JUDGMENT OF THE COURT (Sixth Chamber)
29 April 2004 *

In Case C-277/00,

Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, assisted by M. Schütte, Rechtsanwalt,

applicant,

v

Commission of the European Communities, represented by K.-D. Borchardt and V. Di Bucci, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

APPLICATION for annulment of Commission Decision 2000/567/EC of 11 April 2000 on the State aid implemented by the Federal Republic of Germany for System Microelectronic Innovation GmbH, Frankfurt an der Oder (Brandenburg) (OJ 2000 L 238, p. 50),

THE COURT (Sixth Chamber),

composed of: V. Skouris (Rapporteur), acting for the President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen and N. Colneric, Judges,

Advocate General: A. Tizzano,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the Report for the Hearing

after hearing oral argument from the parties at the hearing on 21 November 2002, at which the Federal Republic of Germany was represented by M. Lumma, acting as Agent, assisted by M. Schütte, and the Commission by K.-D. Borchardt and V. Di Bucci,

after hearing the Opinion of the Advocate General at the sitting on 19 June 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 11 July 2000, the Federal Republic of Germany brought an action under the second paragraph of Article 230 EC for the annulment of Commission Decision 2000/567/EC of 11 April 2000 on the State aid implemented by the Federal Republic of Germany for System Microelectronic Innovation GmbH, Frankfurt an der Oder (Brandenburg) (OJ 2000 L 238, p. 50; 'the contested decision').

The background to the dispute

2 According to the contested decision, before the reunification of Germany VEB/ Kombinat Halbleiterwerk, established in Frankfurt an der Oder (Germany), was the market leader in its field in the Comecon (Council for Mutual Economic Assistance) area, with 8 500 employees. Situated in the *Land* of Brandenburg, this combine's main activity was the production of customised circuits. Mikroelektronik und Technologie GmbH ('MTG') is the successor undertaking to VEB/ Kombinat Halbleiterwerk. Initially owned by the Treuhandanstalt, a German public-law body responsible for restructuring the undertakings of the former German Democratic Republic, MTG was renamed on 1 March 1993 Halbleiter Electronic Frankfurt (O) GmbH ('HEG'). HEG was to continue the main activities of MTG. On the same date a joint venture was created between HEG and Synergy Semiconductor Corporation ('Synergy'), which acquired 49% of MTG's shares. In January 1993 MTG sold the remaining 51% of its shares to the Treuhandanstalt. On 1 December 1993 HEG changed to System Microelectronic Innovation GmbH ('SMI'). On 28 June 1994 the Treuhandanstalt transferred its 51% holding in SMI to the *Land* of Brandenburg.

3 From 1993 to 1997, SMI received financial support from the *Land* of Brandenburg, the Treuhandanstalt and the Bundesanstalt für vereinigungsbedingte Sonderaufgaben ('the BvS'), the body that succeeded the Treuhandanstalt. Grants from the latter two entities totalled DEM 64.8 million and were used for investments totalling DEM 63 million and removals totalling DEM 1.8 million. The DEM 70.3 million provided as a loan by the *Land* of Brandenburg was used to cover losses recorded between 1993 and 1997. The overall amount of financial support was therefore DEM 135.1 million.

4 On 25 April 1997 SMI had to file for bankruptcy and thereupon became SMI in Gesamtvollstreckung (SMI in liquidation, 'SMI iG'). The bankruptcy proceedings were opened on 1 July 1997, after SMI iG had ceased trading on 30 June 1997. On the same date, the administrator founded at Frankfurt an der Oder a hive-off vehicle, Silicium Microelektronic Integration GmbH ('SiMI'), with a capital of DEM 50 000, which, in return for a consideration, was to continue SMI iG's business using SMI iG's plant, with about 105 employees. All the shares in SiMI were owned by SMI iG. On 1 July 1997 the administrator founded a wholly-owned subsidiary of SiMI, Microelectronic Design & Development GmbH ('MD & D'), whose intended activities would be in the field of consulting, marketing, development and design of microelectronic products and services.

5 On 29 July 1997 the *Land* of Brandenburg provided SiMI with a loan of DEM 4 million to enable it to continue the activity of SMI iG. In addition, the BvS granted SiMI DEM 1 million as loss compensation for the period from its creation to June 1998.

6 The *Land* of Brandenburg, together with the bankruptcy administrator, then tried to sell SiMI to a private investor. Despite some unsuccessful efforts, the German authorities informed the Commission of the European Communities that new negotiations had been started with Megaxess Inc., USA ('Megaxess'). These negotiations were successful in the end and SiMI and MD & D were sold to Megaxess. In particular, by a contract of 28 June 1999, 80% of the shares of MD & D were sold to Megaxess. The remaining 20% were bought by three employees of MD & D. On 14 July 1999 MD & D acquired the shares of SiMI at their nominal value of DEM 50 000 and the assets of SMI iG for DEM 1.7 million.

