

OPINION OF ADVOCATE GENERAL

JACOBS

delivered on 11 December 2003¹

1. In these proceedings, brought under Article 230 EC, the Commission seeks the annulment of Council Decision 2002/114/EC.²

3. The contested measure is apparently not the only recent decision of the Council relying on the procedure laid down in the third subparagraph of Article 88(2) EC to authorise an aid which serves to reimburse its recipients for having to repay another aid previously subject to a negative Commission decision.⁴ The present proceedings therefore offer the Court the opportunity to determine whether such a use of the Council's power is consistent with the system laid down by the Treaty for the control of State aid.

2. That decision (hereinafter the 'contested measure') was taken pursuant to the third subparagraph of Article 88(2) EC, which empowers the Council, where justified by exceptional circumstances, to declare compatible with the common market an aid which a Member State is granting or intends to grant. It authorises Portugal to make payments to a group of Portuguese pig farmers equivalent in amount to aid which those farmers have already received but have been required to repay following Commission decisions³ declaring it incompatible with the Common Market.

Legal framework

4. Article 87(1) EC states that 'save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring undertakings or the production

1 — Original language: English.

2 — Council Decision 2002/114/EC of 21 January 2002 authorising the Government of Portugal to grant aid to Portuguese pig farmers who were beneficiaries of the measures granted in 1994 and 1998, OJ 2002 L 43, p. 18.

3 — Commission Decision 2000/200/EC of 25 November 1999 concerning an aid scheme implemented by Portugal with a view to reducing the debt burden of intensive stock farms and assisting recovery in the pig farming sector, OJ 2000 L 66, p. 20; Commission Decision 2001/86/EC of 4 October 2000 on the aid scheme implemented by Portugal in favour of the pig-farming sector, OJ 2001 L 29, p. 49.

4 — See Council Decision 2000/257/EC of 20 March 2000 concerning aid granted in Italy by RIBS SpA in accordance with the provisions of national law No 700 of 19 December 1983 on the restructuring of the sugar beet sector, OJ 2000 L 79, p. 38.

of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'. Article 87(2) specifies categories of aid which are compatible with the common market. Article 87(3) lays down categories of aid which may be considered to be so compatible.

6. The third and fourth subparagraphs of Article 88(2) provide as follows:

'On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

5. The Treaty confers a central role on the Commission in supervising and controlling the granting of aid by the Member States. Under Article 88(1) EC, it is for the Commission, in cooperation with the Member States, to 'keep under constant review all systems of aid existing in those States'. The first subparagraph of Article 88(2) empowers and requires the Commission to assess the compatibility of an aid with Article 87, and, if such aid is incompatible, to 'decide that the State concerned shall abolish or alter it' within a specified time period. Article 88(3) requires Member States to notify the Commission of any plans to grant or alter aid, and prohibits them from implementing such plans until the Commission has reached a decision pursuant to the first paragraph of Article 88(2). Should the State in question not comply with such a decision, the second subparagraph of Article 88(2) permits the Commission or any other interested State to refer the matter directly to the Court of Justice.

If, however the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.'

7. Article 89 empowers the Council to make regulations for the application of Articles 87 and 88. Pursuant to that power, the Council has adopted Regulation (EC) No 659/1999, which lays down detailed rules regarding the procedures to be followed in the application of Article 88 EC.⁵

5 — Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the EC Treaty, OJ 1999 L 83, p. 1.

8. Under Article 36 EC, the competition rules contained in the Treaty, including those relating to State aid, apply to production of and trade in agricultural products only to the extent determined by the Council in legislation working out and implementing the common agricultural policy pursuant to Article 37 EC.

9. Article 21 of Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organisation of the market in pigmeat⁶ states that, except as otherwise specified in that Regulation, the State aid provisions of the Treaty are to apply to the production of and trade in pigs and pigmeat products.

The factual background and the contested measure

10. In 1994 and 1999, Portugal granted aid to its pig farming sector (hereinafter the 'original aid'). The 1994 aid was not notified to the Commission, and the 1999 aid was notified but implemented before the Commission decided as to its compatibility with the common market.

