# JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

22 November 2001 *

In Case T-9/98,

**Mitteldeutsche Erdoel-Raffinerie GmbH,** established in Spergau, Germany, represented initially by M. Schütte and M. Maier, lawyers, and subsequently by Mr Schütte and J. Lüdicke, lawyer, with an address for service in Luxembourg,

applicant,

v

**Commission of the European Communities,** represented by V. Kreuschitz and P. Nemitz, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

APPLICATION for annulment of Commission Decision 98/194/EC of 1 October 1997 concerning the extension of the 8% investment premium for investment projects in the new *Länder* pursuant to the Finance Law 1996 (OJ 1998 L 73, p. 38),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of: P. Lindh, President, R. García-Valdecasas, J.D. Cooke, M. Vilaras and N.J. Forwood, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 25 January 2001

gives the following

## Judgment

### Facts and procedure

1 The applicant is a subsidiary of the French company Elf Aquitaine SA ('Elf'). It was formed with a view to constructing a refinery in Leuna in the *Land* of

Saxony-Anhalt ('the Leuna 2000 refinery' or 'the Leuna 2000 project'), following an agreement of 23 July 1992 on the privatisation of an old refinery in Leuna and of Minol AG, a distributor of refined petroleum products. The construction work, which started in 1993, was to be completed in July 1996, according to Elf's original plans. It was not in fact possible to complete it until November 1997, as a result of circumstances beyond the applicant's control, in particular the presence on the site of bombs and mines from the Second World War.

2 The German authorities decided to grant a package of aid to the applicant for the Leuna 2000 project, including aid of DEM 360 000 000 as the 8% investment premium for investment projects in the new *Länder* provided for by the Investitionszulagengesetz 1993 (Law on investment premiums 1993, 'the InvZulG'). In 1995 part of that sum, DEM 97 500 000, was paid to the applicant for its investments in connection with the project during the previous year.

3 Paragraph 3(3) of the InvZulG stated that, to qualify for the 8% premium, investment projects had to be started between 31 December 1992 and 1 July 1994 and completed before 1 January 1997. If a project was not fully completed within that period, the sums already received by the investor as investment premium had to be repaid. By letter of 24 November 1992 the Commission had informed the German Government of its decision of 11 November 1992 not to raise any objections to that aid scheme under Articles 92 and 93 of the EC Treaty (now, after amendment, Articles 87 EC and 88 EC).

4 By decision of 30 June 1993 the Commission declared the aid package referred to in paragraph 2 above compatible with the common market under Article 92(3) of the Treaty (OJ 1993 C 214, p. 9, 'the decision of 30 June 1993'). By decision of

25 October 1994 it authorised the grant of additional aid for the Leuna 2000 project (OJ 1994 C 385, p. 35, 'the decision of 25 October 1994').

5 Paragraph 3(3) of the InvZulG was amended by Paragraph 18(1) of the Jahressteuergesetz 1996 (Finance Law 1996), which was adopted on 11 October 1995 and entered into force on 1 January 1996. Under that provision, to qualify for the 8% premium, the investment project now had to be completed before 1 January 1999. The period within which the project had to be started remained unchanged.

6 By a communication of 19 December 1995 the German Government belatedly notified the Commission of the amendment. By letter of 17 November 1995 the Federal Ministry of Finance had, however, instructed the tax authorities of the *Länder* not to apply the amendment until the Commission approved it pursuant to Articles 92 and 93 of the Treaty.

7 By decision of 3 July 1996, notified to the German Government on 31 July 1996, the Commission initiated the procedure under Article 93(2) of the Treaty against Paragraph 18(1) of the Finance Law 1996 (OJ 1996 C 290, p. 8). It invited the Federal Republic of Germany and the other Member States and interested parties to submit comments. The German Government and Elf submitted comments by letters of 9 September and 29 October 1996 respectively. The French Government gave its views on 30 October 1996, referring to Elf's observations.

8 Between December 1996 and July 1997, the Commission and the German authorities had several meetings to discuss the matter.

9 On 1 October 1997 the Commission concluded the procedure by adopting Decision 98/194/EC concerning the extension of the 8% investment premium for investment projects in the new *Länder* pursuant to the Finance Law 1996 (OJ 1998 L 73, p. 38, 'the contested decision'). Its operative part reads as follows:

'*Article 1*

[Paragraph] 18(1) of the Finance Law 1996, which amends [Paragraph 3 of the InvZulG] to the effect that the 8% investment premium is now granted for investment projects which were begun after 31 December 1992 and before 1 July 1994 and are completed before 1 January 1999 (instead of before 1 January 1997), introduces new, additional State aid for undertakings which have made investments in the new *Länder*. This aid is unlawful, since it was put into effect in disregard of Article 93(3) of the EC Treaty. The aid is incompatible with the common market, since it does not contribute to the achievement of one of the objectives referred to in Article 92(2) and (3) of the EC Treaty.

*Article 2*

[Paragraph] 18(1) of the Finance Law 1996 shall be repealed. Germany shall recover all aid which was granted pursuant to this provision. The aid shall be repaid in accordance with the procedures and provisions of German law with interest running from the date of grant of the aid calculated on the basis of the rate serving as the reference interest rate used in assessing regional aid programmes.

*Article 3*

Germany shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply herewith.

*Article 4*

This Decision is addressed to the Federal Republic of Germany.'

10 By application lodged at the Registry of the Court of First Instance on 5 January 1998, the applicant brought the present action.

11 On 30 January 1998 the German Government notified the Commission of a settlement concluded on 30 December 1997 between Elf and the applicant on the one hand and the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (Federal Office for special tasks consequent on reunification, 'the BvS') on the other. The settlement provided *inter alia* for the payment to the applicant of DEM 240 000 000 by the BvS and DEM 120 000 000 by the *Land* of Saxony-Anhalt. Implementation of the settlement was subject to prior authorisation by the Commission from the point of view of the Community rules on State aid.

12 By letter of 13 March 1998 the German Government informed the Commission that the contested decision had been put into effect by Paragraph 12 of the Gesetz

zur weiteren Fortentwicklung des Finanzplatzes Deutschland (Law for the further development of Germany as a financial centre). That law was adopted by the Bundestag on 13 February 1998, approved by the Bundesrat on 6 March 1998, and published on 24 March 1998.

