

JUDGMENT OF THE COURT

21 March 1990 *

In Case C-142/87

Kingdom of Belgium, represented by Robert Hoebaer, Director of Administration in the Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agent, assisted by Lambert Matray and Charly Hanot, of the Liège Bar, and Gerald Schubert, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Belgian Embassy, 4, rue des Girondins,

applicant,

v

Commission of the European Communities, represented by Antonino Abate, Legal Adviser, and Hendrik van Lier, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremliis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Decision 87/507/EEC of 4 February 1987, in which the Commission found that the aid granted, in various forms, by the Belgian State to a steel pipe and tube manufacturer was illegal and incompatible with the common market and ordered its recovery,

THE COURT

composed of: O. Due, President, C. N. Kakouris and F. A. Schockweiler (Presidents of Chambers), G. F. Mancini, R. Joliet, G. C. Rodriguez Iglesias and M. Díez de Velasco, Judges,

Advocate General: G. Tesauro

Registrar: D. Louterman, Principal Administrator

* Language of the case: French.

having regard to the Report for the Hearing and further to the hearing on 11 May 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 19 September 1989,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 8 May 1987, the Kingdom of Belgium brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of Decision 87/507/EEC of 4 February 1987. In that decision the Commission found that the aid granted, in various forms, by the Belgian State to SA des Usines à tubes de la Meuse-Tubemeuse (hereinafter referred to as 'Tubemeuse') was unlawful, on the grounds that the procedure laid down in Article 93(3) of the EEC Treaty had not been observed and that the aid was incompatible with the common market within the meaning of Article 92 of the EEC Treaty; consequently, the aid should be recovered.
- 2 According to the contested measure, Tubemeuse, founded in the Liège area in 1911, has concentrated on the manufacture of seamless steel tubes for the oil industry. Having already encountered difficulties in the 1970s, Tubemeuse found itself in a critical situation in 1979; this led to the replacement of a number of private shareholders by the Belgian State, which took 72% of the capital.
- 3 Since Tubemeuse's new shareholders decided to undertake an industrial restructuring of the company, and to modernize its production plant, the Commission, in 1982, authorized the grant of a series of aid measures by the Belgian State for the

purpose of implementing an investment programme which was to ensure the undertaking's future within the context of two medium and long-term contracts with the Soviet Union.

- 4 The efforts to modernize Tubemeuse did not have the anticipated effects, and the deterioration in the situation led to the complete withdrawal of the company's private shareholders and to the acquisition by the Belgian State of almost all its share capital.

- 5 In the contested decision, the Commission states that, on 19 July 1984, the Belgian Government informed it, under Article 93(3), of its intention to increase the capital of Tubemeuse and to subscribe to an issue of conditional participating convertible bonds. The Belgian Government went ahead with the implementation of the plan it had notified to the Commission before the procedure under Article 93(2), which the Commission had initiated in the meantime, had resulted in a final decision. Moreover, the Belgian Government is said to have confirmed, by letter of 29 July 1985, that Tubemeuse had previously received other public support which had not been notified to the Commission. These measures amounted in total to BFR 9 085 million.

- 6 According to the decision, the Belgian Government also informed the Commission, by a letter dated 6 June 1986, of a plan to convert BFR 3 010 million of guaranteed loans to Tubemeuse into capital, and in fact finally converted BFR 2 510 million of that amount, despite the fact that the Commission had initiated the procedure under Article 93(2) in respect of that plan.

- 7 According to the decision, the financial assistance amounted in total to approximately BFR 12 thousand million.

- 8 In the decision, the Commission reaches the conclusion that the aid in question is illegal because the procedure in Article 93(3) was not complied with. In substantive terms, it is also incompatible with the common market under Article 92(1) and does not fall within any of the exceptions provided for in Article 92(3). On those two grounds, the Commission ordered the Belgian State to recover the aid, allowing the latter a period of two months to notify it of the measures taken.
- 9 In the submissions put forward in its application, the Belgian Government:
- (a) denies that the financial assistance in question constitutes aid;
 - (b) claims that if it is aid, it is aid for exports, which is governed by Article 112 of the EEC Treaty rather than Articles 92 to 94 thereof;
 - (c) denies that trade between the Member States has been affected within the meaning of Article 92(1);
 - (d) claims that, at the time that the aid was being examined under Article 93(2), it was denied the right to a fair hearing;
 - (e) claims that the contested measure is without purpose since at the time it was adopted Tubemeuse was subject to judicial composition proceedings;
 - (f) claims that the financial assistance was justified under Article 92(3)(a) and (c);
 - (g) claims that recovery of the aid was impossible because of the composition proceedings to which Tubemeuse was subject.
- 10 The Commission contends that the submissions put forward in the application to the effect that the contested financial assistance is justified under Article 92(3)(a) and (c) are inadmissible.

