

Case T-181/02 R

Neue Erba Lautex GmbH Weberei und Veredlung

v

Commission of the European Communities

(Proceedings for interim measures — State aid — Aid granted in the new Länder — Rescue and restructuring aid — Obligation to recover aid — Urgency — Balancing of interests)

Order of the President of the Court of First Instance, 3 December 2002 . . . II-5086

Summary of the Order

1. *Applications for interim measures — Conditions for admissibility — Main action seeking annulment of a Commission decision ordering repayment of State aid — Possible to bring an action before the national courts against the national enforcement measures — Irrelevant to admissibility of the application for interim measures (Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(1))*

2. *Applications for interim measures — Suspension of operation — Conditions for granting — Serious and irreparable damage — Burden of proof — Financial damage — Risk of insolvency*
(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))
 3. *Applications for interim measures — Suspension of operation — Conditions for granting — Serious and irreparable damage — Undertaking faced with prospect of having to apply for commencement of insolvency proceedings — Assessment on a case-by-case basis — Account taken of the characteristics of the group to which the undertaking belongs*
(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))
 4. *Applications for interim measures — Suspension of operation — Conditions for granting — Serious and irreparable damage — Commission decision ordering recovery of State aid — National enforcement measures — Domestic remedies — Whether relevant*
(Arts 230 EC, 234 EC and 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))
 5. *Applications for interim measures — Suspension of operation — Conditions for granting — Balancing of all the interests involved — Commission decision ordering recovery of State aid*
(Arts 88(2) EC and 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2); Council Regulation No 659/1999, Arts 7 and 11(2))
 6. *State aid — Prohibition — Derogations — Aid which may be regarded as compatible with the common market — Discretion of the Commission — Account taken of circumstances assessed when earlier aid was examined and of the decision adopted on that aid*
(Art. 87(3) EC)
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1. The fact that an undertaking which has been granted State aid the recovery of which has been ordered by the Commission may bring an action before the national courts against the measures to enforce that decision can neither have any bearing on the rule laid down in Article 104(1) of the Rules of Procedure of the Court of First Instance that an application to suspend the operation of a measure shall be admissible only if the applicant has challenged that measure in proceedings before the Court of First Instance nor lead to a refusal to grant such an undertaking which has actually brought an action for annulment against the Commission decision before the Court of First Instance interim judicial protection before the Community judicature.

(see paras 38-39)
 2. The urgency of an application for interim measures must be assessed in relation to the necessity for an order granting interim relief in order to

prevent serious and irreparable damage to the party requesting the interim measure. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of this kind.

It is not necessary for the imminence of the damage to be demonstrated with absolute certainty, it being sufficient, especially when the occurrence of the damage depends on the concurrence of a series of factors, to show that damage is foreseeable with a sufficient degree of probability. However, the party applying for suspension of operation is required to prove the facts forming the basis of its claim that serious and irreparable damage is likely.

3. For the purposes of examining an application for interim measures, a situation in which an undertaking is compelled to apply for the commencement of insolvency proceedings may indeed constitute serious and irreparable damage, given the risk that that implies for the very existence of the undertaking and the serious consequences to which such proceedings give rise, hindering normal operations. However, such an assessment must be carried out on a case-by-case basis, having regard to the facts of each case and the legal issues involved. When making that assessment, account may be taken of the characteristics of the group to which the undertaking concerned is linked.

(see paras 88-89, 92)

Although damage of a pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation, an interim measure is justified if it appears that, without that measure, the applicant would be in a position that could imperil its existence before final judgment in the main action.

4. Where the legality of a decision ordering the recovery of State aid under Article 230 EC is contested, the national court is not bound by the definitive nature of that decision and thus remains entitled to order suspension of the operation of the application for recovery of that aid pending settlement of the case before the Court of First Instance or to refer a question to the Court of Justice for a preliminary ruling under Article 234 EC. Furthermore, the fact that an application for suspension has not been successful before the Community judicature does not prevent suspension being ordered by the national court.

(see paras 82-84)

Therefore, where the aid recipient has requested interim measures before the Community judicature, it is for that recipient to demonstrate that the domestic remedies available to it under national law allowing it to oppose repayment do not enable it to avoid serious and irreparable damage and, consequently, that the condition concerning urgency is satisfied.

the Community interest must normally, if not always, take precedence over the interest of the aid recipient in avoiding enforcement of the obligation to repay it before judgment is given in the main proceedings.

(see paras 107-110)

5. In the event that an application for suspension of the operation of a decision on State aid is brought before him, it is for the judge hearing that application to weigh the applicant's interest in obtaining the interim measures requested against the public interest in the operation of decisions taken in connection with the monitoring of State aid.

Since the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected, the fact that that undertaking does not have a large market share cannot be regarded as establishing that there are exceptional circumstances justifying an order for suspension of the operation of such a decision.

In that regard, the general interest in the name of which the Commission fulfils the tasks entrusted to it, by Article 88(2) EC and Article 7 of Regulation No 659/1999, in order to ensure, essentially, that the functioning of the common market is not distorted by State aid harmful to competition, is particularly important. Consequently,

The fact that the Commission considers that the conditions for adopting a decision to recover the aid provisionally pursuant to Article 11(2) of Regulation No 659/1999 are not met in no way prevents it from finding, at the end of the *inter partes* proceedings, that the Community interest justifies the immediate withdrawal of the aid in question and the immediate restoration of the situation which prevailed prior to payment of that aid. Similarly, the fact that the Commission, after a lengthy procedure, has reached the conclusion that the aid in question is incompatible does not alter in any way

the Community interest in that aid being repaid without delay in order to restore the situation which prevailed before the aid was paid and to suppress the anti-competitive effects on the common market resulting from it.

6. In the context of Article 87(3) EC, the Commission enjoys a wide discretion and, when examining the anti-competitive effects of aid, must take all the relevant factors into account, including, where appropriate, the circumstances already considered in a prior decision and the obligations which that prior decision may have imposed on a Member State.

(see paras 111-113, 115-117)

(see para. 118)