

JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, extended composition)

13 September 1995 *

In Joined Cases T-244/93 and T-486/93,

TWD Textilwerke Deggendorf GmbH, a company incorporated under German law, established in Deggendorf (Germany), represented by Walter Forstner, Lutz Radtke and Karl-Heinz Schupp, Rechtsanwälte, Deggendorf, assisted by Michael Schweitzer, Professor at the University of Passau, with an address for service in Luxembourg at the office of M. Stein, Bayerische Landesbank International SA, 7-9 Boulevard Royal,

applicant,

supported by

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat, and Bernd Kloke, Regierungsrat, both of the Federal Ministry for Economic Affairs, acting as Agents,

intervener,

v

* Language of the case: German.

Commission of the European Communities, represented by Antonino Abate, Principal Legal Adviser, Bernhard Jansen and Bernard Langeheine, of the Legal Service, and by Claus Michael Happe, national official seconded to the Commission, acting as Agents, assisted by Meinhard Hilf, Professor at the University of Hamburg, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Article 2 of Commission Decision 91/391/EEC of 26 March 1991 on aid granted by the German Government to Deggendorf GmbH, a producer of polyamide and polyester yarns located in Deggendorf (Bavaria) (OJ 1991 L 215, p. 16), and of Article 2 of Commission Decision 92/330/EEC of 18 December 1991 on aid by Germany to the Deggendorf textile works (OJ 1992 L 183, p. 36),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, extended composition),

composed of: J. Biancarelli, President, R. Schintgen, C. P. Briët, R. García-Valdecasas and C. W. Bellamy, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 10 January 1995,

gives the following

Judgment

Facts and procedure

- 1 During the period from 1981 to 1983 the applicant, TWD Textilwerke Deggendorf GmbH (hereafter 'TWD'), a company active in the synthetic fibre sector, received State aids, initially not notified to the Commission, consisting of a subsidy of DM 6.12 million from the Federal German Government and a loan on preferential terms of DM 11 million from the *Land* of Bavaria (hereafter 'the TWD I aid'). Following late notification by the German authorities in March and July 1985 after repeated requests from the Commission, the Commission adopted, on 21 May 1986, Decision 86/509/EEC on aid granted by the Federal Republic of Germany and the *Land* of Bavaria to a producer of polyamide and polyester yarn situated in Deggendorf (OJ 1986 L 300, p. 34, hereafter 'the TWD I decision'), in which it found that the aids in question were unlawful, on the ground that, in breach of Article 93(3) of the EEC Treaty, they had not been notified to the Commission, and on the ground that they were incompatible with the common market because they did not satisfy any of the conditions laid down in Article 92(2) and (3) of the EEC Treaty, owing in particular to the fact that they were contrary to the synthetic fibre and yarn aid code. The decision ordered the aid in question to be recovered. No legal challenge was mounted against the TWD I decision, which thus became definitive.

- 2 On 19 March 1987 the Federal German Ministry for Economic Affairs withdrew the certificates concerning the subsidy of DM 6.12 million granted by the Federal German Government, in order to recover that subsidy in accordance with the TWD I decision. However, the applicant challenged that step before the national administrative courts by lodging an appeal before the *Verwaltungsgericht* (Administrative Court) Cologne and then appealing against that court's judgment to the *Oberverwaltungsgericht* (Higher Administrative Court) for the *Land* North Rhine-Westphalia.

- 3 On 31 October 1989 the Federal Republic of Germany notified the Commission of a second aid plan for the applicant comprising a new subsidy of DM 4.52 million and the grant of two loans, of DM 6 and DM 14 million, on preferential terms (hereafter 'the TWD II aid'). On 26 March 1991 the Commission adopted Decision 91/391/EEC on aid granted by the German Government to Deggendorf GmbH, a producer of polyamide and polyester yarns located in Deggendorf (Bavaria) (OJ 1991 L 215, p. 16, hereafter 'the TWD II decision'). Articles 1 and 2 of the TWD II decision read as follows:

'Article 1

The aid in the form of a grant of DM 4 520 000 and two soft loans of DM 6 million and DM 14 million granted to Deggendorf for 12 years and 8 years respectively at 5% interest with a two-year grace period and notified to the Commission by letter dated 31 October 1989 from the German authorities is compatible with the common market within the meaning of Article 92 of the EEC Treaty.

Article 2

The German authorities are hereby required to suspend payment to Deggendorf of the aid referred to in Article 1 of this decision until such time as they have recovered the incompatible aids referred to in Decision 86/509/EEC.'

- 4 The TWD II decision has not been challenged by the Federal Republic of Germany but, by application lodged at the Registry of the Court of Justice on 19 June 1991, the applicant brought an action, registered under No C-161/91, for annulment of Article 2 of that decision.

- 5 In the meantime, on 25 February 1991, the German authorities had notified the Commission of a third plan to grant aid to the applicant in the form of 'soft' loans (hereafter 'the TWD III aid'). That aid concerned investments to be made in the Pietsch undertaking specializing in the manufacture of textile curtains, which had been acquired by the applicant. On 18 December 1991 the Commission adopted Decision 92/330/EEC on aid by Germany to the Deggendorf textile works (OJ 1992 L 183, p. 36, hereafter 'the TWD III decision') whose operative provisions are in similar terms to those contained in the TWD II decision. The operative part of the TWD III decision reads as follows:

'Article 1

The aid in the form of two subsidized loans of DM 2.8 million and DM 3 million granted to Textilwerke Deggendorf GmbH for 15 years and 8 years respectively at 4.5% interest with a three-year grace period and notified to the Commission by letter dated 25 February 1991 from the German authorities is compatible with the common market within the meaning of Article 92 of the EEC Treaty.

Article 2

The German authorities shall suspend payment to Deggendorf of the aid referred to in Article 1 of this Decision until such time as they have recovered the incompatible aid referred to in Article 1 of Decision 86/509/EEC.

Article 3

The German Government shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply therewith.

...'

- 6 By application lodged at the Court Registry on 6 April 1992 the Federal Republic of Germany brought an action, registered under No C-110/92, for annulment of Articles 2 and 3 of the TWD III decision.

- 7 By application lodged at the Court Registry on 18 May 1992, the applicant brought an action, registered under No C-220/92, for annulment of Article 2 of the TWD III decision.

