JUDGMENT OF THE COURT (First Chamber)

17 September 2009*

In Case C-520/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 21 November 2007,

Commission of the European Communities, represented by K. Gross and B. Martenczuk, acting as Agents, with an address for service in Luxembourg,

applicant,

the other party to the proceedings being:

MTU Friedrichshafen GmbH, represented by Th. Lübbig and M. le Bell, Rechtsanwälte,

applicant at first instance,

* Language of the case: German.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano (Rapporteur), A. Borg Barthet, E. Levits and J.-J. Kasel, Judges,

Advocate General: V. Trstenjak,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General at the sitting on 19 February 2009,

gives the following

Judgment

1 By its appeal, the Commission of the European Communities requests the Court to set aside the judgment of the Court of First Instance of the European Communities of 12 September 2007 in Case T-196/02 *MTU Friedrichshafen* v *Commission* [2007] ECR II-2889 ('the judgment under appeal'), by which that court annulled Article 3(2) of Commission Decision 2002/898/EC of 9 April 2002 on the State aid implemented by Germany for SKL Motoren- und Systembautechnik GmbH (OJ 2002 L 314, p. 75; 'the decision at issue'), in so far as it orders the recovery jointly and severally from MTU Friedrichshafen GmbH ('MTU') of the amount of EUR 2.71 million.

Legal context

2 Article 10 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] EC (OJ 1999 L 83, p. 1; 'the regulation') provides:

'1. Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.

2. If necessary, it shall request information from the Member State concerned. Article 2(2) and Article 5(1) and (2) shall apply *mutatis mutandis*.

3. Where, despite a reminder pursuant to Article 5(2), the Member State concerned does not provide the information requested within the period prescribed by the Commission, or where it provides incomplete information, the Commission shall by decision require the information to be provided (hereinafter referred to as an "information injunction"). The decision shall specify what information is required and prescribe an appropriate period within which it is to be supplied.'

3 Article 13(1) of the regulation states:

'The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7. If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.'

4 Finally, Article 14 of the regulation provides:

‘1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a “recovery decision”. The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

…’

Background to the dispute

5 By letter of 9 April 1998, the German authorities notified the Commission of a number of payments of financial aid, granted through the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (the federal body responsible for special tasks connected with German reunification) (‘the BvS’), to SKL Motoren- und Systemtechnik GmbH (‘SKL-M’), an undertaking which manufactures engines for ships and boats, in relation to its restructuring.

6 From 1997, SKL-M and MTU Friedrichshafen GmbH (‘MTU’), operating in the sector of production of high-powered diesel engines, entered into contractual relations, with a view to MTU taking over SKL-M.

7 In particular, on 5 November 1997, two agreements were entered into between MTU and SKL-M. The first agreement gave MTU an option to purchase shares in SKL-M, whereas the second agreement (the Wechselseitiger Lizenz- und Kooperationsvertrag zwischen SKL-M und MTU,‘the WLKV’), for the creation of a joint-venture, laid down the framework of rules on the joint use of the two undertakings’ know-how, as well as in relation to studies on, the manufacture and sale of two new types of engine.

8 On 15 June 2000, in accordance with clause 5 of the latter agreement, MTU was granted exclusive use of the know-how of SKL-M falling within the WLKV with regard to third parties, including the industrial property rights and applications for registration of those rights which existed at that date. In return for that right, SKL-M received a payment intended to cover the development costs incurred, amounting to a total of DEM 6.71 million (EUR 3.43 million).

9 By letter of 8 August 2000, the Commission informed the German authorities of its decision to initiate the formal investigation procedure provided for in Article 88(2) EC (OJ 2001 C 27, p. 5), inviting interested parties to submit their observations. In that letter, the Commission also asked the German authorities whether MTU had benefited from the aid granted to SKL-M or whether it was likely to benefit from it in the future.

10 On 1 September 2000, insolvency proceedings were initiated against SKL-M.

11 By various letters in 2000 and 2001, the Federal Republic of Germany sent the Commission its observations on the decision to initiate the formal investigation procedure.