11. By decisions 2000/200/EC of 25 November 1999 and 2001/86/EC of 4 October 2000 (hereinafter the 'Commission decisions')⁷ the Commission declared most of the original aid to be incompatible with the common market and ordered it to be repaid.

12. On 21 January 2002, following an application from the Portuguese Government, the Council adopted the contested measure, which declared compatible with the common market a grant of aid by Portugal to the pig farmers who had benefited from the original aid 'equivalent to the amounts which those beneficiaries must reimburse' under the Commission decisions.

13. Recitals 13 and 14 in the preamble to the contested measure contain the following justification for that measure:

'... refunding the [original aid] threatens the economic viability of not a few beneficiaries and would have extremely damaging social effects in certain regions because 50 % of the pig herd is concentrated in less than 5 % of the territory.

6 — OJ 1975 L 282, p. 1

7 — Cited in note 3.

Exceptional circumstances therefore exist, making it possible to consider such aid, by way of derogation and to the extent strictly necessary to remedy the imbalance which has arisen, to be compatible with the common market on the terms specified in this Decision.'

Commission to bear the costs. The Portuguese Government has intervened in its support. The French Government also applied for leave to intervene, but did so only after the expiry of the time-limit specified in Article 93(1) of the Court's Rules of Procedure. It was therefore given leave, pursuant to Article 93(7), to submit its observations during the oral procedure, if that procedure were to take place. In the event, a hearing was not requested, and none was held.

Procedure and claims of the parties

16. The Council and the Portuguese Government argue principally that the contested measure relates to a new aid, and that from a legal viewpoint, it therefore leaves intact, and is unaffected by, the previous Commission decisions.

14. In its application pursuant to Article 230 EC, the Commission asks the Court to annul the contested measure and to order the Council to pay the costs. It submits, in essence, that the Council was not entitled to adopt the measure given the Commission decisions on the original aid. By so doing, the Council is alleged to have exceeded its competence, misused its powers, and infringed the Treaty as well as general principles of Community law. Alternatively, the Commission submits that the Council committed a manifest error of appreciation in concluding that there were the exceptional circumstances required under the third subparagraph of Article 88(2) EC. Further in the alternative, the Commission asserts that the contested measure is not adequately and correctly reasoned.

Identification of the issues

17. In the light of the arguments of the parties, the following issues fall to be considered:

15. The Council asks the Court to dismiss the application as unfounded and order the

- Is the Council entitled under the third subparagraph of Article 88(2) EC to adopt a decision in respect of aid which has previously been the subject of a negative Commission decision?

- May the Council in any event authorise aid which has as its object and effect to assist its recipients to repay aid previously the subject of a negative Commission decision?
- Was the Council manifestly in error in concluding that exceptional circumstances justified the adoption of the contested measure?
- Is the contested measure adequately and correctly reasoned?

puted. Secondly, the procedure specified in respect of that power only makes sense on the assumption that the Commission has yet to reach a decision. Otherwise, there would be no point in the requirement that the Commission suspend its investigation for a three-month period following a Member State's application to the Council. Thirdly, if the Council were able to override the Commission, there would be the risk of a conflict between the supervision of the Commission by the Community judicature and that exercised by the Council. Fourthly, a loss of legal certainty would also result.

19. I find the Commission's submissions on the first issue compelling.

Is the Council entitled to adopt a decision in respect of aid which has previously been the subject of a negative Commission decision?

18. The Commission develops a number of overlapping arguments to show that once it has decided against a given aid, the Council may not adopt a contrary decision. The following four of its submissions appear to me the most important. First, it has the primary competence to determine the compatibility of aid with the common market, and that the Council's power to do likewise is exceptional and should be narrowly inter-

20. It seems to me clear that, as the Commission contends, the relationship between the competences conferred upon the Council and the Commission under Article 88(2) must be regulated on the basis of a principle of pre-emption, so that once either institution has decided upon the compatibility of a given aid, the other is thereby pre-empted from reaching a decision with regard to that aid.