- 8 By order of 12 March 1993, Cases C-161/91 (concerning the TWD II decision) and C-110/92 and C-220/92 (concerning the TWD III decision) were joined for the purposes of the oral procedure and the judgment.

- 9 Pursuant to Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom establishing the Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), the Court, by order of 15 September 1993, disjoined Case C-110/92 (*Germany v Commission*) from Cases C-161/91 and C-220/92 (*TWD v Commission*) and, by order of 27 September 1993, referred Joined Cases C-161/91 and C-220/92 to the Court of First Instance. Those cases were registered at the Court of First Instance under Nos T-244/93 and T-486/93 respectively.

- 10 By order of 13 December 1993 made pursuant to the third paragraph of Article 47 of the Statute (EC) of the Court of Justice, the Court of Justice stayed proceedings in Case C-110/92 until delivery of judgment by the Court of First Instance in Joined Cases T-244/93 and T-486/93.
- 11 Meanwhile, in the national proceedings concerning the TWD I aid (paragraph 2 above), the Oberverwaltungsgericht for the *Land* North Rhine-Westphalia, by an order received at the Court of Justice on 12 May 1992, submitted to it for a preliminary ruling a question asking essentially whether the applicant could plead as a preliminary issue in proceedings before the national courts the unlawfulness of the TWD I decision, although it had allowed the period prescribed in Article 173 of the EEC Treaty to expire and, secondarily, whether that decision was lawful. In its judgment in that case (C-188/92 *TWD Textilwerke Deggendorf v Germany* [1994] ECR I-833) the Court held: 'The national court is bound by a Commission decision adopted under Article 93(2) of the Treaty where, in view of the implementation of that decision by the national authorities, the recipient of the aid to which the implementation measures are addressed brings before it an action in which it pleads the unlawfulness of the Commission's decision and where that recipient of aid, although informed in writing by the Member State of the Commission's decision, did not bring an action against that decision under the second paragraph of Article 173 of the Treaty, or did not do so within the prescribed period.'
- 12 By order of 22 March 1994 made by the Court of First Instance pursuant to the second paragraph of Article 42 of the Statute (EC) of the Court of Justice the Federal Republic of Germany was granted leave to intervene in Case T-486/93 in support of the applicant.
- 13 Upon hearing the report of the Judge-Rapporteur the Third Chamber (extended composition) of the Court of First Instance decided to open the oral procedure in Joined Cases T-244/93 and T-486/93 without any prior measures of inquiry. However, as a measure of organization of procedure the Court of First Instance put certain questions in writing to the Commission in order to clarify the Commission's calculations concerning the amount of aid in question. The Commission replied by letter of 14 December 1994.

- 14 The Court of First Instance heard oral argument from the parties and their replies to the Court's oral questions on 10 January 1995.

Forms of order sought by the parties

- 15 In Case T-244/93 the applicant claims that the Court should:

- annul the Commission's decision of 26 March 1991 on aid granted by the German Government to Deggendorf GmbH, a producer of polyamide and polyester yarns located in Deggendorf (Bavaria), in so far as Article 2 thereof requires the German authorities to suspend payment to the applicant of the aid referred to in Article 1 of the decision until actual recovery of the aid referred to in Article 1 of Commission Decision 86/509/EEC of 21 May 1986 and deemed incompatible with the common market;

- annul the Commission's decision of 26 March 1991;

- order the defendant to pay the costs.

- 16 In Case T-486/93 the applicant claims that the Court should:

- annul Article 2 of the Commission's decision of 18 December 1991;

- order the Commission to pay the costs.

17 In the latter case the intervener submits that the Court should:

- annul Article 2 of the Commission's decision of 18 December 1991;

- order the Commission to pay the costs.

18 In both cases the defendant contends that the Court should:

- dismiss the application;

- order the applicant to pay the costs.

Substance

19 In its application in Case T-244/93 the applicant essentially advances three pleas. The first plea is that the Commission was not empowered to adopt Article 2 of the TWD II decision. The second is that Article 2 of the TWD II decision prevents it from pleading the protection of legitimate expectations under national law, and thus constitutes an unwarranted interference in the national legal system. Thirdly, the applicant maintains that it derives no competitive advantage from the TWD I aid because the funds have been used and the loans repaid.

- 20 In its reply in Case T-244/93 the applicant essentially makes two further pleas: at least part of the TWD I aid satisfied the substantive conditions for it to be declared lawful and, secondly, the principle of proportionality was infringed in that the Commission did not authorize payment of the balance of the TWD II aid after deduction of the amount of the TWD I aid.
- 21 In its application in Case T-486/93, the applicant essentially advances six pleas. The first is that the Commission was not empowered to adopt Article 2 of the TWD I-II decision. The second plea alleges misuse of powers on the ground that, by adopting Article 2 of the TWD III decision, the Commission sought to exert pressure on the applicant so that it could not rely on the rights it has under the national legal system, thus usurping the powers of a Member State. Thirdly, the applicant maintains that it derives no competitive advantage from the TWD I aid since the requirements of the TWD I decision have been observed and it has established reserves in anticipation of the possible outcome of the national proceedings. Fourthly, the applicant pleads infringement of the principle of proportionality, in particular on the ground that the Commission did not authorize payment of the difference between, on the one hand, the total amount of the TWD II and TWD I-II aid and, on the other, the amount of TWD I aid. The fifth plea is that at least part of the TWD I aid satisfied the substantive conditions for it to be declared lawful. Finally, as its sixth plea, the applicant contends that recovery of the TWD I aid is precluded under German law, which is the sole law applicable to the claim for repayment.
- 22 The pleas which are common to both cases must be dealt with together. Some of the pleas must also be grouped together, in so far as they overlap. The Court therefore considers it appropriate to examine the applicant's pleas under the following headings:
- first, the pleas alleging the Commission's lack of competence and infringement of the principles governing the division of powers between the Community and the Member States;

- secondly, the pleas that no competitive advantage was gained from the TWD I aid;
- thirdly, the pleas alleging infringement of the principle of proportionality, and
- fourthly, the pleas of lawfulness of the TWD I aid.

