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# German Federal Administrative Court (Bundesverwaltungsgericht – BVerwG)
# Judgment 23 of April 1988, file number: 3 C 15/97
# – Alcan –

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**Procedural History**

Preceding judgment *Oberverwaltungsgericht Koblenz, 26 November 1991, file number: 6 A 11676/90*
Preceding judgment *Verwaltungsgericht Mainz, 7 June 1990, file number: 1 K 103/89*

## Headnotes

1. The European Court of Justice does not exceed its competence under the Treaty establishing the European Economic Community (EC TREATY) when it establishes the limits on national legislation regulating the annulment of State aid granted contrary to Community law with regard to determining claim limitation periods and the protection of legitimate expectations.
2. The case law of the European Court of Justice on the inapplicability of the claim limitation periods under Section 48 (4) of the VwVfG (*Verwaltungsverfahrensgesetz* – Law on Administrative Proceedings) and on the lack of a protection of legitimate expectations in the recovery of State aid, which by final decision of the European Commission has been declared inconsistent with the Common Market and whose recovery is ordered by the decision, does not violate any indispensable fundamental constitutional rights.

## Holding

Following the appeal of the defendant, the preceding judgments of the Higher Administrative Court Rhineland-Palatinate of 26 November 1991, and the judgment of the administrative court of 7 June 1990, have been revoked.

The lawsuit is dismissed.

The claimant bears the costs of the lawsuit.

## Facts

I. The plaintiff contests the annulment of operational aid granted for the aluminum smelter in Ludwigshafen and the demand for recovery of disbursed payments.

In 1979, the plaintiff took over the aluminium smelter in Ludwigshafen and operated it until its closure on 31 May 1987. Due to significant increases in power prices in 1982, the plaintiff's management decided that the smelter was to be closed on 31 January 1983 and it terminated the employment contracts of its 330 employees. Following subsequent discussions with the federal government and with the sued Bundesland [German state] about the possibility of maintaining operations, the defendant's Minister for Economy and Transport informed the plaintiff on 4 February 1983 that the state government was willing to grant interim aid up to a figure of DM 8 million limited for a period of one year. On 5 February 1983, the plaintiff announced that the offer was accepted and the aluminum smelter would continue its operations.

After the Commission of the European Communities learned about the intended payment from press reports, it asked the Federal Minister for Economics by telex of 8 March 1983 to provide prior information about the intended State aid in accord with Article 93 (3) of the EC Treaty. The Commission pointed out that the aid was not to be disbursed before the Commission had made a final determination on the matter. By letter dated 14 March 1983, the Federal Minister for Economics forwarded this information to the defendant.

Pursuant to notice of 9 June 1983, the defendant granted the plaintiff aid of DM 4 million as part of a nonrecurring interim grant of aid to be paid in 1983 for the maintenance of the smelter operation and the jobs.

On 25 July 1983, the Federal Minister for Economics sent a communication to the EC Commission describing the basis for approving the grant of interim support. On 3 August 1983, the Commission posed questions regarding details of the aid; the federal government responded to this inquiry on 6 October 1983. In a letter to the Federal Minister for Foreign Affairs of 25 November 1983, the Commission then explained that the previous approval and disbursement of aid had been unlawful and that the remaining aid was not to be disbursed before the Commission issued a final decision. The defendant was informed in this regard on 28 November 1983.

Pursuant to notice of 30 November 1983, the plaintiff was granted and subsequently disbursed additional aid in the amount of DM 4 million.

In a decision of 14 December 1985 (OJ L 72, 11 March 1998, p. 30) directed to the Federal Republic of Germany, the Commission determined that the aid granted to the plaintiff was unlawful; its provision was a violation of Article 93 (3) of the EC Treaty. Furthermore, the aid was inconsistent with the Common Market under Article 92 of the EC Treaty. The aid, consequently, needed to be recovered. The Federal Minister for Economics informed the defendant of the Commission's determination in a writing dated 8 January 1986. The defendant informed the plaintiff's director of the Commission's decision in a conversation occurring on 15 January 1986; the director invoked the protection of legitimate expectations.

Neither the Federal Republic of Germany nor the plaintiff brought action against this decision before the European Court of Justice. The Federal Ministry for Economics instead sought an "agreement" with the Commission. By notice of 27 June 1986, the Commission rejected a corresponding resolution of the matter.

