JUDGMENT OF THE COURT
20 March 1997 *

In Case C-24/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesverwaltungsgericht for a preliminary ruling in the proceedings pending before that court between

Land Rheinland-Pfalz

and

Alcan Deutschland GmbH,

in the presence of the **Oberbundesanwalt beim Bundesverwaltungsgericht,**

on the interpretation of Articles 92 and 93(3) of the EC Treaty with regard to the obligation of national authorities to recover unlawful State aid where national rules protecting the recipient of aid give rise to difficulties,

* Language of the case: German.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, J. C. Moitinho de Almeida and J. L. Murray (Presidents of Chambers), P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur), H. Ragnemalm and M. Wathelet, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Land Rheinland-Pfalz, by Professor Siegfried Magiera, Hochschule für Verwaltungswissenschaften, Speyer,

— Alcan Deutschland GmbH, by Reiner Kurschat, of the Frankfurt-am-Main Bar,

— the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry for Economic Affairs, and Gereon Thiele, Assessor at the same Ministry, acting as Agents,

— the Austrian Government, by Franz Cede, Botschafter at the Federal Ministry for Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by Anders Jessen and Paul Nemitz, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Land Rheinland-Pfalz, represented by Professor Siegfried Magiera and Monika Hentges-Krätzer, Ministerialrätin at the Federal Ministry for Economic Affairs, Communications, Agriculture and Wine-growing of the Land Rheinland-Pfalz; Alcan Deutschland GmbH, represented by Reiner Kurschat; of the French Government, represented by Jean-Marc Belorgey, Head of Mission at the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by Paul Nemitz, at the hearing on 10 September 1996,

after hearing the Opinion of the Advocate General at the sitting on 12 November 1996,

gives the following

Judgment

1 By order of 28 September 1994, which was received at the Court on 2 February 1995, the Bundesverwaltungsgericht (Federal Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Articles 92 and 93(3) of the EC Treaty with regard to the obligation of national authorities to recover unlawful State aid where national rules protecting the recipient of aid give rise to difficulties.

2 The questions were raised in the course of a dispute between Land Rheinland-Pfalz and Alcan Deutschland GmbH (hereinafter 'Alcan').

3 Between 1979 and 1987 Alcan operated an aluminium plant in Ludwigshafen which was threatened by closure in 1982 as a result of a substantial rise in the cost of electricity. After Alcan had indicated that it intended to shut down the plant and

terminate the contracts of 330 employees, the Rheinland-Pfalz Government proposed to pay Alcan transitional aid of DM 8 million to compensate for electricity costs.

4 After learning of the proposed aid from the press, the Commission sent a telex to the Federal Government on 7 March 1983 requesting information.

5 Land Rheinland-Pfalz granted the first tranche of aid, amounting to DM 4 million, by decision of 9 June 1983.

6 The Federal Government confirmed the intention of Land Rheinland-Pfalz to grant aid in a telex to the Commission of 25 July 1983, and provided additional details in response to a supplementary request for information from the Commission of 3 August.

7 On 7 November 1983 the Commission acknowledged receipt of the information from the Federal Government, and stated that the 30-day period for examining the proposed aid therefore began to run on 11 October 1983. By a telex dated 24 November 1983, received by the Commission on 28 November 1983, the German Government informed the Commission that, since the prescribed period had expired, it presumed that the transitional aid could be paid.

8 By a letter of 25 November 1983 the Commission informed the Federal Government that it had decided to open the procedure under the first paragraph of Article 93(2) of the EEC Treaty.

9 Land Rheinland-Pfalz was informed of this on 28 November 1983. Nevertheless, by a decision of 30 November 1983, it paid Alcan the remaining DM 4 million of aid.

10 On 13 December 1983 Alcan was informed by the national authorities that the aid had not been notified to the Commission.

11 By Decision 86/60/EEC of 14 December 1985 on aid which Land Rheinland-Pfalz of the Federal Republic of Germany has provided to an undertaking producing primary aluminium situated in Ludwigshafen (OJ 1986 L 72, p. 30), the Commission found the aid granted to Alcan to be illegal, having been granted in breach of Article 93(3) of the Treaty, and incompatible with the common market under Article 92 of the Treaty; it accordingly ordered its recovery. Alcan was informed of that decision on 15 January 1986.

