JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
14 May 2002 *

In Case T-126/99,

Graphischer Maschinenbau GmbH (now KBA-Berlin GmbH), established in Berlin (Germany), represented by A. Bach, avocat, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by D. Triantafyllou and P. Nemitz, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the partial annulment of Commission Decision 1999/690/EC of 3 February 1999 on State aid which Germany is planning to introduce for Graphischer Maschinenbau GmbH, Berlin (OJ 1999 L 272, p. 16),

* Language of the case: German.

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

composed of: B. Vesterdorf, President, P. Mengozzi, J. Pirrung, M. Vilaras and N.J. Forwood, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 3 July 2001,

gives the following

Judgment

Facts

1 The applicant, which is established in Berlin, is a wholly-owned subsidiary of Koenig & Bauer-Albert AG (hereinafter 'KBA'), established in Würzburg. It manufactures parts for newspaper printing machinery and sells components to KBA which is essentially engaged in the manufacture of presses.

2 A general fall in demand in the sector of printing machines having led in 1993 to an appreciable decrease in orders placed with the applicant by KBA and its other

subsidiaries and branches (hereinafter 'the KBA group'), the decision to shut the applicant's factory was taken in November 1996. Closure was to take place on 30 June 1997 in order to avoid an accumulation of losses.

3 *Land Berlin* and the trade unions concerned expressed their wish that closure of the applicant's factory should be avoided. Accordingly, negotiations between those parties, on the one hand, and the applicant and KBA, on the other, led to the signing on 24 February 1997 of an 'alliance for employment' on the basis of a restructuring plan drawn up, according to the applicant, in collaboration with the Berlin authorities. *Land Berlin* declared its readiness at this stage to grant aid of around 9 million German marks (DEM) to the applicant.

4 In its restructuring plan which was finalised in September 1997 following several slight amendments to the February 1997 version, the applicant sought to concentrate its production on a reduced range of new products, in particular modified and more competitive roller bearers, drawing rollers and cooling rollers. Non-profitable products were to be discontinued and the production cycle was to be organised more efficiently. Within the framework of the restructuring provided for, whose total cost was to amount to DEM 22.93 million, KBA was to take over the applicant's losses, amounting to DEM 12.25 million, and make a joint capital injection with the applicant of DEM 1.37 million.

5 Since the applicant did not have its own planning and design department, the planning and development work had to be carried out by other factories belonging to companies within the KBA group situated in Würzburg and in Frankenthal. Work to convert the Berlin factory was also envisaged to enable the applicant to manufacture the new products. According to the latter, work on design and development commenced only after signature of the alliance for employment.

6 Since the *Land Berlin* had still taken no decision to grant aid to the applicant, KBA threatened in August 1997 to close the latter's factory. On 11 September 1997 the Berlin Senate finally decided to grant the applicant aid amounting to DEM 9.31 million ('the contested aid'), and an initial instalment of that aid, in the amount of DEM 2.5 million, was paid to it on 23 December 1997. The German Government notified the aid to the Commission by letter of 21 January 1998 enclosing in particular a copy of the final version of the restructuring plan.

7 Following an exchange of correspondence including three letters from the Commission dated 23 February, 28 May and 3 July 1998 requesting the German Government to provide further information concerning the aid in question and the latter's replies, in particular that of 18 June 1998, and following a discussion between the parties on 1 July 1998, the Commission informed the German authorities, by letter dated 17 August 1998 (OJ 1998 C 336, p. 13, hereinafter 'the notice of initiation'), of its decision to initiate the investigative procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC).

8 The German Government replied to the notice of initiation by letter dated 21 September 1998 drawn up in concertation with counsel for the applicant. Moreover, the applicant states that its counsel had a telephone conversation on 7 October 1998 with the Commission official responsible for the matter.

9 On 3 February 1999 the Commission adopted Decision 1999/690/EC on State aid which Germany is planning to introduce for Graphischer Maschinenbau GmbH, Berlin (OJ 1999 L 272, p. 16, hereinafter 'the contested decision'). It decided to deduct from 'eligible restructuring costs' the totality of development costs in respect of new or modified products amounting to DEM 4.875 million. Taking account in particular of KBA's contribution of DEM 12.25 million and

the joint contribution by KBA and the applicant of DEM 1.37 million and of the fact that the eligible restructuring costs, as thus reduced, amounted to only DEM 18.055 million, the Commission concluded that the aid planned was compatible with the common market only to the extent to which it was intended to finance that expenditure up to a limit of DEM 4.435 million. The aid planned was therefore declared incompatible with the common market to the extent to which it exceeded that amount.

10 The operative part of the contested decision is in the following terms:

'*Article 1*

The State aid which Germany is planning to grant to Graphischer Maschinenbau GmbH, Berlin, in the form of a grant amounting to DEM 9.31 million, is compatible with the common market within the meaning of Article 92(3)(c) of the EC Treaty and Article 61(3)(c) of the EEA Agreement only to the extent of DEM 4.435 million.

The amount of planned aid in excess of DEM 4.435 million may not be granted.

Article 2

Germany shall provide the Commission with detailed annual reports in order to demonstrate the due implementation of the restructuring plan.

Article 3

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

Article 4

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

Procedure

11 By application lodged at the Court registry on 25 May 1999 the applicant brought this action under Article 230 EC for partial annulment of the contested decision.

