JUDGMENT OF THE COURT
15 May 1997 *

In Case C-355/95 P,

Textilwerke Deggendorf GmbH (TWD), a company incorporated under German law, established in Deggendorf, Germany, represented by Walter Forstner, Lutz Radtke and Karl-Heinz Schupp, Rechtsanwälte, Deggendorf, assisted by Michael Schweitzer, Professor at the University of Passau, with an address for service in Luxembourg at the office of M. Stein, Bayerische Landesbank International SA, 7-9 Boulevard Royal,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 13 September 1995 in Joined Cases T-244/93 and T-486/93 *TWD Textilwerke Deggendorf* v *Commission* [1995] ECR II-2265, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Paul F. Nemitz and Anders Jessen, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: German.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. C. Moitinho de Almeida, J. L. Murray and L. Sevón (Presidents of Chambers), C. N. Kakouris, P. J. G. Kapteyn, C. Gulmann, P. Jann (Rapporteur), H. Ragnemalm and M. Wathelet, Judges,

Advocate General: G. Tesauro,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 December 1996,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 20 November 1995, Textilwerke Deggendorf GmbH (TWD) (hereinafter 'TWD') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 13 September 1995 in Joined Cases T-244/93 and T-486/93 *TWD Textilwerke Deggendorf* v *Commission* [1995] ECR II-2265 (hereinafter 'the contested judgment'), in which that Court dismissed its applications for annulment of Article 2 of Commission Decision 91/391/EEC of 26 March 1991 on aid granted by the German Government to Deggendorf GmbH, a producer of polyamide and polyester yarns located in Deggendorf (Bavaria) (OJ 1991 L 215, p. 16, hereinafter 'the TWD II decision'), and of Article 2 of Commission Decision 92/330/EEC of 18 December 1991 on aid by Germany to the Deggendorf textile works (OJ 1992 L 183, p. 36, hereinafter 'the TWD III decision').

2 As regards the facts of the case, the contested judgment states:

'1. During the period from 1981 to 1983 the applicant, TWD Textilwerke Deggendorf GmbH (hereafter "TWD"), a company active in the synthetic fibre sector, received State aids, initially not notified to the Commission, consisting of a subsidy of DM 6.12 million from the Federal German Government and a loan on preferential terms of DM 11 million from the *Land* of Bavaria (hereafter "the TWD I aid"). Following late notification by the German authorities in March and July 1985 after repeated requests from the Commission, the Commission adopted, on 21 May 1986, Decision 86/509/EEC on aid granted by the Federal Republic of Germany and the *Land* of Bavaria to a producer of polyamide and polyester yarn situated in Deggendorf (OJ 1986 L 300, p. 34, hereafter "the TWD I decision"), in which it found that the aids in question were unlawful, on the ground that, in breach of Article 93(3) of the EEC Treaty, they had not been notified to the Commission, and on the ground that they were incompatible with the common market because they did not satisfy any of the conditions laid down in Article 92(2) and (3) of the EEC Treaty, owing in particular to the fact that they were contrary to the synthetic fibre and yarn aid code. The decision ordered the aid in question to be recovered. No legal challenge was mounted against the TWD I decision, which thus became definitive.

2. On 19 March 1987 the Federal German Ministry for Economic Affairs withdrew the certificates concerning the subsidy of DM 6.12 million granted by the Federal German Government, in order to recover that subsidy in accordance with the TWD I decision. However, the applicant challenged that step before the national administrative courts by lodging an appeal before the Verwaltungsgericht (Administrative Court) Cologne and then appealing against that court's judgment to the Oberverwaltungsgericht (Higher Administrative Court) for the *Land* North Rhine-Westphalia.

3. On 31 October 1989 the Federal Republic of Germany notified the Commission of a second aid plan for the applicant comprising a new subsidy of

DM 4.52 million and the grant of two loans, of DM 6 and DM 14 million, on preferential terms (hereafter "the TWD II aid"). On 26 March 1991 the Commission adopted Decision 91/391/EEC on aid granted by the German Government to Deggendorf GmbH, a producer of polyamide and polyester yarns located in Deggendorf (Bavaria) (OJ 1991 L 215, p. 16, hereafter 'the TWD II decision'). Articles 1 and 2 of the TWD II decision read as follows:

"*Article 1*

The aid in the form of a grant of DM 4 520 000 and two soft loans of DM 6 million and DM 14 million granted to Deggendorf for 12 years and 8 years respectively at 5% interest with a two-year grace period and notified to the Commission by letter dated 31 October 1989 from the German authorities is compatible with the common market within the meaning of Article 92 of the EEC Treaty.