The pleas of the Commission's lack of competence and of infringement of the principles governing the division of powers between the Community and the Member States

Summary of the parties' arguments

- 23 The applicant submits that there is no legal basis for the suspension of payment of the TWD II and TWD III aid ordered in Article 2 of the operative parts of the decisions in question. Furthermore, it alleges essentially that the Commission infringed the principles governing the division of powers between the Community and the Member States. It maintains, in particular, that Article 2 of the operative parts of the decisions constitutes an unwarranted interference in the national legal system.
- 24 In its view, when the Commission takes a decision under Article 92(3)(c) of the Treaty, it certainly has a wide discretion, but that discretion must be exercised in accordance with the procedural requirements of Community law. If it wished to use coercion in order to make the Federal Republic of Germany take action to recover the TWD I aid, the Commission was obliged to use the procedure provided for in Article 169 of the EEC Treaty, or the procedure provided for in the second subparagraph of Article 93(2) of the Treaty, to the exclusion of a conditional authorization procedure, not provided for in the Treaty (see the judgment of the Court

of Justice in Case C-294/90 *British Aerospace and Rover v Commission* [1992] ECR I-493, paragraph 11 et seq). Similarly, the possibility of 'altering' the aid, available under Article 93(2) of the Treaty, concerns only aid incompatible with the common market, which, according to the decisions themselves, is not the case here.

- 25 The applicant also claims that it is for the Member States to recover unlawful aid and that TWD is entitled to challenge the recovery of the TWD I aid before the national courts by relying on the principle of the protection of legitimate expectations (judgment in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* [1983] ECR 2633). In those circumstances, the link made by the contested decisions between the TWD I aid and the TWD II and TWD III aid constitutes unwarranted interference in the national legal order. The suspension of payment of the TWD II and TWD III aid prevents TWD from pleading legitimate expectations in national law because, even if it won in the national proceedings which it has commenced, it could never receive the TWD II and TWD III aid.
- 26 Moreover, in stressing, in the TWD II and TWD III decisions, that it did not have any 'means of coercion at its disposal to accelerate or enforce the implementation of its decision of 21 May 1986', the Commission sought to exert economic pressure on TWD in order to obtain recovery of the TWD I aid; this constituted misuse of power and usurpation of the power of a Member State. Since the procedure for recovery is governed by national law, the Commission could not, without awaiting the decision of the national court, purport to require TWD to repay the TWD I aid and could not therefore make its authorization conditional.
- 27 With regard to its position in national law, the applicant states that restitution is now impossible in so far as the two loans granted by the *Land* of Bavaria are concerned. Since the *Land* has not claimed repayment of the aid in question, such restitution is now precluded by Paragraph 48 of the *Verwaltungsverfahrensgesetz* (Law

on Administrative Procedure, hereinafter 'the VwVfG'), which requires an unlawful administrative act to be withdrawn within a period of one year from the time when the administrative authorities became aware of the circumstances justifying that step.

- 28 As regards the aid granted by the Federal Government, the applicant states that, in its action before the Verwaltungsgericht, Cologne, and then in its appeal to the Oberverwaltungsgericht for the *Land* North Rhine-Westphalia, it claimed protection of its legitimate expectations and relied on the provisions of the VwVfG. At no time was it informed that the TWD I aid ran counter to provisions of Community law so that, when the investment was made and the relevant national administrative decisions adopted, it was entitled to expect that they would not be overturned. Moreover, the period of one year provided for in Paragraph 48 of the VwVfG expired with regard to the federal German authorities, which knew that the decisions granting the TWD I aid were unlawful as soon as they were adopted.
- 29 Even if, as was held in the judgment of the Court of Justice in Case C-5/89 *Commission v Germany* [1990] ECR I-3437, the principle of the protection of legitimate expectations cannot apply to aid granted in breach of Article 93(3) of the Treaty, there are nevertheless cases in which the undertaking may expect aid granted to be lawful and in which it will ultimately be for the Court to decide whether the principle of the protection of legitimate expectations applies. That is so in the present case since the sectoral code was published in the *Official Journal of the European Communities* — and thus brought to the notice of the applicant — only in 1985, after the TWD I aid had been applied for and granted and after the applicant had received assurances from the German authorities about the lawfulness of the aid in question. The prior publication of the sectoral code in the *Bulletin of the Communities* was not sufficient, in the applicant's view, to found an obligation on its part to take cognisance of it.
- 30 The intervener in Case T-486/93 does not dispute that the Commission may take account of a competitive advantage unlawfully acquired by the applicant but considers that in the present case the question as to the extent to which the Commission may take account of the effects of maintaining in force the TWD I aid is of no

significance. Since the TWD III decision found the TWD III aid to be compatible with the common market, it was not possible for its implementation to be prohibited. The suspensory condition is therefore without legal foundation; as a measure restricting the rights of those concerned, it needed authorization under the Treaty (judgment of the Court of Justice in Case 111/63 *Lemmerz-Werke v High Authority* [1965] ECR 677, at p. 699), since the Commission is not authorized to apply procedures not provided for therein (see the judgment in Case C-294/90 *British Aerospace and Rover v Commission*, cited above, paragraph 14). The effect of the first subparagraph of Article 93(2) and Article 92(3)(c) of the Treaty is that a Member State must abolish or alter aid found to be incompatible with it, and not that it should refrain from disbursing aid found to be compatible.

31 Moreover, the benefit conferred on the applicant by the TWD I aid, on the assumption that it still subsists, is merely the consequence of its right to challenge recovery of that aid, and the link established by the Commission is incompatible with the principles of the rule of law, should the applicant be successful in the national proceedings which it has commenced. Since recovery is subject to national law, the Commission should accept the consequences thereof; it may not circumvent them by means of procedures which are not provided for in the Treaty. At the most it could bring proceedings against the Federal Republic of Germany for a declaration that it has failed to fulfil its obligations.

32 It is clear from the TWD III decision that the Commission is using the suspensory condition as a penalty, in the absence of any other means of compelling implementation of the TWD I decision. There is no legal basis for imposing such a penalty. Regard should be had to the fact that penalties affect in a particularly significant way the legal situation of individuals and thus require a clear and unambiguous foundation (judgment of the Court in Case 117/83 *Könecke* [1984] ECR 3291, paragraphs 16 and 17).

33 The defendant contends that the TWD II and TWD III aid was in itself compatible with the common market but that it was necessary to have regard to all matters capable of influencing the effect of that aid, and in particular the fact that the

applicant was still in receipt of the TWD I aid, which had been declared incompatible by a decision of 1986 which became definitive (see the judgment of the Court of Justice in Case C-261/89 *Italy v Commission* [1991] ECR I-4437, paragraph 20). As is clearly apparent from the TWD II and TWD III decisions, the effect of the new TWD II or TWD III aids, respectively, combined with the old, unrecovered TWD I aid, gives the applicant an excessive and undue advantage which seriously affects the general interest.

