JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

19 October 2005 *

In Case T-318/00,

Freistaat Thüringen (Germany), represented by M. Schütte, lawyer, with an address for service in Luxembourg,

applicant,

supported by

Federal Republic of Germany, represented by W.-D. Plessing and T. Jürgensen, acting as Agents, assisted by R. Bierwagen, lawyer,

intervener,

Commission of the European Communities, represented by K.-D. Borchardt and V. Kreuschitz, acting as Agents, assisted by C. Koenig, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

supported by

ODS Optical Disc Service GmbH, established in Hamburg (Germany), represented by I. Brinker and U. Soltész, lawyers, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of Commission Decision 2000/796/EC of 21 June 2000 on State aid granted by Germany to CDA Compact Disc Albrechts GmbH (Thuringia) (OJ 2000 L 318, p. 62),

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

composed of J. Azizi, President, R. García-Valdecasas, J.D. Cooke, M. Jaeger and F. Dehousse, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 5 May 2004,

gives the following

Judgment

Law

1 Article 87 EC provides:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

...'

2 Article 88 EC provides:

'1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not

compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

...'

3 According to Article 5 of 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):

'1. Where the Commission considers that information provided by the Member State concerned ... is incomplete, it shall request all necessary additional information. Where a Member State responds to such a request, the Commission shall inform the Member State of the receipt of the response.

2. Where the Member State concerned does not provide the information requested within the period prescribed by the Commission or provides incomplete information, the Commission shall send a reminder, allowing an appropriate additional period within which the information shall be provided.

...'

4 In addition, Article 6 of Regulation No 659/1999 provides:

'1. The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the

doubts as to its compatibility with the common market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.

...'

5 According to Article 10 of Regulation No 659/1999:

'1. Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.

2. If necessary, it shall request information from the Member State concerned. ... Article 5(1) and (2) shall apply mutatis mutandis.

3. Where, despite a reminder pursuant to Article 5(2), the Member State concerned does not provide the information requested within the period prescribed by the Commission, or where it provides incomplete information, the Commission shall by decision require the information to be provided (hereinafter referred to as an "information injunction"). The decision shall specify what information is required and prescribe an appropriate period within which it is to be supplied.'

6 Article 13(1) of Regulation No 659/1999 provides:

'The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7. If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.'

7 Article 14 of the same regulation provides:

'1. 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 recipient (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the recipient until the date of its recovery.

3. Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article [242 EC], recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the

Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.'

8 Article 16 of Regulation No 659/1999, entitled 'Misuse of aid', states:

'Without prejudice to Article 23, the Commission may in cases of misuse of aid open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7, 9 and 10, Article 11(1), Articles 12, 13, 14 and 15 shall apply mutatis mutandis.'

9 In 1994 the Commission adopted Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12), amended in 1997 (OJ 1997 C 283, p. 2) ('Guidelines on aid for rescuing and restructuring').

Facts

10 By Decision 2000/796/EC of 21 June 2000 on State aid granted by Germany to CDA Compact Disc Albrechts GmbH, Thuringia ('the contested decision'), the Commission ruled on the legality of the financial aid granted by various German public entities from 1991 to 1995 for a compact disc ('CD') production plant and CD accessories, established in Albrechts, Thuringia ('the Albrechts CD plant').

A — *General context*

11 In the contested decision, the Commission distinguished between three phases: first, the start-up phase of the undertaking, second, the undertaking's restructuring phase and, lastly, the acquisition of some of the undertaking's assets by the company MediaTec Datenträger GmbH ('MTDA').

1. *The undertaking's start-up phase (1990 to 1992)*

12 The contested decision indicates that the Albrechts CD plant was created by a joint venture agreement concluded on 20 February 1990 between, on the one hand, the VEB (nationally owned) Kombinat Robotron, established in Dresden, Saxony ('Robotron') and, on the other, the company R. E. Pilz GmbH & Co. Beteiligungs KG ('PBK'), a company forming part of the Pilz Group established in Kranzberg, Bavaria ('the Pilz Group'). Robotron held a two thirds share in the capital of the joint venture, then called 'Pilz & Robotron GmbH & Co. Beteiligungs KG' ('the joint venture'), with the remaining one third held by PBK. The joint venture was set up for the purpose of manufacturing CDs, CD boxes and accessories. Mr Reiner Pilz, managing director of the Pilz Group, also ensured the management of the plant (recital 11 of the contested decision).

13 In order to achieve its corporate objective, on 29 August 1990 the joint venture and Pilz GmbH & Co. Construction KG ('Pilz Construction'), a company belonging to the Pilz Group, signed a general contracting turnkey agreement for the construction of a CD production plant for an all-inclusive price of DEM 235.525 million, plus lot development costs of DEM 7.5 million (recitals 12 and 20 of the contested decision).

14 Under an additional contract dated 26 May 1992, the partners in the joint venture agreed to expand manufacturing capacity for CDs and CD boxes. An all-inclusive price of DEM 39 million for all deliveries and services was agreed (recital 22 of the contested decision).

15 In order to finance those investments, the joint venture, Robotron and PBK borrowed the necessary funds from a bank consortium. Those bank loans were partially or totally covered by guarantees from the Treuhandanstalt ('the THA'), a public body responsible for financing the privatisation of undertakings in the former German Democratic Republic and from the *Land* of Bavaria. Moreover, the *Länder* of Thuringia and Bavaria, the latter through the Bayerische Landesanstalt für Aufbaufinanzierung ('the LfA'), the Bavarian body charged with the financing of infrastructures, granted investment subsidies and allowances to the joint venture.

16 During the start-up phase of the Albrechts CD plant, ownership of the shares in the capital of the joint venture changed hands several times. First, when Robotron was wound up by the THA in 1992, the shares in the joint venture held by the company were taken over by PBK. Subsequently, PBK, in turn, transferred almost all of the shares held by it in the joint venture to the company Pilz GmbH & Co. Compact Disc KG, another company belonging to the Pilz Group ('Pilz Compact Disc'), so that the joint venture became a subsidiary of the latter company. Lastly, on 24 November 1992, following that transfer and the transfer of its head office to Albrechts, the joint venture operated under the name Pilz Albrechts GmbH ('PA'). Immediately after that transfer, it was integrated into the Pilz Group's central cash-management system (recitals 13 and 14 of the contested decision).

2. *Restructuring phase (1993 to 1998)*

17 The CD production plant commenced operations in 1993. From the outset, it encountered major difficulties and became heavily indebted (recital 15 of the contested decision).

18 In order to remedy the situation, a restructuring agreement was concluded on 7 March 1994 by the Pilz Group (including PA), the banks and the public bodies (the THA, the LfA, the Thüringer Industriebeteiligungsgesellschaft ('the TIB') and the Thüringer Aufbaubank ('the TAB')) which had participated in the financing for the establishment of the Albrechts CD plant. Under that agreement, a large portion of the bank loans which had been granted for the purpose of building the CD production plant was partially or totally paid off. Moreover, under the restructuring agreement, the shares in PA were acquired by TIB — 98% of the shares — and TAB — 2% of the shares — with retroactive effect from 1 January 1994, with the result that PA no longer belonged to the Pilz Group. From October 1994, the company also underwent a name change and subsequently operated under the name CDA Compact Disc Albrechts GmbH ('CD Albrechts') (recitals 15 and 17 of the contested decision). In 1994 and 1995, the TAB and the LfA granted several rounds of credit to CD Albrechts.

19 It was also in 1994 that the German authorities noticed that a large part of the financial assistance which had been granted to finance the establishment of the Albrechts CD plant had been misused, particularly in the central cash-management system in the Pilz Group, for the other companies in the group. Moreover, on 25 July 1995, insolvency proceedings were initiated in respect of the assets of all the companies in the Pilz Group. Lastly, Mr Reiner Pilz has been sentenced to prison for fraudulent bankruptcy and other offences (recital 16 of the contested decision).

3. *Acquisition of certain assets by MTDA*

20 With effect from 1 January 1998, MTDA, a wholly-owned subsidiary of the TIB whose main centre of activities is the production of high-performance data-storage media, in particular recordable CDs (CD-ROM) and DVDs, acquired some of the assets belonging to CD Albrechts, namely fixed and current assets, short-term usable assets, technical know-how and marketing organisation (recital 18 of the contested decision).

21 At the time of that acquisition, CD Albrechts changed its name to LCA Logistik Center Albrechts GmbH ('LCA'), whilst MTDA changed its name to CDA Datenträger Albrechts GmbH ('CDA'). LCA continued to own the land on which the company operated, the existing buildings, the technical infrastructure and the logistical installations. Moreover, LCA and CDA concluded an agreement on the exchange of services, which provides, first, for a lease contract with an annual rent of DEM 800 000 and, second, for a service contract worth around DEM 3 million a year, depending on the volume of business (recital 19 of the contested decision).

22 On 22 September 2000, LCA asked to be put into liquidation as part of bankruptcy proceedings.

B — *Administrative procedure*

23 In response to reports in the press that the German authorities had granted aid for the establishment of the Albrechts CD plant, in October 1994 the Commission

asked the Federal Republic of Germany to provide it with information on that aid. An intense exchange of correspondence ensued, and various meetings were held between the German authorities and the Commission (recitals 1 to 3 of the contested decision).

24 By letter of 17 July 1998 ('the decision to initiate the procedure'), the Commission informed the Federal Republic of Germany of its decision to initiate the formal investigation procedure provided for under Article 88(2) EC with regard to that aid. A list of questions being put to the German authorities was enclosed with that letter. The decision to initiate the procedure was published in the *Official Journal of the European Communities* of 15 December 1998 (Commission notice pursuant to Article [88(2) EC] to other Member States and interested parties on aid for setting up CD Albrechts GmbH, Thuringia, former Pilz Group, Bavaria, OJ 1998 C 390, p. 7).

25 The German authorities reacted to the decision to initiate the procedure by sending various letters containing additional information. A number of meetings were again held between the German authorities and representatives of the Commission.

26 However, considering that the information provided by the German authorities did not provide satisfactory answers to its questions, the Commission, by letter of 22 July 1999, set a deadline of 31 August 1999 for answers to its questions. After having requested an extension of that deadline by letter of 28 July 1999 and after having had another meeting with representatives of the Commission on 23 September 1999 in Brussels, the German authorities provided supplementary information.

27 After expiry of the time-limit laid down in the decision to initiate the procedure, the companies CDA and Point Group Ltd, a competitor of CDA, informed the Commission that they were interested parties and submitted observations.

28 On 21 June 2000, the Commission closed the procedure by adopting the contested decision.

C — *Findings of fact and legal assessment*

29 The Commission made separate assessments of the aid granted by the Federal Republic of Germany during the start-up phase, the restructuring phase and, lastly, the acquisition of certain assets of CD Albrechts by MTDA.

1. *Financial aid granted by the Federal Republic of Germany during the start-up phase*

30 In the contested decision, the Commission identified five types of financial measures granted during the start-up phase. In a synoptic table in recital 32 of the contested decision, it described them as follows:

	Measure	Amount (DEM million)	Recipient	Granted by	Date	Legal basis
1	100% deficiency guarantee, initially 80% guarantee covering DEM 52.7 million	54.7	PBK	LfA	1991	Law on the assumption of guarantees and sureties of the Free State of Bavaria
2	Investment grants and allowances	19.42	Joint venture	LfA	1991/1992	Joint scheme for improving regional economic structures, Investment Allowance Law
3	Waiver	3.0	PBK	LfA	1994	None
4	100% guarantee	190.0	Robotron AG, joint venture	THA	199[2]	THA scheme
5	Investment grants and allowances	63.45	Joint venture, from 24.11.1992, PA	Thuringia	1991 to 1993	Joint scheme for improving regional economic structures, Investment Allowance Law
Total		330.57				

31 It is apparent from the table, first, that in 1992 the THA provided a 100% guarantee worth DEM 190 million which covered most of the bank loans granted to Robotron and to the joint venture. According to the Commission, that guarantee must be considered to be State aid which is incompatible with the common market because it was not granted in accordance with the conditions laid down in the aid schemes approved by the Commission by letter SG(91) D/17825 of 26 September 1991 ('the first THA scheme') and by letter SG(92) D/17613 of 8 December 1992 ('the second THA scheme'), respectively. It considers, however, that of the DEM 190 million initially covered, only the amount of DEM 120 million actually paid out by the THA as part of the guarantee should be recovered.

32 Second, the Commission found that, until 31 December 1993, the *Land* of Thuringia had granted to the joint venture, then to PA, under the Investitionszulagengesetz (Investment Allowance Law) and the 20th and 21st Rahmenpläne der Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftstruktur (Framework programmes adopted, for 1992 and 1993, pursuant to the Law of 6 October 1969 on the Joint scheme for improving regional economic structures ('the GA scheme')), investment subsidies and allowances totalling DEM 63.45 million. In the Commission's view, however, that regional aid was granted wrongly under the joint scheme and the Investment Allowance Law and, therefore, since it is incompatible with the common market, it must be repaid. In the light of the decision taken by the *Land* of Thuringia to order the recovery of DEM 32.5 million, the Commission considers that DEM 30.95 million must still be recovered.

33 Third, the Commission found that, in 1991 and 1992, the *Land* of Bavaria had, through the LfA, granted the joint venture investment subsidies and allowances totalling DEM 19.42 million. Because those grants and allowances were misused for the benefit of companies in the Pilz Group, the Commission considers that they were granted wrongly under the GA scheme and the Investment Allowance Law. It is thus, in the Commission's view, aid which is incompatible with the EC Treaty.

34 Fourth, the Commission found that the *Land* of Bavaria had established, pursuant to the Richtlinien für die Übernahme von Staatsbürgschaften im Bereich der gewerblichen Wirtschaft (Guidelines for the granting of State guarantees in industry and commerce, published in Notice of the Bavarian Ministry of Finance of 7 August 1973, No L 6811-1/7-43358 ('Guidelines for the granting of guarantees by the *Land* of Bavaria')), a guarantee changed from 80% to 100% on the loans totalling DEM 54.7 million ultimately obtained by PBK. According to the Commission, the German authorities, despite the request for information contained in the decision to initiate the procedure, did not provide sufficiently detailed particulars to dispel its doubts as to the legality of the operations relating to the guarantee provided by the *Land* of Bavaria (the LfA). Moreover, given that the aid in question was not used to finance investment but was misused, it found that that guarantee constituted unlawful aid.

35 Fifth, the Commission took the view that LfA's waiver of the debt of DEM 3 million which had arisen for PBK due to the payment of that amount to the banks pursuant to the guarantee referred to in paragraph 34 was State aid. In its view, that aid is incompatible with the common market because it was granted without a legal basis.

36 In the light of those findings, the Commission concluded that, during the start-up phase of the Albrechts CD plant, the Federal Republic of Germany had granted, contrary to Article 88(3) EC, State aid totalling DEM 260.57 million. That aid was comprised of aid measures from the *Land* of Thuringia totalling DEM 63.45 million, from the LfA totalling DEM 77.12 million (DEM 54.7 million in the form of a guarantee, DEM 19.42 million in the form of investment allowances and DEM 3 million in the form of debt waivers) and from the THA totalling DEM 120 million.

37 According to the Commission, that aid is incompatible mainly because it conferred an advantage on the companies belonging to the Pilz Group and was therefore misused within the meaning of Article 88(2) EC.

2. *Financial measures granted during the restructuring phase*

38 In the contested decision, the Commission identified and classified as aid 12 financial measures granted during the undertaking's restructuring phase. In a synoptic table contained in recital 39 of the contested decision, those measures are presented as follows:

	Measure	Amount in DEM million	Recipient	Granted by	Date	Legal basis
1	Loan	25.0	PA	TAB	October 1993	None
2	Loan	20.0	PA	TAB	March 1994	None
3	Purchase price	3.0	PBK	TIB	March 1994	None
4	Grant	12.0	PA	TIB	March 1994	None
5	Shareholding	33.0	PA	TIB (98 %) TAB (2 %)	March 1994	None
6	Loan	2.0	PA	LfA	March 1994	None
7	Shareholder's loan	3.5	PA	TIB	April 1994	None
8	Loan	15.0	Pilz Group	LfA	June 1994	None
9	Loan	15.0	CD Albrechts	TAB	October 1994	None
10	Loan	7.0	CD Albrechts	LfA	December 1994	None
11	Loan	9.5	CD Albrechts	TAB	January 1995	None
12	Interest	21.3			since the end of 1993	
Total		166.3				

39 First, the Commission found that, in October 1993, the TAB had granted PA a loan of DEM 25 million in order to cover that company's liquidity shortfalls, but that those funds had accrued directly to the other companies in the group through the Pilz Group's central cash-management system.

40 Second, the Commission found that, in March 1994, the TAB had granted PA a credit of DEM 20 million to enable it to repay the loan which had been secured by the THA, but that those funds had also accrued directly to the companies belonging to the Pilz Group through the central cash-management system.

41 Third, the Commission found that, in March 1994, the TIB had paid PBK DEM 3 million for the purchase of shares in PA held by PBK.

42 Fourth, the Commission found that, in March 1994, the TIB had made a grant in the form of a DEM 12 million contribution to PA's capital reserve.

43 Fifth, the Commission found that, in March 1994, the TIB and the TAB had acquired 98% and 2%, respectively, of the shares in PA, worth a total of DEM 33 million.

44 Sixth, the Commission found that, in March 1994, the *Land* of Bavaria had, through the LfA, granted a loan of DEM 2 million to PA.

45 Seventh, the Commission found that, in April 1994, the TIB had granted a shareholder's loan of DEM 3.5 million to PA.

46 Eighth, the Commission found that, in June 1994, the LfA had granted an operating loan of DEM 15 million to the Pilz Group, which was intended as a bridging loan to cover the period up until such time as an investor willing to buy the Albrechts CD plant was found.

47 Ninth, the Commission found that, in October 1994, the TAB had granted a loan of DEM 15 million to CD Albrechts. It observed that, although the funds had been paid to CD Albrechts, they had been used to provide services to the companies in the Pilz Group, services for which they never paid, so that they had received an advantage.

48 Tenth, the Commission found that, in December 1994, the *Land* of Bavaria had, through the LfA, granted a fresh DEM 7 million loan to CD Albrechts.

49 Eleventh, the Commission found that, in January 1995, the TAB had granted a DEM 9.5 million loan to CD Albrechts.

50 Twelfth, the Commission found that, according to the information from the German authorities, PA and CD Albrechts had received advantages in the form of interest totalling DEM 21.3 million in the period from the end of 1993 to 1998.

51 According to the Commission, the 12 financial measures described above, totalling DEM 166.3 million, must be considered to be illegal State aid which is incompatible with the common market. To the extent that those measures conferred an advantage on the TIB and the TAB after those bodies had assumed economic responsibility for the Albrechts CD plant, they could be approved by the Commission only on the basis of Article 87(3)(c) EC and in accordance with the Guidelines on aid for rescuing and restructuring. The Commission is also of the view that it is obvious that the aforementioned measures do not comply with those guidelines, since the information it has does not establish that they were granted as part of a viable restructuring plan containing concrete internal measures enabling the Commission to find that the undertaking's long-term profitability and viability has been restored within a reasonable time. In addition, no private investor has emerged who is willing to acquire the current companies LCA and CDA, so that, without private investment, it is not possible to determine whether the aid is proportionate to the restructuring costs.