By petition of 30 March 1987, the Commission brought an action before the European Court of Justice against the Federal Republic of Germany. Thereupon, the Court decided by judgment of 2 February 1989 – C 94/87 – that the Federal Republic of Germany violated its obligations resulting from the EC-Treaty by disregarding the decision of the Commission of 14 December 1985.

By notice of 26 September 1989, the defendant revoked the grant orders of 9 June and 30 November 1983 and demanded the plaintiff to repay the grant of DM 8 million. As justification, it pointed to Section 48 of the VwVfG and stated further: Due to the resulting incontestability of the incontestable decision of the EC Commission of 14 December 1985, a legally binding determination had been reached that the grant approvals were inconsistent with Articles 92 and 93 of the EC Treaty and therefore unlawful. Admittedly, the legitimate expectations of the plaintiff in the existence of the grant approvals must be attributed great importance given that the plaintiff had used the disbursed payments and fulfilled the obligations relating thereto, and because the initiative for the payment of interim support had originated from State authorities. However, when gauging the public interest in a recovery action, it was not only the interests of the authority approving the aid that were relevant; the interests of the European Community must be taken into account as well. The implementation of national law was not permitted to impair the enforcement of Community law.

The plaintiff brought an action to annul this decision, which the administrative court granted. The Higher Administrative Court dismissed the defendant's appeal on the grounds that the contested notices were in any event unlawful because they had been issued only after the expiry of the one-year period under Section 48 (4) of the VwVfG. This ruling was opposed by the appeal of the defendant, alleging a violation of substantive law.

By order of 28 September 1994, the Federal Administrative Court stayed the proceedings and pursuant to Article 177 (3) of the EC Treaty referred the matter to the European Court of Justice for a preliminary ruling. By judgment of 20 March 1997 – C C-24/95 – the European Court of Justice decided as follows:

1. The competent authority is obligated under Community law to revoke a decision granting unlawful aid in accordance with a final decision issued by the Commission declaring the aid inconsistent with the Common Market and ordering recovery, even if the authority has allowed the time-limit laid down for that purpose under national law in the interest of legal certainty to elapse.

2. The competent authority is obligated under Community law to revoke a decision granting unlawful aid in accordance with a final decision by the Commission which declares the aid inconsistent with the Common Market and which orders its recovery, even if that authority is responsible for its illegality to such an extent that recovery appears to be a violation of good faith towards the recipient as long as the recipient could not have had a legitimate expectation that the aid was lawful because the procedure intended under Article 93 of the Treaty had not been followed.

3. The competent authority is obligated under Community law to recover a decision granting unlawful aid in accord with a final decision by the Commission which declared the aid inconsistent with the Common Market and which ordered its recovery, even where such recovery is excluded under national law because the gain no longer exists, in the absence of bad faith on the part of the recipient.

The parties involved continue the litigation with their previous pleadings. Referring to an expert opinion by Prof. Dr. Sch., the plaintiff additionally states that the preliminary ruling by the European Court of Justice is void and without effect because the Court exceeded its competence granted by the Treaty establishing the European Economic Community. To the extent that the Council of the European Community has not exercised its competence under Article 94 of the EC Treaty to pass appropriate implementing provisions for Articles 92 and 93 of the EC Treaty, the competence lies with the Member States to pass legal regulations on the recovery of State aid granted unlawfully under Community law. The plaintiff argues that the European Court of Justice may not undermine this competence by declaring essential parts of Member State procedural rules inapplicable. Considering the limitations resulting from the decision of the European Court of Justice, Section 48 of the VwVfG no longer complies with the national legislature's intention. Moreover, due to the elimination of all elements protecting legitimate expectations, this provision is no longer consistent with the rule of law under the Basic Law (*Grundgesetz* – GG).

## Rationale

II. The appeal of the defendant is justified. The contested decision violates voidable law (Section 137 (1) no. 1 of the VwGO (*Verwaltungsgerichtsordnung* – Administrative Court Procedures Code)). It is inconsistent with Article 93 (2) sentence 1 and (3) of the EC Treaty under the interpretation by the European Court of Justice that is binding for the Federal Administrative Court. As it does not prove to be correct on other grounds, the prior instance decisions must be set aside and the case dismissed.

