JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
21 March 2001 *

In Case T-69/96,

Hamburger Hafen- und Lagerhaus Aktiengesellschaft, established in Hamburg (Germany),

Zentralverband der Deutschen Seehafenbetriebe eV, established in Hamburg,

and

Unternehmensverband Hafen Hamburg eV, established in Hamburg,

represented by E.A. Undritz and G. Schohe, avocats, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by P.F. Nemitz, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

APPLICATION for annulment of the Commission's decisions, communicated to the Netherlands Government on 25 October and 6 December 1995, concerning planned State aids Nos 618/95 and 484/95,

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

composed of: V. Tiili, President, P. Lindh, R.M. Moura Ramos, J.D. Cooke and P. Mengozzi, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 28 June 2000,

gives the following

Judgment

Facts

1 By letter of 28 April 1995, the Netherlands authorities notified the Commission of a planned State aid, registered under No 484/95. By letter of 6 December 1995, the Commission communicated to them its decision not to raise any

objections to the grant of the aid. That decision had been taken on 20 September 1995, after further information had been obtained from the Netherlands authorities about the proposed aid.

2 Aid No 484/95 consisted of a direct subsidy of ECU 241 000 to the undertaking NS Cargo, which was intended to facilitate the purchase of two sets of 20 railway wagons to be used in the combined transport of goods. The objective of that aid was the development of combined rail/road transport, in particular on the Rotterdam-Prague route.

3 By letter of 27 June 1995, the Netherlands authorities notified the Commission of a second planned State aid, consisting of a general aid scheme which was also intended for investments in rolling stock for combined rail/road transport. That planned aid was registered under No 618/95 and, by letter of 25 October 1995 addressed to the Netherlands Government, the Commission communicated its decision not to raise any objections to the grant of that aid.

4 Aid No 618/95 consisted of direct subsidies totalling ECU 960 000 to be granted in 1995 and 1996 to undertakings operating in the combined rail/road transport sector.

5 Both in its letter of 25 October 1995 and in that of 6 December 1995, the Commission gave reasons for its decisions (hereinafter 'the contested decisions'), stating that '[t]hese aid measures [fell] within the scope of the common intermodal transport policy and in particular [were] consistent with the stated objective of the common transport policy of developing combined transport, including through the provision of public assistance for investment in specialised equipment'. According to those letters, the favorable decisions were based on

Article 3(1)(e) of Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the grant of aids for transport by rail, road and inland waterway (OJ, English Special Edition 1970 (II), p. 360), as amended by Council Regulation (EEC) No 3578/92 of 7 December 1992 (OJ 1992 L 364, p. 11).

6 Article 3(1)(e) of Regulation No 1107/70 authorised Member States to adopt, until 31 December 1995, transport coordination measures involving the grant of aids under Article 77 of the EC Treaty (now Article 73 EC), provided that such aids were granted as a temporary measure and designed to facilitate the development of combined transport, such aids having to relate *inter alia* to 'investment in transport equipment specifically designed for combined transport and used exclusively in combined transport'.

7 The applicant Hamburger Hafen- und Lagerhaus (hereinafter 'HHLA') is an undertaking which provides transhipment and warehousing services in the Port of Hamburg.

8 The applicants Unternehmensverband Hafen Hamburg (hereinafter 'UVHH') and Zentralverband der Deutschen Seehafenbetriebe (hereinafter 'ZDS') are associations which represent the interests of the German seaports.

9 The undertaking NS Cargo, the recipient of aid No 484/95, is a subsidiary of the Netherlands railway undertaking Nederlandse Spoorwegen (hereinafter 'NS'). Its purpose is the carriage of goods.

10 In September 1995 HHLA learned through the press of the Netherlands Government's plans to grant aid. On 23 October 1995 its lawyer contacted the

Commission in order to ascertain whether those plans had been notified. By letter of 28 November 1995, HHLA lodged a complaint against the two planned aids, requesting access to the documents of the procedure relating to those plans and the initiation of the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC).

11 As the result of a telephone conversation with a member of the Commission's staff on 29 November 1995, HHLA's lawyer learned that the aids in question had been declared compatible with the common market and that the procedure referred to in Article 93(2) of the Treaty had therefore not been initiated.

12 From 1 December 1995 onwards, HHLA repeatedly approached the Commission with the request that it be sent any decision relating to the planned aid in question and, by letter of 4 February 1996, called upon the Commission to act in accordance with Article 175 of the EC Treaty (now Article 232 EC). On 8 March 1996 the Commission sent HHLA a copy of the two decisions addressed to the Netherlands Government concerning planned State aids Nos 484/95 and 618/95.

