JUDGMENT OF THE COURT

13 April 1994 *

In Joined Cases C-324/90 and C-342/90,

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and by Nils-Peter Schmidt-Decker, Rechtsanwalt, Hamburg, both acting as Agents, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 Avenue Émile Reuter,

and

Pleuger Worthington GmbH, a company incorporated under German law, represented by Urs Aschenbrenner and Gerrit Schohe, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the Chambers of Marc Baden, 24 Rue Marie-Adelaïde,

applicants,

v

Commission of the European Communities, represented by Antonino Abate, Principal Legal Adviser, and Bernd Langeheine, a member of its Legal Service, both acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: German.

APPLICATION, in Case C-324/90, for the annulment of Commission Decision 91/389/EEC on aids granted by the City of Hamburg (Official Journal 1991 L 215, p. 1) and, in Case C-342/90, for the annulment of Articles 1 to 3 of that decision, in so far as they concern the applicant,

THE COURT,

composed of: G. F. Mancini, acting as President, J. C. Moitinho de Almeida, D. A. O. Edward (Presidents of Chambers), R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias (Rapporteur), F. Grévisse, M. Zuleeg and J. L. Murray, Judges,

Advocate General: M. Darmon,
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 18 May 1993,

after hearing the Opinion of the Advocate General at the sitting on 6 October 1993,

gives the following

Judgment

1 By applications lodged at the Court Registry on 23 October and 16 November 1990 respectively, the Federal Republic of Germany and Pleuger Worthington

GmbH brought actions under the first and second paragraphs of Article 173 of the EEC Treaty for the annulment of Commission Decision 91/389/EEC of 18 July 1990 on aids granted by the City of Hamburg (Official Journal 1991 L 215, p. 1).

2 By order of 23 March 1993, the President decided that the two cases should be joined for the purposes of the oral procedure and the judgment.

3 During the years 1986, 1987 and 1988 the Free and Hanseatic City of Hamburg granted financial benefits to certain undertakings established within its territory without informing the Commission. By letter of 7 January 1987, the Commission requested the Federal Republic of Germany to provide it with information on benefits which the City of Hamburg had planned to grant to the company Montblanc-Simplo. On 22 October 1987, the Federal Republic of Germany informed the Commission that the purpose of the aid was to prevent production from being transferred to the Far East. By letter of 15 January 1988, the Commission asked the Federal Government to state its position on a number of points. The Federal Government replied on 15 April 1988 to the questions raised by the Commission and confirmed that Hamburg was exposed to keen competition from the adjacent area. By letter of 15 April 1988, the Federal Government also notified three other cases in which the City of Hamburg had granted financial aids.

4 By letter of 3 May 1989, the Commission notified the Federal Government that it had learned that aids had been granted by the City of Hamburg to a number of undertakings without being notified to it. By that letter, it initiated the procedure provided for in Article 93(2) of the Treaty with regard to the aid programme or programmes and the individual cases in which aid had been granted. The Commission indicated in a communication (Official Journal 1989 C 309, p. 3) the objections which it had against the various grants made by the City of Hamburg. By letter of 23 August 1989, the Federal Government responded to the initiation of the procedure, stating that there was no subsidy programme in Hamburg.

5 At talks held on 7 November 1989 between representatives of the Commission, the Federal Government and the City of Hamburg, the Commission was informed that 11 undertakings had received subsidies in 1986, seven in 1987 and 11 in 1988 on the basis of individual decisions. The Commission requested particulars of each of the aids granted. By letter of 3 January 1990, the Federal Government sent it the information requested in the form of tables entitled 'Prevention of the Exodus of Undertakings'.

6 One of the undertakings receiving subsidies from the City of Hamburg was Pleuger Worthington GmbH, formed from the merger of two Hamburg undertakings which belonged to the same group, Deutsche Worthington GmbH and Pleuger Worthington GmbH, and which each had operating units at different cites. The merger took place on 1 November 1987. The joint management decided to amalgamate the operating units in the old Pleuger Worthington GmbH (hereinafter referred to as 'Pleuger Worthington'). After examining whether a subsidy could be granted for the amalgamation plans, the City of Hamburg, by letter of 15 July 1988, informed the undertaking that the commission responsible for granting credits had given its approval for a subsidy towards payment of the expenditure incurred in the relocation and conversion of the operating units. The City of Hamburg attached to its letter a contract relating to the grant of a subsidy of DM 600 000, which was signed by Pleuger Worthington on 15 July 1988. By letter of 18 December 1989, the City of Hamburg informed that undertaking that that amount had been transferred to it.