3. *Recovery of the aid*

52 Acting pursuant to Article 14(1) of Regulation No 659/1999, the Commission decided that the Federal Republic of Germany had to demand repayment of the aid found to be illegal and incompatible with the common market which was paid out both during the start-up phase and during the restructuring phase of the Albrechts CD plant.

53 The Commission also stated that, in order to ensure compliance with its decision and eliminate all distortion of competition, it had to, if necessary, require that the procedure for recovering the aid not be limited to the initial recipient of that aid, but be extended to any undertaking carrying on its activities using the transferred means of production. It stated that, in order to determine whether an undertaking is actually carrying on the activities of the initial recipient of the aid, it took account of a certain number of elements, including the subject-matter of the transfer, the

purchase price, the identity of the partners and owners of the former undertaking and of the investor, the date of completion of the transfer and the commercial nature thereof. It took the view that, in the present case, LCA and CDA were definitely benefiting from the aid which had previously been granted to PBK, the joint venture and PA, because they were using the assets and infrastructure of those undertakings in order to carry on their activities. Accordingly, it decided that that aid had to be repaid by LCA, CDA and any other undertakings to which the assets of the joint venture, PA or PBK had been or would be transferred, as they fell to be considered as 'recipients' of that aid.

4. *Operative part of the contested decision*

54 In the light of those assessments, the Commission adopted the following decision:

'Article 1

1. DEM 260.57 million of the aid granted to [PBK, the joint venture and PA] by [the Federal Republic of] Germany for the establishment, operation and consolidation of the CD plant in Albrechts (Thuringia) was used elsewhere within the Pilz Group.

This amount consists in DEM 63.45 million from the [*Land* of] Thüringen, DEM 77.12 million [from] the [LfA] and DEM 120 million from the [THA].

The wrongful use constitutes a misuse of aid within the meaning of Article 88(2) [EC] and the aid is therefore incompatible with the [EC] Treaty.

2. The aid totalling DEM 166.3 million for the restructuring of [CD Albrechts] is incompatible with the provisions of the EC Treaty pursuant to Article 87(1) thereof.

Article 2

1. [The Federal Republic of] Germany shall take the necessary measures to recover from the respective beneficiaries the aid referred to in Article 1 and unlawfully made available to them.

2. Recovery shall be effected in accordance with the procedures of national law. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiaries until their actual recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

3. For the purposes of this article the term "beneficiaries" shall include CDA ... and LCA ... as well as any other undertaking to which [PBK's, the joint venture's and PA's] assets and/or infrastructure have been transferred or will be transferred in such a way as to evade the consequences of this Decision.

...'

Procedure and forms of order sought

55 By application lodged at the Registry of the Court of First Instance on 10 October 2000, the *Land* of Thuringia brought an action for annulment of the contested decision. That action was registered under number T-318/00.

56 By order of 28 May 2001 of the President of the Third Chamber, Extended Composition, of the Court of First Instance, the Federal Republic of Germany was granted leave to intervene in support of the forms of order sought by the *Land* of Thuringia, whilst ODS Optical Disc Service GmbH ('ODS'), a competitor of CDA, was granted leave to intervene in support of the forms of order sought by the Commission.

57 ODS and the Federal Republic of Germany lodged their statements in intervention on 29 August and 3 September 2001 respectively. On 24 October 2001, the *Land* of Thuringia and the Commission lodged their observations on the statements in intervention lodged by ODS and the Federal Republic of Germany.

58 By order of 30 September 2002, the Court of First Instance (Third Chamber, Extended Composition) decided to stay the proceedings pending the judgment of the Court of Justice in Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission*. In the light of the judgment delivered on 8 May 2003 in those joined cases, the Court of First Instance asked the parties for their observations on the consequences for the present case. Those observations were lodged on 23 and 24 June 2003.

59 On receiving the report of the Judge-Rapporteur, the Court of First Instance asked the parties for their comments on the appropriateness of a possible joining of this

action with the action having the same subject-matter brought by CDA and registered with the Registry of the Court of First Instance under number T-324/00. After the parties' observations had been received, the cases were joined by order of 8 March 2004, for the purposes of the hearing and judgment.

60 On receiving the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the Court of First Instance, asked the parties to supply certain documents and put questions to them in writing.

61 The parties presented oral argument and replied to the questions put by the Court of First Instance at the hearing on 5 May 2004.

62 By order of 23 July 2004, Cases T-318/00 and T-324/00 were disjoined for the purposes of judgment.

63 The *Land* of Thuringia claims that the Court of First Instance should:

— annul the contested decision;

— in the alternative, annul Article 1(1) of the contested decision, in so far as it declares the aid paid to the joint venture and to PA to be incompatible with the common market, and annul Article 1(2) and Article 2(3) of the contested decision;

— order the Commission to pay the costs.

64 The Federal Republic of Germany, intervener, contends that the Court of First Instance should:

— annul the contested decision.

65 The Commission, supported by ODS, contends that the Court of First Instance should:

— dismiss the action;

— order the *Land* of Thuringia to pay the costs.

Law

I — *Preliminary observations*

66 In support of its action, the *Land* of Thuringia puts forward several pleas in law relating to breach of the rights of the defence, incorrect findings of fact, breach of the obligation to state reasons, infringement of Articles 87 EC and 88 EC and their

implementing provisions, breach of the principle of proportionality and, lastly, breach of the principle of legal certainty and of a 'principle of certainty'.

67 The Court of First Instance will examine, first, the pleas put forward in support of the forms of order seeking annulment of Article 1 of the contested decision. Next, the Court of First Instance will consider the pleas relating to the order for recovery contained in Article 2 of the contested decision.

II — *The legality of Article 1 of the contested decision*

68 The *Land* of Thuringia states essentially that Article 1 of the contested decision is unlawful because the Commission's assessment of the various financial measures granted as part of the Albrechts CD plant project is based on errors of fact, is contrary to Article 87(1) EC and Article 88(2) EC and fails to comply with the obligation to state reasons.

69 Accordingly, it is necessary to examine in turn, for each of the financial measures which were identified in the tables reproduced in paragraphs 30 and 38 above, the pleas put forward by the *Land* of Thuringia.

70 The Court of First Instance considers it necessary, however, to examine first the *Land* of Thuringia's argument that the Commission was not entitled to rely on the information it had at the time it adopted the contested decision.

A — *Whether the contested decision could be based on the information available*

1. Arguments of the parties

71 The *Land* of Thuringia submits that, in the present case, the Commission was not entitled to base the contested decision on the information it possessed at the time it adopted the contested decision. It states, first, that, as evidenced by the second sentence of Article 13(1) of Regulation No 659/1999 and consistent case-law, the Commission may base a decision on the information available only when the Member State has failed to reply or has replied incompletely to an information injunction from the Commission (Case C-301/87 *France* v *Commission* (*'Boussac'*) [1990] ECR I-307, paragraphs 19 and 22; and Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, paragraph 26). It also observes that, even if the national authorities must provide the Commission with all relevant information in order to assist it in its task of monitoring State aid, the Commission has an obligation to clarify the facts as much as possible. In its view, that implies that the Commission must inform the national authorities, in a clear and precise manner, of all of the information it requires for its task, and that it must adopt a decision on the basis of the information available only in extreme cases where, despite its requests, it has not been able to obtain the required clarifications. The *Land* of Thuringia states that, in the present case, the German authorities replied to the Commission's various requests for information and, in particular, to the questions annexed to the decision to initiate the procedure. It observes that, with one exception, the questions contained in the letter of formal notice of 22 July 1999 were not the same as those annexed to the decision to initiate the procedure, which shows, in its view, that the procedure had progressed in the interim. It submits that if the Commission believed that the answers to the questions annexed to the decision to initiate the procedure were insufficient, it should have said so in its letter of 22 July 1999. Accordingly, the *Land* of Thuringia submits that, since the Commission did not ask the German authorities for clarifications, it was not entitled to base the contested decision on the information available.

72 The Commission, supported by ODS, disagrees with the *Land* of Thuringia's assertion.

2. Findings of the Court

73 It is settled case-law that the Commission is empowered to adopt a decision on the basis of the information available when it is faced with a Member State which fails to comply with its obligation of cooperation and refuses to provide information requested from it for the purpose of assessing the compatibility of aid with the common market (*Boussac*, paragraph 71 above, paragraph 22; and *Germany and Pleuger Worthington* v *Commission*, paragraph 71 above, paragraph 26). Before taking such a decision, however, the Commission must comply with certain procedural requirements. In particular, it must order the Member State to provide it, within the time-limit it lays down, with all the documentation, information and data necessary in order that it may examine the compatibility of the aid with the common market. It is only if the Member State, notwithstanding the Commission's order, fails to provide the information requested that the Commission is empowered to terminate the procedure and make its decision, on the basis of the information available to it, on the question whether or not the aid is compatible with the common market (*Boussac*, paragraph 71 above, paragraphs 19 and 22). These requirements have been taken up and given concrete expression in Article 5(2), Article 10(3) and Article 13(1) of Regulation No 659/1999.

74 It is in the light of those principles that it must be determined whether in the present case the Commission was entitled to adopt the contested decision taking account only of the information which it had in its possession in June 2000.

75 It is appropriate to begin by reviewing the course of the administrative procedure in the case.

76 It began in October 1994, with the sending of a letter to the German authorities. In that letter, the Commission requested the German authorities to provide information on the State aid granted for the establishment of a CD plant in Albrechts. In response, the German authorities, by letter of 9 November 1994, notified aid from the *Land* of Thuringia and from the *Land* of Bavaria in favour of the joint venture and the Pilz Group. By letter of 15 November 1994, the Commission asked for more detailed information on that aid. The German authorities elaborated on their notification by letter dated 3 March 1995 notifying new aid granted by the THA, the *Land* of Thuringia and the *Land* of Bavaria. Since that aid had already been granted, the Commission registered it under number NN 54/95 (recital 2 of the contested decision). By letters dated 1 August 1995, 16 October 1995 and 25 November 1996, the Commission asked additional questions which the German authorities answered by letters dated 22 August 1995, 25 August 1995, 18 January 1996 and 17 April 1997. On 3 February 1997 and on 22 and 23 September 1997, meetings were held in Brussels and Erfurt between representatives of the Commission and the German authorities. By letter dated 20 January 1998, the German authorities submitted a summary of their comments on the case based on the outcome of the meeting with Commission representatives (recital 3 of the contested decision).

77 Following a preliminary examination of the information provided by the German authorities, the Commission was of the view that the disputed measures raised serious doubts as to its compatibility with the common market and, therefore, on 17 July 1998 it adopted the decision to initiate the procedure.

78 By that decision, it also ordered the Federal Republic of Germany 'to provide, within one month of receiving [the decision], all the necessary documentation, information and data for assessing the compatibility with Article [87 EC] of the aid'. An annex containing seven questions was enclosed with the decision to initiate the procedure.

79 By letter of 26 August 1998, the Federal Republic of Germany reacted to the decision to initiate the procedure. On 15 October 1998, another meeting was held in Brussels between representatives of the Commission and the German authorities. By letter dated 11 November 1998, the latter submitted further information.

80 Taking the view that the information provided was still insufficient, the Commission, by letter of 4 March 1999, once again ordered the German authorities to provide the necessary information and, in particular, to answer the questions attached to the decision to initiate the procedure.

81 In response to that fresh order, the German authorities, by letters of 30 March, 1 April and 16 April 1999, provided further information.

82 The Commission, however, considered that that information was still not a sufficient response to the questions contained in the attachment to the decision to initiate the procedure (in particular, questions 3 to 7). Accordingly, by letter of 22 July 1999, it set a deadline of 31 August 1999 for the questions to be answered. It also requested the Federal Republic of Germany to provide it with additional information and documentation.

83 After this deadline had been extended in response to a request by letter dated 28 July 1999 and after a further meeting had been held between representatives of the Commission and the German authorities in Brussels on 23 September 1999, the German authorities sent further information by letters dated 28 September and 19 October 1999.

84 The Commission adopted the contested decision on 21 June 2000.

85 With respect to the Land of Thuringia's argument that the German authorities provided all of the information requested and that the Commission was thus not entitled to base itself on the information available, the Court finds, as a preliminary point, that it is clear from the course of the administrative procedure that the Commission complied with the procedural requirements laid down by the case-law and provided for in Regulation No 659/1999. On three occasions it formally ordered the Federal Republic of Germany to provide it with the information necessary in order that it might examine the compatibility of the disputed aid with the common market.

86 Moreover, contrary to the contentions put forward by the *Land* of Thuringia, the Commission's letter of 22 July 1999 does not indicate that the German authorities replied to all of the questions save one. On the contrary, in that letter the Commission again requested the German authorities to answer questions 3 to 7 in the annex to the decision to initiate the procedure.

87 Next, the *Land* of Thuringia has not established that the German authorities provided complete answers to all of the questions put by the Commission in the annex to the decision to initiate the procedure. In particular, it has not demonstrated that the German authorities provided a specific list of the aid granted since 1991, despite several requests to that effect from the Commission. Likewise, it did not establish that the German authorities replied to the question relating to the existence of possible restructuring plans. It is, moreover, evident from the case-file that the German authorities replied only in a vague manner to the question concerning the description of the transactions carried out as part of the acquisition of the joint venture by the TAB and the TIB, and to the question relating to the description of the circumstances and conditions under which the loans were waived by the private banks in 1994.

88 It should also be borne in mind that, according to Article 6(1) of Regulation No 659/1999, 'the decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market'. That decision and the publication thereof in the *Official Journal of the European Communities* inform the Member State and other interested parties of the facts on which the Commission intends to base its decision. It follows that, if those parties believe that some of the facts contained in the decision to initiate the formal investigation procedure are incorrect, they must inform the Commission thereof during the administrative procedure or risk not being able to challenge those facts at the litigation stage (see, to that effect, with respect to the Member State, Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31). By contrast, in accordance with the principles laid down in the case-law and the relevant provisions as described in paragraph 73 above, where there is no information to the contrary from interested parties, the Commission is empowered to base itself on the factual elements it has at the time it adopts its final decision, even if they are incorrect, provided that the factual elements in question were the subject of an information injunction issued by the Commission to the Member State to provide it with the necessary information. If, however, it fails to order the Member State to provide it with information on the facts on which it intends to rely, it cannot subsequently justify any errors of fact by stating that, at the time of adopting the decision ending the formal investigation procedure, it was entitled to rely only on the information it had at that time.

89 Contrary to the suggestion made by the *Land* of Thuringia, the Commission is not thereby exempt from all judicial review of its findings of fact. If the Member State has fulfilled its obligation to provide all of the information requested by the Commission, it will be quite easy for it to use the information it provided during the procedure to demonstrate that any errors of fact contained in the contested decision are not attributable to it. Moreover, when the Commission bases a decision on the information available as to certain factual elements without having complied, specifically with respect to those elements, with the procedural requirements established by the case-law and laid down in Regulation No 659/1999, the Court of First Instance may exercise its power of review on the matter of whether taking those facts into account was likely to give rise to an error of assessment vitiating the legality of the contested decision.

90 In the circumstances described in paragraphs 85 to 88 above and having regard in particular to the three injunctions issued by the Commission to the *Land* of Thuringia during the administrative procedure, the latter has not demonstrated that the Commission took account in the contested decision of matters of fact without having complied with the applicable procedural requirements. Consequently, the Commission was entitled to base itself on the information it had in its possession at the time of adopting the contested decision.

91 In the light of the foregoing, this plea must be rejected.

B — *The guarantee provided by the Land of Bavaria (the LfA) to PBK*

1. Arguments of the parties

92 The *Land* of Thuringia submits, first, that the Commission committed an error of fact in respect of this measure. It states that, contrary to what the Commission found in recital 30 of the contested decision, the guarantee provided by the *Land* of Bavaria, which initially covered 80% of the bank loans granted to PBK, was not converted into a guarantee covering 100% of the loans for a total amount of DEM 54.7 million. It states, in particular, that the DEM 54.7 million referred to by the Commission corresponds to the book value of the loans (not including interest) which were 80% guaranteed by the *Land* of Bavaria when the restructuring agreement was concluded in March 1994. In its view, contrary to what the Commission found in the contested decision, the *Land* of Bavaria did not agree to provide a 100% guarantee for that amount. On the contrary, under the restructuring agreement, the total amount of loans guaranteed by the *Land* of Bavaria was reduced, first, following the banks' waiver of repayment of DEM 12 million in loans and, second, following various interventions by the *Land* of Bavaria. It states that it is only the remainder, namely DEM 41.4 million, which the *Land* of Bavaria (the

LfA) agreed to guarantee 100% under the restructuring agreement and that, in 1995, the LfA had to meet its guarantee in total by paying the relevant amount to the banks. It adds that the *Land* of Bavaria's claim on the joint venture for a total amount of DEM 41.4 million resulting from that payment, as well as the *Land* of Bavaria's other claims on the joint venture for DEM 9 million, were ultimately acquired by the TAB on 7 November 1995 for DEM 15 million. It maintains that that claim held by the TAB on the joint venture was repaid in its entirety by CDA after it acquired the assets of LCA.

93 The *Land* of Thuringia states that that information was provided to the Commission by the German authorities during the administrative procedure. It states that it is clear from the letters of 18 January 1996 and 30 March 1999 that the *Land* of Bavaria's guarantee, which initially covered 80% of the bank loans granted to PBK, was not converted into a guarantee covering 100% of the loans for a total amount of DEM 54.7 million. In its view, the granting of that alleged 100% guarantee related, in reality, to the initial guarantee and, moreover, covered only a remaining amount of DEM 41.4 million. In its view, the Commission wrongly failed to make a finding in this respect, whereas this element was decisive because it showed that the provision of the 100% guarantee by the *Land* of Bavaria under the restructuring agreement was not new aid, but rather intervention in relation to existing aid which had been granted under an authorised aid scheme.

94 The *Land* of Thuringia adds that it follows from that information that, contrary to what the Commission found in recital 30 of the contested decision, the LfA did not pay DEM 54.7 million and a further DEM 7 million as part of its intervention in relation to the guarantee. According to the *Land* of Thuringia, the LfA at most paid out DEM 48.4 million since in March 1994 it paid DEM 3 million to the banks and granted PA two loans of DEM 2 million each — one to repay the guaranteed loans and the other to guarantee the payment of future interest on those loans — and in

1995 it paid DEM 41.4 million to the banks. It believes that the difference between that amount of DEM 48.4 million and the DEM 54.7 million referred to in recital 30 of the contested decision can be explained inter alia by the fact that the Commission took some amounts into account twice, that is, once as an amount guaranteed by Bavaria and then as an amount paid out by the LfA under that guarantee.

95 The *Land* of Thuringia submits, second, that the Commission infringed Article 87 (1) EC in finding incorrectly in recitals 89 to 93 of the contested decision that, because of the conversion into a 100% guarantee, the disputed guarantee no longer fulfilled the conditions provided for by the legislation pertaining to provisions of guarantees by the *Land* of Bavaria.

96 Lastly, the *Land* of Thuringia considers that the Commission infringed the obligation to state reasons because it did not provide reasons in support of its finding that the guarantee provided by the *Land* of Bavaria did not comply with the applicable legislation.

97 The Commission, supported by ODS, considers that all of the arguments put forward by the *Land* of Thuringia pertaining to the guarantee provided by the *Land* of Bavaria must be dismissed as unfounded.

