournai manufacturing equipment for the food industry (Official Journal 1984, L 276, p. 34) is void,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling, K. Bahlmann and R. Joliet (Presidents of Chambers), G. Bosco, O. Due, Y. Galmot, C. Kakouris, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: C. O. Lenz
Registrar: D. Louterman, Administrator

* Language of the Case: French.

after hearing the Opinion of the Advocate General delivered at the sitting on 16 April 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 18 September 1984, the Kingdom of Belgium brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of Commission Decision No 84/496 of 17 April 1984 (Official Journal 1984, L 276, p. 34) in so far as it declares that the subscription in 1982 by a regional investment agency, Société régionale d'investissement de Wallonie (hereinafter referred to as 'SRIW'), of capital of BFR 145 million in an undertaking located at Tournai manufacturing equipment for the food industry and, in particular, tanks for the storage of beer, constitutes an aid which is incompatible with the common market within the meaning of Article 92 of the Treaty and must therefore be withdrawn.

2 Among the reasons given for the decision in the preamble thereto is the fact that the undertaking's financial situation constituted such a handicap as to make it very unlikely that it could have raised on the private capital markets the sums necessary for its survival. The undertaking's gross profits since 1977 were insufficient to cover the depreciation of its fixed assets and its losses over the same period averaged around 5% of turnover. Since 1979 its cash flow had been in deficit. Furthermore, the Belgian State had already assisted the undertaking in April 1979 by subscribing BFR 40 million of new capital and in May 1979 by giving a guarantee for a bank loan of BFR 45 million and an interest-rate subsidy of 7% on a further loan of BFR 34 million. In May 1980 it intervened again by guaranteeing a BFR 75 million loan and in August 1980 it subscribed capital of BFR 150 million.

3 It is also stated in the preamble that the undertaking concerned exported about 40% of its output to other Member States and that the aid granted by the Belgian Government had reduced its financial costs and given it an advantage over its competitors. That being so, the Commission considered that the aid was likely to affect trade between the Member States and to distort, or threaten to distort, competition within the meaning of Article 92 (1) of the Treaty by favouring the undertaking in question and the production of equipment for, in particular, the food industry.

4 The commission also states in the preamble that the industry supplying the equipment in question was clearly suffering from overcapacity and that the outlook for the industry suggested that the common interest was not served by preserving production capacity by means of State aid, even if the aid was linked to a restructuring plan. According to the Commission, the governments of two Member States and two trade associations representing the industry in question stated that they shared its concern about the Belgian aid. Finally, it is stated in the preamble that the Belgian Government has been unable to give, or the Commission to discover, any justification for finding that the aid in question fulfilled the conditions for the application of any of the exceptions provided for in Article 92 (3) of the Treaty.

5 It appears from the documents before the Court and, in particular, from the information furnished by the Belgian Government at the Court's request that the undertaking in question is a former family business which has been in difficulties since 1974 and which at the end of 1978 showed a loss of BFR 95 million, whereas its capital amounted to only BFR 4 million. When its usual bankers refused to give any assistance, the undertaking appealed to the public authorities, which provided a guarantee of BFR 75 million and subsequently, in April 1979, subscribed new capital so as to become the holder of 70% of the shares in the undertaking. Despite that action, the undertaking's aggregate deficit amounted to BFR 180 million when, in August 1980 — even after a revaluation of the undertaking's fixed assets and the capitalization of its reserves — the undertaking's capital was reduced to zero. By subscribing BFR 150 million of new capital the public authorities — then represented by SRIW — thus became the undertaking's sole shareholder.

6 A reorganization plan was adopted for the purposes of the second reconstruction of the undertaking's capital but its objectives were never attained, since the under-

taking's trading losses amounted to BFR 20 million in 1980, BFR 33 million in 1981 and BFR 91 million in 1982. At the time of the subscription of capital at issue a new reorganization plan was drawn up, designed to reduce selling prices, *inter alia* by cutting the number of employees from 400 to around 225, and to increase the undertaking's market share, in particular by developing new products and by increasing exports to non-Community countries. The financial objectives of the plan were not attained, with the result that the undertaking was judicially declared insolvent in early 1986.

7 At the Court's request, the Belgian Government provided information with regard to the undertaking's turnover and the geographical distribution of its sales. It appears that for the period from 1979 to 1982 the undertaking's turnover fluctuated between BFR 305 million (in 1982) and BFR 562 million (in 1980). Exports to other Member States accounted for between 42% and 54% of turnover and exports to non-member countries for between 21% and 40%.

