JUDGMENT OF THE COURT (Third Chamber)

5 October 2006 *

In Case C-368/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgerichtshof (Austria), made by decision of 12 August 2004, received at the Court on 24 August 2004, in the proceedings

Transalpine Ölleitung in Österreich GmbH

Planai-Hochwurzen-Bahnen GmbH

Gerlitzen-Kanzelbahn-Touristik GmbH & Co. KG

v

Finanzlandesdirektion für Tirol

* Language of the case: German.

Finanzlandesdirektion für Steiermark

Finanzlandesdirektion für Kärnten,

THE COURT (Third Chamber),

composed of A. Rosas, Rapporteur, President of the Chamber, J. Malenovský, S. von Bahr, A. Borg Barthet and U. Lõhmus, Judges,

Advocate General: F.G. Jacobs,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 14 September 2005,

after considering the observations submitted on behalf of:

— Transalpine Ölleitung in Österreich GmbH and Planai-Hochwurzen-Bahnen GmbH, by W. Arnold, Rechtsanwalt,

— the Republic of Austria, by H. Dossi, acting as Agent,

— the Commission of the European Communities, by V. Kreuschitz and V. Di Bucci, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 November 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the last sentence of Article 88(3) EC.

2 The reference was made in the context of three sets of proceedings, the first between Transalpine Ölleitung in Österreich GmbH, ('TAL') and Finanzlandesdirektion für Tirol, the second between Planai-Hochwurzen-Bahnen GmbH ('Planai') and Finanzlandesdirektion für Steiermark and the third between Gerlitzen-Kanzelbahn-Touristik GmbH & Co. KG ('Gerlitzen') and Finanzlandesdirektion für Kärnten, concerning energy tax rebates.

Legal context

Community law

3 Article 88(3) EC provides:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision'.

4 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) codifies the practice developed by the Commission of the European Communities, in accordance with the Court's case-law, with regard to the review of State aid. Pursuant to Article 30 thereof, the regulation entered into force on 16 April 1999.

5 Article 14(1) of Regulation No 659/1999 provides:

'Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary ... . The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.'

National law

6 Under tax reforms within the framework of the Strukturanpassungsgesetz (Structural Adjustment Law) 1996 of 30 April 1996 (BGBl. I 1996, No 201), the Republic of Austria adopted, published and brought into force at the same time three laws, namely:

— the Elektrizitätsabgabegesetz (Law on the tax on electricity; 'the EAG');

— the Erdgasabgabegesetz (Law on the tax on natural gas; 'the EGAG');

— the Energieabgabenvergütungsgesetz (Law on the rebate of energy taxes; 'the EAVG').

7 The EAG provides for taxation of the supply and consumption of electricity. Under Article 6(3) of the EAG, the electricity supplier must pass on the tax to the recipient of the supply.

8 The EGAG lays down similar rules for the supply and consumption of natural gas.

9 The EAVG provides for a partial rebate of the energy taxes charged on supplies of electricity and natural gas under the EAG and the EGAG. Under Article 1(1) of the EAVG, those taxes must be reimbursed on application in so far as they exceed, in total, 0.35% of the energy consumer's net production value. The rebate is paid after deduction of a maximum amount of the first ATS 5 000 (EUR 363).

10 However, pursuant to Article 2(1) of the EAVG, as amended by the Abgabenänderungsgesetz 1996 (Law amending taxes) of 30 December 1996 (BGBl. I, 797/1996), only undertakings whose activity is shown to consist primarily in the manufacture of goods are entitled to an energy tax rebate.

Background to the main proceedings

11 The Verfassungsgerichtshof (Constitutional Court) (Austria), seised of appeals brought by undertakings whose activity does not consist primarily in the manufacture of goods contesting refusals of energy tax rebates, has referred questions to the Court for a preliminary ruling in order to ascertain, inter alia, whether the provisions of the EAVG constitute State aid within the meaning of Article 87 EC.

