JUDGMENT OF THE COURT
13 March 1985 *

In Joined Cases 296 & 318/82

Kingdom of the Netherlands, represented by A. Bos, Assistant Legal Adviser in the Ministry of Foreign Affairs, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C.-M.-Spoo (Case 296/82),

and

Leeuwarder Papierwarenfabriek BV, whose registered office is at Leeuwarden (Netherlands), represented by B. H. ter Kuile and L. H. Van Lennep, of the Hague Bar, with an address for service in Luxembourg at the Chambers of J. Loesch, Avocat, 2 Rue Goethe (Case 318/82),

applicants,

v

Commission of the European Communities, represented by its Legal Adviser, B. van der Esch, acting as Agent, with an address for service in Luxembourg at the office of M. Beschel, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported in Case 318/82 by

H. A. Hofmans, vennootschap onder firma, whose registered office is at Rotterdam,
Schiecarton BV, whose registered office is at Schiedam,
Cartonnagefabriek Bakker & Stoffels BV, whose registered office is at Wormerveer,
Industriële Drukkerij Chromos BV, whose registered office is at Krommenie,
Acket Vouwdozen BV, whose registered office is at Oss,
BV Imca Cartonnages, whose registered office is at Hoogerheide,
Cartonnagefabriek D. Miedema BV, whose registered office is at Utrecht,
Hubregtse BV, whose registered office is at Almelo,
Targa BV, whose registered office is at 's-Hertogenbosch, and
4P Drukkerij Reclame BV, whose registered office is at Rotterdam,

* Language of the Case: Dutch.

all represented by T. R. Ottervanger, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, 34 B Rue Philippe-II,

interveners,

APPLICATION for a declaration that Commission Decision No 82/653 of 22 July 1982 on aid granted by the Netherlands Government to a paperboard-processing firm (Official Journal L 277, p. 15), is void,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris, (Presidents of Chambers), P. Pescatore, T. Koopmans, U. Everling, K. Bahlmann and Y. Galmot, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

*

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By applications lodged at the Court Registry on 23 November and 14 December 1982 respectively, the Kingdom of the Netherlands (Case 296/82) and Leeuwarder Papierwarenfabriek BV (Case 318/82) brought actions under Article 173 of the EEC Treaty for a declarationn that Commission Decision No 82/653 of 22 July 1982 on aid granted by the Netherlands Government to a paperboard-processing firm (Official Journal L 277, p. 15) is void.

* after hearing the Opinion of the Advocate General at the sitting on 16 January 1985,

2 The undertaking which received the aid and which is the subject of the decision, Leeuwarder Papierwarenfabriek BV (hereinafter referred to as 'Leeuwarder'), whose registered office is at Leeuwarden (Province of Friesland), manufactures folding cardboard boxes and flexible packaging materials. In 1968 its predecessor, Leeuwarder Papierwarenfabriek NV (hereinafter referred to as 'Leeuwarder's predecessor') was taken over by Papierfabrieken Van Gelder Zonen NV. As a result of the parent undertaking's financial difficulties the position of Leeuwarder's predecessor deteriorated to a considerable extent at the beginning of the 1970s. Nevertheless, after a reorganization carried out in 1977 its position improved and in 1979 and 1980 it made a profit.

3 In 1980 its position deteriorated once again due largely to the difficulties in which the parent undertaking found itself. In those circumstances Leeuwarder's predecessor contacted a regional development undertaking, the Noordelijke Ontwikkelingsmaatschappij (hereinafter referred to as 'the development undertaking'), which stated that it was prepared to acquire a holding in that undertaking's capital provided, however, that it was detached from the Van Gelder group. The development undertaking is a public body whose capital is subscribed by the Netherlands authorities. Its purpose is to improve the social and economic structure of the Northern provinces of the Netherlands by means, *inter alia*, of the acquisition of holdings in the equity capital of undertakings. To that end it has at its disposal financial resources raised on the capital market with a State guarantee and the use of which is subject to authorization on the part of the public authorities.

4 With the consent of the Ministry of Economic Affairs the development undertaking's holding was secured by the formation, with effect from 8 September 1980, of a new company with limited liability, namely Leeuwarder Papierwarenfabriek BV, whose capital of HFL 12 million was subscribed for and paid up by Van Gelder and the development undertaking equally. The new company purchased the business from Van Gelder for HFL 9.4 million. It should be noted that the acquisition of the holding coincided with a restructuring of the undertaking which, since 1979, had based its commercial policy on the manufacture of high-quality (specialized) products and had therefore reduced its production capacity and its share of the market in both folding cardboard boxes and flexible packaging materials.

