ORDER OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
27 November 2002 *

In Case T-291/01,

Dessauer Versorgungs- und Verkehrsgesellschaft mbH, established in Dessau (Germany),

Neubrandenburger Stadtwerke GmbH, established in Neubrandenburg (Germany),

Stadtwerke Schwäbisch Hall GmbH, established in Schwäbisch Hall (Germany),

Stadtwerke Tübingen GmbH, established in Tübingen (Germany),

Stadtwerke Uelzen GmbH, established in Uelzen (Germany),

represented by D. Fouquet, lawyer,

applicants,

* Language of the case: German.

Commission of the European Communities, represented by V. Kreuschitz and J.L. Buendía Sierra, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that the Commission unlawfully failed to examine non-notified aid granted by the Federal Republic of Germany to nuclear power station operators,

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

composed of: B. Vesterdorf, President, J. Azizi, R.M. Moura Ramos, M. Jaeger and H. Legal, Judges,

Registrar: H. Jung,

makes the following

Order

1 By letter of 19 November 1999 the applicants, municipal electricity distribution utilities established in Germany, requested the Commission to commence an investigation of State aid under Articles 87 EC and 88 EC with regard to the tax exemptions granted by Germany in respect of provisions made by nuclear power stations for the purposes of financing their closing-down and disposal of their irradiated fuel elements and their radioactive waste.

2 By letter of 18 April 2000 the Commission acknowledged receipt of the applicants' request for an investigation. It informed them that it had opened the preliminary rewiew procedure with regard to the tax regime in dispute.

3 At the Commission's invitation, communicated by letter of 17 July 2000, the Federal Republic of Germany, by letter of 12 February 2001, submitted its observations on the applicants' request for an investigation.

4 After various correspondence, the applicants, by letter of 29 August 2001, received at the Commission on 30 August 2001, called upon it to act, pursuant to the second paragraph of Article 232 EC, by adopting a decision on the further course of their case.

5 By application lodged at the Registry of the Court of First Instance on 30 November 2001 the applicants applied to the Court to declare that, by failing to examine their request for an investigation and by failing to take any decision with regard to the examination of the tax regime in dispute within a period of two months from the date of receipt of their request to act of 29 August 2001, the Commission had infringed Article 232 EC.

6 In its defence the Commission observed that it adopted, on 11 December 2001, a decision declaring that the tax exemptions in dispute are not State aid within the meaning of Article 87(1) EC (hereinafter 'the Decision'). The Commission also stated that the Decision had been notified to the German authorities on 13 December 2001, then transmitted to the applicants' representative on 16 January 2002, after the expiry of the period laid down for the German authorities to request the deletion of the confidential material which the Decision might contain.

7 By document lodged on 5 March 2002 the applicants requested the Court of First Instance to declare this action devoid of purpose since, by adopting the Decision, the Commission had put an end to the failure complained of.

8 In addition, the applicants sought an order for costs against the Commission on the ground that it is responsible for the commencement of the action and all the costs which that has entailed.

9 In its observations on the request that there is no need to adjudicate, the Commission considered that it had responded to the applicants' call to act and, therefore, considered that the action had effectively become devoid of purpose.

10 By application lodged at the Registry of the Court of First Instance on 28 March 2002 and registered under No T-92/02, Stadtwerke Schwäbisch Hall GmbH, Stadtwerke Tübingen GmbH, Stadtwerke Uelzen GmbH and Wuppertaler Stadtwerke AG brought an action for annulment of the Decision.

11 The Court of First Instance points out that, according to settled case-law (see, in particular, Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraphs 30 and 31), where, as in this case, the Commission defines its position, within the meaning of the second paragraph of Article 232 EC, after the commencement of an action for failure to act, it renders the action brought for a declaration of such failure devoid of purpose.

12 The Court therefore finds, as the parties on both sides agree, that there is no need to adjudicate on this action for failure to act.

Costs

13 In a case where there is no need to adjudicate, Article 87(6) of the Rules of Procedure of the Court of First Instance provides that the costs shall be in the discretion of the Court of First Instance.

14 Contrary to the applicants' contention, it cannot be taken as established that the Commission adopted the Decision solely by reason of the applicants' call on it to act or of their action for failure to act.

15 As may be seen from the above statement of the facts, the German authorities, to which the Commission was required to notify the applicants' request for an investigation, submitted their observations on that request on 12 February 2001.

16 The actual period of 10 months which the Commission thus took to adopt the Decision does not enable it to be said that the Decision was not taken, in the circumstances of this case, within a reasonable period.

17 It was for the Commission to gather all the necessary evidence in order to establish sufficiently in law that Articles 87 EC and 88 EC are inapplicable to the tax exemption regime in dispute, which was its conclusion in the Decision. It was, in that regard, justified in anticipating that its legal position, diametrically opposed to that of the applicants, would be challenged by way of an action for annulment of the Decision.

18 In such circumstances, the Court of First Instance considers it fair that each party should bear its own costs.

On those grounds,

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

hereby orders:

1. **There is no need to adjudicate on the application.**

2. **The parties shall bear their own costs.**

Luxembourg, 27 November 2002.

H. Jung
Registrar

B. Vesterdorf
President