JUDGMENT OF THE COURT (Sixth Chamber)
12 December 2002 *

In Case C-209/00,

Commission of the European Communities, represented by F. Santaolalla and K.-D. Borchardt, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, assisted by H.-F. Wissel, Rechtsanwalt,

defendant,

APPLICATION for a declaration that, by not adopting within the prescribed time-limit the measures necessary to withdraw and recover the State aid granted to the Westdeutsche Landesbank Girozentrale between 1992 and 1998 which was declared incompatible with the common market by Commission Decision

* Language of the case: German.

2000/392/EC of 8 July 1999 on a measure implemented by the Federal Republic of Germany for Westdeutsche Landesbank — Girozentrale (WestLB) (OJ 2000 L 150, p. 1), the Federal Republic of Germany has failed to fulfil its obligations under Article 249 EC in conjunction with Article 3 of that decision,

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting for the President of the Sixth Chamber, C. Gulmann and V. Skouris, F. Macken (Rapporteur) and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,

Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 June 2001,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 25 May 2000, the Commission brought an action under the second subparagraph of Article 88(2) EC for a declaration that, by not adopting within the prescribed time-limit the measures necessary to withdraw and recover the State aid granted to the Westdeutsche Landesbank Girozentrale between 1992 and 1998 which was declared incompatible with the common market by Commission Decision 2000/392/EC of 8 July 1999 on a measure implemented by the Federal Republic of Germany for Westdeutsche Landesbank — Girozentrale (WestLB) (OJ 2000 L 150, p. 1), the Federal Republic of Germany has failed to fulfil its obligations under Article 249 EC in conjunction with Article 3 of that decision.

Facts

Decision 2000/392

2 In accordance with Paragraph 1 of the Gesetz zur Regelung der Wohnungsbauförderung (Law governing the promotion of housing) of 18 December 1991 ('GRW'), adopted by the Parliament of the *Land* North Rhine-Westphalia, the Wohnungsbauförderungsanstalt ('WfA') was transferred, with effect from 1 January 1992, to the Westdeutsche Landesbank Girozentrale ('WestLB') which is WfA's universal legal successor.

3 WestLB is a public-law body governed by the laws of North Rhine-Westphalia. It is wholly owned by the public sector. Its principal shareholder is the *Land* North Rhine-Westphalia ('the *Land*'), which holds 43.2% of the capital.

4 WfA operated as a public-law institution until 31 December 1991. As such, it was a wholly-owned legal person in which the *Land* was the sole shareholder. Its sole task was to promote the construction of housing. After 1 January 1992, WfA remained an organisationally and economically independent public-law institution within WestLB, but without legal capacity.

5 WfA's nominal capital and reserves had to be shown in the balance sheet of WestLB as special reserves. In accordance with the second subparagraph of Paragraph 2(16) GRW, the assets of WfA, that is to say its capital, capital reserves, the *Land* housing promotion fund and its other claims, as well as any future return flows from housing loans, totalling DEM 5 900 million, remained earmarked for housing promotion after the transfer to WestLB. Those assets of WfA transferred to WestLB must therefore be managed separately from the other activities of WestLB. Nevertheless, the GRW also provided that the assets transferred were to serve simultaneously as equity capital, that is to say as capital used to calculate a bank's solvency ratio.

6 The transfer of WfA did not lead to a change in the ownership structure of WestLB. The *Land* received no consideration for the capital thus contributed to WestLB, either in the form of a higher share in dividends paid or in the form of a higher share in the capital gains of the holdings in WestLB. However, an annual rate of 0.6% was fixed to remunerate the *Land* for the capital contributed. WestLB paid that remuneration from profits after tax. The remuneration,

calculated on the basis of the capital of WfA recognised by the Bundesaufsichtsamt für das Kreditwesen (German Banking Supervisory Authority) as own funds of WestLB, was paid only in respect of the part of those funds of which WestLB was able to dispose in order to guarantee its commercial operations.

7 On 1 October 1997, the Commission decided to initiate the procedure laid down in Article 93(2) of the EC Treaty (now Article 88(2) EC). At the end of its investigation, the Commission adopted Decision 2000/392.

8 In that decision, the Commission found that, by the transfer of WfA to WestLB by the *Land*, the Federal Republic of Germany had granted State aid in breach of Article 88(3) EC. According to Decision 2000/392, the aid element consisted in the difference between the amounts actually paid as remuneration for the capital contributed and those which would have been consistent with the market rate. The Commission found further that the aid could not be regarded as compatible with the common market either under Article 87(2) or (3) EC or under any other provisions of the Treaty.