12 Since it was not satisfied with those answers, the Commission invited the German authorities, by letter of 19 September 2001, to provide the information necessary to assess the compatibility with the common market of the aid granted to SKL-M, pursuant to Article 10 of the regulation. In its letter, the Commission observed, in particular, that the information at its disposal did not enable it to ascertain whether a part of the aid awarded to SKL-M had been used in MTU's interests rather than in those of SKL-M, or to establish whether MTU had exercised the option provided for in the WLKV to acquire the know-how developed by SKL-M for a price which did not reflect its current or expected market value. On 9 November 2001, the Commission also pointed out that, in the absence of this information, it would adopt a final decision on the basis of the information in its possession, in accordance with Article 13(1) of the regulation.

13 By letters of 23 January, 26 February and 11 March 2002, the German authorities replied to the information injunction. On 5 March 2002, they also sent the Commission certain observations sent by MTU on 1 October and 21 November 2001 to the BvS regarding the use of the know-how and the price paid to SKL-M under the WLKV.

14 On 9 April 2002, the Commission adopted the decision at issue in which it found, first, that the restructuring aid paid to SKL-M did not satisfy the conditions in the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12) and, second, took the view that the Federal Republic of Germany had not provided sufficient information to enable the Commission to rule out the possibility that MTU had benefited indirectly by way of the WLKV from the aid which had been granted to SKL-M for loss cover during the restructuring period.

15 In that regard, the Commission noted, in particular, that the purchase price of the know-how paid by MTU to SKL-M, calculated on the basis of the development costs estimated in 1997, turned out to be DEM 5.30 million less than the actual development costs incurred by SKL-M.

16 Since the German authorities had not provided any objective information on the actual or expected market value of the know-how, the Commission found that the restructuring aid granted to SKL-M could have at least partly covered the losses resulting from the development of the know-how which might have been used in the interests of MTU rather than in the interests of SKL-M. The latter, being State-controlled, thus had to assume a cost risk that was not in line with the market economy investor principle. Consequently, according to recital 86 in the preamble to the contested decision, the transfer of know-how could thus rank as a transfer to MTU of State resources amounting to DEM 5.30 million.

17 Therefore, the Commission found that the State aid which the German authorities granted to SKL-M, amounting to DEM 67.017 million (EUR 34.26 million), was incompatible with the common market, and that of the total amount which must be recovered by the German authorities, DEM 5.30 million (EUR 2.71 million) had to be recovered jointly and severally from SKL-M and MTU (Article 3(2) of the decision at issue).

18 On 28 June 2002, MTU brought an action before the Court of First Instance for annulment of the contested decision.

The judgment under appeal

19 In support of its action for annulment, MTU essentially raised two pleas in law alleging, respectively, defective reasoning and errors of law in relation to the existence of the constituent elements of State aid in its favour, the erroneous application of Article 13(1) of the regulation and the infringement of the procedural safeguard requiring a correct and impartial assessment of the facts.

20 The Court of First Instance began by examining the second plea in law. In the context of that analysis it noted, first of all, in paragraphs 39 to 45 of the judgment under appeal, that the Commission had complied with the procedural requirements laid down in Article 10(3) and Article 13(1) of the regulation, necessary to be able to adopt the contested decision on the basis of the information available.

21 However, it stated in paragraph 46 of the judgment under appeal that Article 13(1) of the regulation does not allow the Commission to impose on a particular undertaking an obligation to repay, even jointly and severally, a fixed part of the amount of the aid declared to be incompatible, where the transfer of State resources from which that undertaking benefited is hypothetical.

22 In paragraph 48 of the judgment under appeal, the Court of First Instance found that the obligation imposed by Article 3(2) of the decision at issue to make repayment jointly and severally was based, in the present case, on assumptions that the information available to the Commission allowed it neither to confirm nor rebut. In particular, in paragraph 47 of that judgment, the Court of First Instance stated that, in recital 88 in the preamble to the decision at issue, the Commission merely found that 'on the basis of the information available, it could not be ruled out' that MTU had benefited from a transfer of resources by SKL-M, when the know-how was acquired on conditions deemed to be favourable.