- 34 The TWD II and TWD III decisions are based on the first subparagraph of Article 93(2) and on Article 92(3)(c) of the Treaty. The TWD II and TWD III aids are prohibited by Article 92(1) of the Treaty but could be regarded as compatible with the common market under Article 93(2)(c) if the TWD I aid were repaid. Such a decision would be less severe for the applicant since if the Commission did not have the power to suspend payment of the new aid it would immediately have to declare them to be totally incompatible with the common market.
- 35 The judgment in the *British Aerospace* case, cited above, had indeed adverted the Commission to the possibility of bringing the matter before the Court under the second subparagraph of Article 93(2) of the Treaty but also, at paragraph 10 of the judgment, to the possibility of altering the aid in question, provided for in the first subparagraph of that same paragraph. Alteration of the new aid, consisting in suspending its disbursement until the unlawful competitive advantage enjoyed by the applicant no longer existed, was the appropriate solution in the present case.
- 36 The TWD II and TWD III decisions do not contain two separate decisions, one declaring the aid compatible, the other suspending its payment. In both cases there is a single decision finding that the TWD II aid and the TWD III aid respectively are not compatible and only disbursable if the applicant has first repaid the TWD I aid, the objective being to restore the pre-existing situation, in accordance with the judgment of the Court of Justice in Case C-142/87 *Belgium v Commission* [1990] ECR I-959, paragraph 66.

- 37 Conditional authorization of the TWD II and TWD III aid is neither a coercive measure nor a means of exerting economic pressure nor a misuse of powers. The only means of actually enforcing implementation of the TWD I decision, which has now become definitive, would be to bring proceedings for breach of the Treaty. The TWD II and TWD III decisions were intended only to prevent the payment of new aids distorting competition in the common market and therefore unlawful. The Commission cannot be obliged, just because certain expectations may be held to be legitimate under national law, to infringe the provisions of the Treaty by authorizing payment of new aids which, if the TWD I aid were maintained, would distort competition and would not be compatible with the common market.
- 38 It is in fact apparent from the judgment of the Verwaltungsgericht, Cologne, of 21 December 1989 that the applicant cannot plead legitimate expectation as far as the aids granted by the Federal Government are concerned. Under German law, a legitimate expectation arises in such circumstances only if the beneficiary first had an expectation and then acted on that expectation, whereas in the present case the greater part of TWD's investments were made before TWD received the TWD I aid. Moreover, no question of legitimate expectation may arise if the recipient knew that the act was unlawful or, owing to gross negligence, was unaware of that fact. According to the judgment of the Verwaltungsgericht, TWD ought to have known that the aids were unlawful. Furthermore, the certificates issued by the Federal Ministry for Economic Affairs were withdrawn within the one-year period provided for in Paragraph 48 of the VwVfG, which could not have started to run before 1 September 1986.
- 39 As far as the aids received from the *Land* of Bavaria are concerned, the applicant knew that the *Land* was obliged to withdraw them and could not have any legitimate expectation that the Bavarian authorities would act contrary to Community law and decline to recover the aids.
- 40 The defendant adds that the application of national law cannot in any event render implementation of the TWD I decision impossible in practice. In the present case, the conditions set in the *Deutsche Milchkontor* judgment, cited above, at pages 2665 and 2666, and in the judgment in *Commission v Germany*, cited above, at paragraph 17, are satisfied, which means that the provisions of the VwVfG are not applicable.

It is also clear from paragraph 14 of the judgment in *Commission v Germany*, cited above, that a trader may not legitimately rely on aids granted if the procedure provided for in Article 93(3) of the Treaty has not been followed.

- 41 In any event, a legitimate expectation in the maintenance of aid contrary to Community law cannot be upheld by the national court without a reference to the Court of Justice (*Commission v Germany*, cited above, paragraph 16). If the Court had ruled, in proceedings for a preliminary ruling, that the applicant could legitimately have entertained an expectation that the TWD I aid was lawful, even under Community law, the suspension of payment of the TWD II and TWD III aids would automatically have become nugatory. However, that has not happened in the present case.

Findings of the Court

- 42 The questions raised by these pleas must be examined in two stages; first, the question of the Commission's competence to adopt Article 2 of the TWD II and TWD III decisions and, secondly, the question of the alleged infringement of the principles governing the division of powers between the Community and the Member States.

— The Commission's competence to adopt Article 2 of the TWD II and TWD III decisions

- 43 Article 1 of the operative part of each decision finds that the TWD II and TWD III aids are 'compatible with the common market within the meaning of Article 92 of the EEC Treaty'. However, according to Article 2 of the operative part, the German authorities are to 'suspend payment to [TWD] of the aid referred to in

Article 1 of this Decision until such time as they have recovered the incompatible aid referred to in Article 1 of Decision 86/509/EEC'.

- 44 The arguments of the applicant and of the intervener on the question of the Commission's competence are mainly based on the fact that Article 1 of the operative part of each decision found the TWD II and TWD III aids to be compatible with the common market. In their view, the Commission does not have power to suspend disbursement of aid so declared compatible with the common market.

- 45 Given those arguments and in order to decide whether the Commission had the power to adopt the contested decisions, it is first necessary to determine the meaning and effect of those decisions. In particular, the relationship between the operative parts and the grounds of the decisions must be examined.

- 46 The operative part of an act must be interpreted by having regard to the reasoning which led to its adoption (see the judgment of the Court of First Instance in Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others v Commission* [1992] ECR II-1403, paragraph 320).

- 47 As regards the TWD II decision, after finding at the end of Part IV, that the TWD II aid measures 'are eligible for exemption pursuant to Article 92(3)(c)' of the Treaty, the Commission continues in these terms in the first recital in Part V:

'When deciding whether one of the exemptions provided for in Article 92(3) of the Treaty can apply to an aid, the Commission must take into account all relevant

circumstances which may influence the effect of the aid on trading conditions in the Community.’