98 First, it denies that it committed an error in its findings of fact relating to that guarantee. It states, first, that despite the injunction issued to the German authorities, they failed to clarify the facts surrounding the measure. In the letter of 30 March 1999, the German authorities merely found it 'logical' to increase the guarantee from 80% to 100%, but did not provide any explanation on the point. It considers that, accordingly, it was entitled, in accordance with the judgment in Case C-47/91 *Italy* v *Commission* ('*Italgrani*') [1992] ECR I-4145), to adopt its decision in the light of the information available. The Commission adds that it was evident from

that information that, because of the conversion, the actual provision of the guarantee did not meet the initial conditions provided for by the legislation pertaining to the granting of guarantees by the *Land* of Bavaria. Since that aid scheme, which had received prior approval from the Commission, provided that the guarantee could cover only a maximum of 80% of the loans, the guarantee from the *Land* of Bavaria should have been reduced because of the banks' waiver of repayment of loans totalling DEM 12 million. It adds that neither the German authorities nor the *Land* of Thuringia could explain the increase of the guaranteed amount from DEM 52.72 to 54.72 million. Lastly, the Commission states that, even if the *Land* of Thuringia is right when it states that the guaranteed risk had materialised when the *Land* of Bavaria undertook to provide a 100% guarantee for the remaining amount, the fact remains that the *Land* of Bavaria should have covered only 80% of the new amount due.

99 Second, it considers that the *Land* of Thuringia was wrong in stating that it infringed Article 87(1) EC and the obligation to state reasons as regards the legal assessment of the *Land* of Bavaria's guarantee.

2. Findings of the Court

100 The *Land* of Thuringia contests the legality of Article 1 of the contested decision inasmuch as it classifies as State aid incompatible with the common market a financial measure granted by the LfA in the form of a loan guarantee for DEM 54.7 million, alleging error of fact, infringement of Article 87(1) EC and infringement of the obligation to state reasons.

101 It is appropriate to consider, first, whether the Commission committed an error of fact in finding in recital 30 of the contested decision that 'given the high level of regional aid granted, only DEM 54.7 million of the DEM 65.85 million bank consortium's loan was used' and that 'the LfA granted a deficiency guarantee of 100% instead of the 80% originally envisaged'.

102 As stated in paragraph 88 above, this would be so only if the *Land* of Thuringia can establish that, during the administrative procedure, the Commission obtained the information necessary to enable it to correct any inaccuracies in the facts as summarised in the decision to initiate proceedings.

103 It should be borne in mind that, in the third subparagraph of part 2.2.1 of the decision to initiate the procedure, the Commission stated that 'this loan was secured by an 80% deficiency guarantee (DEM 52.72 million) by the *Land* [of] Bavaria based on an approved aid scheme'. In the fifth subparagraph of the same part, the decision to initiate the procedure states as follows:

'Owing to the fact that investment subsidies and tax refunds awarded to [PBK] were higher than expected, the banks have extended the DEM 65.85 million loan only to an amount of DEM 54.7 million. In return, the *Land* [of] Bavaria has changed its original 80% deficiency guarantee (DEM 52.72 million) to a 100% deficiency guarantee (DEM 54.7 million) in 1994. ...'

104 Lastly, in its preliminary assessment of the aid, the decision to initiate the procedure states that 'the Commission also has serious doubts whether the measures in connection with this guarantee, i.e. changing it into a 100% deficiency guarantee and

increasing the guaranteed amount from DEM 52.72 million to DEM 54.7 million, were covered by the [authorised] aid scheme' (first subparagraph of part 3.1.1 of the decision to initiate the procedure).

105 It is clear from these explanations that, at the time the procedure was initiated, the Commission had inferred from the information in its possession that, first, in 1994, the *Land* of Bavaria's guarantee covering initially 80% of the loans had been converted into a 100% guarantee and, second, that the guaranteed amount had been increased from DEM 52.72 million to DEM 54.7 million.

106 However, in the letter of 30 March 1999 the German authorities gave their view on that presentation of the facts as regards the *Land* of Bavaria's guarantee. They stated that, under the restructuring agreement, the banks agreed to waive claims for DEM 12 million on loans covered by that guarantee and that, because of that waiver, their own risk on those loans was fully covered, so that 'accordingly, the remaining loan amount remains covered 100% by the *Land* of Bavaria's guarantee'. They also outlined the evolution of the loans covered by that guarantee. That description indicates that, before the banks' waiver under the restructuring agreement, the total amount of loans covered by the *Land* of Bavaria's guarantee was DEM 58.4 million. Following the banks' waiver of DEM 12 million, the intervention by the *Land* of Bavaria under its DEM 3 million guarantee and the grant of a DEM 2 million loan by the LfA to PA to repay loans, the amount of the guarantee was reduced to DEM 41.4 million.

107 In the light of that information, which has not been contradicted by the Commission or disproven by any of the evidence in the case-file, the Court finds that the Commission erred in finding in recital 30 of the contested decision essentially that the guaranteed amount had been increased from DEM 52.72 to DEM 54.7 million.

108 As regards the consequences of that error of fact, the Court notes that it is on the basis of the finding contained in recital 30 of the contested decision that the Commission found that the amount of aid to be recovered under the *Land* of Bavaria's guarantee was DEM 54.7 million (recitals 89 to 93 and 123 of the contested decision). It follows that because of the aforementioned error of fact, the Commission fixed an incorrect amount of aid to be recovered.

109 The Court of First Instance also notes that it does not have all the information necessary to enable it to carry out its review on the merits of the contested decision and that it is therefore necessary for it to raise of its own motion the plea alleging failure to state reasons on this point in the contested decision (see, to that effect, Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 24; Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 129; and judgment of 8 July 2004 in Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 210). The reasons given in recitals 30, 32 and 89 of the contested decision do not enable the Court of First Instance to exercise its power of review because they fail to state in a precise and coherent manner how the Commission established the link between, first, the amount of the loans, reduced from DEM 65.58 million to DEM 54.7 million (recital 30 of the contested decision), second, the amount of the guarantee provided by the LfA, increased from 80% of the loans to 100% of the loans (recitals 30 and 32 of the contested decision) and, third, the amount of the guarantee provided, increased from DEM 52.72 million to DEM 54.7 million (recitals 30 and 89 of the contested decision), to justify its calculation of the respective value of the different aid allotments in question and arrive at the incorrect conclusion referred to in paragraph 108 above. Moreover, in the contested decision, the Commission did not answer the Federal Republic of Germany's arguments put forward in the letters from the German authorities of 18 January 1996 and 30 March 1999, according to which the *Land* of Bavaria's claims were ultimately acquired by the TAB for DEM 15 million, or state reasons for its assessment as to possible repercussions of that transaction on the value and repayment of the aid in question. In those circumstances, the Court finds that in those respects the Commission also infringed the obligation to state reasons laid down in Article 253 EC.

110 Next it is appropriate to consider whether the Commission also infringed Article 87 (1) and (2) EC in its legal assessment of that financial measure. The Court notes that the *Land* of Thuringia has submitted that the Commission incorrectly found that the conditions laid down in the legislation pertaining to the provision of guarantees by the *Land* of Bavaria were not complied with because, first, the initial guarantee was converted into a 100% guarantee and, second, the loans covered by that guarantee were diverted to the Pilz Group. The *Land* of Thuringia submits that there was thus no justification for the Commission's inference that the *Land* of Bavaria's guarantee was, from the outset, incompatible with the common market.

111 It is appropriate to bear in mind, first, that in recitals 89 to 93 of the contested decision the Commission explained the reasons which led it to order the recovery of the aid represented by the *Land* of Bavaria's guarantee. Thus, having noted in recital 89 that the incomplete information from the German authorities had not dispelled the doubts surrounding the conversion of the initial guarantee, the Commission found that, contrary to the requirements in the legislation pertaining to the grant of guarantees by the *Land* of Bavaria, 'this measure did not essentially serve to finance the investment which was the subject of the aid application, and the investor did not make an appropriate contribution from its own funds to financing the investment costs' (recitals 90 and 91). It added that the statements by the German authorities to the effect that most of the loans granted benefited solely the companies in the Pilz Group led to the conclusion that the aid had been misused (recital 92). It thus concluded that 'the aid was not used for the investment project involving the setting-up of a CD plant but to keep the entire Pilz Group in business and that it was therefore misused within the meaning of Article 88(2) [EC]' and that 'therefore, the aid does not comply with the Treaty's provisions and should be revoked and recovered by the German authorities' (recital 93).

112 First, it is clear from those reasons that it was because of the misuse of the aid granted under the *Land* of Bavaria's guarantee that the Commission considered that that aid should be recovered. As rightly pointed out by the Commission, the issue of

the conversion of the initial guarantee to a 100% guarantee was referred to only incidentally and is not in any way the basis of the Commission's assessment of this point.

113 Second, the Court notes that the concept of misuse of aid derives directly from the first subparagraph of Article 88(2) EC, which provides that 'if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is ... being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission'. In addition, Article 1(g) of Regulation No 659/1999 defines 'misuse of aid' as 'aid used by the beneficiary in contravention of a decision taken pursuant to Article 4(3) or Article 7(3) or (4) of this Regulation'.

114 It follows from those provisions that, in order to demonstrate that aid granted under an authorised aid scheme has been misused, the Commission must establish that that aid was used in a manner contrary to that scheme as approved by the Commission, that is, in breach of the national rules governing that scheme or supplementary conditions which have been accepted by the Member State as part of approval of the scheme by the Commission.

115 It is, moreover, clear in the present case that the Commission has established with certainty that the *Land* of Bavaria's guarantee was used in breach of the legislation pertaining to the provision of guarantees by the *Land* of Bavaria. First, it stated in recital 90 of the contested decision that, under that scheme, the *Land* of Bavaria provides guarantees to cover loans intended to finance investment (establishment, expansion, etc.) and that, in order to avail itself of that guarantee, the undertaking entitled to submit an application must put up an appropriate proportion of its own funds to finance the project in question, and in order to make it probable that

interest will be paid and loans repaid within a reasonable time the overall financing of the project should be secured. Next, it found that, first, 'this measure did not essentially serve to finance the investment which was the subject of the aid application, and the investor did not make an appropriate contribution from its own funds to financing the investment cost' (recital 91) and, second, 'these publicly secured loans ... were essentially of economic benefit solely to the companies in the Pilz Group' (recital 92).

116 In the light of the foregoing, the fact that the guarantee was provided initially in accordance with the aid scheme is irrelevant. As rightly pointed out by the Commission, it is not the initial grant of the aid, but rather its subsequent use in breach of the terms of an authorised aid scheme which constitutes misuse of the aid. It is also clear from the first subparagraph of Article 88(2) EC that a finding of misuse is a criterion distinct from, and independent of, the criterion of compatibility with the common market and can therefore by itself serve as a basis for a decision by the Commission to order the cancellation or amendment of aid. Accordingly, and contrary to the line of argument put forward by the *Land* of Thuringia, the Commission was right not to include in the contested decision reasons establishing the incompatibility of the *Land* of Bavaria's guarantee with the common market. It also follows that the Commission fulfilled its obligation to state reasons on this point under Article 253 EC.

117 Accordingly, the *Land* of Thuringia's arguments alleging infringement of Article 87 EC must be dismissed as unfounded.

118 In the light of all of the foregoing, Article 1 of the contested decision must be annulled in so far as the Commission found therein that the State aid granted in respect of the establishment of the Albrechts CD plant includes an amount of DEM 54.7 million under the *Land* of Bavaria's guarantee.

C — *The waiver of the DEM 3 million claim granted by the Land of Bavaria (the LfA) to PBK*

1. Arguments of the parties

119 The *Land* of Thuringia submits that the Commission found incorrectly in recital 96 of the contested decision that PBK received aid due to the waiver by the LfA of its DEM 3 million claim against that undertaking. In so finding, the Commission disregarded the fact that it had already counted that amount as aid in the assessment of the guarantee provided by the *Land* of Bavaria — namely the amount of DEM 54.72 million. As the German authorities stated to the Commission during the procedure by letters of 3 March 1995 and 30 March 1999, that claim against PBK arose precisely because of the payment of the same amount to the banks in order to reduce the amount of loans covered by the initial guarantee.

120 Next, it states that the Commission committed an error of assessment in finding in the contested decision that the waiver of the DEM 3 million claim by the LfA constitutes new aid. It states, as noted in the previous paragraph, that that measure was used to repay loans which had been granted for the purpose of building the Albrechts CD plant and which were covered by the *Land* of Bavaria's guarantee. It takes the view that, in any event, the Commission infringed the obligation to state reasons because it did not state the reasons for which it considered that the LfA's waiver of the DEM 3 million claim in favour of PBK constituted aid incompatible with the common market.

121 The Commission, supported by ODS, contests the *Land* of Thuringia's entire line of argument concerning the waiver of the DEM 3 million claim. It states, first, that it did not commit an error of fact or of law in respect of that measure because it was not the intervention under the guarantee which was found to be supplementary aid,

but rather the subsequent waiver of the claim which arose from that intervention. It adds that, although that waiver had already been found to be aid when the formal investigation procedure was opened, in particular in the table on page 9 of the decision to initiate the procedure, the German authorities did not subsequently raise any objections. The Commission further states that it complied with its obligation to state reasons in respect of that aid. In recital 96 of the contested decision it found, on the basis of the incomplete information provided by the German authorities, that the aid had been granted without any legal basis and was therefore incompatible with the common market.

2. Findings of the Court

122 The *Land* of Thuringia alleges, in respect of the LfA's waiver of its DEM 3 million claim against PBK, error as to the facts, manifest error of assessment and infringement of the obligation to state reasons.

123 The Court notes, as a preliminary point, that in recital 96 of the contested decision the Commission found that 'the waiver of the repayment of a DEM 3 million loan should also be deemed incompatible and the relevant funds recovered as they were granted without any legal basis'.

124 According to the *Land* of Thuringia, that finding is based on an error of fact and on an incorrect legal assessment in that, by counting both the total amount of the *Land* of Bavaria's guarantee (DEM 54.7 million) and the amount of the claim that it decided not to recover from PBK (DEM 3 million), the Commission counted the same aid twice. The Commission in any event infringed the obligation to state reasons by failing to state why it considered the waiver of the claim to be aid incompatible with the common market.

125 The Court notes that both the existence and the amount of aid fall to be assessed in the light of the situation prevailing at the time it was granted. Accordingly, the fact that a public guarantee is at stake in the event of a recipient undertaking becoming insolvent in no way changes the nature of that guarantee for the purposes of Article 87 EC and does not give rise to new aid.

126 It is true that, in some cases, the unilateral waiver by a public guarantor of rights it holds against the recipient when the guarantee is called in may constitute aid. This is particularly the case where the public guarantor does not conduct itself like a rational economic operator by taking all possible steps to obtain repayment of the amount it had to settle under the guarantee. Moreover, if it emerges that the waiver of a claim initially covered by a loan guarantee, once the guarantee is enforced, is definitive, thus resulting directly in the recipient's debt load being reduced, that waiver is, in principle, liable to constitute separate aid because it confers an economic advantage in addition to the loan guarantee and its enforcement.

127 Only in these proceedings did the Commission state that it is not the intervention under the guarantee that it found to be supplementary aid, but rather the subsequent waiver of the claim which arose from that intervention. It is clear, however, that in law recitals 31 and 96 of the contested decision do not enable either individuals or the Court of First Instance to understand sufficiently the reasoning put forward on this point and, therefore, the Court of First Instance to exercise its power of review of the reasons for which the Commission found, when it adopted that decision, that the waiver of the claim constituted new aid, different from that counted under the *Land* of Bavaria's guarantee or its enforcement. It is, moreover, settled case-law that, in principle, explanations given by the Commission during the litigation procedure before the Court of First Instance may not remedy insufficiencies in the statement of reasons in the contested decision (see, to that effect, Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraphs 47 and 48; Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraphs 116 to 119; and judgment of 18 January 2005 in Case T-93/02 *Confédération nationale du Crédit mutuel* v *Commission* [2005] ECR II-143, paragraphs 123 to 126).

128 Accordingly, without its being necessary to consider whether the Commission actually counted the same aid twice, the Court finds that, in any event, the Commission could not merely state, in recital 96 of the contested decision, that the waiver of the repayment of the loan constituted aid incompatible with the common market because it was 'granted without any legal basis'.

129 Therefore, without its being necessary to consider the other pleas put forward by the *Land* of Thuringia on this point, it was right in submitting that the Commission infringed its obligation to state reasons under Article 253 EC as regards the finding that the waiver of the DEM 3 million claim granted by the LfA to PBK constituted aid.

130 In the light of the foregoing, Article 1(1) of the contested decision must be annulled in so far as the Commission found that the State aid granted for the establishment, operation and consolidation of the Albrechts CD plant includes an amount of DEM 3 million by virtue of the debt waiver granted to PBK.

D — *Investment subsidies and allowances of DEM 63.45 million and DEM 19.42 million granted by the Land of Thuringia and the Land of Bavaria (the LfA) to the joint venture and to PA*

1. Arguments of the parties

131 The *Land* of Thuringia submits that the Commission made various errors of fact and errors of assessment and infringed the obligation to state reasons in respect of the investment subsidies and allowances granted by the *Land* of Thuringia and the *Land* of Bavaria (the LfA).

132 It states, first, that because the Commission found in recital 88 of the contested decision that a decision was taken to issue a repayment notice to CD Albrechts in respect of DEM 32.45 million which the *Land* of Thuringia had granted in the form of investment subsidies, the Commission was wrong to order recovery of all of the aid, that is, DEM 63.45 million, in Article 2 of the contested decision.

133 Next, it states that, contrary to what the Commission found in recitals 87 and 88 of the contested decision, the investment subsidies and allowances granted in respect of the establishment of the Albrechts CD plant constitute existing aid, which complies with aid schemes previously approved by the Commission, and not new aid which is incompatible with the common market because it was granted in breach of an alleged prohibition on assistance for capital assets in associated undertakings. It states that, generally, neither the Investment Allowance Law nor the GA scheme nor Community law imposes any prohibition to that effect. Next it observes that, even if the GA scheme did provide for a prohibition on assistance for capital assets in associated undertakings, that prohibition was complied with in this case because, before disbursing the grants, each time it required confirmation from the joint venture that the grants would not be used to maintain capital assets in associated undertakings. In its view, this is clear from the indictment lodged by the Public Prosecutor's Office with the Landgericht (Regional Court) Mühlhausen on 9 April 1998, which was notified to the Commission in the annex to the letter of 28 September 1999. It adds that it cannot be maintained that, at the time the contract for the establishment of the Albrechts CD plant was concluded, the relationship between the joint venture and Pilz Construction was a relationship between 'associated undertakings' because, at that time, the Pilz Group was only a minority shareholder in the joint venture. It submits that, accordingly, the grants complied with the conditions laid down by the GA scheme, thus came within an authorised aid scheme and, therefore, were compatible with the common market. In its view, it was only the diversion of part of the grants to the Pilz Group which made that part of the investment subsidies non-compliant with the conditions laid down by the GA scheme and therefore incompatible with the common market. It also contests the Commission's assertion that, during the formal investigation procedure, the German

authorities did not provide proof that part of the grants had indeed been misused. It states that that information could be found in the indictment lodged by the Public Prosecutor's Office with the Landgericht Mühlhausen on 9 April 1998 (pp. 10 to 12).