23 The Court of First Instance also stated, in paragraph 50 of the judgment under appeal, that imposing on a given undertaking an obligation to repay jointly and severally part of the aid, on the basis of Article 13(1) of the regulation, is not in any way a logical consequence of the implementation of the procedure laid down by the EC Treaty in relation to State aid, because 'the State providing the aid which is ordered to be recovered is, in any event, under an obligation to require recovery from the actual beneficiaries under the Commission's supervision, without it being necessary to name those beneficiaries expressly in the recovery decision and, a fortiori, to specify the amount of the sums which must be repaid by each beneficiary'.

24 In the light of those considerations, and without examining the first plea in law, the Court of First Instance annulled Article 3(2) of the contested decision in so far as it ordered the recovery jointly and severally from MTU of part of the aid granted to SKL-M.

Forms of order sought

25 By its appeal, the Commission claims that the Court should:

— set aside the judgment under appeal;

— give a final decision in the case and dismiss the application for annulment as unfounded;

— order MTU to bear the costs of the appeal proceedings and those of the proceedings at first instance.

26 MTU contends that the Court should:

— declare the appeal inadmissible;

— in the alternative, dismiss it as unfounded;

— order the Commission to pay the costs.

The appeal

27 In support of its appeal the Commission raises two grounds of appeal alleging errors of law made by the Court of First Instance in its interpretation of Articles 13(1) and 14(1) of the regulation.

The first ground of appeal

— Arguments of the parties

28 By its first ground of appeal, the Commission claims that, in paragraphs 46 to 51 of the judgment under appeal, the Court of First Instance erred in law in assuming that a decision adopted solely on the basis of the information available, within the meaning of Article 13(1) of the regulation, could not serve as a basis for the identification of the actual beneficiary of the aid, from which the reimbursement of that aid must be claimed.

29 In that regard, there is no basis for such an interpretation in the wording of the regulation and, in particular, in Articles 13(1) and 14(1) thereof.

30 The 'recovery decision' referred to in Article 14(1) forms an integral part of the negative decision which may be adopted on the basis of the information available in cases of unlawful aid.

31 In the Commission's view, the contrary interpretation proposed by the Court of First Instance would also have harmful consequences. First, it would not ensure an effective control of State aid at the Community level, the main objective of which, as confirmed by the 13th recital in the preamble to the regulation, is precisely to eliminate the distortion of competition caused by unlawful aid by recovering immediately sums unlawfully received. Second, such an interpretation would have the consequence of stripping the Commission of the majority of its 'means of exercising pressure' in the field, and would thus risk severely harming the effectiveness of the aid recovery procedure by favouring less cooperative Member States.

32 According to MTU, this ground of appeal is inadmissible in so far as the Commission is contesting an assertion which the Court of First Instance has not even made.

33 In any event, MTU contends that, since the German authorities duly sent all of the information requested, the Commission infringed the rules of procedure in place for the adoption of a decision under Article 13(1) of the regulation. It is thus unnecessary to give judgment on the secondary issue, namely whether the Commission can, in principle, base its decision regarding the identification of the beneficiary of the aid at issue on the information available.

— Findings of the Court

34 It should be held at the outset that this ground of appeal is based on an incorrect reading of the relevant paragraphs of the judgment under appeal.

35 Contrary to what the Commission submits, it is not apparent from the relevant paragraphs of the judgment under appeal that the Court of First Instance held, in a

general manner, that a decision based on Article 13(1) of the regulation may not be used to identify the actual beneficiary or beneficiaries of the support measure at issue and, consequently, to order its recovery.

36 On the contrary, in paragraph 45 of the judgment under appeal, the Court of First Instance clearly affirmed the principle that 'where the Member State concerned does not provide the Commission with the information requested, the Commission may take a decision that the aid is incompatible on the basis of the information available and, if appropriate, order the Member State concerned to recover the aid from the beneficiaries in accordance with Article 14 of Regulation No 659/1999'.