9 The Commission therefore adopted the following provisions, as they appear in the operative part of Decision 2000/392:

'*Article 1*

The State aid which Germany has implemented for Westdeutsche Landesbank Girozentrale in the years 1992 to 1998, amounting to DEM 1 579.7 million (EUR 807.7 million), is incompatible with the common market.

Article 2

1. Germany shall take all necessary measures to discontinue and recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to the beneficiary.

2. Recovery shall be effected in accordance with the procedures of national law. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 3

Germany shall inform the Commission, within two months of notification of this decision, of the measures taken to comply with it.

Article 4

This decision is addressed to the Federal Republic of Germany.'

10 On 7 October 1999, the Federal Republic of Germany brought an action for annulment of Decision 2000/392, which was registered at the Court Registry under the number C-376/99.

11 On 12 October 1999, WestLB and the *Land* brought actions for annulment of the same decision before the Court of First Instance, which were registered under the numbers T-228/99 and T-233/99 respectively.

12 By order of the Court of 8 February 2000, the proceedings in Case C-376/99 were stayed pending the final judgments of the Court of First Instance in Cases T-228/99 and T-233/99.

13 By letter of 4 October 1999, the German Government notified to the Commission a measure for implementation of Decision 2000/392. Following the rejection of that measure by the Commission on 1 December 1999, the German Government, by letter of 15 March 2000, submitted a proposal for implementation of that decision.

The measure notified to the Commission on 4 October 1999

14 According to the letter from the German Government of 4 October 1999, implementation of Decision 2000/392 resulted from an agreement concluded by the shareholders of WestLB on 22 September 1999 to implement Decision 2000/392. The surplus recorded in WestLB's open and hidden reserves between 1992 and 1998 as a result of the increase in own funds following the transfer of WfA were to be redistributed among the current shareholders in order to comply with the order of recovery. The *Land*'s share in the increase in value of WestLB's assets was to increase by 22.1%. With respect to a surplus estimated by the *Land* at DEM 10 000 million for the period 1992 to 1998, the additional share would be at least DEM 2 210 million. That additional amount to which the *Land* was entitled would offset the State aid which is the subject of Decision 2000/392.

15 However, that redistribution would take place only in the event of liquidation of WestLB or of a change in the shareholding structure.

16 After 1998, the special reserve arising from the transfer of WfA to WestLB was to be converted into a 'passive holding' ('*stille Einlage*') of the *Land*, without any alteration of the shareholdings in the company's capital. A passive holding, within the meaning of German law, consists of a shareholding in the capital of a company which confers on the person to whom it is granted neither a right to vote nor a right to determine the company's actions. The precise conditions of a passive holding are laid down in the contract under which it is granted.

17 The *Land* was to have the right, in the event of future increases in the capital of WestLB, to subscribe for shares by way of conversion of parts of its passive holding at a level which would always be unanimously agreed by the guarantors.

18 The agreement concluded between the shareholders of WestLB was to be annulled with retroactive effect if the Court of First Instance were to annul Decision 2000/392 or if, on the contrary, it were to confirm it or, finally, if it were to consider that the agreement in question does not implement the decision.

19 By letter of 1 December 1999, the Commission replied to the German Government that the measure was not capable of ensuring proper implementation of Decision 2000/392.

The proposal notified to the Commission on 15 March 2000

20 As a result of that refusal, the German Government, on 15 March 2000, submitted to the Commission a proposal to implement Decision 2000/392. By letter of 5 April 2000, the German Government explained the conditions of that proposal.

21 According to the German Government, instead of cash compensation, WestLB would pay the *Land* compensation in kind in the form of the grant of a passive holding of DEM 2 200 million with retroactive effect from 1 January 2000. That passive holding was to cover not only the aid which the Commission found to have been granted between 1 January 1992 and 31 December 1998 in Decision 2000/392, plus interest, but also the aid for 1999 which was not quantified by that decision.

22 That passive holding was also to be granted under 'market conditions', in particular in accordance with the requirements laid down by the Basel Committee on Banking Supervision on 27 October 1998 with respect to 'hybrid own funds', which term covers, in German commercial law, capital from a passive holding. The interest earned on the passive holding was not to be paid to the *Land* but was to remain within WestLB. That interest was to be added to the passive holding every year until delivery of the final judgments of the Court of First Instance and the Court of Justice concerning Decision 2000/392.

