OPINION OF ADVOCATE GENERAL MISCHO

delivered on 28 May 2002 [1]

1. In an action brought on 16 September 1996 the Federal Republic of Germany is claiming that the Court should annul Commission Decision 96/666/EC of 26 June 1996 concerning aid granted by Germany to the Volkswagen Group for works in Mosel and Chemnitz [2] (hereinafter 'the contested decision').

2. By order of 4 February 1997 the Court stayed the present proceedings because the relief sought is the same as that sought, firstly, by Freistaat Sachsen (Free State of Saxony) and, secondly, by Volkswagen AG and Volkswagen Sachsen GmbH (hereinafter 'the applicants') in Cases T-132/96 and T-143/96.

3. Those cases gave rise to the judgment of the Court of First Instance of the European Communities in *Freistaat Sachsen and Others* v *Commission* [3] (hereinafter 'the judgment of the Court of First Instance'), dismissing the claims made by the applicants.

4. The applicants appealed against the judgment of the Court of First Instance. Their appeals were registered under case numbers C-57/00 P and C-61/00 P.

5. The German Government intervened in support of the applicants in Cases T-132/96 and T-143/96 and in Cases C-57/00 P and C-61/00 P, and all but two of the pleas relied upon in the present case are identical to the pleas raised, first, before the Court of First Instance and then on appeal.

6. I refer, with regard to those identical pleas, to my Opinion of today's date in Cases C-57/00 P and C-61/00 P, which shows that I consider them to be unfounded.

7. The German Government also bases its case on a plea which, in its reply, it calls: 'Erroneous finding of fact and excessive review of aid by the Commission', but

1 — Original language: French.
2 — OJ 1996 L 308, p. 46.
3 — Joined Cases T-132/96 and T-143/96 [1999] ECR II-3663.

which in reality is composed of two separate parts.

8. The first part, alleging erroneous findings of fact by the Commission, is essentially identical to the plea dealt with by the Court of First Instance in paragraphs 220 to 257 of its judgment under the heading 'The classification of the paint and final assembly workshops at Mosel II and Chemnitz II as "extension investment"'.

9. As those paragraphs in the judgment of the Court of First Instance were not disputed in the appeal proceedings I did not have occasion to express my views on this matter in my Opinion in those proceedings. I do, however, completely endorse the detailed analysis undertaken by the Court of First Instance with regard to this plea and I therefore propose that the first part of the plea relied upon by the German Government should be rejected.

10. The part of the plea alleging excessive review of aid by the Commission is founded entirely on the conception that the Commission should have applied Article 92(2)(c) of the EC Treaty (now, after amendment, Article 87(2)(c) EC). It should therefore have undertaken a more limited review than that under Article 92(3) of the EC Treaty.

11. It follows from my aforementioned Opinion that, in my view, the Commission was not wrong in not applying Article 92(2)(c) of the EC Treaty when the contested decision was adopted.

12. I therefore propose that the second part of the plea — and hence the plea in its entirety — should be rejected.

13. Finally, the German Government relies on another plea which was not raised before the Court of First Instance, or, consequently, in the appeal proceedings.

14. According to the German Government, the contested decision is invalidated by the contradictory nature of its reasoning, so that it infringes Article 190 of the EC Treaty (now Article 253 EC).

15. Specifically, the contradiction, according to the German Government, lies in the fact that, on the one hand, the Commission considers, in Part III of the grounds of the contested decision, that 'on 13 January 1993 VW decided to postpone substantial parts of its proposed investments' whereas, on the other hand, it considers in Part XII that 'the future investment for a new paint and final assembly hall in Mosel II... represents an extension of existing capacity'. According to the German Government, a postponement of the investments means that these were not yet decided, whereas an extension of existing capacity logically presupposes that the investments have already been decided.

16. The Commission rightly observes that these two considerations are not in conflict with each other since they are stated in two quite different contexts.

17. The consideration relating to the postponement of investments constitutes a pure finding of fact on the part of the Commission regarding the timetable of investments decided by Volkswagen.

18. The consideration relating to the extension of existing capacity, however, forms part of an assessment by the Commission of the nature of the investment, which can be either 'greenfield' or 'extension' investment. These concepts only concern the environment within which the investment is made — and particularly the state of development of the site at the time of the entry into service of a plant or unit. [4]

19. The fact that an investment is postponed by a day does not, therefore, prevent it, once it has been made, from constituting, having regard to the state of development of the site, extension investment.

20. I therefore propose that the German Government's plea alleging contradictory reasoning in the contested decision should be rejected.

4 — See, the findings of the Court of First Instance relating to the concepts of 'greenfield' and 'extension' investment in paragraphs 238 to 257 of its judgment and paragraph 246 in particular.

Conclusion

21. In the light of the foregoing, I propose that the Court should:

— dismiss the action brought by the Federal Republic of Germany;

— order the Federal Republic of Germany to pay the costs.