7 After it had been reported in the *Handelsblatt* on 22 August 1996 that the Land of Brandenburg planned to grant aid of DEM 10 million to SMI, the Commission wrote to the German authorities on 2 September 1996 and 23 January 1997 requesting further information. Despite these requests no official communication to it was forthcoming from the Federal Republic of Germany.

8 By letter dated 5 August 1997, the Commission informed the German authorities of its decision to initiate the procedure laid down in Article 88(2) EC in respect of the aid. In addition, interested third parties were invited to submit comments. From 1997 to 2000, the German authorities responded to the decision to initiate the procedure by sending the Commission several letters, but the Commission did not consider the information provided to be satisfactory. Only one reaction from a third party, supporting the Commission's decision to initiate the procedure, was received.

9 Those were the factual and procedural circumstances in which the Commission adopted the contested decision, Articles 1 to 3 of which are worded as follows:

'Article 1

The grants totalling DEM 64.8 million made by the Treuhandanstalt and the loans totalling DEM 70.3 million granted by the *Land* of Brandenburg to System Microelectronics Innovation GmbH, Frankfurt/Oder i.G. (SMI), are incompatible with the common market.

Article 2

The grant of DEM 1 million made by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben and the loan of DEM 4 million granted by the *Land* of Brandenburg to System Microelectronic Innovation GmbH Frankfurt/Oder (SIMI) are likewise incompatible with the common market.

Article 3

1. Germany shall take all necessary measures to recover from the beneficiaries the aid referred to in Articles 1 and 2 unlawfully made available to them.

2. Recovery shall be effected in accordance with the procedures of national law. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

3. For the purposes of this article, the term 'beneficiaries' shall encompass SMI, SIMI and Microelectronic Design & Development GmbH (MD & D) as well as any other firm to which SMI's, SIMI's or MD & D's assets have been or will be transferred in order to evade the consequences of this decision.'

Forms of order sought

10 The Federal Republic of Germany claims that the Court should:

— annul the contested decision,

— order the Commission to pay the costs.

11 The Commission claims that the Court should:

— dismiss the action as unfounded,

— order the Federal Republic of Germany to pay the costs.

The action

12 In support of its action, the Federal Republic of Germany relies on four pleas in law:

— breach of the rights of the defence and of Article 88(2) EC on the ground that the recovery order is also addressed to SiMI, MD & D and other unnamed undertakings, even though the Commission did not open an inquiry procedure against those undertakings;

— breach of essential procedural requirements on account of:

— errors in ascertaining the facts in connection with the privatisation of SMI, the question whether the loan granted to SMI by the *Land* of Brandenburg could be covered by an authorised aid scheme and the transfer of competitive advantages to SiMI, MD & D or to third undertakings, and

— a defective statement of reasons relating to the privatisation of SMI and the possibility of enjoying a derogation under Article 87(2)(c) EC;

— an erroneous assessment under Article 87(1) EC, Article 87(2)(c) EC and Article 88 EC of the compatibility of the disputed aid with the common market;

— the unlawfulness of the order to recover the aid in question from undertakings other than SMI.

The second and third pleas

13 By its second and third pleas, which should be examined together, the German Government claims, first of all, that the Commission has infringed Article 87 (1) EC, Article 87(2)(c) EC and Article 88 EC in so far as it declared, in Articles 1 and 2 of the contested decision, that all the grants and loans to SMI and SiMI are incompatible with the common market. Secondly, it asserts that the contested decision breaches essential procedural requirements on account of errors in ascertaining the facts and a defective statement of reasons.

The grants awarded to SMI by the Treuhandanstalt and the BvS

14 First of all, as regards the grant of DEM 63 million awarded by the Treuhandanstalt to Synergy for the privatisation of SMI, the German Government claims that it was based on the regulatory framework for that organisation's activities and, in particular, on letter SG(92) D/17613, which the Commission sent to the German Government on 8 December 1992 ('the second Treuhandanstalt aid scheme'); in other words, this grant was based on an existing aid scheme.

15 However, in the contested decision the Commission wrongly denied that this scheme was applicable, because it made a manifestly incorrect assessment as to the existence of a privatisation. The Commission merely deduced from the fact that 49% of SMI's shares were acquired by Synergy that the Treuhandanstalt had retained control of SMI and that, as a result, the company had not been privatised. The German Government maintains that despite the fact that Synergy had acquired only a minority interest in SMI, the agreements concluded between the Treuhandanstalt and Synergy in connection with that transaction allowed Synergy to take over management of the undertaking and to acquire comprehensive rights of control over SMI.

16 The German Government adds that the administrator appointed to manage Treuhandanstalt's shares in SMI held only limited and ancillary supervisory powers. Furthermore, the Commission failed to take account of the fact that, by virtue of its 49% interest, Synergy held joint control of SMI's main activities, since under the third paragraph of Article 14 of its statutes, an 85% majority of all votes was required for decisions on key issues.