21. In my view, that principle follows clearly from the text of the Treaty. Without it, there

would be no purpose to the requirement in the third and fourth subparagraphs of Article 88(2) that the Commission suspend its investigation for three months whilst the Council considers an application from a Member State.⁸ The three-month period would serve neither to protect the Council's freedom to decide upon an aid nor to impose a time-limit within which the Council must act, given that the Council would retain its power to act, apparently indefinitely, even after the Commission had reached a decision.

paragraph and is expressly confined to exceptional circumstances. A power in the Council to overturn at any time a negative Commission decision would clearly set at nought the allocation of responsibility thus envisaged by the Treaty.

22. The principle also accords with the general objective of the relevant Treaty provisions of securing the effective and impartial control of State aid. The Commission is better suited to the task of overseeing the activities of the Member States than the Council, which comprises their representatives. It is therefore given primary responsibility for assessing the compatibility of an aid with the common market.⁹ The Council's power is by contrast subject to the procedural limitation discussed in the previous

23. Without such a principle, there would, to my mind, be a real possibility for conflict between a Council decision under the third subparagraph of Article 88(2) and a judgment of the Community judicature in relation to a prior Commission decision. If the Council retained its power to act for an indefinite period after the Commission had decided upon the compatibility of an aid, it might intervene only after proceedings relating to the Commission's prior decision had been commenced, or even concluded, before the Community Courts.¹⁰ In the words of Advocate General Mayras, it is surely 'inconceivable that the authors of the Treaty could have allowed for a possible conflict between a decision of the Council based on a determination of circumstances which are exceptional, and which derogate from Article [87], and a judgment of the Court which can only be based on a definitive interpretation of this provision of the Treaty'.¹¹

8 — Advocate General Mayras reached the same conclusion in his Opinion in Case 70/72 *Commission v Germany* [1973] ECR 813, at p. 835, second column. See, however, the Opinion of Advocate General Cosmas in Case C-309/95 *Commission v Council* [1998] ECR I-655, at paragraph 45.

9 — The Commission's primary role in that regard has been recognised by the Court in its case-law which denies to the national courts any power to assess the compatibility of an aid with the common market. See Case C-354/90 *FNCE* [1991] ECR I-5505, at paragraph 14 of the judgment.

10 — Those proceedings might take the form of a challenge under Article 230, or they might arise out of an application by the Commission or another interested State under the second subparagraph of Article 88(2).

11 — Cited in note 8 above, at p. 835, second column.

24. Further, a principle of pre-emption appears to me to be necessary in order to secure legal certainty. Without it, the Council could reverse a decision of the Commission apparently at any stage and, as the present proceedings illustrate, potentially long after it had been taken.¹² Such a possibility would inject a significant element of uncertainty into the relations between the Commission, the Member States and the recipients of State aid. The incentive would be very great for beneficiaries to withhold repayment of illegal aid and to concentrate their efforts instead upon lobbying the State concerned to make application to the Council. Such aid as was recouped by action of the Member State or by order of the national courts might later have to be restored to the beneficiaries. Awards of damages in favour of competitors might also have been made in the interim.

25. The time-limits specified in the Treaty — in the fifth paragraph of Article 230 for direct actions, for example, and, in the present context, in the fourth subparagraph of Article 88(2) — aim precisely to minimise the period during which parties are uncertain as to their legal position. The drafters of the Treaty cannot in my view have intended to confer upon the Council a power, unlimited in time, to reverse a negative decision of the Commission in the field of State aid.

26. The main response offered by the Council and the Portuguese Government is to argue that the contested measure did not purport to authorise the original aid, but related rather to a new and distinct aid. I shall consider that argument when I turn to the second issue. However, both of those parties also advance arguments contesting the Commission's position in relation to the first issue.

27. The Council submits that its power under Article 88(2) is limited only by the requirement of exceptional circumstances. On that view, the three-month period specified in the fourth subparagraph serves to suspend the Commission investigation, but has no consequences for the Council.

28. The Council also argues that the principle of pre-emption, advocated by the Commission, would run counter to the second paragraph of Article 7(1) EC, which provides that each institution is to act within the limits of the powers conferred on it by the Treaty, in that it would render the competence of an institution conditional upon the willingness and speed of another institution to act first.

¹² — The contested measure was adopted on 21 January 2002, over two years after the first of the Commission decisions.

