OPINION OF ADVOCATE GENERAL JACOBS
delivered on 12 November 1996 *

1. The Bundesverwaltungsgericht (Federal Administrative Court) seeks a ruling from the Court on whether Community law requires the setting aside of certain rules of national administrative law which would render unlawful a measure revoking the grant of aid and demanding repayment.

The facts and the national court's questions

2. The relevant facts and issues are set out with commendable clarity in the order for reference. Alcan Deutschland GmbH ('Alcan') is the German subsidiary of a Canadian company. From 1979 it operated an aluminium plant in Ludwigshafen. In 1982, following substantial increases in the price of electricity, the company decided to close the plant, but the closure was subsequently postponed when the *Land* of Rheinland-Pfalz, with the agreement of the Federal Government, offered Alcan temporary aid of up to DM 8 million. The plant was eventually closed in 1987.

3. After learning of the proposed aid from reports in the press, the Commission, by a telex of 8 March 1983 addressed to the Federal Government, requested prior notification of the aid under Article 93(3) of the Treaty, adding that no aid should be paid until the Commission had given its final decision. The telex was forwarded to the *Land* by letter of 14 March 1983. By decision of 9 June 1983 the *Land* nevertheless granted Alcan half of the proposed aid, namely DM 4 million.

4. The Federal Government notified the aid to the Commission by a communication of 25 July 1983. After obtaining further details of the aid from the Federal Government the Commission commenced its preliminary examination on 11 October 1983, setting itself a period of one month. By a telex dated 24 November 1983 the Federal Government informed the Commission that, since the one-month period had now expired, the aid would be paid. By a letter of 25 November 1983 the Commission informed the Federal Government that the aid which had already been paid was unlawful and that the remainder should not be paid before the Commission took a final decision. The *Land* was informed of this on 28 November 1983. Nevertheless by a decision of 30 November 1983 it granted Alcan the remaining DM 4 million of aid.

* Original language: English.

5. By a decision of 14 December 1985 [1] addressed to the Federal Republic of Germany the Commission found the aid granted to Alcan to be unlawful, having been paid in violation of Article 93(3) of the Treaty, and to be incompatible with the common market within the meaning of Article 92 of the Treaty; it accordingly ordered its recovery.

6. By letters of 12 February and 21 April 1986 the Federal Government informed the Commission that recovery of the aid was precluded by the principle of the protection of legitimate expectations. By a letter of 27 June 1986 the competent member of the Commission replied that, since the Federal Government had not put forward any proposals for suitable solutions, such as repayment of the aid by instalments or conversion into a loan on market terms, he was unable to propose any amendment to the Commission decision.

7. By an application of 30 March 1987 the Commission brought the matter before the Court which, by a judgment of 2 February 1989 (*'Alcan I'*), [2] declared that Germany had failed to fulfil its obligations under the Treaty by not complying with the Commission decision.

8. Subsequently, by a decision of 26 September 1989, the *Land* revoked the decisions granting the aid and demanded repayment of the DM 8 million. Alcan instituted proceedings before the Verwaltungsgericht (Administrative Court), which annulled the *Land*'s decision revoking the aid on the ground that it infringed Paragraph 48(4) of the Verwaltungsverfahrensgesetz (Law on Administrative Procedure) of the *Land*. [3] That provision imposes a time-limit for the revocation of administrative acts of one year from the moment when the authority became aware of the facts justifying such revocation.

9. Following an unsuccessful appeal to the Oberverwaltungsgericht (Higher Administrative Court) the *Land* appealed to the referring court, the Bundesverwaltungsgericht. The latter upheld the finding of the lower courts that Paragraph 48(4) was infringed, taking the view that the one-year time-limit began to run at the latest in July 1986, being the date on which the *Land* was informed of the letter of 27 June 1986 from the competent member of the Commission. It also considers that the revocation decision may be unlawful under German law on two further grounds. First, it seems likely that the exercise by the *Land* of its discretion to revoke the aid measures under Paragraph 48(1) of the Verwaltungsverfahrensgesetz infringed the principle of good faith because the *Land* was primarily responsible for the illegality of the aid decisions. In that connection the Bundesverwaltungsgericht notes Alcan's allegation that the *Land* was

1 — OJ 1986 L 72, p. 30.