12 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber, Extended Composition) decided to open the oral procedure. By way of measures of organisation of procedure under Article 64 of its Rules of Procedure, the Court of First Instance requested the parties and the German Government to reply to certain questions in writing and to produce certain documents. Those requests were complied with within the period prescribed.

13 The parties presented oral argument and answered the questions put orally by the Court at the hearing on 3 July 2001.

Forms of order sought by the parties

14 The applicant claims that the Court should:

— annul the contested decision to the extent to which it declares the part of the planned aid in excess of the amount of DEM 4.435 million incompatible with the common market and prohibits it;

— order the Commission to declare the planned aid compatible with the common market in the additional amount of DEM 4.875 million,

— order the Commission to pay the costs.

15 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Admissibility

16 It should be recalled that under Article 113 of the Rules of Procedure the Court of First Instance may of its own motion consider whether there is any absolute bar to proceeding with an action.

17 In that regard, the Court points out that, in accordance with settled case-law, it is not for it, in an action for annulment based on Article 230 EC, to issue directions to the Community institutions (see, in particular, Case C-5/93 P *DSM* v *Commission* [1999] ECR I-4695, paragraph 36, and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *ENS and Others* v *Commission* [1998] ECR II-3141, paragraph 53). If the Court annuls the contested measure, it is then for the administration concerned to adopt, in accordance with Article 233 EC, the necessary measures to comply with the judgment annulling that measure (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 200). Accordingly, the second form of order sought by the applicant, namely that the Court should order the Commission to declare the planned aid compatible in its entirety with the common market, must be dismissed as inadmissible.

Substance

18 In the contested decision the Commission founded its conclusion concerning the incompatibility of the part of the planned aid exceeding the amount of DEM 4.435 million essentially on two separate considerations, which are challenged by the applicant in two sets of pleas.

19 First, the Commission pointed out that the work in question could not legitimately be financed by that part of the aid since development work was started before the applicant and KBA could have been certain that the aid relating thereto would be granted with the result that that aid could not have induced KBA to undertake the work. In that connection the applicant essentially raises three pleas alleging, respectively, inadequacy of the statement of reasons, infringement of the right to be heard and various errors of law or manifest errors of assessment in the application of Article 92(3)(c) of the EC Treaty (now, after amendment, Article 87(3)(c) EC), and the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1997 C 283, p. 2, hereinafter 'the Guidelines').

20 Secondly, the Commission considered that the part of the contested aid which was not approved could not be deemed to be lawful restructuring aid to the applicant since development was carried out by other companies in the KBA group in their own establishments situated outside the *Land Berlin* and that, consequently, the applicant is not the true beneficiary of that part of the aid. In that connection the applicant raises three pleas alleging, respectively, various errors of law or manifest errors of assessment in the application of the criteria laid down in Article 92(3)(c) of the EC Treaty and the Guidelines, an infringement of the rights of the defence and inadequacy of the statement of reasons for the contested decision.

21 The applicant further raises a plea alleging a misuse of powers by the Commission inasmuch as it adopted a compromise solution instead of basing itself on an objective assessment of the situation.

22 The Court notes that since each of the sets of pleas mentioned at paragraphs 19 and 20 above relate to a distinct section of the reasoning underlying the contested decision, the fact that a single plea of one of the sets may possibly be well founded

does not necessarily mean that the contested decision must be annulled. Accordingly, for the contested decision to be annulled at least one plea from each of those two series must be held to be well founded.

23 That being so, the Court considers it appropriate to examine first the plea in the first series alleging various errors of law or manifest errors of assessment as regards the criterion concerning inducement and, then, the plea in the second series likewise alleging various errors of law or manifest errors of assessment as regards the identity of the actual beneficiary of the part of the aid which was prohibited.

The plea alleging various errors of law or manifest errors of assessment vitiating the conclusion that the criterion of inducement was not satisfied

24 This plea is divided into three limbs: the first alleges a manifest error of assessment concerning the time when the costs of development were incurred; the second an error of law or a manifest error of assessment as to the conclusion that the aid was not compatible with the common market owing to the fact that those costs were incurred before the date of notification of the grant of aid, the third infringement of the principle of proportionality owing to the fact that development costs were excluded in their entirety.

25 It is appropriate first to examine the second limb of this plea.

Arguments of the parties

26 In regard to the first limb of the plea the applicant maintained that, contrary to the findings of fact in the contested decision, development costs were to a large extent not incurred prior to the date of notification of the aid by the German authorities on 21 January 1998. In connection with the second limb of the same plea it claims that, even on the supposition that those findings were correct, the Commission erred in law or manifestly misdirected itself by inferring therefrom that the part of the aid relating to development is not compatible with the common market since the criterion of inducement in its case was not satisfied, as it was required to be.

27 The Commission refers, first, to the case-law (judgment in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671) according to which State aid cannot be granted under one of the derogations set out in Article 92(3) of the EC Treaty unless it is necessary in order to induce one or more undertakings to act in a manner which assists attainment of the objective envisaged by the relevant derogation. According to the Commission, once an undertaking carries out development work without being in receipt of aid, as the applicant did, the restructuring aid subsequently granted cannot be deemed necessary in order to attain that objective.

28 Although the Commission acknowledges that the Community framework for state aid for research and development (OJ 1996 C 45, p. 5) is not directly applicable to the present case, none the less it considers it appropriate to recall that that framework upholds the principle set out in the previous paragraph of the necessity for the aid in the specific framework of research and development aid and that paragraph 6.5 thereof states that the Commission will adopt a stricter view 'in all cases in which a significant proportion of the R & D expenditure has already been made prior to the aid application.'