7 The contested decision, which was adopted on 18 July 1990, finds in Article 1 that the aid programme introduced by the City of Hamburg to prevent the outmigration of undertakings was unlawful since it had been put into effect in breach of Article 93(3) of the Treaty and that it was incompatible with the common market, within the meaning of Articles 92 and 93 of the EEC Treaty. The German Government was therefore required to abolish the aid programme within two months of notification of the decision. Article 2 states that within that same period the German Government is to ensure that the 33 undertakings which had received aids in the years 1986 to 1988 repay them in the amounts mentioned in that article,

the amount concerned in the case of Dresser Pleuger GmbH being DM 600 000. Finally, Article 3 requires the Federal German Government to inform the Commission of the measures which it has taken to comply with the decision.

8 By letter of 26 July 1990 the City of Hamburg informed the undertaking in question that the Commission considered that the subsidies granted were unlawful and required them to be repaid. By letter of 5 September 1990, the City of Hamburg forwarded to Pleuger Worthington a copy of the decision in question.

9 In support of its action the Federal Republic of Germany claims that Article 190 of the Treaty was infringed through non-compliance with essential procedural requirements. It claims that the decision is not sufficiently reasoned as regards the aspects relating to the existence of an aids scheme and to the examination of the criterion laid down in Article 92(1) of the Treaty. The action is also based on the Commission's alleged misapplication of Article 92(1) and infringement of Article 92(3)(c). Finally, the Federal Government contends that the Commission committed a misuse of power and acted in breach of the principle of equal treatment.

10 Pleuger Worthington bases its action on the breach of essential procedural requirements on the ground that the Commission did not give sufficient reasons for the decision with regard to certain aspects relating to the existence of an aids scheme, the examination of the criteria laid down in Article 92(1) and Article 92(3)(c) of the Treaty and the requirement that the aid be repaid. Pleuger Worthington also submits that the Commission infringed the procedural rules laid down in Article 93(2) and (3). It also bases its action on infringement of the Treaty, in particular of Article 92(1) and (3).

The alleged insufficient reasoning of the decision as regards the existence of an aid programme

11 The plea raised by both applicants to the effect that Article 190 of the Treaty was infringed through the decision's insufficient reasoning

as regards the aid programme of the City of Hamburg must be examined first.

12 The applicants deny that such a programme existed. They contend that the decision does not refer to any matters justifying the Commission's assumption that the City of Hamburg was running an unnotified aid programme for preventing the exodus of undertakings.

13 The tenth and eleventh paragraphs of Section IV(2) of the decision state as follows:

'In initiating proceedings under Article 93(2) of the EEC Treaty, the Commission started from the assumption that, in addition to the four individual cases of which it had knowledge, aid was being granted to other undertakings. It therefore initiated proceedings against this aid programme (or aid programmes) and each of its cases of application. Although there is no special assistance programme in Hamburg, all the 33 known awards of aid are granted by the same agency specially set up for the purpose (Hamburger Kredit-Kommission), on the same grounds (to prevent out-migration) and under the same budgetary heading. *De facto*, therefore, the features of a programme are fulfilled. The Commission's examination can therefore proceed by analogy to that of a programme.

An examination of the effect on trade of each individual award is not appropriate as regards the aid to prevent out-migration from Hamburg since otherwise the Federal Republic would be placed in a more favourable position than other Member States which notify aid at the planning stage. On the basis of experience, it was to be assumed from the outset that undertakings which participate in intra-Community trade would be involved in the aid.'

14 The Court finds first that the decision does not identify any legal act establishing an aid programme. On the contrary, the Commission expressly recognized in its decision that there was no special aid programme in Hamburg. Nevertheless, it based its conclusion on factual matters.

15 Certainly, the Commission may not in principle be barred from relying on a set of circumstances which taken as a whole indicate the *de facto* existence of an aid programme. In this regard, the Commission refers to three factors, which, in its view, are such as to establish the existence of such a programme in this case.

16 The first factor relied upon by the Commission is that all the investment subsidies were designed to prevent the recipient undertakings from leaving Hamburg. The Commission points out, in particular, that the Federal Government had sent to it a document, entitled 'Prevention of the Exodus of Undertakings', relating to the various aids which the City of Hamburg had decided to grant.

17 It must be observed generally that the mere fact that a set of aids may be part of a policy to prevent the exodus of undertakings is not sufficient to demonstrate that all those aids must be treated as a programme for the purposes of the application of Article 93 of the Treaty: such a policy may be conducted on the basis of measures of a very different nature and even by means of very varied aid programmes.

