

JUDGMENT OF THE COURT
19 May 1993 *

In Case C-198/91,

William Cook plc, a company incorporated under English law, whose registered office is in Sheffield, represented by Philip Bentley QC, and José Rivas de Andrés, of the Saragossa Bar, with an address for service in Luxembourg at the Chambers of Arsène Kronshagen, 12 Boulevard de la Foire,

applicant,

v

Commission of the European Communities, represented by Eric White and Michel Nolin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Anecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Kingdom of Spain, represented by Alberto José Navarro Gonzalez, Director General for Community Legal and Institutional Coordination, and Antonio Hierro Hernández-Mora, State Attorney in the Legal Department for matters before the Court of Justice, acting as Agent,

intervener,

APPLICATION for the annulment of the Commission's decision, communicated to the applicant by letter of 29 May 1991, 'to raise no objections' to several State aids received by Piezas y Rodajes SA,

* Language of the case: English.

THE COURT,

composed of: O. Due, President, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 February 1993,

after hearing the Opinion of the Advocate General at the sitting on 31 March 1993,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 30 July 1991, William Cook plc (hereinafter 'Cook') brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of a Commission decision, communicated to the applicant by letter of 29 May 1991, 'to raise no objections' to several State aids received by Piezas y Rodajes SA (hereinafter 'PYRSA').
- 2 It is apparent from the documents before the Court that, by Decision of 26 May 1987 (see Notice 88/C251/04, OJ 1988 C 251, p. 4), the Commission authorized the general regional aid scheme for Spain, the plan for which had been notified to it by the Spanish Government on 30 January of that year, in accordance with Article 93(3) of the Treaty. The amendments subsequently made to that scheme were approved by a Commission decision on 1 September 1987.

3 That aid scheme, authorized under Article 92(3)(a) of the Treaty, provides in particular for the grant of regional aid in the Province of Teruel not exceeding a ceiling of 75% net grant equivalent (NGE).

4 In that province, in the municipality of Monreal del Campo, PYRSA has embarked on a PTA 2 788 300 000 investment programme for the construction of a foundry to produce sprockets (a toothed wheel that engages with a chain, used chiefly in the mining industry) and GET parts (used in the construction of earth-moving and excavation equipment).

5 It is common ground that the following aids were granted in respect of that investment:

— a subsidy of PTA 975 905 000 from the Spanish Government;

— a subsidy of PTA 182 000 000 from the Autonomous Community of Aragon;

— a subsidy of PTA 2 300 000 from the municipality of Monreal del Campo;

— a loan guarantee for PTA 490 000 000 from the Autonomous Community of Aragon;

— interest-rate subsidies on the aforesaid loan, from the Provincial government of Teruel.

6 On 14 January 1991 Cook, which produces steel castings and GET parts, submitted a 'formal complaint' to the Commission in which it challenged the compatibility of those aids with the common market.

- 7 By letter of 13 March 1991, the Commission informed Cook that the aid of PTA 975 905 000 had been granted by the Spanish Government under the general regional aid scheme and was therefore compatible with Article 92 of the Treaty. That letter referred, so far as the other aids were concerned, to the opening of an investigation with the Spanish authorities.
- 8 Following that investigation, the Commission informed Cook, by letter of 29 May 1991, of its decision 'to raise no objections' to the aids granted to PYRSA. Attached to that letter was Decision NN 12/91, which was addressed to the Spanish Government and in which the Commission concluded that those aids fell within the scope of Article 92(3)(a) of the Treaty, according to which aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered to be compatible with the common market.
- 9 That decision is based on two grounds. First, the Commission considers that 'PYRSA production is in the "sprockets" and "GETs parts" sub-sector for which demand rose in the period 1988-90 and which is not experiencing problems of overcapacity'. Secondly, the Commission notes that 'the aid is towards an investment programme in a new firm and that the overall intensity of all the aids together is actually below the 50% net grant equivalent ceiling'.
- 10 In its application, Cook seeks annulment of the Commission decision communicated to it by letter of 29 May 1991.
- 11 By Order of the President of the Court of 20 November 1991, the Spanish Government was given leave to intervene in support of the Commission's conclusions.