29. Finally, the Council notes that ordinarily, in the case of incompatible legal acts which are not subject to any formal hierarchy, it is the subsequent act that overrules the former in time and not the reverse.

aid. There is no reason why the competence of one institution should not depend upon whether or not there has been some prior act by another. Such is an essential feature of the legislative procedures specified in the Treaty.

30. I am not convinced by the Council's submissions.

31. As I have already explained,¹³ I cannot see what purpose the three-month time-limit specified in the fourth subparagraph of Article 88(2) would serve if the Commission's decision, once reached, did not pre-empt the Council from deciding upon the same subject matter. I therefore cannot accept that the only limitation on the Council's power under the third subparagraph is the existence of exceptional circumstances.

32. Nor do I consider that the principle of pre-emption would in any way infringe the principle of attribution of competences, enshrined in Article 7(1) EC. In my view, the Council's competence under the third subparagraph of Article 88(2) only accrues on the assumption that there has yet to be a Commission decision relating to the same

33. Lastly, it is not clear to me that the principle *lex posterior derogat priori* is of any application in the present context, which concerns two decisions relating to the same circumstances rather than two conflicting pieces of legislation. In any event, for the reasons set out above, I consider that there are good reasons for applying instead a principle of pre-emption.¹⁴

34. The Portuguese Government advances a further argument. It submits that the inclusion in the third subparagraph of Article 88(2) of a reference to aid which a State 'is granting' demonstrates that that provision encompasses aid upon which the Commission has already taken a position, given that under Article 88(3), the State could not have proceeded to grant that aid until the Commission had reached its final decision upon it. *Ex hypothesi*, the Commission's decision would be negative, for otherwise there would be no need for the State to apply to the Council.

13 — At paragraph 21 above.

14 — At paragraphs 20 to 25.

35. I am unconvinced by that argument.

issue therefore required a fresh assessment under Article 87(2), which it received, in the event, from the Council by the adoption of the contested measure.

36. As the Commission submits, the reference in the third subparagraph of Article 88 (2) to aid which a State is granting can be explained as relating either to illegal aid (granted without notification or after notification but prior to any positive decision by the Commission) or existing aid (which does not need to be notified or authorised prior to its implementation). Such an interpretation does not imply any need for a prior Commission decision on the aid. For the reasons already explained, any other reading would seem to me incompatible with both the letter and the spirit of Article 88(2).

38. Because the contested measure relates to a new aid, it does not in the Council's submission affect the legal status of the Commission decisions, which remain valid and operational. In consequence, the supposed principle of pre-emption is of no application to the contested measure.

May the Council authorise aid which has as its object and effect to assist its recipients to repay aid previously the subject of a negative Commission decision?

39. The Council considers irrelevant to its legal analysis the fact that the aid authorised by the contested measure had some of the same beneficiaries as the original aid, that its effect was to counterbalance some of the economic consequences flowing from the repayments ordered by the Commission decisions, or that its object was more or less similar to that of the original aid.

37. The Council and the Portuguese Government submit that the contested measure deals not with the original aid which formed the subject of the Commission decisions, but with a new aid, involving separate legislation, a distinct transfer of resources, and its own criteria of eligibility and payment. The aid at

40. The Council submits that the possibility of divergent decisions relating to successive aid schemes in favour of the same recipients is explicitly recognised by the third subpara-

graph of Article 11(2) of Regulation 659/1999,¹⁵ according to which ‘the Commission may authorise [a] Member State to couple the refunding of [an] aid [which is subject to an injunction providing for its provisional recovery] with the payment of rescue aid to the firm concerned’. It also follows from the Court’s judgment in *TWD*,¹⁶ upholding the validity of a Commission decision which declared new aid to be compatible with the common market provided that aid previously prohibited by another decision was duly recovered.