2 — Case 94/87 *Commission* v *Germany* [1989] ECR 175.

3 — It may be noted that the *Land* of Rheinland-Pfalz applies the Bundesverwaltungsverfahrensgesetz also in matters falling within the competence of the *Land*: see Ferdinand Kopp, *Verwaltungsverfahrensgesetz*, 6th edition, C. H. Beck, p. 17.

fully aware as early as March 1983 of the questionable legality of the aid and did not inform Alcan so as not to dissuade it from continuing to operate the plant; the *Land* does not deny that it did not inform Alcan of the Commission's telex of 8 March 1983 demanding that no aid should be paid out. Secondly, the Bundesverwaltungsgericht considers that Alcan may be able to rely on Paragraph 818(3) of the Bürgerliches Gesetzbuch (Civil Code) (applicable by virtue of Paragraph 48(2) of the Verwaltungsverfahrensgesetz), which precludes recovery where the gain arising from an unlawful administrative measure has ceased to exist. Alcan alleges that that is so here because it subsequently closed the plant in question after incurring further losses. It seems however that, by virtue of the seventh sentence of Paragraph 48(2) of the Verwaltungsverfahrensgesetz, that defence would not be available if Alcan knew the circumstances which rendered the aid decision unlawful or if its lack of such knowledge was due to gross negligence.

10. The Bundesverwaltungsgericht raises the question whether Community law may nevertheless require recovery of the aid and therefore seeks a ruling from the Court on the following questions:

'1. Is the competent authority obliged, by reason of the requirement to apply national law in such a way that "the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration", to revoke, in accordance with a final, binding decision of the EC Commission ordering recovery, the aid decision in question even if the authority has allowed the preclusive time-limit which exists for that purpose under national law in the interest of legal certainty to elapse?

2. If the reply to question 1 is in the affirmative:

Is the competent authority obliged, by reason of the abovementioned requirement, to revoke, in accordance with a final, binding decision of the EC Commission ordering recovery, the aid decision in question even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient?

3. If the reply to questions 1 and 2 are in the affirmative:

Is the competent authority obliged, by reason of the abovementioned requirement, to demand, in accordance with a

final, binding decision of the EC Commission ordering recovery, the repayment of the aid which was granted even if such demand is excluded by national law because the gain no longer exists and in the absence of bad faith on the part of the recipient of the aid?'

11. Alcan alone proposes a negative reply to the questions. The *Land*, the French, German and Austrian Governments and the Commission submit that the Court should give an affirmative reply to all three questions.

Relevant Community provisions and case-law

12. Before turning to those questions it may be helpful to set out some of the basic principles applicable in this area. Under the first sentence of Article 93(3) of the Treaty a Member State is obliged to inform the Commission, in sufficient time to allow it to submit its comments, of any plans to grant or alter aid. If after its preliminary examination it considers that the plan is not compatible with the common market it must, under the second sentence of Article 93(3), initiate without delay the consultative examination procedure provided for in Article 93(2). The last sentence of Article 93(3) prohibits the putting into effect of aid measures before the procedure laid down in Article 93(2) has been completed. Measures granting aid in breach of the prohibition laid down by that provision are unlawful; moreover, the Commission's final decision on the compatibility of aid with the common market does not have the effect of regularizing *ex post facto* such measures. [4]

13. The Court has held that recovery is the logical consequence of the illegality of aid. [5] The objective of recovery is to re-establish the previously existing situation; by repaying the aid the recipient forfeits the advantage which it enjoyed over its competitors on the market, and the situation prior to the payment of the aid is considered to be restored. [6] Consequently, where after completing the consultative examination procedure under Article 93(2) the Commission finds aid to be incompatible with the common market, it will normally order the Member State concerned to recover the aid. A Member State is obliged to comply with such a decision unless it is absolutely impossible for it to do so. Financial difficulties of the recipient of the aid do not amount to absolute impossibility; if necessary, a Member State must commence liquidation proceedings against the recipient of the aid in its capacity as shareholder or creditor in order to ensure recovery. [7]

4 — See Case C-354/90 *FNCE* [1991] ECR I-5505, paragraph 16 of the judgment.