1. The legal basis for the contested order of 26 September 1989, by which the defendant revoked the aid grants of 9 June and 30 November 1983 and demanded recovery of the approved payments of DM 8 million, is Section 48 of the VwVfG in

conjunction with Section 1 (1) of the Procedural Law of the Land of Rhineland-Palatinate of 23 December 1976 – GVBl p. 308. Specifically, the annulment of administrative acts that are unlawful under Community law must generally be assessed under national law where there is no comprehensive regulation on annulment under Community law (cf. judgment of 14 August 1986 – BVerwG 3 C 9.85 – BVerwG 74 p. 357 and of 17 February 1993 – BVerwG 11 C 47.92 – BVerwGE 92 p. 81).

2 a) The prior court instances based their judgment rejecting the case on Section 48 (4) sentence 1 of the VwVfG. Accordingly, the annulment of an unlawful administrative act is possible only within one year after the authority becomes aware of the facts justifying the annulment. As far as the annulment is excluded thereafter, the recovery of the already granted aid payments would not be possible pursuant to Section 48 (2) sentence 5 of the VwVfG.

In the order for reference of 28 September 1994, the Federal Administrative Court was of the view that under national law the application of the claim limitation period in the present case cannot be challenged. When the Commission's decision of 14 December 1985 on the impermissibility of the aid granted to the plaintiff and the corresponding order for recovery became final and unappealable, the defendant had the necessary knowledge to annul the aid grants. Thus, the contested notice of annulment was untimely in September 1989. It need not be decided whether this assessment must be fully adhered to under national law. This is not decisive because under the ruling of the European Court of Justice it has been determined that Community law does not in this case allow recourse to the claim limitation period under Section 48 (4) sentence 1 of the VwVfG.

The European Court of Justice ruled that the obligation to annul a grant of aid persists despite the expiry of the claim limitation period existing under national law where the Commission has by a final decision declared a grant of aid inconsistent with the Common Market and ordered its recovery. By the decision of 14 December 1985, the Commission stated that the interim aid granted to the plaintiff was in violation of Article 93 (3) of the EC Treaty and inconsistent with the Common Market under Article 92 of the EC Treaty. At the same time, it ordered recovery of the already disbursed aid. This decision became final because neither the Federal Republic of Germany nor the plaintiff made use of its option to bring a case before the European Court of Justice under Article 173 of the EC Treaty.

b) The decision of the European Court of Justice in the present case is binding for the Senate handing down the judgment. The European Court of Justice is the legally competent judge pursuant to Article 101 (1) sentence 2 of the Basic Law within the limits defined in Article 177 (3) of the EC Treaty (cf. BVerfG, order of 22 October 1986 – 2 BvR 197/83 – BverfGE 73 p. 339 et seqq.). Preliminary rulings of the Court bind the national court in the proceedings in which the decision was requested (cf. BVerfG, order of 8. April, 1987 – 2 BvR 687/85 – NJW 1988 p. 1459 et seqq.).

Nevertheless, the competence given under Article 177 of the EC Treaty is not without limits according to the Federal Constitutional Court (cf. order of 8 April 1987 – 2 BvR 687/85 – ibid p. 1460). The present legal dispute does not, however, create a need to take a position on the essential questions resulting from this ruling. The plaintiff is incorrect in its assertion that the Court of Justice has exceeded the limits drawn by

the Treaty establishing the European Community and that the Court's decision is therefore without effect.

It is not correct that the European Court of Justice by its decision has appropriated for itself a legislative competence which is reserved to the Council of the Community pursuant to Article 94 of the EC Treaty. Though correct that the Council pursuant to Article 94 of the EC Treaty has been given the right to enact "all necessary implementation provisions relating to Articles 92 and 93", this does not alter the fact that the terms of Articles 92 and 93 of the EC Treaty are directly applicable law as regards the permissibility of State aid and especially the Commission's monitoring power. The interpretation of these terms is an original task of the European Court of Justice under Article 177 (1) lit. a of the EC Treaty. This includes determination of the limitations that the mentioned Articles place on the design of cancellation provisions, which is generally entrusted to national law.