- 12 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Subject-matter and admissibility of the application

- 13 The letter of 29 May 1991 merely informs Cook of Decision NN 12/91 in which the Commission considered that the aids granted to PYRSA were compatible with the common market.
- 14 In itself, that letter sent for information does not constitute a decision that may be challenged in proceedings for annulment.
- 15 On the other hand, Decision NN 12/91, which is addressed to the Spanish Government, may be the subject of an action for annulment.
- 16 The defendant contended that the latter decision, in so far as it refers to the aid of PTA 975 905 000 granted by the Spanish Government, merely confirms the aforesaid letter of 13 March 1991, in which it was stated that such aid had been granted under the general regional aid scheme approved by the Commission. In response to that argument, Cook pointed out in its reply that the action was not directed against the letter of 13 March 1991 or any subsequent confirmation of that letter.
- 17 It is appropriate, in those circumstances, to consider the action as being directed against Decision NN 12/91 only in so far as that decision relates to aids other than that granted by the Spanish Government.

- 18 Since Cook is not the addressee of the contested decision, the admissibility of the application is subject, according to the second paragraph of Article 173 of the Treaty, to the condition that the applicant is directly and individually concerned by that decision.
- 19 The Commission and the Spanish Government maintain that that condition is not fulfilled and that, consequently, the application is inadmissible.
- 20 The Court has consistently held that persons other than those to whom a decision is addressed may claim to be concerned within the meaning of the second paragraph of Article 173 only if that decision affects them 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 distinguishes them individually just as in the case of the person addressed (*Case 25/62 Plaumann v Commission* [1963] ECR 95).
- 21 In order to establish whether those conditions are fulfilled in this case, it is appropriate to bear in mind the aim of the procedures provided for by Article 93(2) and by Article 93(3) of the Treaty.
- 22 As the Court pointed out in its judgment in *Case 84/82 (Germany v Commission* [1984] ECR 1451, at paragraphs 11 and 13), the preliminary stage of the procedure for reviewing aids 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 conformity of the aid in question, must be distinguished from the examination under Article 93(2) of the Treaty. 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.

23 Where, without initiating the procedure under Article 93(2), the Commission finds, on the basis of Article 93(3), that an 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 by the Commission before the Court.

24 The parties concerned, within the meaning of Article 93(2) of the Treaty, have been defined by the Court as the 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, at paragraph 16).

25 In this case, whilst the Commission and the Spanish Government deny that the distortions of competition resulting from the contested aids are substantial, they do not dispute that Cook, which, like the undertaking in receipt of the aid, produces GET parts, is a party concerned for the purposes of Article 93(2) of the Treaty.

26 In that capacity, consequently, Cook must be considered to be directly and individually concerned by Commission Decision NN 12/91. It is therefore entitled to seek the annulment of that decision on the basis of the second paragraph of Article 173 of the Treaty.

Substance

27 In support of its application, Cook claims that the procedure was unlawful on the ground that the Commission adopted the contested decision solely on the basis of Article 93(3) of the Treaty, without first initiating the investigation procedure under Article 93(2). Cook also maintains that the principles of the rights of the defence and of proper administration have been disregarded, inasmuch as, in its capacity as complainant, it was not given the opportunity under the Article 93(3) procedure to submit its comments on the facts and evidence on which the Commission based its decision. Finally, the ground of the contested decision which

states that there is no overcapacity in the sprockets and GET parts sub-sector is vitiated, according to Cook, by a manifest error in the assessment of the facts.

- 28 Cook claims, in particular, that the Commission is under an obligation to follow the procedure under Article 93(2) of the Treaty where, as in this case:

it decides on the compatibility of an aid which has not been notified to it;

it establishes the compatibility of an aid on the basis of Article 92(3)(a) of the Treaty;

the difficulties involved in assessing the compatibility of the aid justify the initiation of that procedure.