13 The Commission rejected the request for access to other documents. The planned aids and the contested decisions were not published in the *Official Journal of the European Communities*.

Procedure

14 By application lodged at the Registry of the Court of First Instance on 13 May 1996, the applicants brought the present action.

15 By a separate document, lodged at the Registry on 1 October 1996, the defendant raised a plea of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance with regard to the decision concerning aid No 618/95.

16 The applicants lodged their observations on the plea of inadmissibility on 13 December 1996.

17 By order of 4 August 1997, the Court of First Instance decided to join the plea of inadmissibility to the substance of the action.

18 On 8 August 1997 the Court invited the parties to reply to certain questions.

19 On 20 June 2000 the applicants sought leave from the Court to include in the file a study, carried out by Planco Consulting GmbH on 19 June 2000, on the relationship between domestic traffic to and from the seaports, on the one hand, and competition between the seaports, on the other.

20 On 21 June 2000 the President of the Fourth Chamber, Extended Composition, decided to include that document in the file.

21 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure.

22 At the hearing on 28 June 2000, the parties presented oral argument and replied to oral questions put by the Court.

Forms of order sought

23 The applicants claim that the Court should:

— annul the contested decisions;

— order the defendant to pay the costs.

24 The defendant contends that the Court should:

— dismiss the application as inadmissible in so far as it relates to aid No 618/95;

— dismiss the application as inadmissible, or as unfounded, in so far as it relates to aid No 484/95;

— order the applicants to pay the costs.

Admissibility

Arguments of the parties

25 According to the defendant, the applicants are not individually concerned by the decision relating to aid No 618/95. What the aid measure in question actually established was a general aid scheme. The Commission's decision relating to aid No 618/95 therefore produced legal effects *vis-à-vis* a category of persons considered in the abstract. That is illustrated *inter alia* by the fourth paragraph of the letter of 25 October 1995, which describes the recipients of the aid as 'private legal persons established in the Netherlands who operate, on a professional basis and for the purposes of combined transport, rolling stock owned by them'.

26 Nor are the applicants directly concerned by the decision relating to aid No 618/95. Since in a general aid scheme the actual grant of an aid takes place only by a decision taken by the competent authorities of the Member State in question, the Commission's decision is not of direct concern to any of the potential recipients. Consequently, applicants likewise could not be directly concerned by the Commission's decision, even if they demonstrated that they were direct competitors of the potential recipients.

27 The Commission argues further that the applicants are not competitors of the potential beneficiaries of the aid scheme. The applicants' interests lie purely in port activities, and in particular transhipment and warehousing, whereas the potential beneficiaries of the aid scheme are transport undertakings.

28 The Commission also challenges the admissibility of the action in so far as it concerns the decision relating to aid No 484/95. In particular, it claims that there is no direct and current competitive relationship between the applicants on the one hand and the recipient of the aid, the undertaking NS Cargo, on the other. Only transport undertakings operating between Rotterdam and Prague are competitors of NS Cargo in the context of the aid at issue. The applicants have not in any way demonstrated the specific nature of the competitive disadvantage which they claim to have suffered on account of the aid in question. They cannot therefore be regarded as 'parties concerned' within the meaning of Article 93(2) of the Treaty.

29 According to the applicants, HHLA must be regarded as a 'party concerned' within the meaning of Article 93(2) of the Treaty and is therefore individually concerned by the contested decisions. By reason of the interchangeability, from the point of view both of vessel operators and of consignors in inland Europe, of the transhipment activities in the various seaports situated between Hamburg and Le Havre, HHLA is in competition with transhippers operating in the Port of Rotterdam, who are grouped together in a company called Europe Combined Terminal (hereinafter 'ECT'). Essentially, the recipient of the aid at issue is ECT and not NS Cargo or the other transport undertakings operating out of the Port of Rotterdam. With regard to aid No 618/95, it is not in fact a general aid scheme but a single financial contribution of which ECT is the beneficiary. The transport undertakings are merely acting as intermediaries since the competitive advantages are intended for the transhippers. The applicants point out in this connection that NS Cargo holds 10% of ECT's capital.

30 The applicants also submit that HHLA is directly concerned by the contested decisions. Those decisions resulted *inter alia* in a direct advantage for ECT, inasmuch as vessel operators and consignors most frequently choose the Port of

Rotterdam on account of the cost reductions obtained by transport undertakings operating out of that port as a result of the aid at issue. By the same token, the contested decisions resulted in a direct disadvantage for transhippers operating in ports in competition with the Port of Rotterdam, such as the Port of Hamburg. The fact that the Netherlands authorities had yet to grant some of the aids makes no difference in this respect because, first, there was no doubt that the Netherlands authorities would pay out the amounts authorised by the Commission and, second, the payment criteria were already laid down in detailed and binding form by the Commission.