- 48 Then, after recalling the background to the present case, the Commission goes on to find that:

‘The cumulative effect of the illegal aid which [TWD] has been refusing to repay since 1986 and the present new investment aid would give it an excessive and undue advantage which would adversely affect trading conditions to an extent contrary to the common interest’ (Part V, seventh recital).

and that

‘As a result, [TWD] has benefited from unjustified enrichment and will continue to do so until the aid granted illegally is actually repaid.

Consequently, even if the present planned aid (...) may be regarded as compatible with the common market, the Commission considers that it should not be paid until the incompatible aid referred to in its 1986 decision has been repaid (...).

Furthermore, the Commission does not have the power to enforce the speeding up or implementation of its 1986 decision, which makes it all the more necessary to suspend payment of the aid in question.

It should also be noted that, in its notice pursuant to Article 93(2), the Commission referred to the doubly distorting effect on competition caused by the failure of [TWD] to repay the earlier incompatible aids. Yet neither the German Government nor the company in question have submitted any arguments or comments on this matter' (ninth to twelfth recitals).

49 The Commission concludes that

' [the TWD II aid] is compatible with the common market but may not be granted until [TWD] has repaid the aid received illegally between 1981 and 1983 referred to in Commission Decision 86/509/EEC' (thirteenth recital).

50 The grounds of the TWD III decision are almost identical to those of the TWD II decision (see, in particular, the last recital of Part III, and the first and tenth to fourteenth recitals of Part IV of the TWD III decision).

51 The Court considers that, in those circumstances, the TWD II decision and the TWD III decision, each read as a whole, must be interpreted as meaning that the Commission came to the conclusion that the new TWD II and TWD III aids were incompatible with the common market as long as the old TWD I aid had not been repaid. In the grounds of the contested decisions, the Commission considered that the cumulative effect of the old TWD I aid and the new TWD II and TWD III aids would be to alter trading conditions in a way contrary to the general interest. The meaning of the decisions in question is therefore that the new TWD II and TWD III aids, considered in themselves, may be compatible with the common market but that they may not be authorized under Article 92(3)(c) of the Treaty unless the cumulative effect of the old TWD I aid and the new TWD II and TWD III aids is eliminated.

- 52 It follows that the operative parts of the contested decisions cannot be interpreted in the manner contended for by the applicant and the intervener, namely as an unconditional finding of compatibility with the common market (Article 1), to which is added an unlawful suspensory condition (Article 2). On the contrary, the Court considers that it is clear from the actual reading of the decisions in question that the Commission would not have found the new TWD II or TWD III aids to be compatible with the common market, as it did in Article 1 of the operative parts in question, without the condition laid down in Article 2. The purpose of Article 2 of the operative parts in question is in fact to enable the declaration of compatibility in Article 1 to be made.
- 53 In those circumstances, it must be examined, secondly, whether the Commission had power to adopt decisions subject to conditions relating to the grant of aids under Article 92(3)(c) of the Treaty.
- 54 According to Article 92(1) of the Treaty, all State aids referred to by that provision are incompatible with the common market, subject to the derogations provided for in Article 92(2) and (3). According to the first paragraph of Article 93(2), if the Commission finds, after giving notice to the parties concerned to submit their comments, that State aid is not compatible with the terms of Article 92, it is to decide that the State concerned must abolish or alter such aid within a period of time to be determined by the Commission.
- 55 That power of the Commission, to decide that aid must be 'altered', necessarily implies that a Commission decision, authorizing aid under Article 92(3)(c) of the Treaty, may be made subject to conditions for ensuring that authorized aid does not alter trading conditions in a way contrary to the general interest.
- 56 Furthermore, as the Court of Justice held at paragraph 20 of its judgment in *Italy v Commission*, cited above, when the Commission considers the compatibility of a State aid with the common market, it must take all the relevant factors into account, including, where relevant, the circumstances already considered in a prior decision

and the obligations which that previous decision may have imposed on a Member State. It follows that the Commission had the power to take into consideration, first, any accumulated effect of the old TWD I aid and the new TWD II and TWD III aid and, secondly, the fact that the TWD I aid declared unlawful in the TWD I decision had not been repaid.

- 57 It remains to examine whether, as the applicant and the intervener contend, the Commission followed a procedure not provided for by the Treaty and whether the only remedies available to the Commission in the circumstances of this case were the infringement proceedings provided for by Article 169 or the second subparagraph of Article 93(2) of the Treaty.
- 58 In that regard, the Court finds that, unlike the situation considered in the *British Aerospace* case, cited above, the Commission in the present case properly followed the procedure for giving notice provided for by the first paragraph of Article 93(2) of the Treaty before adopting the contested decisions.
- 59 The purposes of the infringement proceedings provided for by the Treaty and of Article 2 of the operative parts of the decision in question are not the same. In the present case, infringement proceedings would have the purpose of finding that the Treaty has been infringed through non-compliance with the TWD I decision. However, as the Commission rightly points out, the TWD II and TWD III decisions deal with conditions upon which new aid, which TWD was in no way obliged to request, could be granted to it. In that context, the aim of Article 2 of the operative parts in question is not to find that the TWD I decision has been infringed but to prevent disbursement of new aid distorting competition in a way contrary to the general interest.
- 60 It follows that the Commission did not follow procedures not provided for by the Treaty and that the infringement proceedings were not the only remedies available to the Commission in this case.

61 As regards the arguments of the applicant and the intervener according to which the Commission committed a misuse of power, having regard, in particular, to the fact that in the contested decisions it stated that it 'does not have any means of coercion at its disposal to accelerate or enforce the implementation of its 1986 decision', which 'makes it all the more necessary to suspend payment of the aid in question' (see paragraph 26 above), it is clear from settled case-law that the concept of misuse of power has a very precise meaning and encompasses the use by an administrative authority of its powers for a purpose other than that for which they were conferred upon it. A decision is vitiated by misuse of power only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the purpose of achieving ends other than those stated (see, for example, the judgment of the Court of Justice in Case C-331/88 *Fedesa and Others* [1990] ECR I-4023 and the judgment of this Court in Case T-106/92 *Frederiksen v Parliament* [1995] ECR-SC II-99).

62 The Court has already found here that the purpose of Article 2 of the operative parts in question is to ensure that competition in the common market is not distorted by payment of the new TWD II and TWD III aids before the old TWD I aid is repaid (see paragraph 59 above). It follows that the contested decisions were not taken for achieving purposes other than those stated and are not therefore vitiated by misuse of power (see also paragraphs 64 to 68 below).

