JUDGMENT OF THE COURT
16 June 1993 *

In Case C-325/91,

French Republic, represented by Edwige Belliard, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Géraud de Bergues, Principal Deputy Secretary for Foreign Affairs in that Ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

applicant,

v

Commission of the European Communities, represented by Antonino Abate, Principal Legal Adviser, and Michel Nolin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ 1991 C 273, p. 2) — Transparency of financial relations between Member States and national public undertakings — Reporting system,

THE COURT,

composed of: O. Due, President, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

* Language of the case: French.

Advocate General: G. Tesauro,
Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 November 1992, at which the French Government was represented by Philippe Pouzoulet, Director of the Second Class in the Legal Affairs Directorate of the Ministry of Foreign Affairs, assisted by Catherine de Salins, Foreign Affairs Adviser in that Ministry, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 14 December 1991, the French Republic brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of an act adopted by the Commission entitled 'Commission communication to the Member States — Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector' (OJ 1991 C 273, p. 2; hereinafter 'the communication').

2 On 25 June 1980, the Commission adopted, pursuant to Article 90(3) of the Treaty, Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35; hereinafter 'the Directive').

3 Article 5 of the Directive provides as follows:

'1. Member States shall ensure that information concerning the financial relations referred to in Article 1 be kept at the disposal of the Commission for five years from the end of the financial year in which the public funds were made available to the public undertakings concerned. However, where the same funds are used during a later financial year, the five-year time limit shall run from the end of that financial year.

2. Member States shall, where the Commission considers it necessary so to request, supply to it the information referred to in paragraph 1, together with any necessary background information, notably the objectives pursued.'

4 The communication at issue is made up of two parts. In the first (points 1 to 44), the Commission essentially sets out its interpretation of the Court's case-law on public undertakings and the manner in which it intends to apply the rules on State aid in the event of public intervention, in particular as regards injections of capital, guarantees, loans and returns on invested capital.

5 In the second part (point 45 et seq.), points 46 to 49 read as follows:

'46. Article 5 of the transparency Directive [80/723/EEC] obliges Member States to supply the information required to ensure transparency where the Commission considers it necessary. The Commission, for the reasons set out above, now considers that it is necessary for Member States to supply reports on State intervention on an annual basis for public undertakings in the manufacturing sector. Therefore, without prejudice to its right to ask for more detailed information on specific cases, and in accordance with Articles 1 and 5 of the said Directive, the Commission hereby requests Member States to submit an annual report setting out all the details in relation to the following aspects of State intervention in each individual public undertaking concerned by this communication:

(a) the annual financial statements (balance sheet and profit and loss accounts) of each public undertaking concerned.

To the extent that they are not already contained in these reports, the following data shall also be provided for each enterprise:

(b) the provision of any capital/equity (specify the terms of provision (e. g. ordinary, preference));

(c) non-refundable grants or grants which are only refundable in certain circumstances;

(d) the award of any loans to the enterprise (specify rates and terms of loan and security, if any, given by the enterprise receiving the loan to the lender);

(e) guarantees given to the enterprise in respect of loan finance (specify terms and any charges paid by enterprises for these guarantees);

(f) dividends paid out and profits retained;

(g) the change in conditions of any previous State intervention, in particular, the forgoing of sums due to the State by a public undertaking (this includes, *inter alia*, the repayment of loans, grants, etc., payment of corporate or social taxes or any similar debts);

(h) in accordance with the definition of the Fourth Council Directive 78/660/EEC of 25 July 1978 on annual accounts of certain types of companies (OJ L 222, 14.8. 1978, p. 11) the following information:

— profit or loss on ordinary activities before tax (items 14 and 15 of Article 23),

— interest payable (item 13 of Article 23),

— creditors: amounts becoming due and payable after more than one year (points 1, 2, 6 and 7 of Article 10. I),

— capital and reserves (points I to VI of Article 10. L).

Note: Grants, loans and guarantees given under aid schemes which have been approved by the Commission (and which are linked to specific investment projects) shall not be included under (c), (d) or (e) above.

47. The above requested information shall be supplied separately for each public. undertaking including those located in other Member States, and shall include, where appropriate, details of all intra-and inter-group transactions between different public undertakings, as well as directly between public undertakings and the State. Thus, for example, the equity referred to in point 46(b) shall include not only equity from the State directly but also any equity from a public holding company or other public undertaking (including financial institutions) either inside or outside the same group. The relationship between the provider of the finance and the recipient must always be specified. Similarly the reports and information requested in point 46(a) and (h) must be for each individual public undertaking separately as well as for the (sub)holding company which consolidates several public undertakings.

48. All the requested information falls within the general scope and objective of the abovementioned transparency Directive (Article 1) and more specifically it concerns the detailed information that Member States are obliged to keep at the disposal of the Commission (Article 3).

49. The information shall be provided for all public undertakings:

— whose turnover for the most recent financial year is more than ECU 250 million, and

— whose principle area of activity (or in the case of holding companies whose [subsidiaries' principal] area of activity) is manufacturing. ...

The information requested under point 46(b) to (g) for the public undertakings concerned shall arrive at the Commission no later than six months after each year-end. Those requested at point 46(a) and (h) shall be forwarded on publication of the annual accounts but in any event no later than 10 months after the end of the financial year of the enterprise concerned.'

6 It is common ground that 14 French undertakings are concerned by the communication and that the French authorities notified their names to the Commission on 25 June 1991.

7 Reference is made to the Report for the Hearing for a fuller account of the background to the case and the facts, the origins of the communication, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility of the application

8 The Commission asks that the application be declared inadmissible in so far as, contrary to that which the applicant claims, the contested measure adds no new obligation to those laid down by Article 5 of the Directive and therefore has no new legal effects distinct from those of that provision.

9 It must be pointed out that, as the Court has consistently held, an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42).

10 What is at issue in this case is a communication, which, according to its title, sets out to specify the manner of application of, in particular, Article 5 of the Directive, has no legal basis, was published in full in the C Series of the Official Journal and, as appears from the documents before the Court, was notified to each Member State by letter from the competent member of the Commission dated 8 October 1991.

11 It follows that the assessment of whether the objection of inadmissibility is well founded depends on how the complaints made by the French Republic about the contested act should be assessed, and that the objection of inadmissibility must therefore be considered together with the substantive issues raised by the proceedings.

Substance

12 The French Republic alleges in support of its application first that Article 190 of the Treaty and the principle of legal certainty have been infringed in so far as maintains that the communication adds new obligations to those imposed on the Member States by Article 5(2) of the Directive. Next it argues that, as a result of the communication, the Commission exceeded the limits of its discretion under Article 90(3) of the Treaty on the grounds that there was no necessity for the communication, the requirements which it lays down are disproportionate and it discriminates between public and private undertakings.

13 For its part, the Commission argues that the communication constitutes merely a measure applying and implementing the obligations set out in Article 5(2) of the Directive and answers the need to apply that provision consistently, having regard to the development of economic life and of the Court's case-law on State aid.

14 It is therefore appropriate first to consider whether the communication is confined to fleshing out the obligation to inform the Commission which is imposed on the Member States by Article 5(2) of the Directive or whether it lays down new obligations as compared with that provision.

15 In that regard, it should be emphasized in the first place that Article 5 of the Directive merely lays down an obligation on the Member States to keep at the disposal of the Commission for five years information concerning financial relations and to supply it with such information on request.

16 While reference is made for a more detailed analysis of the relevant provisions of the communication to section 7 of the Advocate General's Opinion, it is sufficient to observe that the communication provides, as regards undertakings in the manufacturing sector with a turnover of more than ECU 250 million, for the annual communication of data relating to the financial relations specified in point 46 of the communication.

17 It must be held that the obligation for Member States to communicate such data systematically and in a generalized manner cannot be regarded as being inherent in the obligations laid down in Article 5(2) of the Directive, even though that obligation relates to only a particular class of undertakings whose turnover exceeds a given figure.

18 However, the Commission denies that the obligation imposed in this way on the Member States is general and systematic and argues that the communication constitutes a cluster of individual acts, specifically aimed at each undertaking or group of undertakings concerned in the various Member States.

19 That argument cannot be accepted.

20 In fact, the communication contemplates categories of undertakings in general, abstract terms depending on objective criteria inasmuch as it covers undertakings on the basis of criteria consisting of their membership of a particular sector and the level of their turnover.

21 That finding cannot be invalidated by the existence of a list of undertakings to which the communication in question applies, since the 14 French undertakings concerned do indeed belong to the manufacturing sector and their turnover is more than ECU 250 million. This has, moreover, been acknowledged by the

Commission itself, which confirmed that the list in question was subject to change in the event that the annual turnover of other undertakings exceeded ECU 250 million.

22 It follows from the foregoing that, by requiring Member States annually to report to it, on a general, systematic basis, data relating to the financial relations of a particular category of undertaking achieving a specified turnover, the Commission has added new obligations not provided for in Article 5(2) of the Directive.

23 Accordingly, it must be held that the communication constitutes an act intended to have legal effects of its own distinct from those of Article 5(2) of the Directive on transparency and that, as a result, an action for annulment will lie against it.

24 Secondly, it should be considered whether, by adopting an act imposing on Member States obligations not provided for in Article 5(2) of the Directive without indicating a legal basis therein, the Commission is, as the French Government submits, in breach of the principle of legal certainty.

25 In that connection, it should be noted that Article 90(3) of the Treaty empowers the Commission to adopt directives or decisions appropriate for the application of Article 90.

26 However, as the Court has repeatedly held, Community legislation must be clear and its application foreseeable for all interested parties. As a result of that requirement for legal certainty, the binding nature of any act intended to have legal effects must be derived from a provision of Community law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis.

27 It follows that acts intended to alter the obligations laid down by Article 5(2) of the Directive or to create different obligations may be adopted only on the express basis of Article 90(3) of the Treaty.

28 As regards the Commission's argument to the effect that, since the list of the 14 French undertakings affected by the communication was sent by the competent French authorities, the communication constitutes an act negotiated between itself and the French Government, it is sufficient to state that the possibility of adopting such an act is not provided for by Article 5(2) of the Directive, and it is not necessary to consider whether the act in question does in fact constitute a negotiated act.

29 Lastly, as regards the Commission's argument put forward at the hearing to the effect that the communication is in fact a circular addressed to the Commission's departments with a view to their requesting the Member States, pursuant to Article 5(2) of the Directive, to provide the data relating to the financial relations of the undertakings concerned, it is sufficient to note that the communication refers expressly to the Member States and was, moreover, notified to them.

30 It follows from the whole of the foregoing considerations and without having to rule on the other pleas relied on by the French Republic that, by adopting an act intended to have legal effects without expressly indicating therein the provision of Community law from which it derives its binding force, the Commission has infringed the principle of legal certainty, which forms part of the general principles of Community law the observance of which is the Court's task to ensure.

31 Consequently, the Commission communication must be annulled and there is no need to rule on the other pleas relied on by the French Republic.

Costs

32 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Annuls the Commission communication to the Member States — Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector;**

2. **Orders the Commission to pay the costs.**

Due Zuleeg Murray Mancini

Schockweiler Moitinho de Almeida Grévisse Diez de Velasco Kapteyn

Delivered in open court in Luxembourg on 16 June 1993.

J.-G. Giraud — Registrar

O. Due — President