12 Neither the German Government nor Alcan has contested Decision 86/60.

13 On 12 February and 21 April 1986 the Federal Government informed the Commission that there were substantial political and legal obstacles to the recovery of the aid. By letter of 27 June 1986 the Commission insisted on the recovery, and since the time-limit for bringing an action challenging Decision 86/60 had expired, it lodged an application under the second paragraph of Article 93(2) of the EEC Treaty.

14 In its judgment of 2 February 1989 in Case 94/87 *Commission* v *Germany* [1989] ECR 175, the Court held that Germany had failed to fulfil its obligations under the Treaty by not complying with Decision 86/60.

15 By a decision of 26 September 1989, Land Rheinland-Pfalz revoked the decisions of 9 June and 30 November 1983 granting the aid and demanded repayment of the sums paid out. Alcan brought an action for the annulment of that decision, which succeeded before the Verwaltungsgericht (Administrative Court) Mainz. An appeal to the Oberverwaltungsgericht (Higher Administrative Court) Rheinland-Pfalz having been dismissed, Land Rheinland-Pfalz appealed on a point of law to the Bundesverwaltungsgericht, which made this reference.

16 In opposing recovery, Alcan relies on Paragraph 48 of the Verwaltungsverfahrensgesetz (Law on Administrative Procedure applicable in the Land pursuant to Article 1(1) of the Landesverwaltungsverfahrensgesetz, hereinafter the 'VwVfG'), which provides:

'(1) An unlawful administrative measure, even after it is no longer open to challenge, may be revoked, wholly or in part, with prospective or retrospective effect. An administrative measure which has founded or confirmed a right or a legally material advantage (administrative measure granting a benefit) may be revoked only subject to the restrictions of subparagraphs (2) and (4) hereof.

(2) An unlawful administrative measure which grants a non-recurring or continuous monetary payment or a divisible payment in kind or forms the basis thereof, may not be revoked, in so far as the beneficiary has relied upon the administrative measure's being maintained in force and that expectation, weighed against the public interest in revocation, requires protection. Expectation in general requires protection where the beneficiary has used the benefits granted or has made some disposition of them affecting his resources which he either cannot reverse or can reverse only by incurring unreasonable disadvantages. The beneficiary cannot rely on expectation where he

1. has secured the administrative measure by intentional deception, threats or corrupt practices;

2. has secured the administrative measure by giving information which was incorrect or incomplete in a material respect;

3. knew, or did not know as a result of gross negligence, that the administrative measure was unlawful.

In the circumstances referred to in sub-subparagraph 3 hereof the administrative measure shall in general be revoked with retroactive effect. In so far as the administrative measure has been revoked, payments already made thereunder shall be reimbursed. As to the amount of restitution, the provisions of the Bürgerliches Gesetzbuch (Civil Code) relating to the restitution of unjust enrichment shall apply so far as relevant. If the conditions mentioned in sub-subparagraph 3 hereof are satisfied the person liable to make the restitution cannot plead loss of the enrichment if he knew, or did not know as a result of gross negligence, the circumstances leading to the illegality of the administrative measure. The amount of restitution shall be determined by the authority at the time of the revocation of the administrative measure.

,...

(4) If the authority receives knowledge of facts justifying the revocation of an unlawful administrative measure, revocation shall be permissible only within a period of one year from the time at which such facts came to its notice, save in the circumstances referred to in the third sentence of subparagraph (2) hereof, sub-subparagraph 1.

...'

17 The national court considers that, on the basis of those provisions, the appeal should be dismissed. First, the time-limit referred to in the first part of Paragraph 48(4) of the VwVfG has expired, since the aid was found to be unlawful by

Decision 86/60, dated 14 December 1985, or at the latest in the Commission's letter of 27 June 1986, and revocation of the measure took place only on 26 September 1989. National law therefore precludes such revocation. However, Community law could restrict the provisions of national law, in particular where the time-bar has been used for an improper purpose by the administration in order to prevent the recovery required by Community law. The Bundesverwaltungsgericht refers in this connection to the Court's judgment in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* v *Germany* [1983] ECR 2633, from which it follows that where unduly paid aid must be recovered, first, national law must be applied in such a way that the recovery of sums unlawfully granted is not rendered practically impossible, and, secondly, the interests of the Community must be taken fully into consideration.

18 The Bundesverwaltungsgericht then states that the recipient of aid may, under domestic law, challenge revocation of aid where the discretionary powers of the State authorities have been exercised unlawfully. Those conditions are probably satisfied in the case at issue, inasmuch as the aid was practically imposed on Alcan in order to safeguard jobs during a period preceding important elections. Land Rheinland-Pfalz is thus responsible for the illegality of the decision to grant aid to such an extent that the plea of misuse of powers would, under domestic law, prevent revocation of the said decision. However, application of the principles set out in *Deutsche Milchkontor*, cited above, could lead to a different assessment at Community level.

19 Lastly, the Bundesverwaltungsgericht points out that, under national law, Alcan can also rely on the fact that the gain has ceased to exist, pursuant to Paragraph 48(2), sixth and seventh sentences, of the VwVfG, read in conjunction with Paragraph 818(3) of the German Civil Code, which provides that the obligation to repay or compensate is excluded where it appears that the recipient is no longer enriched.

20 In those circumstances, the Bundesverwaltungsgericht referred to the Court of Justice for a preliminary ruling the following questions:

'1. Is the competent authority obliged, by reason of the requirement to apply national law in such a way that "the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration", to revoke, in accordance with a final, binding decision of the EC Commission ordering recovery, the aid decision in question even if the authority has allowed the preclusive time-limit which exists for that purpose under national law in the interest of legal certainty to elapse?

2. If the reply to Question 1 is in the affirmative:

Is the competent authority obliged, by reason of the abovementioned requirement, to revoke, in accordance with a final, binding decision of the EC Commission ordering recovery, the aid decision in question even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient?

3. If the reply to Questions 1 and 2 are in the affirmative:

Is the competent authority obliged, by reason of the abovementioned requirement, to demand, in accordance with a final, binding decision of the EC Commission ordering recovery, the repayment of the aid which was granted even if such demand is excluded by national law because the gain no longer exists and in the absence of bad faith on the part of the recipient of the aid?'

21 The three questions concern the interpretation of Community law with regard to certain national rules of procedure applicable to the recovery, required by a

decision of the Commission, of State aid granted unlawfully and declared incompatible with the common market. It is therefore appropriate to recapitulate first the rules of Community law on the matter.

22 Article 93(2) of the Treaty provides that if the Commission finds that aid granted by a State or through State resources is not compatible with the common market it is to decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. Where, contrary to the provisions of Article 93(3), the proposed aid has already been granted, the decision may take the form of an order to the national authorities to recover the aid (Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 24, and Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 78).

23 The purpose of the obligation of States to abolish aid regarded by the Commission as incompatible with the common market is to re-establish the previously existing situation (see *inter alia* Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 26).

24 In principle the recovery of aid must take place in accordance with the relevant procedural provisions of national law, subject however to the proviso that those provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 61; Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 12; the same applies as regards recovery of Community aid, see *Deutsche Milchkontor*, cited above). In particular, the interests of the Community must be taken fully into consideration in the application of a provision which requires the various interests involved to be weighed up before a defective administrative measure is withdrawn (Case 94/87 *Commission* v *Germany*, cited above, paragraph 12).

25 In that connection, although the Community legal order cannot preclude national legislation which provides that the principles of the protection of legitimate expectations and legal certainty are to be observed with regard to recovery, it must be noted that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed (Case C-5/89 *Commission* v *Germany*, cited above, paragraphs 13 and 14, and Case C-169/95 *Spain* v *Commission*, [1997] ECR I-135, paragraph 51).

26 The questions referred by the national court must be answered in the light of those considerations.

Question 1

27 By its first question, the national court is asking, essentially, whether the competent authority is obliged to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering its recovery, even if the authority has allowed the time-limit which exists for that purpose under national law in the interest of legal certainty to elapse.

28 The national court considers that the date from which that period began to run was the date on which the Commission decision declaring the aid incompatible with the common market and requiring recovery was adopted or, at the latest, the date on which the Commission repeated that demand in a letter addressed to the Member State.

29 Land Rheinland-Pfalz, the German and Austrian Governments and the Commission consider that the requirement that account must be taken of Community interests, as stated in *Deutsche Milchkontor*, cited above, must prevail over the application of such a time-limit. Alcan, however, considers that legal certainty, which the setting of such a time-limit serves to ensure, is a fundamental principle which Community law must safeguard, as do the national legal orders. Unlawful State aid should therefore cease to be recoverable on the expiry of such a time-limit.

30 It appears from the file on the case that the aid was paid without prior notification to the Commission, so that it was unlawful under Article 93(3) of the Treaty. The first tranche was paid on 9 June 1983, without prior advice to the Commission, and the second on 30 November 1983, after the Commission's letter of 25 November 1983 informing the Federal Government that the grant of the first tranche had been unlawful and that the second tranche should not be paid.

31 In accordance with the principle set out in paragraph 25 of this judgment, the recipient of aid could not, therefore, have had at that time a legitimate expectation that its grant was lawful.

32 Decision 86/60, which found the aid incompatible with the common market and expressly and unconditionally ordered the sums paid out to be recovered, was adopted on 14 December 1985 and Alcan knew of the decision by 15 January 1986 at the latest.

33 It is also clear from the file that the national administration allowed the one-year time-limit provided for in national law which began to run from the date on which it became aware of the Commission's decision to elapse.

34 It must be noted that where State aid is found to be incompatible with the common market, the role of the national authorities is, as the Advocate General stated in point 27 of his Opinion, merely to give effect to the Commission's decision. The authorities do not, therefore, have any discretion as regards revocation of a decision granting aid. Thus, where the Commission, in a decision which has not been the subject of legal proceedings, orders the recovery of unduly paid sums, the national authorities are not entitled to reach any other finding.

35 Where the national authorities nevertheless allow the time-bar provided for in national law in respect of revocation of the decision granting the aid to come into effect, that situation cannot be treated in the same way as the situation where a trader does not know whether the competent administrative authorities are going to reach a decision, and where the principle of legal certainty requires that such uncertainty be brought to an end after a certain period has elapsed.

36 Since the national authorities have no discretion in the matter, the recipient of unlawfully granted aid ceases to be in a state of uncertainty once the Commission has adopted a decision finding the aid incompatible with the common market and requiring recovery.

37 The principle of legal certainty cannot therefore preclude repayment of the aid on the ground that the national authorities were late in complying with the decision requiring such repayment. If it could, recovery of unduly paid sums would be rendered practically impossible and the Community provisions concerning State aid deprived of effectiveness.

38 The answer to Question 1 must therefore be that Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the authority has allowed the time-limit laid down for that purpose under national law in the interest of legal certainty to elapse.

Question 2

39 By its second question the national court asks essentially whether the competent authority is obliged to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering its recovery, even if that authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient.

40 Land Rheinland-Pfalz, the German and Austrian Governments and the Commission consider that that question also calls for a reply in the affirmative; Alcan, however, claims in particular that the circumstances of the case in the main proceedings were highly exceptional, since the national authorities had practically compelled it to accept the aid in order to prevent its closure. Accordingly, an objection based on good faith, in a very specific case, would not have the effect of automatically or nearly always preventing the implementation of Community law.

41 Without its being necessary to examine the conduct of the German authorities in the case at issue in the main proceedings, which is a task for the national courts alone and not for the Court in the context of proceedings under Article 177 of the Treaty, it must be stated that, as is clear from paragraphs 30 and 31 of this judgment, the recipient of the aid cannot claim that it had a legitimate expectation that the aid was lawful. The recipient's obligation to ensure that the procedure set out in Article 93(3) of the Treaty has been complied with cannot, in fact, depend on the conduct of the State authorities, even if the latter were responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith.

42 In circumstances such as those in the main proceedings, failure to revoke the decision granting aid would seriously and adversely affect the Community interest and render practically impossible the recovery required by Community law.

43 The answer to Question 2 must therefore be that Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient, where the latter could not have had a legitimate expectation that the aid was lawful because the procedure laid down in Article 93 of the Treaty had not been followed.

Question 3

44 By its third question, the national court asks essentially whether the competent authority is obliged to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering its recovery, even if that would be excluded by national law because the gain no longer exists, in the absence of bad faith on the part of the recipient of the aid.

45 In this connection Alcan claims that the aid was used, as intended, to compensate for part of the electricity costs incurred between March 1983 and February 1984, which, under national law, could be regarded as a gain that no longer exists.

46 It also considers that it follows from the judgment in *Deutsche Milchkontor*, cited above, that the principle underlying the plea that a gain no longer exists, which

flows from the principle of proportionality, is also part of Community law and must therefore be complied with. Moreover, cases concerning State aid where the gain has disappeared are very rare since, in most cases, the aid will continue to have an effect on the assets of the recipient. In this case, the circumstances were highly exceptional and were not such as to render practically impossible the implementation of Community law.

47 Land Rheinland-Pfalz, the German and Austrian Governments and the Commission consider that the Court's case-law as set out in Case C-5/89 *Commission* v *Germany*, cited above, also applies to this case, so that the recipient of aid cannot claim that the gain has ceased to exist.

48 On this point it should be noted that according to the national court, the fact that under national law account is taken of the disappearance of the gain, in the absence of bad faith on the part of the recipient, falls under the general principle of protection of the legitimate expectations of the addressee of an unlawful administrative act.

49 It has already been pointed out, in paragraph 25 of this judgment, that undertakings receiving aid cannot have a legitimate expectation as to the lawfulness of the aid unless it has been granted in compliance with the procedure laid down in Article 93 of the Treaty.

50 The same conclusion therefore applies to the plea that the gain has ceased to exist, which would in this case render the recovery required by Community law practically impossible.

51 Contrary to Alcan's claims, the fact that the gain has ceased to exist is not unusual from an accounting point of view; it is in fact the rule in the case of State aid, which is generally granted to undertakings in difficulty, whose balance sheet, when aid is recovered, no longer reveals the added value indisputably resulting from the aid.

52 Moreover, as the Advocate General emphasized in point 38 of his Opinion, an undertaking which incurs losses after the grant of aid may nevertheless obtain ongoing benefits from its temporary survival in terms of, for instance, retention of its place on the market, reputation and goodwill. Accordingly, it cannot be maintained that the gain no longer exists simply because the benefit resulting from the grant of State aid no longer appears on the recipient undertaking's balance sheet.

53 Consequently, Alcan's argument that the Court should take its exceptional situation into consideration because the gain has allegedly ceased to exist is without foundation.

54 Accordingly, the answer to Question 3 must be that Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even where such recovery is excluded by national law because the gain no longer exists, in the absence of bad faith on the part of the recipient of the aid.

Costs

55 The costs incurred by the German, French and Austrian Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesverwaltungsgericht by order of 28 September 1994, hereby rules:

1. **Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the authority has allowed the time-limit laid down for that purpose under national law in the interest of legal certainty to elapse.**

2. **Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commis-**

sion declaring the aid incompatible with the common market and ordering recovery, even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient, where the latter could not have had a legitimate expectation that the aid was lawful because the procedure laid down in Article 93 of the Treaty had not been followed.

3. **Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even where such recovery is excluded by national law because the gain no longer exists, in the absence of bad faith on the part of the recipient of the aid.**

Rodríguez Iglesias Moitinho de Almeida Murray

Kapteyn Gulmann Edward

Puissochet Hirsch Jann

Ragnemalm Wathelet

Delivered in open court in Luxembourg on 20 March 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President