63 The conclusion of this Court is that the Commission was competent to adopt Article 2 of the operative parts of the decisions in question.

— The alleged breach of the division of powers between the Community and the Member States

64 The burden of this plea, according to which Article 2 of the operative parts in question, suspending payment of the TWD II aid and the TWD III aid until the TWD I aid is repaid, constitutes 'unwarranted interference' in the national legal system, is essentially that the Commission infringed the rules governing the

division of powers between the Community and the Member States in that it ignored national proceedings concerning the same subject-matter and infringed the principle of the protection of legitimate expectation relied on in those same proceedings, as defined in the relevant national administrative law.

- 65 The question to be examined therefore is whether the existence of national proceedings, in which such questions of national law are in point, can affect the legality of the TWD II and TWD III decisions.
- 66 The Commission's competence to adopt Article 2 of the contested operative parts cannot be called in question merely by reason of the fact that national proceedings are in progress. The legality of the TWD II and TWD III decisions cannot depend on questions of domestic German law, such as observance by the German authorities of Paragraph 48 of the VwVfG. Furthermore, the fact that domestic proceedings are in progress cannot affect the Commission's power to adopt all measures necessary to ensure that competition in the Community is not distorted.
- 67 As the Court has already found (see paragraphs 59 to 62 above), the aim of Article 2 of the operative parts of the decisions in question is to ensure that competition in the common market is not distorted by the accumulated effect of the aids in question, and not to prevent the applicant from relying on its rights in the national legal system. Accepting the applicant's argument would mean accepting that the Commission was obliged to infringe the Treaty by authorizing new aid capable of accentuating the distortion of competition arising from the fact that the old unlawful aid had not been repaid.
- 68 Moreover, the decisions in question do not prevent the applicant from pursuing the proceedings in progress before the national court, which the applicant has in fact done in this case. Nor can the applicant complain of any 'pressure' since it was the

applicant itself which freely asked for the new TWD II and TWD III aids to be granted to it at a time when it continued to enjoy the competitive advantage afforded by the aid declared unlawful by the TWD I decision.

- 69 It is, in any event, settled law that provisions of national law cannot be applied so as to render practically impossible the recovery of sums required by Community law (see the judgment of the Court of Justice in the *Deutsche Milchkontor* case, cited above, paragraph 22, and in the *Commission v Germany* case, cited above, paragraph 12). There the Court held in particular that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which aid has been granted may not, in principle, have a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. In that case, it is only in exceptional circumstances that the recipient of unlawful aid may properly rely on legitimate expectation. In such a case, it is for the national court, if the case comes before it, to assess the circumstances in question, if necessary after submitting to the Court of Justice questions for a preliminary ruling on interpretation (see the judgment in *Commission v Germany*, cited above, paragraphs 12 to 16).
- 70 In the present case, it is common ground that the TWD I aid was not granted in accordance with the procedure laid down by Article 93(3) of the Treaty. It therefore follows, in accordance with the judgment in *Commission v Germany*, cited above, paragraph 16, that the expectation upon which the applicant relies in the national proceedings may be held to be legitimate only in exceptional circumstances. It is also established that the national court has not made a reference to the Court of Justice under Article 177 of the Treaty in order to ascertain whether such exceptional circumstances, within the meaning of Community law, exist in the present case.
- 71 The Court considers that, in those circumstances, the Community legal system did not oblige the Commission to await the outcome of the national proceedings — in which in fact the alleged legitimate expectation of the applicant has still not been

established after more than eight years of proceedings — before adopting Article 2 of the operative parts in question. Any other interpretation would deprive Articles 92 and 93 of the Treaty of their practical effect.

72 It must be borne in mind in any event that the national proceedings relied on by the applicant do not concern the TWD I aid granted by the Bavarian authorities. According to the applicant's own statements, which have not been contradicted either by the intervener or by the defendant, the Bavarian authorities allowed the one-year period provided for by Paragraph 48 of the VwVfG to expire without taking any steps to recover the aid in question. Moreover, the applicant stated at the hearing that the Bavarian authorities do not wish to claim back the aid in question and that they refused to issue the necessary notice of repayment.

73 In those circumstances, the Court considers that the applicant may not in any event legitimately rely, in Community law, on legitimate expectation based on the fact that the Bavarian authorities did not demand repayment of the TWD I aid in the period laid down by national law. As the Court of Justice held in its judgment in the *Commission v Germany* case, cited above, paragraph 19, a provision laying down a time-limit for the revocation of an administrative act creating rights must be applied in such a way that the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration.

74 It follows from all the foregoing that the pleas alleging that the Commission had no power to adopt the contested decisions and that it infringed the division of powers between the Community and the Member States must be dismissed.

The pleas contending that no competitive advantage was obtained from the TWD I aid

Summary of the parties' arguments

- 75 The applicant maintains that it now has no competitive advantage from the TWD I aid since the funds have been used and the loans repaid. In any event, the Commission has not evaluated the competitive advantage which it found to exist and it is not possible to verify the statement, contained in the TWD II decision, that the TWD I and TWD II aid together entail the equivalent of a subsidy of 29%.
- 76 In Case T-486/93, the applicant, supported by the intervener, further submits that the Commission overestimated the competitive advantage afforded by the TWD I aid because the applicant formed a reserve of DM 6.12 million, plus annual interest, in anticipation of the possible outcome of the national proceedings. The TWD I aid has not therefore had an effect contrary to the Community interest.
- 77 The Commission states that it has to decide whether aid is compatible with the common market in the light of factors relating to the Community as a whole (judgments of the Court of Justice in Case 730/79 *Philip Morris v Commission* [1980] ECR 2671 and in Case 310/85 *Deufil v Commission*, cited above, paragraph 18) and taking account of all the relevant facts. It maintains that its decision is not vitiated by any error of assessment.
- 78 In the contested decisions the Commission considered it necessary to take account of all the factors which might influence the effect of the TWD II and TWD III aid and in particular the fact that the applicant was still in possession of the TWD I aid. The accumulated effect of the two packages of aid distorted competition and seriously affected the general interest, especially on a market in polyamide yarn

already characterized by keen competition, stagnant demand, capital-intensive investments and reduced profit margins.