12 In Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, the Court ruled, inter alia:

'National measures which provide for a rebate of energy taxes on natural gas and electricity only in the case of undertakings whose activity is shown to consist primarily in the manufacture of goods must be regarded as State aid within the meaning of Article 92 of the Treaty.'

13 Following that judgment of the Court, the Verfassungsgerichtshof, by judgment of 13 December 2001 (B 2251/97, Sammlung 15450), annulled the order by which the national authority had refused to grant a partial rebate of energy taxes on electricity.

14 The Verfassungsgerichtshof took the view that, since the EAVG had not been notified to the Commission, the authorities in question could not take Article 2(1) of that law as a basis for its refusal of energy tax rebates in respect of undertakings whose activity was not primarily the manufacture of goods. In so doing, the authorities in question committed an error equating to an arbitrary act since they infringed the directly applicable prohibition laid down in the last sentence of Article 88(3) EC. Such unlawful application of the law was equivalent to absence of law and accordingly constituted an infringement of the constitutionally guaranteed right to equality before the law for all citizens.

15 The Verfassungsgerichtshof based its decision on the obligation on national courts, referred to in paragraph 27 of the *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* judgment, to offer to individuals the certain prospect that all appropriate conclusions will be drawn from an infringement of the last sentence of Article 88(3) EC, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures.

16 By letter of 6 December 2001, the Commission requested information on the EAVG from the Austrian authorities. After an exchange of letters and consultation, on 22 May 2002 the Commission adopted Decision C (2002) 1890 final in respect of State aid measure No NN 165/2001 (OJ 2002 C 164, p. 4; 'the decision of 22 May

2002'). Since the Austrian law had subsequently been amended, the Commission states that it was examining the State aid measure for the period from 1 June 1996 to 31 December 2001. The operative part of the decision states as follows:

'The Commission regrets that Austria granted the aid in infringement of Article 88(3) of the EC Treaty.

Nevertheless, on the basis of the assessment set out above, the Commission finds that the aid is compatible with Article 87(3)(c) of the EC Treaty and Article 4(c) of the ECSC Treaty.'

17 In order to comply with the *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* judgment, the Republic of Austria amended the Law on the rebate of energy taxes 1996 by Federal Law No 158/2002, Article 6 of which provides that, with effect from 1 January 2002, all undertakings are entitled to a rebate of taxes on supplies of natural gas and electricity where the total of those taxes exceeds 0.35% of the net value of their production.

18 By Decision 2005/565/EC of 9 March 2004 on an aid scheme implemented by Austria for a refund from the energy taxes on natural gas and electricity in 2002 and 2003 (OJ 2005 L 190, p. 13), the Commission took the view that the use of the threshold of 0.35% of the net value of production had the effect of favouring undertakings which were large energy consumers. According to the Commission, with regard to the undertakings to which the EAVG did not apply up to 31 December 2001, the aid scheme was incompatible with the Community guidelines on State aid for environmental protection and with the other derogations

laid down in Article 87(2) and (3) EC. Referring more particularly to another provision of the Community guidelines on State aid for environmental protection, the Commission reached the same conclusion with regard to the undertakings to which the EAVG already applied before 31 December 2001.

19 Taking into consideration the possibility that the wording of the Court's answer to the second question in the *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* judgment may have led certain beneficiaries to believe in good faith that the national measures at issue before the national court would cease to be selective and therefore cease to constitute State aid if their benefit were extended to sectors other than the manufacture of goods, the Commission concluded that, having regard to the particular circumstances of the case in question, recovery of the aid would be contrary to the principle of the protection of legitimate expectations and, in accordance with Article 14 of Regulation No 659/1999, should not be required.