17 The German Government also claims that, in any case, the acquisition of shares by public authorities, like the Land of Brandenburg in the present case, satisfies the factual conditions for a privatisation in such a way that the privatisation of SMI took place, at the latest, when that acquisition occurred.

18 Secondly, as regards the grant of DEM 1.8 million awarded by the BvS to SMI to cover its restructuring and removal costs, the German Government notes that this expenditure was incurred because it was necessary to concentrate the undertaking's facilities into a smaller surface area following the dismantling of the old

combine. These costs were covered on the basis of letter SG(95) D/1062, which the Commission sent to the German Government on 1 February 1995 ('the third Treuhandanstalt aid scheme').

19 Thirdly, the German Government contends that the contested decision has a defective statement of reasons in so far as the Commission failed to respond to the specific argument that the acquisition of 49% of SMI's shares by Synergy, combined with the agreements concluded in connection with that transaction, satisfied the conditions for a privatisation for the purposes of the Treuhandanstalt aid schemes.

20 In this respect it should be noted, first of all, that the Court has consistently held that all derogations from the general principle, laid down in Article 87(1) EC, that State aid is incompatible with the common market must be construed narrowly (see Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 49, and Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 117).

21 Furthermore, as the Court has held, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it forms part (Case 292/82 *Merck* [1983] ECR 3781, paragraph 12, Case 337/82 *St Nikolaus Brennerei und Likörfabrik* [1984] ECR 1051, paragraph 10, Case C-156/98 *Germany* v *Commission*, cited above, paragraph 50, and Case C-334/99 *Germany* v *Commission*, cited above, paragraph 118).

22 In the present case, it is common ground that the regulatory framework for the Treuhandanstalt's activities, as adopted by the Commission, constitutes a series of derogations from the principle, laid down in Article 87(1) EC, that State aid is incompatible with the common market. By adopting those derogations, the Commission intended to simplify the task of the Treuhandanstalt, a unique body in its field, which was to restructure the undertakings of the former German Democratic Republic and to ensure their transition from a planned economy to a market economy.

23 For that reason, under the second and third Treuhandanstalt aid schemes, grants like those at issue in the present case, which constitute the most direct form of State support, were authorised only if they were awarded in connection with a privatisation of the undertaking in question.

24 It follows that, as a condition for the application of a scheme derogating from the principle, laid down in Article 87(1) EC, that State aid is incompatible with the common market, the term 'privatisation' must be construed narrowly in the context of the Treuhandanstalt aid schemes. If such an interpretation is adopted, a privatisation can be taken to exist, for the purpose of these schemes, only where a private investor acquires a proportion of the shares capable of affording him control of the undertaking in question.

25 It cannot therefore be ruled out that the acquisition of a minority interest in a public undertaking, combined with a transfer of the effective control of that undertaking, may be regarded as a 'privatisation' for the purposes of the Treuhandanstalt aid schemes.

6 However, that is not the situation in the present case. First of all, whilst it is true, as is apparent from the documents before the Court, that the acquisition of 49% of SMI's shares by Synergy was accompanied by a series of agreements, under which Synergy had inter alia obtained the right to appoint two of SMI's three managers and the chairman of SMI's supervisory board, the administrator who was responsible for managing the majority interest held by the Treuhandanstalt nevertheless had the right, under those agreements, to oppose any appointment for significant reasons.

7 Secondly, the German Government itself has noted that, under the third paragraph of Article 14 of the statutes, an 85% majority of all votes was required for decisions on key issues relating to SMI. This therefore means that a decision relating to an issue of this nature could not be taken by Synergy without the consent of the Treuhandanstalt.

8 Thirdly, as has been acknowledged by the German Government, the trustee responsible for managing the majority interest in SMI held by the Treuhandanstalt was contractually obliged to find a new industrial investor in order to achieve 'full privatisation'. Accordingly, the acquisition of 49% of SMI's shares by Synergy and the agreements concluded between Synergy and the Treuhandanstalt merely constituted a first step towards the full privatisation of SMI.

9 Fourthly, as the Commission has rightly pointed out, the transfer to the *Land* of Brandenburg of 51% of SMI's shares held by the Treuhandanstalt could not in any case constitute a privatisation for the purposes of the Treuhandanstalt aid schemes, since it was a transfer of shares in an undertaking from one State body to another.

30 In these circumstances, it must be concluded that the transactions in question did not constitute a 'privatisation' for the purposes of the second and third Treuhandanstalt aid schemes, with the result that the Commission quite rightly took the view that the grants awarded to SMI by the Treuhandanstalt and the BvS were not covered by those schemes.