29 The Commission relies on the case-law under which an undertaking in receipt of aid has no certainty as to the grant thereof before the Commission has taken a decision approving it and the period for bringing an action against that decision has expired (judgment of the Court in Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 53). Thus, the fact, in the present case, that nearly one half of the development costs was incurred prior to grant of the aid being notified, which notification occurred moreover nearly a year after commencement of the work, is sufficient to preclude the possibility that that aid may have induced the applicant to carry out the work in that connection.

30 The applicant's argument that it was the undertaking to pay the aid in question adopted by the Senate of *Land Berlin* on signature on 24 February 1997 of the 'alliance for employment' that prompted it to embark on the work in question is therefore irrelevant. It is not the case that the prospect of receiving aid which is merely envisaged from a political point of view can warrant the undertaking of a restructuring operation by the beneficiary. In any event that line of argument is invalidated by the fact that the applicant had to threaten to close its factory in order to obtain in August 1997 a formal decision to grant the aid. In reality, by means of that ultimatum the applicant and KBA sought for the first time in 1997 to arrange for the financing by the *Land Berlin* of the work which had already been commenced.

31 In the Commission's view, it must be concluded that KBA would have had the development work in question undertaken even if no aid had been granted to it.

Findings of the Court

32 As a preliminary point it should be noted that, in accordance with settled case-law, the Commission enjoys a broad power of assessment in the application

of Article 92(3) of the Treaty, which involves complex economic and social appraisals. Since it is not for the Court to substitute its own economic assessment for that of the author of the decision, the Court must, in reviewing a decision adopted in such a context, confine its review to determining whether the Commission complied with the rules governing procedure and the provision of the statement of reasons, whether the facts on which the contested finding was based are accurately stated and whether there has been any manifest error of assessment or any misuse of powers (judgment in *Philip Morris* v *Commission*, cited above, paragraphs 17 and 24; and judgment in Case T-123/97 *Salomon* v *Commission* [1999] ECR II-2925, paragraph 47).

33 Furthermore, it should be recalled that, in accordance with settled case-law, the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted and the complex assessments made by the Commission must be examined solely on the basis of the information available to it at the time when those assessments were made (see *Salomon* v *Commission*, cited above, paragraph 48 and the case-law therein cited).

34 Moreover, it should be recalled that the Commission is entitled to refuse the grant of aid where that aid did not induce the beneficiary undertakings to adopt conduct likely to assist attainment of one of the objectives mentioned in Article 92(3) of the EC Treaty (*Philip Morris*, cited above, paragraphs 16 and 17). That case-law is applicable to the present case since the contested aid was examined in the context of the derogation provided for in Article 92(3)(c) of the EC Treaty and in light of the Guidelines setting out the conditions thereof.

35 After noting in the present case that the development work was commenced before notification of the aid on 21 January 1998, the Commission relies on this chronological fact in the contested decision in order to support its conclusion that the aid which was to finance that work in fact benefited KBA. Before the Court the Commission maintained that that line of argument also demonstrates the absence of the element of inducement required by the case-law cited in the

previous paragraph. In the Commission's view, KBA would not in fact have incurred the costs relating to that work prior to notification of the work to the Commission if the work carried out had not been in its own interest.

36 Accordingly, it falls to examine whether that chronological aspect of the case warrants the conclusion, in line with the Commission's arguments in the contested decision, that the element of inducement required by the case-law was absent in the present case in regard to the aid for financing the development work

37 In principle, the fact that the work in relation to restructuring has been started by the undertaking before the national authorities have even given the slightest indication as to their intention to grant aid precludes the subsequent promise of aid or its actual grant from being deemed to be an inducement to the undertaking to carry out that restructuring. In fact, once such work has been started, at least to an appreciable extent, not to complete it would normally constitute a waste of resources. The decision by an undertaking to undertake the work is therefore in principle final.

38 Conversely, the fact that a major part of the costs relating to design and development work was incurred prior to notification of the aid to the Commission does not warrant the conclusion that the promise of aid for that work on the part of the national authorities could not have induced the undertaking in question to carry it out and that that work must accordingly be excluded from eligible restructuring costs. The arguments deployed to that effect by the Commission as regards the assurances and even the undertakings given by *Land Berlin* cannot therefore be accepted.

39 In fact it should be pointed out, first, that an undertaking whose financial situation is such that it needs to receive restructuring aid in order to ensure its viability cannot always wait until it is absolutely certain of payment of that aid in

order to implement its restructuring programme. On the contrary, it may in certain cases be that implementation of that programme within a short period of time is required so as to satisfy the criterion of restoration to viability provided for in the Guidelines.

40 Moreover, the Commission has acknowledged the correctness of this analysis in the circumstances of the present case by pointing out in the contested decision that '[the applicant's] capacities would not have allowed for developing, on a short-term basis, the requisite competitive and innovative products and that [the applicant] therefore had to have recourse to KBA's capacities' (p. 24).

41 Moreover, it is plain that an undertaking which may potentially be the recipient of new State aid can have no certainty of actually receiving it before the authorities of the Member State have notified that aid to the Commission and the Commission has declared it to be compatible with the common market. The fact that aid is notified has no effect, in itself, on its compatibility with the common market.