31 The applicants further submit that UVHH and ZDS, as trade organisations formed by competitors of the recipients of the aids, must likewise be regarded as individually and directly concerned by the contested decisions.

32 They add that, even if the Court decides that aid No 618/95 constitutes a general aid scheme, the action is admissible as regards UVHH and ZDS. It is settled case-law that associations are entitled to bring an action even if the measure at issue has general application. It is sufficient, in order for an association to be entitled to bring an action for annulment, for the measure at issue to concern that association in its role as the Commission's preferred interlocutor. By virtue of the rights of the defence recognised by the case-law in administrative procedures relating to State aid, such associations are entitled to submit observations to the Commission before the decisions at issue are adopted.

33 Finally, the applicants argue that the present action for annulment is the only legal remedy available to them in order to challenge the aids at issue. In

particular, it would not be possible for them to challenge the measures implementing the aids before the Netherlands courts in view of the insurmountable difficulty of obtaining information on those measures.

Findings of the Court

34 Under the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC), any natural or legal person may institute proceedings against a decision addressed to another person only if the decision in question is of direct and individual concern to the former. Since the contested decisions were addressed to the Netherlands Government, it must be considered, in the first place, whether they are of individual concern to the applicants.

35 It is settled case-law that persons other than the addressees of a decision cannot claim to be individually concerned unless they are affected by that decision by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of these factors, distinguished individually just as in the case of the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107; Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraph 22; Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraph 71; and Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraph 83).

36 In the context of supervision of State aid, the preliminary stage of the procedure for reviewing aid under Article 93(3) of the Treaty, which is intended merely to

allow the Commission to form a prima facie opinion on the partial or complete compatibility of the aid in question, must be distinguished from the examination under Article 93(2). It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (Case T-188/95 *Waterleiding Maatschappij* v *Commission* [1998] ECR II-3713, paragraph 52).

37 Where, without initiating the procedure under Article 93(2), the Commission finds, on the basis of Article 93(3), that aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision of the Commission before the Court (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 23; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 17; and *Waterleiding Maatschappij*, paragraph 53). Therefore, the Court of Justice and the Court of First Instance will declare an action for the annulment of a decision taken on the basis of Article 93(3), brought by a party concerned within the meaning of Article 93(2), to be admissible where that person is by his action seeking to safeguard his procedural rights under Article 93(2) (*Cook*, paragraphs 23 to 26, *Matra*, paragraphs 17 to 20, and *Waterleiding Maatschappij*, paragraph 53).

38 In this case, the two contested decisions were taken on the basis of Article 93(3) of the Treaty, without the Commission having initiated the formal procedure provided for in Article 93(2). Moreover, the applicants seek the annulment of the contested decisions on the ground that the Commission did not initiate the formal procedure provided for in Article 93(2) in the present case. They consider that it was necessary to initiate such a procedure because an initial assessment of the aid

in question raised serious difficulties in assessing its compatibility with the common market.

39 In the light of the foregoing, the applicants must therefore be regarded as directly and individually concerned by the contested decisions if it appears that they have the status of 'parties concerned' within the meaning of Article 93(2) of the Treaty.

40 It is settled case-law that 'parties concerned' within the meaning of Article 93(2) of the Treaty include not only the undertaking or undertakings benefiting from the aid, but those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16, *Cook*, paragraph 24, *Matra*, paragraph 18, and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 41, confirming the judgment of the Court of First Instance in Case T-95/94 *Sytraval and Brink's France* v *Commission* [1995] ECR II-2651).

41 It is also settled case-law that, in order for its action to be admissible, the competitor of the recipient of the aid must demonstrate that its competitive position in the market is affected by the grant of the aid. Where that is not the case, it does not have the status of a party concerned within the meaning of Article 93(2) of the Treaty (*Waterleiding Maatschappij*, paragraph 62).

42 As to whether the applicants' position in the market is affected in this case, it must be observed, first, that they are not direct competitors of the recipients of

the aids at issue, since those aids relate to combined rail/road transport of goods, whereas the applicants are, in one case, an undertaking providing transhipment and warehousing services in the Port of Hamburg and, in the other two cases, associations representing *inter alia* the interests of undertakings engaged in that activity in German seaports. That conclusion is not invalidated by the study carried out by Planco Consulting GmbH, which seeks to demonstrate that a reduction in the cost of inland transport to and from the seaports affects competition between ports, but does not prove that operators engaged in transhipment and warehousing in the German ports are direct competitors of the recipients of the aids at issue.