134 Moreover, as regards the grant of investment allowances, the *Land* of Thuringia states that the Commission failed to determine the conditions under which they were granted and, therefore, concluded incorrectly that the alleged prohibition on assistance in associated undertakings should have precluded the grant of such allowances. It states that the Investment Allowance Law does not contain any such prohibition and that, on the contrary, it enshrines the entitlement of an investor to those allowances, regardless of who the supplier of the capital assets is. It adds that the Commission failed to take account of the fact that part of the investment allowances, namely DEM 6.137 million, was ordered to be recovered and that, for the remainder, the conditions laid down by the Law were indisputably met.

135 Lastly, the *Land* of Thuringia contests ODS's assertion that the investment subsidies and allowances should not have been allowed because the investment project commenced on 29 August 1989, that is, before the reunification of Germany. In its view, not only is this statement inaccurate, but also the planning order of 25 January 1991 fixing the particulars for the granting of aid under the GA scheme also allowed for the promotion of projects which commenced after 1 July 1990 and thus before 3 October 1990 (Bundestag, publication 12/895, annex 4). It adds in respect of investment allowances that the applicable legislation was already in force in the Federal Republic of Germany before reunification and was initially maintained after reunification under the Treaty signed on 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic relating to the establishment of German unity (BGBl. 1990 II, p. 889).

136 The Commission denies that it made any error in the assessment of the facts or in its assessment concerning the investment subsidies and allowances.

137 It states, first, that the *Land* of Thuringia's assertion that the Commission did not take account of the condition explicitly laid down by the *Land* for allowing investment subsidies under the GA scheme is incomprehensible because that condition was precisely one of the elements taken into account in the legal assessment of that aid (recitals 87 and 88 of the contested decision). It states that the addition of such a condition was logical because, even if there is no general prohibition regarding grants to associated undertakings, the grant of public funds should be prohibited when, in the context of a central cash-management system, those funds are automatically diverted from their purpose and wind up in other undertakings in the group which do not fulfil the conditions for obtaining those grants (in this case companies in the Pilz Group). It observes that, if grants authorised under Article 87(3) EC are paid to an undertaking which participates in a central cash-management system, those grants must, exceptionally, be considered to be illegal ab initio and therefore be recovered. In the Commission's view, such a system, from the outset, prevents grants from being used in accordance with their objective. Moreover, the *Land* of Thuringia's demand for repayment of the investment subsidies is recognition of the misuse of that aid by the joint venture. It adds that if the *Land* of Thuringia wishes to maintain that the other grants were used correctly, it must furnish proof to that effect. It observes, however, that during the administrative procedure no one, including the German federal authorities, the *Land* of Thuringia or any other party, was able to prove that at least part of the grants were used for the establishment, expansion, conversion or rationalisation of the undertaking.

138 Next, it states that, because the German authorities did not provide it with the *Land* of Thuringia's decision demanding repayment of the aid, it had no choice but to base its decision on the only information it had at that time it adopted the contested decision, namely the indictment laid before the Landgericht Mühlhausen on 9 April 1998. In its view, that document shows that, in calculating the amount of the aid which they had to order to be repaid, the Thuringia authorities incorrectly assumed that the misused amount was lower, because they did not yet know, at the time of determining the amount to be repaid, that the project as a whole violated the prohibition on grants to associated undertakings and that therefore no grant should have been allowed. Accordingly, it maintains that it was right to find, in the

contested decision, that all of the grants allowed should be considered to be illegal and therefore should be repaid, especially when one considers that, at the time of adopting the contested decision, it did not have the information which showed that the DEM 32.45 million demanded by the *Land* of Thuringia had actually been repaid.

139 Moreover, in response to the *Land* of Thuringia's line of argument that it did not consider the possibility that the Albrechts CD plant might be subsidised under the regional aid scheme, it states that in assessing the investment subsidies and allowances it relied on its Guidelines on national regional aid (Information from the Commission – Guidelines on national regional aid, OJ 1998 C 74, p. 9), amended most recently by the Amendments to the Guidelines on national regional aid (OJ 2000 C 258, p. 5) ('Guidelines on national regional aid'), so that it is not necessary to discuss this issue.

140 Lastly, it submits that, since, first, it is common ground that the investment allowances were misused through the central cash-management system and, second, the proof that part of the allowances was used correctly has not been made out, it is appropriate to order repayment of all of those allowances, since they must be considered to have been incompatible from the moment they were granted. Although repayment of DEM 6.4 million, plus DEM 2.2 million, has already been ordered (recital 79 of the contested decision), it does not have information that that amount has actually been repaid, and so it ordered repayment of the entire amount, DEM 19.42 million. It further submits that the *Land* of Thuringia's argument that it did not rule on the investment allowances is inaccurate. It states that it did rule on that issue because, by referring to the preceding recitals in recital 94 of the contested decision, it established the incompatibility of those allowances on the basis of the statements of the German authorities, which tended to indicate that those funds did not benefit the investment project, but rather served to maintain the entire Pilz Group in activity and were therefore misused.

141 ODS concurs with the Commission's submissions concerning the investment subsidies and allowances. It adds that there is still another reason in support of the Commission's view that the investment subsidies and allowances granted to the joint venture and then to PA did not comply with the aid scheme provided for by the Investment Allowance Law and the GA scheme, which were approved by the Commission. It states that, according to the statements made by the *Land* of Thuringia itself, aid was granted before reunification, that is, at a time when those aid schemes had not yet come into effect for the *Land* of Thuringia (paragraphs 1.2, 3.2 and 2.9.2 of the GA scheme and Guidelines on national regional aid, paragraph 4.2).

2. Findings of the Court

142 For the purposes of the present plea, it is appropriate to consider separately the *Land* of Thuringia's arguments relating to the investment subsidies and allowances which were granted by it and those relating to the investment subsidies and allowances granted by the *Land* of Bavaria (the LfA). In the contested decision, the Commission gave different reasons for those two measures.

(a) The investment subsidies and allowances granted by the *Land* of Thuringia

143 According to Article 1(1) of the contested decision, the investment subsidies and allowances granted by the *Land* of Thuringia are incompatible with the EC Treaty because they were misused within the meaning of Article 88(2) EC.

144 The concept of misuse derives directly from Article 88(2) EC, which states that '[i]f, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources ... is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.' According to Article 1(g) of Regulation No 659/1999, aid is misused when it is 'used by the beneficiary in contravention of a decision taken pursuant to Article 4(3) or Article 7(3) or (4) of this Regulation'.

145 It follows from those provisions that, in order to demonstrate that aid granted under an authorised aid scheme has been misused, the Commission must establish that that aid was used in contravention of the national rules governing that scheme or supplementary conditions which were accepted by the Member State at the time the scheme was approved by the Commission.

146 In the present case, the Commission stated the reasons for its assessment of the misuse of the grants and allowances granted by the *Land* of Thuringia in recital 87 of the contested decision as follows: 'According to the investigations of the German criminal prosecution authorities, there was an exchange of goods/services with a total value of DEM 109 million between the companies within the Pilz Group. Consequently, the entire investment plan should not have received assistance since there was an infringement of the prohibition of aid being used to finance capital assets from associated companies. Consequently, the investment grant of DEM 63.45 million made on the basis of [the GA scheme and] the Investment Allowance Law for 1991 and 1992 was incompatible with the programme and thus must be deemed not to be covered [by the authorised schemes].' Accordingly, the Commission concluded that that aid, which was channelled through the Pilz Group's central cash-management system, had to be regarded as incompatible with

the common market and be recovered. It also noted that, by decision of 27 July 1995, the *Land* of Thuringia ordered repayment of only DEM 32.5 million, so that a further DEM 30.95 million remained to be recovered (recital 88 of the contested decision).

147 It follows from those reasons that it is because there was an exchange of goods and services within the Pilz Group and the diversion of funds through the centralised cash-management system that the Commission found, in the contested decision, that the prohibition on assistance for capital assets in associated undertakings had been breached and that therefore there had been misuse within the meaning of Article 88(2) EC.

148 The Court notes that, in its written pleadings, the *Land* of Thuringia maintained, and was not contradicted on this point by the Commission, that that prohibition was not in the GA scheme or the Investment Allowance Law which were approved as aid schemes by the Commission, but was a supplementary condition imposed by the *Land* of Thuringia on the payment of each instalment of the grants and allowances in this case, in order to prevent their being used to benefit other undertakings in the Pilz Group. The indictment lodged by the Public Prosecutor's Office with the Landgericht Mühlhausen, which was notified to the Commission during the administrative procedure, appears to support this interpretation.

149 Since the prohibition on support was not part of the aid schemes or the approval decisions for those schemes, the Commission could not, in this case, base its finding that aid has been misused solely on a breach of that prohibition. As stated in paragraph 145 above, in order to show that aid granted pursuant to an authorised aid scheme has been misused, the Commission must show that that aid was used in a manner contrary to the national rules governing that scheme or supplementary conditions which were accepted by the Member State at the time the scheme was approved. However, breach of a mere supplementary condition imposed unilaterally

by the party granting the aid, without that condition having been explicitly provided for by such national rules, as approved by the Commission, cannot be considered sufficient evidence to show that the aid has been misused within the meaning of the first subparagraph of Article 88(2) EC.

150 It is true that, generally, it may be useful in a case such as this one, where the aid recipient is part of a group of companies within which a central cash-management system is used, for the disbursement of grants and other forms of aid to be subject to a strict prohibition on using that aid for other undertakings in the group to which the recipient belongs. The indictment lodged by the Public Prosecutor's Office with the Landgericht Mühlhausen in fact indicates that it is precisely for that reason that, in the present case, the *Land* of Thuringia made the disbursement of the grants subject to just such a prohibition. The mere fact, however, that it might have been desirable to include a certain clause in an aid scheme does not obscure the fact that, in the present case, such a provision was not included either in the schemes in question or in the Commission's decision, so that non-compliance with that clause cannot constitute misuse of aid within the meaning of the first subparagraph of Article 88(2) EC; otherwise, the foreseeability of control carried out by the Commission on the basis of that provision would be undermined.

151 Accordingly, the *Land* of Thuringia rightly claimed that the Commission made a manifest error of assessment in finding that the investment subsidies and allowances granted by the *Land* of Thuringia were misused within the meaning of the first subparagraph of Article 88(2) EC, on the sole ground that there had been a breach of the prohibition in force when they were granted.

152 In the light of the foregoing, without its being necessary to consider the other pleas put forward by the *Land* of Thuringia in this regard, Article 1 of the contested decision must be annulled in so far as the Commission found that the State aid declared to be incompatible with the common market includes an amount of DEM 63.45 million in investment subsidies and allowances granted by the *Land* of Thuringia.

(b) The investment subsidies and allowances granted by the *Land* of Bavaria (the LfA)

153 Recitals 93 to 95 of the contested decision indicate that, in respect of the investment subsidies and allowances granted by the *Land* of Bavaria (the LfA), the Commission made the following findings:

'... the aid was not used for the investment project involving the setting up of a CD plant but to keep the entire Pilz Group in business and ... was therefore misused within the meaning of Article 88(2) of the EC Treaty. ...

This goes also for the investment subsidies on the basis of the [GA scheme or the Investment Allowance Act] totalling DEM 19.42 million.

The German authorities have informed the Commission that they have taken the steps required under German law to recover the aid in the bankruptcy proceedings concerning the Pilz Group.'

154 The Court notes that the *Land* of Thuringia rightly states that those grounds, which are vague and not very detailed, infringe Article 253 EC because they do not provide any indication as to why the Commission found that the investment subsidies and allowances granted by the *Land* of Bavaria were used in breach of the GA scheme and the Investment Allowance Act.

155 It is not sufficient to find, as indicated in recital 95 of the contested decision, that the German authorities informed the Commission that they had taken the steps provided for under German law to recover the aid in question. Regardless of whether those steps could legitimately be construed by the Commission as recognition by the German authorities that the aid had been misused, that would not dispense the Commission from its obligation to state reasons under Article 253 EC as to the incompatibility of the aid in question with the common market.

156 It is settled case-law that the statement of grounds required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Court to exercise its power of review (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15, and the case-law cited therein). Moreover, as regards the scope of the persons concerned for the purposes of the case-law cited, the Court of Justice has held that the requirements to be satisfied by the statement of reasons depend inter alia on the need for information of those to whom the measure is addressed or of other parties to whom it is of direct and individual concern within the meaning of Article 230 EC (Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19; *Confédération nationale du Crédit mutuel* v *Commission*, paragraph 127 above, paragraph 68). Accordingly, the requirement to state reasons in a decision taken in a matter involving State aid cannot be determined solely according to the interest of the Member State to which the decision is addressed, since that interest may be lesser for specific reasons relating to certain elements of law or of fact which might be challenged during the administrative procedure (see, to that effect, *British Airways and Others and British Midland Airways* v *Commission*, paragraph 127 above, paragraph 92). Therefore, so long as the contested decision concerns the applicant directly and individually within the meaning of the fourth paragraph of Article 230 EC, as is the case here for the *Land* of Thuringia, it is entitled to demand that the reasons for the decision make clear all of the considerations of fact and of law which make up the basis of the decision, in order to satisfy the requirements of Article 253 EC.

157 It follows that the Commission has infringed its obligation under Article 253 EC by failing to state the reasons for which it found that the investment subsidies and allowances granted by the *Land* of Bavaria were used in breach of the GA scheme and the Investment Allowance Act.

158 In the light of the foregoing, without its being necessary to consider the other pleas put forward by the *Land* of Thuringia in this context, Article 1(1) of the contested decision must be annulled in respect of the investment subsidies and allowances granted by the *Land* of Bavaria.

E — *The THA guarantee in favour of Robotron and the joint venture*

1. Arguments of the parties

159 The *Land* of Thuringia states that the Commission incorrectly found in recitals 97 to 99 of the contested decision that the guarantee provided by the THA and the subsequent intervention under that guarantee are not existing aid under an aid scheme previously approved by the Commission, but rather new aid which is incompatible with the common market. It states, first, that since the THA provided the guarantee for the joint venture in order to facilitate the privatisation of that undertaking, that guarantee was indeed provided under the first and second THA schemes (approved by letters of 26 September 1991 and 8 December 1992 from the Commission) and, accordingly, is existing aid and not new aid. It observes that the THA's first scheme clearly provided that the THA was entitled to provide guarantees covering obligations of the undertakings in which it held shares, it being understood that the term 'undertakings' also covers shareholdings in associated companies or in joint ventures. It adds that this was precisely the case here, since the provision of the guarantee for Robotron and the joint venture allowed for transfers of shares held mostly by Robotron — a State company — to PBK — a private company — whilst

eliminating possible claims for compensation against the former. It adds that the statements by the managing director of Robotron, referred to by the Commission in recital 98 of the contested decision in order to establish that the THA's objective from the beginning was to wind up and not to privatise Robotron, are not relevant because they were not made at the time the guarantee was provided, but rather later, at the time when the winding-up of Robotron was envisaged. The *Land* of Thuringia states that the contracts setting up the joint venture were all concluded and the guarantee was provided well before the reunification of Germany, that is, at a time when, first, Robotron still genuinely hoped to take part in a market economy — through the joint venture — and become a leader in CD production in the former German Democratic Republic and, second, bankruptcy was not envisaged.

160 Second, the *Land* of Thuringia disagrees with the Commission's assertion that the THA schemes, including the conditions for granting the various aid measures under those schemes, must be interpreted narrowly. It submits that, in addition to the fact established by it that the provision of the guarantees to Robotron and the joint venture certainly met the grant conditions under the THA's schemes, even on a very restrictive reading of those conditions, the Commission's view disregards the fact that, at the time the schemes were approved by the Commission, all parties — including the Commission — agreed that the THA's unprecedented task called for a generous application of the Community aid monitoring scheme (see Van Miert, K., *Markt, Macht, Wettbewerb. Meine Erfahrungen als Kommissar in Brüssel*, Deutsche Verlaganstalt Stuttgart/München, 2000, p. 243 et seq.). In its view, the Commission cannot unilaterally cancel that agreement.

161 Third, the *Land* of Thuringia states that the guarantee was provided before the reunification of Germany, so that it must be viewed as not constituting State aid, or as constituting State aid which already existed prior to reunification, which expanded the application of the Treaty provisions to the territory of the former German Democratic Republic.

162 Fourth, regarding the intervention under the guarantee, the *Land* of Thuringia considers that the payment by the THA of DEM 120 million under the restructuring agreement is not State aid because, in so acting, the THA acted as a private investor in a market economy would have done in a similar situation. The *Land* of Thuringia observes that that payment enabled it definitively to release itself from its guarantee obligation for over DEM 160 million and, therefore, to save DEM 40 million.

163 Fifth, the *Land* of Thuringia considers that the diversion to the Pilz Group of the loans which were covered by the THA guarantee did not alter the initial compatibility of that guarantee with the common market. In the *Land* of Thuringia's view, it is only in so far as those funds were not used by the Pilz Group for the purpose of setting up the Albrechts CD plant that they were misused and thereby became incompatible with the common market. It adds that that part of the funds did not benefit the joint venture but rather the Pilz Group and must therefore be recovered only from the latter.

164 Sixth, the *Land* of Thuringia observes that, contrary to ODS's assertions, the Commission did not state in its press release of 18 September 1991 that joint ventures are excluded from the scope of application of the THA scheme and that it intended to interpret the rules applicable to the THA scheme restrictively. Likewise, the *Land* of Thuringia submits that Mr Schütte's article, referred to by ODS, does not prove that it is appropriate to apply a restrictive interpretation to the scheme: Mr Schütte merely stated that the THA could act as a guarantor for the undertakings it owns, which was the case for the joint venture. According to the *Land* of Thuringia, that means that the THA could also act as guarantor for activities relating to its shareholdings.

165 Lastly, the *Land* of Thuringia submits that the Commission infringed the obligation to state reasons because it did not give the reasons why the THA's intervention under the guarantee was State aid. In its view, a statement of reasons in that respect was all the more necessary because the THA was then acting subject to market conditions. Likewise, it submits that the decision infringes the obligation to state reasons because it does not indicate why the Commission takes the view that the guarantee did not comply with the THA scheme and why the Community State aid monitoring scheme is applicable to it, when that commitment was undertaken before the application of that scheme in the territory of the former German Democratic Republic.

166 The Commission, supported by ODS, denies having made an error of assessment and having infringed the obligation to state reasons, in finding, in recitals 97 to 99 of the contested decision, that the THA's guarantee is incompatible with the common market.

167 It states, first, that the *Land* of Thuringia wrongly asserts that the guarantee for the joint venture complied with the THA's schemes. The THA's schemes are exceptions to the general rule that State grants for the privatisation of an undertaking constitute State aid which is, in principle, incompatible with the common market.

168 The Commission adds that the *Land* of Thuringia does not follow this restrictive interpretation of the concept of 'privatisation' when it states that even measures in favour of the joint venture aimed at privatising a shareholding State undertaking are covered by the THA's scheme. The THA's schemes do not provide for any derogation for the privatisation of a joint venture (paragraph 3.1.1 of the decision to initiate the procedure). According to the Commission, this can be explained by the fact that the situation of a joint venture is markedly different from that of a State undertaking, which cannot access private capital markets without State guarantees, because the solvency of the joint venture does not depend only the State undertaking which holds shares in it, but also on its private shareholders. Accordingly, the Commission

considers that the decisive condition for the application of the THA's aid schemes is not met in the case of a privatisation through a joint venture, since the provision of a grant to such an undertaking also benefits the private shareholders in that company, even though they are not in the specific situation of the undertakings belonging to the THA. According to the Commission, this is all the more so in cases where, such as the present case, the existence of a central cash-management system within the joint venture increases the risk that the State grants will be diverted to the private shareholders.

