

Joined Cases T-132/96 and T-143/96

Freistaat Sachsen and Others

v

Commission of the European Communities

(State aid — Compensation for economic disadvantages caused by the division of Germany — Serious disturbance in the economy of a Member State — Regional economic development — Community Framework on State Aid to the Motor Vehicle Industry)

Judgment of the Court of First Instance (Second Chamber, Extended Composition), 15 December 1999 II-3670

Summary of the Judgment

1. *Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Commission decision, addressed to a Member State, finding that aid is incompatible with the common market — Action brought by the regional authority which had granted the aid — Whether admissible (EC Treaty, Art. 173 (now, after amendment, Art. 230 EC))*

2. *State aid — Prohibited — Derogations — Aid for regions affected by the division of Germany — Scope of the derogation — To be narrowly construed — Economic disadvantages caused by the isolation entailed by the establishment of a border between East and West*
(EC Treaty, Art. 92(2)(c) (now, after amendment, Art. 87(2)(c) EC))

3. *State aid — Prohibited — Derogations — Member State seeking derogation under a duty to cooperate*
(EC Treaty, Art. 92(2) (now, after amendment, Art. 87(2) EC))

4. *Acts of the institutions — Statement of reasons — Obligation — Scope — Where the decision is consistent with previous decisions — Summary statement of reasons is sufficient*
(EC Treaty, Art. 190 (now Art. 253 EC))

5. *State aid — Prohibited — Derogations — Aid which may be regarded as compatible with the common market — Aid to remedy serious disturbance in the economy of a Member State — To be narrowly construed — The disturbance must affect the whole of the economy of the Member State concerned*
(EC Treaty, Art. 92(3)(b) (now, after amendment, Art. 87(3)(b) EC))

6. *State aid — Prohibited — Derogations — Aid which may be regarded as compatible with the common market — Discretion enjoyed by the Commission — Judicial review — Limits*
(EC Treaty, Art. 92(3) (now, after amendment, Art. 87(3) EC))

7. *State aid — Prohibited — Derogations — Aid which may be regarded as compatible with the common market — Aid for the development of certain regions — Assessment by the Commission — Obligation to take into account the repercussions of the aid at Community level*
(EC Treaty, Art. 92(3)(a) and (c) (now, after amendment, Art. 87(3)(a) and (c) EC))

8. *State aid — Investigation by the Commission — Establishment of an aid framework for a particular economic sector — No binding effect in the absence of an agreement between the Member States — Whether the framework may be taken into consideration by the Commission in order to apply Article 92 of the Treaty (now, after amendment, Article 87 EC) and Article 93 of the Treaty (now Article 88 EC) — Permissible*
(EC Treaty, Art. 92 (now, after amendment, Art. 87 EC) and Art. 93 (now Art. 88 EC))

9. *State aid — Commission decision — Legality to be assessed in the light of the information available at the time of adopting the decision — Foreseeable development of competition must be taken into account*
(EC Treaty, Arts 92(1) and 173 (now, after amendment, Arts 87(1) EC and 230 EC))
10. *State aid — Investigation by the Commission — Commission must take a position within a reasonable period — Where it fails to do so, an action may be brought for failure to act*
(EC Treaty, Art. 92 (now, after amendment, Art. 87 EC) and Arts 93 and 175 (now Arts 88 EC and 232 EC))
11. *State aid — Investigation by the Commission — Pre-established operational criteria may be used — Whether the Council's prerogatives are thereby encroached upon — No such encroachment — Distinction between greenfield investments and extensions of existing capacity — Classification to be made in the context of Community law*
(EC Treaty, Art. 92 (now, after amendment, Art. 87 EC) and Art. 93 (now Art. 88 EC))

1. Where a territorial entity within a Member State has legal personality under the law of that State, it may bring an action under the fourth paragraph of Article 173 of the Treaty (now, after amendment, Article 230 EC) for annulment of a decision addressed to that entity and against any decision which, albeit in the form of a regulation or a decision addressed to another person, is of direct and individual concern to that entity.

A Commission decision, addressed to a Member State, finding that certain forms of State aid are incompatible with the common market is of individual concern to a territorial entity within that State, where it was that entity which granted the aid in question, partly from its own resources, and which, by virtue of the decision, is prevented from exercising its autonomous powers as it would wish and obliged to initiate the administrative

procedure for recovering the aid from recipients, a procedure which it alone has the power to implement at national level.

That territorial entity must be regarded as directly concerned by the decision where the national authorities to which the decision was addressed have not exercised any discretion when communicating it to the entity.

Furthermore, the interest which that territorial entity has in challenging the decision is distinct from that of the Member State of which that entity forms part.

2. In view of the fact that both the Maastricht Treaty and the Amsterdam Treaty retained Article 92(2)(c) of the Treaty (now, after amendment, Article 87(2)(c) EC), under which aid compatible with the common market includes 'aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division', and that an identical provision was inserted in Article 61(2)(c) of the Agreement on the European Economic Area, it cannot be assumed that Article 92(2)(c) has become devoid of purpose since the reunification of Germany.

Nevertheless, since Article 92(2)(c) is a derogation from the general principle laid down in Article 92(1) of the Treaty that State aid is incompatible with the common market, it must be interpreted narrowly. Moreover, in interpreting it, it is necessary to consider not only its wording but also its context and the aims of the rules of which it forms part.

For instance, since the phrase 'division of Germany' refers historically to the establishment in 1948 of a dividing line between the Eastern and the Western zones, the 'economic disadvantages caused by that division' can only mean the economic disadvantages caused by

the isolation which the establishment or maintenance of that border entailed, such as the encirclement of certain areas, the breaking of communication links, or the loss of the natural markets of certain undertakings, which therefore need support, either to be able to adapt to new conditions or to be able to survive that disadvantage.