Article 2

The German authorities are hereby required to suspend payment to Deggendorf of the aid referred to in Article 1 of this decision until such time as they have recovered the incompatible aids referred to in Decision 86/509/EEC."

...

5. In the meantime, on 25 February 1991, the German authorities had notified the Commission of a third plan to grant aid to the applicant in the form of "soft" loans (hereafter "the TWD III aid"). That aid concerned investments to be made in the Pietsch undertaking specializing in the manufacture of textile curtains, which had been acquired by the applicant. On 18 December 1991 the Commission adopted Decision 92/330/EEC on aid by Germany to the Deggendorf textile works (OJ 1992 L 183, p. 36, hereafter "the TWD III decision") whose operative provisions are in similar terms to those contained in the TWD II decision. The operative part of the TWD III decision reads as follows:

"*Article 1*

The aid in the form of two subsidized loans of DM 2.8 million and DM 3 million granted to Textilwerke Deggendorf GmbH for 15 years and 8 years respectively at 4.5% interest with a three-year grace period and notified to the Commission by letter dated 25 February 1991 from the German authorities is compatible with the common market within the meaning of Article 92 of the EEC Treaty.

Article 2

The German authorities shall suspend payment to Deggendorf of the aid referred to in Article 1 of this Decision until such time as they have recovered the incompatible aid referred to in Article 1 of Decision 86/509/EEC.

Article 3

The German Government shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply therewith.

...".'

The contested judgment

3 The Court of First Instance began by examining the pleas alleging that the Commission lacked competence and that the principles governing the division of powers between the Community and the Member States had been infringed.

4 As regards the allegation relating to the Commission's competence to adopt Article 2 of the TWD II and TWD III decisions, the Court pointed out first, in paragraph 46, that the operative part of an act had to be interpreted by having regard to the reasoning which led to its adoption. After examining the statements of reasons on which the TWD II and TWD III decisions were based, in particular the seventh recital in Part V of the TWD II decision, in which it is stated that 'the cumulative effect of the illegal aid which [TWD] has been refusing to repay since 1986 and the ... new ... aid would give it an excessive and undue advantage which would adversely affect trading conditions to an extent contrary to the common interest', the Court found, in paragraph 51, that those two decisions had to be interpreted as meaning that the new aids, considered in themselves, might be compatible with the common market but that they could not be authorized under Article 92(3)(c) of the Treaty unless the cumulative effect of the old aid and the new aids were eliminated.

5 The Court held therefore, in paragraph 52, that the contested decisions could not be interpreted as an unconditional finding of compatibility with the common market (Article 1), to which is added an unlawful suspensory condition (Article 2). On the contrary, it considered that it was clear from the actual reading of those decisions that the Commission would not have found the new TWD II and TWD III aids to be compatible with the common market without the condition laid down in Article 2, and that the purpose of Article 2 of the operative parts in question was in fact to enable the declaration of compatibility in Article 1 to be made.

6 The Court therefore examined whether the Commission had power under Article 92(3)(c) of the Treaty to adopt decisions subject to conditions relating to the grant of aids.

7 It held, in paragraph 55, that the power conferred on the Commission by Article 93(2) of the Treaty to decide that aid had to be 'altered' also implied that a decision authorizing aid under Article 92(3)(c) of the Treaty could be made subject to conditions for ensuring that authorized aid did not alter trading conditions to an extent contrary to the general interest. It also drew attention, in paragraph 56, to the case-law of the Court of Justice, according to which the Commission, when examining the compatibility of aid, must take all the relevant factors into account, including the circumstances already considered in a prior decision and the obligations which such a decision may have imposed on a Member State.

8 It reached the conclusion, in paragraph 56, that the Commission had the power to take into consideration, first, any cumulative effect of the old TWD I aid and the new TWD II and TWD III aids and, secondly, the fact that the TWD I aid declared unlawful in the TWD I decision had not been repaid.

9 Finally, the Court examined, in paragraphs 58 and 59, the allegation that the Commission had followed a procedure not provided for by the Treaty instead of initiating infringement proceedings under Article 169 or the second subparagraph of Article 93(2) of the Treaty.

10 It held, in paragraph 59, that the procedure was lawful since the aim of Article 2 of the operative parts of the TWD II and TWD III decisions was not to find that the TWD I decision had been infringed, but to prevent disbursement of new aid distorting competition to an extent contrary to the general interest.

11 It therefore concluded, in paragraph 63, that the Commission was competent to adopt Article 2 of the TWD II and TWD III decisions.