169 Second, the Commission submits that considerations cited by the *Land* of Thuringia pertaining to the economic necessity of setting up the joint venture are not relevant. Even if the merger of the two undertakings could be considered to be based on financial reasons, that finding is totally irrelevant to the issue of whether the measures in favour of the joint venture were covered by the THA's scheme. In its view, the same is true of the *Land* of Thuringia's statement that Robotron had already undertaken to set up the joint venture before reunification. It considers that the only decisive factor is the assisted undertaking's situation at the time of the grant of the aid in question.

170 Third, the Commission disagrees with the *Land* of Thuringia's assertion that the THA's guarantee was provided before the reunification of Germany, so that it either cannot be characterised as aid or must be classified as existing aid. It states that that guarantee was provided in 1992, that is, after reunification.

171 Fourth, the Commission submits that the *Land* of Thuringia is incorrect in stating that the payment of DEM 120 million to the banks is not aid because it allegedly satisfies the test of reflecting the behaviour of a private investor acting in a market economy. It states that, as long as the provision of the guarantee constitutes State

aid, it does not matter that the provider of the aid subsequently conducts itself like a private investor (Case T-234/95 *DSG* v *Commission* [2000] ECR II-2603, paragraph 162). It also observes that, in recital 99 of the contested decision, it explicitly took account of the fact that the THA paid only DEM 120 million, because it ordered recovery of that amount only.

2. Findings of the Court

172 The *Land* of Thuringia claims, in respect of the THA's guarantee, that there has been a manifest error of assessment and infringement of the obligation to state reasons.

173 The Court notes that, in recitals 97 to 99 of the contested decision, the Commission stated its reasons for concluding that the THA's DEM 190 million guarantee must be held to be aid incompatible with the EC Treaty.

174 It stated, first, that in the decision to initiate the procedure, it expressed misgivings as to whether the THA guarantee of DEM 190 million, of which DEM 120 million was called in, could be covered by the first and second THA schemes (recital 97 of the contested decision). It stated in recital 98 of the contested decision:

'These doubts increased in the course of the proceedings, particularly as a result of the statement made by Mr Henzler, the then managing director of Robotron ... appointed by the THA, to the German judicial authorities according to which it was

his objective from the beginning to wind Robotron up, by splitting it into small firms and privatising them, and an investment of this magnitude did not fit into this plan. Robotron ... had been forced to take out loans of DEM 20 million in order to pay its contribution, and this ran counter to commercial principles. As main partner, he did not consider Robotron to have competence in the area of CDs. He stated that Robotron therefore signed the contracts only on condition that Pilz would buy back the shares in Robotron when the plant was completed at the nominal price including bank interest.'

175 First of all, the *Land* of Thuringia's argument that the Commission made a manifest error of assessment in finding that the disputed guarantee was not provided in accordance with the first and second THA schemes must be rejected.

176 It follows from Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraphs 22 to 24, that the regulatory framework for the THA's activities, as adopted by the Commission, constitutes a series of derogations from the general principle laid down in Article 87(1) EC that State aid is incompatible with the common market. By adopting those derogations, the Commission intended to simplify the task of the THA, a unique body in its field, which was to restructure the undertakings of the former German Democratic Republic and to ensure their transition from a planned economy to a market economy. It follows that, as a condition for the application of a scheme derogating from the general principle laid down in Article 87(1) EC that State aid is incompatible with the common market, the term 'privatisation' must be construed narrowly in the context of the THA aid schemes. On such an interpretation, a privatisation can be taken to exist, for the purpose of these schemes, in principle only where a private investor acquires a proportion of the shares of a public undertaking capable of affording him control of the undertaking in question. It should also be borne in mind that the letter of 26 September 1991 from the Commission approving the first THA scheme states clearly as a precondition for approval of the aid granted in the context of a privatisation that that aid must be intended to enable the undertaking in question to continue its existing activities.

177 In the present case, however, the THA guarantee was provided for the purpose of setting up a new undertaking in the *Land* of Thuringia to pursue a new commercial activity, namely CD production in the form of a joint venture between an undertaking from the former German Democratic Republic and an undertaking from the Federal Republic of Germany. It is obvious that such an operation cannot be viewed as privatisation for the purposes of the abovementioned THA schemes. Unlike the privatisation envisaged by those schemes, which is intended to bring an undertaking from a planned economy into a market economy, creating a new undertaking enabled a completely new business plan with new resources and a new commercial activity to be set up.

178 Next, the Court does not accept the *Land* of Thuringia's assertion that the guarantee was provided before the entry into force of the provisions of the Treaty in the new *Länder*, that is, before 3 October 1990. Not only is that assertion not supported by documentation, but it is clear from the letter of 3 March 1995 from the German authorities that that guarantee was provided in 1992.

179 It follows from the foregoing that the Commission was correct in finding that the THA guarantee was not provided in accordance with the first and second THA schemes and, therefore, could not be viewed as existing aid. Accordingly, the plea alleging manifest error of assessment must be dismissed as unfounded.

180 It also follows from the foregoing that, contrary to the *Land* of Thuringia's argument, the Commission did provide sufficient reasons on this point in the contested decision. It is clear from the evidence in the case-file that, during the administrative procedure and particularly following the Commission's preliminary assessment in paragraph 3.1.1 of the decision to initiate the procedure, neither the Federal Republic of Germany nor the *Land* of Thuringia provided evidence, other than the argument that the guarantee provided was covered by the first and second THA schemes as approved by the Commission, establishing, first, that it was not aid and, second, that in any event that aid was compatible with the common market and had not been misused. It was, moreover, only during the present proceedings that

the *Land* of Thuringia put forward other evidence to show that the measure in question had been in keeping with the conduct of a private investor in a market economy. Since the Commission did not have these explanations — the burden of proof of which lies with the Federal Republic of Germany — during the administrative procedure, the Court of First Instance finds that the Commission was entitled to restrict its reasons in the contested decision to the fact that the aid did not comply with the conditions laid down in its letters approving the THA's schemes (see, to that effect, Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 20 et seq.).

181 Accordingly, the plea alleging infringement of the obligation to state reasons cannot be accepted, either.

182 In the light of the foregoing, the pleas put forward by the *Land* of Thuringia relating to this measure must be dismissed as unfounded.

F — *The DEM 25 million loan granted by the TAB to PA*

1. Arguments of the parties

183 The *Land* of Thuringia submits that the Commission found incorrectly in recital 33 of the contested decision that the TAB granted PA a DEM 25 million loan in order to cover liquidity shortfalls. It states that, as evidenced by the letters of 3 March 1995 and 18 January 1996 from the German authorities, that loan was used only to reimburse, under the restructuring agreement, part of the bank loans covered by the THA guarantee. Next, it states that that loan is not State aid and a fortiori not new aid which is incompatible with the common market. It submits that, since the loan

was paid out to repay part of the loans which were covered by the THA guarantee and, in the Commission's view, the provision of that guarantee constitutes State aid, the Commission erred in finding that the amounts paid under that guarantee are also State aid, because that is tantamount to finding twice that the same amounts are State aid. It further submits that, as it has demonstrated, in so far as the provision of the guarantee must be viewed as existing aid compatible with the Treaty, the same must be true for this financial measure, which was paid out pursuant to obligations resulting from the guarantee. It recognises, however, that this reasoning applies only in so far as the loans covered by the THA guarantee were actually used for the start-up of the Albrechts CD plant. The *Land* of Thuringia also observes that the DEM 25 million loan cannot be viewed as restructuring aid because when the aid in question was granted, PA was not in difficulty. Lastly, it states that the Commission infringed the obligation to state reasons in failing to give the reasons why it considered the DEM 25 million loan to be State aid in favour of PA and CD Albrechts, when that loan was used solely to repay loans intended for the start-up of the Albrechts CD plant and paid exclusively to Pilz Construction.

184 The Commission, supported by ODS, submits that the *Land* of Thuringia's line of argument concerning this measure must be dismissed as unfounded. It observes, first, that, although it is true that in the letter of 3 March 1995 the German authorities consider the loan in question to be a loan intended for the repayment of debts, the corresponding amount was nevertheless placed under the heading 'operating resources' (Betriebsmittel) in a table contained in the letter of 17 April 1997. The Commission goes on to state that, according to settled case-law, the purpose of a State financial measure has no bearing on its classification as aid because it is only the beneficial effect of the measure which counts. It adds that the fact that other public providers (the TIB and the LfA) intervened in support of the THA in order to meet the commitments under the guarantee cannot affect the issue of the classification of the THA guarantee as State aid and its compatibility with the common market. According to the Commission, the only consequence of those actions is that the THA had to disburse DEM 120 million instead of DEM 156 million.

185 Lastly, it denies having infringed the obligation to state reasons with respect to the financial measure. The Commission states that, because that measure had already been found to be illegal restructuring aid in the decision to initiate the procedure and the Commission had not received any information to the contrary, it had no reason to arrive at a different assessment in the contested decision. In particular, it observes that, since the information from the German authorities indicated that PA was an undertaking in difficulty (see the letters of 18 January 1996 and 17 April 1997), it assessed that measure in the light of the Guidelines on aid for rescuing and restructuring and found that, since there was no plan for restoring the viability and profitability of the undertaking within a reasonable time, the restructuring aid was illegal (recitals 104 to 111 of the contested decision).

2. Findings of the Court

186 The *Land* of Thuringia contends that there has been an error of fact, a manifest error of assessment and infringement of the obligation to state reasons in the present case.

187 The Court notes that, in recital 33 of the contested decision, the Commission found that 'as early as in October 1993, the TAB granted PA a DEM 25 million interest-bearing loan to cover liquidity shortfalls. In March 1994 it granted a further DEM 20 million loan to enable the company to repay the loan which had been secured by the THA'. Next, in recitals 104 to 111, it set out the reasons for which it considered that that measure had to be regarded as restructuring aid which had been granted in breach of the Guidelines on aid for rescuing and restructuring and therefore as aid incompatible with the common market.

188 According to the *Land* of Thuringia, that assessment is based on an error of fact because the DEM 25 million loan granted by the TAB was not used to cover liquidity shortfalls, but only to repay, under the restructuring agreement, part of the bank loans covered by the THA guarantee.

189 The Court notes that, in the first paragraph of point 2.2.2 of the decision to initiate the procedure, the Commission stated that 'as early as 29 September 1993 TAB awarded the joint venture a DEM 20 million interest-bearing loan (7%, duration 21 March 1996) covering liquidity [shortfalls] and a loan of DEM 25 million (7%, duration 31 March 1996), serving to repay the loan which had been secured by the THA'. That finding of fact, which differs from the one in recital 33 of the contested decision, is supported by the documents in the case-file. The letters of 3 March 1995 and 18 January 1996 from the German authorities indicated that the DEM 25 million loan was granted in March 1994 to repay part of the THA loans. Moreover, there is nothing in the observations of the parties concerned which were put forward after the opening of the formal procedure to indicate that they asked for a correction of the statement of the facts on this point contained in the decision to initiate the procedure.

190 In those circumstances, the Court finds that, given the information it had at the time it adopted the contested decision, the Commission should have known that the DEM 25 million loan had not been used to cover liquidity shortfalls in October 1993, but had been granted in March 1994 to repay part of the loans guaranteed by the THA. Therefore, the Commission committed an error of fact with respect to that measure.

191 It is settled case-law, however, that even if a recital in a disputed act contains an incorrect reference of fact, that defect need not lead to the annulment of that act if the other recitals of the contested decision state reasons capable of establishing that the decision is well founded (see, to that effect, Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraph 160; and Case T-35/01 *Shanghai Teraoka Electronic* v *Council*

[2004] ECR II-3663, paragraph 167 et seq.). In the present case, the fact that the TAB reversed the amounts of the loans granted in September 1993 and March 1994 did not affect the Commission's assessment of those measures. The reasons given by the Commission for assessing their compatibility with the common market are identical, namely that, according to the Commission's information, that aid was granted in breach of the Guidelines on aid for rescuing and restructuring. Accordingly, the error of fact referred to above with respect to the DEM 20 million loan and the DEM 25 million loan does not justify annulment of the contested decision on this point.

192 Second, the *Land* of Thuringia denies that the DEM 25 million loan is State aid and even more strongly that it is new aid incompatible with the common market. It states that, since that loan was disbursed to repay part of the loans covered by the THA guarantee and since, in the Commission's view, the provision of that guarantee constitutes State aid, the Commission found incorrectly that the amounts paid out as part of the intervention under that guarantee also constitute State aid, because that is counting the same amount twice as State aid.

193 This line of argument cannot be accepted.

194 First, the Court notes that, as evidenced by recital 99 of the contested decision, of the total amount of the guarantee provided by the THA, namely DEM 190 million, only 'the amount called in, DEM 120 million, should be recovered because it is this amount which actually was paid out'. In those circumstances, classifying the DEM 25 million loan as State aid is not counting twice the aid taken into account under that guarantee.

195 Second, as evidenced by paragraphs 175 to 179 above, the THA guarantee was not provided in accordance with the first and second THA schemes and therefore cannot be regarded as existing aid. Moreover, even if the THA guarantee could be so regarded, that classification is not sufficient to justify the conclusion that a loan granted to PA by another public undertaking in order to repay part of the loans covered by that guarantee must be considered to be existing aid.

196 Furthermore, the Court does not accept the *Land* of Thuringia's line of argument to the effect that the DEM 25 million loan cannot be regarded as restructuring aid since, at the time the aid in question was granted, PA was not in difficulty.

197 First, none of the parties denies that, before the conclusion of the restructuring agreement in March 1994, PA's economic and financial situation was disastrous. As evidenced by the letter of 3 March 1995 from the German authorities, the decline in the undertaking's sales and the weak utilisation of its production capacity had led to considerable losses and a dramatic deterioration in its liquidity situation. This situation is also confirmed by a loan from TAB in October 1993 loan to cover liquidity shortfalls.

198 Next, the Court observes that, as stated in the *Land* of Thuringia's written pleadings, it was precisely in order to remedy that situation that both the private- and the public-sector parties signed the restructuring agreement on 7 March 1994. That agreement was intended to achieve considerable debt reduction for PA in order to ensure its survival. By far the most important measure taken in that context was THA's intervention under its guarantee for the amount of DEM 120 million. That amount, as well as other loans granted to PA by the TIB and the TAB, enabled a large part of the bank loans granted to the joint venture to be repaid. The TAB, the TIB and the LfA also adopted various measures, first, in order to repay the remainder of the bank loans granted to PBK and, second, to consolidate PA's liquidity situation.

199 Accordingly, on the basis of all that information, the Commission could legitimately arrive at the conclusion in the contested decision that, when the DEM 25 million loan was granted, PA was experiencing liquidity shortfalls. This has, moreover, not been contradicted by the *Land* of Thuringia's statement that, following these various interventions under the restructuring agreement, the undertaking's financial situation was looking rather brighter. In the light of the circumstances which gave rise to PA's restructuring, the Commission could reasonably find that this factor by itself did not lead to the conclusion that PA was no longer in difficulty. This conclusion was all the more obvious when it subsequently emerged that the assets listed in the company's balance sheet had been grossly overvalued. Moreover, as evidenced by recitals 36 and 37 of the contested decision, less than six months after the conclusion of the restructuring agreement, PA was once again experiencing liquidity problems, which forced the TAB and the LfA to grant it new loans. Furthermore, as stated by the *Land* of Thuringia itself in paragraphs 356 and 360 of the application, PA was also running a risk due to the imminent bankruptcy of the Pilz Group and because the claims PA held against the companies within the group had to be considered to be non-recoverable.

200 For the sake of completeness the Court adds that, at the time of conclusion of the restructuring agreement, the public players involved were not yet aware of the various accounting manipulations and the misuse of the aid by the Pilz Group. Their lack of awareness, however, does not lead to the conclusion that, at the time the various measures were granted, those bodies were entitled to consider that, following those interventions, PA would not be in difficulty anymore. Given the disastrous situation of PA when the restructuring agreement was concluded, any reasonably diligent investor acting in a market economy would first have made an in-depth study of the undertaking's financial situation and required a viable restructuring plan to be drawn up before granting it such sizeable loans and a fortiori before acquiring it. It is clear that, despite several requests from the Commission, the German authorities did not provide information as to the drawing-up of any restructuring plan (recital 108 of the contested decision). In those circumstances, the *Land* of Thuringia cannot rely on the lack of awareness on the part of those public bodies in support of its assertions to the effect that, according to the information they had in March 1994, those bodies could consider that PA was no longer an undertaking in difficulty.

201 In those circumstances, the Commission was entitled to find that, at the time the restructuring aid was granted, PA was to be regarded as an undertaking in difficulty and that, therefore, it had to assess the DEM 25 million in the light of its Guidelines on aid for rescuing and restructuring.

202 Lastly, the *Land* of Thuringia errs in alleging that there has been infringement of the obligation to state reasons. It is true that the contested decision contains few indications as to why PA had to be regarded as an undertaking in difficulty. In the decision to initiate the procedure, however, the Commission had stated clearly that 'the objective of the aid measures does not seem to be the promotion of regional development but the rescue and restructuring of firms in difficulty', so that, in order to be considered compatible with the common market, the aid had to satisfy the conditions laid down in the Guidelines on aid for rescuing and restructuring. It is clear, however, that the parties concerned did not object to that classification. It follows that the Commission was not required to provide more detailed information on this point in the contested decision. This conclusion is also supported by settled case-law, according to which it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard inter alia to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63). For the same reasons, and contrary to the argument put forward by the *Land* of Thuringia, the Commission was not required to state, in the contested decision, the specific reasons for which it found inter alia that the DEM 25 million was aid benefiting CD Albrechts.

203 In the light of all the foregoing, the pleas put forward by the *Land* of Thuringia in respect of this measure must be dismissed as unfounded.

G — *The DEM 20 million granted by the TAB to PA*

1. Arguments of the parties

204 The *Land* of Thuringia states, first, that, contrary to what the Commission found in recital 33 of the contested decision, the DEM 20 million loan was granted by the TAB to PA in October 1993 and not in March 1994. It adds that that loan was used to consolidate PA's liquidity and not to repay part of the bank loans covered by the THA guarantee. Next, it states that the contested decision infringes Article 87(1) EC by finding that that loan is State aid in favour of PA, which PA must now repay. It submits that, contrary to what the Commission found in the contested decision, that loan must not be assessed in the light of the Guidelines on aid for rescuing and restructuring because PA was not in difficulty. It adds that the Commission infringed the obligation to state reasons by not giving reasons to support its finding that CD Albrechts benefited from that financial measure and that it conferred an advantage using public funds which must be assessed having regard to the Guidelines on aid for rescuing and restructuring.

205 The Commission, supported by ODS, submits that the *Land* of Thuringia's line of argument with respect to this measure must be rejected as unfounded.

2. Findings of the Court

206 The Court notes that the *Land* of Thuringia's line of argument relating to the DEM 20 million granted by the TIB is largely similar to the one relied on with respect to the DEM 25 million loan.

207 Accordingly, for all of the reasons given in paragraphs 186 to 205 above, which are applicable to this measure, it is appropriate to dismiss as unfounded the pleas put forward on this point by the *Land* of Thuringia.

