

# Joined Cases T-228/99 and T-233/99

## Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen

v

### Commission of the European Communities

(State aid — Commission's lack of competence — Infringement of the rights of the defence — Infringement of essential procedural requirements — Concept of aid — Infringement of Articles 87 EC and 295 EC — Market economy investor — Appropriate rate of return — Infringement of the obligation to state reasons)

Judgment of the Court of First Instance (Second Chamber, Extended Composition), 6 March 2003 . . . . . II- 445

### Summary of the Judgment

1. *Commission — Management of current business — Scope — Supervisory function in matters of State aid — Included (Arts 87(1) EC and 211 EC)*

2. *State aid — Administrative procedure — Commission's obligation to give notice to the parties concerned to submit their comments — Exclusion of those parties from rights of defence*  
(Arts 88(2) EC and 253 EC)
  
3. *Actions for annulment — Pleas in law — Infringement of essential procedural requirements — Action against a Commission decision declaring State aid incompatible with the common market — Right of the beneficiary of the aid and the grantor thereof to plead infringement of the Member State's right to be heard*  
(Arts 88(2) EC and 230, second para., EC)
  
4. *Procedure — Intervention — Application in support of the form of order sought by one of the parties but relying on a different argument — Whether admissible*  
(Statute of the Court of Justice, Art. 40, fourth para.)
  
5. *Acts of the institutions — Statement of reasons — Error of fact in an otherwise adequate statement of reasons — No bearing on the lawfulness of the decision*  
(Art. 253 EC)
  
6. *Community law — General principles of law — Right to proper administration — Diligent and impartial examination of the case*
  
7. *State aid — Definition — Grant of an advantage by a State through State resources*  
(Art. 87(1) EC)
  
8. *Competition — Application of the competition rules — Equal treatment of public and private undertakings — Rules governing public ownership — No effect — Possibility of derogations for undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly*  
(Arts 86(1) and (2) EC, 87(1) EC and 295 EC)
  
9. *State aid — Definition — Assessment on the basis of the private investor criterion — Criterion applicable to measures favouring profitable undertakings*  
(Art. 87(1) EC)

10. *State aid — Definition — Financial aid granted to an undertaking by public authorities — Assessment criterion — Attractiveness to a private investor of a similar investment made on the same conditions*  
(Art. 87(1) EC)
11. *State aid — Definition — Private investor test — Assessment in the light of the average return on capital invested in the sector concerned — Whether permissible — Limits*  
(Art. 87(1) EC)
12. *State aid — Definition — Application to public investors of the informed private investor test — Breach of the principle of equal treatment — None*  
(Art. 87(1) EC)
13. *State aid — Definition — Application of the private investor test — Commission's power of assessment — Judicial review — Limits*  
(Art. 87(1) EC)
14. *Acts of the institutions — Statement of reasons — Obligation — Scope — Commission decision on State aid — Description of the effect on competition and on trade between Member States*  
(Arts 87(1) EC and 253 EC)
15. *State aid — Effect on trade between Member States — Prejudicial to competition — Assessment criteria*  
(Art. 87(1) EC)
16. *Acts of the institutions — Statement of reasons — Obligation — Scope — Choice of basic rate of return when applying the private investor principle*  
(Art. 253 EC)

1. A Commission decision making a finding as to the compatibility with the common market of State aid, applying the market economy investor principle, falls within the scope of the Commission's supervisory function pursuant to Article 211 EC and in particular of its

duty to apply Article 87(1) EC in such a way as to ensure that aid granted by a Member State or through State resources in any form whatsoever does not distort or threaten to distort competition by favouring certain undertakings. Accordingly, even though it

applies that principle to a profitable undertaking, it is not a new political initiative which goes beyond dealing with current business.

(see paras 96, 98, 100)

2. The administrative procedure regarding aid is opened only against the Member State concerned. Undertakings that receive aid and the local authorities within that State which grant the aid are considered, in the same way as competitors of the recipients of the aid, only to be 'interested parties' in this procedure.