31 Moreover, with regard to the complaint relating to the defective statement of reasons in the contested decision in this regard, it need only be stated that, as can be seen from paragraph 26 of the grounds of the decision, the Commission gave an adequate explanation of the reasons for which it considered that the acquisition of 49% of SMI's shares by Synergy did not constitute a privatisation.

32 It follows that the second and third pleas relied upon by the Federal Republic of Germany, in so far as they concern the grants awarded to SMI by the Treuhandanstalt and the BvS, must be rejected as unfounded.

The loans provided to SMI by the Land of Brandenburg

33 The German Government claims that since the loans totalling DEM 70.3 million made to SMI by the *Land* of Brandenburg were not granted in connection with a privatisation and since they were not therefore compatible with the common market, the Commission made an error in ascertaining the facts and an error in law. In its view, those loans were made in accordance with the second Treuhandanstalt aid scheme. The privatisation agreement included an undertaking by the *Land* of Brandenburg to provide financing of DEM 35 million to

SMI. That undertaking formed part of the privatisation agreement and a precondition for the conclusion of that agreement and it did not matter what was the State source of this financing, which was lawful under the abovementioned scheme.

64 The German Government adds that, following the acquisition by the Land of Brandenburg of the shares in SMI held by the Treuhandanstalt, the Land of Brandenburg provided an additional DEM 35.3 million as a loan, since it transpired that SMI's financial needs were greater than expected. This constitutes a privatisation agreement management measure on the part of the Land of Brandenburg, which acted in the place of the Treuhandanstalt. It follows that this loan is also lawful under the second Treuhandanstalt aid scheme. The Commission did not, however, examine the compatibility of the loan against that background.

65 In this respect, it need only be observed, first of all, that, as is clear from paragraphs 20 to 30 of this judgment, neither the acquisition of 49% of SMI's shares by Synergy nor the subsequent acquisition of 51% of those shares by the Land of Brandenburg constitutes a privatisation for the purposes of the Treuhandanstalt aid schemes.

66 Secondly, in the light of the case-law referred to in paragraphs 20 and 21 of this judgment and, more specifically, the requirement that any scheme derogating from the general principle, laid down in Article 87(1) EC, that State aid is incompatible with the common market must be construed narrowly, the scope of the Treuhandanstalt aid schemes cannot be interpreted as also covering aid granted by public bodies other than the Treuhandanstalt itself.

37 Consequently, the second and third pleas relied on by the Federal Republic of Germany, in so far as they concern the loans provided to SMI by the Land of Brandenburg, must be rejected as unfounded.

The loan of DEM 4 million provided to SiMI by the *Land* of Brandenburg

38 The German Government contends that the loan of DEM 4 million provided to SiMI by the Land of Brandenburg did not constitute State aid that was incompatible with the common market. That loan, which was granted at the market rate, 3% above the Bundesbank's discount rate, was consistent with the conditions laid down in the 'directive of the *Land* of Brandenburg on the grant of consolidation fund resources to safeguard small and medium-sized industrial undertakings'. That programme was approved by the Commission (see Authorisation for State aid pursuant to Articles [87] and [88] of the EC Treaty. Cases where the Commission raises no objections (OJ 1995 C 295, p. 24)), which means that the loan should also be regarded as aid based on an existing aid scheme.

39 In that regard, it should be observed that the legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted. A Member State therefore cannot rely on information which it failed to bring to the attention of the Commission in the course of the administrative procedure when contesting the legality of such a decision (see, inter alia, Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31, and Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 76).

40 In the present case, as the Commission has stated and the German Government has not denied, the Federal Republic of Germany did not cite the programme mentioned in paragraph 38 of the present judgment as the legal basis for the loan in question in the course of the administrative procedure that led to the contested decision. The German Government in fact mentioned such an argument for the first time in its application.

41 It follows that, in the absence of information on the legal basis for the loan of DEM 4 million provided to SiMI by the *Land* of Brandenburg that could, by definition, lead the Commission to regard that loan as forming part of an authorised aid scheme, the Commission was entitled to assess the measure in question with reference to the provisions of the Treaty alone.

42 In these circumstances, the second and third pleas relied on by the Federal Republic of Germany, in so far as they concern the loan in question, must also be rejected as unfounded.

The applicability of the derogation laid down in Article 87(2)(c) EC

43 With regard to the grant of DEM 1 million awarded to SiMI by the BvS and, in the alternative, with regard to all the disputed aid, the German Government claims that the Commission erred in law when it ruled out the applicability of the derogation laid down in Article 87(2)(c) EC without making a specific assessment in this regard. In the view of the German Government, the Commission should have assessed whether, within the meaning of that provision, the city of Frankfurt

an der Oder, which is situated on the border with Poland, was an 'area' affected by the division of Germany and whether the various measures in support of SMI and SiMI, both established in that area, were required in order to compensate for the disadvantage caused by the economic isolation of that area. If such an assessment had been properly carried out, it would inevitably have led the Commission to apply the derogation in question and, as a result, to declare the disputed aid to be compatible with the common market.

