ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
6 December 1996 *

In Case T-155/96 R,

City of Mainz (Germany), represented by Martin Heidenhain, Bernhard Maassen, Cord-Georg Hasselmann and Horst Satzky, Rechtsanwälte, Berlin, with an address for service in Luxembourg at the Chambers of Jean Hoss, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by Paul F. Nemitz and Dimitris Triantafyllou, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for suspension of operation of Commission Decision 96/631/EC of 17 July 1996 concerning State aid that the City of Mainz, a local authority of the Federal Republic of Germany, has granted to Grundstücksverwaltungsgesellschaft Fort Malakoff Mainz mbH & Co. KG, a subsidiary of Siemens AG/Siemens Nixdorf Informationssysteme AG (OJ 1996 L 283, p. 43),

* Language of the case: German.

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
makes the following

Order

Facts and procedure

1 By Decision 96/631/EC of 17 July 1996 concerning State aid that the City of Mainz, a local authority of the Federal Republic of Germany, has granted to Grundstücksverwaltungsgesellschaft Fort Malakoff Mainz mbH & Co. KG (hereinafter 'Fort Malakoff'), a subsidiary of Siemens AG/Siemens Nixdorf Informationssysteme AG (hereinafter 'Siemens'), the Commission found that the sale of a site in Mainz to Fort Malakoff at a price below its market value constituted State aid, within the meaning of Article 92(1) of the EC Treaty, totalling DM 4 904 725 (OJ 1996 L 283, p. 43, hereinafter 'the Decision'). In Article 1 of the Decision, the Commission finds that such aid is illegal since it has been granted in breach of Article 93(3) of the EC Treaty requiring State aid to be notified to the Commission, and that it is incompatible with the common market. In Article 2 of the Decision, it orders the Federal Republic of Germany to recover the aid from the recipient company.

2 It is common ground that the purchase price of the site, located in the city centre close to the Rhine, the total area of which is 22 010 m^2, amounted to DM 13 528 650, or DM 614.66 per m^2. The contract, which was concluded on 24 February 1992 between the City of Mainz and Fort Malakoff, a real-estate holding of Siemens, stated that this price was payable at the date of the transfer of ownership, set at 1 January 1995. It did not provide for payment of interest in respect of the period between signature of the contract and transfer of ownership.

3 In return for this price below the market value of the site, which could be calculated on the basis of the prices for comparable sites in the area of Mainz, the contract imposed certain obligations on Fort Malakoff. In particular, it was required to construct office and business buildings with 25 000 m² usable floor space and an 800-car capacity underground garage for a Siemens distribution and training centre. It was obliged to let the built-up site no later than one year after completion of the buildings, for a minimum period of 15 years, to Siemens or related enterprises, those enterprises being required to run a taxable business. If that provision was not wholly fulfilled, Fort Malakoff was required to pay the difference between the purchase price agreed and the actual market value of the site at the time of sale, but the sum payable was not to be less than DM 40 million. This potential claim of the City of Mainz was secured by a first priority mortgage for a maximum sum of DM 40 million to be registered in the *Land* Title Register.

4 In the Decision, the Commission accepted the conclusions reached in the experts' opinion of the independent group of land valuers in the City of Mainz — submitted to the Commission by the German Government within the framework of the examination procedure provided for under Article 93(2) of the EC Treaty — on the market value of the site in question at the time when the contract of sale was signed and on the economic implications of the special obligations imposed on the purchaser, as well as the arguments of the German Government as set out in the Decision, with the exception of the view that, in normal commercial conditions, the obligation to provide a guarantee mortgage would be offset by a reduction in the purchase price. The Commission formed the view, in those circumstances, that the market value of the site had in this case to be fixed, in the light of the special obligations assumed by the purchaser, at DM 837.50 per m², or DM 18 433 375 for the entire site, instead of the sum of DM 13 528 650 specified in the contract.

5 By application lodged at the Registry of the Court of First Instance on 9 October 1996, the City of Mainz sought the annulment, under the fourth paragraph of Article 173 of the EC Treaty, of the Decision, which the Commission had addressed to the Federal Republic of Germany.