13 By order of 30 April 1998 the President of the Fourth Chamber, Extended Composition, of the Court of First Instance suspended the procedure until 15 June 1998. By order of 10 June 1998 he extended the suspension until 15 July 1998.

14 By separate document lodged at the Registry on 21 September 1998, the Commission raised a plea of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance.

15 The applicant submitted observations on the plea of inadmissibility on 9 November 1998.

16 On 17 March 1999 the Court of First Instance (Fifth Chamber, Extended Composition), pursuant to Article 64(3) of the Rules of Procedure, requested the parties to provide information on the settlement and to state whether they considered that it would still be necessary to adjudicate if the settlement were put into effect. The parties replied by letters of 31 March 1999.

17 By order of 11 May 1999 the Court of First Instance (Fifth Chamber, Extended Composition) joined the plea of inadmissibility to the substance.

18 On 13 March 2000 the Commission adopted a decision finding that the settlement did not contain any element of State aid within the meaning of Article 92(1) of the Treaty as far as the payment of DEM 240 000 000 by the BvS was concerned ('the decision of 13 March 2000'). With respect to the payment of DEM 120 000 000 by the *Land* of Saxony-Anhalt, it considered that that measure constituted State aid but declared it compatible with the common market.

19 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure. As measures of organisation of the procedure, it invited the parties and the Federal Republic of Germany to produce various documents and reply to various questions. The parties and the Federal Republic of Germany did so within the time-limit set.

20 The parties presented oral argument and answered the questions put by the Court at the hearing on 25 January 2001.

**Forms of order sought by the parties**

21 The applicant claims that the Court should:

— reject the plea of inadmissibility;

— annul the contested decision in so far as it causes the applicant harm;

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss it as unfounded;

— order the applicant to pay the costs.

**Admissibility**

23 The Commission submits that the action is inadmissible on the grounds that the applicant is not directly and individually concerned by the contested decision and that it has no interest in having it annulled.

24 The question as to whether the applicant has an interest in bringing proceedings will be considered first.

*Interest in bringing proceedings*

Arguments of the parties

25 The Commission submits that the applicant has not shown that it has an interest in bringing proceedings, since it is clear that the aid scheme at issue would not be reintroduced if the contested decision were annulled. It observes that the Federal Republic of Germany has taken the necessary legislative measures to enforce that decision, those measures entered into force on 28 March 1998, and the tax authorities of the *Länder* have begun to seek from investors who were unable to complete their projects before 1 January 1997 repayment of the sums they had already received as 8% investment premium. It also points out that the German Government has not brought an action for annulment of the contested decision, and has not intervened in the present case in support of the form of order sought by the applicant.

26 The Commission adds that the settlement, which it approved by decision of 13 March 2000, settled the dispute concerning the payment of the 8% premium to the applicant. It observes that the applicant has moreover undertaken to discontinue the present action once the settlement has been approved and the sum of DEM 360 000 000 paid.

27 The applicant claims that it has an interest in bringing proceedings.

28 It submits, first, that in the event of the contested decision being annulled the repeal of Paragraph 18(1) of the Finance Law 1996 could not be invoked against

it, having regard to the principle of the protection of legitimate expectations. Moreover, in the absence of such annulment, it would not be able under German law to submit any ancillary claims.

29 The applicant considers, second, that the fact that the Federal Republic of Germany has not challenged the contested decision and has not intervened in the present action is of no relevance.

30 It observes, third, that the question of the admissibility of the action must be assessed by reference to the date when the application was lodged, and points out that at that date the settlement had not yet been approved by the Commission and Paragraph 18(1) of the Finance Law 1996 had not yet been repealed.

31 As regards the settlement, the applicant stated at the hearing that, following the decision of 13 March 2000, the BvS had paid it the agreed sum of DEM 240 000 000. As to the sum of DEM 120 000 000 payable by the *Land* of Saxony-Anhalt, it explained that it was originally intended to be set off against the DEM 97 500 000 it had received in 1995 as 8% premium. When the Commission objected to such a set-off, the applicant repaid the latter amount by depositing it in a blocked account, in order to avoid it being included in the general budget of the *Land* of Saxony-Anhalt — investment premiums do not come under a specific expenditure item — and consequently being used by the *Land* to make the payment due under the settlement. According to the applicant, if the Court were to annul the contested decision and the German authorities accordingly had to withdraw the repayment notice relating to the sum of DEM 97 500 000, that sum would become available for carrying out the settlement. As to the balance of DEM 22 500 000, the BvS had agreed to pay it to the applicant, in view of the inability of the *Land* of Saxony-Anhalt to accept such a financial burden.

Findings of the Court

32 In accordance with settled case-law, an action for annulment brought by a natural or legal person is admissible only if that person can show an interest in bringing proceedings (order in Case T-5/99 *Andriotis* v *Commission and Cedefop* [2000] ECR II-235, paragraph 36, and Case T-139/99 *AICS* v *Parliament* [2000] ECR II-2849, paragraph 28). Such an interest exists only if the annulment of the measure is of itself capable of having legal consequences (Case 53/85 *Akzo Chemie* v *Commission* [1986] ECR 1965, paragraph 21, and Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 40).

33 Moreover, the interest in bringing proceedings for annulment is assessed as at the date when the action is brought (Case 14/63 *Forges de Clabecq* v *High Authority* [1963] ECR 357, at 371, and Case T-22/97 *Kesko* v *Commission* [1999] ECR II-3775, paragraph 55).

34 In the present case, the fact that the German Government has fully complied with the contested decision and does not intend to reintroduce the aid scheme in question if the decision is annulled cannot be used to argue that the applicant has no interest in bringing proceedings. The documents in the case show that if Paragraph 18(1) of the Finance Law 1996 had remained in force, the applicant would have received the 8% premium for its investment project, since it satisfied all the conditions laid down by the InvZulG and had completed the project before 1 January 1999. In those circumstances, it cannot be excluded that, as the applicant asserts, it may be able to put forward certain claims before the German authorities if the contested decision is found by the Court to be unlawful.

35 Nor may any conclusion be drawn from the — entirely legitimate — choice of the German Government for its part not to seek annulment of the contested decision or to intervene in support of the form of order sought by the applicant in the present case.

36 Moreover, the conclusion of the settlement on 30 December 1997 did not deprive the applicant of its interest in bringing proceedings. It is common ground that the implementation of that settlement was conditional on approval by the Commission. That was not given until 13 March 2000, more than two years after the date on which the present action was brought.

