

JUDGMENT OF THE COURT (Fifth Chamber)

5 October 2000 *

In Case C-288/96,

Federal Republic of Germany, represented by B. Kloke, Oberregierungsrat at the Federal Ministry of the Economy, acting as Agent, and M. Schütte, Rechtsanwalt, Berlin, with an address for service in Luxembourg at the Chambers of E. Röder, Ministerialrat at the same Ministry, D — 53107 Bonn,

applicant,

v

Commission of the European Communities, represented by P.F. Nemitz, of its Legal Service, acting as Agent, and R.M. Bierwagen, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: German.

APPLICATION for the annulment of Commission Decision 96/563/EC of 29 May 1996 on aid from the *Land* of Lower Saxony to the company JAKO Jadekost GmbH & Co. KG (OJ 1996 L 246, p. 43),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward (Rapporteur), President of the Chamber, J.C. Moitinho de Almeida, L. Sevón, J.-P. Puissochet and M. Wathelet, Judges,

Advocate General: G. Cosmas,

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 11 March 1999, at which the Federal Republic of Germany was represented by W.-D. Plessing, Ministerialrat at the Federal Ministry of Finance, acting as Agent, and M. Schütte, and the Commission by P.F. Nemitz and R.M. Bierwagen,

after hearing the Opinion of the Advocate General at the sitting on 11 May 1999,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 26 August 1996, the Federal Republic of Germany brought an action pursuant to the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) for the annulment of Commission Decision 96/563/EC of 29 May 1996 on aid from the *Land* of Lower Saxony to the company JAKO Jadekost GmbH & Co. KG (OJ 1996 L 246, p. 43, 'the contested decision').

2 JAKO Jadekost GmbH & Co. KG ('Jadekost'), based in Wilhelmshaven (Germany), was founded in August 1991. It was part of the Nordfrost group, whose majority shareholder was the managing director of Jadekost, and specialised in manufacturing and marketing deep-frozen products. The company had two factories, one for fish products, the other for meat products. It began manufacturing fish products in June 1993.

3 As a result of cash-flow problems which it was encountering, Jadekost endeavoured to obtain a security from the *Land* of Lower Saxony for an operating loan granted to it by its bank.

- 4 On 1 March 1994 the Cabinet of the Government of the *Land* of Lower Saxony adopted the following decision:

‘The Ministry hereby authorises the *Land* to provide an 80% security for an operating loan of DEM 35 million and authorises cover of the additional liquidity requirement of DEM 15 million which has arisen under the liquidity plan until December 1996.’

- 5 Following the required approval by the *Land* Loans Committee and the Budget Committee of the Lower Saxony Parliament, by letter of 2 May 1994 the *Land* Finance Ministry informed Jadekost that the security had been granted.
- 6 By letter of 30 June 1994 the Commission expressed doubt as to whether the security was compatible with point 1.3 of its ‘Guidelines for the examination of State aids in the fisheries and aquaculture sector’ (Communication 92/C 152/02, OJ 1992 C 152, p. 2, ‘the Guidelines’) and asked the Federal Republic of Germany to state its position.
- 7 That request was followed by an exchange of correspondence, following which, on 20 February 1995, the Commission notified the Federal Republic of Germany of its decision to initiate the administrative procedure laid down in Article 93(2) of the EC Treaty (now Article 88(2) EC). At the end of that procedure the Commission adopted the contested decision.
- 8 On 31 March 1995 Jadekost was declared bankrupt.

The Guidelines

9 The introduction to the Guidelines provides that State aid is only justified if it is in accordance with the objectives of the common fisheries policy. The sixth paragraph in that introduction states moreover:

‘It is against this background that the Commission is planning to administer the derogations to the principle of incompatibility of State aids with the common market (Article 92(1) of the EEC Treaty) provided for in Article 92(2) and (3) of the EEC Treaty and in its implementing instruments.’