5 — See, for example, Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 66 of the judgment.

6 — See, for example, Case C-350/93 *Commission* v *Italy* [1995] ECR I-699.

7 — Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 14 of the judgment.

14. Although pending its final decision the Commission may adopt an interim decision ordering suspension of payment of aid (and, if necessary, bring the matter before the Court as a matter of urgency without following the pre-litigation procedure), it has no power to order repayment of aid solely on the ground that the procedure laid down in Article 93(2) and (3) of the Treaty was not complied with; before ordering recovery it must make a finding that the aid is incompatible with the common market. [8] However, since measures granting aid in breach of the prohibition in Article 93(3) are unlawful, it is open to a competitor of the recipient of the aid to apply to the national court to order the aid to be recovered. The function of the national courts is to safeguard the rights of individuals pending the Commission's final decision. A national court has no power to make a finding as to the compatibility of aid with the common market; that power is reserved to the Commission. However, where a national court finds that a Member State has granted aid in breach of the prohibition in Article 93(3) of the Treaty, it is in principle obliged to order its recovery. [9]

15. Recovery of unlawful State aid, whether at the instigation of the Commission or at that of a competitor, takes place in accordance with the relevant procedural provisions of national law, subject to the proviso that such provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible. [10] That approach is in keeping with the general principle laid down in a long line of cases [11] that, in the absence of Community rules on the subject, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law, provided that such conditions are not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

16. In *Deutsche Milchkontor* [12] the Court acknowledged that the principles of the protection of legitimate expectations and of legal certainty such as those embodied in Paragraph 48 of the Verwaltungsverfahrensgesetz form part of the Community legal order and could not therefore be considered contrary to that legal order. Accordingly it held that 'Community law does not prevent national law from having regard, in excluding the

8 — See Case C-301/87 *France* v *Commission* [1990] ECR I-307 (the '*Boussac*' case), paragraphs 19 to 22 of the judgment. See however my Opinion in Case C-42/93 *Spain* v *Commission* [1994] ECR I-4175, paragraphs 37 to 39.

9 — See most recently the judgment of 11 July 1996 in Case C-39/94 *SFEI and Others* v *La Poste and Others*, [1996] ECR I-3547, paragraph 67.

10 — See *Belgium* v *Commission*, cited in note 5, paragraph 61 of the judgment and Case C-5/89 *Commission* v *Germany* (the '*BUG-Alutechnik*' case) [1990] ECR I-3437, paragraph 12.

11 — See Case 33/76 *Rewe* v *Landwirtschaftskammer* Saarland [1976] ECR 1989, paragraph 5 of the judgment; Case 45/76 *Comet* v *Produktschap voor Siergewassen* [1976] ECR 2043, paragraph 13; Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, paragraph 12; Case C-208/90 *Emmott* [1991] ECR I-4269, paragraph 16; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 43; Case C-338/91 *Steenhorst-Neerings* v *Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-5475, paragraph 15; Case C-410/92 *Johnson* [1994] ECR I-5483, paragraph 21; Case C-312/93 *Peterbroeck* v *Belgian State* [1995] ECR I-4599, paragraph 12; and Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* v *SPF* [1995] ECR I-4705, paragraph 17.