37 As to the question whether that approval then deprived the applicant of its interest in bringing proceedings, it suffices to note that the Commission has not seriously cast doubt on the applicant's assertion that the *Land* of Saxony-Anhalt will be in a position to pay the sum of DEM 97 500 000, currently deposited in a blocked account, in order fully to implement the settlement, only in the event that the Court annuls the contested decision (see paragraph 31 above). The allegation by the Commission at the hearing that the applicant wants to be paid the DEM 360 000 000 twice, once under the aid scheme in question and again under the settlement, must be rejected. The settlement expressly provides that the applicant is to repay to the BvS any sum paid to it as 8% investment premium which would enable it to dispose over an amount greater than DEM 360 000 000.

38 It follows from the above considerations that the applicant has an interest in obtaining the annulment of the contested decision.

*Whether the applicant is directly concerned by the contested decision*

Arguments of the parties

39 The Commission submits that the contested decision does not directly affect the applicant's rights.

40 It argues that the obligation of repayment on the applicant derives not from the contested decision but from the fact that the applicant did not satisfy the condition under the InvZulG, in its 1993 version, that the investment project had to be completed before 1 January 1997. In this respect, Article 2 of the contested decision relates only to aid granted under Paragraph 18(1) of the Finance Law 1996. No case of application of Article 2 exists, given that, following the letter of the Federal Ministry of Finance of 17 November 1995 (see paragraph 6 above), the amendment to Paragraph 3(3) of the InvZulG was not put into effect.

41 The Commission further submits that, at the date of lodging of the document in which it raised a plea of inadmissibility, the German authorities had not yet required the applicant to repay the DEM 97 500 000 already received as 8% investment premium for 1994. It considers that if the contested decision had directly entailed an obligation to repay, the repayment would have had to be made within a period of two months from the notification of the decision.

42 Finally, the Commission points out that, if the contested decision were annulled, the applicant would not be able to claim any payment as investment premium,

since the amendment to the InvZulG by Paragraph 18(1) of the Finance Law 1996 has been repealed in the meantime.

43 The applicant submits that it is directly concerned by the contested decision.

44 First, it observes that the investment premium is granted directly by German federal law, so that any undertaking which satisfies the conditions laid down by the InvZulG is entitled to that premium without a discretionary decision of the administration being necessary. It then says that it satisfied the conditions laid down by that law, as amended by Paragraph 18(1) of the Finance Law 1996, since construction of the Leuna 2000 refinery was completed in November 1997. Consequently, if the Commission had approved that provision, the applicant would have been directly entitled to DEM 360 000 000 as 8% investment premium. The applicant adds that, in accordance with the principle of the protection of legitimate expectations, it can still claim that entitlement despite the implementation by the Federal Republic of Germany of the contested decision.

45 Second, the applicant submits that Article 2 of the contested decision has the direct consequence of requiring it to repay the DEM 97 500 000 it received in 1995 as 8% investment premium. It observes here that it is settled case-law that the national authorities have no discretion as regards the recovery of aid (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, and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 24). The applicant considers that the Commission's assertion that the obligation to make repayment derives from the InvZulG is incorrect. It observes that the Commission made its approval of the settlement conditional on repayment of the sum in question, which shows that it considers that the money was unlawfully paid on the basis of Paragraph 18(1) of the Finance Law 1996. Moreover, the repayment notice issued by the German authorities was based on the latter provision.

Findings of the Court

46 Under the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC), a natural or legal person may bring an action against a decision addressed to another person only if that decision is of direct and individual concern to him. Since the contested decision was addressed to the Federal Republic of Germany, the Court must examine, first, whether it is of direct concern to the applicant.

47 It is settled case-law that for a contested Community measure to be of direct concern to a private applicant for the purposes of the above provision, it must directly affect the applicant's legal situation and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules (Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43, and Case T-69/99 *DSTV* v *Commission* [2000] ECR II-4039, paragraph 24).

48 The same applies where the opportunity for addressees not to give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt (Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraphs 8 to 10, and *Dreyfus* v *Commission*, paragraph 44).

49 In the present case, by virtue of the first sentence of Article 2 of the contested decision, the Federal Republic of Germany was obliged to repeal Paragraph 18(1) of the Finance Law 1996. As a result of that repeal, the deadline for completion

of investment projects qualifying for the 8% premium was automatically brought forward from 31 December 1998 to 31 December 1996.

50 Consequently, the German authorities were obliged to recover from investors who had not completed their projects by that date the sums they had already received as 8% investment premium. Thus, in the applicant's case, the documents in the case show that it had to repay the DEM 97 500 000 it had been paid in 1995. The fact that the money was not repaid within two months from the notification of the contested decision to the Federal Republic of Germany (see paragraph 41 above) is immaterial, since it is common ground that that State was obliged to implement that decision. The fact that, formally, the obligation of repayment referred to in the second sentence of Article 2 of the contested decision only concerns aid granted pursuant to Paragraph 18(1) of the Finance Law 1996 is irrelevant because, as stated above, the repeal obligation in the first sentence of Article 2 necessarily had the consequence of requiring the German authorities to recover DEM 97 500 000 from the applicant.

51 Moreover, the documents show that the applicant satisfied all the conditions laid down by the InvZulG and that, since its investment project was completed before 1 January 1999, it would have received the 8% premium if the amendment to that law introduced by Paragraph 18(1) of the Finance Law 1996 had been maintained. The intention of the German authorities to grant the applicant that aid was never in doubt. The Commission's argument based on the fact that Paragraph 18(1) has been repealed (see paragraph 42 above) is of no relevance to the question whether the applicant is directly concerned by the contested decision.

52 It follows from the above considerations that the legal position of the applicant is directly affected by the contested decision.

*Whether the applicant is individually concerned by the contested decision*

Arguments of the parties

53 The Commission observes that, according to settled case-law, persons other than those to whom a decision is addressed can be individually concerned within the meaning of the fourth paragraph of Article 173 of the Treaty only if the decision affects them by reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 107, Case 231/82 *Spijker* v *Commission* [1983] ECR 2559, paragraph 8, and Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 20; Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 42, Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraph 62, Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 51, and Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477, paragraph 37).