- 11 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The objection of inadmissibility

- 12 The objection of inadmissibility was initially raised in regard to the application in its entirety but was limited by the Commission, in its rejoinder and at the hearing, solely to the submissions dealing with the findings in the contested measure to the effect that the aid in question could not be regarded as compatible with the common market under Article 92(3)(a) and (c).
- 13 The Commission contends that those findings merely constitute subsidiary and non-essential grounds for the contested measure and that the principal, and sufficient, ground was that the aid in question was illegal because it had been implemented, contrary to Article 93(3), before the procedure initiated under that article had been terminated. Even if the aid was substantially compatible with the common market under Article 92(3)(a) or (c), that did not alter its illegality on account of the infringement of Article 93(3).
- 14 It should be pointed out that, in its judgment of 14 February 1990 in Case C-301/87 *France v Commission* [1990] ECR I-307, the Court made the following points concerning the consequences of an infringement of that provision.
- 15 Once it has established that aid has been granted or altered without notification, the Commission has the power, after giving the Member State in question an opportunity to submit its comments on the matter, to issue an interim decision requiring it to suspend immediately the payment of such aid pending the outcome of the examination of the aid and to provide the Commission, within such period as it may specify, with all such documentation, information and data as are necessary to enable it to examine the compatibility of the aid with the common market.

- 16 The Commission has the same power in cases where it has been notified of aid but the Member State in question, instead of awaiting the outcome of the procedure provided for under Article 93(2) and (3) of the Treaty, has instead proceeded to put the aid into effect, contrary to the prohibition contained in Article 93(3).
- 17 Where a Member State has complied in full with the Commission's order, the Commission is obliged to examine the compatibility of the aid with the common market, in accordance with the procedure laid down in Article 93(2) and (3) of the Treaty.
- 18 If the Member State, notwithstanding the Commission's order, fails to provide the information requested, the Commission is empowered to terminate the procedure and to decide, on the basis of the information available to it, whether or not the aid is compatible with the common market. If appropriate, such a decision may call for recovery of the amount of aid which has already been paid.
- 19 If the Member State fails to suspend payment of the aid, the Commission is entitled, while pursuing its substantive examination, to refer the matter of the Treaty infringement direct to the Court. Such a referral is justified on grounds of urgency because the decision embodying the order has been taken after the Member State in question has been given an opportunity to submit its comments and thus at the conclusion of a preliminary administrative procedure in which it has been in a position to put its case, as in the case of the action provided for under the second subparagraph of Article 93(2) of the Treaty. This action is in fact no more than a variant of the action for a declaration of failure to fulfil Treaty obligations, specifically adapted to the special problems which State aid poses for competition within the common market.
- 20 In the light of the foregoing, the Court cannot accept the Commission's argument to the effect that the irregularity stemming from the fact that the aid was paid before the procedure under Article 93(3) had been completed makes the aid illegal and thereby makes it unnecessary to consider the compatibility thereof with Article 92(3).

- 21 It follows that the objection of inadmissibility concerning the application of Article 92(3) must be rejected and, consequently, all the submissions in the application must be considered.

Whether the financial assistance at issue constitutes aid

- 22 In the contested decision, it was found that the undertaking's financial position was precarious, that the sector in which it carried on its activities had significant structural overcapacity and that the situation on the oil market had led to a reduction in drilling operations and a fall in the demand for seamless tubes. In such circumstances, no private investor would have made a contribution of capital. Consequently, according to the decision the abovementioned measures taken by the Belgian State constitute State aid, which must be assessed on the basis of Article 92.
- 23 In its first submission, the Belgian State claims that Article 92(1) of the Treaty was wrongly applied because the measures in question did not constitute aid within the meaning of that provision but rather a normal contribution by a shareholder to the company.
- 24 In support of that submission, the Belgian Government claims that the measures taken in favour of Tubemeuse do not constitute aid as such but are the logical consequence of the broad programme of restructuring and modernization undertaken with respect to the company and the completion of the investment programme authorized by the Commission itself in 1982. The Commission was informed of the investment plan at that time although the Belgian Government had no obligation to do so because it was not State aid. Its support for Tubemeuse was therefore the normal reaction of any investor whose initial investment is at risk.
- 25 It should be pointed out that, according to settled case-law, investment by the public authorities in the capital of undertakings, in whatever form, may constitute State aid where the conditions set out in Article 92 are fulfilled (see the judgments of 14 November 1984 in Case 323/82 *Intermills v Commission* [1984] ECR 3809, and of 13 March 1985 in Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek v Commission* [1985] ECR 809).