23 However, the measures proposed were to be implemented only after confirmation by the Commission that there was no objection to the non-participating shareholding under competition law.

24 Moreover, if the Court of First Instance or the Court of Justice were to annul Decision 2000/392, the *Land* was to return the passive holding with the interest to WestLB, without any compensation being paid as consideration.

25 By letter of 29 March 2000, the Commission replied to the German Government that the proposal of 15 March 2000 did not permit the conclusion that the measures envisaged therein constituted a proper implementation of Decision 2000/392.

Pre-litigation procedure

26 The Commission's letter of 29 March 2000 was followed by several meetings between the representatives of the Commission, the German Government, the *Land* and WestLB concerning the possibility of adapting the proposal of 15 March 2000.

27 At the meeting of 3 May 2000, the representatives of the Commission requested actual repayment of the aid granted, as required by Decision 2000/392, and of the interest accruing thereto, within the following two weeks.

28 On expiry of that period, the Commission brought the present action.

Substance

29 As a preliminary point, it should be borne in mind that, according to Article 3(1)(g) EC, the activities of the Community include the establishment of a system ensuring that competition in the internal market is not distorted and that, in that context, Article 87(1) EC declares any aid granted by a Member State which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between the Member States, to be incompatible with the common market.

30 In order to ensure that that prohibition is effective, the Commission has competence, where it finds that aid is incompatible with the common market, to decide that the Member State concerned must abolish or modify it. To be of practical effect, that abolition or modification may include an obligation to require repayment of the aid granted in breach of the Treaty (see Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 13).

31 The Member State to which such a decision requiring recovery of illegal aid is addressed is obliged under Article 249 EC to take all measures necessary to ensure implementation of that decision.

32 Since there are no Community provisions on the procedure for recovery of wrongly paid amounts, illegal aid must, in principle, be recovered in accordance with the relevant procedural provisions of national law (see, to that effect, Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 24).

33 Moreover, that case-law was confirmed by Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), in particular Article 14(3) thereof, which provides that recovery is to be effected without delay and in accordance with the procedures laid down by the national law of the Member State concerned.

34 A Member State which, pursuant to a decision of the Commission, is obliged to recover illegal aid is thus free to choose the means of fulfilling that obligation, provided that the measures chosen do not adversely affect the scope and effectiveness of Community law.

35 It follows from the above that a Member State can fulfil such an obligation to recover only if the measures adopted by it are suitable to re-establish the normal conditions of competition which were distorted by the grant of the illegal aid and are consistent with the relevant provisions of Community law.

36 Measures which are themselves inconsistent with Community law therefore do not constitute proper implementation of a decision requiring the recovery of illegal aid.

37 Finally, it must be observed that, where a Member State fails to comply with the obligation to recover illegal aid, the Commission is entitled to seek from the Court a declaration that the Treaty has been infringed, either under Article 226 EC or under Article 88(2)EC, the latter action being simply a variant of the procedure for a failure to comply with obligations which has been adapted to the specific problems affecting competition in the common market which have been caused by the maintenance of State aids which have been declared illegal.

38 It is settled case-law that, in proceedings for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to provide the Court with the evidence necessary to enable it to establish that the obligation has not been fulfilled and, in so doing, the Commission may not rely on any presumption (see Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6).

39 However, the Member States are obliged, by virtue of Article 10 EC, to facilitate the achievement of the Commission's tasks, which consist in particular of ensuring that the provisions adopted by the institutions pursuant to the Treaty are applied (see *Commission* v *Netherlands*, cited above, paragraph 7).

40 As regards the implementation of a decision requiring the recovery of illegal aid, where a Member State recovers that aid by means other than a cash payment, it must provide the Commission with all the information enabling it to establish that the means chosen constitute an adapted implementation of the decision.

41 In contrast to recovery by way of a cash payment, which by its nature lends itself to supervision by the Commission, alternative measures proposed by a Member State for the fulfilment of its obligation to ensure recovery of illegal aid may make it necessary to assess complex matters.

42 However, in order for the Commission to be able to make such an assessment, it requires information which it cannot obtain without close cooperation on the part of the Member State concerned.

43 It follows that, although a State may recover illegal aid by means other than a cash payment, it must ensure that the measures it chooses are sufficiently transparent to enable the Commission to satisfy itself that they are suitable for the purpose of eliminating, in full compliance with Community law, the distortion of competition caused by that aid.