54 It observes that Paragraph 1 of the InvZulG defines as eligible for the 8% premium taxable persons within the meaning of the laws on income tax and corporation tax who carry out qualifying investments within the meaning of Paragraphs 2 and 3 of the InvZulG within the favoured region, that that region corresponds to the new *Länder*, and that qualifying investments are essentially the acquisition and production of new depreciable moveable assets.

55 It then states that the amendment introduced by Paragraph 18(1) of the Finance Law 1996 benefited two categories of persons, namely those who applied for and obtained 8% investment premiums for the years 1994 to 1996 but were unable to complete their projects before 1 January 1997 and so had to repay the premium

('the first category') and those who started to carry out investments before 1 January 1994 but did not claim the premium for the years 1994 to 1996 because they knew that they would not be able to complete their projects before 1 January 1997 ('the second category').

56 According to the Commission, those elements show that the scope of the rules in question is not limited to the applicant's case, and that the number and identity of potential beneficiaries cannot be determined precisely.

57 It submits, next, that since the contested decision prohibits the application of general rules, it is itself, as regards the potential beneficiaries of those rules, a measure of general application which applies to objectively defined situations and has legal effects for a category of persons defined in a general and abstract manner. The decision affects the applicant only by virtue of its objective capacity as an investor in the aid region concerned, in the same manner as any other investor who is, or might be in the future, in the same situation (*Piraiki-Patraiki*, paragraph 14, *Spijker*, paragraph 9, and *Kahn Scheepvaart*, paragraph 41).

58 The Commission also disputes the circumstances relied on by the applicant in support of its argument that it is individually concerned by the contested decision.

59 It considers, in the first place, that the applicant's argument that it seeks annulment of the decision only to the extent that it does not authorise the application of Paragraph 18(1) of the Finance Law 1996 in the applicant's particular case cannot be accepted.

60 First, it has not been shown that that provision was specifically intended to govern the applicant's situation. The fact, mentioned in a communication from the German Government to the Commission of 23 June 1998, that the 8% investment premium had to be repaid in over 100 cases in fact proves the contrary. Moreover, the second category includes an indefinite number of potential beneficiaries. In any event, the reasons behind the adoption of a general aid scheme are not relevant for assessing whether an applicant has standing to bring an action.

61 Second, the Commission submits that the contested decision cannot be interpreted as including a distinct part relating to the applicant's situation. It states that it could not have made such a distinction, since the notification of 19 December 1995 related solely to a general aid scheme available to any person satisfying certain objective conditions, and that scheme was already in force at that date. The German Government's observations of 9 September 1996 cannot be construed, moreover, as notification of a specific aid in favour of the applicant. On the contrary, they confirm that the extension of the period for carrying out investments qualifying for the 8% premium was not intended to benefit the applicant alone, and the Leuna 2000 project is cited merely as an example. In any case, even if the German Government had intended to present the extension as aid for the exclusive benefit of the applicant, that would have had no effect. According to the Commission, the classification of a measure as a specific aid or a general aid scheme depends on objective criteria, not on the subjective assessment of the notifying authority. The Commission observes, finally, that it would have been open to the German Government to withdraw its original notification and to notify it of a specific aid in favour of the applicant.

62 Third, the Commission denies that it had no objection in principle, from the point of view of the Community rules on State aid, to the application of Paragraph 18(1) of the Finance Law 1996 to the specific case of the applicant.

63 In the second place, it repeats that the number of cases concerned by the extension of the period for carrying out investments qualifying for the 8% premium was not known. It adds that in any event it is settled case-law that 'a measure does not cease to be a regulation because it is possible to determine the number or even the identity of the persons to whom it applies at any given time as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in relation to its purpose' (*Spijker*, paragraph 10).

64 In the third place, the Commission argues that the fact that the applicant took part in the administrative procedure and is mentioned by name in the contested decision does not mean that it has standing to bring proceedings. It disputes the relevance of the cases cited by the applicant in the application. Four of the five judgments it cites concerned anti-dumping procedures and regulations, a completely different situation from that of the present case. As to the fifth judgment cited, Case 169/84 *Cofaz* v *Commission* [1986] ECR 391, the principles it states are not applicable here, since the applicant was not at the origin of a complaint which led to the opening of the administrative procedure and its observations did not determine the course of that procedure. The Commission adds that the mere fact that the applicant made observations during the administrative procedure or might perhaps be regarded as a party concerned within the meaning of Article 93(2) of the Treaty does not suffice to distinguish it individually in the same way as the person to whom the decision was addressed (*Kahn Scheepvaart*, paragraph 42, and order in Case T-189/97 *Comité d'entreprise de la société française de production and Others* v *Commission* [1998] ECR II-335, paragraphs 42 and 44). It observes, next, that the applicant was mentioned by name in points II and III of the contested decision only to summarise the arguments of the German Government, which had referred to the applicant's difficulties to justify the aid scheme.

65 The applicant claims that the contested decision affects it by reason of certain attributes peculiar to it or by reason of circumstances in which it is differentiated from all other persons.

66 It states, in the first place, that it attacks the decision only to the extent that it does not accede to the German Government's request to authorise application of the amendment to the InvZulG in its particular case. That the InvZulG constitutes a general aid scheme and Paragraph 18(1) of the Finance Law 1996 amends such a scheme is therefore immaterial.

67 In the applicant's view, the notification by the German Government in fact had two subjects: a general aid scheme and a specific aid for the applicant. The German Government introduced the latter aspect of the notification in its observations of 9 September 1996, when it became apparent that the Commission had certain objections to Paragraph 18(1) of the Finance Law 1996. Those observations thus amended the original notification of 19 December 1995.

68 The applicant claims that the latter provision was adopted specifically for it by the German authorities. The *Land* of Saxony-Anhalt took the initiative of asking for the InvZulG to be amended when it became apparent that, for reasons not attributable to the applicant, the Leuna 2000 project could not be completed by the end of 1996. The applicant observes that in September 1996 the Federal Ministry of Economic Affairs had moreover informed it that, as far as the ministry knew, it was the only undertaking to benefit from the extension brought about by Paragraph 18(1) of the Finance Law 1996, and it was not until later that it became evident that other undertakings could also benefit.

69 The applicant further submits that the Commission had no objection of principle as regards the compatibility with the common market of the application of Paragraph 18(1) of the Finance Law 1996 to its specific case. It observes that by its decision of 30 June 1993 the Commission had moreover already authorised the grant of DEM 360 000 000 for its investment project.