43 It must also be held that the applicants have not proved that they were affected by the contested decisions.

44 The applicants point to the reduced turnover they recorded in the carriage of goods to Prague. However, in the first place it is clear from the file as a whole that the applicants' turnover did not decrease substantially during the years when the aids were granted, and in the second place the applicants have never proved the existence of a direct link between the reductions in their turnover and the grant of the aids at issue.

45 The applicants produce turnover figures for Metrans, a company controlled by HHLA, which operated inland container transport services on the route between Hamburg, Prague and Zelechovice from January 1992 to December 1996, figures which, they claim, show that, when the Rotterdam shuttle train (directly

subsidised by aid No 484/95) was brought into service, the Port of Rotterdam gained the quantities of containers lost by the Port of Hamburg.

46 However, it must be observed that, even though, according to the data in the table at Annex 24 to the reply, Metrans' turnover decreased in September 1994, that is, when the shuttle train between Rotterdam and Prague was brought into service, it is apparent from that same table that in October 1994 those figures were again increasing, in parallel to those for the train in question. Even if the Rotterdam shuttle train did in fact capture some business from trains operating out of the Port of Hamburg, that would have been temporary and would not have seriously affected the turnover of the German operators. Moreover, as the temporary decrease in Metrans' turnover was registered in August and September 1994, that is, when the shuttle train between Rotterdam and Prague was brought into service, and not during 1995 and 1996, when the aid was granted, it may be assumed that any effect on the business of the German operators was attributable to the start of that service and not to the grant of the aid.

47 Finally, the only conclusion to be drawn from the data provided by the parties is that from 1994 to 1996 the German seaports experienced comparatively better growth, as regards inland transport to destinations in Eastern Europe, than the Port of Rotterdam, a fact acknowledged by the applicants. In particular, Annex 20 to the reply, which contains an extract from the official shipping statistics compiled by the German Federal Statistical Office, on the trend of container transhipment activities in the ports of Hamburg, Bremen and Bremerhaven from 1994 to 1996, shows that the number of containers transhipped continued to increase steadily.

48 That being the case, the applicants have not adduced sufficient evidence to demonstrate that their competitive position in the market was affected by the grant of the aids at issue.

49 With regard to the claim that the actions brought by UVHH and ZDS are inadmissible because they are associations representing the interests of the German seaports, it has consistently been held that an association formed for the protection of the collective interests of a category of persons cannot be considered to be individually concerned, for the purposes of the fourth paragraph of Article 173 of the Treaty, by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment on behalf of its members where the latter cannot do so individually (Joined Cases 19/62 to 22/62 *Fédération nationale de la boucherie en gros et du commerce en gros des viandes and Others* v *Council* [1962] ECR 491, and Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, paragraphs 14 and 29). However, in this case, since UVHH and ZDS have not proved that their members are in a position to bring an admissible action, the associations themselves are not in such a position.

50 Furthermore, the action brought by those associations cannot be regarded as admissible within the meaning of the judgments in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 21 to 24, and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 29 and 30. In those two cases, the Court recognised that the applicant association had specific *locus standi* because of its status as negotiator of the provisions challenged by the Commission and as Commission interlocutor in discussions concerning the establishment, extension and adaptation of a State aid scheme in the sector concerned. However, UVHH and ZDS have not demonstrated that they have such status. It follows that they have no specific *locus standi* within the meaning of the case-law cited above (see, to that effect, Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* [1999] ECR II-179, paragraphs 55 to 64).

51 With regard to the point made by the applicants that the present action is the only legal remedy available to them in order to challenge the aids at issue, that is also irrelevant. It is sufficient to note that the absence of an effective remedy before the national courts cannot constitute a ground for the Court to exceed the limits of its jurisdiction set by the fourth paragraph of Article 173 of the Treaty (orders in

Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 26, and in Case C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003, paragraph 38, and judgments in Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477, paragraph 50, and in *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd*, paragraph 52).

52 It follows from all the foregoing that the contested decisions do not constitute decisions of individual concern to the applicants within the meaning of the fourth paragraph of Article 173 of the Treaty.

53 The action must therefore be declared inadmissible without any need to consider whether the applicants are directly concerned by the contested decisions.

Costs

54 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

55 Since the applicants have been unsuccessful in their pleadings and the Commission has applied for costs, the applicants must be ordered to pay the costs.

On those grounds,

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

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicants to bear their own costs and those incurred by the Commission.**

Tiili Lindh Moura Ramos

Cooke Mengozzi

Delivered in open court in Luxembourg on 21 March 2001.

H. Jung P. Mengozzi

Registrar President