44 It must therefore be concluded that, where a Member State decides not to recover aid by way of a cash payment but chooses to take alternative measures, it is obliged to provide the Commission with the evidence enabling it to establish that such measures are suitable for achieving, in full compliance with Community law, the result required by the decision.

45 It is in the light of those preliminary observations that the measures notified on 4 October 1999 and 5 March 2000 must be considered.

The measure notified to the Commission on 4 October 1999

46 First of all, it must be observed that, at the hearing, the parties debated the nature of the agreement concluded by the shareholders of WestLB, which was annexed to the German Government's notification of 4 October 1999, in order to establish whether it was a measure actually adopted to implement Decision 2000/392, as the German Government maintains, or whether it was a mere proposal for implementation, as the Commission claims.

47 In that regard, it is sufficient to observe that, both in its letter of 4 October 1999 and before the Court, the German Government presented the measure as one actually adopted which, in its opinion, is suitable for the purpose of ensuring implementation of Decision 2000/392. It is therefore necessary to examine it as such.

Arguments of the parties

48 The Commission submits that the measure notified on 4 October 1999 does not meet the requirements of a proper implementation of Decision 2000/392.

49 Firstly, the measure entails only the waiver by the other shareholders of rights to a share in the assets of WestLB in favour of the *Land* but in no way alters WestLB's position from the point of view of costs. In principle, the injection of new capital into a bank generates costs for that bank. The measure proposed therefore does not remedy the distortion of competition in favour of WestLB which was caused in the past.

50 Secondly, a private investor acting in a manner consistent with the market would never accept a postponement of the realisation of an increased share. However, the notified measure provides that the proposed redistribution will take place only in the event of liquidation of WestLB or of a change in the structure of the shareholdings.

51 The Commission further observes that not even the WestLB shareholders considered the measure notified on 4 October 1999 to be sufficient to implement Decision 2000/392 since they made provision for a revision of the proposed rules, even in the event of a confirmation of that decision by the Court of First Instance.

52 In contrast, the German Government states, first of all, that any change in the structure of the remuneration granted upon the transfer of WfA — irrespective

of whether effected by an increase in the periodic payment of dividends or by an additional share of the *Land* in the increased value of WestLB's assets — can have repercussions only in respect of the relations between the shareholders. A negative entry in the profit and loss account of the bank therefore cannot be decisive.

53 Furthermore, according to the German Government, there is no State aid where, in accordance with the standard of an investor operating in a market economy, the investor expects a normal return on his capital in the form of a share in the increase in value of the assets of the recipient company. It follows that the retroactive share of the investor — in this case the *Land* — in the increase in asset value should, by symmetrical effect, enable the distortions of competition to be eliminated.

54 The German Government also objects to the Commission's rejection of the implementation measure on the ground that the surplus granted retroactively may be realised only in the event of a transfer of shares or of the liquidation of WestLB. With respect to contributions of capital, it submits that, in general, the share in the surplus constitutes the factor determining the payment of cash profits. In any event, it disputes the Commission's claim that the holding in WestLB's capital is inalienable or lasting to the extent that it can never secure profits for the *Land*.

55 Finally, as regards the allegedly suspensory effect of the measure notified on 4 October 1999, the German Government considers that, given its certainty that Decision 2000/392 will be annulled, it would have been unwise to provide for a cash payment which would have caused irreparable damage to WestLB. It is essential to ensure that it is possible to annul the measure.

Findings of the Court

56 It should be pointed out that, as stated in paragraph 32 of this judgment, the illegal aid must, in principle, be recovered in accordance with the relevant procedural provisions of national law.

57 However, whilst it is true that a Member State which, pursuant to a decision of the Commission, is obliged to recover illegal aid is free to choose the means of fulfilling that obligation, the fact nevertheless remains that the measures chosen may not adversely affect the scope and effectiveness of Community law, in particular the Treaty provisions relating to State aid. Such measures must therefore have the same effect as that of repayment by way of a transfer of funds.

58 Thus, any measure adopted in order to fulfil an obligation to recover illegal aid must be a suitable instrument for re-establishing the conditions of competition which have been distorted by the grant of that illegal aid, be capable of being identified as such by the Commission and other interested parties, and be unconditional and immediately applicable.

59 In the present case, it must be found that the measure adopted in order to recover the aid granted to WestLB does not satisfy those conditions.

60 In that regard, it is sufficient to observe, first, that the right to receive an additional share of a company's surpluses in the event of its liquidation or of a change in the shareholders' holdings in the capital relates to an uncertain future event.