70 Finally, the applicant considers that the Commission cannot claim that it would have been illegal in German constitutional law to limit the application of a federal law to one particular case. Even if an aid is introduced by a law, there is nothing to prevent the Commission, taking its decision with reference to the Community rules on State aid, from authorising a particular case of application of that law while prohibiting all the others.

71 The applicant observes, in the second place, that the number of undertakings liable to benefit from the extension introduced by Paragraph 18(1) of the Finance Law 1996 is objectively limited and capable of determination. The only undertakings concerned by that measure are those which started to carry out an investment project between 1 January 1993 and 30 June 1994 and first applied to the German authorities for the 8% premium before 30 September 1995 (see paragraph 89 below). It reiterates that, at the time of adoption of the contested decision, it was the only known beneficiary of the extension. The fact that it appeared from the German Government's communication of 23 July 1998 that more than 100 undertakings benefited from the extension is irrelevant because it was subsequent to the contested decision. Besides, repayment of the 8% investment premium was in fact sought in only 62 cases, and it is doubtful whether those cases all concerned premiums granted under Paragraph 3(3) of the InvZulG.

72 The applicant submits, in the third place, that it is mentioned by name in several places in the contested decision, that its particular situation determined the course of the administrative procedure, and that Elf took an active part in that procedure and made numerous observations. In support of its arguments, it cites a number of judgments of the Court of Justice in anti-dumping cases (Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005, Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, Joined Cases C-133/87 and C-150/87 *Nashua and Others* v *Commission and Council* [1990] ECR I-719, and Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501), together with the *Cofaz* judgment which, it says, held that the cases on the anti-dumping procedure should be used as a guide when assessing whether an applicant has standing to bring an action for annulment in a State aid case. It says

that *Cofaz* cannot be interpreted as meaning that undertakings unable to demonstrate that they are in a situation identical to that examined in that judgment can never be regarded as individually concerned within the meaning of Article 173 of the Treaty (Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraph 64, and Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraph 34). The fact that the applicant was not at the origin of a complaint which gave rise to the opening of the administrative procedure is not therefore decisive in the present case.

Findings of the Court

73 Since the contested decision was addressed to the Federal Republic of Germany, the Court must, secondly, examine whether it is of individual concern to the applicant (see paragraph 46 above).

74 To begin with, the applicant's argument that the German Government's notification to the Commission of Paragraph 18(1) of the Finance Law 1996 concerned, in addition to a general aid scheme, a specific aid for the applicant, so that the contested decision itself had two subjects (see paragraphs 66 and 67 above), must be rejected. As the applicant concedes, the German Government had by its communication of 19 December 1995 (see paragraph 6 above) notified a provision amending Paragraph 3 of the InvZulG, which constituted a general aid scheme. That notification was not subsequently amended by the German Government. In particular, its observations of 9 September 1996 cannot be interpreted as having had the object or effect of making a supplementary notification of a specific aid for the applicant. In those observations the German Government clearly continues to seek approval of the aid scheme as notified in December 1995, while attempting to show that in practice it will benefit only the applicant.

75 Next, it is settled case-law that persons other than the addressees of a decision may claim to be individually concerned only if the decision affects them by reason of certain attributes peculiar to them or by reason of factual circumstances differentiating them from all other persons and, as a result, distinguishing them individually in like manner to the person addressed (*Plaumann*, at 107, and *Cofaz*, paragraph 22; Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 44, Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraph 83, and Case T-69/96 *Hamburger Hafen- und Lagerhaus and Others* v *Commission* [2001] ECR II-1037, paragraph 35).

76 In the present case, it is apparent from the documents in the case (and is common ground) that Paragraph 18(1) of the Finance Law 1996 constitutes a tax provision of general application.

77 Because it prohibits generally the application of such a provision, the contested decision, although addressed to a Member State, has the appearance, as regards the potential beneficiaries of that provision, of a measure of general application covering situations which are determined objectively and entailing legal effects for a class of persons envisaged in a general and abstract manner (Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* [1999] ECR II-179, paragraph 45). The applicant itself acknowledges that other investors could benefit from the extension of the period for carrying out investments qualifying for the 8% premium (see paragraph 68 above) and that, following the contested decision, the premium had had to be reclaimed in a number of cases (see paragraph 71 above).

78 However, notwithstanding those findings, the contested decision cannot be regarded as affecting the applicant solely by virtue of its objective capacity as a potential recipient of the investment premium, in the same manner as any other

operator who is, or might be in the future, in the same situation (*Piraiki-Patraiki*, paragraph 14, and Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 15). There are a number of factors which place the applicant in a situation which differentiates it from all other operators.

79 The Court notes, first, that the applicant's investment project undoubtedly qualified for the 8% premium and the Commission, by its decision of 30 June 1993, had expressly declared the grant of an aid package in support of the project — including aid of DEM 360 000 000 as investment premium — to be compatible with the common market. It is common ground that it was not possible to complete the project before 1 January 1997, as required by Paragraph 3(3) of the InvZulG in its 1993 version, because of unforeseen circumstances beyond the applicant's control. It is also agreed that the applicant's investment project was not altered in character or extent during the additional period of two years introduced by Paragraph 18(1) of the Finance Law 1996, and that the extension allowed it to benefit from the 8% premium without involving any change whatsoever in the intensity of the various items of aid.

80 Next, it is clear from the documents in the case, in particular the contested decision (see point III of the decision), that the adoption of Paragraph 18(1) of the Finance Law 1996 was prompted *inter alia* by the particular features of the applicant's situation mentioned above.

81 Moreover, during the administrative procedure, the applicant's particular situation was the subject not only of written observations of the German Government and the applicant's parent company but also of detailed discussions between the German Government and the Commission.

82 Furthermore, the German Government proposed to the Commission that it would apply Paragraph 18(1) of the Finance Law 1996 to the applicant only and would individually notify any other cases in which that provision was applied. In the contested decision the Commission expressly considered that proposal and gave the reasons why it could not be accepted.

83 It is thus evident that, contrary to the Commission's suggestions in its pleadings, the applicant's case was not considered merely as an example of a large industrial project covered by the aid scheme in question.