41. Such a possibility is, in the Council’s view, only logical given that a negative decision relating to a particular aid can hardly serve to prohibit any subsequent aid to the same beneficiary in the more or less distant future. The Court indeed acknowledged the need to examine each aid individually when it set aside the ‘once and once only’ principle in the context of restructuring aid on the basis that such a principle ‘would not allow the Commission to examine, in each particular case, whether a project for restructuring aid was necessary in order to attain Treaty objectives’.¹⁷

42. I am not convinced by the Council’s arguments.

43. It is self-evident that a negative Commission decision does not serve to prevent any subsequent aid to the same beneficiaries from being found compatible with the common market.¹⁸

44. However, the contested measure purports to authorise an aid which is in my view clearly and simply intended to compensate the beneficiaries of the original aid for having to repay that aid. The aid permitted under Article 1 of the measure is stated to be ‘equivalent to the amounts which [the] beneficiaries [of the original aid] must reimburse under th[e Commission] decisions’. As recital 13 in the preamble to the contested measure makes clear, the specific difficulties which the contested measure aims to address arise out of the requirement that the beneficiaries of the new aid refund the original aid. The effect of the contested measure is therefore to counteract, in so far as is possible, the economic consequences of the Commission decisions.

45. As the Commission rightly submits, if the Council were able to adopt a decision authorising the grant of an aid which has its object and effect to compensate the recipients for having to repay a previous aid, it could easily circumvent the principle of pre-

¹⁵ — Cited in note 5.

¹⁶ — Case C-355/95 P [1997] ECR I-2549.

¹⁷ — Case C-441/97 P *Wirtschaftsvereinigung Stahl and Others v Commission* [2000] ECR I-10293, at paragraph 55 of the judgment.

¹⁸ — See, in that regard, the Opinion of Advocate General Mayras in Case 156/77 *Commission v Belgium* [1978] ECR 1881, at p. 1911, first column.

emption which, for the reasons which I have outlined above, must in my view govern the relationship between the competences conferred by Article 88(2) EC.

46. Thus, I consider that the Council may not adopt under the third subparagraph of Article 88(2) a decision to authorise a new aid the object and effect of which are to relieve the beneficiaries of the costs entailed in reimbursing another aid which must be repaid pursuant to a previous Commission decision.

47. Given my conclusions on the first two issues, I am of the opinion that the contested measure should be annulled on the grounds that the Council lacked competence to act as it did, and therefore also infringed the third subparagraph of Article 88(2). It is unnecessary to consider the other cumulative pleas in law relating to misuse of powers or to the infringement of other provisions or principles of Community law, given that they overlap with and would if successful result in the same outcome as the grounds which I have already addressed.

48. The approach which I have here proposed does not appear to me in any way to

undermine either the liberty of a Member State to make an application or the power of the Council to reach a decision under the third subparagraph of Article 88(2). In the course of its investigation of a given aid under Article 88(2), the Commission must inform the Member State concerned of its doubts. That State will therefore have sufficient notice to bring the matter before the Council, should it wish to do so, before the Commission reaches its final decision.¹⁹ Moreover, if a Member State is dissatisfied with the Commission's decision, once taken, the appropriate route for it to follow, in my view, is to bring judicial proceedings under Article 230 within the specified time-limit.

49. Notwithstanding my above conclusions, I propose also to consider the alternative pleas advanced by the Commission: namely, that the Council committed a manifest error of appreciation in concluding that there existed exceptional circumstances sufficient to justify recourse to the procedure specified in the third subparagraph of Article 88(2); and that it failed to offer adequate reasoning in support of the contested measure.

¹⁹ — In the present proceedings, as regards the Commission decisions, cited in note 3 above, see the Commission's decisions initiating the procedure laid down in Article 88(2) (OJ 1998 C 83, p. 5; and OJ 1999 C 220, p. 19). For the current position, see Articles 4(4) and 6(1) of Regulation No 659/1999, cited in note 5.

Was the Council manifestly in error in concluding that exceptional circumstances justified the adoption of the contested measure?

assessment of a complex economic situation. The complexity of its task may be all the more pronounced in the agricultural field. That said, there must in my view be certain limits to the Council's discretion.

50. The Commission submits in the alternative that the Council committed a manifest error of appreciation in concluding that the hardship to the beneficiaries of the original aid arising out of the obligation to repay that aid constituted in itself an exceptional circumstance within the meaning of the third subparagraph of Article 88(2).