12 — Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* v *Germany* [1983] ECR 2633, paragraph 30 of the judgment.

recovery of unduly paid aids, to such considerations as the protection of legitimate expectation, the loss of unjustified enrichment, the passing of a time-limit or the fact that the administration knew, or was unaware owing to gross negligence on its part, that it was wrong in granting the aids in question, provided however that the conditions laid down are the same as for the recovery of purely national financial benefits and the interests of the Community are taken fully into account.' [13]

17. Significantly, however, *Deutsche Milchkontor* was concerned not with State aid but with sums unduly paid under the Community rules on aid for the processing of skimmed-milk powder. The Court showed signs of a stricter approach in relation to recovery of unlawful State aid in its judgment in *Alcan I*, where it emphasized that 'the relevant provisions of national law must be applied in such a way that ... the interests of the Community are taken fully into consideration in the application of a provision which, like that relied upon by the German Government, requires the various interests involved to be weighed before a defective administrative measure is withdrawn'. [14] The provision in question was Paragraph 48(2) of the Verwaltungsverfahrensgesetz, the first sentence of which precludes withdrawal of a decision conferring a financial advantage if the recipient expected the decision to be legally valid and his expectation merits protection when weighed against the public interest in recovering the aid. It may be noted that in its order for reference in this case the Bundesverwaltungsgericht concludes that Alcan cannot rely on the principle of the protection of legitimate expectations laid down in that provision because the Community interest takes precedence over any expectation which Alcan might have; it has not therefore put a question to the Court on that issue.

18. In the *BUG-Alutechnik* case [15] the Court, while holding that the principles laid down in *Deutsche Milchkontor* also applied to the recovery of unlawfully paid State aid, added the following qualification:

'However, it must be noted that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed.

13 — Paragraph 33 of the judgment.

14 — Paragraph 12 of the judgment.

15 — Cited in note 10, paragraphs 14, 15 and 16 of the judgment.

In that regard, it must be pointed out that, by a communication published in the *Official Journal of the European Communities*, the Commission informed potential recipients of State aid of the risk attaching to any aid granted them illegally, in that they might have to refund the aid. [16]

It is true that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid. If such a case is brought before a national court, it is for that court to assess the material circumstances, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice.'

19. The Court observed further that 'a provision laying down a time-limit for the revocation of an administrative act must, like all the relevant provisions of national law, be applied in such a way that the recovery required by Community law is not rendered practically impossible and the interests of the Community are fully taken into consideration'. [17]

Appraisal of the issues

20. Alcan has argued in these proceedings that in the *Alcan I* and *BUG-Alutechnik* cases the Court was concerned with the obligations of the offending Member State — the judgments say nothing about the rights of the recipient of the aid. I do not share that view. In *BUG-Alutechnik* the Court made it clear that in proceedings for recovery brought in the national courts the recipient of aid could plead the principle of legitimate expectations only where he had legitimately assumed the aid to be lawful; in principle such a plea was possible only where the procedure laid down in the Treaty had been complied with. It is true that the Court appeared to distinguish between the offending Member State and the recipient of aid in holding that Member States could not rely upon the legitimate expectations of recipients to justify a failure by a Member State 'to take the steps necessary to implement a Commission decision instructing it to recover the aid'; the Court noted that, if a Member State were able to do so, 'Articles 92 and 93 of the Treaty would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the Commission under provisions of the Treaty of their effectiveness'. [18] However, it cannot be inferred from the judgment that, notwithstanding the obligation on Member States to recover unlawful aid, there is no restriction on the application of national rules precluding recovery. It would be pointless to impose on Member States a strict obligation to recover unlawful aid while adopting a liberal approach to the

16 — OJ 1983 C 318, p. 3.

17 — Paragraph 19 of the judgment. See also paragraph 32 of the Opinion of Advocate General Darmon.

18 — Paragraph 17 of the judgment.

application of such rules. The obligation on a Member State to recover unlawful aid and the rights of the recipient are plainly two sides of the same coin.