H — *The purchase price of DEM 3 million paid by the TIB to PBK*

1. Arguments of the parties

208 The *Land* of Thuringia submits that the Commission failed to take account in its assessment of the fact that this amount was paid out after most of PA's debts had been discharged, resulting in assets of DEM 250 million and debts of DEM 100 million. According to the *Land* of Thuringia, the Commission should have inferred from this fact, which had been explicitly brought to its attention by the German authorities in their letter of 30 March 1999, that this measure was in keeping with the principle of the private investor in a market economy and that, therefore, it was not aid. It adds that, because this purchase price was paid to a company in the Pilz Group and did not in any way benefit PA, repayment should be demanded only from those undertakings in the group. Lastly, it submits that the Commission infringed the obligation to state reasons by failing to state why it considered the DEM 3 million purchase price paid by the TIB and the TAB to be State aid in favour of PA and CD Albrechts.

209 The Commission, supported by ODS, contests the *Land* of Thuringia's allegation that it incorrectly assumed that there was State aid. It states that, although the questions it put to the German authorities by letter of 25 November 1996 were directly intended to ensure that the restructuring took place in accordance with market conditions, those authorities did not provide comments on this point or send a copy of the restructuring agreement, but merely stated that the purchase price had been negotiated. In that context, it was impossible for it to verify the

accuracy of the positive forecast of the undertaking's profitability. It adds that it is the fact that PA had to be regarded at the time as an undertaking in difficulty which determined its finding that a private investor would not have purchased PA and that the purchase price had to be regarded as State aid. It states that it was not clear from the information it had that the aid had been granted as part of a restructuring plan which would ensure, within a reasonable time, the long-term profitability and viability of the undertaking. On the contrary, that information indicated that the bank debts had been mostly discharged, particularly following the payment of DEM 120 million by the THA and that the measures serving to support or rescue PA had been financed almost entirely by public funds. It adds that, as early as the time of the decision to initiate the procedure, it had classified the purchase price as illegal restructuring aid on the basis of the Guidelines on aid for rescuing and restructuring. Lastly, it states that that classification had been confirmed by the German authorities, which had stated that the liquidity aid was absolutely indispensable (letter of 18 January 1996) and that PA would not have survived without the restructuring measures (letter of 14 July 1997).

210 Likewise, the Commission, supported by ODS, challenges the assertion that it did not comply with the obligation to state reasons on this point, explaining that, because that financial measure had already been classified in the decision to initiate the procedure as illegal restructuring aid in favour of an undertaking in difficulty and the Commission had not received any information to the contrary from the German authorities (letters of 18 January 1996 and 17 April 1997), it had no reason to arrive at a different assessment in the contested decision (recitals 104 to 111).

211 ODS also observes that the *Land* of Thuringia appears to confuse the requirements relating to the obligation to state reasons with the issue of whether the Commission correctly investigated the facts. It states that any inaccuracies as to the facts relied on by the Commission do not fall within the obligation to state reasons because the Commission was entitled to presume that they were accurate, since they were based on information received from the Federal Republic of Germany. It states that

because it was evident that, according to that information, the measures in question were State aid, the Commission was not required to examine in detail and specifically each material aspect of Article 87(1) EC, but could instead merely provide a summary statement of reasons.

2. Findings of the Court

212 The *Land* of Thuringia alleges that in the present case there has been an error of fact, a manifest error of assessment and an infringement of the obligation to state reasons.

213 As to the plea alleging an error of fact and a manifest error of assessment, the *Land* of Thuringia submits essentially that, in the light of the information the Commission had at the time it adopted the contested decision, the Commission should have found that the DEM 3 million purchase price paid by the TIB to acquire the shares in PA was in keeping with the market.

214 The Court notes that, in the decision to initiate the procedure, the Commission stated that 'within the frame of the take-over [of PA] in March 1994 [the TAB and the TIB] agreed to pay a total of DEM 15 million' and that 'TIB paid DEM 3 million as [the] purchase price for its shares to [PBK]' (second paragraph of point 2.2.2 of the decision to initiate the procedure). Next, in its preliminary assessment of the financial measures, it stated that the DEM 3 million purchase price, like the other measures, was surely State aid within the meaning of Article 87(1) EC (first paragraph of point 3 of the decision to initiate the procedure). Moreover, it explicitly requested the Federal Republic of Germany to describe to it in detail the manner in which that purchase price had been calculated (question 4 in the annex to the decision to initiate the procedure).

215 By their letter of 30 March 1999, the German authorities set out their position on this point. They stated, first, that the purchase price was not notified in the form of a calculation, but rather as the result of a negotiation and, second, that it was not PA which had been the recipient of the measure, but the Pilz Group. They added that, given the positive balance sheet and the amount of debt reduction achieved with the restructuring agreement, the TIB and the TAB could at that time consider that a commitment of that magnitude was justified because the value of the undertaking's assets far exceeded the value of its debts. According to the German authorities, that conclusion was all the more justified, given that those bodies were not yet aware of the accounting manipulations carried out by Mr Pilz.

216 The Commission was right to find that that information was not sufficient to alter its conclusion that the purchase price had to be classified as State aid.

217 First, the German authorities did not provide information enabling the manner in which the DEM 3 million price was calculated to be verified. The mere fact that that price was negotiated by the parties is irrelevant in this context. Second, for the reasons stated in paragraph 199 above, the German authorities were wrong to rely on the value of the assets of the joint venture after the conclusion of the restructuring agreement and the fact that the TIB and the TAB were unaware of the manipulations of the assets carried out in order to justify the purchase price. This is particularly true given that, in the light of the information it had at the time it adopted the contested decision, the Commission could legitimately find that, at the time of the purchase, in March 1994, a reasonably diligent investor acting in the market economy should have found that PA was in difficulty (see paragraphs 196 to 202 above).

218 However, the *Land* of Thuringia rightly stated that the Commission failed to take account of the fact that that amount was paid directly to PBK. The Commission has not produced any evidence showing that that measure was intended for the

restructuring of PA or CD Albrechts. The Commission should not, therefore, have found that that aid was 'for the restructuring of [CD Albrechts]' in Article 1(2) of the contested decision. Lastly, the Commission did not give any reasons in the contested decision to show that PA had received an advantage from that financial measure which justified recovery of that aid from it.

219 Given that error of fact as to the identity of the recipient of the aid and the failure to give reasons on this point, in breach of Article 253 EC, it is appropriate to annul Article 1(2) of the contested decision in so far as the Commission states that the DEM 3 million purchase price must be counted as aid 'for the restructuring of [CD Albrechts]'.

I — *The DEM 12 million contribution from the TIB into PA's capital reserve*

1. Arguments of the parties

220 The *Land* of Thuringia states, first, that the Commission made various errors of fact in relation to this measure. The Commission failed to find, as evidenced by the letters of 18 January 1996 and 30 March 1999 from the German authorities, that DEM 7.6 million of the DEM 12 million capital contribution was used to repay part of the bank loans secured by the THA guarantee, which were paid directly to Pilz Construction. As to the rest of the capital contribution, namely DEM 4.4 million, the *Land* of Thuringia states that that sum was diverted to the benefit of the Pilz Group in the form of fees which were not reimbursed and payments which were not honoured under the management and supply contract that PA concluded with the Pilz Group.

221 It states, next, that because of those errors of fact, the Commission made errors of assessment and infringed the obligation to state reasons in respect of that measure. Because DEM 7.6 million of that grant was used to repay part of the bank loans covered by the THA guarantee, it is not State aid and even less new aid which is incompatible with the common market. Since that part of the grant was paid out in order to repay part of the loans covered by the THA guarantee and, according to the Commission, the provision of that guarantee constitutes State aid, the Commission erred in finding that the amounts paid as part of the intervention under that guarantee are also State aid, because that is counting the same amount twice as State aid. It adds that, as it has already demonstrated, because the provision of the guarantee must be considered to be existing aid compatible with the Treaty, the same is necessarily true for this financial measure, which was paid out pursuant to the obligations under the guarantee. The *Land* of Thuringia submits, however, that this holds true only in so far as the loans covered by the THA guarantee were actually used for the establishment of the Albrechts CD plant.

222 As to the remaining DEM 4.4 million, the *Land* of Thuringia submits that here, too, the Commission committed an error of assessment and infringed the obligation to state reasons by finding in the contested decision that that amount was State aid in favour of PA. It states that, contrary to what the Commission found in the contested decision, that financial measure did not fall to be analysed having regard to the Guidelines on aid for rescuing and restructuring, because PA was not in difficulty. It adds that PA never received anything from this measure, because it was used to finance the production of goods delivered to the Pilz Group under the product management and supply contract, but never paid for. Accordingly, it submits that if this measure is to be regarded as State aid recovery should be made only from undertakings in the Pilz Group.

223 The Commission, supported by ODS, submits that the entire line of argument concerning the DEM 12 million capital contribution must be rejected as unfounded.

2. Findings of the Court

224 The *Land* of Thuringia submits with respect to this plea that there have been various errors of fact, a manifest error of assessment and infringement of the obligation to state reasons.

225 First, the Court does not accept the arguments put forward by the *Land* of Thuringia in order to establish that the Commission committed an error of fact with respect to the TIB's DEM 12 million capital contribution to PA by failing to find, first, that DEM 7.6 million was used to repay the loans secured by the THA and, second, that DEM 4.4 million was diverted to the Pilz Group.

226 It must be borne in mind that, in the decision to initiate the procedure, the Commission stated that, of the total amount of DEM 15 million paid out by the TIB and the TAB to take over the joint venture, DEM 3 million was the purchase price of the shares, whereas the remaining 'DEM 12 million was paid as a capital [contribution] to the joint venture, of which DEM 7.6 million served to pay back the loan secured by the THA and the remaining DEM 4.4 million served as working capital' (second paragraph of point 2.2.2 of the decision to initiate the procedure).

227 In their letter of 30 March 1999, the German authorities confirmed this version of the facts. There is, moreover, nothing in the case-file to indicate that any of the other parties concerned do not agree with it.

228 In those circumstances, and given the information it had at the time of adopting the contested decision, the Commission rightly found in recital 34 of the contested decision that the TAB and the TIB paid a total of DEM 15 million in connection with their takeover of the joint venture, of which DEM 3 million was paid by the TIB to PBK for the purchase of shares and DEM 12 million was paid by the TIB into PA's capital reserve.

229 Next, the *Land* of Thuringia wrongly states that the Commission failed to take account of the fact that DEM 7.6 million of this measure was used to repay the loans covered by the THA. Without its being necessary to rule on the question of whether the Commission actually did omit to take account thereof, suffice it to note that that omission, even if it were proven to be true, does not affect the validity of its assessment on this point. As stated in paragraph 194 above, the financial measures provided for the repayment of the loans guaranteed by the THA could not have been taken into account twice, because only the amounts actually honoured by the THA pursuant to its guarantee were classified as State aid in the contested decision.

230 Lastly, the *Land* of Thuringia submits that the Commission failed to take account of the fact that DEM 4.4 million of this measure was diverted to the Pilz Group. This plea will be examined below (see paragraphs 307 to 348) in connection with the *Land* of Thuringia's argument relating to the lawfulness of the recovery order in Article 2 of the contested decision.

231 Second, since it is established that the Commission did not err as to the facts with respect to this measure, it is appropriate to consider the various arguments put forward by the *Land* of Thuringia in order to prove that there have been manifest errors of assessment and breach of the obligation to state reasons in respect of this measure.

232 The *Land* of Thuringia errs in stating that since DEM 7.6 million of the contribution was used to repay loans guaranteed by the THA, the Commission committed an error of assessment and infringed the obligation to state reasons in finding that that measure was new aid. The mere fact that that measure, which was used to repay the loans secured by the THA, was paid out by the TIB, indicates that it was not intervention under that guarantee. It follows that it is indeed new aid.

233 In any event, the Commission was right to class this measure as restructuring aid for an undertaking in difficulty. As stated in paragraphs 196 to 202 above, PA could be classified as an undertaking in difficulty at the time that measure was provided. It can, moreover, be assumed that a private company in the TIB's situation would not have made a capital contribution to an undertaking in difficulty such as PA without at least conducting a detailed analysis of the undertaking's financial situation and drawing up a restructuring plan. Furthermore, this measure had been classified as State aid in the decision to initiate the procedure and the German authorities did not object to that classification during the administrative procedure. Lastly, as stated in paragraph 202 above, the Commission did provide a sufficient statement of the reasons for which that aid was incompatible with the common market, as required by Article 253 EC.

234 In the light of the foregoing, the pleas put forward by the *Land* of Thuringia relating to this measure must be dismissed as unfounded.

J — *The purchase of PA's share capital by the TIB and the TAB*

1. Arguments of the parties

235 The *Land* of Thuringia submits that the Commission found incorrectly in the contested decision that the DEM 33 million referred to in recital 35 of the contested

decision is a financial measure. It states that that amount was, in reality, PA's par value capital. It also submits that the Commission committed a manifest error of assessment and infringed the obligation to state reasons.

236 At the hearing on 5 May 2004, the Commission acknowledged that it had found incorrectly in the contested decision that the purchase of PA's share capital by the TIB and the TAB for DEM 33 million was State aid. Accordingly, it accepted that the contested decision should be annulled on this point.

2. Findings of the Court

237 In the light of the statements made by the Commission at the hearing on 5 May 2004, which were recorded in the minutes of the hearing, the Court finds, without its being necessary to consider the other pleas put forward on this point, that the Commission committed an error of fact in classing the purchase of PA's share capital by the TIB and the TAB for DEM 33 million as State aid.

238 In the light of the foregoing, Article 1(2) of the contested decision must be annulled in so far as the Commission found that the incompatible State aid for the restructuring of the firm CD Albrechts includes an amount of DEM 33 million for the purchase of PA's share capital.

K — *The DEM 2 million loan granted by the LfA to PA*

1. Arguments of the parties

239 The *Land* of Thuringia states that, in the contested decision, the Commission incorrectly failed to take into account or give sufficient reasons for the fact that a DEM 2 million loan granted by the LfA to PA was not paid to PA, but was used solely to repay the bank loans granted to PBK which were secured by the *Land* of Bavaria's guarantee. It considers that, since the total amount of the guarantee (DEM 54.7 million) was already counted as State aid by the Commission, finding that that loan is also State aid amounts to counting the same amount twice as aid. Likewise, it submits that the Commission committed an error of assessment in finding in the contested decision, without providing any reasons whatsoever, that the DEM 2 million granted by the LfA is new aid. Lastly, it states that the Commission infringed the obligation to state reasons by failing to give the reasons for which it found that the DEM 2 million granted by the LfA to PA was aid incompatible with the common market.

240 The Commission, supported by ODS, submits that the line of argument put forward by the *Land* of Thuringia in relation to this measure must be dismissed as unfounded.

2. Findings of the Court

241 The *Land* of Thuringia submits with respect to this financial measure that there has been an error of fact, a manifest error of assessment and infringement of the obligation to state reasons.

242 It is appropriate to consider, first, whether, as advocated by the *Land* of Thuringia, the Commission committed an error of fact by failing to take into account the fact that the DEM 2 million loan granted by the LfA to PA was used to repay part of the loans covered by the *Land* of Bavaria's guarantee.

243 The Court notes that in the third subparagraph of paragraph 2.2.2 of the decision to initiate the procedure, the Commission made the following findings:

'By a contract dated 8 March 1994 [the *Land* of] Bavaria, via the LfA ... awarded a DEM 2 million and a DEM 7 million interest-bearing loan (7%, repayable until 31 March 1996 respectively 30 March 1996) to the joint venture. The first loan was used ... to repay the loan that had been secured by [the *Land* of] Bavaria.'

244 It is clear from this passage that the Commission had been informed that the DEM 2 million loan granted by the LfA was used to repay the secured loans.

245 Next, the Court notes that, during the administrative procedure, neither the German authorities nor the other parties concerned submitted observations in order to correct that information. On the contrary, in the letter of 30 March 1999, the German authorities confirmed the accuracy of what had been stated in this respect in the decision to initiate the procedure.

246 In those circumstances, the Court finds that, on the basis of the information it had at the time of adopting the contested decision, the Commission ought to have known that the DEM 2 million loan had been used to repay part of the loans guaranteed by the *Land* of Bavaria.

247 However, unlike what was found with respect to the waiver of the DEM 3 million claim (see paragraphs 123 to 130 above), that error does not affect the legality of the decision because, in this case, it is in any event impossible that the same gain was counted twice. The mere fact that this measure was used to repay the loans guaranteed by the *Land* of Bavaria does not justify the conclusion that it is intervention under that guarantee. In particular, the loan was paid out to PA in order to enable it to repay part of the loans covered by the guarantee. Thus, although the grant of the loan should enable the secured loans to be repaid, the fact remains that it is not intervention under an existing guarantee, but rather new aid.

248 Secondly, the *Land* of Thuringia errs in its submission that the Commission committed an error of fact and infringed the obligation to state reasons in finding that that loan was granted to an undertaking in difficulty and in finding it to be State aid incompatible with the common market. It should be borne in mind that, at the time that loan was granted, PA could be classified as an undertaking in difficulty (see, on this point, paragraphs 196 to 202 above). Furthermore, it can be assumed that a private company in the LfA's situation would not have granted another loan to an undertaking in difficulty such as PA, at least not without checking the undertaking's financial situation and having a restructuring plan. Moreover, whilst that loan had been classified as State aid in the decision to initiate the procedure, the German authorities did not subsequently object to that classification. Lastly, as stated in paragraph 202 above, the Commission did provide sufficient reasons as to why it had classified PA as an undertaking in difficulty and, therefore, why it had found that aid to be incompatible with the common market.

249 In the light of the foregoing, the pleas put forward by the *Land* of Thuringia relating to this measure must be dismissed as unfounded.

L — *The DEM 3.5 million liquidity loan granted by the TIB to PA*

1. Arguments of the parties

250 The *Land* of Thuringia submits that the contested decision infringes Article 87(1) EC and the obligation to state reasons in classifying the DEM 3.5 million liquidity loan as State aid in favour of PA incompatible with the common market. It states that, contrary to what the Commission found in the contested decision, that loan did not fall to be considered in the light of the Guidelines on aid for rescuing and restructuring, because PA was not in difficulty. It adds that, as evidenced by the letter of 30 March 1999 from the German authorities, the DEM 3.5 million liquidity loan granted by the TIB to PA was diverted to the Pilz Group through the central cash-management system.

251 The Commission, supported by ODS, submits that the line of argument put forward by the *Land* of Thuringia in relation to this measure must be rejected as unfounded.

2. Findings of the Court

252 The *Land* of Thuringia submits with respect to this measure that there has been an error of fact, a manifest error of assessment and infringement of the obligation to state reasons.

253 The Court notes, as a preliminary point, that the *Land* of Thuringia does not contest the finding in recital 35 of the contested decision, according to which the TIB granted a DEM 3.5 million liquidity loan to PA in April 1994.

254 Next, the *Land* of Thuringia wrongly claims that the Commission erred in law and infringed the obligation to state reasons in applying the Guidelines on aid for rescuing and restructuring and in classifying that loan as State aid incompatible with the common market. As stated in paragraphs 196 to 202 above, PA could be classified as an undertaking in difficulty at the time that the loan was granted. It can, moreover, be assumed that a private company in TIB's situation would not have granted a loan to an undertaking in difficulty such as PA without at least conducting a detailed analysis of the joint venture's financial situation and drawing up a restructuring plan. Moreover, although that measure had been found to be State aid in the decision to initiate the procedure, the German authorities did not subsequently object to that classification. Lastly, as stated in paragraph 202 above, the Commission provided sufficient reasons for classing PA as an undertaking in difficulty and, accordingly, for classifying the aid as incompatible with the common market.