61 Secondly, it does not appear that the measure in question is a suitable instrument for ensuring implementation of Decision 2000/392 by reason of its precarious character. The guarantors of WestLB decided that the agreement concluded between them would be annulled with retroactive effect not only in the event of annulment of that decision by the Community Courts or of a decision finding that that agreement is not suitable to ensure implementation but also in the event of a final confirmation of Decision 2000/392 by those courts.

62 Consequently, the implementation measure notified to the Commission by the German Government on 4 October 1999 cannot be regarded as a measure suitable to obtain recovery from the recipient of the aid which is the subject of Decision 2000/392.

The proposal notified to the Commission on 15 March 2000

Arguments of the parties

63 The Commission submits that the proposal notified to it on 15 March 2000 consisting of an immediate reinvestment of the aid recovered by way of creation of a non-participating shareholding may constitute fresh aid so that it must be notified thereof. The need for such notification means that implementation of Decision 2000/392 in practice remains suspended until the Commission has

examined the notified measure. That suspensory effect is incompatible with the obligation to effect immediate recovery arising from the Decision. In order to avoid that problem, the recovery of the aid granted and the creation of a non-participating shareholding of the same amount would have to take place in two separate stages.

64 The German Government rejects the Commission's argument that the proposition notified on 15 March 2000 may include fresh State aid. An investment in a company, in the form of the creation of a non-participating shareholding, which is effected under market conditions is not covered by the obligation to notify imposed by the rules on State aid, since such a measure clearly includes no aid element.

65 Alternatively, the German Government submits that the Commission has misinterpreted the context in which a notification of the proposal communicated on 15 March 2000 is necessary. Firstly, Regulation No 659/1999 lays down clear rules on the duration of an investigative procedure. Secondly, the Commission could have granted an extension of the time-limit for implementation of Decision 2000/392 which was at least equivalent to the duration of the preliminary investigation.

66 The German Government also claims that the Commission is not legally authorised to require a precise manner of implementation and, in any event, restricted itself, in Decision 2000/392, to imposing in a general manner the adoption of the measures necessary to discontinue the alleged aid and recover it from the recipient. The requirement of a precise measure of recovery is therefore unlawful and is, in particular, a breach of the principle of proportionality laid down in the third paragraph of Article 5 EC.

Findings of the Court

67 It is sufficient to observe that the German Government conceded, both in its written observations and at the hearing, that the measure it communicated to the Commission on 15 March 2000 is only a proposal for the implementation of Decision 2000/392.

68 It is therefore undisputed that it is not a binding measure, so that the Court cannot consider it in the context of the present action.

The obligation to cooperate in good faith

69 The German Government nevertheless contends that, with respect to the implementation of Decision 2000/392, the Commission has failed to comply with its obligation to cooperate in good faith in cases which present difficulties. Although it notified an implementation measure to the Commission and, in addition, submitted an implementation proposal which could have replaced the first measure, the Commission rejected both that measure and that proposal without any explanation.

70 In that regard, it should be noted that the only defence available to a Member State in opposing an application by the Commission under Article 88(2) EC for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was

absolutely impossible for it to implement the decision properly (see, *inter alia*, Case C-261/99 *Commission* v *France* [2001] ECR I-2537, paragraph 23).

71 As is clear from all the above considerations, the German Government has failed to take the measures necessary to recover from the beneficiary the aid which is the subject of Decision 2000/392.

72 It follows that the German Government's complaint regarding the alleged failure by the Commission to cooperate in good faith cannot affect that Government's failure to comply with its obligations.

73 In light of the above considerations, it must therefore be held that, by not complying with Decision 2000/392, the Federal Republic of Germany has failed to fulfil its obligations under Article 249 EC and Article 3 of that decision.

Costs

74 Under Article 69(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. Since the Commission has applied for the Federal Republic of Germany to be ordered to pay the costs and the latter has been unsuccessful, the Federal Republic of Germany must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. **Declares that, by not complying with Commission Decision 2000/392/EC of 8 July 1999 on a measure implemented by the Federal Republic of Germany for Westdeutsche Landesbank — Girozentrale (WestLB), the Federal Republic of Germany has failed to fulfil its obligations under Article 249 EC and Article 3 of that decision;**

2. **Orders the Federal Republic of Germany to pay the costs.**

Schintgen Gulmann Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 12 December 2002.

R. Grass — Registrar

J.-P. Puissochet — President of the Sixth Chamber