20 Questioned by the Court during the written procedure in the present case on the failure to take into consideration, in the decision of 22 May 2002, the threshold of 0.35%, the Commission referred to the third subparagraph of Paragraph 3 of that decision, which states as follows:

'The Commission notes that the selectivity of the measure is caused already by the restriction of the exemption to companies whose main activity consists in manufacturing goods. The Commission did therefore not assess if other elements of the national measure, such as in particular the threshold of 0.35%, would also render the measure selective.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

21 The first appellant in the main proceedings, TAL, inter alia constructs and operates oil pipelines. Before the Verfassungsgerichtshof it challenged three decisions of the Finanzlandesdirektion für Tirol dismissing its appeals against the refusal of energy tax rebates for 1996, 1997 and 1998. The Verfassungsgerichtshof annulled those decisions by three judgments of 13 December 2001 referring, in its reasons, to judgment B 2251/97, which it had delivered on the same day, following the *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* judgment.

22 On 15 November 2002, the Finanzlandesdirektion für Tirol adopted a new decision relating to the three appeals. By reference to the new factual and legal situation resulting from the decision of 22 May 2002 which declared the aid compatible with the EC Treaty, the Finanzlandesdirektion took the view that it was no longer bound by the decision of the Verfassungsgerichtshof and dismissed the appeals. It is against that decision that TAL brought an appeal before the referring court.

23 The second appellant in the main proceedings, Planai, is an undertaking that operates funicular railways. Before the Verfassungsgerichtshof it challenged a decision of the Finanzlandesdirektion für Steiermark, dismissing its appeal against the refusal of energy tax rebates for periods covering 1996 and 1997. The Verfassungsgerichtshof annulled that decision by judgment of 13 December 2001 referring in its reasons to judgment B 2251/97, cited above.

24 Following that annulment, on 17 July 2002, the Finanzlandesdirektion für Steiermark adopted a new decision. It took into consideration the decision of 22 May 2002 declaring the aid compatible with the Treaty, emphasising that that

decision had retroactive effect for the period referred to in the initial application. As a consequence it dismissed the appeal.

25 Planai brought an appeal before the Verfassungsgerichtshof, but that appeal was dismissed by judgment of 12 December 2002 (B 1348/02, Sammlung 16771) on the ground that there was no clearly erroneous application of the law which gave the Verfassungsgerichtshof jurisdiction to hear it. In its judgment, the Verfassungsgerichtshof noted inter alia:

'Since the Commission decision of 22 May 2002, the Verfassungsgerichtshof can assume that the prohibition on putting measures into effect under Article 88(3) EC (formerly Article 93(3) of the EC Treaty) at least no longer manifestly precludes the application of Article 2(1) of the EAVG. The authority concerned was therefore also permitted to apply that provision as far as possible.

The Verwaltungsgerichtshof would have to address the question whether — as is claimed in the appeal — the Commission's decision infringed Community law only if the infringement of Community law were manifest, that is to say it could be established without further consideration ... or could be addressed from a constitutional perspective. However, this is not the case — even against the background of the judgment in Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *French State* [1991] ECR I-5505 which dealt with the question of the effects of the failure to give notification, but not with the question of the lawfulness of an expressly retroactive authorisation of aid by the Commission.'

26 Following an application made to that effect by Planai, the Verfassungsgerichtshof referred its appeal to the Verwaltungsgerichtshof.

27 The third appellant in the main proceedings, Gerlitzen, is also an operator of funicular railways. Before the Verfassungsgerichtshof it challenged a decision of 29 October 2002 by the Finanzlandesdirektion für Kärnten dismissing its appeal against the refusal of energy tax rebates for 1999 to 2001. That appeal was dismissed on 12 December 2002 by a judgment referring to the grounds of the judgment given on the same day in Case B 1348/02, cited above. Following an application made to that effect by Gerlitzen, the Verfassungsgerichtshof transferred its appeal to the Verwaltungsgerichtshof.

28 The Verwaltungsgerichtshof is uncertain, firstly, as to the consequences of the decision of 22 May 2002 with regard to the appeals brought by the three appellants in the main proceedings since that decision expressly refers to a period before the date of its adoption and, secondly, whether, after that decision, account should still be taken of the prohibition on putting aid into effect under Article 88(3) EC.