5 On 5 December 1980, in response to a Commission request, the Netherlands Government supplied certain information concerning the transaction in question and maintained that, in its opinion, it did not constitute aid within the meaning of Article 92 (1) of the Treaty. Since the Commission did not take that view, it commenced the procedure provided for in Article 93 (2) of the Treaty which led to the adoption of the contested decision.

6 Article 1 of that decision, which was notified to the Netherlands Government by a letter dated 20 September 1982, provides that 'the aid granted by the Netherlands Government to a paperboard-processing firm, which was notified to the Commission by a telex dated 5 December 1980 is incompatible with the Common Market under Article 92 of the EEC Treaty'. Article 2 thereof stated that 'the Kingdom of the Netherlands shall inform the Commission within three months of the date of notification of this Decision of the measures it has taken to ensure that the aid granted does not continue to distort competition in future, notably competition with undertakings in other Member States'.

7 As the grounds for its decision the Commission states in the preamble to its decision that in the course of the procedure provided for in Article 93 (2) of the Treaty, which it commenced as a result of its contact with the Netherlands Government, 'the Governments of two Member States told the Commission that they shared its concern over the effect of the aids on competition within the Community' (fifth recital) and that, in addition, the complaints filed by two trade associations in the sector in question 'reveal distortions of competition resulting from the measure taken by the Netherlands Government' (sixth recital). Accordingly, the aid 'in this case is such as to affect trade between Member States and to distort or threaten to distort competition within the meaning of Article 92 (1) of the EEC Treaty by favouring the undertaking concerned or the production of its goods' (seventh recital).

8 The preamble to the decision goes on to state that 'the prohibition on State aids laid down in Article 92 (1) applies to injections of capital both by the central Government itself and by regional or local authorities or other public agencies under the central Government's authority' (eighth recital). With regard to this case it is stated that 'the financial structure of the firm, which urgently needed to carry out replacement investments, and the over-capacity in the paperboard-processing industry, constituted handicaps indicating that the firm would probably have been unable to raise on the private capital markets the funds essential to its survival' (ninth recital) and that 'the situation on the market in question provides no reasonable grounds for hope that a firm urgently needing large-scale restructuring could generate sufficient cash flow to finance the replacement investment necessary, even if it received the proposed assistance' (tenth recital).

9 With regard to the exemptions provided for in Article 92 (3) of the Treaty, the Commission states that that provision 'specifies objectives to be pursued in the Community interest, and not that of the individual recipient. The exemption clauses must be strictly construed . . . in particular, exemptions may be granted only when the Commission can establish that this will contribute to the attainment of one of the objectives specified, which the recipients would not secure by their own actions under normal market conditions alone' (eleventh recital). An exemption could not be granted in this case because 'the Netherlands Government has not been able to show, nor has the Commission found any evidence to establish that the proposed aid satisfies one of the tests for exemption in Article 92 (3)' (fifteenth recital).

10 Since they took the view that the contested decision was adopted in breach of substantive and procedural rules of Community law, the Netherlands Government and Leeuwarder brought these actions for a declaration that that decision is void.

11 By an order of 18 May 1983, the Court allowed the intervention, pursuant to Article 93 of the Rules of Procedure, of Hofmans, v.o.f. of Rotterdam, Schiecarton BV of Schiedam, Cartonnagefabriek Bakker & Stoffels BV of Wormerveer, Industriële Drukkerij Chromos BV of Krommenie, Acket Vouwdozen BV of Oss, BV Imca Cartonnages of Hoogerheide, Cartonnagefabriek D. Miedema BV of Utrecht, Hubregtse BV of Almelo, Targa BV of 's-Hertogenbosch and 4P Drukkerij Reclame BV of Rotterdam, in support of the Commission's conclusions in Case 318/82 (*Leeuwarder Papierwarenfabriek BV* v *Commission*).

12 By an order of 4 July 1984, the Court joined the two cases for the purposes of the oral procedure and the judgment pursuant to Article 43 of the Rules of Procedure.

13 The Commission does not contest the admissibility of the actions. Although the contested decision was addressed to the Kingdom of the Netherlands alone, the applicant in Case 296/82, it is of direct and individual concern within the meaning of the second paragraph of Article 173 of the Treaty to Leeuwarder, the applicant in Case 318/82, in its capacity as the recipient of the aid in question.