255 Lastly, the *Land* of Thuringia states that the Commission failed to take account of the fact that this measure was diverted to the Pilz Group. This plea will be examined below in paragraphs 307 to 347, where the *Land* of Thuringia's line of argument relating to the lawfulness of the recovery order in Article 2 of the contested decision will also be assessed.

256 In the light of the foregoing, the pleas put forward by the *Land* of Thuringia relating to this measure must be dismissed as unfounded.

M — *The DEM 15 million loan granted by the LfA to the Pilz Group*

1. Arguments of the parties

257 The *Land* of Thuringia submits that the Commission committed a manifest error of assessment in relation to the DEM 15 million loan granted by the LfA, in that it was

granted directly to the Pilz Group, so that it is not appropriate to order recovery thereof from the joint venture and its successors. Next, it submits that the Commission infringed the obligation to state reasons by failing to state why that loan is aid to PA or CD Albrechts.

258 The Commission, supported by ODS, contends that the line of argument put forward by the *Land* of Thuringia in relation to this measure must be dismissed as unfounded. It states that it does not matter that the DEM 15 million loan was intended for the Pilz Group because it was an operating loan intended as a bridging loan to cover the period up until such time as an investor willing to buy the joint venture was found and thus conferred an advantage on both the joint venture and PA.

2. Findings of the Court

259 The *Land* of Thuringia submits with respect to this financial measure that there has been a manifest error of assessment and infringement of the obligation to state reasons.

260 The *Land* of Thuringia correctly argues that the Commission failed to take account of the fact that this measure was paid directly to the Pilz Group. The Commission has not produced any evidence showing that this measure was intended for restructuring PA or CD Albrechts.

261 This finding is not affected by the fact that, as found by the Commission in recital 37 of the contested decision, the DEM 15 million loan was intended to back the Pilz

Group until such time as an investor willing to buy PA was found. In addition to the Commission's not having adduced any evidence in support of that assertion, it has not been established that PA actually derived any benefit from that aid. Accordingly, the Commission committed a manifest error of assessment in finding that that loan conferred an advantage on PA.

262 In the light of the foregoing, without its being necessary to consider the plea alleging infringement of the obligation to state reasons, Article 1(2) of the contested decision must be annulled in so far as the Commission declares that the DEM 15 million loan constitutes aid 'for the restructuring of [CD Albrechts]'.

N — *The DEM 15 million loan granted by the TAB to CD Albrechts*

1. Arguments of the parties

263 The *Land* of Thuringia states that, as evidenced by the letter of 30 March 1999 from the German authorities, the DEM 15 million loan granted by the TAB to CD Albrechts was diverted to the Pilz Group. It adds that that loan has already been repaid. Next, it submits that the Commission infringed Article 87(1) EC in finding, in the contested decision, that the DEM 15 million loan is State aid in favour of PA. It states that, contrary to what the Commission found in the contested decision, that loan does not fall to be assessed in the light of the Guidelines on aid for rescuing and restructuring because PA, later CD Albrechts, was not an undertaking in difficulty at the time the loan was disbursed. It adds that the Commission infringed the obligation to state reasons by failing to state why that loan constitutes aid to PA or CD Albrechts.

264 The Commission, supported by ODS, submits that the line of argument put forward by the *Land* of Thuringia in relation to this measure must be rejected as unfounded.

2. Findings of the Court

265 The *Land* of Thuringia submits with respect to this measure that there has been an error of fact, a manifest error of assessment and infringement of the obligation to state reasons.

266 The Court notes, first, that the *Land* of Thuringia has not adduced any evidence in support of its allegation that the loan has already been repaid, in whole or in part. Nor has it demonstrated that the Commission was informed during the administrative procedure of any such repayment.

267 Next, the *Land* of Thuringia is wrong to claim that the Commission committed an error of law and infringed the obligation to state reasons in finding that that loan is State aid for restructuring which is incompatible with the common market. As stated in paragraphs 196 to 202 above, CD Albrechts, formerly PA, could be classified as an undertaking in difficulty at the time that loan was granted. It can, moreover, be assumed that a private company in TAB's situation would not have granted a loan to an undertaking in difficulty such as CD Albrechts without at least conducting a detailed analysis of the undertaking's financial situation and drawing up a restructuring plan. Moreover, although that measure had been found to be State aid in the decision to initiate the procedure, the German authorities did not subsequently object to that classification. In any event, as stated in paragraph 202 above, the Commission did provide a sufficient statement of the reasons for finding that CD Albrechts was an undertaking in difficulty and, accordingly, for finding that that aid was incompatible with the common market.

268 Lastly, the *Land* of Thuringia states that the Commission failed to take account of the fact that this measure was diverted to the Pilz Group. This plea will be examined below in paragraphs 318 to 344, where the *Land* of Thuringia's line of argument relating to the lawfulness of the recovery order in Article 2 of the contested decision will also be assessed.

269 In the light of the foregoing, the pleas put forward by the *Land* of Thuringia relating to this measure must be rejected as unfounded.

O — *The DEM 7 million loan granted by the LfA to CD Albrechts*

1. Arguments of the parties

270 The *Land* of Thuringia claims, first, that the Commission committed various errors of fact in relation to the DEM 7 million loan. Contrary to what the Commission found in recitals 36 and 73 of the contested decision, the DEM 7 million loan granted by the LfA to PA was not used to maintain PA. It observes that, following the conclusion of the restructuring agreement, DEM 2 million of that loan was used to repay the interest due on the bank loans granted to PBK which were covered by the *Land* of Bavaria's guarantee. It submits that, accordingly, since the Commission has already entered the total amount of the guarantee (DEM 54.7 million) in the accounts as State aid, finding that that part of the loan is also State aid amounts to counting the same amount twice as aid.

271 Next, the *Land* of Thuringia submits that the Commission committed various errors of law and infringed the obligation to state reasons in relation to this measure. It denies in particular that that loan is State aid and even more strongly that it is new aid which is incompatible with the common market. It states that, since DEM 5 million of that loan was used to repay part of the loans which were covered by the THA's guarantee and, according to the Commission, the provision of that guarantee constitutes State aid, the Commission should not have found that the amounts paid pursuant to that guarantee were also State aid, because that amounts to counting the same amount twice as State aid. It adds that, as demonstrated earlier, since the provision of that guarantee must be regarded as existing aid which is compatible with the Treaty, the same must hold true for this financial measure, which was paid out pursuant to obligations under the guarantee. Lastly, the *Land* of Thuringia submits that the Commission infringed the obligation to state reasons by failing to give the reasons why it found that the DEM 7 million loan is aid to CD Albrechts which is incompatible with the common market, when DEM 5 million of that loan was used only to repay bank loans intended for the establishment of the Albrechts CD plant which were paid only to Pilz Construction and DEM 2 million was used to repay the interest on the loans covered by that guarantee.

272 The Commission, supported by ODS, submits that the line of argument put forward by the *Land* of Thuringia in relation to this measure must be rejected as unfounded.

2. Findings of the Court

273 The *Land* of Thuringia submits with respect to this measure that there have been various errors of fact, a manifest error of assessment and infringement of the obligation to state reasons.

274 It is appropriate to consider, first, whether, as maintained by the *Land* of Thuringia, the Commission committed an error of fact in failing to take into account the fact that DEM 2 million of the DEM 7 million loan granted by the LfA to PA was used, first, to guarantee future interest on the loans covered by the Land of Bavaria's guarantee and, second, the fact that DEM 5 million was used to repay part of the loans covered by the THA's guarantee.

275 It should be borne in mind that, in the decision to initiate the procedure, the Commission made the following statements:

'By a contract dated 8 March 1994 [the *Land* of] Bavaria, via the LfA, awarded a DEM 2 million and a DEM 7 million interest-bearing loan (7%, repayable until 31 March 1996 respectively 30 March 1996) to the joint venture. The first loan was used ... to repay the loan that had been secured by [the *Land* of] Bavaria. DEM 5 million of the second loan served to reduce the loan which had been secured by the THA and the remaining DEM 2 million was needed as working capital.'

276 It is clear from this passage that the Commission had been informed before the formal procedure was initiated that DEM 5 million of the DEM 7 million loan granted by the LfA was used to repay the loans secured by the THA. However, it does not seem to have been informed at this stage of the procedure that the remaining DEM 2 million of the second DEM 7 million loan granted by the LfA were used to guarantee payment of future interest on the loans secured by the *Land* of Bavaria.

277 The Court notes that, during the administrative procedure, the German authorities submitted observations on the use of that loan. In the letter of 30 March 1999, they stated, first, that DEM 5 million of the loan was not used to repay the loans guaranteed by the *Land* of Bavaria, but rather the loans guaranteed by the THA. Next, they stated that the remaining DEM 2 million were transferred to private banks in order to guarantee payment of future interest due.

278 In those circumstances, the Court finds that, having regard to the information it had at the time of adopting the contested decision, the Commission must have known that of the DEM 7 million loan granted by the LfA DEM 5 million had been used to repay part of the loans secured by the THA and DEM 2 million had been used to guarantee future interest on the loans covered by the *Land* of Bavaria.

279 However, the absence of findings to that effect in the contested decision did not affect the legality thereof in relation to this measure.

280 Even if the Commission had taken account of the fact that DEM 5 million of the DEM 7 million loan was used to repay the loans guaranteed by the THA, that would not have affected its assessment of this measure since, for the reasons given in paragraph 194 above, the financial measures granted for the repayment of the loans guaranteed by the THA are separate from the amounts paid by the THA under that guarantee.

281 Moreover, the *Land* of Thuringia errs in claiming that because DEM 5 million of that loan was used to repay part of the loans guaranteed by the THA, the Commission committed an error of assessment and infringed the obligation to state

reasons in finding that this was new aid. The mere fact that this measure was used to repay the loans guaranteed by the THA does not lead to the conclusion that it was intervention under that guarantee. In particular, that loan was paid to the joint venture in order to enable it to repay part of the loans covered by the guarantee. It follows that, although the grant of the loan serves to enable repayment of the secured loans, the fact remains that it is indeed new aid and not intervention under an existing guarantee.

282 Lastly, as regards the use of DEM 2 million of this measure to guarantee the payment of future interest on the loans guaranteed by the *Land* of Bavaria, the *Land* of Thuringia has not demonstrated how this fact could have affected the Commission's finding on this measure, namely that it is aid incompatible with the common market, since it was granted in breach of the Guidelines on aid for rescuing and restructuring.

283 In the light of the foregoing, the pleas put forward by the *Land* of Thuringia relating to this measure must be dismissed as unfounded.

P — *The DEM 9.5 million loan granted by the TAB to CD Albrechts*

1. Arguments of the parties

284 The *Land* of Thuringia states that, in the contested decision, the Commission did not take account of the fact that this loan has been repaid in its entirety. It also states that this loan is the only one which in fact conferred a benefit on CD Albrechts

because, in December 1994, the links with the Pilz Group were definitively terminated. It adds that the Commission should have assessed this loan according to the criterion of the investor acting in a market economy, that is, taking into account the financial difficulties faced by CD Albrechts due to the illegal actions of the Pilz Group.

285 The Commission states that it has not received any information about repayment, so that it was entitled to believe that this loan had not yet been repaid.

2. Findings of the Court

286 As to the line of argument put forward by the *Land* of Thuringia concerning this measure, the Court finds that the *Land* of Thuringia has not adduced any evidence in support of its assertion that this loan has been repaid in its entirety. Even if it was able to produce proof of repayment, the fact remains that it omitted to adduce this evidence during the administrative procedure, so that the Commission cannot be criticised for having failed to take account of it in the contested decision. Lastly, the *Land* of Thuringia's argument that the grant of the aid is in keeping with the rational conduct of a private investor cannot be accepted since, in the light of the reasoning in paragraph 217 above, in the present case the issue of whether the TAB acted like a private investor does not affect the assessment of the compatibility of the aid with the common market and is, accordingly, irrelevant.

287 In the light of the foregoing, the pleas put forward by the *Land* of Thuringia relating to this measure must be dismissed as unfounded.

Q — *The interest totalling DEM 21.3 million*

1. Arguments of the parties

288 The *Land* of Thuringia submits, first, that the Commission infringed the obligation to state reasons in relation to the interest. It states that nowhere in the contested decision did the Commission make findings or provide reasons in relation to the calculation of the amount of DEM 21.3 million for unpaid interest on the various measures. In its view, this is all the more surprising since the amounts paid under the restructuring agreement with a view to discharging the guarantees already contained a major interest portion. The *Land* of Thuringia adds that, since the contested decision provides that the aid to be recovered is to include interest at the reference rate, the Commission should have explained clearly which interest it meant and why it had benefited the joint venture and its successors. In its view, the Commission could not merely refer to the information forwarded by the Member State on this point.

289 Next, the *Land* of Thuringia challenges the Commission's assertion that, having regard to the statements made by the German authorities, it had to order the recovery of the interest-rate advantages amounting to DEM 21.3 million. It observes, first, that the Commission has not adduced any proof that the German authorities have confirmed that this is the case and, second, that it should be borne in mind that, even if they had made such a declaration — which the *Land* of Thuringia denies — this would not justify the lack of material findings as to the calculation of the amount of interest.

290 The *Land* of Thuringia adds that the Commission infringed Article 87(1) EC by fixing, in the contested decision, a lump sum of DEM 21.3 million for the interest-rate advantages allegedly conferred on the joint venture and its successors.

291 The Commission, supported by ODS, contests the entire line of argument put forward by the *Land* of Thuringia in relation to the DEM 21.3 million interest-rate advantages.

292 It states, first, that it had to take a decision having regard to the information provided to it by the German authorities, namely that the various payments had generated interest-rate advantages totalling at least DEM 21.3 million for the period from the end of 1993 to 1998 (recital 40 of the contested decision). It submits that the *Land* of Thuringia's comment concerning the interest to be paid pursuant to the recovery order is incorrect, since the amount of DEM 21.3 million represents only the interest-rate advantages which were granted to the undertaking and which, accordingly, are themselves aid. In its view, a distinction must be drawn between the interest which must be repaid as from the date of disbursement of the aid which, according to Article 2(2) of the contested decision, is to be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aids.

293 It also contests the *Land* of Thuringia's assertion that it fixed a lump sum of at least DEM 21.3 million for the interest-rate advantage, without considering that the payments benefited different undertakings or that the advantage had already been partially taken into account in the calculation of certain amounts. It observes that it is not the ultimate recipient of the aid within a group of undertakings, which is decisive for the calculation of the amount of aid paid, but rather the objective recipient, in this case the joint venture and its successors. The Commission adds that the total amount of interest-rate advantages in the contested decision is not based on incorrect calculations but, as is clear from recital 40 of the contested decision, on the information provided by the German authorities.

294 Lastly, it denies that it infringed the obligation to state reasons regarding the interest-rate advantages. It states that, given the lack of clear information from the

German authorities, it had to rely on the amount of DEM 21.3 million which, as is clear from recital 40 of the contested decision, had been stated by the German authorities as being the total interest-rate advantage conferred on the joint venture and its successors. It adds that this advantage was assessed having regard to the Guidelines on aid for rescuing and restructuring and, pursuant thereto, was found to be illegal restructuring aid. Lastly, regarding the *Land* of Thuringia's assertion that it did not indicate to what extent it took account of the fact that two loans were used to repay interest on the loans in the calculation of the total interest-rate advantage, it states that, given the information it had, it had no choice but to conclude that they were loans which had to be regarded as illegal restructuring aid to undertakings in difficulty.

2. Findings of the Court

295 In response to a written question from the Court of First Instance, the Federal Republic of Germany denied that its authorities provided the Commission with information showing that the interest-rate advantages conferred under the Albrechts CD plant project amounted to at least DEM 21.3 million for the period from 1993 to 1998. It also stated that that figure contradicted the interest rate amount indicated in the letter of 17 April 1997 from the German Government, which gave a figure of DEM 14.9 million.

296 The Commission, for its part, stated in its reply to a written question from the Court of First Instance that it is not able to prove that it received information from the German authorities to the effect that the aid in question totalled DEM 21.3 million.

297 In those circumstances, the Court finds that the Commission committed an error of fact in finding, in recital 40 of the contested decision, that 'according to the German authorities, these payments generated interest-rate advantages, totalling at least DEM 21.3 million from the end of 1993 until 1998'.

298 In the light of the foregoing, without its being necessary to consider the other pleas relied on in this connection, Article 1(2) of the contested decision must be annulled in so far as it includes an amount of DEM 21.3 million in interest-rate advantages granted as part of the restructuring of the Albrechts CD plant.

III — *The pleas relating to the legality of Article 2 of the contested decision*

A — *Preliminary observations*

299 The *Land* of Thuringia, supported by the Federal Republic of Germany, submits that, in so far as in Article 2 of the contested decision the Commission orders the recovery of the aid from LCA, CDA, and 'any other undertaking to which [PBK's], [the joint venture's] and [PA's] assets and/or infrastructure have been transferred or will be transferred', that article is unlawful because the recovery order contained therein is based on numerous errors in the findings of fact, is contrary to Article 87 (1) EC and Article 88(2) EC, infringes the obligation to state reasons and the principle of protection of the rights of the defence and, lastly, violates the principles of legal certainty and proportionality.

300 The Court of First Instance will consider, first, the *Land* of Thuringia's line of argument to the effect that the recovery order in Article 2 of the contested decision infringes Article 87(1) EC and Article 88(2) EC.

B — *Infringement of Article 87(1) EC and Article 88(2) EC*

1. Arguments of the parties

301 In support of its plea alleging infringement of Article 87(1) EC and Article 88(2) EC, the *Land* of Thuringia submits essentially that the Commission cannot require the Federal Republic of Germany to recover aid from undertakings which have not received an advantage from the aid in question. Its states, first, that the aid was largely diverted to the undertakings within the Pilz Group; second, as found by the Commission in recital 103 of the contested decision, that MTDA, subsequently CDA, did not receive aid when the shares in CD Albrechts, subsequently LCA, were purchased because it paid market price; and, third, that part of the aid was paid directly to the Pilz Group.

302 It also maintains that the Commission cannot require recovery of the aid from third parties simply by alleging that there has been evasion. It states, first, that the Commission cannot order recovery from a third party without proving that that third party received an advantage from the aid. Moreover, it submits that the objective criteria used by the Commission in order to establish that there has been evasion — what is transferred, the purchase price, the identity of the shareholder or owner of the initial undertaking and of the buyer, the time at which the transfer takes place and the commercial character of the transfer — referred to in recital 118 of the contested decision were not fulfilled in the present case.

303 The Commission, supported by ODS, challenges the entire line of argument put forward by the *Land* of Thuringia alleging that it infringed Article 87(1) EC and Article 88(2) EC by requiring the Federal Republic of Germany to recover the aid from LCA, CDA and any other undertaking to which the joint venture's assets and/or infrastructure have been transferred or will be transferred in order to evade the consequences of the contested decision.