42 Thus, notification of the aid in no way removes the uncertainty as to its approval at Community level. So long as the Commission has not taken a decision approving it and so long as the period for bringing an action against that decision has not expired, the recipient cannot be certain as to the lawfulness of the proposed aid which alone is capable of giving rise on the part of the recipient to a legitimate expectation (see, in that connection, judgment in *Spain* v *Commission*, cited above, paragraph 53). In those circumstances, it must be held that the absence of absolute certainty as to the grant of aid and, with it, of legitimate expectations, at the time when the potential beneficiary decides to proceed with restructuring does not mean that the assurances given previously by national or regional authorities had no effect as an inducement.

43 In those circumstances it must be acknowledged that the Commission cannot infer from the mere fact that the development was commenced before the date of

notification of the aid intended to finance it that that aid does not satisfy the criterion concerning inducement. It is for the Commission to assess the circumstances of each case in order to determine whether the prospect of the grant of the aid is sufficiently likely to satisfy the criterion as to inducement.

44 Thus, in the present case, in order to assess whether the element of inducement was present the Commission ought to have taken into account the precise form and nature of the communications and acts emanating from the competent national authorities, together with the other pertinent factors and in particular the urgency due to the applicant's financial situation found as a fact in the contested decision.

45 Moreover, the Commission's assessment lacks coherence in this case. In the contested decision, the Commission notes that 'improved roller-bearer (Type "Pastomat RC") has been mass-produced by [the applicant] since the end of 1997, resulting in a first commercial success for the restructuring plan'. It infers therefrom that a significant part of the development expenditure in connection with the restructuring plan had already taken place before notification.

46 However, this mass production could only be started if not only the part of the design and development work relating to the roller-bearer in question but also the part of the work to convert the Berlin factory where it was to be manufactured had been completed. Moreover, the contested decision confirms that significant conversion work was carried out in 1997 inasmuch as the Commission states therein that 'the costs incurred in 1997 are caused by the restructuring and the outage period due to the conversion of the production layouts and range of products' (p. 22).

47 None the less, the Commission took the view in the contested decision that the totality of the expenditure on work to convert the Berlin factory constituted

eligible restructuring costs and that they could therefore be financed by the part of the aid declared compatible with the common market. In so doing, it acknowledged, at least implicitly, that the assurances and undertakings given by *Land Berlin* in the course of 1997 concerning the grant of aid induced the applicant and KBA to carry out those conversion works.

48 It follows from the foregoing that the Commission committed a manifest error in its assessment by concluding that the part of the aid relating to the design and development work was incompatible with the common market on the ground that, in its view, the necessary element of inducement in that connection was lacking since the costs relating to that work had been incurred 'before January 1998' (p. 23), that is to say before 'the date of notification' (p. 24); it made this assessment without taking account of the possible relevance of all the circumstances surrounding the grant of aid and, in particular, the circumstances prevailing prior to notification. The erroneous nature of the Commission's analysis in that connection is borne out by the fact that it approved the aid relating to the work to convert the Berlin factory although it is clear from the findings in the contested decision that that work had also been started before notification of the aid.

49 The error noted in the preceding paragraph would be inoperative and accordingly would not be sufficient to warrant annulment of the contested decision if, in the particular circumstances of the case, it could not have had a decisive effect on the outcome (see, by analogy, in relation to an error of law, judgments in Case T-75/95 *Günzler Aluminium* v *Commission* [1996] ECR II-497, paragraph 55 and Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 199).

50 Thus, were it to appear from the contested decision read in the light of the material available to the Commission at the time of its adoption that the Commission was entitled to take the view that the part of the aid relating to design and development work did not have the necessary element of inducement because that work had begun on a date when the national authorities had not yet

given notice of their intention to grant it, annulment of the contested decision on the grounds mentioned in the preceding paragraph would be meaningless. In fact in that case, the Commission could merely reach the same conclusion in regard to the part of the aid declared incompatible with the common market by having regard to that date rather than the date of notification.

51 From that perspective it is appropriate to examine the Commission's arguments that the indications received from the national authorities by the applicant and KBA before the latter decided to commence the development work were not sufficient to induce it to do so.

52 In that connection it appears from the arguments presented in the defence that the authorities of *Land Berlin* adopted a formal decision to grant the aid following threats to close the applicant's factory by KBA in August 1997. It should also be noted that in their letter addressed to the Commission on 18 June 1998, the German authorities referred to a 'decision of 11 September 1997 to grant aid'. At the Court's request the German Government produced a copy of that decision of the Senate of *Land Berlin*. It turns out indeed to be the decision by which the aid in the applicant's favour in the amount of DEM 9 310 000 was formally granted on 11 September 1997 subject to the Commission's approval.

53 It must be noted that the applicant therefore received from *Land Berlin*, no later than 11 September 1997, as many guarantees as to the grant of the aid as could legitimately be obtained from it.

54 As to signature on 24 February 1997 of the Alliance for employment it is necessary to reject the Commission's argument that political undertakings not

ratified by legally binding administrative decisions are by their nature too unreliable to induce an undertaking to undertake a restructuring programme within the meaning of the case-law recalled at paragraph 34 above. Again, these arguments disregard the fact that the circumstances of each case under the Guidelines are different and that it is for the Commission to determine the element of inducement by taking account of all the relevant facts including the non-binding undertakings which may have been given by the political authorities at national level or, as in the present case, at regional level.