- 26 In order to determine whether such measures are in the nature of State aid, the relevant criterion is that indicated in the Commission's decision, and not contested by the Belgian Government, namely whether the undertaking could have obtained the amounts in question on the capital market.
- 27 In the event, it can be seen from the contested measure taken together with the other documents before the Court that, in addition to the technical inadequacies of its plant, which made necessary the extensive modernization programme in 1982 carried out with the help of the public authorities and authorized by the Commission, the company has, since 1979, had to face structural financial difficulties. Excessively high production costs, continual operating losses, poor liquidity and heavy indebtedness led to the withdrawal of almost all the private shareholders from the undertaking.
- 28 Moreover, it is not contested that the seamless steel tubes sector, whose production was intended principally for use in oil exploration, was in a state of crisis, marked by considerable surplus capacity in the producing countries and new production capacity in the developing and State-trading countries. Furthermore, the restrictions which the United States imposed on the importation of steel tubes into their territory and the fall in world oil prices, which contributed to a reduction in drilling, led to a fall in demand for the tubes in question and therefore to a substantial reduction in their price and in world production. That is the reason why other Member States sought to reduce their production capacity in that sector.
- 29 Under those circumstances, there is nothing which suggests any error in the Commission's assessment that Tubemeuse's prospects of profitability were not such as to induce private investors operating under normal market economy conditions to enter into the financial transactions in question, that it was unlikely that Tubemeuse could have obtained the amounts essential for its survival on the capital markets and that, for that reason, the Belgian Government's support for Tubemeuse constituted State aid.

30 It follows that the first submission must be rejected.

Article 92(1) of the Treaty

31 Belgium claims that, even if the interventions at issue in fact constitute aid, they are export aid, since Tubemeuse exports 90% of its production to non-member countries. They are thus governed by Article 112, which excludes the application of Articles 92 to 94.

32 It should be pointed out in that regard that, regardless of whether the aid may be regarded as export aid, Article 112, which concerns the harmonization of national export aid in the context of the common commercial policy, does not exclude the application of Articles 92 to 94. It is not impossible for export aid to affect intra-Community trade.

33 According to the Belgian Government, the measures in question cannot affect trade between the Member States or distort competition in the common market since 90% of Tubemeuse's production is exported outside the Community, even if, as the contested decision states, its production of seamless tubes represents 17% of the Community production.

34 The Belgian Government adds that the undertaking was restructured in order to serve, principally, the Soviet market. For that reason, the new production capacity thus created cannot inundate the common market and intra-Community trade cannot be affected by the contested measures taken by the Belgian State. Consequently, the contested decision is not, in that regard, adequately reasoned.

35 It should be noted first that, having regard to the interdependence between the markets on which Community undertakings operate, it is possible that aid might distort competition within the Community, even if the undertaking receiving it exports almost all its production outside the Community. The exportation of part

of the undertaking's production to non-member countries is only one of a number of circumstances which must be considered.

36 In this case, the Commission pointed out in the contested measure that a large part of the activities of Community manufacturers of seamless tubes is directed towards exports outside the Community, although it emphasized that the Community market continues to offer outlets.

37 The Commission also states that there is a world-wide crisis, recession and increased competition in the seamless tubes sector marked by substantial surplus capacity in the producer countries and resultant price instability; this is accentuated by the import restrictions imposed by the United States and by the new production capacity in the developing and State-trading countries. Any advantage accorded to an undertaking in this sector is therefore likely to improve its competitive position in regard to other undertakings.