84 Finally, it can be seen from the contested decision that the Commission, which had already approved the scheme of the 8% investment premium (see paragraph 3 above) and declared the grant of an aid package for the Leuna 2000 project — including aid of DEM 360 000 000 as investment premium — to be compatible with the common market (see paragraph 4 above), was willing to look for a solution to the applicant's case. It appears from the decision and from the Commission's statements at the hearing that the obstacle to such a solution was the alleged inability of the German Government to ensure that the extension of the period for carrying out investment projects would benefit only the applicant. In other words, the alleged impossibility of singling out the applicant's case at national level, with respect to the application of Paragraph 18(1) of the Finance Law 1996, was an important element of the contested decision.

85 The applicant is thus individually concerned by the contested decision. The action must therefore be declared admissible.

## Substance

86 In support of its application, the applicant raises several pleas in law which may be grouped as follows: a first plea alleging breach of Article 92(2)(c) of the Treaty and failure to state reasons, a second plea alleging breach of Article 92(3) of the Treaty, a third plea alleging breach of the principle of proportionality, a fourth plea alleging breach of Article 93(1) of the Treaty and, finally, a fifth plea alleging failure to state reasons. Despite the heading of the second plea, which refers exclusively to Article 92(3) of the Treaty, the applicant's argument in fact aims to show, more generally, an infringement of Article 92 of the Treaty. This plea should therefore be described as alleging breach of Article 92.

87 The second and third pleas in law will be examined together first.

*Second and third pleas: breach of Article 92 of the Treaty and the principle of proportionality*

Arguments of the parties

88 By the plea alleging breach of Article 92 of the Treaty, the applicant criticises the Commission, in the first place, for classifying as additional State aid the extension of the period for carrying out investments qualifying for the 8% investment premium. It says that the effect of the extension was only to maintain rights

which were in danger of lapsing because of the delay in completing especially complex investment projects.

89 It submits that the group of potential beneficiaries of Paragraph 18(1) of the Finance Law 1996 was already fixed when that provision was adopted, so that the extension could not benefit investors who had not been entitled to the 8% premium under the 1993 version of the InvZulG. It notes that, in accordance with Paragraph 6(1) of the InvZulG, the application for the premium had to be made before 30 September of the calendar year following the financial year in which the investment was completed, payments on account were made or part of the cost of construction borne. It says that since the investor had to have started carrying out his investment project before 1 July 1994, he had necessarily already ordered some work or had some work done by that date, and thus made payments on account or borne some costs of construction during 1994. He must, consequently, have applied for the investment premium before 30 September 1995. At the hearing, the applicant submitted that if an investor decided not to apply for the premium for a given year before 30 September of the following year, he was no longer allowed to do so later. On the other hand, it conceded that an investor who had started to carry out his project within the prescribed period and had not applied for the premium before 30 September 1995 for investment carried out in 1994 could theoretically, on the basis of the InvZulG as amended, have obtained an investment premium, for example, for work done in 1997 if he had applied before 30 September 1998.

90 Finally, the applicant observes that, in any event, the amendment to the InvZulG did not introduce any additional State aid in its particular case.

91 In the second place, it submits that the Commission infringed Article 92 of the Treaty by considering that the extension of the period for completing investments qualifying for the 8% premium introduced operating aid.

92 The investment premium manifestly had all the characteristics of investment aid, as defined by the Community judicature in its case-law and by the Commission in its communications on the method for the application of Article 92(3)(a) and (c) of the Treaty to regional aid (OJ 1988 C 212, p. 2) and on regional aid systems (OJ 1979 C 31, p. 9). According to the applicant, such investment aid cannot — at least in its particular case — have become operating aid merely because of the extension of the period for carrying out investments. It points out that the extension did not involve any additional payment of money to it and that the 8% premium was due to it by virtue of the decisions of 30 June 1993 and 25 October 1994, regardless of the date of completion of its project. Finally, it submits that, as regards that project, the extension does not alter the potential distortion of competition linked to the 8% premium, which was declared compatible with the common market by the Commission in those decisions.

93 The applicant adds that the Commission described the German Government's position incorrectly when it said, in the contested decision, that in its communication of 19 December 1995 the Government explained that the extension of the period for carrying out investments was intended 'as operating aid for increasing the equity of the undertaking concerned'.

94 In the third place, the applicant submits that the Commission infringed Article 92(3)(a) of the Treaty by ruling out the application of that provision on the ground that the eastern German economy would not be the only beneficiary of the aid. It notes that under Paragraph 1(2) of the InvZulG the investment projects must be carried out in the new *Länder*, the premium is necessarily tied up in the capital of the plants in that region, and the extension of the period for investment makes no difference in this respect. It disputes the relevance of the Commission's argument that the aid could be used to finance activities outside the new *Länder*, by saying that it is immaterial if an undertaking, after completing an investment project and receiving aid for that project, uses the aid in another plant.

95 The Commission submits, in the first place, that Paragraph 18(1) of the Finance Law 1996 introduced additional State aid.

96 It argues, first, that that provision enabled undertakings which had started an investment project within the prescribed period but had not, at that time, claimed the 8% investment premium because they knew that they would not be able to complete the project before 1 January 1997 to benefit from that premium.

97 It challenges the applicant's interpretation of Paragraph 6(1) of the InvZulG. It submits that the application for the 8% investment premium did not necessarily have to be made before 30 September 1995, since the investor could wait until 30 September of the year following the financial year during which the investment project was completed before claiming the premium. As a result of the adoption of Paragraph 18(1) of the Finance Law 1996, an investor who completed his project in 1998 could then apply, for the first time, for the investment premium covering the years 1994 to 1998.

98 The Commission submits, next, that the amendment to the InvZulG entailed a relaxation of the conditions for the grant of the 8% premium. More particularly, it had the effect of eliminating the risk, for an investor who had taken the decision to invest in the expectation of benefiting from that premium, of not being able to complete the investment project within the original time-limit.

99 It also submits, in the defence, that since Paragraph 4 of the InvZulG defines the basis of calculation of the 8% premium as 'the sum of the costs of acquisition and production of the qualifying investments completed in the financial year', an

undertaking could have received the premium for the additional investments made during the two years' extension.

100 It observes, finally, that the amendment to the InvZulG introduced by Paragraph 18(1) of the Finance Law 1996 itself amounted to altering aid within the meaning of Article 93(3) of the Treaty, thus requiring the Commission to be informed and to take a decision.

101 In the second place, the Commission refers to point IV of the contested decision to show that the extension of the period for carrying out investments constitutes operating aid.