44 In addition, the German Government considers that the failure by the Commission, in the contested decision, to explain the reasons for which it did not take into consideration the derogation laid down in Article 87(2)(c) EC constitutes a defect in the statement of reasons.

45 It must be observed in this connection that under Article 87(2)(c) EC 'aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division' is compatible with the common market.

46 After the reunification of Germany that provision was not repealed either by the Treaty on European Union or by the Treaty of Amsterdam (see, inter alia, Case C-156/98 *Germany* v *Commission*, cited above, paragraph 47).

47 However, as was pointed out in paragraph 20 of the present judgment, derogations such as those provided for in Article 87(2)(c) EC from the general principle laid down in Article 87(1) EC that State aid is incompatible with the common market must be construed narrowly.

48 Furthermore, as was pointed out in paragraph 21 of the present judgment, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it forms part.

49 In addition, although, following the reunification of Germany, Article 87(2)(c) EC falls to be applied to the new *Länder*, such application can only be on the same conditions as those applicable in the old *Länder* during the period preceding the date of that reunification (Case C-156/98 *Germany* v *Commission*, cited above, paragraph 51).

50 In this case, the phrase 'division of Germany' refers historically to the establishment of the dividing line between the two occupied zones in 1948. Therefore, the 'economic disadvantages caused by that division' can only mean the economic disadvantages caused in certain areas of Germany by the isolation which the establishment of that physical frontier entailed, such as the breaking of communication links or the loss of markets as a result of the breaking off of commercial relations between the two parts of German territory (Case C-156/98 *Germany* v *Commission*, cited above, paragraph 52).

51 By contrast, the idea that Article 87(2)(c) EC permits full compensation for the undeniable economic lack of development suffered by the new Länder disregards both the nature of that provision as a derogation and its context and aims (Case C-156/98 *Germany* v *Commission*, cited above, paragraph 53).

52 The economic disadvantages suffered by the new Länder as a whole were not directly caused by the geographical division of Germany within the meaning of Article 87(2)(c) EC (Case C-156/98 *Germany* v *Commission*, cited above, paragraph 54).

53 It follows that the differences in development between the original and the new *Länder* are explained by causes other than the geographical rift caused by the division of Germany and in particular by the different politico-economic systems set up in each part of Germany (Case C-156/98 *Germany* v *Commission*, cited above, paragraph 55).

54 In the present case, the German Government has merely asserted that the city of Frankfurt an der Oder is close to the border with Poland and relied generally on the purported economic isolation of the area in which the city is situated.

55 It must therefore be concluded that the German Government has not adduced any evidence to show that the disputed aid was required in order to compensate for an economic disadvantage caused by the division of Germany.

56 Lastly, as regards the complaint relating to the defective statement of reasons for the contested decision, it must be observed that, as the Commission asserts, the German Government relied on the applicability of the derogation laid down in Article 87(2)(c) EC for the first time in its application. In addition, that decision

was adopted in a context well known to the German Government and belongs to a well-established line of decisions relating to the interpretation of that provision (Case C-156/98 *Germany* v *Commission*, cited above, paragraph 105).

57 It follows that the Commission has not failed to fulfil the obligation to state reasons provided for in Article 253 EC by not explaining the reasons for which it considered that Article 87(2)(c) EC was not applicable in the present case.

58 Consequently, the second and third pleas relied on by the Federal Republic of Germany, in so far as they concern the applicability of the derogation laid down in Article 87(2)(c) EC, must also be rejected as unfounded.

59 In these circumstances, in the light of the above considerations, the second and third pleas relied on by the Federal Republic of Germany in support of its action must be rejected.

The first and fourth pleas

60 By its first and fourth pleas, which should be examined together and which fall into five parts, the German Government claims that the recovery order in Article 3 of the contested decision is unlawful for:

— infringement of Article 87(1) EC and Article 88(2) EC, since the status of aid beneficiary was unlawfully extended because of a supposed intention to evade the repayment obligation;

— breach of the principle of the rights of the defence and of Article 88(2) EC, in so far as the recovery order is also addressed to SiMI, MD & D and other unnamed undertakings, even though the Commission did not open a specific inquiry procedure against those undertakings;

— lack of competence of the Commission to define the manner in which the national authorities must act in order to recover the unlawful aid;

— breach of essential procedural requirements, in the form of inadequate ascertainment of the facts and a defective statement of reasons in the contested decision, and

— breach of the principles of legal certainty and proportionality.