55 In the present case it is apparent from the contested decision that 'in November 1996 KBA proposed closing down [the applicant] on 30 June 1997, in which case the [control and profit-transfer] agreement would have been terminated before the closure and [the applicant] would not have been entitled to take over the operating losses incurred in 1996 and 1997.'

56 Moreover, in reply to a question raised by the Court, the Commission produced a copy of the version of the restructuring plan which had been forwarded to it by the German authorities during the course of the procedure under Article 93(2) of the EC Treaty. It is apparent from a reading of section zero of this document that KBA had in fact initially decided to close the applicant's factory but that, following detailed discussions with the Berlin Senate on 8 January 1997 and 14 February 1997, an appropriate plan was drawn up allowing for the partial survival of the undertaking and financial support was approved by the Senate. Section zero of the plan goes on to state that the board of KBA had decided carry out a complete restructuring of the applicant's undertaking in order to ensure its partial survival in so far as it was possible to count on the financial support envisaged.

57 In that connection the argument alleging that KBA had to threaten to close the applicant down in order to obtain the formal grant of the aid on the part of the Berlin authorities, advanced by the Commission before the Court, does not

invalidate the applicant's arguments as to the reality of the assurances given by those authorities in February 1997. In fact, the applicant is not claiming that those assurances were legally binding and it does not therefore deny taking a risk, like KBA, by relying on them. None the less, neither the fact that KBA may have doubted in August 1997 that the undertakings by the public authorities would be honoured, nor the fact that it sought to exert pressure in order to compel them to do so, automatically means that it did not place reliance on those undertakings in carrying out the restructuring as from February 1997.

58 Finally, even though it is clear from the contested decision that the Commission considers, in light of the paucity of information available to it in the absence of the precise timetable which it says it requested from the German authorities, that a major part of the costs relating to development work was incurred before the end of 1997, none the less it must be held that the contested decision contains no finding concerning expenditure incurred prior to 11 September 1997 or 24 February 1997. Since the Commission did not appraise the situation prevailing on those dates, it must be held that the manifest error committed by it may have had a decisive effect in that connection.

59 Accordingly, this plea is well founded and there is therefore no need to examine the other pleas in this first series.

The plea alleging an error of law or a manifest error of assessment allegedly committed by the Commission inasmuch as it took the view that the aid relating to the design and development work does not constitute restructuring aid benefiting the applicant within the meaning of the Guidelines

60 This plea, which is divided into four limbs, relates first to the consequences to be drawn from the fact that the Würzburg and Frankenthal factories are not located

in assisted regions, secondly, to the assessment that the design and development work benefits KBA, thirdly, to the assessment that the applicant's viability is not affected by the prohibition of a part of the aid, from the fact that an appreciable proportion of the costs had already been incurred and, fourthly, to the assessment that the part of the aid refused involves no additional inducement.

61 It is appropriate to examine the second and third limbs of this plea jointly.

Arguments of the parties

62 According to the applicant, the Commission erred in law and/or was guilty of a manifest error of assessment in taking the view that the design and development work benefits KBA with the result that it, rather than the applicant, is in actual fact the main beneficiary of the part of the aid relating thereto. In fact the development offices of the KBA group, far from needing to carry out the work in question in order to keep themselves busy, did not lack work at the time when they undertook it and the group's other projects were thus delayed. However, there was no time to involve an outside development firm. Moreover, closure of the applicant's factory would have been the least costly solution for KBA.

63 Moreover, the applicant claims that the Commission ought not to have disregarded its legal autonomy in relation to its parent company, KBA, in considering that it was the beneficiary of the aid. In the matter of aid the situation of a subsidiary had to be assessed without regard to that of the other

undertakings forming part of the same group (judgment in Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraphs 314 and 315).

64 The statement in the contested decision that '[KBA] was, in any case, interested in supplying improved machinery parts to be incorporated into its printing machinery' (p. 24) is neither supported by evidence nor well founded. Prior to implementation of the restructuring plan the KBA group used certain machinery parts, in particular roller bearers supplied by third parties, a strategy which it could have extended to other components if the applicant had ceased its business. Thus, according to the applicant, if the decision to close its factory on 30 June 1997 had not been cancelled, the development work at issue would not have been embarked upon by the KBA group at least during the period 1997 to 1999.

65 In any event the Commission committed a manifest error of assessment in taking the view that the applicant's viability was not called in question by the contested decision. In fact, the costs relating to design and development work had not yet been invoiced to the applicant by the KBA group, precisely on the ground that it had not been possible to pay the aid relating thereto. If those costs had been invoiced the applicant would have incurred losses.

66 The Commission claims that it was entitled to take the view that KBA, a company which was not in difficulty, was the main beneficiary of the aid.

67 In that connection the Commission notes that KBA owns the whole share capital in the applicant and that it takes over its losses or profits under an agreement entered into between the two companies. In their observations formulated during the course of the administrative procedure, the German authorities described the

applicant as a 'workshop extension' to KBA and in their letter of 18 June 1998 they stated that it was necessary to assess 'the undertaking made by the two companies as forming a whole.'

68 Moreover, according to the Commission, the applicant cannot derive any arguments from the judgment in *British Airways and Others* v *Commission*, cited above. In fact, the Commission's assessment in the case giving rise to that judgment was based on the fact that relations between Air France and Air Inter had become those of 'independent sister companies' of the same 'parent' company rather than that of a parent company and its subsidiary. In those circumstances the Court considered that, in the exercise of its broad discretion, the Commission was entitled to treat those two companies as independent companies in its assessment of the aid at issue (see paragraph 314 of the judgment).