18 In the present case, the German Government argued before the Court, without being contradicted on this point, that in certain cases (in particular, those of J. H.

Peters & Bey GmbH and Horst Röder & Co. (GmbH&Co.], the undertakings receiving the aids in question had not even envisaged moving outside the City of Hamburg.

19 In those circumstances, the Commission's argument based on the aim of the aids in question cannot be accepted.

20 The two other factors referred to by the Commission in the reasoning of the decision are that the various aids were granted under the same budget heading and that the same administrative body made decisions on the grant of all the aids.

21 According to the applicants, those particular circumstances are explained by the position of the City of Hamburg in the federal organization of Germany. Pursuant to the principle of the legality of administrative action, the City has a single authority for the grant of subsidies under a single budget heading, which does not, however, indicate the conditions under which and the purposes for which aids may be granted or their amounts.

22 The applicants also point out that the fact that all the aids referred to by the Commission were granted on the basis of contracts governed by public law shows that they were not part of a programme. Otherwise, the general rules making up the programme in question would have to have been implemented by individual decisions and not by contracts.

23 In the absence of any further explanations by the Commission on the question of the administrative and financial practices followed by the City of Hamburg in the granting of the subsidies mentioned in the decision, those two factors are not sufficient to warrant the conclusion that a programme of aids existed. In particular,

the Commission has failed to indicate legislative, administrative, financial or economic factors which would have enabled all the aids in question to be characterized as belonging to a separate programme of other aids of the City of Hamburg. The Commission has merely confined itself to showing that all the aids were granted under the same procedure.

24 The Commission maintains, however, that in the circumstances of this case it was entitled to draw the conclusion in question since, owing to the failure to notify the aids and the conduct of the German Government, which provided extremely incomplete information, it was able to base its decision only on the fragmentary information which it had received. It was therefore entitled to take the view, on the basis of the information at its disposal, that the criteria for establishing the existence of a programme were indeed met and to proceed with its investigation as if a programme existed.

25 It should be pointed out that in its judgment of 14 February 1990 in Case C-301/87 *France* v *Commission* (Boussac Saint-Frères) [1990] ECR I-307, which was delivered before the adoption of the contested decision, the Court explained the consequences of a breach of the duty to notify which is incumbent on Member States by virtue of Article 93(3) of the Treaty.

26 As may be seen from that judgment, once the Commission has established that aids have been granted or altered without notification, it has the power, after giving the Member State in question an opportunity to submit its comments on the matter, to issue an interim decision requiring it to suspend immediately the payment of such aids pending the outcome of the examination of the aids and to provide the Commission, within such period as it may specify, with all such documentation, information and data as are necessary in order that it may examine the compatibility of the aid with the common market. It is only if the Member State, notwithstanding the Commission's order, fails to provide the information requested, that the Commission is empowered to terminate the procedure and make its decision, on the basis of the information available to it, on the question whether or not the aids are compatible with the common market.

27 In the present case, when the procedure relating to the unnotified aids was commenced, the Commission requested information about the aids and about Hamburg's aid programme or programmes. Although during the procedure prior to the commencement of legal proceedings the German Government denied that such a programme existed, the Commission found on the basis of the information available to it that a programme did exist.

28 Yet the Commission did not order the Federal Government, by interim decision, to provide it with all the information relating to all the aids granted by the City of Hamburg, which, according to the Commission, formed part of a programme, as it ought to have done in accordance with the judgment cited above.

29 In those circumstances, the Commission was not entitled to rely on the failure by the Federal Republic of Germany to notify the individual aids in question to support a finding that an aid programme existed. Nor can it rely, in justification of its decision, on the fragmentary nature of the information sent to it by the German Government since it did not use all its powers to cause the Member State to provide it with all the necessary information.

30 In view of the foregoing considerations, it must be found that on the question of the existence of an aid programme the contested decision does not satisfy the duty to provide reasons laid down by Article 190 of the Treaty and that the first plea in law is therefore well founded.

31 Consequently, the contested decision must be annulled for infringement of essential procedural requirements prescribed by the Treaty without its being necessary to examine the other pleas relied upon.

Costs

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

On those grounds,

THE COURT

hereby:

1) Annuls Commission Decision 91/389/EEC of 18 July 1990 on aids granted by the City of Hamburg;

2) Orders the Commission to pay the costs.

Mancini Moitinho de Almeida Edward Joliet

Schockweiler Rodríguez Iglesias Grévisse Zuleeg Murray

Delivered in open court in Luxembourg on 13 April 1994.

R. Grass G. F. Mancini

Registrar President of the Second and Sixth Chambers, acting as President