8 In support of its application for a declaration that the contested decision is void, the Belgian Government relies essentially upon three submissions:

(a) misapplication of Article 92 (1) of the Treaty in so far as the contested subscription of capital does not constitute an aid within the meaning of that provision;

(b) misapplication of Article 92 (1) and inadequacy of the statement of the reasons on which the contested Commission decision is based, in so far as it does not establish in what respect the subscription of capital affects trade between the Member States and distorts competition;

(c) infringement of the right to a fair hearing in so far as the Commission did not notify to the Belgian Government the complaints made by the Member States and trade associations which took part in the administrative procedure.

(a) The nature of the subscription of capital

9 The Belgian Government contends that, by prohibiting the Belgian public authorities from increasing the capital of the undertaking, the Commission is discriminating against them by comparison with a private shareholder. In its view, it is normal and legitimate for a shareholder to support, by subscribing additional capital, an undertaking which that shareholder controls and which is experiencing

temporary difficulties, in particular where, as in this case, the subscription of capital is part of a reorganization plan designed to redirect the business of the undertaking towards other sectors and to develop exports to non-Community countries.

10 In the Commission's view, public authorities, in their capacity as shareholders, are not debarred from supporting an undertaking. However, if they do so, they must, as is clear from Article 90 (1) of the Treaty, observe the competition rules.

11 The Belgian Government provided no information to the Commission before the contested increase in capital was carried out despite the latter's repeated requests. Although the Belgian Government subsequently informed the Commission that the subscription of capital was part of a reorganization plan whose aims were those described above, the plan was never notified to the commission under Article 93. The Commission was not informed of the content of the plan until the Belgian Government produced it at the Court's request shortly before the hearing. It states, moreover, that the plan was not such as to render the undertaking viable.

12 Having no other sources of information, the Commission based its decision on the financial results of the undertaking, which had been negative for a long time despite the earlier injections of capital, and on SRIW's annual reports, which described the undertaking's difficulties. In view of the undertaking's results and its historical development until it was declared insolvent in January 1986, it could not have survived but for the injections of public funds. The Commision was therefore correct in its claim that the subscription of capital was aid in the form of a State rescue operation since, in the circumstances, the undertaking would have been unable to raise any capital whatsoever on the private capital market or from a private shareholder.

13 It must be observed that by virtue of Article 92 (1) of the Treaty, the provisions of the Treaty concerning State aid apply to aid granted by a Member State or through State resources 'in any form whatsoever'. It follows, as the Court held in its judgment of 14 November 1984 (Case 323/82 *SA Intermills* v *Commission* [1984] ECR 3809), that no distinction can be drawn between aid granted in the form of loans and aid granted in the form of a subscription of the capital of an undertaking. Aid taking either form falls within the prohibition contained in Article 92, where the conditions set out therein are fulfilled.

14 An appropriate way of establishing whether such a measure is a State aid is to apply the criterion which was mentioned in the Commission's decision and, moreover, was not contested by the Belgian Government, of determining to what extent the undertaking would be able to obtain the sums in question on the private capital markets. In the case of an undertaking whose capital is held by the public authorities, the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question.

15 As the Belgian Government has observed, a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganization. However, in this case, at the time when the capital was subscribed the undertaking in question had for several years been making very substantial losses relative to its turnover, its survival had already necessitated the reconstitution of its capital by the public authorities on several occasions after it had been completely exhausted, and its products had to be sold on a market in which there was excess capacity.

16 In so far as the Belgian Government contends that the subscription of capital in question was linked to the implementation of a plan for reorganizing the undertaking, it must be emphasized that the legality of the contested decision is to be assessed in the light of the information available to the Commission when the decision was adopted. Although the existence of a reorganization plan was in fact briefly mentioned by the Belgian authorities in their correspondence with the Commission, the content of that plan was never notified to it in the course of the procedure under Article 93 of the Treaty.

17 It follows from the foregoing considerations that, in the light of the information available to it at the time, the Commission was right to consider that the undertaking would very probably be unable to raise the sums essential for its survival on the private capital markets and that the additional subscription of capital by SRIW therefore constituted a State aid.

18 The Belgian Government's first submission must therefore be dismissed.

(b) The statement of the reasons on which the decision was based and the effects of the aid

19 The Belgian Government claims that the contested decision is a stereotyped measure containing nothing from which it can be inferred that the subscription of capital in question is capable of affecting trade between the Member States or of distorting or threatening to distort competition. The Commission did not analyse the market or trade in products in the sector in question, or take account of the undertaking's exports to non-member countries or of its modest size. Furthermore, it maintains that the Commission did not take into consideration the fact that the capital was subscribed for reasons connected with the reorganization of the undertaking with a view to adapting its production capacity to suit new markets and to reducing its capacity in its traditional sector of equipment for the food industry. The Belgian Government submits that, in those circumstances, the impact on competition in the Community could only be *de minimis*. That submission therefore challenges both the statement of the reasons on which the decision was based and the Commission's assessment of the effects of the aid.