102 In the third place, it says that the extension could have benefited undertakings located outside the assisted regions, since it did not promote additional investment.

103 By the plea alleging breach of the principle of proportionality, the applicant criticises the Commission for not excluding its particular case from the declaration of incompatibility with the common market and for not exempting it from the obligation to repay the aid granted under Paragraph 18(1) of the Finance Law 1996.

104 It points out, first, that in its decision of 30 June 1993 the Commission had already approved a package of aid for the Leuna 2000 project, including DEM 360 000 000 as 8% investment premium. The lawfulness of that aid package did not depend determinatively on the fact that the work had to be completed by

31 December 1996. It says that the Commission had no objection of principle, from the point of view of the Community rules on State aid, with respect to the application of Paragraph 18(1) of the Finance Law 1996 to its particular case.

105 The applicant submits, next, that the contested decision refers in several places to its particular situation, that the German Government had stated that Paragraph 18(1) of the Finance Law 1996 had been adopted because of the Leuna 2000 project, and that the German and French Governments and Elf had clearly explained during the administrative procedure that that project had a number of special features which distinguished it from other undertakings which might benefit from that provision. It recalls the proposal made to the Commission by the German Government during the administrative procedure (see paragraph 81 above) and observes that, by letter of 25 September 1997, it submitted to the Commission an alternative draft of the operative part of the contested decision which would have made it possible for its particular case to be covered within a general declaration.

106 In those circumstances, according to the applicant, the Commission could not restrict itself to a general, abstract analysis of Paragraph 18(1) of the Finance Law 1996, but had also to make a separate decision on its particular case. It considers that, by rejecting the German Government's proposal and adopting a general declaration of incompatibility, the Commission took a measure that was disproportionate to the aim pursued and unnecessarily imposed a substantial financial burden on it.

107 The applicant submits that no procedural reason prevented the Commission from dealing separately with its particular case. It says that the solution put forward by the German Government would have been legally possible and would not have raised difficulties at administrative level. In particular, the Commission cannot object that it was impossible in German law to adopt a federal law to cover the

applicant's case alone. The adoption of an individual law is unlawful only in the case referred to in the first sentence of Article 19(1) of the German Basic Law, namely where it restricts a fundamental right, and not where, as in the present case, it creates a right.

108 The Commission denies that it disregarded the principle of proportionality.

109 It observes, to begin with, that the German Government notified it only of a general aid scheme, so that it was unable for procedural reasons to treat the applicant's case separately. It considers that if the Government had intended it to rule at the same time on a specific aid for the applicant, it would have had to notify such aid separately, or else change its original notification into a notification of a specific aid plan.

110 The Commission submits, next, that Paragraph 18(1) of the Finance Law 1996 did not have the character of an individual provision. It notes that the German Government had itself stated, moreover, that it was not possible for legal reasons to enact a federal law to cover the applicant's case alone, and asserts that it was not for it to ascertain whether that statement was correct.

111 As to the reasons why the solution suggested by the German Government could not be accepted, it refers to the last three paragraphs of point IV of the contested decision. It states essentially that Paragraph 18(1) of the Finance Law 1996 had already entered into force and constituted a general measure which could be relied on automatically by any investor who satisfied its objective conditions.

112 Finally, the Commission considers that, in any event, the particular situation of the applicant did not justify a derogation in the contested decision. The applicant has not shown, with reference to its project, either that the extension of the period for completion of investments qualifying for the premium caused it to make additional investments in the assisted regions or that the extension did not introduce operating aid.

Findings of the Court

113 It must be noted to begin with that the object of Article 92 of the Treaty is to ensure that competition in the internal market is not distorted (see Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC)). Article 92(1) of the Treaty declares that State aid which distorts or threatens to distort competition is incompatible with the common market in so far as it affects trade between Member States.

114 It must also be observed that, where the Commission enjoys substantial freedom of assessment, as it does when applying Article 92 of the Treaty, the Community judicature, in reviewing whether that freedom was lawfully exercised, cannot substitute its own assessment for that of the competent authority but must restrict itself to examining whether that authority's assessment is vitiated by a manifest error or misuse of powers (Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 34, and Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 26).

115 Moreover, the principle of proportionality requires that the measures adopted by Community institutions do not go beyond what is appropriate and necessary for attaining the objective pursued and where there is a choice between several

appropriate measures the least onerous measure must be used (Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 25, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 163).

116 It should be observed, finally, that the fact that, formally, the Commission has been notified of an aid scheme does not prevent it from examining its application in a particular case, as well as making a general and abstract examination of the scheme. Similarly, in the decision it adopts following its examination, the Commission can consider that some specific applications of the aid scheme notified constitute aid while others do not, or can declare certain applications only to be incompatible with the common market. In the exercise of its wide discretion, it may differentiate between the beneficiaries of the aid scheme notified by reference to certain characteristics they have or conditions they satisfy (see, for example, Commission Decision 2000/394/EC of 25 November 1999 on aid to firms in Venice and Chioggia by way of relief from social security contributions under Laws Nos 30/1997 and 206/1995 (OJ 2000 L 150, p. 50)).

117 In the present case, the Commission could not confine itself to carrying out a general, abstract analysis of Paragraph 18(1) of the Finance Law 1996, but was also obliged to examine the specific case of the applicant. Such an examination was required not only in view of the particular features of the applicant's investment project (see paragraph 79 above) — of which the Commission was fully aware — but also because, during the administrative procedure, the German Government had expressly asked for that to be done.

118 The Commission cannot object in this respect that Paragraph 18(1) of the Finance Law 1996 had already entered into force and constituted a general provision which could be relied on automatically by any investor who satisfied the objective criteria for its application. It would have been for the Federal Republic of

Germany to adopt, if necessary, all the legislative and administrative measures needed to implement the Commission's decision. It would have been for that State to deal with any difficulties arising from its late notification of the aid scheme in question.

119 The arguments of the parties must be considered in the light of those principles and findings.

120 In the contested decision, the Commission considered, first, that the extension of the period for completion of investments qualifying for the 8% premium introduced by Paragraph 18(1) of the Finance Law 1996 constituted additional State aid for undertakings which made investments in the new *Länder*. It stated, next, that that aid did not promote any additional investment and consequently had to be regarded as operating aid intended to increase the capital of the undertakings concerned. It ruled out, finally, the possibility of applying the derogation in Article 92(3)(a) of the Treaty, in particular on the ground that the operating aid would not benefit only the economy of the new *Länder*. According to the Commission, 'undertakings which meet the conditions may also maintain plant elsewhere and could thus use the aid to finance activities outside eastern Germany'.

