JUDGMENT OF THE COURT (Sixth Chamber)
12 November 1998 *

In Case C-415/96,

Kingdom of Spain, represented by Luis Pérez de Ayala Becerril, Abogado del Estado, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

applicant,

v

Commission of the European Communities, represented by Francisco Santaolalla, Principal Legal Advisor, and Ramón Vidal Puig, of its Legal Service, acting as Agents, with an address for service at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision 97/242/EC of 18 September 1996 amending Decision 92/317/EEC on State aid in favour of Hilaturas y Tejidos Andaluces SA, now called Mediterráneo Técnica Textil SA, and its buyer (OJ 1997 L 96, p. 30),

* Language of the case: Spanish.

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn, President of the Chamber, G. Hirsch (Rapporteur), J. L. Murray, H. Ragnemalm and K. M. Ioannou, Judges,

Advocate General: F. G. Jacobs,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 19 March 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 30 December 1996, the Kingdom of Spain brought an action under Article 173 of the EC Treaty for a declaration that Commission Decision 97/242/EC of 18 September 1996 amending Decision 92/317/EEC on State aid in favour of Hilaturas y Tejidos Andaluces SA, now called Mediterráneo Técnica Textil SA, and its buyer (OJ 1997 L 96, p. 30, hereinafter 'the contested decision') was void.

2 Hilaturas y Tejidos Andaluces SA (hereinafter 'Hytasa') was a limited liability company which, following financial difficulties, was taken over in 1982 by the Patrimonio del Estado (Property Office of the Ministry of Economic Affairs and Finance). It made textile products in its plants in and around Seville.

3 In 1989, following a complaint, the Commission requested the Spanish authorities to provide it with information concerning any capital contributions granted to Hytasa from 1986, the year in which the Kingdom of Spain acceded to the Communities. The reply given by the Spanish authorities enabled the Commission to establish that Hytasa had received capital increases amounting to PTA 7 100 million to cover operating losses.

4 In 1990, the Spanish authorities informed the Commission that Hytasa was in the process of being privatised. One of the terms of privatisation was a capital contribution of PTA 4 200 million by the Patrimonio del Estado.

5 In July 1990, the Commission initiated the procedure provided for in Article 93(2) of the EC Treaty in relation to the capital contributions of PTA 7 100 million granted to Hytasa by the Kingdom of Spain between 1986 and 1988 as well as any additional aid granted upon the sale of the undertaking.

6 The Commission considered that the financial assistance constituted aid within the meaning of Article 92(1) of the EC Treaty and that it did not seem to be covered by the conditions for application of one of the derogations provided for in Article 92(2) and (3) of the Treaty and, by letter of 3 August 1990, notified the Spanish Government of the initiation of the procedure.

7 On 16 October 1990, the Spanish Government submitted its observations in the procedure, arguing, in particular that the sale of Hytasa did not involve aid since the undertaking had been sold to the highest bidder after being offered on the international market. Furthermore, since the undertaking was based in Seville, in an area which could claim regional aid, the derogation provided for in Article 92(3)(a) of the Treaty had to apply.

8 The Spanish authorities replied on 27 March 1991 to observations submitted by third parties on the initiation of the procedure. They also submitted a restructuring plan drawn up by the new owners of Hytasa, which was amended on 13 June 1991.

9 On 25 March 1992, the Commission adopted Decision 92/317 (OJ 1991 L 171, p. 54), in which it concluded that both the capital increases amounting in total to PTA 7 100 million and the capital contribution of PTA 4 200 million constituted State aid which had been granted in breach of the provisions of Article 93(3) of the Treaty (Article 1, first paragraph, and Article 2, first paragraph, of Decision 92/317). The Commission considered, however, that the aid amounting to PTA 7 100 million was compatible with the common market (Article 1, second paragraph, of Decision 92/317).

10 As regards the capital contribution of PTA 4 200 million, the Commission concluded, on the other hand, that it was aid incompatible with the common market because it did not satisfy any of the conditions to be fulfilled for application of the derogations provided for in Article 92(2) and (3) of the Treaty (Article 2, second paragraph of Decision 92/317).

11 In consequence, the Commission required the aid granted to be repaid (Article 3 of Decision 92/317).

12 Article 4 of that decision provides:

'Any agreement providing for an indemnity for the buyers by the State or the Patrimonio del Estado for an obligation imposed by this Decision to reimburse aid shall not be carried out.'

13 Finally, Article 5 of that decision required the Spanish Government to inform the Commission, within a period of two months, of the measures taken.