29 It wishes to ascertain, in particular, whether the dates on which the applications for rebates were made or the dates of the decisions of the administrative authority relating to those applications are of importance in that regard. It points out that the first two appellants in the main proceedings submitted their applications before the decision of 22 May 2002, whereas the third submitted its application after that decision.

30 The Verwaltungsgerichtshof takes the view that the judgment in Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraphs 53 et seq. and 73) could be interpreted as meaning that a positive decision of the Commission could not have the effect of rendering lawful an aid scheme put into effect in breach of Article 88(3) EC.

31 It notes, however, that the situations in the main proceedings nevertheless differ from the case that gave rise to the judgment in *van Calster and Others*. First of all, it is clear in the present cases that the measure constitutes aid, since a rebate is granted selectively, with the result that the grant of the rebate also to undertakings not entitled thereto under the national rule, in order to create a situation consistent with Community law, is only one possible way to prevent the existence of unlawful aid or to comply with the prohibition on putting aid measures into effect. Secondly, the judgment in *van Calster and Others* was delivered in a case where Regulation No 659/1999 was not yet applicable. Lastly, in *van Calster and Others* the retroactive effect of the rule provided for ultimately by the Belgian legislator had not been revealed in the course of the procedure before the Commission, whilst in the present cases the Commission intentionally conducted the examination for a period in the past and declared the measure compatible with the common market.

32 In those circumstances, the Verwaltungsgerichtshof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Does the prohibition on putting measures into effect under Article 88(3) EC preclude the application of a national legal provision which excludes businesses whose activity is not shown to consist primarily in the manufacture of goods from energy tax rebates and which must therefore be classified as aid within the meaning of Article 87 EC, but which was not notified to the Commission prior to the national entry into force of the rules, even where the Commission has found the measure to be compatible with the common market under Article 87(3) EC for a period in the past and the application for reimbursement relates to taxes payable for that period?

(2) If so, in such a case does the prohibition on putting measures into effect require a rebate even in cases where the applications were made by service businesses after the adoption of the Commission's decision for assessment periods prior to that date?'

The questions

33 By its questions, the referring court asks, essentially, whether Article 88(3) EC is to be interpreted as meaning that it requires national courts to disapply a law which excludes certain undertakings from a partial rebate on energy taxes — a measure likely to constitute State aid and which was not notified — even after the Commission, ruling in respect of the period for which the rebate was requested, has declared the aid compatible with the common market pursuant to Article 87(3) EC. In that context, the referring court asks, secondly, whether the date on which the undertaking submitted its application for a rebate is material.

34 As a preliminary point, and to answer a question raised by the referring court in the body of its decision, it should be noted that, in so far as Regulation No 659/1999 contains rules of a procedural nature, they apply to all administrative procedures in the matter of State aid pending before the Commission at the time when Regulation No 659/1999 entered into force, namely on 16 April 1999 (Case C-276/03 P *Scott* v *Commission* [2005] ECR I-8437, confirming by implication the judgment in Case T-366/00 *Scott* v *Commission* [2003] ECR II-1763, paragraph 52).

35 Nevertheless, as is clear from the recital 2 in the preamble to Regulation No 659/1999 and its provisions, that regulation codifies and reinforces the Commission's practice in reviewing State aid and does not contain any provision relating to the powers and obligations of the national courts, which continue to be governed by the provisions of the Treaty as interpreted by the Court.

36 In that regard, firstly, it should be noted that implementation of the system for supervision of State aid, resulting from Article 88 EC and the case-law of the Court on the subject, is a matter, on the one hand, for the Commission and, on the other, for national courts.

37 It is common ground that, as regards the supervision of Member States' compliance with their obligations under Articles 87 EC and 88 EC, the national courts and the Commission fulfil complementary and separate roles (see Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 41, and *van Calster and Others*, cited above, paragraph 74).

38 Whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Community Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 88(3) of the Treaty is infringed (*van Calster and Others*, paragraph 75).