121 The documents in the case and the Commission's explanations at the hearing show that to reach those conclusions the Commission distinguished two different categories of potential beneficiaries of the aid measure in question.

122 The first category consists of the undertakings which had decided to carry out investment projects in the new *Länder* in reliance on the 8% investment

premium, had started the projects between 1 January 1993 and 30 June 1994 and applied in good time for part payments of the premium, but, contrary to their original expectations, were in the end unable to complete their projects before 1 January 1997. In the contested decision the Commission states, in this respect, that 'undertakings which have taken investment decisions regarding the 8% investment premium without allowing time for investment-related risks have accepted investment aid which turns out to be potentially lower than if they had met the requirements laid down in the [InvZulG], and despite those risks have regarded their investment as profitable'. It says that 'the extension of the time-limit does not generate any extra investment and will probably have no effect on the termination of investment projects already begun'. On being asked by the Court at the hearing to explain in more detail, the Commission stated that, with respect to undertakings in the first category, Paragraph 18(1) of the Finance Law 1996 introduced additional State aid by 'eliminating the risk' for those undertakings of not completing their investment projects within the time-limit.

123 The second category consists of the undertakings which likewise started to carry out investment projects in the new *Länder* between 1 January 1993 and 30 June 1994, but did not apply for the 8% investment premium before the adoption of Paragraph 18(1) of the Finance Law 1996, because they knew that they would not be able to complete their projects before 1 January 1997. The Commission submits that as a result of the two-year extension introduced by that provision those undertakings could now claim the investment premium. The premium constituted not an encouragement to make further investments but a 'windfall profit for undertakings which had originally calculated their investment in such a way that it would be profitable even without such aid'. It should be said that at the hearing the applicant admitted that, theoretically, an undertaking which had started to carry out an investment project within the time-limit but had not applied for the 8% investment premium before the adoption of Paragraph 18(1) of the Finance Law 1996 could, following the enactment of that provision, have obtained the premium for the work done in 1997 by presenting a first application

for the premium before 30 September 1998 (see paragraph 89 above). It thus acknowledges that that provision could produce a 'windfall profit' for some undertakings.

124 However, the Commission places the applicant in the first category of undertakings. There is therefore no need, in the present case, to rule on the correctness of the definition of the second category, nor, consequently, on the parties' differing interpretations of Paragraph 6(1) of the InvZulG (see paragraphs 89 and 97 above).

125 As far as the applicant is concerned, Paragraph 18(1) of the Finance Law 1996 manifestly introduced no additional aid, and hence no operating aid.

126 The documents in the case show that the applicant did not embark on the Leuna 2000 project while taking the risk of not being able to complete it before 1 January 1997, the date referred to in Paragraph 3(3) of the InvZulG in the 1993 version. Besides the fact that it allowed a certain margin of time for completing the project — it was originally to be finished in July 1996 —, it must be pointed out that the delay which occurred resulted from circumstances completely outside its control which it should not necessarily have envisaged when it took the decision to invest. It cannot thus be presumed that the applicant regarded its investment project as 'profitable' even without the 8% premium.

127 Nor could the Commission conclude that there was any other additional State aid in favour of the applicant. In particular, the Commission, which knew from the outset the precise nature and extent of the applicant's investment project and the amount and intensity of the various aids granted for that project (see *inter alia* the

decision of 30 June 1993), could not but find that those factors remained wholly unchanged by the extension for two years of the period for completion of investments qualifying for the 8% premium.

128 Finally, with respect to the Commission's argument, founded on the basis of calculation of the investment premium, that the extension allowed an undertaking to receive the premium for investments made during the two years' extension (see paragraph 99 above), it must be observed that this completely contradicts its assertation that the extension did not encourage any additional investment. Moreover, under Paragraph 3(3) of the InvZulG (in the original and amended versions), implementation of the investment project had to have started — and its extent therefore already be defined — between 31 December 1992 and 1 July 1994. With respect more particularly to the applicant, it is apparent from the documents in the case and the explanations it provided at the hearing that, before its implementation, its project had been precisely defined and had been the subject of detailed discussions both with the German authorities and with the Commission (see *inter alia* the decision of 30 June 1993).

129 In any event, even supposing that Paragraph 18(1) of the Finance Law 1996 introduced additional State aid for the applicant too, there was no justification for declaring that aid incompatible with the common market in the applicant's case. It must be pointed out, first, that not only had the Commission raised no objection to the system of the 8% investment premium, it had actually expressly declared the grant of an aid package for the Leuna 2000 project — including DEM 360 000 000 as investment premium — to be compatible with the common market under Article 92(3) of the Treaty, and, second, that the mere extension of the period for carrying out the investment project was not capable of altering the nature and scope of the project or the amount and intensity of the aid package. In those circumstances, the Commission had no reason to suppose that the extension was such as to distort or threaten to distort competition, at least to a greater extent than the Leuna 2000 project originally notified, so as to make it incompatible with the common market.

130 It follows from the foregoing that, as far as the applicant was concerned, the Commission should have considered that Paragraph 18(1) of the Finance Law 1996 did not introduce additional State aid, or, at the least, that the additional aid introduced was compatible with the common market.

131 By failing to do so, and concluding instead, in all cases, that the provision introduced additional State aid, by declaring that aid incompatible with the common market, and by requiring the repeal of that provision, the Commission infringed Article 92 of the treaty and the principle of proportionality.

132 The second and third pleas in law are consequently well founded. The contested decision must therefore be annulled in so far as it concerns the situation of the applicant, without there being any need to rule on the applicant's other arguments in support of those pleas or on its other pleas.

## Costs

133 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear the applicant's costs in addition to its own, as applied for by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision 98/194/EC of 1 October 1997 concerning the extension of the 8% investment premium for investment projects in the new *Länder* pursuant to the Finance Law 1996 in so far as it concerns the situation of the applicant;**

2. **Orders the Commission to bear its own costs and to pay those incurred by the applicant.**

Lindh García-Valdecasas Cooke

Vilaras Forwood

Delivered in open court in Luxembourg on 22 November 2001.

H. Jung
Registrar

J.D. Cooke
President