In the context of an examination under Article 88(2) EC, the Commission is required to give notice to the parties concerned to submit their comments.

In that regard, the publication of a notice in the Official Journal is an appropriate means of informing all the parties concerned that a procedure has been initiated. The sole aim of this communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action.

The parties concerned essentially play the role of information sources for the Commission in that administrative procedure. It follows that, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having, the parties concerned have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case.

(see paras 122-125)

3. The administrative procedure for the examination of State aid is initiated only against the Member State concerned. Decisions adopted by the Commission at the end of that procedure are addressed only to that Member State. Furthermore, in accordance with Article 88(2) EC, the Member State is responsible for complying with any decision by the Commission requiring the State aid in question to be abolished or altered.

In those circumstances, having regard to the Member State's central role in that procedure, the Member State's right to be heard in the same procedure constitutes an essential procedural

requirement and failure to comply with that requirement entails the nullity of a Commission decision ordering that aid be abolished or altered.

measure if the other recitals in themselves supply a sufficient statement of reasons.

(see para. 162)

Consequently, the beneficiary of the aid, and the local government body which has granted it, have a legitimate interest in pleading such a defect in the Commission's decision where a failure to comply with the Member State's right to be heard may have a bearing on the legality of the contested measure.

(see paras 140-142)

6. The Commission is under a duty to examine a case diligently and impartially, in particular in the context of Article 88 EC. That obligation is associated with the right to sound administration, which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States.

4. The fourth paragraph of Article 40 of the Statute of the Court of Justice does not preclude an intervener from submitting arguments which differ from those of the party which he supports, provided that his aim is to support the form of order sought by that party.

(see para. 167)

(see para. 145)

7. For advantages to be capable of being categorised as State aid within the meaning of Article 87(1) EC, they must be granted directly or indirectly through State resources and be imputable to the State.

5. Even if one recital of a contested measure contains a factually incorrect statement, that procedural defect cannot lead to the annulment of that

However, Article 87(1) does not distinguish between State interventions by reference to their causes or their objectives but defines them by reference to

their effects. It follows that the concept of aid is an objective one, the sole test being whether a State measure confers an advantage on one or more particular undertakings.

State resources do not cease to be so simply because the use of those resources is similar to that by a private investor. The question whether the State has conducted itself like an entrepreneur is a question relating to the existence of State aid and not to the examination of whether the resources in question are public in nature.

(see paras 179-181)

This application of the competition rules to undertakings irrespective of the property systems to which they are subject does not have the effect of restricting the protection under Article 295 EC and of leaving the Member States hardly any latitude in the management of public undertakings, in the retention of shareholdings which they have in those undertakings, or in recourse to considerations other than purely profit-making criteria. Where such interests might conflict with the application of the competition rules, they are taken into account by Article 86(2) EC since it provides that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly may escape the application of the competition rules if those rules obstruct the performance, in law or in fact, of the particular tasks assigned to those undertakings.

8. Although systems of property ownership continue to be a matter for Member States by virtue of Article 295 EC, that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty. Thus, and in accordance with Article 86(1) EC, the competition rules, which are fundamental rules, apply without distinction to public and private undertakings. Article 295 EC cannot therefore be held to restrict the scope of the concept of State aid within the meaning of Article 87(1) EC.

(see paras 192-196)

9. The use, in order to assess whether a State measure is aid, of the private market-economy investor is not restricted solely to undertakings that

are loss-making or being restructured; it also applies to profitable companies.

(see paras 209-210)

10. In order to determine whether action taken by public authorities in respect of the capital of an undertaking, in whatever form, is in the nature of State aid, it is necessary to assess whether, in similar circumstances, a private investor operating in normal conditions of a market economy, of a comparable size to that of the bodies operating in the public sector, could have been prompted to make a capital contribution of that size. In particular, the relevant question is whether a private investor would have entered into the transaction in question on the same terms and, if not, on which terms he might have done so. Moreover, the comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of the transaction in question, having regard to the available information and foreseeable developments at that time.