38 The contested decision states that, against that general background, the new objective announced by Tubemeuse, whose production of seamless tubes represents a considerable part of Community production and whose exports represent 90% of its turnover, was to withdraw from the Soviet market, which was thought to be insufficiently profitable, and to direct its efforts, with the help of the aid granted to it, to other markets. It was thus reasonably foreseeable that Tubemeuse would redirect its activities towards the internal Community market.

39 In that regard, the Commission added at the hearing, without being contradicted by the Belgian Government, that during the first half of 1988 Tubemeuse's exports to the Soviet Union dropped to 33% of its total production, whereas exports to Community countries amounted to 31.8% of production.

- 40 In the light of those considerations, the Commission's assessment, made in the contested measure, that the aid granted to Tubemeuse was likely to affect the competitive position of the other Community undertakings in the sector concerned and, therefore, to affect trade and distort competition within the meaning of Article 92(1) is adequately reasoned and does not appear to be erroneous.
- 41 With regard to Belgium's argument that Tubemeuse's production accounts for much less than 17% of Community production, even if that claim is correct it does not detract from the assessment made above with regard to the effect of the aid on the competitive position of Community undertakings in the sector in question.
- 42 Belgium also contends that, since there is no rule defining in regard to State aid the threshold above which intra-Community trade is affected, reference may be made to the level of 5% of the market usually adopted by the Commission in competition matters.
- 43 That argument cannot be accepted. According to the judgments of 17 September 1980 in Case 730/79 *Philip Morris v Commission* [1980] ECR 2671 and of 11 November 1987 in Case 259/85 *France v Commission* [1987] ECR 4393, the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected.
- 44 It follows from the foregoing considerations that this submission is unfounded and must therefore be rejected.

The submission based on an infringement of the right to a fair hearing

- 45 Belgium points out that the Commission refers in the contested decision to the representations made by 'three other Member States and four associations of steel pipe and tube producers', without producing the relevant documents and without permitting it to comment on those representations. Thus, the influence which those representations might have had on the Commission's decision are unknown. Consequently, the right to a fair hearing and due process have been infringed.
- 46 It should be pointed out in that regard that, as the Court has already decided on numerous occasions, in particular in its abovementioned judgments of 10 July 1986 in Case 234/84 *Belgium v Commission* [1986] ECR 2263 and of 11 November 1987, observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules.
- 47 In the abovementioned judgments, the Court held that that principle required that the Member State in question must be given the opportunity effectively to make known its views on the observations which interested third parties have submitted under Article 93(2) and on which the Commission proposes to base its decision; and it also stated that, in so far as the Member State has not been afforded the opportunity to comment on those observations, the Commission may not use them in its decision against that State.
- 48 For such an infringement of the right to be heard to result in an annulment it must, however, be established that, had it not been for that irregularity, the outcome of the procedure might have been different. The observations in question, lodged with the Court at the Court's request, contain no information in addition to that which the Commission already possessed and of which the Belgian Government was already aware. Under those circumstances, the fact that the Belgian Government had no opportunity to comment on those observations was not of such a nature as to influence the result of the administrative procedure. This submission must therefore be rejected.

The submission based on the fact that, at the time at which the contested decision was adopted, Tubemeuse was subject to judicial composition proceedings involving relinquishment of its assets

49 Belgium claims, in the alternative, that even if the assistance given to Tubemeuse constitutes aid prohibited by Article 92(1), the Commission's decision is without purpose since, at the time it was adopted, the undertaking was subject to judicial composition proceedings involving relinquishment of its assets, which means that it had ceased to exist in economic terms. Consequently, intra-Community trade could no longer be affected or competition distorted.

50 Belgium also claims that, at the time that the contested decision was adopted, the aid had ceased to be paid owing to the insolvency of the undertaking which had received it and was eliminated by the liquidation of the undertaking's assets. By disregarding that situation, the contested decision was based on incorrect information and was without purpose in so far as it ordered the recovery of the aid.

51 It should be noted in that regard that, under Belgian law, a court supervising composition proceedings may authorize the liquidator to continue the undertaking's trading operations. In this case, it is common ground that Tubemeuse continued its production activities, albeit at a reduced rate, throughout the composition proceedings, that it did not cease to exist either in economic or legal terms and it was ultimately sold to another undertaking. It cannot therefore be argued that the contested decision had no purpose.