6 By separate document lodged at the Registry of the Court of First Instance on the same date, the applicant also applied, pursuant to Article 185 of the EC Treaty, for operation of the Decision to be suspended. The Commission submitted its written observations by a document lodged at the Registry of the Court of First Instance on 8 November 1996. The parties presented oral argument on 25 November 1996.

Law

7 Pursuant to the combined provisions of Articles 185 and 186 of the Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21) and by Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), the Court of First Instance may, if it considers that circumstances so require, order that application of contested acts be suspended or prescribe any necessary interim measures.

8 Article 104(1) of the Rules of Procedure provides that an application to suspend the operation of a measure is to be admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. According to settled case-law, the issue of the admissibility of the main action should not, in principle, be examined in proceedings relating to an application for interim measures. It should be reserved for the examination of the main application, unless it is apparent at first sight that the latter is manifestly inadmissible, so as not to prejudge the Court's decision on the substance of the case (see, most recently, the order of the President of the Court of 14 October 1996 in Case T-137/96 R *Valio* v *Commission* [1996] ECR II-1327, paragraph 27).

9 With regard to the substance, Article 104(2) provides that an application for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. Such measures must be provisional in the sense that they do not prejudge the decision on the substance of the case (see paragraph 15 of the order in *Valio*, cited above).

10 In the present case, the President of the Court considers it appropriate to examine the condition relating to urgency first.

Risk of damage if interim measures are not granted immediately

Arguments of the parties

11 The applicant submits that the condition relating to urgency must be regarded as satisfied if the suspension of operation of a contested decision would not preclude the decision from being fully effective if the main application were to be dismissed and if, conversely, immediate implementation of the contested decision would give rise to effects which would be difficult or impossible to reverse if the decision were to be annulled (see, in particular, the order of the President of the Court of Justice in Joined Cases 76/89 R, 77/89 R and 91/89 R *RTE and Others* v *Commission* [1989] ECR 1141, paragraph 12 et seq.).

12 In the present case, if operation of the Decision ordering recovery of the aid from Fort Malakoff were not suspended, the Federal Republic of Germany would in all likelihood request the City of Mainz, through the *Land*, to recover immediately from Fort Malakoff the alleged State aid together with interest. It should not be required, contrary to its firm conviction and to the principle of *pacta sunt servanda*, to enforce in a national court a right to repayment of aid allegedly granted in breach of procedural rules before it has even been established that funds financed by State resources and classifiable as aid have in fact been granted.

13 Furthermore, according to the applicant, it is probable that no German court would consider such an action against Fort Malakoff to be admissible, in the

absence of any interest on the part of the applicant so long as it is not established that the Decision would be upheld. In any event, even if such an action were declared admissible, it is likely that the national court would decide, on its own initiative or upon application, to stay the proceedings until such time as the Court of First Instance has ruled on the legality of the Decision or to refer a question of interpretation to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty.

14 The applicant also submits that immediate implementation of the Decision would allow Fort Malakoff to plead the total or partial nullity of the contract of sale in question and thereby attempt to escape certain long-term obligations stipulated in that contract and that this would create an irreversible situation. The applicant submits that its fears in this regard are well founded. The distribution and training centre for Siemens, which Fort Malakoff has undertaken to construct, has not yet been completed and its medium-and long-term profitability have become totally uncertain. Changes in the market situation have induced companies operating in the data-processing sector to abandon the idea of having their own training centres combined with distribution centres. In addition, the prices of offices which could be rented out for use by training organizations have been falling for several months in the Rhine-Main Region and are probably very much lower than the costs of having a centre providing services which belongs to a group. At the hearing, the applicant pointed out in this regard that, during discussions on 27 September 1996 between the City of Mainz, Fort Malakoff and Siemens, the latter stated, first, that it was not inclined to appeal against the Decision. Second, it expressed the opinion that the contract concluded with the City of Mainz was void in part or in its entirety as being in breach of Article 93(3) of the EC Treaty. Third, Siemens declared that it would be prepared to accept an increase in the disputed purchase price. The applicant concludes from all of these factors that Siemens will be seeking to avoid its long-term commitments, which, in view of developments in the market situation, have become disadvantageous for its group.