Moreover, this is what the European Court of Justice has always assumed. The determination that the recovery of aid generally proceeds pursuant to the applicable national law has been subject to the caveat that the application of this law is not permitted to render the recovery required under Community law practically impossible (cf. judgments of 21 March 1990 – C-142/87 – ECJ 1990 I – 959 mn. 61 and 20 September 1990 – C-5/89 – ECJ 1990 I – 3437 mn. 12 with further references). Furthermore, it has emphasised that in applying a provision which makes the annulment of an unlawful administrative act dependent on the balancing of various competing interests, the interests of the Community must be taken into account comprehensively (cf. judgment of 2 February 1989 – C-94/87 – ECJ 1989 p. 175 mn. 12). Accordingly, the conclusion that the application of a claim limitation period provided for in national law under the requirements established in the decision renders the recovery stipulated under Community law practically impossible is nothing more than a substantiation of the limitations derived from Articles 92 and 93 EC Treaty and is something that has always been emphasised by the case law of the European Court of Justice as regards the design of national recovery provisions.

This does not change if one takes into consideration the further answers that were provided by the European Court of Justice in response to Questions 2 and 3. Rejection of the argument of good faith under the conditions specified in the judgment of the European Court of Justice and rejection of the argument of an absence of enrichment are merely manifestations of the principle that national law may not render recovery practically impossible and that it must ensure that Community law interests are fully taken into account.

c) The judgment of the European Court of Justice cannot be denied recognition on the ground that it failed to respect inalienable guarantees of fundamental rights. This is especially true for the principle of the protection of legitimate expectations. Under mn. 25 of this judgment, the European Court of Justice states explicitly that allowing national law to protect legitimate expectations and legal certainty in relation to recovery does not contradict the legal order of the Community. At the same time it emphasises, however, that a company benefitting from State aid can generally only anticipate the validity of the aid if it was approved in compliance with the required procedure because the Commission makes the monitoring of State aid mandatory under Section 93 of the EC Treaty; it is routinely possible for a diligent operator to determine whether this procedure was complied with. Thus the Court merely reaches

conclusions which correspond to the fact that, as generally known in the business community, State aid must pursuant to Article 93 (3) of the EC Treaty be reported to the Commission and is subject to its monitoring. The categorical exclusion of protection of legitimate expectations in cases where this procedure was not followed does not represent a violation of constitutional principles. There is no room for protection of legitimate expectations if the party concerned is not worthy of protection in the first place. It also needs to be taken into account that the European Court of Justice rejects the protection of legitimate expectations for a violation of the procedure pursuant to Article 93 (3) of the EC Treaty only "in principle". If the concerned party thinks that in its case by way of exception there are legitimate expectations worthy of protection, it can assert this by an action against the Commission's decision in accord with Article 173 of the EC Treaty (cf. ECJ, judgment of 24 February 1987 – C 310/85 – ECJ 1987 p. 901, 927). Even in cases of State aid granted in violation of Article 93 (3) of the EC Treaty, the case law of the European Court of Justice does not necessarily lead to a loss of protection of legitimate expectations. The issue is merely transferred to the legal action taken against the Commission's decision. Thus, the constitutional requirements are satisfied.

3. The judgment under appeal does not prove to be correct on other grounds either (Section 144 (4) of the VwGO).

a) In accord with Section 48 (1) sentence 1 of the VwVfG, the granted aid could be annulled because it was unlawful. The unlawfulness was conclusively determined on the basis of the Commission's decision of 14 December 1985 because an action against it was not brought, thus rendering it final (cf. ECJ, judgment of 9 March, 1994 – C-188/92 – EuZW 1994 p. 250). The plaintiff knew about the Commission's decision because of the notification provided by the defendant and also the publication in the Official Journal of the European Community. Thus, it was presented with the opportunity to make use of the legal remedy existing under Article 173 (4) of the EC Treaty.

b) Nor can the plaintiff claim the protection of legitimate expectations pursuant to Section 48 (2) sentences 1 through 3 of the VwVfG. It can remain open whether one of the reasons listed in Section 48 (2) sentence 3 of the VwVfG for the exclusion of a legitimate expectation is present.

As the 11th Senate of the Federal Administrative Court correctly observed in the judgment of 17 February 1993 (BVerwG 11 C 47.92 – BVerwGE 92, 81 <84 et seqq.>), a potential legitimate expectation on the part of a recipient of State aid – in deviation from the "rule" of Section 48 (2) sentence 2 of the VwVfG – can independent of the requirements of Section 48 (2) sentence 3 of the VwVfG be unworthy of protection in view of the public's interest in annulment as enhanced by the influence of the Community law; such a case is present here: In light of the particular interest in annulment, the concerned party's interest in the protection of legitimate expectations recedes in a case where the State aid was approved without adhering to the mandatory monitoring procedures found in Article 93 of the EC Treaty, that is without the oversight of the EC Commission. There exists a sound basis for a legitimate expectation as to the substantive lawfulness of aid only where the monitoring procedures were followed as a prerequisite to the validity of the aid. As already clarified, a diligent business operator can usually be expected to ensure that this requirement has been fulfilled. If the mandatory monitoring procedures have not

been followed – as was the case here – the legitimate expectations of the aid recipient are worthy of protection only by way of exception if this is indicated by the specific circumstances (cf. ECJ, Judgment of 20 September 1990, ibid mn. 16).