37 The true position is, as is apparent from paragraphs 46 to 51 of the judgment under appeal, that it is only in taking account of the particular circumstances of the case, and in particular of the fact that, in the Court of First Instance's view, the Commission's decision was based on mere hypotheses, that the Court found in paragraph 51 of that judgment that, in the circumstances, 'the Commission could not legitimately rely on Article 13(1) of Regulation No 659/1999 to impose on MTU, pursuant to the contested decision, an obligation to repay jointly and severally a part of the aid granted to SKL-M'.

38 Consequently, the first ground of appeal must be rejected as unfounded.

The second ground of appeal

— Arguments of the parties

39 By its second ground of appeal, the Commission submits that the Court of First Instance erred in law in wrongly supposing that the decision at issue was based on a

mere hypothesis which did not meet the requirements applicable to decisions adopted on the basis of the information available within the meaning of Article 13(1) of the regulation.

40 First, the Commission submits that, contrary to what was found at first instance, it is not possible to require complete certainty when making decisions on the basis of the information available.

41 Article 13(1) of the regulation expressly empowers the Commission to adopt a decision on the basis of the 'information available' when, in spite of sending a request for information in compliance with all the required formalities, it has not obtained the relevant information from the national authorities. In such a situation, it is therefore possible for the information available to remain incomplete and fragmented, while none the less constituting a sufficient basis for the assumption made by the Commission. That is also apparent, *a contrario*, from the case-law, according to which the Commission may rely on the fragmented or incomplete information at its disposal only if it has sent a request for information to the Member State in question (Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR II-1173, paragraph 29).

42 Second, the Commission criticises the Court of First Instance for having categorised the information at its disposal as 'a mere hypothesis', since the information enabling it to assume that part of the aid had been provided to MTU was based on solid evidence, stemming, inter alia, from an opinion of the liquidator of SKL-M, as is apparent from recitals 79 to 86 in the preamble to the decision at issue.

43 According to MTU, the second ground of appeal is inadmissible since, in part, it does no more than challenge the assessment of the facts made by the Court of First Instance and, in part, merely makes general legal observations bearing no direct link with the present case.

44 As regards the substance, MTU essentially submits that the Court of First Instance was correct to find, first, that mere hypotheses are not a sufficient basis for an order for recovery and, second, that, in the circumstances of the case, the Commission actually based its findings on such hypotheses, both in respect of the existence of an advantage in favour of MTU and the amount thereof.

45 According to MTU, the Commission did not possess any reliable information enabling it to justify an order for recovery against MTU. In its view, the Commission thus based its findings on a hypothesis resulting from a superficial and biased examination of the information at its disposal, which also included detailed observations from MTU showing that the latter had not benefited from any advantage since all the contractual provisions linking the two companies had been concluded on the basis of the market conditions.

— Findings of the Court

46 As regards, first, the admissibility of this ground of appeal, it is clear from Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice that an appeal is limited to points of law and must be based on grounds of lack of jurisdiction of the Court of First Instance, breach of procedure before it which adversely affects the interests of the applicant, or infringement of Community law by the Court of First Instance (see, to that effect, inter alia Case C-284/98 P *Parliament* v *Bieber* [2000] ECR I-1527, paragraph 30; order in Case C-420/04 P *Gouvras* v *Commission* [2005] ECR I-7251, paragraph 48; and order of 20 March 2007 in Case C-323/06 P *Kallianos* v *Commission*, paragraph 10).

47 Contrary to what MTU claims, this ground of appeal does not merely call into question the assessment of the facts made at first instance, but also disputes the interpretation of Article 13(1) of the regulation made by the Court of First Instance of the conditions governing the adoption of a decision on the basis of the information available, within the meaning of that provision, in considering that a Commission decision based on a

hypothesis, such as that which the Court of First Instance held to exist in the case before it, did not meet those conditions. Consequently, such a dispute concerns a question of law.