The first part

— Arguments of the parties

61 The German Government claims, first of all, that the recovery order in Article 3 of the contested decision infringes Article 87(1) EC and Article 88(2) EC, in so far as none of the undertakings mentioned therein, namely SMI, SiMI, MD & D and other unnamed undertakings, received benefits totalling DEM 140.1 million and

none of those undertakings obtained a benefit from the various measures adopted by the administrator. Making reference to those measures, the German Government claims, first of all, that SiMI did not derive any benefit from using SMI's assets, since it paid SMI a price consistent with the market price and, secondly, that MD & D did not derive any benefit from acquiring 80% of SiMI's shares and SMI's assets, since it paid SMI the market price.

62 The German Government also asserts that MD & D cannot be required to repay the aid granted to SMI simply because it had acquired assets held by that company. It would be absurd to take the view that the repayment obligation should always follow SMI's assets since, if that were the case, no one would be willing to acquire the assets, which would quite simply be doomed to destruction. It also claims that SiMI was not liquidated after its shares were sold to MD & D, but continued to exist, maintaining its rights and obligations. Consequently, any debts pertaining to the repayment of the disputed aid should therefore also remain with SiMI and MD & D cannot be held liable for those debts.

63 The German Government further denies that the operations carried out by the administrator sought to evade the obligation to repay the disputed aid. In selling SMI's assets at the market price, the administrator was not 'protecting' the company's assets, since the sum obtained from that sale was paid into the bankrupt company's assets, which are subject to the repayment obligation. This obligation was not evaded either by selling SMI's assets 'en bloc', since that produced a higher sum than would have been obtained by selling the assets in question separately, which increased the resources available for recovering the disputed aid. Moreover, even if SiMI and MD & D had not been created, no investor would have been prepared to acquire SMI, which was insolvent on account of all its debts, with the result that the administrator could do nothing but sell the company's assets at the market price.

64 Lastly, the German Government disputes the Commission's argument that the distortion of competition caused by the grant of State aid would not be eliminated if the buyer of the assets of the beneficiary undertaking continued the economic activity with those assets. In the view of the German Government, those who acquire the assets of the beneficiary undertaking at the market price do not cause any distortion of competition, because they have not obtained any abnormal benefit compared with their competitors.

65 The Commission first of all clarifies in general terms its views regarding the determination of the persons who are required to repay aid in the event of a transfer of shares in the beneficiary company (share deal) or assets held by that company (asset deal).

66 It begins by observing that no particular difficulties arise in the case of the share deal, since the beneficiary company continues to exist and only the owner changes. As is also confirmed by the Court's case-law, in these circumstances the repayment obligation continues to rest with the company that received the aid, irrespective of changes affecting the ownership of that company and any consideration given to the recovery obligation when determining the conditions for the sale of the abovementioned shares. By continuing the subsidised activity, this company continues to derive a benefit from the aid, thereby perpetuating the distortion of competition.

67 Nor are there particular difficulties in the case where the assets of the beneficiary company are transferred to undertakings in the same group. In this case, in addition to the beneficiary company, the aid in question would have to be repaid by the undertakings in the group which, because of the transfer of assets, have been able to enjoy the favourable effects stemming from the grant of that aid, thus deriving an economic advantage.

68 On the other hand, as far as the sale of the beneficiary company's assets to third companies is concerned, the Commission draws a distinction depending on whether the assets have been sold separately or 'en bloc'.

69 In cases where those assets have been sold separately, at the market price, the buyers are not required to repay the aid. Because of this separate sale, the subsidised activity disappears, which leaves scope for the beneficiary company's competitors. In this way, the recovery of aid from the seller, whether it be from the beneficiary company itself or from the assets of the bankrupt or liquidated company, makes it possible to eliminate the distortion of competition.

70 Major problems arise, on the other hand, where the assets have been sold 'en bloc' so as to allow the buyer to continue the beneficiary company's activity. In these circumstances, continuing the subsidised activity could perpetuate the distortion of competition with the result that particular caution is needed in order to prevent the transfer of the beneficiary company's assets allowing the repayment obligation to be evaded by 'protecting' those assets. In the view of the Commission, in such a case, evasion can be ruled out only where, in addition to taking place at the market price, the transfer of the beneficiary company's assets 'en bloc' is made as part of an unconditional procedure that is open to all the company's competitors. Only in this case are the buyers not required to repay the aid.

71 Having clarified its position in general terms, the Commission, referring to the present case, stresses that:

— the decisions to file for bankruptcy and to create SiMi and MD & D were taken in June and July 1997, when the German authorities certainly knew of the Commission's intention to open an inquiry procedure;

— between mid-1997 and June and July 1999, SMI's activities were continued through the leasing of its assets to SiMI. Since it did not obtain information enabling it to assess whether the lease price was consistent with market conditions, the Commission could only take the view that, during this period, SiMi and MD & D, which is its wholly-owned subsidiary, had benefited from aid that was unlawfully granted to SMI;

— on 28 June 1999, as the Commission was preparing to adopt a negative decision together with a recovery order, MD & D was sold to three of its employees and to Megaxess;

— on 14 July 1999, SiMI's shares and all SMI's assets were sold to MD & D without an open and transparent procedure having been followed.