39 A national court may have cause to interpret the concept of aid contained in Article 87(1) of the Treaty in order to determine whether a State measure has been introduced in disregard of Article 88(3) (Case C-345/02 *Pearle and Others* [2004]

ECR I-7139, paragraph 31). Thus it is for that court to verify, inter alia, whether the measure at issue constitutes an advantage and whether it is selective, that is to say whether it favours certain undertakings or certain producers within the meaning of Article 87(1) EC.

40 Secondly, it must be pointed out that an aid measure within the meaning of Article 87(1) EC which is put into effect in infringement of the obligations arising from Article 88(3) EC is unlawful (see Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *French State* [1991] ECR I-5505, paragraph 17, and Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Distribution Casino France and Others* [2005] ECR I-9481, paragraph 30. See also the definition of unlawful aid in Article 1(f) of Regulation No 659/1999.

41 A Commission decision finding aid that was not notified compatible with the common market does not have the effect of regularising ex post facto implementing measures which were invalid because they were taken in disregard of the prohibition laid down by the last sentence of Article 88(3) EC, since otherwise the direct effect of that provision would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded. Any other interpretation would have the effect of according a favourable outcome to the non-observance of that provision by the Member State concerned and would deprive it of its effectiveness (see *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *French State*, paragraph 12, and *van Calster and Others*, paragraph 63).

42 Indeed, as the Advocate General pointed out in point 50 of his Opinion, if, for any particular aid plan, whether compatible with the common market or not, failure to comply with Article 88(3) EC carried no greater risk or penalty than compliance, the incentive for Member States to notify and await a decision on compatibility would be greatly diminished — as would, consequently, the scope of the Commission's control.

43 It is of little consequence in that connection that a Commission decision states that its assessment of the aid in question relates to a period prior to the adoption of that decision, as is the case of the decision of 22 May 2002 at issue in the cases in the main proceedings.

44 As mentioned in paragraph 38 of the present judgment, it is for the national courts to safeguard the rights of individuals against possible disregard, by the national authorities, of the prohibition on putting aid into effect before the Commission has adopted a decision authorising that aid.

45 In that regard, and since there is no Community legislation on the subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from Community law, provided, firstly, that those rules are not less favourable than those governing rights which originate in domestic law (principle of equivalence) and, secondly, that they do not render impossible or excessively difficult in practice the exercise of rights conferred by the Community legal order (principle of effectiveness) (see Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 67, and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 57).

46 Depending on the legal remedies provided for under domestic law, a national court may thus be seised of an application for interim relief such as the suspension of the measures at issue, in order to safeguard the interests of individuals and, in particular, to protect parties affected by the distortion of competition caused by the grant of the unlawful aid (see *SFEI and Others*, paragraph 52).

47 Furthermore, the Court has held that national courts must offer to individuals entitled to rely on disregard of the obligation of notification the certain prospect that all appropriate conclusions will be drawn, in accordance with national law, with regard to both the validity of the acts giving effect to the aid and the recovery of financial support granted in disregard of that provision or possible interim measures (*Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon*, paragraph 12, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraphs 26 and 27; *van Calster and Others*, paragraph 64; and Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, paragraph 50).

48 When giving its decision, the national court must preserve the interests of individuals. Nevertheless, in doing so it must also take fully into consideration the interests of the Community (see, by analogy, Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 19).

49 With regard to partial rebate of a tax constituting an unlawful aid measure because it was granted in breach of the obligation of notification, it would not be compatible with the interest of the Community to order that such a rebate be applied also in favour of other undertakings if such a decision would have the effect of extending the circle of recipients, thus leading to an increase in the effects of that aid instead of their elimination (see, to that effect, Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 45).

50 As the Advocate General stated in point 74 of his Opinion, care must be taken by the national courts to ensure that whatever remedies they grant are such as in fact to negate the effects of the aid granted in breach of Article 88(3) EC and not merely to extend it to a further class of beneficiaries.