10 Point 1.1 of the Guidelines, which sets out general principles, provides:

‘[t]hese guidelines relate to all measures entailing a financial advantage in any form whatsoever funded from the budgets of public authorities (national, regional or provincial, departmental or local). They relate, in particular, to capital transfers, reduced-interest loans, and certain State holdings in the capital of undertakings, aid financed by special levies and aid granted in the form of State security for bank loans or the reduction of or exemption from charges or taxes, including accelerated depreciation and the reduction of social contributions.

All these measures are covered by the term “State aids” as used in this document.’

11 Point 1.3 of the Guidelines, which also sets out general principles, provides:

‘State aids may be granted only if they are consistent with the objectives of the common policy.

Aids may not be conservative in their effect: they must serve to promote the rationalisation and efficiency of the production and marketing of fishery products in a way which encourages and accelerates the adaptation of the industry to the new situation it faces at Community level.

In more practical terms, aids must provide incentives for development and adaptation which cannot be undertaken under normal market circumstances because of insufficient flexibility in the sector and the limited financial capacity of those employed in it. They must yield lasting improvements so that the industry can continue to develop solely on the basis of market earnings. Their duration must therefore be limited to the time needed to achieve the desired improvements and adaptations.

Consequently the following principles apply:

- State aids must not impede the application of the rules of the common fisheries policy. Therefore in no circumstances can aids to the export of or to trade in fishery products within the Community be deemed compatible with the common market,

- those aspects of the common fisheries policy that cannot be considered to have been thoroughly resolved, in particular as regards structural policy, may still warrant State aids provided such aids comply with the objectives of the common rules so as not to jeopardise or risk distorting the full effect of these rules; this is why they must, where appropriate, form part of guidance programmes provided for under Community rules,

- State aids which are granted without imposing any obligation on the part of recipients and which are intended to improve the liquidity situation of their undertakings, the amount of which depends on the quantity produced or marketed, the prices of products, the unit of production or the factors of production and the result of which would be a reduction in the recipient's production costs or an improvement in the recipient's income are, as operating aids, incompatible with the common market. The Commission will examine such aids on a case-by-case basis where they are directly linked to a restructuring plan considered to be compatible with the common market.'

The contested decision

- ¹² In section IV of the grounds of the contested decision, the Commission stated that the security in question had to be examined in the light of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC) and the Guidelines.
- ¹³ The Commission found that the security constituted aid within the meaning of Article 92 of the Treaty. In that connection it observed, first, that neither the German Government nor other interested parties had questioned that assessment,

and, secondly, that under point 1.1 of the Guidelines the granting of a State security for a bank loan was to be regarded as aid.

- 14 It pointed out that aid deriving from such a loan guarantee was generally equal to the difference between the rate of interest on a loan raised on normal market terms and the actual rate secured by virtue of the guarantee, net of any premium paid. In that respect, in the Commission's view, since no credit institution would have agreed to lend to Jadekost without a State guarantee and because of the very high risk of the security, the security in question constituted a precondition for granting the loan, the entire amount of which was to be regarded as aid.
- 15 The Commission also noted that the aid improved Jadekost's income since, first, it freed the company from costs which it would have had to bear in the normal course of business and, secondly, it had been granted without any obligation being imposed with regard to its use. The aid enabled Jadekost to offer its products at prices kept artificially low for customers.
- 16 The Commission concluded that that type of operating aid was, as such, fundamentally incompatible with the common market in the light of point 1.3 of the Guidelines and there was therefore no need to examine the compatibility of such aid with the other conditions specified in Article 92(1) of the EC Treaty.
- 17 Apart from this, the Commission considered that the aid threatened to distort competition on the market in deep-frozen fish products with other companies in Germany and the other Member States which did not receive benefits of this type, since it benefited a particular company and reduced the costs to be borne by that company, enabling it artificially to strengthen its position on the market.

18 In section V of the grounds of the contested decision, the Commission examined the derogations provided for in Article 92(2) and (3) of the EC Treaty and concluded that they did not apply in the present case given the nature and objectives of the aid.

19 Lastly, in section VI of the grounds of the contested decision, the Commission further noted that the German Government had failed to notify it in advance of the aid, contrary to the provisions of Article 93(3) of the Treaty, and had failed to comply with the suspensory effect prescribed by that article.