72 In the view of the Commission, it is apparent from all these circumstances that the different transactions were coordinated in such a way that the repayment obligation fell on SMI and SiMI, whilst MD & D, free of that obligation, was allowed to continue the subsidised economic activities. The Commission therefore considers that the economic link between MD & D, on the one hand, and SMI and SiMI, on the other, was not broken, since the sole objective of the different transactions was to allow those activities to be continued, evading the recovery order. The extension of the obligation to repay the disputed aid to MD & D is thus justified.

— Findings of the Court

73 As a preliminary observation, it should be pointed out that, in accordance with Community law, when the Commission finds that aid is incompatible with the common market, it may require the Member State to recover that aid from the recipient (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 20, and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 65).

74 Removing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful and seeks to re-establish the previous situation (*Italy and SIM 2 Multimedia*, paragraph 66).

75 That purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient (Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 22) or, in other words, by the undertakings which actually benefited from it (Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 57). By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (Case C-350/93 *Commission* v *Italy*, paragraph 22).

76 Consequently, the main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded by the unlawful aid.

77 It is therefore in the light of these general findings that the lawfulness of the recovery order set out in Article 3 of the contested decision should be examined.

78 As regards the aid granted to SiMI, first of all, it should be noted that, after that aid had been granted, SiMI was sold to MD & D whilst retaining its legal personality. In other words, this was a transfer through a sale of shares, a share deal.

79 It should also be noted that, as can be seen from paragraph 44 of the grounds of the contested decision, the Commission considered that the aid in question must be recovered from MD & D, as the buyer of SiMI.

80 The Court has consistently held that where an undertaking that has benefited from unlawful State aid is bought at the market price, that is to say at the highest price which a private investor acting under normal competitive conditions was ready to pay for that company in the situation it was in, in particular after having enjoyed State aid, the aid element was assessed at the market price and included in the purchase price. In such circumstances, the buyer cannot be regarded as having benefited from an advantage in relation to other market operators (Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 77).

81 In the present case, the undertaking to which unlawful State aid was granted retains its legal personality and continues to carry out, for its own account, the activities subsidised by the State aid. Therefore, it is normally this undertaking that retains the competitive advantage connected with that aid and it is therefore this undertaking that must be required to repay an amount equal to that aid. The buyer cannot therefore be asked to repay such aid.

82 In addition, it is not disputed that the Commission did not take into consideration the price for the sale of SiMi's shares to MD & D and merely found, in paragraph 44 of the grounds of the contested decision, that 'in so far as the present decision concerns aid granted to SiMI, it should be noted that its shares were sold to MD & D on 14 July 1999. Therefore, this aid must be recovered from MD & D'.

83 It must therefore be concluded that, by ordering MD & D to repay the State aid granted to SiMI, the Commission failed to have regard to the principles governing the recovery of State aid.

84 Secondly, as regards the aid granted to SMI, it should be noted that, as can be seen from paragraphs 50 to 52 of the grounds of the contested decision, the Commission regarded SMI, SiMI, MD & D and any firm that acquired the assets of one of these three companies in order to evade the consequences of the decision as beneficiaries of that aid. In addition, at the hearing, the Commission made clear that it considers that all the companies mentioned in Article 3(3) of the contested decision are jointly and severally liable for the repayment obligation.

85 In the light of the fact that in the present case SMI has been in liquidation since bankruptcy proceedings were opened on 1 July 1997, it should be pointed out that, as follows from the case-law on bankrupt undertakings that have received aid, the re-establishment of the previous situation and the elimination of the distortion of competition resulting from the unlawfully paid aid may, in principle, be achieved by registration of the liability relating to the repayment of the aid in question in the schedule of liabilities. In accordance with this case-law, such registration would be sufficient (Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 14, and Case C-142/87 *Belgium* v *Commission ('Tubemeuse')* [1990] ECR I-959, paragraphs 60 to 62).

86 It is certainly possible that, in the event that hive-off companies are created in order to continue some of the activities of the undertaking that received the aid, where that undertaking has gone bankrupt, those companies may also, if necessary, be required to repay the aid in question, where it is established that they actually continue to benefit from the competitive advantage linked with the receipt of the aid. This could be the case, inter alia, where those hive-off companies acquire the assets of the company in liquidation without paying the market price in return or where it is established that the creation of such companies evades the obligation to repay that aid.

87 In the present case, as regards, first of all, the repayment obligation imposed on SiMI by the Commission, it is clear from paragraph 71 of the present judgment that the Commission based its assessment, first, on the fact that SiMI continued SMI's activities by leasing SMI's plant and, secondly, on the fact that it did not obtain information that allowed it to assess whether the lease price was consistent with market conditions.