14 In addition to various arguments with regard to the conduct of the administrative procedure leading up to the adoption of the contested decision, the applicants make two submissions with regard to that decision itself. Firstly, they contend that the Commission was incorrect in regarding the development undertaking's share in Leeuwarder's share capital as State aid within the meaning of Article 92 (1) of the Treaty and therefore wrongly refused to grant an exemption under Article 92 (3). Secondly, they contend that the Commission, contrary to Article 190 of the Treaty, failed to give a sufficient statement of its reasons for adopting the decision with regard both to the conditions laid down in Article 92 (1) and to the refusal to apply Article 92 (3). It is necessary to consider the submission that it failed to give a sufficient statement of its reasons first.

Failure to give a sufficient statement of reasons for the decision

15 The Netherlands Government maintains that the Commission failed to indicate the facts and considerations on which it based its conclusion that the holding amounted to aid which was incompatible with the Common Market because it affected trade between Member States and distorted or threatened to distort competition. In particular the preamble to the decision says nothing about the situation on the market in question which indicates that Leeuwarder is a healthy undertaking with satisfactory prospects as regards profits. In addition, the Commission wrongly states that the Netherlands Government was unable to show that the aid in question satisfied the conditions necessary for one of the exemptions in Article 92 (3) of the Treaty to apply. Finally, the decision does not indicate the manner in which the criteria according to which and the period within which the obligation set out in Article 2 of the operative part of the decision, namely 'to ensure that the aid granted does not continue to distort competition in future', had to be complied with.

16 Leeuwarder argues that the statement of reasons for the decision is insufficient because the decision does not indicate that the Commission possessed the necessary knowledge of the market or of the undertaking's range of products or future prospects. In particular, it was incorrect to connect the alleged over-capacity in the sector in question with Leeuwarder's chances of survival since, on the contrary, its cash flow indicated that it was a healthy undertaking with good prospects for the future.

17 However, the Commission contends that the statement of reasons satisfies the requirements of Article 190 of the Treaty. With regard to Article 92 (1) of the Treaty the statement begins with the declaration of principle that State holdings, in whatever form, may amount to aid and goes on to consider the decisive factors relating to Leeuwarder's solvency, namely its financial structure, its urgent need for replacement investments and over-capacity in the sector concerned. It concludes that in this case the public authority acquired its holding under conditions which would not have been acceptable to a private investor taking into account the market conditions. With regard to Article 92 (3) the preamble to the decision indicates that it is for the Member State which wishes to grant aid to show that the circumstances justify the conclusion that the aid in question has a beneficial effect for the Common Market.

18 In addition, the Commission refers to the need to reconcile the requirements of Article 190 of the Treaty with its obligation to preserve professional secrecy with regard to the actual position of the undertakings and sectors concerned, as provided for in Article 214 of the Treaty. Finally, the meaning of Article 2 of the operative part of the decision is clear from the wording thereof, according to which the Netherlands is allowed a measure of discretion in the choice of the appropriate measures but is under a duty to eliminate the adverse consequences for competing undertakings of the artificial increase in Leeuwarder's industrial capacity afforded by the aid in question.

19 The Court has consistently held that the statement of reasons for a decision adversely affecting an undertaking must be such as to allow the Court to review its legality and to provide the undertaking concerned with the information necessary to enable it to ascertain whether or not the decision is well-founded. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the need for information of the undertakings to whom the measure is addressed or of other parties to whom it is of direct and individual concern within the meaning of the second paragraph of Article 173 of the Treaty.

20 With regard to State aid within the meaning of Article 92 (1) of the EEC Treaty, it is clear from the preamble to the decision that the Commission takes the view that the prohibition of such aid may also apply to injections of capital effected by

public agencies under the State's authority (eighth recital). In this case it was the absence of the possibility of raising finance on the private capital market which indicated that the contribution in question amounted to aid in the light of three factors, namely the financial structure of the undertaking, its urgent need for replacement investments and the over-capacity in the paperboard-processing sector. In the Commission's opinion those factors made it unlikely that the undertaking would be able to raise on the private capital markets the funds essential to its survival (ninth recital).

21 That statement of reasons satisifes the requirements of Article 190 of the EEC Treaty since it is sufficient to permit a review by the Court and gives those concerned an appropriate opportunity to express their views on the accuracy and relevance of the alleged facts and circumstances.

22 However, the decision does not contain a statement of reasons with regard to the assessment of the other criteria laid down in Article 92 (1), namely the requirement that the aid in question affects trade between Member States and distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

23 The preamble recalls the concern expressed by the Governments of two Member States and by two trade associations in the relevant industry with regard to the distortion of competition resulting from the measure taken by the Netherlands Government (fifth and sixth recitals) and then merely repeats the wording of Article 92 (1) (seventh recital) without any indications of fact.

24 Even if in certain cases the very circumstances in which the aid is granted are sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision. In this case it has failed to do so since the contested decision does not contain the slightest information concerning the situation of the relevant market, the place of Leeuwarder in that market, the pattern of trade between Member States in the products in question or the undertaking's exports.

25 In addition, the statement of reasons with regard to the failure to apply the exemptions provided for in Article 92 (3) is inadequate. In that respect, it is declared in the statement of reasons for the decision that it had not been established that the conditions required for the application of any of the exemptions were satisfied (fifteenth recital). Although that statement is conclusively supported with regard to the exemptions provided for in Article 92 (3) (a) and (b) (sixteenth and seventeenth recitals), that is not the position with regard to the exemption provided for in subparagraph (c) thereof, in respect of which the statement of reasons for the decision does not indicate that the Commission considered all the essential elements of fact or law which could have justified the granting of that exemption.

26 The contested decision merely states in the first place that the Netherlands aid 'would not "facilitate the development of ... certain economic areas" within the meaning of that provision' (final sentence of the sixteenth recital) and in the second place that 'developments in the paperboard-processing industry show that to maintain production capacity through the grant of State aid would not be in the common interest' and that 'furthermore, the paperboard-processing industry's future prospects rule out the conclusion that the aid envisaged would not adversely affect trading conditions to the extent contrary to the common interest' (eighteenth recital). However, there is no indication whatsoever in the decision that the Commission took into consideration the essential fact, which might have caused it to make a different assessment, that the aid in question was accompanied by a restructuring of the recipient undertaking which, by diverting its production to high-quality products, led to a reduction in its production capacity and in its market share.

27 The duty laid down in Article 214 of the Treaty to preserve professional secrecy, in this case Leeuwarder's business secrets, cannot be invoked as justification for the deficiencies in the statement of reasons. Apart from the fact that certain relevant facts, in particular those relating to the structure of the market, are manifestly not of a confidential nature so as to fall within the obligation of professional secrecy, that obligation cannot be given so wide an interpretation that the obligation to provide a statement of reasons is deprived of its essential content, thus making it difficult for the Member States and undertakings concerned to prepare their defence.

28 In addition, since the decision in this case is an individual decision the entry into effect of which is not dependent upon publication in the Official Journal of the Community pursuant to Article 191 of the EEC Treaty, the Commission could have excluded from publication those facts which it considered to be covered by the obligation of professional secrecy, as it has in fact recognized in relation to decisions adopted under Articles 85 and 86 of the EEC Treaty in Article 21 (2) of Regulation No 17 of 6 February 1962 (Official Journal, English Special Edition 1959-62, p. 87).

29 The Commission had a particular duty to provide a full statement of the reasons for its decision in this case because Article 2 of its decision requires the Kingdom of the Netherlands to take measures 'to ensure that the aid granted does not continue to distort competition in future, notably competition with undertakings in other Member States' and because the content and scope of that obligation must be defined in the light of the elements of fact and law which led the Commission to conclude that the aid had such effects. Moreover, if the Commission adopted the aforementioned wording precisely in order to allow the Netherlands Government some latitude in deciding what measures were to be taken to bring to an end the breach of Community law which it had established, it was obliged to provide the Government with the information necessary to enable the latter to ascertain what measures might be considered appropriate.

30 For all the aforementioned reasons, the Court finds that the contested decision does not comply with the requirement laid down in Article 190 of the EEC Treaty that it must state the reasons on which it is based and declares the decision void on the ground that it infringes an essential procedural requirement without its being necessary to examine the other submissions made by the applicants.

Costs

31 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been asked for in the pleadings. Where there are several unsuccessful parties the Court is to decide how the costs are to be shared.

32 As the Commission and the interveners have failed in their submissions they must be ordered to pay the costs. The Commission shall pay the whole of the costs in Case 296/82, and the costs in Case 318/82 shall be paid by the Commission and the interveners jointly and severally.

On those grounds,

THE COURT

hereby:

(1) **Declares that Commission Decision No 82/653 of 22 July 1982 on aid granted by the Netherlands Government to a paperboard-processing firm (Official Journal 1982, No L 277, p. 15) is void.**

(2) **Orders the Commission and the interveners to pay the costs. The Commission shall pay the whole of the costs in Case 296/82, and the costs in Case 318/82 shall be paid by the Commission and the interveners jointly and severally.**

Mackenzie Stuart Bosco Due Kakouris

Pescatore Koopmans Everling Bahlmann Galmot

Delivered in open court in Luxembourg on 13 March 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President