69 In the present case, on the other hand, KBA and the applicant had more classic relations of parent company and subsidiary and the Commission was therefore entitled to treat them as a single entity in its assessment of the part of the aid in relation to the development work (see judgment in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 11).

70 Moreover, the design and development work financed by the aid directly benefited the KBA company inasmuch as it had a strategic interest in the production within its own group of flexible and innovative machinery parts for its printing machinery (pp. 17 and 24 of the contested decision) and the progressive replacement of the parts supplied previously by manufacturers outside the KBA group, thus improving flexibility of supplies and competitiveness. The restructuring plan likewise enabled the closure of overlapping capacities within the KBA group and improvement of the rate of utilisation of production sites within the group (p. 20 of the contested decision). Moreover, it followed that the Commission did not err in referring to the restructuring of KBA since other

companies within the KBA group apart from the applicant had to take steps to adapt to the new situation created by its restructuring. None the less, the Commission clearly considered in the contested decision that only the applicant and not the whole group formed the subject-matter of the restructuring plan to which its assessment related.

71 Finally, contrary to the applicant's arguments it is not appropriate to equate the conditions in which the design and development department of the KBA group provided services to the applicant with those which would have been imposed by an outside design and development firm. In fact, without stating the price to be invoiced to the applicant by the design and development department of the KBA group in order to remunerate the work in question, the German authorities merely stated that 'it was calculated so as to cover all the costs occasioned by development and construction'. For its part the applicant refers in its application to the 'reimbursement of costs'.

72 It is therefore common ground that the price to be invoiced contains no element corresponding to the profit that an external design and development firm would necessarily have to achieve and that it is therefore lower than the best price which the applicant could have obtained on the market. Yet whilst the KBA group assisted the development work by selling the resultant know-how to its subsidiary on favourable terms the logical inference is that they were carried out by the group in its own interest.

73 Moreover, the allegation based on the reference in the contested decision to the applicant's viability is not well founded. Taking the view that the aid in respect of design and development work was not compatible with the common market and should be prohibited, the Commission none the less sought to ensure that that reduction in aid would not in practice prevent the applicant's return to viability. In fact, the latter element is one of the matters to be covered under the Guidelines (point 3.2.2 (A)) by any restructuring plan. In the contested decision the Commission noted that that objective was not called in question by the proposed reduction.

Findings of the Court

74 As a preliminary point reference should be made to the considerations concerning review by the Community judicature set out above at paragraphs 32 and 33.

75 First of all, the applicant's argument based on the judgment in *British Airways and Others* v *Commission*, cited above, must be rejected. In fact, the Commission's assessment in the case which gave rise to that judgment and was confirmed by the Court of First Instance was based on the fact that the relationship between Air France and Air Inter had become one of 'independent sister companies' under the same holding company rather than that of a parent company and its subsidiary, as in the present case. It cannot therefore be deduced from that case that the Commission ought to have treated KBA and the applicant as independent undertakings. On the contrary, the Commission was obliged to take account of all the relevant circumstances for the purposes of its assessment including the relationship of parent and subsidiary existing as between KBA and the applicant.

76 In the contested decision the Commission considers that the part of the aid relating to the design and development work benefits KBA with the result that it and not its subsidiary is the main beneficiary of that aid. That conclusion is founded on a manifestly erroneous analysis.

77 It should also be noted, prior to discussion of the question of the effect of the partial refusal of the aid at issue, that the restructuring plan provides according to the terms of the contested decision for 'concentration [by the applicant] on the manufacture of only three machinery parts' and abandonment of the production of other parts at a loss, manufacture of the latter being transferred to the factories

of the KBA group in Würzburg and Frankenthal (pp. 20 and 22 of the contested decision). Although it is true that that transfer was likely to benefit KBA inasmuch as it permitted, in particular, an increase in the rate of utilisation of those factories, it should be recalled that KBA had to choose, at the beginning of 1997, between the restructuring of the applicant's undertaking and its definitive closure and that that transfer of production was possible or even logical in both those situations. Under those circumstances it must be held that the restructuring of the applicant's undertaking did not benefit the KBA group owing to that redistribution of functions within that group since that redistribution could have been and probably would have been effected in any event.

78 The Commission's refusal to approve the aid in respect of DEM 4.875 million has meant in practice that the KBA group has had to bear an additional burden in carrying out the design and development work without financial compensation in order to enable the restructuring plan to be implemented since the applicant was not in a position to make that financial contribution (see paragraphs 80 and 81 below).

79 However, it must be noted that the Commission has not demonstrated to the requisite legal standard the existence in KBA's case of a direct financial or commercial interest in assuming the burden of the development work, over and above its taking over with its own funds losses amounting to DEM 12.25 million (p. 17 of the contested decision) and its joint contribution with the applicant of DEM 1.37 million (p. 23). In fact, the Commission stated in the contested decision (p. 20) that on the basis of 'optimistic but achievable' assumptions made by the German authorities, the restructuring plan provided for the applicant to become profitable again only in 2000 by achieving a modest profit of DEM 520 000. In those circumstances there was no reason to suppose that, at the time when the decision was adopted, KBA would derive from its investment in the applicant undertaking in the form of dividends to be paid to it *qua* parent company sufficient profit to cover the design and development costs and still less to offer it a reasonable return on the capital invested.