15 In these circumstances, immediate implementation of the Decision would cause serious and irreparable damage to the City of Mainz, for which Siemens' use of the site in question until 2012 is of fundamental importance, both from the city-planning point of view and from economic and social perspectives. According to

the applicant, the city would have very great difficulty in finding a new purchaser at the prices and on the conditions accepted by Siemens. On the other hand, suspension of implementation of the Decision would not, it claims, preclude the Decision's being fully effective, should it be upheld by the Court. The aid allegedly granted to Fort Malakoff is proportionately modest and represents at most 2% of that company's total investments in the execution of the project envisaged in the contract for sale in question. Recovery of the aid is therefore not jeopardized.

16 The Commission rejects the applicant's arguments. It first points out that the applicant acknowledges that implementation of the Decision requires action on the part of the State concerned. No proceedings have yet been instituted. Moreover, and in any event, the applicant has the opportunity, by virtue of domestic legal remedies, to obtain protection — interim, if need be — against a national decision ordering recovery of the aid, in order to avoid the damage which it contends it will suffer.

17 Likewise, the Commission claims that the applicant could protect itself against any attempts by Fort Malakoff to avoid its contractual obligations by having recourse to domestic legal remedies with a view to ensuring that the contractual obligations are complied with.

18 In any event, termination of the contract would only have the effect of restoring the position before it was signed. It would then be open to the applicant to arrange a public sale of the site and obtain a better price for it. Even if it were to experience difficulties in finding a new purchaser or securing an equivalent price, its loss would be purely financial and would therefore be recoverable. The applicant has also failed to establish that a new sale, under such conditions, would jeopardize the city's finances. The views which it has expressed on the relatively small amount of aid alleged tend to confirm that neither it nor Fort Malakoff would be unduly affected by immediate recovery of the aid.

Findings of the President of the Court

19 According to well-established case-law, the urgency of the adoption of interim measures must be considered by examining whether the implementation of the contested measures, prior to the intervention of the decision of the Court on the main issue, is such as to give rise, for the party requesting the measures, to serious and irreparable damage which could not be put right if the contested decision were annulled or which, despite their interim nature, would be disproportionate to the defendant's interest in having the measures implemented, even when they are the subject of legal proceedings. It is for the applicant to prove that those conditions are satisfied (see, most recently, the order of the President of the Court of First Instance of 28 August 1996 in Case T-112/96 R *Séché* v *Commission* [1996] ECR SC II-1121, paragraph 16).

20 In the present case, the applicant maintains that the risk of serious and irreparable damage which would allegedly arise if the Decision were to be implemented immediately stems from the obligation to institute legal proceedings against Fort Malakoff to recover the alleged State aid under which it could find itself and from a possible variation of the contractual terms, or even the annulment of the contract at Siemens' request, once the purchase price is changed pursuant to the Decision ordering recovery of the aid.

21 With regard, first, to the risk that the applicant may be obliged to bring proceedings against its contracting party in order to recover the amount of alleged aid, it should be stressed at the outset that, according to the documents in the case and the observations of the parties, no steps or measures have so far been taken in that regard.

22 Furthermore, even if the German Government were to institute proceedings in order for the applicant to recover the alleged aid, the party concerned does not specify what the exact nature of its loss would be. The fact alone that it may be obliged to resile a clause in the contract relating, in this case, to the purchase price,

owing to its alleged irregularity, and to bring proceedings against Fort Malakoff in order to recover the amount of aid alleged would not, as it submits, be contrary to the principle of *pacta sunt servanda* but would simply be an application of the principle that the administrative authorities must act within the law.