14 On 19 June 1992, the Kingdom of Spain brought an action under Article 173 of the Treaty seeking annulment of Articles 2, 3, 4 and 5 of Decision 92/317 relating to the capital contribution of PTA 4 200 million. By judgment of 14 September 1994 in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, the Court partially upheld that claim.

15 In particular, it annulled the second paragraph of Article 2 of Decision 92/317, which also entailed annulment of Articles 3, 4 and 5 of Decision 92/317.

16 In this regard, the Court held, in paragraph 49 of its judgment of 14 September 1994, that the fact that aid was not granted under a regional aid programme did not necessarily exclude it from classification as regional aid within the meaning of Article 92(3)(a). The Commission was not therefore exempt, on that ground, from the obligation to examine the compatibility of the aid in the light of that provision.

17 As regards the Commission's alternative argument that the grant of the aid was not accompanied by a restructuring plan ensuring the viability of the undertaking, the Court replied in these terms:

'53 The Commission observes at the eighth paragraph of part VI of the decision at issue that:

"Even if the aid in question were to be considered as regional, it would not however be eligible for compatibility under Article 92(3)(a), because aid granted pursuant to the provisions of that Article must contribute to the long-term development of the region — this notably means in this case that the aid must at least serve for restoring the company's viability, an objective not attained for Hytasa in the light of the information submitted so far to the Commission (this

aspect was already discussed in part IV above) — without having unacceptable negative effects on competition conditions within the Community."

54 Part IV of the decision at issue, to which the Commission refers, concerns the question of ascertaining to what extent the measure in question contained State aid elements within the meaning of Article 92(1) of the Treaty. It does not deal with the question of the restoration of the viability of Hytasa.

55 Nor is that question referred to in part III of the decision. After summarising the contents of the two restructuring plans, the Commission questions, in the 16th paragraph, the validity of the statements put forward by the Spanish authorities and the forecast results. According to the Commission, the several contradictions noted between the two plans did not allow it to share the optimistic forecasts in the conclusion of the revised plan (same paragraph). The Commission does not however put forward any specific argument on that point other than that the new restructuring plan would not ensure the viability of Hytasa.

56 Finally, the Commission states in the ninth paragraph of part VI that the question of ascertaining whether the investment projects are in line with the interest of the Community and of ascertaining whether they contribute to a sound restructuring of the company are "discussed further below". In fact, the Commission discusses below the adverse effects of the aid on the conditions of competition without analysing the impact of the revised plan on the restoration of Hytasa's profitability. Such an analysis was necessary in the present case, particularly because the plan provided for a substantial redirection of production towards the manufacture of clothing.

57 It must therefore be concluded that the Commission's analysis of the compatibility of the aid in question with Article 92(3)(a) of the Treaty does not meet the criteria established by itself.

58 The second paragraph of Article 2, and Articles 3, 4 and 5 of the decision concerning the undertaking Hytasa must therefore be annulled.'

18 On 13 October 1995, the Commission addressed a letter to the Kingdom of Spain in which it stated:

'In accordance with the judgment of the Court of Justice of 14 September 1994 (in Case C-278/92), annulling a number of articles of the Commission's Decision of 25 March 1992, the Commission is preparing a new draft of its definitive decision in the procedure initiated pursuant to Article 93(2) of the EC Treaty ... which, in accordance with that judgment, is still open. The draft will be submitted soon to the College of Commissioners for adoption.'

19 On 18 September 1996, the Commission adopted the contested decision. According to the reasons on which it is stated to be based, it was adopted in order to take due account of the judgment in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* (Part III, first paragraph). At the end of the analysis of the restructuring plan, the Commission concluded that the plan did not enable Hytasa's long-term viability to be ensured. It therefore reached the conclusion, in the 24th paragraph of Part III, that the aid could not be regarded as compatible with the common market pursuant to Article 92(3)(a). For the same reason, it concluded, in the 25th paragraph of Part III, that the derogation provided for in Article 92(3)(c) was no longer applicable.

20 In the 26th and 27th paragraphs of Part III, the Commission states:

'The Commission's view that the abovementioned restructuring plan did not render the company viable is confirmed by the financial interventions in its favour in which the Spanish authorities had to engage after 1992. The restructuring plan was never implemented. Following the bankruptcy of one of the owners, Hilaturas Gossypium, Improasa, the executive company of Patrimonio del Estado, acquired 30% of MTT's shares in 1992. Several properties belonging to MTT were mortgaged in favour of Improasa for some PTA 726 million. Improasa also acquired promissory notes issued by MTT for some PTA 4 660 million.