Such specific circumstances that could in relation to the protection of legitimate expectations lead to a divergent conclusion have not been presented and are not evident either. The plaintiff was and is an important and internationally engaged enterprise. It can be expected that it was possible for such an enterprise to recognise that the interim aid was questionable under Community law (cf. judgment of 17 February 1993 – BVerwG 11 C 47.92 – ibid p. 87). The particularities asserted by the plaintiff are not of a nature such that its interest in the protection of legitimate expectations outweighs the interest in annulment. This assessment holds, first, for the assertion that the initiative for the payment of interim aid originated with the State authorities' interest in preserving jobs; the plaintiff, it is argued, had been under significant political, media and temporal pressure. This assertion may be correct; however, the plaintiff was not merely an object of State aid, having instead accepted the State initiative of its own volition. Additionally, the circumstance asserted by the plaintiff that the defendant did not immediately inform it about the EC Commission's request of 8 March 1983 and its further communications (but only at the end of 1983) does not lead to a decisive enhancement of plaintiff's interest in a protection of legitimate expectations vis-à-vis the public interest in the annulment of the grant approvals; this omission by the defendant does not alter the conclusion that it was possible for the plaintiff as a large enterprise to recognise the problem of State aid under Community law. In this respect, it is legally insignificant as well that the plaintiff, according to its pleadings, did not realise any profits which would have remained in the overall enterprise as a benefit relating to the interim aid and the continuation of the enterprise up to its closure in 1987. This situation is not extraordinary in cases concerning Section 48 (2) sentence 2 of the VwVfG. The specified circumstance does not change anything regarding the public interest in annulling the aid grants at issue so as to restore validity to the competition regime under Community law which had been violated by the grant of aid. It needs to be taken into consideration that according to its pleadings, the plaintiff is still in business with several plants operating in the field of aluminium processing.

Although the appellate court did not comment on the protection of legitimate expectations in the contested judgment, subsequent to the judgment of 17 February 1993 (BVerwG 11 C 47.92 – ibid), the Senate can ascertain that the contested decision of annulment is not being opposed based on a protection of legitimate expectations under Section 48 (2) sentences 1 through 3 of the VwVfG and that, thus, the appellate judgment cannot be based on such grounds.

c) The annulment of the aid grants is furthermore not counter to the principle of good faith. According to [Question] no. 2 of the preliminary ruling of the European Court of Justice, the fact that the defendant is predominantly responsible for the unlawful aid grant does not negate the recovery obligation of the defendant because these circumstances are not capable of counterbalancing the plaintiff's lacking a legitimate expectation worthy of protection. The binding force of the decision of the European Court of Justice cannot be doubted for the reasons identified above.

d) Nor can the decision of the defendant to seek recovery be challenged by claiming an absence of enrichment pursuant to Section 48 (2) sentence 7 of the VwVfG. In

accord with the preliminary ruling of the European Court of Justice, Community law excludes asserting an absence of enrichment if – as here – unlawfully granted State aid was declared inconsistent with the Common Market by final decision of the Commission and recovery was ordered. Therefore, there is no room for further clarification as to whether the prerequisites for an absence of enrichment are actually present.

e) The answer of the European Court of Justice as to the admissibility of an objection based on the duty of good faith precludes pursuing the alternative pleading of the plaintiff that it was eligible for claims arising from the liability of public authorities because the conduct of the defendant made the demand for recovery a seeming breach of trust. The circumstances that purportedly justify the claim for public liability are, in accord with the second Question which was presented to the European Court of Justice for a preliminary ruling, identical with those that allegedly justify assigning the defendant the predominant responsibility for the unlawful grant of State aid. As these circumstances do not exclude the obligation to seek recovery, their mere categorisation as a public liability claim from the point of view of the principle of good faith cannot justify a divergent decision.