12 As regards the allegation that the rules governing the division of powers between the Community and the Member States had been infringed, TWD claimed that the Commission had ignored national proceedings concerning the same subject-matter and infringed the principle of the protection of legitimate expectations.

13 The Court stated, in paragraph 66, that the fact that national proceedings relating to the TWD I aid were in progress did not affect the Commission's power to adopt all measures necessary to ensure that competition in the Community was not distorted, so that the Commission had not encroached upon the powers of the Member States.

14 It accordingly found, in paragraph 71, that the Community legal system did not oblige the Commission to await the outcome of the national proceedings before

adopting Article 2 of the operative parts in question and that any other interpretation would deprive Articles 92 and 93 of the Treaty of their practical effect.

15 The Court therefore rejected those pleas.

16 It also rejected TWD's pleas to the effect that it had gained no competitive advantage from the grant of the TWD I aid because the funds had been used and the loans repaid, and because the Commission had not evaluated the competitive advantage which it had found to exist so that it was not possible to verify the statement contained in the TWD II decision that the TWD I and TWD II aids together entailed the equivalent of a subsidy of 29%, finding, in paragraph 83, that TWD had not proved that the Commission had manifestly erred in its assessment.

17 In paragraph 97, it likewise rejected the pleas relating to breach of the principle of proportionality, on the ground that TWD had not established the correctness of the premiss on which its argument was based, namely that the total of TWD II and TWD III aids exceeded the value of the TWD I aid.

18 The Court also rejected, in paragraph 103, the pleas that the TWD I aid was lawful inasmuch as no action had been brought against that decision within the period prescribed.

The appeal

19 In support of its appeal seeking to have the contested judgment set aside, TWD relies on six pleas:

— first, the Court of First Instance erred in law by determining the meaning and scope of the contested decisions without taking account of the wording used by the Commission;

— second, it erred in law by finding that the Commission had acted within the limits of its powers, when it did not in fact have power to make the TWD II and TWD III aids subject to a prohibition on disbursement since such action is not provided for by law;

— third, it failed to take into account the fact that the Commission, in acting in that way, had offended against the principle of the division of powers between the Community and the Member States with regard to State aids. The distinguishing feature of that division of powers is that decisions are adopted at Community level, but implemented by the national authorities which apply their own administrative law;

— fourth, it failed to take into account the fact that the Commission had misused its powers in attempting to exert pressure on TWD by means of the prohibition on disbursement so long as the old aid had not been repaid;

— fifth, it was wrong to accept the Commission's finding that the new aids, together with the old aid, distorted competition to an extent contrary to the Community interest;

— finally, it offended against the principle of proportionality in taking the amount of the aid instead of its actual value into account.

The first plea

20 In its first plea, TWD claims that the Court of First Instance erred in law by determining itself the meaning and scope of the contested decisions without taking account of the wording used by the Commission. The latter stated expressly and unconditionally in Article 1 of the TWD II and TWD III decisions that the aid in question was compatible with the common market and then, in Article 2, it prohibited payment of that aid for reasons other than its inherent lawfulness. In paragraphs 51 and 52 of the contested judgment, the Court wrongly linked together Articles 1 and 2 of those two decisions, referring to their preambles and stating that the operative part of each had to be read as a whole, with the result that the compatibility of the aid was subject to a condition. The Court therefore improperly reinterpreted the decisions inasmuch as, according to TWD, the grounds of a decision are merely an aid and cannot therefore have the effect of reversing the legal content of a decision.

21 In that regard, it should be stated that the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption.

22 Accordingly, the Court of First Instance did not err in law. The passages from the TWD II decision cited by it in paragraphs 47 to 50 of the contested judgment, which also appear in almost identical terms in the TWD III decision, show clearly that the Commission intended in those two decisions to come to a conclusion which dealt with the twofold distortion of competition produced by the TWD I aid, on the one hand, and by the TWD II and TWD III aids, on the other. In view of the clear and entirely unambiguous statement of reasons, it does not matter that the operative part of both decisions is divided into two articles, one of which states that the TWD II and TWD III aids are compatible with the common market while the other suspends their disbursement until the TWD I aid has been repaid.

23 The first plea must therefore be rejected.

The second, third and fourth pleas

24 The second, third and fourth pleas cover a single allegation, namely that the Court of First Instance erred in law by finding that the Commission had acted within its powers, and did not misuse those powers when it suspended payment of the new aids until the old TWD I aid had been recovered. Those three pleas should therefore be considered together.