20 Consequently, in Article 1 of the contested decision, the Commission found that the security provided by the *Land* of Lower Saxony was incompatible with the common market within the meaning of Article 92(1) of Treaty, and was unlawful, having been granted in breach of the rules of procedure laid down in Article 93(3) of the Treaty.

21 The Commission therefore requires reimbursement of 42.3% of the aid, that percentage constituting the percentage of Jadekost's turnover attributable to fish products. Since the Guidelines are solely applicable to fish products, only the proportion of the aid which supported that part of production was to be recovered.

22 In calculating the amount to be recovered, the Commission took into account the fact that the security in question only covered 80% of the loan obtained by Jadekost and that the funds provided to Jadekost under the loan secured amounted to DEM 32 000 000, DEM 25 600 000 being guaranteed by the *Land* of Lower Saxony. On the basis of the premiss of a net subsidy equivalent of 98.7%, the resulting amount was DEM 25 267 200, of which DEM 10 688 025, or 42.3%, came under the heading of fish products.

Pleas in law of the Federal Republic of Germany

- 23 The German Government puts forward four pleas in law in support of its application for annulment. First, it claims that the contested decision is unlawful simply on the ground of non-compliance with the principle that the rights of the defence must be observed. Secondly, it claims that the Commission established the facts with only partial accuracy and that it failed to make a number of important findings. In its third plea it maintains that the Commission applied Article 92(1) of the Treaty incorrectly. Lastly, in its fourth plea, it claims that the Commission ought to have found the security in question compatible with the common market pursuant to Article 92(3)(c) of the Treaty.
- 24 It is appropriate to begin by examining the second, third and fourth pleas put forward by the German Government, which relate to the substance of the case, and then to consider the first plea, concerning procedure.

The plea alleging inaccurate findings of fact

- 25 By its second plea in law, which is in three parts, the German Government claims that the Commission established the facts with only partial accuracy in the context, respectively, of the assessment of the amount of the aid (first part), the application of the Guidelines (second part) and assessment of the distortion of competition (third part).
- 26 It must be borne in mind at the outset that, where the Commission enjoys substantial freedom of assessment, as it does when applying Article 92 of the Treaty, the Court, in considering whether that freedom was lawfully exercised, cannot substitute its own assessment for that of the competent authority but must

restrict itself to examining whether that authority's assessment is vitiated by a manifest error or misuse of powers (see, in particular, Case 57/72 *Westzucker v Einfuhr- und Vorratsstelle für Zucker* [1973] ECR 321, paragraph 14, and Case C-169/95 *Spain v Commission* [1997] ECR I-135, paragraph 34).

27 It is in the light of that principle that the three parts of the second plea put forward by the German Government concerning inaccurate establishment of the facts must be examined.

Findings of fact concerning the amount of the aid

28 As it has acknowledged in its application, the German Government does not dispute the fact that the security given by the *Land* of Lower Saxony contained elements of aid within the meaning of Article 92(1) of the Treaty, but it maintains that the Commission committed errors of assessment in determining those elements and, in consequence, the amount of the aid. In that connection it puts forward six arguments.

29 First, the German Government maintains that the Commission failed to give adequate consideration to the question whether other financing possibilities were open to Jadekost.

30 In order to determine the extent to which the security in question is in the nature of State aid, the relevant criterion is that indicated in the Commission's decision, namely whether Jadekost could have obtained the amounts in question on the capital market without the security (see, to that effect, Case C-301/87 *France v Commission* ('*Boussac*') [1990] ECR I-307, paragraph 39, and Case C-142/87 *Belgium v Commission* ('*Tubemeuse*') [1990] ECR I-959, paragraph 26).