79 The existing overcapacity of the applicant's business could only have been created with the unlawful TWD I aid. If the applicant were able to keep the TWD I aid and at the same time receive the TWD II or TWD III aid in order to remove the overcapacity created with the unlawful aid, it would receive subsidies for both creating overcapacity and for removing it and would thus be doubly rewarded for its past conduct, contrary to Community law.

80 According to the Commission's calculations, as explained most recently in its letter of 14 December 1994 in reply to questions from the Court, the applicant had to repay to the Federal German Government the grant of DM 6.12 million, plus interest at 6% (DM 3.67 million at 31 December 1993). As regards the loan granted by the *Land* of Bavaria, the advantage does not consist in the amount of the capital loaned, and now repaid, but in the interest rate subsidy granted, namely the difference between the rate of 5% charged and the market rate, and in the two-year grace period. Taking a reference rate of 7.5% as a basis, that interest rate subsidy amount to DM 1.44 million up to 31 December 1993. The total amount of TWD I aid to be repaid therefore amounts to DM 11.2 million.

81 In Case T-486/93, the Commission adds that, even if the applicant had made provision (and not a 'reserve') of DM 6.12 million in its balance sheet for repayment of the investment grant, that amount still remains indirectly available to it and could still be kept, depending on the outcome of the recovery proceedings. Such a provision also has positive financial implications for the applicant by reducing its tax charges. Moreover, the advantages stemming from the interest-rate subsidy on the loans granted by the Bavarian authorities are not covered by the provision in question.

Findings of the Court

- 82 It is settled case-law that Article 92(3) of the Treaty confers on the Commission a discretion the exercise of which entails complex assessments of an economic and social nature which must be made in a Community context (see the judgment of the Court of Justice in the *Deufil v Commission* case, cited above, paragraph 18). The Court must therefore limit its review of such an assessment to ascertaining that the rules of procedure have been complied with, that the reasoning is sufficient, the facts are correct, and that there is no manifest error of assessment or misuse of power.
- 83 The Court finds that the applicant has not demonstrated that the Commission manifestly exceeded the limits of its discretionary power in finding, in the contested decisions, that the applicant enjoyed a competitive advantage in not returning the TWD I aid, and that the TWD II and TWD III aid, together with the TWD I aid, distorted competition in a way contrary to Community law. It is common ground that the applicant has not returned either the investment grant of DM 6.12 million granted by the German Government nor the interest accrued since that sum was made available. Moreover, the fact that the loans granted by the *Land* of Bavaria have been repaid cannot by itself mitigate the distortion of competition since the applicant has not returned the interest-rate subsidy relating to those loans. The applicant therefore continues to enjoy the unlawful competitive advantage accruing from the TWD I aid which, according to the Commission, amounts to more than DM 11 million. Furthermore, the applicant has not put forward any matters to show that the Commission's calculations, as definitively set out in its letter of 14 December 1994, were incorrect.
- 84 As regards the applicant's argument — raised only in Case T-486/93 — that it has made a reserve of DM 6.12 million, plus interest, in its balance sheet, the applicant has not contradicted the Commission's observation that the applicant has not made a 'reserve' in its balance sheet but a provision, in anticipation of the possible outcome of the national proceedings. In the Court's view, the making of such a

provision is not the same as repaying the aid in question. Secondly, the applicant has not provided evidence to show that the provision in question has the effect of removing the unlawful competitive advantage which it derives from the TWD I aid. Thirdly, that provision does not cover the advantages arising from the interest-rate subsidy on the loans granted by the Bavarian authorities.

- 85 It follows that the applicant has not demonstrated that the Commission committed a manifest error of assessment and that the submissions to the effect that the TWD I aid gave the applicant no competitive advantage must therefore be dismissed.

The pleas of breach of the principle of proportionality

Summary of the parties' arguments

- 86 In its reply in Case T-244/93, the applicant contends that the Commission infringed the principle of proportionality by making payment of all the TWD II aid subject to repayment of the TWD I aid. It could have achieved the same result, and impaired the applicant's rights less, by authorizing payment of the TWD II aid less the amount of the TWD I aid.
- 87 In its application in Case T-486/93, the applicant contends that, assuming that the Commission was competent to use 'a means of coercion', it exhausted that possibility in the TWD II decision before adopting the TWD III; the least that is necessary, in order for the principle of proportionality to be observed, is to add the TWD II and TWD III aid, deduct from that total the TWD I aid, and authorize payment of the difference.

- 88 The applicant proposes to achieve that aim by using the following method of calculation: from the amount of the subsidy concerned by the TWD II decision and the capital sum of each of the loans concerned by the TWD II and TWD III decisions, a proportion, calculated in proportion to those amounts, must be deducted from the amount of the TWD I aid to be repaid. The sums thus obtained (more than DM 21 million out of more than DM 30 million approved by the TWD II and TWD III decisions) could lawfully be paid in the form of aid. Account must also be taken of the fact that, since it has not received the TWD III aid, which has not been paid, the applicant has had to finance the investments in question on the open market, which has caused it certain losses.
- 89 In Case T-486/93, the applicant contends in its reply that in order to calculate the value of the aid consisting of loans on preferential terms, the Commission ought to have taken the reference rate of 7.5% used by the Federal Government at the time, and not the rate of 9.5%.
- 90 In its rejoinder in Case T-244/93, the Commission doubts whether the principle of proportionality can apply to a decision not entailing any sanction. The TWD II decision simply means that new aid, to which the applicant has no right, could only be paid to it if it no longer involved any distortion of competition. Since the amount of the TWD I aid to be repaid is in any event higher than the amount of the TWD II aid, there is clearly no infringement of the principle of proportionality. The value of the TWD I aid was DM 11.2 million and the value of the TWD II aid was DM 5.77 million on 31 December 1993 (Annex I to the Commission's letter of 14 December 1994).
- 91 In its defence in Case T-486/93, the Commission contends that the applicant's calculations meant to demonstrate a breach of the principle of proportionality (see paragraph 88 above) are incorrect, in particular because the applicant added together the investment grant and the total amounts of the loans, when it was the investment grant and the interest-rate subsidy granted in relation with the loans which it ought to have taken into account. Similarly, the calculation of the applicant's losses is wrong, in particular because it took no account of the continuing

competitive advantage deriving from the fact that the TWD I aid has not been repaid.