- 29 As the Court pointed out in its abovementioned judgment in *Germany v Commission* (at paragraph 13), the procedure under Article 93(2) is essential whenever the Commission has serious difficulties in determining whether an aid is compatible with the common market. The Commission may restrict itself to the preliminary examination under Article 93(3) when taking a decision in favour of an aid only if it is able to satisfy itself after the preliminary examination that the aid is compatible with the Treaty. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to obtain all the requisite opinions and for that purpose to initiate the procedure provided for in Article 93(2).

- 30 Although, contrary to Cook's contention, the obligation to initiate the procedure under Article 93(2) of the Treaty does not depend on the circumstances in which the aid is notified or on the provision of Article 92 of the Treaty which is applied, it is for the Commission to determine, subject to review by the Court, on the basis

of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the aid warrant the initiation of that procedure.

- 31 Accordingly, it is necessary to ascertain whether, in this case, the assessments on which the Commission relied, and more specifically that relating to the absence of overcapacity in the sprockets and GET parts sub-sector, gave rise to such difficulties as to justify the initiation of that procedure.
- 32 As the Commission acknowledged in its answers to the questions from the Court, there are no specific figures for sprockets and GET parts.
- 33 The only figures available are those for the steel foundries sub-sector, which covers the production of sprockets and GET parts. In Notice 88/C320/03 concerning the framework for the grant of aid in certain steel sectors not covered by the ECSC-Treaty (OJ 1988 C 320, p. 3), the Commission recorded that in the steel foundries sub-sector demand had been shrinking and further adjustments were necessary owing to the low utilization rate of equipment.
- 34 The Commission maintains that, since the issue of that document which suggested that there was overcapacity of production in the sub-sector in question, the situation had changed for the better in 1989 and 1990. In support of that analysis, which runs counter to the consistent documents produced by Cook, the Commission relies on statistics compiled by the Committee of the European Foundry Associations (CAEF).
- 35 The figures set out in those statistics are only partial, in that they relate only to production, the value of such production and the number of persons employed. They do not make it possible to ascertain production capacity and to compare it

with production and demand on the market. The absence or the existence of overcapacity of production cannot therefore be inferred from those figures with any degree of certainty.

- 36 Moreover, the Commission itself acknowledges in its pleadings and answers that 'it is not easy to estimate production capacity in the steel foundry industry'.
- 37 In those circumstances, it was not clear from the figures and statistics available at the time of the contested decision whether or not there was overcapacity in the sprockets and GET parts sub-sector. On the contrary, such a finding would have necessitated a complex analysis of the sub-sector in question and further investigations into the undertakings in that sub-sector.
- 38 It follows that, since the Commission sought to rely on the absence of overcapacity in the sub-sector in question, it should have initiated the procedure under Article 93(2) of the Treaty in order to ascertain, after obtaining all the requisite opinions, whether its assessment — which gave rise to serious difficulties — was correct.
- 39 Since it was not preceded by that procedure, Decision NN 12/91 is illegal in so far as it relates to aids other than that granted to PYRSA by the Spanish Government. To that extent, therefore, that decision must be annulled, without there being any need to consider the other pleas relied upon by Cook.

Costs

- 40 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

- 41 Under Article 69(4) of those rules, the Kingdom of Spain, as intervener, must be ordered to bear its own costs.

On those grounds,

THE COURT

hereby:

1. **Annuls Commission Decision NN 12/91, which is addressed to the Spanish Government and was communicated to Cook by letter of 29 May 1991, 'to raise no objections' to several State aids granted to PYRSA in so far as it relates to aids other than the subsidy of PTA 975 905 000 granted by the Spanish Government;**
2. **Orders the Commission to pay the costs;**
3. **Orders the Kingdom of Spain to bear its own costs.**

Due	Zuleeg	Murray	Mancini	Schockweiler
Moitinho de Almeida		Grévisse	Diez de Velasco	Kapteyn

Delivered in open court in Luxembourg on 19 May 1993.

J.-G. Giraud

O. Due

Registrar

President