- 31 Thus where, owing to an undertaking's precarious financial circumstances, no credit institution would agree to lend to it without a State guarantee, the entire amount of the secured loan which it obtains must be regarded as aid.
- 32 Applying that criterion, the Commission concluded, in the seventh paragraph of section IV, that Jadekost could not have obtained the loan in question without the security given by the *Land* of Lower Saxony.
- 33 That finding by the Commission is corroborated by evidence in the file showing that, at the time when the loan was granted to it, Jadekost was in a precarious liquidity situation and that, after it had entered the market for deep-frozen fish products, there was a very sharp collapse in prices on that market. The business report of 29 March 1994 drawn up by the auditors C & L Treuarbeit — Deutsche Revision ('C & L') concluded, moreover, that the risk for the provider of the security was very high.
- 34 Furthermore, it must be borne in mind that, according to settled case-law, the legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted (Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 16, and Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 33).
- 35 The German Government did not produce, either in the course of the administrative procedure or even before the Court, specific examples of other financing possibilities that might have been open to Jadekost. Moreover, during the administrative procedure, the German Government did not claim that the Commission should have actively sought to ascertain whether there were other

financing possibilities. Consequently, its first argument concerning other financing possibilities appears to be conjectural.

- 36 In the context of its second argument, the German Government maintains that the Commission did not take into consideration for the purpose of determining the amount of the aid the existence of sureties lodged with Jadekost's creditor banks.
- 37 It appears, however, from section II, fourth paragraph, of the grounds of the contested decision that the Commission did take that matter into consideration. Furthermore, it concluded, at section IV, seventh paragraph, that those sureties could not have affected the amount of aid, because without the security in question no credit would have been granted to Jadekost. That conclusion is corroborated by the documents produced by the German Government, by the position taken by the *Land* of Lower Saxony and by C & L's business report, from which it is clear that those sureties were of limited value.
- 38 The Commission's conclusion is also corroborated by the provisions of the *Land* of Lower Saxony's General Directives on Securities concerning the conditions to be met for the *Land* of Lower Saxony to act as guarantor.
- 39 More specifically, point 3 of those General Directives specifies that 'a security shall not in principle be given unless the measures cannot be implemented otherwise, in particular because sufficient sureties are not available and it is not possible to obtain the security from the Niedersächsische Bürgschaftsbank (NBB) GmbH'.
- 40 By its third argument, the German Government maintains that the Commission did not take into account the fact that the rate of interest on the loan secured was quite normal on the capital market.

- 41 In that connection, it also follows from the seventh paragraph of section IV of the grounds of the contested decision that it did not matter whether the rate of interest charged to Jadekost on the loan secured was lower or higher than the average rate charged by banks on the capital market for similar loans since, in any event, without the security in question the loan would not have been granted.
- 42 Having regard to the foregoing considerations, there is nothing to suggest that the Commission committed a manifest error of assessment in considering, in the fifth paragraph of section IV of the grounds of the contested decision, that ‘Jadekost thus obtained, with the assistance of the *Land* of Lower Saxony, financing which it would otherwise not have been granted because of its financial difficulties’ and in concluding that the amount of the aid was equal to the total amount of the loan.
- 43 The first three arguments must therefore be rejected.
- 44 By its fourth argument, the German Government submits that the Commission was too negative in its analysis of the trends on the relevant market. It contends that forecasts at the time indicated that Jadekost’s prospects for the future were good. Moreover, neither the Nordfrost Group nor its competitors foresaw the market being saturated.
- 45 The Commission’s assessment is supported by the C & L business report, which concluded that the risk for the security was very high in view, principally, of the reduction in the financial capacity of the Nordfrost Group, the difficulties it was facing, and market trends. In addition that assessment is corroborated by the fact that Jadekost was subsequently declared bankrupt on 31 March 1995.

46 Accordingly, the fourth argument put forward by the German Government does not reveal any manifest error of assessment on the part of the Commission and cannot, therefore, be upheld.

47 By its fifth and sixth arguments, the German Government disputes the Commission's characterisation of the security in question as an operating aid. It maintains, first, that the Commission was wrong in concluding that the aid led to a substantial reduction of production costs and, secondly, that the Commission should have carried out an overall assessment, which would have shown that the security had facilitated higher investment. More specifically, the German Government claims that the security given by the *Land* of Lower Saxony could have been used to finance investments, so that Jadekost's own funds could be employed to cover its liquidity requirements. It follows that the security cannot be characterised as operating aid.