48 It follows that the ground of appeal is admissible in so far as it is directed against the interpretation made by the Court of First Instance of the requirements to which the adoption of a decision on the basis of Article 13(1) of the regulation is subject.

49 By contrast, the arguments raised by the Commission seeking to call into question the assessment of the evidence made by the Court of First Instance, accusing the latter of not having taken account of certain information mentioned in the decision at issue, are inadmissible.

50 Such an assessment is subject to review by the Court of Justice only where the facts and evidence put before the Court of First Instance have been distorted, but such distortion has not been shown or alleged by the Commission in the present case (see, to that effect, inter alia Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 49; and Case C-206/04 P *Mülhens* v *OHIM* [2006] ECR I-2717, paragraph 28).

51 Second, as regards the question whether this ground of appeal is well founded, it should be pointed out, first of all, that contrary to what the Commission claims, the Court of First Instance did not require in any way that the Commission be completely certain before adopting a decision on the basis of Article 13(1) of the regulation.

52 It is apparent from a reading of paragraphs 46 to 48 of the judgment under appeal that the Court of First Instance, far from requiring such a level of certainty, simply found that the decision at issue was adopted on the basis of a mere hypothesis, which was neither confirmed nor rebutted by the information at the Commission's disposal, since

the latter found merely that there was a lack of evidence enabling it to be ruled out that MTU benefited from a transfer of State resources.

53 By proceeding in that manner, the Court of First Instance did not err in law.

54 It is admittedly true that Article 13(1) of the regulation, codifying settled case-law (see, in particular, Case C-301/87 *France* v *Commission* [1990] ECR I-307 *'Boussac Saint-Frères'* paragraph 22; Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 18; and *Germany and Pleuger Worthington* v *Commission*, paragraph 26), empowers the Commission, once it finds that aid has been granted or altered without notification, to adopt a decision on whether the aid is compatible or not with the common market on the basis of the information available, where it is faced with a Member State which does not fulfil its duty to cooperate and has not provided the Commission with the information requested. Furthermore, if appropriate, such a decision may, under the conditions laid down in Article 14 of the regulation, call for the recovery of the amount of the aid which has already been paid.

55 However, as also suggested by the Advocate General in point 50 of her Opinion, that possibility which is granted to the Commission cannot be interpreted as releasing that institution entirely from the obligation to base its decisions on reliable and coherent evidence to support the conclusions which it arrives at.

56 Thus, in a case like the one at hand, the Commission is, at the very least, required to ensure that the information at its disposal, even if incomplete and fragmented, constitutes, as it indeed acknowledges in its appeal, a sufficient basis on which to conclude that an undertaking has benefited from an advantage amounting to State aid.

57 Such considerations are even more relevant where the Commission orders, as in the present case, the recovery of the aid from the beneficiary, since the very aim of such reimbursement is to eliminate the distortion of competition brought about by a certain competitive advantage and, thus, to re-establish the status quo before the aid was granted (see, to that effect, inter alia Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 66, and Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraphs 74 to 76).

58 It follows from the principles set out in the preceding paragraphs that the Commission cannot assume that an undertaking has benefited from an advantage constituting State aid solely on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no other evidence capable of positively establishing the actual existence of such an advantage.

59 As pointed out in paragraph 52 above, it is precisely in the light of the fact that the decision at issue was based on such a presumption, that the Court of First Instance considered that that decision could not properly be based on Article 13(1) of the regulation.

60 In the light of the above, the second ground of appeal must be rejected as being partly inadmissible and partly unfounded.

61 Since neither of the two grounds of appeal raised by the Commission in support of its appeal can be upheld, the appeal must be dismissed in its entirety.

Costs

62 According to the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs.

63 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

64 Since MTU has applied for costs and the Commission has been unsuccessful in its pleadings, the Commission must be ordered to pay the costs of the present proceedings.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders the Commission to pay the costs.

[Signatures]