51 In addition, it should be noted that, in the cases in the main proceedings, the applications for grant of the unlawful aid measure, namely the partial rebate on energy taxes, may be likened to applications for partial exemption from those taxes. As is clear from case-law, businesses liable to pay an obligatory contribution cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that contribution (see Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 80; Joined Cases C-430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I-5235, paragraph 47; *Distribution Casino France and Others*, paragraph 42, and *Air Liquide Industries Belgium*, paragraph 43).

52 Having been called upon to analyse the disputed measure in order to ascertain whether it corresponded to the definition of aid referred to in Article 87(1) EC, the national court should, in principle, have available to it all the facts enabling it to assess whether the measure which it proposes to adopt ensures that the rights of individuals are safeguarded by neutralising the effects of the aid on competitors of the recipient undertakings, while taking Community law fully into consideration and avoiding adoption of a measure which would have the sole effect of extending the circle of recipients of that aid.

53 The second question raised by the referring court relates to a situation where, as in the case in the main proceedings between Gerlitzen and the Finanzlandesdirektion für Kärnten, an application for a partial rebate on energy taxes, an aid measure which was unlawful because it was not notified, was submitted after the Commission decision declaring the aid compatible with the common market was adopted.

54 As pointed out in paragraphs 41 and 42 of the present judgment, the decision of 22 May 2002 declaring State aid compatible with the common market does not have the effect of regularising ex post facto measures implementing the aid which at the time of their adoption were invalid because they had been taken in disregard of the prohibition referred to in the last sentence of Article 88(3) EC.

55 It follows that it is of little consequence whether an application is made before or after adoption of the decision declaring the aid compatible with the common market, since that application relates to the unlawful situation resulting from the lack of notification.

56 Depending on what is possible under national law and the remedies available thereunder, the national court may thus, according to the case, be called upon to order recovery of unlawful aid from its recipients, even if that aid has subsequently been declared compatible with the common market by the Commission. In the same way, a national court may be required to rule on an application for compensation for the damage caused by reason of the unlawful nature of the aid.

57 In doing so, the national court must strive to preserve the interests of individuals whilst taking the Community interest fully into consideration, taking particular care not to adopt a decision which would have the sole effect of extending the circle of recipients of the unlawful aid.

58 In the light of the foregoing considerations, the reply to be given to the questions referred must be that the last sentence of Article 88(3) EC must be interpreted as meaning that it is for the national courts to safeguard the rights of individuals against possible disregard, by the national authorities, of the prohibition on putting aid into effect before the Commission has adopted a decision authorising that aid. In doing so, the national court must take the Community interest fully into consideration and must not adopt a measure which would have the sole effect of extending the circle of recipients of the aid.

59 Since a Commission decision declaring aid that has not been notified compatible with the common market does not have the effect of regularising ex post facto implementing measures which, at the time of their adoption, were invalid because they had been taken in disregard of the prohibition referred to in the last sentence of Article 88(3) EC, it is of little consequence whether an application is made before or after adoption of the decision declaring the aid compatible with the common market, since that application relates to the unlawful situation resulting from the lack of notification.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

The last sentence of Article 88(3) EC must be interpreted as meaning that it is for the national courts to safeguard the rights of individuals against possible disregard, by the national authorities, of the prohibition on putting aid into effect before the Commission of the European Communities has adopted a decision authorising that aid. In doing so, the national court must take the Community interest fully into consideration and must not adopt a measure which would have the sole effect of extending the circle of recipients of the aid.

Since a decision of the Commission of the European Communities declaring aid that has not been notified compatible with the common market does not have the effect of regularising ex post facto implementing measures which, at the time of their adoption, were invalid because they had been taken in disregard of the prohibition referred to in the last sentence of Article 88(3) EC, it is of little consequence whether an application is made before or after adoption of the decision declaring the aid compatible with the common market, since that application relates to the unlawful situation resulting from the lack of notification.

[Signatures]