In 1992, two credits amounting to PTA 300 million were given to the company by the Instituto de Fomento de Andalucía (IFA), as part of an aid scheme approved by the Commission. MTT finds itself at present in financial straits, with liabilities worth some PTA 10 000 million, so that it has been decided by the competent Spanish authorities to suspend indefinitely the payments of the company, with a view to its liquidation and the subsequent sale of its assets to pay its debts.'

21 Since the analysis carried out pursuant to the judgment in *Spain* v *Commission* confirmed the conclusion which the Commission had already reached in Decision 92/317, the Commission, in the operative of the contested decision, replaced the provisions previously annulled by the Court with provisions of similar content.

22 In support of its application, the Kingdom of Spain relies on two pleas alleging breach of Articles 93 and 174 of the EC Treaty and breach of its rights of defence, of the principle of legal certainty and of the principle of legitimate expectations.

Breach of Articles 93 and 174 of the Treaty

23 The Kingdom of Spain submits that, in adopting the contested decision, the Commission acted in breach of the first paragraph of Article 174 of the Treaty, which states: 'If the action is well founded, the Court of Justice shall declare the act concerned to be void.' In its view, the principle of *res judicata*, by virtue of which an annulled act cannot be the subject of fresh court proceedings, bars the adoption of a fresh decision whose content would be identical to the decision previously annulled.

24 In this regard, it states that, according to the judgment in *Spain* v *Commission*, cited above, the Commission had acted improperly in not carrying out the analyses necessary for the adoption of a proper decision. In its view, what is concerned is not therefore a simple lack of reasoning as would be the case if the Commission had merely adopted a decision without setting out the reasons for its adoption. In the present case, however, the Court criticised the Commission for not having done what was necessary to adopt a decision having a tenor consistent with the criteria laid down in Article 92 of the Treaty.

25 Since the nullity did not arise from a mere formal or procedural defect but from a much more serious error, the effect of the annulling judgment should be held to be total and absolute as far as the measure at issue is concerned. It follows, according to the Kingdom of Spain, that the annulment of Decision 92/317, precisely by virtue of the reason for its annulment, extends to all preliminary acts taken by the Commission before adopting that decision. The Commission cannot therefore rectify its error by merely adopting a fresh decision but must, on the contrary, restart the procedure from the beginning.

26 The Commission, however, considers that it cannot be inferred from Article 174 of the Treaty that invalidity of the contested measure must 'extend' to the preliminary acts. These are not one of the 'effects' of the contested measure to which Article 174 makes reference but acts preliminary to that measure. Apart from the case in which nullity of the contested measure is brought about specifically by a defect in

the preliminary act, there is no reason why that act could not serve as one preliminary to a new measure adopted to replace the annulled measure.

27 The Commission claims that the Court annulled the contested decision on the ground that it had not sufficiently explained the reasons for which it had come to the conclusion that the restructuring plan submitted by the Spanish Government would not have ensured restoration of Hytasa's profitability. The defect which led to the annulment is therefore a formal one, namely insufficient reasoning of the contested decision as regards the compatibility of the aid, and not a substantive defect relating to possible causes of that insufficiency, about which the Court could only have speculated.

28 According to the Commission, having regard to the terms of the annulling judgment, the only obligation which it had under Article 176 of the EC Treaty was to adopt a new decision setting out appropriate reasons for its conclusion concerning the compatibility of the aid. The contested decision is in conformity with that obligation in so far as the Commission there makes a detailed analysis of the compatibility of the aid in the light of Article 92(3)(a) and (c). That analysis confirms the conclusion which it had already reached in Decision 92/317. That is the reason why, in the operative of the contested decision, it merely replaced the provisions annulled by the Court with other provisions of similar tenor.

29 However, the Commission considers that implementation of the annulling judgment did not require a new procedure and, in particular, a call for the Spanish Government to submit its observations afresh. The defect for which the annulling judgment found fault with its decision related solely and exclusively to the form of the final decision and not to the acts preliminary to its adoption. Consequently, repetition of those preliminary acts was not necessary.

30 The Court observes first of all that, according to the first paragraph of Article 174 of the Treaty, if the action is well founded, it is to declare the act concerned to be void.

31 According to Article 176 of the Treaty, the institution whose act has been declared void is required to take the measures necessary to comply with the judgment of the Court. As the Court held in its judgment in Joined Case 97/86, 193/86, 99/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 27, in order to comply with the judgment and to implement it fully, the institution is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure. The procedure for replacing such a measure may thus be resumed at the very point at which the illegality occurred (see the judgment in Case 34/86 *Council* v *Parliament* [1986] ECR 2155, paragraph 47).

32 According to established case-law, annulment of a Community measure does not necessarily affect the preparatory acts (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 34).

33 In the operative part of its judgment in the *Spain* v *Commission* case, cited above, the Court annulled the second paragraph of Article 2 and Articles 3, 4 and 5 of Decision 92/317. At paragraph 57 of that judgment, the court concluded that the Commission's analysis of the compatibility of the aid in question with Article 92(3)(a) of the Treaty did not meet the criteria established by itself.

34 The Kingdom of Spain does not contest that, at the time of adoption of Decision 92/317, the investigation measures completed by the Commission allowed an exhaustive analysis to be made of the compatibility of the aid with regard to Article 92(3) of the Treaty. Since the analysis carried out by the Commission was, however, incomplete, thus entailing the illegality of Decision 92/317 (see paragraph 17 of this judgment), the procedure for replacing that decision could be resumed at that point by means of a fresh analysis of the investigation measures, the reliability of which have not in fact been challenged in this case. Implementation of the judgment in *Spain* v *Commission* did not therefore require the Commission to go through the whole procedure provided for in Article 93 of the Treaty.

35 In those circumstances, the first plea must be dismissed.

Infringement of the right to be heard and of the principles of legal certainty and of the protection of legitimate expectations

36 According to the Kingdom of Spain, its right to be heard and the principle of legal certainty have been infringed. The Commission's analysis has been carried out from the angle of the undertaking's profitability, which was not the case in Decision 92/317. It cannot be argued that, in the initial procedure, that is to say in the procedure which led to Decision 92/317, the Kingdom of Spain was given a genuine hearing since there is an obvious difference between presenting observations on the compatibility of aid in 1990/91 and doing so years later, in 1996. What the Spanish Government could say at a precise moment does not exactly coincide with the observations which it presented in 1995 and in 1996. In the 26th and 27th paragraphs of Part III of the contested decision, the Commission carries out an analysis *ex post facto*. In precluding the Kingdom of Spain from submitting fresh observations on the question of the compatibility with the common market of the aid granted to Hytasa, the principle of respecting the right to be heard was infringed.

37 The Kingdom of Spain also claims that the principle of the protection of legitimate expectations was infringed in so far as, two years after delivery of the judgment in *Spain* v *Commission* and without there being the slightest reason to justify its delay, the Commission merely informed the Kingdom of Spain, by letter of 13 October 1995, that it was preparing a fresh decision regarding a case which it had dealt with six years earlier.

38 The Commission considers, however, that the procedure provided for in Article 93(2) of the Treaty was scrupulously respected and that it did not infringe the right to be heard of the Kingdom of Spain.

39 It contends that the Kingdom of Spain adduces no argument in support of its allegations of infringement of the principle of legal certainty and of the principle of the protection of legitimate expectations.

40 As regards the alleged infringement of the right to be heard, it must be stated first of all that, in the Article 93(2) procedure which resulted in Decision 92/317, the Kingdom of Spain submitted its observations both on the decision to initiate the procedure and on the observations made by interested third parties. When that decision was annulled, the Commission then based its new analysis, the substance of which the Kingdom of Spain does not contest, exclusively on information which it had at the time of the adoption of that same decision. Since the Kingdom of Spain had already taken a position on that information, as is clear from paragraphs 7 and 8 of this judgment, there was no reason to consult it again.

41 The fact that, in the 26th and 27th paragraphs of Part III of the contested decision, the Commission examines the profitability of the Hytasa undertaking from an ex post perspective is not liable to change the outcome of the case. That analysis merely confirms the analysis contained in the previous paragraphs (19th to 25th paragraphs) finding that the restructuring plan submitted by the Spanish authorities did not ensure the long-term viability of the undertaking. In those circumstances, no infringement of the right to be heard can be held to have occurred.

42 Finally, as regards the alleged infringement of the principle of legal certainty and of the principle of the protection of legitimate expectations, it is sufficient to state that these allegations are not supported by any relevant arguments so that they cannot be upheld.

43 Since the second plea likewise cannot be upheld, the application must therefore be dismissed.

Costs

44 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for. Since the Kingdom of Spain has been unsuccessful and the Commission has applied for costs to be awarded against it, the Kingdom of Spain must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1) Dismisses the application;

2) Orders the Kingdom of Spain to pay the costs.

Kapteyn Hirsch Murray

Ragnemalm Ioannou

Delivered in open court in Luxembourg on 12 November 1998.

R. Grass — Registrar

P. J. G. Kapteyn — President of the Sixth Chamber