80 It is clear from these findings that the assertion that prohibition of the aid in respect of DEM 4.875 million does not affect the viability of the restructuring plan and with it that of the applicant undertaking is not correct. The restructuring plan under which the Commission considered in the contested decision that the applicant would become profitable again only in the medium-term proceeded on the premiss that the development costs would be invoiced by the KBA group to the applicant without any profit margin (p. 24 of the contested decision), and that the latter would settle the debt thus created from the aid relating to that work. In the absence of a proven interest on the part of KBA in financing the work itself, that debt was anything but virtual and had in fact to be paid.

81 The Commission's reasoning disregards the debt mentioned in the preceding paragraph and does not explain in what way the applicant could become profitable again whilst bearing that additional burden. Since the applicant was not in a position to pay for the design and development work unless the part of the aid refused by the Commission was paid to it, the consequence of the contested decision is overall to turn the development, production and marketing of the new machinery parts into a loss-making commercial operation. The fact relied on by the Commission that a major proportion of the costs had already been incurred at the time when the contested decision was adopted is immaterial in that connection given that in the final analysis it has no effect on the viability of the applicant undertaking given the existence of the debt.

82 Moreover, the Commission had initially taken the view in the second and third of the seven provisional 'conclusions' set out in the notice of initiation (p. 15), that the costs provided for in the restructuring plan for the design and development work in respect of the new products envisaged were excessive and that it was not necessary for the KBA group to sell the resultant know-how to the applicant instead of granting it a licence. However, in the contested decision the Commission withdrew its objections to those aspects of the restructuring plan. In that connection it noted, first, that the costs relating to the work in question would be spread over a period of seven years, in accordance with usual practice in the mechanical construction sector, which represents an annual charge of DEM 868 000 and in relation to the turnover figure of DEM 36 million expected for the year 2000 corresponds to a share of 2.4% per annum and, secondly, that the

German Government had undertaken to ensure that the result of that work would benefit only the applicant.

83 In light of all these circumstances, and of the fact that KBA could have avoided taking over the applicant's losses by closing its factory in June 1997, the Commission's arguments as to the close relations between KBA and the applicant do not demonstrate that the payment of aid to the latter necessarily benefited the former.

84 Since no direct financial interest on the part of KBA in the implementation of the restructuring plan has been established, it follows that the Commission has committed a manifest error of assessment on this point unless it is clear from the contested decision that that plan benefited KBA in some indirect way. It is therefore necessary to ascertain whether the contested decision mentions another financial reason which may have induced KBA to finance the development work.

85 In that connection it should be noted that in the contested decision the Commission justified its conclusion that KBA had an interest in carrying out the development work by reference to the fact that the design and development department of the KBA group carried out that work and by noting that '[KBA] is the main beneficiary of the activities carried out at its own production site' (p. 24 of the contested decision). Moreover, the Commission stated that '[KBA] was, in any case, interested in supplying improved machinery parts to be incorporated into its printing machinery' (p. 24 of the contested decision); that reasoning was enlarged upon before the Court by reference to KBA's strategic interest in having the parts in question supplied by the applicant. It is necessary to examine the relevance and substance of these two parts of the Commission's reasoning.

86 First, the fact that the restructuring plan provided for the KBA group's design and development departments to carry out the design and development work subject

to remuneration by the applicant is not in itself sufficient to support the conclusion that KBA had an interest in that work. It is correct, as the Commission points out, that, if the part of the aid relating to the design and development work had been deemed lawful it would have been paid by the applicant to the KBA group in order to pay for the work in question. However, the mere indirect payment to KBA of the funds advanced by the government of *Land Berlin* is not relevant in determining which of the two companies was the 'main beneficiary' of the aid in the present case since that payment was remuneration for actual work which had necessarily occasioned real costs to the KBA group's design and development departments. The Commission has not explained how KBA could cover those costs in the absence of that payment. In fact, under the restructuring plan the KBA group had to sell the know-how resulting from the design and development work to the applicant at cost price in order to render that operation profitable. Moreover, as has been noted at paragraph 82 above, exclusive use of that know-how was reserved to the applicant under an undertaking given by the German Government to the Commission.

87 On that same point, according to the applicant, the KBA group's design and development departments were already occupied to 100% of their capacity by other projects whose completion had to be deferred in order to enable them to carry out the work in question within the short period dictated by the applicant's financial difficulties. Those facts were not discussed in the contested decision and the Commission did not request any information on the situation of the KBA group's design and development departments during the course of the administrative procedure.

88 It follows that the Commission manifestly erred in its assessment inasmuch as it made the supposition that the restructuring plan benefited KBA owing to the fact that it brought paid work to the KBA group's design and development departments, even though it is clear in particular from the contested decision that KBA group's design and development departments had to invoice that work to the applicant at cost price without any profit margin. Thus, the error committed by the Commission in that regard originated in the inadequacy of its investigation and, more specifically, in the fact that it did not inquire into all the relevant circumstances including the question whether those design and

development departments were underemployed (see, in that connection, judgment in Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 72). It should be stated in that connection that the Commission did not claim in the notice of initiation that KBA was going to benefit from the restructuring plan owing to the fact that the design and development work would be carried out in the KBA group's design and development departments.