To construe Article 92(2)(c) of the Treaty as permitting full compensation for the undeniable economic backwardness suffered by the new *Länder*, until such time as they reach a level of development comparable with that of the original *Länder*, would be to disregard both the nature of that provision as a derogation and its context and aims. Indeed, the differences in development between the original *Länder* and the new *Länder* are explained by causes other than the division of Germany as such, and in particular by the different politico-economic systems established on either side of the frontier.

3. A Member State which seeks to be allowed to grant aid by way of derogation from the Treaty rules has a duty to cooperate with the Commission, requiring it in particular to provide all the information to enable the Commission to verify that the conditions for the derogation sought are fulfilled.

4. The statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must clearly and unequivocally show the reasoning of the institution which adopted the measure, so as to enable the Community judicature to exercise its power of review and the persons concerned to know the grounds on which the measure was adopted.

Nevertheless, a decision which has been adopted in a context well known to the parties and which forms part of a consistent line of decision-making practice may be supported by a summary statement of reasons.

The reasons given for a measure must be assessed, in particular, by reference to the interest which the addressee or other persons concerned may have in receiving explanations, particularly where they played an active part in the procedure prior to the adoption of the contested measure and knew the reasons of fact and law which led the Commission to take its decision.

Moreover, the Commission is not required, in stating its reasons for a decision, to reply to all the issues of fact and law raised by the interested parties, provided it takes account of all the circumstances and all the relevant factors of the case. Consequently, in the case of a decision on State aid, where

the applicants have been closely associated with the administrative procedure which led to the drawing up of that decision, neither the fact that the decision does not reproduce the detailed figures of the cost-benefit analysis of the planned investment nor the fact that the analysis was not annexed to the decision constitutes a breach of the duty to state reasons.

5. It follows from the context and general scheme of Article 92(3)(b) of the Treaty (now, after amendment, Article 87(3)(b) EC) — under which aid to remedy a serious disturbance in the economy of a Member State may be regarded as compatible with the common market — that the disturbance in question must affect the whole of the economy of the Member State concerned, not merely the economy of one of its regions or areas of territory. This, moreover, is in conformity with the need to interpret strictly a derogating provision such as Article 92(3)(b) of the Treaty.
6. When reviewing the Commission's exercise of its discretion under Article 92(3) of the Treaty (now, after amendment, Article 87(3) EC), which involves the making of complex assessments of an economic and social nature

within a Community context, the Community judicature must confine itself to verifying whether the rules on procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment and no misuse of powers. In particular, it is not for the Community judicature to substitute its economic assessment for that of the Commission.

7. The difference in wording between subparagraphs (a) and (c) of Article 92(3) of the Treaty (now, after amendment, Article 87(3) EC) cannot lead to the conclusion that the Commission should take no account of the Community interest when applying Article 92(3)(a) and must confine itself to verifying the regional specificity of the measures involved, without assessing their impact on the relevant market or markets in the Community as a whole.
8. Although the rules of the Community framework for State aid in certain sectors of industry — being appropriate measures proposed by the Commission to the Member States on the basis of Article 93(1) of the Treaty (now Article 88(1) EC) — are entirely devoid of binding force and bind Member States only if the latter have consented to them, there is nothing to prevent the Commission from examining the aid which must be notified to it in the light of those rules when exercising the wide discretion which it enjoys for the purposes of applying Article 92 of the Treaty (now, after amendment, Article 87 EC) and Article 93 of the Treaty.
9. The legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted.

The application of both Article 92(3)(a) and Article 92(3)(c) presupposes the need to take into consideration not only the regional implications of the aid covered by those provisions but also, in the light of Article 92(1), its impact on trade between Member States and thus the sectoral repercussions to which it might give rise at Community level.

When the Commission establishes the existence of aid within the meaning of Article 92(1) of the Treaty (now, after amendment, Article 87(1) EC), it is not strictly bound by the conditions of competition existing at the date on which its decision is adopted. It must carry out an assessment in a dynamic perspective and take account of the foreseeable development of competition and the effects which the aid in question will have upon it.

The Commission cannot therefore be criticised for having taken account of factors arising after the adoption of a plan to grant or alter aid. The fact that the Member State concerned implemented the proposed measures before the investigation procedure resulted in a final decision, in breach of its obligations under Article 93(3) of the Treaty (now Article 88(3) EC), is of no relevance to that question.

partes investigation procedure laid down by Article 93(2) of the Treaty, and its failure to act in the matter may in appropriate cases be disapproved by the Community judicature in proceedings under Article 175 of the EC Treaty (now Article 232 EC).

10. Whilst the preliminary investigation procedure under Article 93(3) of the Treaty (now Article 88(3) EC) is intended to allow the Commission sufficient time, the Commission must, nevertheless, act diligently and take account of the interest of the Member States in being informed of the position quickly in spheres where the need to intervene may be urgent by reason of the effect that the Member States expect from the planned incentive measures. The Commission must therefore take a position within a reasonable period, which the Court of Justice has assessed at two months.

Moreover, the Commission is bound by the same general duty of diligence where it decides to initiate the *inter*

11. The power to make any appropriate regulations for the application of Article 92 of the Treaty (now, after amendment, Article 87 EC) and Article 93 of the Treaty (now Article 88 EC), conferred on the Council by Article 94 of the Treaty (now Article 89 EC), is in no way called into question by the fact that the Commission uses pre-established operational criteria, such as those underlying the distinction between greenfield investments and extensions of existing capacity, when exercising the wide discretion which it enjoys in applying those provisions.

Classification of an investment as an extension of existing capacity or, on the other hand, as a greenfield investment is made in a Community context, irrespective of the classification under the accounting or tax law of the Member State to which the beneficiary undertaking is subject.