304 It expresses, first, in general terms its point of view as to the determination of the parties required to repay the aid in the event of transfer of the shares or assets of the recipient company. It begins by observing that the issue does not raise any particular problems in the case of the transfer of the shares, since the recipient company continues to exist, with only its form of ownership changed. In its view, it follows from the case-law that in such a case the obligation to repay remains with the company which received the aid or its successors, regardless of which changes may have taken place in the ownership structure or any inclusion of the repayment obligation in the determination of the conditions of sale. It states that, in continuing to carry on the subsidised activity, that company continues to draw an advantage from the aid, thereby causing distortion of competition. Next, it submits that there are also no difficulties where the shares of the recipient company are transferred to undertakings belonging to the same group. It states that, in that case, in addition to the recipient company, the undertakings in the group which have been able to derive a benefit from the aid following the transfer by obtaining an economic advantage from it must also be required to repay the aid. Moreover, as regards the sale of the recipient company's assets to third-party undertakings, the Commission draws a distinction according to whether those assets have been sold separately or as a unit. It submits that when assets are sold separately at market price, the producers are not required to repay aid because, once the assets have been sold separately, the subsidised activity is no longer present and the aid granted prior to the transfer of the shares is, accordingly, no longer likely to place the recipient company's competitors at a disadvantage. The Commission considers the situation to be different when the assets are sold as a unit, which enables the purchaser to carry on the recipient company's activities. The Commission submits that in such a case the continuation of the subsidised activity can serve to perpetuate the distortion of

competition, so that particular vigilance is called for in order to ensure that the transfer of the recipient company's assets does not give rise to what is in substance an evasion of the obligation to repay by 'sheltering' the assets sold. It states that the possibility of such an evasion cannot be excluded when, in addition to the market price being paid, the transfer of the recipient company's assets as a unit takes place as part of an unconditional procedure open to all of the company's competitors.

305 In the light of those principles, the Commission considers that it was right to require repayment of the aid from LCA and CDA, since:

— CDA continues to carry on the economic activities of the initial recipient of the aid by using the 'contaminated' production plant which it took over within the group of associated undertakings under the control of the TIB;

— CDA and LCA continue to benefit from the aid illegally granted to the joint venture — and its successors — in that the distortion of competition caused by the grant of that aid continues to produce its effects for CDA and LCA;

— the total purchase price of DEM 35.3 million, which was met by assuming liabilities (recital 102 of the contested decision), remained in any event within the same group of undertakings because the TIB controls both CDA and LCA;

— in the case of a group of economically-integrated undertakings, taking account of the purchase price is contrary to its obligation to prevent evasion of its decisions and the Member States' obligation to ensure compliance with its decisions (recitals 118 and 119 of the contested decision).

306 Lastly, the Commission states that the *Land* of Thuringia is wrong to claim that it cannot require recovery from CDA and LCA of the aid which was paid directly or diverted to the Pilz Group. It observes that that aid came to be applied within the range of activities of the joint venture or its successors, even if it was subsequently rechannelled immediately towards other companies within the Pilz Group. According to the Commission, it does not matter in that regard that the aid did not actually benefit the joint venture. In Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, the Court held that the objection based on the fact that the gain no longer exists is not a valid reason to object to the recovery of aid. It submits that the Court's reasoning can be applied to a case such as this one, where the mechanisms for the transfer of assets within a group of undertakings were virtually intended to eliminate the gain from the balance sheets of the initial recipient of the aid. It submits that, in such a case, account cannot be taken of the objection that the gain no longer exists and, on the contrary, the illegal advantage must be attributed to the undertakings in the group which initially received the aid intended for them. Likewise, it submits that the TIB and the associated undertakings can also not rely on that objection, since the rechannelling of the aid by the Pilz Group may also be attributed to the joint venture and its successors.

2. Findings of the Court

307 As a preliminary observation, it should be pointed out that, in accordance with Community law, when the Commission finds that aid is incompatible with the common market, it may require the Member State to recover that aid from the recipient (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraphs 13 and 20; and *Germany* v *Commission*, paragraph 176 above, paragraph 73).

308 Removing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful and seeks to re-establish the previous situation (*Germany* v *Commission*, paragraph 176 above, paragraph 74).

309 That purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it (see to that effect Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraphs 57 and 60). By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 22).

310 Consequently, the main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded by the unlawful aid (*Germany* v *Commission*, paragraph 176 above, paragraph 76).

311 The legality of the recovery order in Article 2 of the contested decision falls to be assessed in the light of these general considerations.

312 It is appropriate to consider separately the legality of that order with respect to its requirement that the aid be recovered, first, from LCA and, second, from CDA. It is common ground that LCA must be viewed as a direct successor of the joint venture and PA, but that CDA is not in the same situation. In the contested decision, the extension of the recovery order to CDA is based on there having been evasion.

313 The *Land* of Thuringia submits that the order to recover the aid from LCA is unlawful because it includes, first, aid which was paid directly to the Pilz Group and, second, aid which, although paid to the joint venture and PA, was diverted to the Pilz Group.

314 The Court finds in this respect that, as evidenced by the tables in recitals 32 and 39 of the contested decision, the aid referred to in Article 1 of that decision does include certain forms of aid which were provided directly to the Pilz Group and PBK, an undertaking belonging to that group. In particular, this is the case for the measure in favour of PBK under the *Land* of Bavaria's (the LfA's) guarantee for DEM 54.7 million, the measure in favour of PBK in the form of a waiver of claim for the amount of DEM 3 million, the measure in favour of PBK in the form of the purchase of shares in PA for DEM 3 million and the measure in favour of the Pilz Group in the form of a DEM 15 million loan.

315 Regarding the first two measures, it is common ground that, although they were provided directly to PBK, those measures were intended to finance the establishment of the Albrechts CD plant, so that, if one disregards the rechannelling of those measures towards other undertakings in the Pilz Group and the infringement of the obligation to state reasons regarding the waiver of the claim of DEM 3 million, in principle the Commission was right to order recovery from LCA (see, to that effect, Case C-457/00 *Belgium* v *Commission* [2003] ECR I-6931, paragraphs 55 to 62).

316 Regarding the purchase price of DEM 3 million and the DEM 15 million loan, the Court finds, as already held in paragraphs 218 and 260 above, that that aid was paid directly to the Pilz Group and was not intended for the restructuring of the joint venture and PA. Accordingly, it is not possible to consider that they had actual use of that aid. As held in paragraph 261 above, this finding is not affected by the fact that the DEM 15 million loan was to serve as a bridging loan for the Pilz Group until such time as an investor willing to buy PA was found, as noted by the Commission in recital 37 of the contested decision. Not only has the Commission not produced any evidence in support of this assertion, it is not established that PA actually derived any benefit from that aid.

317 Accordingly, in so far as it orders the recovery from LCA of the aid referred to in Article 1, including the aid granted to PBK in the form of the purchase price of DEM 3 million and the aid granted to the Pilz Group in the form of the DEM 15 million loan, Article 2 of the contested decision does not comply with the principles governing the recovery of illegal State aid.

318 Next, it is appropriate to consider the line of argument put forward by the *Land* of Thuringia to the effect that the recovery order is illegal in so far as it concerns aid which, although intended for the joint venture and PA, was diverted to undertakings in the Pilz Group.

319 The Court observes that the contested decision contains many findings concerning the diversion of aid referred to in Article 1 of the contested decision to the Pilz Group. Thus, according to recitals 27, 33, 38 and 63 to 75 of the contested decision a major portion of the aid granted for the purpose of the establishment, consolidation and restructuring of the Albrechts CD plant was diverted to undertakings in that group. Those findings also indicate that the diversion of the aid was achieved through over-billing for services provided for the establishment of the plant, through the central cash-management system within the Pilz Group and through non-payment for goods and services provided by the joint venture and PA for the Pilz Group.

320 Likewise, the Court finds that the indictment lodged by the Public Prosecutor's Office with the Landgericht Mühlhausen, which was produced by the German authorities during the administrative procedure, contains a certain amount of information enabling at least an approximate determination to be made of the scale of the diversion of the aid to the Pilz Group. Contrary to the Commission's submissions, the mere fact that that the indictment concerns illegal conduct in the context of the provision of the investment subsidies and allowances by the *Land* of Thuringia does not by itself justify the conclusion that the information contained therein is irrelevant for the assessment which the Commission is required to carry

out. In fact, that indictment, particularly in the description of the various mechanisms used to effect the fraud and the assessment of the value of the investments made, contains specific and useful indications for assessing the scale of the diversion.

321 In those circumstances, the Court finds that, at the very least at the time of adopting the contested decision, the Commission had a body of valid, consistent evidence indicating that the joint venture and PA had not had actual use of much of the aid intended for the establishment, consolidation and restructuring of the Albrechts CD plant. Moreover, that evidence gave at least an approximate picture of the scale of the diversion.

322 It is true that, as stated by the Commission, the case-file does not indicate that the German authorities provided specific information as to the portion of the aid which was diverted to the Pilz Group.

323 It is clear, however, that although it had the necessary means at its disposal for that purpose (see, to that effect, *Germany and Pleuger Worthington* v *Commission*, paragraph 71 above, paragraph 29), there is nothing in the case-file to indicate that it requested the German authorities to provide it with specific information on this point. Furthermore, as evidenced by the decision to initiate the procedure, it had been aware, at least since 1997, that much of the aid had been diverted. Accordingly, it cannot plead that, having regard to the information it had at the time of adopting the contested decision, it was entitled to require recovery of the aid referred to in Article 1 from LCA in so far as it was aid which it knew or ought to have known had not accrued to the joint venture and to PA.

324 Likewise, the Commission's argument that the recovery order in Article 2 of the contested decision is justified because the joint venture and its successors belong to a group of associated undertakings within which there are internal mechanisms for

the transfer of assets cannot be accepted. In addition to the fact that the joint venture was part of the Pilz Group only from October 1992 to the end of December 1993, it is clear from the findings in the contested decision that, in this case, the transfer mechanisms within that group were used solely to the detriment of that undertaking and not for its benefit. Accordingly, it cannot be asserted that, because it belonged to that group, the joint venture had actual use of the aid of which it was not the recipient.

325 Accordingly, in so far as it orders the recovery from LCA of the aid referred to in Article 1, including aid from which LCA has been proven not to have benefited, Article 2 of the contested decision does not comply with the principles governing the recovery of illegal State aid.

326 Next, in so far as Article 2 of the contested decision orders the recovery from CDA of the aid referred to in Article 1 of the decision, the decision shows that the Commission essentially based its assessment on the existence of an intention to evade the consequences of the decision which, according to the Commission, is shown objectively by the fact that CDA benefits from the aid which had been granted previously to PBK, the joint venture, PA and CD Albrechts, inasmuch as it uses the assets of those undertakings and carries on their activities (recitals 118 and 120 of the contested decision).

327 That line of argument cannot be accepted.

328 It is true that, as evidenced by the exchange of correspondence between the German authorities and the Commission during the administrative procedure, the transfer of part of LCA's assets to CDA was intended to rescue that part of LCA's operations by providing it with the opportunity to develop away from the legal and economic

uncertainties which were threatening its survival. Likewise, various items of evidence were adduced by the Commission and ODS in the present proceedings to show that, since the transfer of the assets, CDA has in reality been continuing the activities of the joint venture, PA and CD Albrechts.

329 However, that alone does not prove that there was an intention to evade the effects of the recovery order in the present case.

330 This is borne out by the fact that, as found in recital 103 of the contested decision, CDA paid market price to purchase LCA's assets, so that that transaction does not mean that CDA keeps the actual use of the competitive advantage associated with the aid granted to LCA (see, to that effect, *Germany* v *Commission*, paragraph 176 above, paragraph 92).

331 In such a situation, one cannot accept the argument put forward by the Commission in its written pleadings to the effect that, following CDA's purchase of the assets, LCA was like an 'empty shell from which the illegal aid could not be recovered'.

332 Given that in this case LCA has been in liquidation since the opening of bankruptcy proceedings in October 2000, it should be borne in mind that, according to the case-law relating to undertakings which are recipients of aid and which have gone bankrupt, the restoration of the previous situation and the elimination of the distortion of competition resulting from the illegally disbursed aid may, in principle, be accomplished by the registration of the obligation to repay the aid in question as a debt of the undertaking in liquidation. According to that case-law, such an entry is

sufficient to ensure the enforcement of a decision ordering the recovery of State aid incompatible with the common market (see, to that effect, Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 14; and Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraphs 60 and 62).

333 Next, the Federal Republic of Germany has stated, without being contradicted by the Commission, that, first, only part of the assets were sold to CDA, namely fixed and current assets, short-term usable assets, technical know-how and marketing organisation, and, second, this manner of doing things enabled a higher sum to be obtained than what would have been the case had the assets in question been sold separately.

334 This finding is not affected by the fact that the purchase price was paid in the form of an acquisition of liabilities. The Court notes that this form of payment did not adversely affect the creditors' situation because the reduction in the company's assets was offset by a corresponding reduction in its liabilities.

335 The reference by the Commission in recital 118 of the contested decision does not invalidate this analysis. The Court finds that, in that recital, the Commission explains, in a general and illustrative manner, the criteria it uses to determine whether a specific operation conceals what amounts to evasion. That passage does not, however, contain any application of those criteria to the present case.

336 Accordingly, the Court finds that the findings of fact in the contested decision were not sufficient to justify the Commission's conclusion that the Commission could not find that there was an intention to evade the consequences of the recovery order in the present case.

337 As to the other facts put forward by the Commission in its written pleadings and at the hearing, the Court finds that they are not to be found anywhere in the contested decision and that, accordingly, they may not be relied on to justify extending the recovery order to CDA.

338 For the sake of completeness, it may be observed that those various facts also do not prove that there was evasion in the present case.

339 Thus, the Commission is wrong to maintain that, in the present case, the purchase of the assets took place within the TIB group, that is, a group of associated undertakings. Not only is the existence of an alleged TIB group not referred to in the contested decision, but the Commission has not adduced any evidence to show that LCA and CDA belong to such a group of undertakings, let alone that those undertakings are linked by internal mechanisms for transfers of assets. On the contrary, the statements provided on this point by the *Land* of Thuringia and by CDA are to the effect that the TIB acts as a shareholding company, in accordance with its articles of incorporation.

340 Next, the Commission's contention that the purchase of assets by CDA was not economically rational cannot be accepted. The Court notes that, during the administrative procedure, the German authorities stated several times that CDA's purchase of part of LCA's assets was indeed economically rational. Although 'the commercial character of the transfer [of assets]' is one of the aspects it takes into account in order to determine whether there has been evasion (recital 118 of the contested decision), the Commission did not give any grounds in the contested decision which might refute the German authorities' position.

341 Likewise, the mere fact that LCA and CDA were managed by the same person at the time of the asset purchase in January 1998 and that, since that transaction, CDA holds itself out on the market as the successor to the joint venture and PA does not justify the conclusion that the purchase of LCA's assets was intended to evade the recovery order in Article 2 of the contested decision. Those factors do not suffice to prove that CDA acted with the intention of obstructing enforcement of the contested decision.

342 Lastly, the Court does not accept the Commission's contention that the purchase of LCA's assets as a unit did not take place at the end of an open and transparent procedure and that some of LCA's competitors were thus prevented from purchasing the assets with which the company was carrying on the subsidised activities. On the contrary, the contested decision, some of the evidence in the case-file and the statements made by the *Land* of Thuringia and by CDA at the hearing on 5 May 2004 all show that CDA's purchase of LCA's assets did not take place immediately, but was preceded by unsuccessful attempts to sell LCA as a whole to third parties, including the parent company of the intervener, ODS (see, to that effect, *Germany* v *Commission*, paragraph 176 above, paragraph 95).

343 In the light of the foregoing, the Court finds that the Commission has not established that there was evasion of the consequences of the contested decision which might serve as a basis for requiring CDA to repay the illegal aid granted to the joint venture and its successors.

344 Accordingly, in so far as it orders recovery from CDA and LCA of the aid granted to PBK, the joint venture, PA and CD Albrechts, the contested decision does not comply with the principles governing the recovery of illegal State aid.

345 The conclusion is the same with respect to Article 2 of the contested decision, which orders the recovery of the aid referred to in Article 1 from 'any other undertaking to which [PBK's], [the joint venture's] and [PA's] assets and/or infrastructure have been transferred or will be transferred in such a way as to evade the consequences of this decision'. The Court finds that the extension of the recovery order to those undertakings is based on the same reasons as the extension of that order to CDA.

346 In the light of the foregoing, the Court upholds this plea.

347 Since, in any event, the Court of First Instance cannot substitute its assessment for that of the Commission or the Member State in question as regards the exact determination of the amount of the aid to be recovered by the Member State, Article 2 of the decision must be annulled with respect to the recovery order in its entirety in so far as it concerns the undertakings referred to in Article 2(3). Article 2 of the contested decision must therefore be annulled in so far as it orders recovery of the aid referred to in Article 1 thereof from CDA and LCA and any other undertaking to which the assets and/or infrastructure of PBK, the joint venture and PA have been or will be transferred in such a way as to evade the consequences of that decision.

348 In those circumstances, it is not necessary to consider the other pleas put forward by the *Land* of Thuringia.

Costs

349 Article 87(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the *Land* of Thuringia.

350 The first subparagraph of Article 87(4) of the Rules of Procedure provides that the Member States which have intervened in the proceedings are to bear their own costs. Accordingly, the Federal Republic of Germany is to bear its own costs.

351 The third subparagraph of Article 87(4) of the Rules of Procedure provides that the Court may order an intervener other than those referred to in the first and second subparagraphs of Article 87(4) to bear its own costs. In this case, ODS is to bear its own costs.

On those grounds,

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

hereby:

1. **Annuls Commission Decision 2000/796/EC of 21 June 2000 on State aid granted by Germany to CDA Compact Disc Albrechts GmbH (Thuringia) in so far as:**

   — **in Article 1(1) it includes, as part of the aid granted to R.E. Pilz GmbH & Co Beteiligungs KG, Pilz & Robotron GmbH & Co. Beteiligungs KG and Pilz Albrechts GmbH for the establishment, operation and**

consolidation of the CD plant in Albrechts (Thuringia), an amount of DEM 54.7 million by way of the *Land* of Bavaria's guarantee, an amount of DEM 3 million as debt waiver, as well as an amount of DEM 63.45 million and an amount of DEM 19.42 million by way of the investment subsidies and allowances provided by the *Land* of Thuringia and by the *Land* of Bavaria;

— **in Article 1(2) it includes as part of the aid granted for the restructuring of CDA Compact Disc Albrechts GmbH an amount of DEM 33 million for the acquisition of share capital in PA/CD Albrechts and an amount of DEM 21.3 million in interest-rate advantages;**

— **in Article 1(2) it states that the purchase price of DEM 3 million and the DEM 15 million loan granted by the LfA constitutes aid 'for the restructuring of CDA Compact Disc Albrechts GmbH';**

— **in Article 2 it orders the recovery of the aid referred to in Article 1 from CDA Datenträger Albrechts GmbH and LCA Logistik Center Albrechts GmbH, as well as any other undertaking to which the assets and/or infrastructure of R.E. Pilz GmbH & Co. Beteiligungs KG, Pilz & Robotron GmbH & Co. Beteiligungs KG and Pilz Albrechts GmbH have been or will be transferred in such a way as to evade the consequences of that decision;**

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

3. **Orders the Commission to pay its own costs and those of the *Land* of Thuringia and orders the Federal Republic of Germany and ODS Optical Disc Service GmbH to bear their own costs.**

Azizi García-Valdecasas Cooke

Jaeger Dehousse

Delivered in open court in Luxembourg on 19 October 2005.

E. Coulon J. Azizi

Registrar President

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