52 Consequently, that submission cannot be accepted.

Article 92(3)

53 With regard to the application of Article 92(3)(a), the Commission refers in the contested measure to a thorough study of economic and social conditions in the Belgian regions which it had previously carried out (Decision 82/740/EEC of 22 July 1982, Official Journal L 312, p. 18, amended by Decision 85/544/EEC of 31 July 1985, Official Journal L 341, p. 19); in that the study it had concluded that

the Liège area did not suffer from an abnormally low standard of living or serious underemployment. The Belgian Government had not challenged that finding at the time, nor had it presented any new evidence since capable of modifying the assessment.

54 With regard to the application of Article 92(3)(c), the Commission states in the contested decision that the measures taken by the Belgian State in favour of Tubemeuse could not be said to be conducive to the economic development of the region concerned because Tubemeuse was not in a position to ensure its own viability.

55 The Belgian Government claims that the social and economic situation has changed since the Commission carried out the abovementioned analysis and that the aid in question ought to have been considered to come within the exceptions provided for in Article 92(3)(a) and (c) inasmuch as it was intended to promote the economic development of the Liège area which has been severely hit recently by factory closures and job losses.

56 The applicant's arguments cannot be accepted. In that regard to Article 92(3), the Commission has a wide discretion the exercise of which implies economic and social assessments which must be carried out in a Community context.

57 Having regard to the Commission's powers in this matter, the Belgian Government's submission, in which it confines itself to making a general criticism of the assessments on which the measure is based, without adducing any evidence capable of casting doubt upon them, must be rejected.

The submission that it was impossible to implement the contested decision immediately

58 Belgium claims that it was impossible to implement the Commission's decision immediately, in so far as it ordered the recovery of the contested aid. Recovery of aid granted contrary to the Treaty may be effected only in accordance with the relevant rules of national law. In this case, the composition proceedings to which

Tubemeuse was subject prevented any claim by the Belgian State. The undertaking's assets have been assigned to its creditors and the State no longer has any power to order the recovery of the aid in question.

59 Belgium adds that, like a judgment of the Court, the Commission's decision cannot create any privilege in its favour which would permit it to derogate, to the disadvantage of Tubemeuse's creditors, from the rules applicable to such cases. In the context of the composition procedure, the Belgian State can only declare its debt as an unsecured creditor of the undertaking. In so far as the contested decision orders the immediate recovery of the aid, it thus infringes the general principles common to the Member States in regard to company law and the law of insolvency.

60 It should be noted that the Belgian Government's argument is based on the premiss that the contested decision orders the recovery of the aid in question on a privileged basis. However, the contested decision confines itself to ordering recovery of the aid, without prescribing the way in which that is to be done.

61 In principle the recovery of aid unlawfully paid 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 (see the judgment of 2 February 1989 in Case 94/87 *Commission v Federal Republic of Germany* [1989] ECR 175).

62 Moreover, that is the reason why the Commission stated at the hearing that the Belgian Government had fulfilled its obligations under the contested measure in regard to the recovery of the aid since, after the dismissal of its application for interim measures by the President of the Court, the Belgian Government sought to have its debt registered as one of Tubemeuse's unsecured liabilities and lodged an appeal against the judgment rejecting that application.

63 It should be added that any procedural or other difficulties in regard to the implementation of the contested measure cannot have any influence on the lawfulness of the measure.

64 Consequently, the submission must be rejected.

65 Belgium also claims that the obligation to recover the aid laid down in the contested decision is disproportionate to the objectives laid down in Articles 92 and 93, inasmuch as the declaration of the debt by the Belgian State in the composition procedure would cause serious damage to other creditors.

66 It should be pointed out in that regard that it follows from the Court's previous decisions (see, for example, the judgment of 24 February 1987 in Case 310/85 *Deufil v Commission* [1987] ECR 901) that recovery of unlawful aid is the logical consequence of the finding that it is unlawful. Consequently, the recovery of State aid unlawfully granted for the purpose of re-establishing the previously existing situation cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aids.

67 That submission must therefore be rejected.

68 Since none of the submissions put forward by the Belgian Government has been accepted, the application must be dismissed in its entirety.

Costs

69 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Belgium has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- (1) Dismisses the application;**
- (2) Orders the Kingdom of Belgium to pay the costs.**

Due	Kakouris	Schockweiler	
Mancini	Joliet	Rodríguez Iglesias	Díez de Velasco

Delivered in open court in Luxembourg on 21 March 1990.

J.-G. Giraud
Registrar

O. Due
President