- 92 In the rejoinder in Case T-486/93 the Commission accepts that an interest rate of 7.5% must be taken as a basis of calculation, as the applicant contends, but, since that rate also applies to the TWD II and TWD III loans, the relationship between the TWD I subsidies and the suspended subsidies remains practically the same. On 31 December 1993, the financial advantage from the TWD I aid was approximately DM 11.2 million and that derived from the TWD II and TWD III aids approximately DM 6.1 million, namely DM 5.77 million for the TWD II aid and DM 0.348 million for the TWD III aid (see the Commission's letter of 14 December 1994). The competitive advantage afforded by the TWD I aid is in fact higher than its subsidy equivalent if account is taken of factors such as the positive tax implications, the increase in available cash funds, the substantive advantages deriving from the aids, the intermediate investments, the possibilities of obtaining supplementary loans or the interest on the provision made by the applicant.
- 93 Finally, the Commission has always accepted that there could be a point at which the value of the aid refused is greater than the applicant's unlawful competitive advantage, but that is still not the case here. Consequently, the question whether the Commission has infringed the principle of proportionality does not, in its view, arise.

Findings of the Court

- 94 In Case T-244/93 the applicant has neither developed nor provided figures for its argument, introduced at the stage of the reply, that the Commission ought to have authorized payment of the TWD II aid after deduction of the TWD I aid. The Court therefore finds that in this case the applicant has not produced any reason establishing that the TWD II decision infringed the principle of proportionality.

- 95 As regards Case T-486/93, the Court finds that the calculations on which the applicant bases its argument (paragraph 88, above) are incorrect. As the Commission has rightly pointed out, in order to arrive at the value of the aid in question, the investment grant must be added to the interest-rate subsidy, whereas the applicant, in its calculations, has added the investment grant to the total amount of the loans. Similarly, the applicant's alleged losses take no account of the fact that it has continued to enjoy the unlawful competitive advantage afforded by the TWD I aid.
- 96 Consequently, the calculations put forward by the applicant do not at all demonstrate that the amount of the TWD II and TWD III aid exceeds the TWD I aid. On the contrary, at the hearing, Counsel for the applicant did not dispute that, at the time when the TWD II and TWD III decisions were adopted, the value of the aid considered in those decisions was lower than the value of the unlawful competitive advantage afforded by the TWD I aid. Moreover, according to the Commission's figures, which the applicant has not contradicted, the value of the unlawful competitive advantage afforded by the TWD I aid remains clearly higher than the value of the TWD II and TWD III aid even if a reference rate of 7.5% is used.
- 97 Since the applicant has not established the correctness of the premiss on which its argument is based, namely that the total of TWD II and TWD III aid exceeded the value of the TWD I aid, it follows that the pleas of breach of the principle of proportionality must be dismissed in any event.

The pleas that the TWD I aid was lawful

Summary of the parties' arguments

- 98 In its reply in Case T-244/93 and in its application in Case T-486/93, the applicant contends that part of the TWD I aid fulfilled the substantive conditions for it to be

declared compatible with the common market, at least as far as the renovation of texturizing, rationalization of dyeing and the purchase of knitting machines were concerned. If the TWD II aid concerning the production of yarn and knitting are lawful as a whole, this should also be the situation for similar activities subsidized by the TWD I aid. The renovation of texturizing, rationalization of dyeing and the purchase of knitting machines did not in any event bring about any increase in production.

99 Furthermore, other aid granted in 1988 for investments of the same kind, between 1985 and 1987, was approved by the Commission. The applicant purports to prove this by producing a note made on 7 April 1988 by the Federal Ministry for Economic Affairs reporting a telephone conversation with a Commission official. In 1988, the Commission thus decided that aid which was, according to the applicant, identical to the TWD I aid, fell into the 'textile' sector and not into the 'fibre' sector.

100 In so far as the unlawfulness of the TWD I aid was based purely on the ground of lack of notification, the attempt to compel its repayment constitutes a misuse of power since the Commission has never required repayment of aid in such circumstances.

101 The applicant considers that it may still raise the issue of the unlawfulness of the TWD I decision at this stage of the proceedings since, in its view, Article 184 of the EEC Treaty is applicable by analogy (see, in particular, the judgment of the Court of Justice in Case 92/78 *Simmenthal v Commission* [1979] ECR 777). It maintains that, even though it could have mounted a direct challenge to the TWD I decision, it was not informed of its real economic implications until it acquired knowledge of the TWD II decision.

- 102 The Commission maintains that the TWD I decision has been definitively enforceable since the period for bringing proceedings laid down by Article 173 of the Treaty expired on 1 November 1986. Since the applicant did not bring proceedings within the prescribed period against the TWD I decision, its arguments are inadmissible and irrelevant. In the alternative, it maintains that the TWD I aid was unlawful not only on procedural grounds but also on substantive grounds. The TWD I investments increased the applicant's yarn production capacity, in breach of the sectoral code, whilst the TWD II and TWD III investments concerned supplementary outlets for yarn.

Findings of the Court

- 103 In its preliminary ruling of 9 March 1994 in Case C-188/92 *TWD Textilwerke Deggendorf*, cited above, the Court held that the applicant could not plead that the TWD I decision was unlawful before the national court on the ground that it had not brought proceedings against that decision pursuant to the second paragraph of Article 173 of the Treaty within the period prescribed (see paragraph 11 above). The Court considers that the situation is the same in the present case. The objection of illegality provided for by Article 184 of the Treaty cannot be raised by a legal or natural person who could have brought proceedings under the second paragraph of Article 173 but who did not do so within the period prescribed therein (see the judgment in *Simmenthal v Commission*, cited above, paragraph 39).
- 104 It follows that the pleas contending that the TWD I aid was lawful must be dismissed in any event.

105 It follows from all the foregoing that the actions must be dismissed in their entirety, it not being necessary to rule on the question of the admissibility, in Case T-244/93, of the pleas raised for the first time in the reply.

Costs

106 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. Since the applicant has failed in its submissions, it must be ordered to pay the costs. In accordance with Article 87(4) of the Rules of Procedure, an intervener is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, extended composition)

hereby:

- 1. Dismisses the actions;**
- 2. Orders the applicant to bear its own costs, as well as those of the defendant;**
- 3. The intervener shall bear its own costs.**

Biancarelli

Schintgen

Briët

García-Valdecasas

Bellamy

Delivered in open court in Luxembourg on 13 September 1995.

H. Jung

J. Biancarelli

Registrar

President