48 The Court would observe, first, that point 1.3 of the Guidelines, which is applicable in this case, provides that State aid which is granted without imposing any obligation on the part of recipients and which is intended to improve the liquidity situation of their undertakings is operating aid.

49 Secondly, that definition is consistent with paragraph 18 of Case C-278/95 P *Siemens v Commission* [1997] ECR I-2507, in which the Court held that aid corresponding to a typical general operating cost that a company must bear in its normal activities was operating aid.

50 It is common ground that the loan in respect of which the security in question was granted was intended to finance Jadekost's general operating costs. In that

connection, it should be noted that the German Government itself characterised the loan secured as an operating credit in its letter to the Commission dated 19 July 1994. That characterisation is confirmed by all the banking documents which accompanied the application made by Jadekost to the *Land* of Lower Saxony.

- 51 In the light of those considerations, the Commission rightly concluded that the aid granted by the *Land* of Lower Saxony constituted operating aid within the meaning of point 1.3 of the Guidelines.

Findings of fact relating to the application of the Guidelines

- 52 By the second part of its second plea, the German Government claims that the Commission did not take account of the fact that the security in question had been granted on condition that Jadekost complied with the financing plan drawn up by it on 23 March 1994, compliance being monitored by the *Land* of Lower Saxony.

- 53 In that connection, it need merely be pointed out that the contested decision clearly indicates that the Commission duly considered the conditions imposed by the *Land* of Lower Saxony and that it concluded, in the ninth paragraph of section IV of the grounds of the contested decision, that they were not in the nature of those envisaged in point 1.3 of the Guidelines.

54 It follows that the second part of the second plea is unfounded.

Findings of fact concerning distortion of competition

55 By the third part of the second plea, the German Government submits that the findings of fact supporting the determination that there was aid which distorted competition, namely the alleged reduction of Jadekost's costs as a result of the security in question, are inadequate.

56 This submission must be understood as being essentially to the effect that the contested decision was insufficiently reasoned for the purposes of Article 190 of the EC Treaty (now Article 253 EC). It must therefore be examined together with the third part of the third plea, alleging failure to comply with the obligation to state reasons.

The plea alleging misapplication of Article 92(1) of the Treaty

57 By its third plea in law, subdivided into three parts, the German Government maintains that the Commission misapplied Article 92(1) of the Treaty, first, by having inappropriate recourse to the Guidelines in order to determine the elements constituting aid as set out in that article; secondly, by characterising the facts in the light of that article incorrectly; and thirdly by failing to comply with the obligation to state reasons laid down in Article 190 of the Treaty.

- 58 It should be remembered at the outset that, during the administrative procedure and also in its application, the German Government did not contest the fact that the security given by the *Land* of Lower Saxony contained elements of aid within the meaning of Article 92(1) of the Treaty.

Recourse to the Guidelines

- 59 In the first part of its third plea, the German Government claims that the contested decision is wrong in law because it bases itself on the Guidelines for the purpose of determining whether the elements constituting a breach of Article 92(1) of the Treaty are present, instead of carrying out an individual examination.
- 60 The Commission's conclusion to the effect that the aid threatened to distort the conditions of competition within the meaning of Article 92 of the Treaty is, to a large extent, founded on the Guidelines. Thus, having concluded that the security in question was an operating aid, the Commission stated, in the eleventh paragraph of section IV of the grounds of the contested decision, that '[p]oint 1.3 of the Guidelines specifies that this type of operating aid is fundamentally incompatible with the common market, there being no need to examine the other conditions specified in Article 92(1) of the EC Treaty in order to establish this'. Moreover, as is clear from the 14th paragraph of section IV, the Commission characterised as aid only the part of the security allocated to fish products, since the Guidelines only apply to that sector.
- 61 The Court has found, at paragraphs 48 to 51 of the present judgment, that the Commission did not commit any error in characterising the security in question

as operating aid. It must nevertheless be determined whether the Commission was justified in basing itself on the Guidelines for the purpose of concluding that the aid in question was incompatible with the common market.