88 It should be noted that the mere fact that SMI's plant was leased for a certain period by SiMI does not necessarily mean that SiMI enjoyed the competitive advantage linked with the aid granted to the lessor almost three years before the creation of the lessee. Furthermore, the German Government has asserted, and the Commission has not denied, that the lease price in question was consistent with market conditions.

89 Therefore, in so far as it orders the repayment by SiMI of the aid granted to SMI, the contested decision does not comply with the principles governing the recovery of unlawful State aid.

90 Secondly, as regards the obligation imposed on MD & D to repay the aid granted to SMI, it can be seen from the grounds of the contested decision that the Commission essentially based its assessment on the existence of an intention to evade the consequences of that decision, which, according to the Commission, objectively results from the fact that all the purchase transactions in question, the sale of MD & D to Megaxess, the sale of SiMI's shares to MD & D and the sale of SMI's assets to MD & D, were closely connected and amounted to a transfer of all the assets owned by SMI and used by SiMI to MD & D's new shareholders, in such a way as to shelter them from the recovery of the disputed aid.

91 This line of argument cannot be accepted.

92 First of all, the German Government has pointed out, and the Commission has not denied, that both the sale of SiMI's shares to MD & D and the sale of SMI's assets to MD & D were made at the market price. Consequently, these transactions did not remove resources from the bankrupt undertaking's assets.

93 Secondly, none of these transactions was carried out by SMI: they were performed on the initiative of the bankruptcy administrator who, acting under judicial supervision, was responsible for working to satisfy creditors as far as possible. As the Advocate General pointed out in point 99 of his Opinion, the Commission has shown nothing to suggest that, in this case, any actions were performed which defrauded the creditors and may have reduced the assets of the insolvent company, nor has it maintained that there was any breach of the principle of the equal ranking of creditors to the loss of the public creditors. In such a situation, if the claims in respect of recovery of the disputed aid were properly listed among the liabilities of the liquidation, the sale of SMI's assets at the market price cannot have led to any form of evasion of the obligation to recover that aid.

94 Thirdly, it is likewise not possible to accept the argument put forward by the Commission that the distortion of competition cannot be eliminated in the present case by listing the relevant claim among SMI's liabilities, since the sale of SMI's assets to MD & D was made, firstly, 'en bloc', and, secondly, without employing an open and transparent procedure, thus allowing MD & D to continue the subsidised activities.

95 Not only is this argument not included in the grounds of the contested decision as the basis for the obligation on the part of MD & D to repay the aid granted to SMI, but it follows both from those grounds and from the documents before the Court that the sale in question was supervised by a court and did not take place immediately, but was preceded by unsuccessful attempts with another American company. This information gives reason to suggest that the procedure followed was sufficiently open and transparent. In addition, the Commission has not presented any information to show that SMI's competitors complained about the lack of transparency that, in the view of the Commission, characterised the operation.

96 In the light of this information, it must be concluded that the Commission did not establish the existence of a transaction designed to evade the consequences of the contested decision which could found an obligation on the part of MD & D to repay the unlawful aid granted to SMI.

97 Consequently, in so far as it orders MD & D to repay the aid granted to SMI, the contested decision does not comply with the principles governing the recovery of unlawful State aid.

98 Lastly, as regards the extension of that repayment obligation to 'any other firm to which SMI's, SiMI's or MD & D's assets have been or will be transferred in order

to evade the consequences of this decision', it should be noted that, as is apparent from the documents before the Court, the extension of the obligation can apply only to Megaxess. In the light of the fact that in the present case neither MD & D nor SiMI can be required to repay the unlawful aid granted to SMI, this applies all the more to Megaxess, which in fact merely acquired 80% of the shares in MD & D.

99 In the light of all the above considerations, the first part of the first and fourth pleas relied on by the Federal Republic of Germany should be upheld and the contested decision annulled in so far as it orders the recovery of aid granted to SMI from undertakings other than SMI and the recovery of aid granted to SiMI from undertakings other than SiMI.

100 In these circumstances, it is not necessary to consider the other parts of the first and fourth pleas.

Costs

101 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, under the first paragraph of Article 69(3), the Court may order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads. Since the Federal Republic of Germany and the Commission have been partially unsuccessful in their pleas, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Annuls Commission Decision 2000/567/EC of 11 April 2000 on the State aid implemented by the Federal Republic of Germany for System Microelectronic Innovation GmbH, Frankfurt an der Oder (Brandenburg) in so far as it orders the recovery of the aid granted to System Mikroelectronic Innovation GmbH from undertakings other than that undertaking and the recovery of aid granted to Silicium Mikroelektronik Integration GmbH from undertakings other than that undertaking;**

2. **Dismisses the remainder of the action;**

3. **Orders the Federal Republic of Germany and the Commission of the European Communities to bear their own costs.**

Skouris Gulmann Puissochet

Schintgen Colneric

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass V. Skouris

Registrar President