89 Secondly, it is not obvious that a parent company necessarily has a commercial interest in having new parts for its machinery products developed by its design and development departments in order that they may be manufactured by its subsidiary. The pertinence of this analysis depends on the specific circumstances of the case and, specifically, the state of supply on the component markets concerned, as well as on the question whether the subsidiary can profitably engage in the manufacture of those products, regard being had to all the costs which it has to bear in that connection.

90 The statement that KBA was, 'in any case, interested in supplying improved machinery parts to be incorporated into its printing machinery' would in fact be correct from a commercial point of view only if it were established that the KBA group could not obtain from outside suppliers in a reliable manner and at interesting prices products equivalent to those developed for the applicant.

91 The contested decision does not examine in detail the possible existence of alternative sources of supply but it should be noted that to the extent to which it did deal with this question the Commission highlighted facts which invalidate rather than bear out its own arguments. In fact, it is stated in the part of the contested decision relating to assessment of the aid that, although the machine parts manufactured by the applicant were in principle intended to replace products previously purchased from outside manufacturers, 'competition with those suppliers' would 'still remain' (p. 22). That analysis confirms the observations of the German authorities of 21 September 1998 in that connection to the effect that the applicant would continue to face competition from other

manufacturers because the KBA group would remain free to obtain elsewhere the parts offered by the applicant.

92 In light of the foregoing it is not established to the requisite legal standard in the present case that KBA or the KBA group had a commercial interest in carrying out the design and development work on the basis that that work would enable it to create a reliable source of supply of the parts necessary for the manufacture of its machines, at the very least given the globally loss-making operating conditions described at paragraph 81 above resulting from the Commission's refusal to pay part of the contested aid. On the contrary, the Commission's assessment in the contested decision would indicate that other reliable sources of supply already existed and that, in those circumstances, KBA did not need to ensure the development of those products and their manufacture by the applicant.

93 As to the Commission's argument that the price to be invoiced to the applicant by the KBA group to remunerate the design and development work does not include the profit element which an outside design and development office would have needed to achieve, it should be pointed out first that those arguments, which are based on the fact that KBA carried out that work under those conditions owing to the advantages which it could derive therefrom in the long term, are incompatible with the argument based on bringing remunerative work to the KBA group's development departments which was rejected at paragraph 88 above. Nor, moreover, may it be inferred from the fact that KBA contributed to the development work by selling the know-how thus acquired at cost price that it necessarily had a strategic interest in carrying out the work, whether or not the aid in question was granted by the authorities of *Land Berlin*.

94 The Commission thus manifestly erred in its assessment inasmuch as it inferred from the facts available to it that KBA had an interest in carrying out the development work on the grounds, *inter alia*, that it had to be carried out by its

own development department and that the products developed were to be manufactured by its subsidiary. The mere assertion that KBA was 'in any case, interested in supplying improved machinery parts to be incorporated into its printing machinery' (p. 24 of the contested decision) does not warrant the conclusion reached by the Commission that KBA and not the applicant was the real beneficiary of the aid at issue.

95 Inasmuch as the Commission erred at least partly as a result of the inadequacy of the information available to it, it must be examined whether it was entitled to rely on incomplete evidence in relation to those aspects of the present case relating to the identity of the real beneficiary of the part of the aid at issue which was refused (see, in that connection, Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, paragraphs 26 to 29). Although the Commission included in its notice of initiation an order to provide 'all information concerning that aid', it should however be noted that in the contested decision it did not regard as inadequate the information which it had received as to KBA's interest in the restructuring, unlike the information relating to other aspects of the case. In those circumstances the rule laid down in paragraph 26 of the judgment in *Germany and Pleuger Worthington* v *Commission*, cited above, is not relevant in this case.

96 In any event, neither the German authorities nor KBA and the applicant who could have submitted observations as parties concerned under Article 93(2) of the Treaty could have inferred from the wording of the notice of initiation, cited in the preceding paragraph, that they were to supply more detailed information in order to demonstrate that KBA had no interest in the development of the new components planned. In particular, the fact that they did not of their own initiative provide information concerning the rate of utilisation of the research and development capacities of the KBA group cannot be held against them, nor the fact that they did not provide information more detailed than that mentioned in paragraph 91 above on external sources of supply of the aforementioned components.

97 In that connection the wording in question is contained in the third of the seven provisional conclusions set out in the notice of initiation. That third conclusion essentially relates to the question whether the KBA group was to sell the know-how developed for the applicant or grant it a licence, a matter addressed by the German Government in its observations of 21 September 1998. KBA's interest in the components' in question, wrongly described by the Commission as 'special machinery parts', being manufactured within the group, is mentioned therein only as a secondary matter.

98 In light of all the foregoing it must be concluded that this plea is well founded.

99 Since the two pleas examined above are well founded the contested decision must be annulled without its being necessary to examine the other pleas and arguments raised by the applicant.

Costs

100 Under Article 87(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 has been unsuccessful and the applicant made application in that regard, the Commission must be ordered to pay the costs.

On those grounds,

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

hereby:

1. **Annuls Commission decision 1999/690/EC of 3 February 1999 on State aid which Germany is planning to introduce for Graphischer Maschinenbau GmbH, Berlin to the extent to which it declares the part of the planned aid exceeding the amount of DEM 4.435 million incompatible with the common market and prohibits it;**

2. **Dismisses the remainder of the application;**

3. **Orders the Commission to pay the costs.**

Vesterdorf Mengozzi Pirrung

Vilaras Forwood

Delivered in open court in Luxembourg on 14 May 2002.

H. Jung B. Vesterdorf

Registrar President