51. In reaching the conclusion, in recital 14 of the preamble to the contested measure, that exceptional circumstances existed, the Council had regard, in recital 13, to the fact that a refund of the original aid would threaten the economic viability of not a few beneficiaries and would have extremely damaging social effects in certain regions because 50 per cent of Portugal's pig herd is concentrated in less than 5 per cent of its territory.

52. I have no doubt that the Council enjoys a substantial margin of discretion in determining whether and when the exceptional circumstances exist which would justify it in authorising a given aid.²⁰ The Council is called upon in that context to carry out an

53. The Commission is correct in contending that the reimbursement of an aid illegally paid prior to a negative Commission decision is an entirely normal and logical consequence of a finding that it is incompatible with the common market. The Court has repeatedly held that the Commission may order the repayment of an aid when reaching a negative decision.²¹ Under Article 14 of Regulation No 659/1999,²² the Commission is now required to order recovery of an aid following a negative decision, unless to do so would be contrary to a general principle of Community law. The recovery of aid serves to restore the previously existing situation, thereby removing the distortion to competition resulting from the aid in question. It is therefore a necessary and fundamental feature of the Community system for the control of State aid.

54. Nor, in my view, can the difficulties encountered by undertakings in reimbursing

20 — See Case C-122/94 *Commission v Council* [1996] ECR I-881, at paragraphs 18, 19, 24 and 25 of the judgment.

21 — See, for example, Case 70/72, cited in note 8, at paragraph 13 of the judgment.

22 — Cited in note 5.

aid be qualified as in any way exceptional. As the Court has held, when ordered by the Commission, recovery must be pursued by the State in question even if it leads to the failure of the undertaking to which the aid was granted.²³ The only defence available to the Member State is that it is absolutely impossible for it to recover the aid.

event be set aside on the basis that the Council committed a manifest error of appreciation in concluding that there were the exceptional circumstances necessary for its adoption.

55. Accordingly, the Council appears to me, in adopting the contested measure, to have committed a manifest error of appreciation when it concluded that exceptional circumstances existed by reason of the economic difficulties encountered by the beneficiaries of the original aid in having to repay that aid.

Is the contested measure adequately and correctly reasoned?

56. Whilst the Council may, of course, justify its intervention on the basis of economic and social circumstances, those circumstances must, in my view, be independent of the reimbursement required by a previous Commission decision.

58. Finally, and also in the alternative, the Commission asserts that, even assuming that exceptional circumstances may exist in the present case, the Council has not sufficiently demonstrated their existence in the contested measure. Most of the preamble to that measure is devoted to setting out the history of the Commission decisions and the situation of the Portuguese pigfarming sector in 1998. In the Commission's submission, such reasons as are offered for the contested measure all relate to the original aid, without explaining why the current situation is to be regarded as exceptional or why it justifies the grant of a new aid.

57. I therefore consider that the Commission succeeds also in its first alternative plea and that the contested measure must in any

59. It appears to me that a distinction must be drawn between the substantive and the formal inadequacies which might be attributed to the reasoning of the contested measure.

23 — See Case 52/84 *Commission v Belgium* [1986] ECR 89 at paragraph 16 of the judgment.

60. As regards the former, I have already concluded that the Council was incorrect to identify as an exceptional circumstance the difficulty experienced by recipients of the original aid as a result of their obligation to repay that aid.

the Council's justification for authorising the aid, namely the need to compensate Portuguese pork producers in difficulty as a consequence of their obligation to reimburse the original aid. Although such reasoning is in my view not valid, it is quite adequate to inform those affected by the contested measure of the Council's motivation in adopting it, and to permit the Court to exercise its supervisory jurisdiction.

61. As regards the latter, the contested measure clearly and unequivocally states

Conclusion

62. In the light of the foregoing observations, I am therefore of the opinion that the Court should:

- (1) annul Council Decision 2002/114/EC of 21 January 2002 authorising the Government of Portugal to grant aid to Portuguese pig farmers who were beneficiaries of the measures granted in 1994 and 1998;
- (2) order the Council to pay the costs;
- (3) order Portugal and France, as interveners, to bear their own costs.