(see paras 244-246)

11. In the course of applying the private investor principle the average return on

capital invested in the sector concerned is an analytical tool, but only one tool amongst others, to determine whether and, if so, to what extent the undertaking benefiting from a State measure is receiving an economic advantage which it would not have obtained under normal market conditions.

The conduct of a private investor in a market economy being guided by prospects of profitability, the use of an average return is consistent with the notion that an informed private investor, that is, an investor who wishes to maximise his profits but without running excessive risks in comparison with other participants in the market, would, when calculating the appropriate return to be expected for his investment, in principle require a minimum return equivalent to the average return for the sector concerned.

Moreover, since the Commission must always examine all the relevant features of the transaction at issue and its context, it must take into account the question whether an informed private investor, in the place of the public body which has introduced funds that it claims to be an investment, would have accepted a lower return than the average return in the sector concerned as an appropriate return because of econ-

omic considerations other than the optimisation of his return.

(see paras 254-255, 270)

12. The principle of equal treatment prohibits like cases from being treated differently, thereby subjecting some to disadvantages as opposed to others, without such differentiation being justified by the existence of substantial objective differences. However, a public investor is not in the same situation as a private investor. The private investor can count only on his own resources in order to finance his investments and is liable, up to the limits of those resources, for the consequences of his decisions, whereas the public investor has access to resources flowing from the exercise of public power, in particular from taxation. Consequently, as the situations of those two types of investors are not the same, if the conduct of an informed private investor is taken into account in order to assess the conduct of the public investor, when the behaviour of a private investor is not subject to such a constraint, this cannot be regarded as discriminating against the public investor.

(see paras 271-272)

13. The assessment by the Commission of the question whether an investment satisfies the private investor test involves a complex economic appraisal. When the Commission adopts a measure involving such a complex economic appraisal it enjoys a wide discretion, and judicial review of that measure, even though it is in principle a 'comprehensive' review of whether a measure falls within the scope of Article 87(1) EC, is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or a misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision.

(see para. 282)

14. Even in cases where it is clear from the circumstances in which State aid has been granted that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision.

The Commission is not, however, required to demonstrate the real effect of that aid on competition and trade between Member States. If it were required to do so, that would ultimately favour those Member States which grant aid in breach of the duty to notify laid down in Article 88(3) EC, to the detriment of those which do notify aid at the planning stage.

would normally have had to bear in their day-to-day management or usual activities in principle distorts competition.

(see paras 298-300)

(see paras 292, 296)

15. Even State aid of a relatively small amount is liable to affect trade between Member States where there is strong competition in the sector in which the recipient operates.

16. When, in order to decide whether financial assistance provided to an undertaking constitutes State aid within the meaning of Article 87(1) EC, the Commission uses the private investor test, the determination of the basic rate of return that might be obtained by such an investor is a central element of its calculation of the appropriate return for the transaction at issue. The duty to state reasons in that regard is therefore of fundamental importance.

When financial aid granted by a State or from State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid.

That duty is not satisfied where the Commission merely lists the sources of information on which its choice was based but does not set out their content in such a way as to explain its use of them, makes a general reference to contradictory documents, of which the document most relevant to the ultimate finding made was not brought to the attention of the parties concerned, and refers to its previous experience and decisions on State aid, of which the relevance of the only one to which the decision expressly refers is not explained.

Aid intended to relieve undertakings of all or part of the expenses which they

This failure to explain the essential considerations which led it to choose the normal figure for the rate of return in question cannot be remedied by the fact that the parties concerned were able to participate in the administrative procedure preceding the adoption of the decision and the beneficiary of the aid is an economic operator in the sector concerned.

There is a similar inadequate reasoning in regard to the Commission's determination of the rate of return for risks which must affect the normal rate of return where the decision merely refers, in footnotes, to an expert's report ordered by the Commission and to a letter concerning its practice, to which the parties concerned did not have access.

(see paras 395-405, 414-419)