- 62 In that connection, it should be borne in mind that the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as the Guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and they do not depart from the rules of the Treaty (see, to that effect, Case C-313/90 *CIRFS and Others v Commission* [1993] I-1125, paragraphs 34 and 36).
- 63 The German Government has neither contested nor expressed any doubt as to the compatibility of the Guidelines with Article 92 of the Treaty.
- 64 The Guidelines, which are not the first to apply in the area under consideration, are based on Article 93(1) of the Treaty, under which the Commission, in cooperation with the Member States, is to keep under constant review the systems of aid existing in those States. It is to propose to them any appropriate measures required by the progressive development or by the functioning of the common market. The Guidelines are thus one element of that obligation of regular, periodic cooperation from which neither the Commission nor a Member State can release itself (see Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraphs 36 and 37).
- 65 The Commission has pointed out that the German Government took part in the procedure for the adoption of the Guidelines and that it approved them, which that government has not disputed. Moreover, those Guidelines constitute one of the conditions for the Commission's approval of the *Land* of Lower Saxony's General Directives on Securities. The German Government therefore accepted that the rules set out in the Guidelines were applicable. Therefore, in accordance with paragraph 36 of *CIRFS and Others v Commission* and paragraph 43 of

IJssel-Vliet, both cited above, those rules bind the Commission and the German Government.

- 66 In any event, it is clear from the contested decision that, regardless of its reasoning based on point 1.3 of the Guidelines, the Commission determined, by applying all the constituent elements set out in Article 92(1) of the Treaty, that the security granted by the *Land* of Lower Saxony constituted aid within the meaning of that article.
- 67 If a measure is to fall within the prohibition referred to in Article 92(1) of the Treaty, it must be an aid originating from the State which distorts or threatens to distort competition and may affect trade between Member States.
- 68 On the basis of a number of considerations, the Commission found that those conditions were satisfied in this case.
- 69 The Commission pointed out, first of all, that according to point 1.1 of the Guidelines, State security for bank loans is regarded as aid, a principle which was not disputed by the German Government. Secondly, the Commission found that, because of the support given by the *Land* of Lower Saxony, Jadekost had been able to obtain financing which it would otherwise not have been granted. It determined, thirdly, that the aid improved Jadekost's income, by freeing the undertaking from costs which it would normally have had to bear. Lastly, the Commission considered that the aid threatened to distort competition and might affect trade between Member States because it benefited a particular undertaking to the detriment of its competitors in Germany and the other Member States.

70 It follows that the first part of the third plea put forward by the German Government must be rejected.

Legal characterisation of the facts

71 By the second part of its third plea in law, the German Government maintains that the contested decision is wrong so far as the determination of the amount of the aid and the assessment of distortion of competition are concerned.

72 As regards the amount of the aid, the German Government maintains, essentially, that the Commission did not verify whether Jadekost could obtain any other credit without security, that it did not take into account the existence of sureties, and that it neglected to examine their value and impact on the assessment of the amount of the aid.

73 Those arguments are not appreciably different from those put forward in support of the first part of the second plea. It is clear from the contested decision and the case-file that the Commission rightly concluded that without the security in question Jadekost would not have been able to obtain, on market conditions, the loan which it was granted. As the Court has found in paragraphs 29 to 43 of the present judgment, the Commission did not commit any manifest error of assessment in that connection. It follows that those arguments cannot be accepted.

74 As regards the assessment of distortion of competition, the German Government's primary contention is, first, that the Commission failed to define the relevant

market and, second, that the presumption that grant of operating aid by its very nature distorts competition is not valid.

75 As regards definition of the market, it must be observed that in the third paragraph of section III and the 12th paragraph of section IV of the grounds of the contested decision, the Commission defined the market as the market in deep-frozen fish products.

76 In that regard it is to be noted that the German Government proposed no other possible definition of the relevant market either during the administrative procedure or before the Court. Nor did it adduce any evidence to show that the market as defined by the Commission was not the correct one.

77 As for the presumption that operating aid by its very nature distorts competition, it must be pointed out, first, that that presumption follows from the Court's case-law. More specifically, in Case C-86/89 *Italy v Commission* [1990] ECR I-3891, paragraph 18, the Court concluded that the aid in question had to be regarded as operating aid to the undertakings concerned and that, as such, it affected trading conditions to an extent contrary to the common interest.