21. Before considering the specific issues raised by the national court's questions I should make two preliminary points which arise from the order for reference. First, the Bundesverwaltungsgericht seems to assume that at the moment when the measures granting the aid were adopted their legality was merely questionable; their illegality became clear only when the Commission adopted its final decision or when the *Land* received notice of the letter of 27 June 1986 from the competent member of the Commission refusing to propose any modification of that decision. However, that analysis is based on a misunderstanding of the Community rules. It is true that until the Commission adopted its final decision it was uncertain whether the Commission would find the aid to be incompatible with the common market and, if so, whether it might exceptionally refrain from ordering its recovery. However, it is clear that the aid was paid in breach of the prohibition in the last sentence of Article 93(3) of the Treaty. As set out above (paragraphs 3 and 4), the first payment was made before the aid was notified to the Commission and the second shortly after the Commission had issued an interim decision requiring suspension of payment of the aid and opened the consultative examination procedure under Article 93(2) Treaty. It is true that the Commission exceeded by two weeks the one-month period which it had set itself for completion of the preliminary examination. However, where the Commission does not make its position known following notification, a Member State must give the Commission notice before implementing an aid plan. [19] In the present case the Commission opened the consultative examination procedure and issued an interim decision prohibiting payment immediately upon receiving notice from the Federal Government of the *Land*'s intention to pay the aid. Despite being informed of the Commission's interim decision by the Federal Government the *Land* proceeded to pay the remainder of the aid. Thus the measures granting the aid were clearly unlawful; moreover, their illegality would not have been cured even if the Commission had subsequently found the aid to be compatible with the common market. [20]

22. Secondly, as I have already explained, the Bundesverwaltungsgericht has not put any question concerning the possible application of the principle of legitimate expectations. It is clear from the judgment in *BUG-Alutechnik* that, since the procedure laid down in the Treaty was not observed, Alcan could not in principle have any legitimate expectation that the aid was lawfully granted; a diligent businessman may be expected to verify whether the procedure laid down in the Treaty has been followed. I shall consider below whether the principle of legitimate expectations may nevertheless apply as the

19 — Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, paragraph 4 of the judgment.

20 — See *FNCE*, cited in note 4.

Court has held that there may be exceptional circumstances in which recovery of aid is precluded even where it was granted in breach of the last sentence of Article 93(3) of the Treaty.

23. The Bundesverwaltungsgericht's questions are concerned specifically with three German rules: (a) the one-year time-limit for revocation of administrative acts; (b) the principle of good faith which a public authority must respect in exercising its discretion to revoke an unlawful decision; and (c) the rule precluding recovery where the recipient of a benefit has ceased to be enriched. Alcan argues that such rules, which are to be found in many legal systems, serve interests such as legal certainty, substantive justice and proportionality.

24. There is no doubting the truth of that assertion. Indeed, as already noted, the Court has in general respected the limits placed by Member States on the bringing of legal proceedings on such grounds. The Court has, however, also insisted that national rules should not render the application of Community law virtually impossible or excessively difficult. As I shall now explain, in the sphere of State aid it is necessary to scrutinize with particular care the application of national rules restricting the recovery of aid.

The one-year time-limit laid down by Paragraph 48(4) of the Verwaltungsverfahrensgesetz

25. Alcan argues that there must be some limit on its liability to repay the aid; even the institution of proceedings for serious criminal offences is subject to time-limits under many legal systems.

26. It seems to me, however, that time-limits such as that laid down by Paragraph 48 of the Verwaltungsverfahrensgesetz pose inherent problems when applied in the sphere of State aid. Such a provision plainly presupposes that the interests of the authority are opposed to those of the individual. Having discovered that a decision granting a financial benefit was unlawful, the authority's interest is normally in recovering the sums paid as expeditiously as possible, whereas the individual's interest is in retaining the benefit. Where a State authority knowingly commits a breach of Community law by granting aid, that assumption is not valid. The interests of the authority and the individual coincide. The authority seeking recovery is the same authority which knowingly infringed Community law. Unless it has abruptly changed its policy, its interest lies in ensuring that the recipient retains the benefit in violation of Community law. It will therefore normally have no interest in observing the time-limit for instituting proceedings.

27. That does not however mean that there is an absence of legal certainty for recipients of State aid. A further distinctive feature of proceedings in matters of State aid is that it is the Commission which under the Treaty has responsibility for examining whether aid is compatible with the common market and, if not, for ordering recovery. The role of the national authorities is merely to give effect to the Commission's decision. As the Commission observes, the legal situation becomes certain from the moment when it adopts its final decision, or at the latest when that decision becomes definitive owing to the expiry of the period for challenge to the decision under Article 173 of the Treaty.

28. Certainly, there may be circumstances in which the recovery of aid paid in breach of the last sentence of Article 93(3) is precluded by undue delay on the part of the Commission in adopting its final decision. In *RSV* v *Commission* [21] the Court held that in the circumstances of the case a delay of 26 months on the part of the Commission in adopting its final decision gave rise to a legitimate expectation on the part of the recipient of unnotified aid precluding the Commission from requiring the Netherlands authorities to order the refund of aid.

29. In that case, however, the Court seems to have been influenced by a number of exceptional circumstances. The aid in question concerned a sector which had been in receipt of aid from the Netherlands authorities for a number of years and was intended to meet additional costs of an operation for which aid had previously been authorized by the Commission. The Commission had no excuse for the delay since it was well aware of the situation and the reasons which caused the costs covered by the earlier aid to be exceeded did not call for deep research.

30. There do not appear to be any such circumstances in the present case. Nor has it been suggested that the Commission's final decision, adopted a little over two years following the commencement of the preliminary inquiry, was taken with undue delay in the circumstances of the present case.

31. For the reasons given in paragraph 26 above, I do not think recovery can be precluded by the principle of legitimate expectations or legal certainty on account of delay on the part of the national authorities in complying with the Commission's final decision; if that were so the Community rules would be deprived of their effectiveness.

32. I conclude therefore that in circumstances such as the present Community law precludes the application of the one-year

21 — Case 223/85 [1987] ECR 4617.

time-limit laid down in Paragraph 48(4) of the Verwaltungsverfahrensgesetz for the revocation of administrative measures.

The principle of good faith

33. There seems to be equally little scope for applying the principle of good faith in cases such as the present. Under Paragraph 48(1) of the Verwaltungsverfahrensgesetz the *Land* had a discretion in deciding whether to revoke the unlawful aid decisions. The Bundesverwaltungsgericht concludes that, in exercising that discretion, the *Land* infringed the principle of good faith by revoking the decision when it had not informed the recipient of the aid of its questionable legality. However, as already noted, under the Treaty it is the Commission which decides upon the recovery of unlawful State aid. The national authorities are obliged to give effect to that decision and enjoy no discretion in revoking aid decisions. The exercise by the Commission of its discretion to order recovery may of course be challenged by the recipient of the aid before the Court of First Instance within the time-limit laid down by the Treaty.

34. Even on the assumption that the *Land* had such discretion, the principle of good faith could not apply. By granting aid without observing the procedure laid down in the Treaty the *Land*, as already noted, infringed the last sentence of Article 93(3). The decisions granting aid were not therefore, as the Bundesverwaltungsgericht suggests, merely of questionable legality — they were manifestly unlawful *ab initio*. If it were accepted that good faith is required before a decision can be revoked, it is hard to see how a public authority could ever revoke a decision which it knew — or can be presumed to have known — was unlawful when adopted. Moreover, even on the Bundesverwaltungsgericht's understanding of how the principle of good faith would apply in the present case, it would be a simple matter for a public authority to ensure that any aid decisions were immune from challenge on account of the principle of good faith — it would suffice to keep the recipient of the aid in the dark about the aid's illegality. Either way, the principle would frustrate the application of the Community rules on State aid.

Disappearance of the enrichment

35. Finally I turn to the rule laid down in Paragraph 818(3) of the Bürgerliches Gesetzbuch according to which recovery is no longer possible where the gain has ceased to exist (Wegfall der Bereicherung). In order to determine whether that is the case it is necessary to determine 'whether ... the total assets of the debtor in the light of all relevant

factors still show a surplus corresponding wholly or partly to the value of what was received'. [22]

36. The Verwaltungsverfahrensgesetz makes the rule applicable under certain conditions in administrative proceedings. However, under the seventh sentence of Paragraph 48(2) of the Verwaltungsverfahrensgesetz, the recipient of a benefit cannot rely upon the rule in Paragraph 818(3) of the Bürgerliches Gesetzbuch if he knew the circumstances which rendered the decision granting the benefit unlawful or if his lack of such knowledge was due to gross negligence (grobe Fahrlässigkeit). If the rule were applicable in the present case, the national court might therefore be required to consider whether Alcan's failure to verify whether the procedure under Article 93(2) and (3) of the Treaty had been complied with constitutes gross negligence.

37. I have however more fundamental objections to the application of a rule such as that in Paragraph 818(3) of the Bürgerliches Gesetzbuch in proceedings for the recovery of State aid. It seems to me that — even if applied uniformly as a principle of Community law — such a rule would be inconsistent with the objective of the Community rules on State aid of preventing distortion of competition in the common market. Clearly the grant of aid to an undertaking which continues to operate for only a temporary period may affect conditions of competition. It would frustrate the objective of the Community rules if aid could be granted in such circumstances by national authorities with little prospect of its being recovered.

38. From the standpoint of the recipient of the aid, it is in any event somewhat simplistic to suggest that the benefits of aid are lost where the recipient ceases to be enriched in terms of its current balance sheet. That is true even if, as is alleged to be the case here, the recipient was induced by the aid to continue operating the plant longer than it had intended and thereby incurred further losses. The recipient might nevertheless obtain significant ongoing benefits from temporary survival of the plant in terms of retention of its place on the market, reputation, goodwill and retention of key personnel, benefits which flow from the distortion of competition created by the aid.

39. The above view is consistent with the principles laid down by the Court with respect to recovery of aid. Recovery of an amount equal to the aid granted, together where appropriate with interest, is deemed to eliminate the competitive advantage obtained by the recipient of the aid and restore the previously existing position. Any other rule would be difficult to apply and, in so far as it entailed recovery of a lesser amount, would jeopardize attainment of the objectives of the Treaty provisions.

22 — See Lieb in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 2nd edition, 1986, Paragraph 818, RdNr. 70.

40. It seems to me therefore that special considerations apply in the sphere of State aid which preclude the application of the rule on loss of enrichment. That may be illustrated further by the judgment given by the Bundesverwaltungsgericht [23] following the Court's ruling in *Deutsche Milchkontor*, in which the Court had held that Community law did not preclude the application of the rule in circumstances such as those of that case. The Bundesverwaltungsgericht accepted the argument of the applicant in the main proceedings that it was no longer enriched by the Community aid for skimmed-milk powder because it had passed the aid on in its invoices to its customer. It seems to me that in that context the Court properly left the matter to be decided in accordance with national law since there was no overriding Community interest justifying encroachment upon the procedural autonomy of the Member State concerned. By contrast, if a similar situation arose in relation to State aid, it would jeopardize attainment of the aims of the Treaty provisions to allow the recipient of aid to resist recovery because he had passed on the benefit of the aid to his customers by lowering his prices. In such circumstances he would with impunity receive a significant competitive advantage.

41. I conclude therefore that in circumstances such as the present Community law precludes the application of a rule such as that in Paragraph 818(3) of the Bürgerliches Gesetzbuch.

Conclusions

42. Accordingly I am of the opinion that the questions referred by the Bundesverwaltungsgericht should be answered as follows:

Community law requires a national authority to revoke, in accordance with a final Commission decision ordering recovery of State aid, its decision granting the aid, even where under national rules such revocation is precluded because the authority has allowed the time-limit laid down by national law to elapse or the authority was responsible for the illegality of the decision to such a degree that revocation appears to be a breach of good faith towards the recipient or the gain is considered by national law no longer to exist.

23 — *BVerWG NJW* 1992, p. 703, at p. 704.