20 The Commission refers to Article 5 of the Treaty and to the reciprocal duty of cooperation which exists between the Member States and the Commission. It contends that, in view of the lacunae in the information furnished by the Belgian Government, it was not possible to provide a fuller statement of reasons on which the decision was based. The Commission denies that a *de minimis* principle exists with regard to aid and rejects the view that account must be taken of the undertaking's exports to non-member countries. The decisive factor is that the undertaking in question was producing for a market characterized by overcapacity, which induced other undertakings in the Member States also to turn to the same non-member countries.

21 As regards the statement of the reasons on which the decision was based, the Court has consistently held that the statement of reasons for a decision adversely affecting an undertaking must be such as to allow the Court to review its legality and to provide the undertaking concerned with the information necessary to enable it to ascertain whether or not the decision is well founded.

22 Despite its concise nature — which is due in part to lack of cooperation by the Belgian Government — the statement of reasons makes it clear that, in order to establish that the two material requirements were fulfilled, the Commission took account of the fact that the undertaking concerned exported about 40% of its output to other Member States, of the excess production capacity existing in the

market in question and of the fact that, in those circumstances, the aid granted to the undertaking had the effect of reducing its financial costs by comparison with those of its competitors. In the absence of any information to the contrary, those findings entitled the Commission to conclude that the aid in question affected trade between Member States and distorted, or threatened to distort, competition within the meaning of Article 92 (1) of the Treaty.

23 It must be added that the figures provided by the Belgian Government during the proceedings before the Court show that the Commission's assessment was by no means invalidated by the fact that the undertaking in question was small and was endeavouring to direct its products towards new markets and its exports to non-member countries.

24 The submission must therefore be dismissed in its entirety.

(c) The right to a fair hearing

25 The Belgian Government claims that the Commission did not disclose to it the identity of the parties which, according to the contested decision, share its concern, or the substance of the complaints which they submitted. As a result, it could not prepare its defence effectively. It submits that, by so acting, the Commission infringed an essential procedural requirement within the meaning of Article 173 of the Treaty. The Belgian Government rejects the view that the duty not to divulge information relating specifically to the undertakings concerned implies that the administrative procedure should be kept entirely secret. It is paradoxical that a Member State affected by a procedure initiated under Article 93 of the Treaty should receive less information than a non-member country which is the subject of anti-subsidy proceedings pursuant to Council Regulation No 2176/84 of 23 July 1984 (Official Journal 1984, L 201, p. 1).

26 The Commission concludes that, in the case of State aids, there is no procedure involving the hearing of all the parties and disclosure as between them comparable to the procedure applied to undertakings for the purposes of competition rules or to non-member countries in connection with dumping and subsidies. The giving of notice in a procedure relating to aid is simply designed to enable the Commission to receive all the information necessary to evaluate the compatibility of the aid with the common market. The Member State concerned enjoys no privileged position in a procedure initiated under Article 93 (3).

27 In that connection, it is appropriate to stress that, as the Court held in particular in its judgment of 13 February 1979 in Case 85/76 (*Hoffmann-La Roche* v *Commission* [1979] ECR 461), observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question. The Court has consisently held that, in order to respect the principle of the right to be heard, the person against whom an administrative procedure has been initiated must have been afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law.

28 By stating in its decision that two Member States and two trade asociations in the industry in question shared its concern about the Belgian aid, the Commission in fact gave the impression that it had used those documents to support its finding that the aid in question was incompatible with the common market and hence had to be abolished.

29 In that connection the Commission cannot rely on the existence in those documents of information covered by business confidentiality. In so far as the Member State concerned was not afforded an opportunity to comment on that information, the Commission may not use it in its decision with regard to that State.

30 Nevertheless, it appears from the above findings made by the Court with regard to the Belgian Government's second submission that the contested decision is sufficiently supported by the objective information referred to in the statement of the reasons on which it was based, of which the Belgian Government was fully apprised and in respect of which it was afforded every opportunity to make known its views. It follows that, even without the comments which the Commission received from interested third parties in the course of the procedure, the decision could not have been substantively different. In those circumstances the mere fact that the Commission mentioned those comments in its decision without having afforded the Member State concerned an opportunity to comment on them does not justify a declaration that the decision is void.

31 Consequently, the application must be dismissed in its entirety.

Costs

32 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application.

(2) Orders the Kingdom of Belgium to pay the costs.

Mackenzie Stuart Koopmans Everling Bahlmann Joliet

Bosco Due Galmot Kakouris O'Higgins Schockweiler

Delivered in open court in Luxembourg on 10 July 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President