78 Second, that presumption also follows from point 1.3 of the Guidelines, according to which operating aid is incompatible with the common market. Since operating aid can never be considered compatible with the common market, it follows *a fortiori* that it distorts competition within the meaning of Article 92(1) of the Treaty.

79 The second part of the third plea must therefore be rejected.

The obligation to state reasons

- 80 By the third part of the third plea in law, the German Government maintains that the Commission failed in its obligation to state reasons for the contested decision.
- 81 The German Government contends that in the contested decision the Commission confined itself to setting out presumptions and suppositions instead of establishing facts that satisfied the conditions referred to in Article 92(1) of the Treaty. It points to the absence, in the contested decision, of findings concerning, in particular, the existence and amount of the aid and distortion of competition. As regards the latter, the German Government claims that the Commission ought to have defined in concrete terms the market situation, explained how distortion of competition resulted from operating aid and given its reasons for finding that the security in question gave rise to distortion of competition and that there were barriers to intra-Community trade.
- 82 As a preliminary point, it must be borne in mind that, according to settled case-law, the statement of reasons required by Article 190 of the Treaty must be appropriate to the nature of the measure in question. It must show clearly and unequivocally the reasoning of the institution which enacted the measure so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review (see Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others v Commission* [1988] ECR 219, paragraph 71, and Case C-353/92 *Greece v Council* [1994] ECR I-3411, paragraph 19).
- 83 Moreover, the requirement to state reasons must be appraised on the basis of the particular features of the case in point, such as the content of the measure in question and the nature of the reasons given (Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek v Commission* [1985] ECR 809, paragraph 19).

84 In this case the fact that the contested decision is based on the Guidelines has a particular significance as regards the content of the obligation to state reasons.

85 According to point 1.3 of the Guidelines, operating aid is, in principle, incompatible with the common market. Since the Commission had found that the security in question constituted such aid, it was not necessary to explain in minute detail why that aid distorted competition. The Guidelines establish that such a conclusion necessarily follows from the existence of operating aid.

86 It follows that the succinct nature of the statement of reasons for the contested decision does not constitute an infringement of Article 190 of the Treaty, since the explanations alleged to be missing, relating, in particular, to distortion of competition, were unnecessary, given that it was operating aid that was at issue.

87 The third part of the third plea is therefore unfounded, as is the third part of the second plea.

The plea in law based on the application of Article 92(3)(c) of the Treaty

88 By its last plea in law, the German Government maintains that the Commission ought to have found the aid in question compatible with the common market by virtue of Article 92(3)(c) of the Treaty.

- 89 In section V, eighth paragraph, of the grounds of the contested decision, the Commission stated that ‘the aid in question is an operating aid maintaining the status quo, which is fundamentally unsuitable for facilitating development within the meaning of Article 92(3)(c)’.
- 90 That finding is in conformity with the judgment in *Siemens v Commission*, cited above, in which the Court upheld the reasoning of the Court of First Instance, which had held, in paragraph 48 of its judgment in Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, that operating aid does not in principle fall within the scope of Article 92(3) of the Treaty.
- 91 It must therefore be held that the Commission’s approach is wholly consistent with the case-law of the Court of Justice and the German Government’s fourth plea must be dismissed.

Plea in law alleging failure to observe the rights of the defence

- 92 By its first plea in law the German Government complains that the Commission denied it and the *Land of Lower Saxony* access to the observations, mentioned in section II of the grounds of the contested decision, which had been sent to the

Commission, during the administrative procedure, by letters of 31 August 1995, 1 September 1995 and 4 September 1995, by four competitors of Jadekost.