23 With regard, second, to the risk of serious and irreparable damage that might arise because of Fort Malakoff's and Siemens' alleged desire to extricate themselves from some of their long-term obligations by pleading that the contract in question is wholly or partially void on the ground that it breaches Articles 92 and 93 of the Treaty, the applicant has failed to adduce any evidence that those undertakings do in fact intend to avoid fulfilling their contractual obligations. In particular, it indicates no moves on their part to negotiate an amendment to the contract in order to take account of the increase in the purchase price resulting from the Decision. On the contrary, Siemens' statement, made during a meeting with the applicant on 27 September 1996, that it would be prepared to accept the price increase resulting from the Decision, as mentioned by the applicant at the hearing, rather suggests that it does not intend to renounce its long-term obligations. More generally, the documents before the Court and the parties' observations do not indicate any specific measure taken by Fort Malakoff or Siemens with a view to having the contract amended.

24 Furthermore, even if it were accepted that Fort Malakoff is seeking to free itself from its contractual obligations, which has not been established, the applicant has not provided any specific explanation or put forward any convincing argument to show that, under German contract law, recovery of the alleged aid could undermine some of the essential terms of the contract, even though the amount to be repaid would, according to the applicant's own observations, amount at most to 2% of Fort Malakoff's total investment in the realization of the project in question. In the absence of more specific evidence, it would appear at first sight

improbable that a relatively modest increase in the purchase price could justify a fundamental alteration of some of the essential contractual obligations assumed by Fort Malakoff, or even the annulment of the contract.

25 The applicant has also failed to demonstrate that the domestic remedies available to it under German law allowing it, if necessary, to oppose an amendment to, or resiliation of, the contract, in whole or in part, by its contracting partner would not enable it to avoid serious and irreparable damage, assuming that it can show that such damage is likely (see the orders of the President of the Court of Justice in Case 310/85 R *Deufil* v *Commission* [1986] ECR 537, paragraph 22, Case 142/87 R *Belgium* v *Commission* [1987] ECR 2589, paragraph 26, and in Case 303/88 R *Italy* v *Commission* [1989] ECR 801 (summary publication)).

26 From that perspective, it must be stressed that the German courts alone are competent to determine whether, in light of the relevant provisions of German law, the alteration of the purchase price pursuant to the Decision ordering recovery of the alleged aid can, in the circumstances of this case, justify the contract being set aside in full or in part. In that context, the best solution is to consider, if appropriate, whether it is necessary to adopt interim measures in order to safeguard the applicant's rights pending the outcome of the main proceedings before the Court.

27 Furthermore, and in any event, suspension of operation of the Decision would, in the context of the present proceedings, merely have the effect of precluding, during the main proceedings, any action by the German public authorities to recover the alleged aid. It would not necessarily and automatically preclude an action on the

part of Fort Malakoff to have the contract declared void or amended on the ground that it involves unlawful aid granted in breach of Article 93(3) of the Treaty, the direct effect of which has been confirmed by the Court of Justice. In such an eventuality, it would be for any national court before which the matter might be brought to determine whether it would be appropriate to stay proceedings or adopt other interim measures, in accordance with its internal rules of procedure, pending the Court's decision in the main proceedings (see paragraph 26 above).

28 Finally, even supposing that immediate implementation of the Decision could result in irreversible annulment of the contract, which is a possibility which has not been established, the applicant has failed to show that it would be in a difficult economic and financial position and that it would be unable to dispose of the site in question, situated in the city centre, to one or more purchasers on terms that would be equally favourable from the financial point of view as well as from the city-planning and economic and social points of view.

29 It follows from all of the foregoing that the applicant has failed to adduce any convincing arguments to support the contention that immediate implementation of the Decision is likely to cause it damage that would be difficult to make good.

30 It follows that the condition regarding the existence of the risk of damage if interim measures are not granted immediately has not been satisfied. The present application for interim measures must therefore be dismissed, without its being necessary to examine the objection of inadmissibility raised by the Commission or the pleas and arguments relied on by the applicant to justify, on the substance, the grant of the interim measure sought.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. The costs are reserved.

Luxembourg, 6 December 1996.

H. Jung

Registrar

A. Saggio

President