25 First of all, it is apparent from the findings made in connection with the first plea that the TWD II and TWD III decisions could properly be interpreted by the Court of First Instance as meaning that the new aids could not be compatible with the common market as long as the old unlawful aid had not been repaid, since the cumulative effect of the aids was to distort competition in the common market to a significant extent. In those circumstances, the failure to repay the unlawful aid constituted an essential factor which was lawfully taken into account when the compatibility of the new aids was examined, so that the suspension of payment of the new aids cannot be treated in the same way as a simple demand for payment.

26 The first subparagraph of Article 93(2) of the Treaty makes the Commission responsible for implementing, subject to review by the Court, a special procedure involving the constant review and monitoring of aid which Member States intend to introduce (Case C-301/87 *France* v *Commission* [1990] ECR I-307 and Case C-294/90 *British Aerospace and Rover* v *Commission* [1992] ECR I-493, paragraph 10). In particular, under Article 92(3) of the Treaty, which applies to the contested decisions, the Commission enjoys a wide discretion, and the exercise of that discretion involves assessments of an economic and social nature which must be made within a Community context (*France* v *Commission*, paragraph 49). When the Commission examines the compatibility of a State aid with the common market it must take all the relevant factors into account, including, where appropriate, the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State (Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 20).

27 It follows that the Court of First Instance did not err in law by finding, in paragraphs 56 and 59 of the contested judgment, that the Commission had acted within its powers when it took into consideration, first, any cumulative effect of the old TWD I aid and the new TWD II and TWD III aids and, secondly, the fact that the TWD I aid had not been repaid.

28 Since the decisions of the Commission thus did not exceed the limits of the discretion which it enjoys, they cannot become unlawful simply because TWD regarded them as a means of exerting pressure in order to recover the sums unlawfully held by it. As the Court of First Instance correctly found, that cannot support the inference that the Commission misused its powers.

29 In addition, since the Commission acted within the limits of its powers, it cannot have encroached at the same time upon those of the Member States.

30 The second, third and fourth pleas must therefore be rejected.

The fifth plea

31 In its fifth plea, TWD claims that the Court of First Instance was wrong to have confirmed, in paragraph 83 of the contested judgment, the decisions of the Commission in which the latter found that the TWD II and TWD III aids, together with the TWD I aid, distorted competition to an extent contrary to the Community interest. It maintains that it gained no competitive advantage from the TWD I aid since the funds had been used and the loans repaid. Interference with competition is precluded because TWD cannot in any event have gained a competitive advantage contrary to Community law: if the national court confirms that the old aid must be refunded, all the benefits will then have to be returned; in the opposite case, that is to say if the national court were to recognize that TWD had legitimate expectations, the benefits would not be contrary to Community law, since Community law should also recognize that those expectations deserve protection.

32 It should be borne in mind that, under Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure, an appeal must give a precise indication of the aspects of the judgment appealed against which are complained of, together with the legal arguments put forward in support of the claim that it should be set aside (see the order of 24 April 1996 in Case C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003, paragraph 29, and the judgment in Case C-138/95 P *Campo Ebro and Others* v *Council* [1997] ECR I-2027, paragraph 60).

33 In this instance, TWD simply repeats arguments already put by it to the Court of First Instance and rejected by the latter in paragraphs 82 to 85 of the contested judgment, without attempting to prove that the Court erred in law in its assess-

ment of the facts. In practice, therefore, this plea seeks merely to have the facts re-examined, which falls outside the jurisdiction of this Court.

34 This plea must therefore be rejected as inadmissible.

The sixth plea

35 In its sixth plea, TWD claims that the principle of proportionality was infringed on the ground that the value of the TWD II and TWD III aids exceeds by far that of the TWD I aid. The Court of First Instance was wrong to take the amount of aid instead of its actual financial value into account. The Commission's method of calculation is thus incorrect.

36 In this plea as well, TWD simply repeats arguments already put by it to the Court of First Instance and which the latter rejected in paragraphs 94 to 97 of the contested judgment, holding that the calculations upon which TWD bases its reasoning are incorrect. This plea therefore, like the preceding one, seeks merely to have the facts re-examined, without setting forth any legal arguments.

37 The plea is therefore inadmissible for the same reasons as those set out in paragraph 33 of this judgment.

38 In the light of the above, the appeal must be dismissed in its entirety.

Costs

39 Under Article 69(2) of the Rules of Procedure, applicable to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs. Since the appellant has been unsuccessful, it must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;

2. Orders the appellant to pay the costs.

Rodríguez Iglesias Mancini Moitinho de Almeida

Murray Sevón Kakouris

Kapteyn Gulmann Jann

Ragnemalm Wathelet

Delivered in open court in Luxembourg on 15 May 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President