- 93 According to section II, the letters in question pointed out, in particular, that Jadekost had used the aid granted to win market share from its competitors through sales at below-cost prices. The competing companies also informed the Commission about Jadekost's business activities, market trends and the treatment of the case in the Lower Saxony Parliament.
- 94 The German Government maintains that the failure to disclose those letters constitutes an infringement of its rights of defence, entailing the illegality of the contested decision. In addition there was a persistent infringement of its rights of defence, in the case, since the letters in question themselves referred to other relevant documents of which the German Government was not able to take cognisance. It adds, in its reply, that its rights of defence were also infringed because considerations of law were not disclosed. It contends that the Commission is required to inform the Member States of the considerations of law on which it intends to base a negative decision.
- 95 According to the German Government, it is clear from the Court's case-law, and in particular from paragraph 31 of *Boussac*, cited above, that the mere possibility that the infringement might have had a negative influence on the procedure suffices for it to be held significant and to give rise to the annulment of the contested decision.
- 96 The Commission admits that, through inadvertence, the letters from the competing companies were not communicated to the German Government. However, it maintains that, according to *Boussac*, cited above, an infringement of

the rights of defence results in annulment of the contested decision only if, had it not been for such an irregularity, the outcome of the procedure might have been different.

97 The Commission contends that, in this case, the observations of the competitors contain nothing of relevance to the assessment of the facts in the light of the rules on competition that had not already been brought to the attention of the Commission by the German Government itself, in its letters and during their detailed discussions of 31 August 1994 and 28 November 1995, by the letters from the banks, forwarded to the German Government for comment, or by other sources accessible to the public, and that had not been discussed in the correspondence exchanged between the parties and in the meetings which they had had.

98 As for the alleged non-disclosure of considerations of law, the Commission maintains, first, that that complaint was raised too late and, second, that it is unfounded since the Commission expressed its view of the law in unequivocal terms, both in its correspondence with the German Government and in its discussions with it.

99 It must be borne in mind that, according to settled case-law, observance of the rights of the defence is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question (see the judgments in *Belgium v Commission*, paragraph 27, and *Boussac*, paragraph 29, cited above).

100 In those judgments the Court recognised that that principle requires the Member State in question to be placed in a position in which it may effectively make known its views on the observations submitted by interested third parties under Article 93(2) of the Treaty. In so far as the Member State had not been afforded

the opportunity to comment on such observations, the Commission could not incorporate them in its decision against that State.

101 However, such an infringement of the rights of the defence results in annulment only if, had it not been for such an irregularity, the outcome of the procedure might have been different (see *Boussac*, cited above, paragraph 31).

102 In *Boussac*, cited above, the Court had found that the observations in question did not contain any information in addition to what was already available to the Commission and known to the French Government. In those circumstances, the fact that the French Government had not had the opportunity of commenting on those observations was not liable to have any influence on the outcome of the administrative procedure.

103 Similarly, as the Advocate General has noted in points 64 to 67 of his Opinion, it is clear from the correspondence between the Commission and the German Government that the material content of the observations of Jadekost's competitors was known to the German Government, which could take it into account when dealing with the complaints raised by the Commission. Furthermore, it is clear from the case-file and Commission Communication 95/C 201/06 (OJ 1995 C 201, p. 6) on aid given to Jadekost, published on 5 August 1995, in accordance with Article 93(2) of the Treaty, that the German Government was aware of the legal and factual context in which the Commission placed the infringement of Community law alleged by it, as section IV of the grounds of the contested decision explains.

104 Moreover, the communication to the German Government of the letters submitted by Jadekost's competitors could not have led the Commission to reach a different decision. It is clear from the considerations set out in the present judgment that the Commission concluded, first, that the Guidelines were

applicable and, second, that the aid in question constituted operating aid. Both those conclusions were clearly brought to the attention of the German Government during the administrative procedure.

105 In that connection, the German Government has been unable, during the proceedings before the Court, to point to any element of fact or law which, had it been disclosed to the German Government, would have led the Commission to reach a different decision.

106 It therefore follows from the considerations set out above that this plea cannot be upheld.

107 Since the German Government has failed in all its arguments, the application must be dismissed.

Costs

108 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. Since the Commission asked for costs and the Federal Republic of Germany has been unsuccessful, costs must be awarded against the Federal Republic of Germany.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the application;
2. Orders the Federal Republic of Germany to pay the costs.

Edward Moitinho de Almeida Sevón
Puissochet Wathelet

Delivered in open court in Luxembourg on 5 October 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber