

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

12 May 2004*

In Case T-198/01 R [III],

Technische Glaswerke Ilmenau GmbH, established in Ilmenau (Germany), represented initially by G. Schohe and C. Arhold, and subsequently by C. Arhold and N. Wimmer, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by V. Di Bucci and V. Kreuzschitz, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Schott Glas, established in Mainz (Germany), represented by U. Soltész, lawyer,

intervener,

* Language of the case: German.

APPLICATION for an extension of the suspension of operation of Article 2 of Commission Decision 2002/185/EC of 12 June 2001 on State aid implemented by Germany for Technische Glaswerke Ilmenau GmbH (OJ 2002 L 62, p. 30), ordered in the present case by the orders of the President of the Court of First Instance of 4 April 2002 and 1 August 2003,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES,

makes the following

Order

Background to the dispute and proceedings

- 1 On 12 June 2001 the Commission adopted Decision 2002/185/EC on State aid implemented by Germany for Technische Glaswerke Ilmenau GmbH (OJ 2002 L 62, p. 30; ‘the contested decision’). Having expressly waived in that decision its right to examine all the aid granted to Technische Glaswerke Ilmenau GmbH (‘TGI’ or ‘the applicant’) which might be incompatible with the common market and was included in the measures notified by the Federal Republic of Germany on 1 December 1998, the Commission concentrated on just one of those measures, namely the waiver of payment of DEM 4 million (EUR 2 045 168; ‘the purchase price waiver’) of the purchase price payable by TGI to the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (‘the BvS’) under an agreement of 26 September 1994 (‘asset deal 1’).

- 2 According to the contested decision (Article 1), the grant of the purchase price waiver constitutes State aid which is incompatible with the common market within the meaning of Article 87(1) EC and cannot be authorised pursuant to Article 87 (3) EC. The contested decision (Article 2) therefore imposes on the Federal Republic of Germany an obligation to demand repayment of that aid.

- 3 By application lodged at the Registry of the Court of First Instance on 28 August 2001, the applicant brought an action for the annulment of the contested decision.

- 4 By letter of 17 September 2001, the Commission refused the request made by the German Government in a letter of 23 August 2001 for suspension of recovery of the amount of the purchase price waiver.

- 5 By letter of 2 October 2001, the BvS sent to the applicant a copy of the Commission's letter of 17 September 2001 and gave it formal notice to repay, by 15 October 2001 at the latest, the sum of DEM 4 830 481.10 (EUR 2 469 785.77), which was the amount of the aid in question plus interest. Taking formal note that the applicant had informed it of its intention to bring an action before the Court of First Instance for suspension of the operation of the contested decision, the BvS also stated that, in order to avoid prejudging the outcome of that action, it would not insist on recovery of the disputed aid before the court hearing the application for interim measures had given a ruling.

- 6 By a separate document lodged at the Registry of the Court of First Instance on 15 October 2001, the applicant made an application under Articles 242 EC and 243 EC for suspension of the operation of Article 2 of the contested decision.

- 7 By a first order in the present case (Case T-198/01 R *Technische Glaswerke Ilmenau v Commission* [2002] ECR II-2153; ‘the initial order’) of 4 April 2002, the President of the Court of First Instance ordered, in paragraph 1 of the operative part, that operation of Article 2 of the contested decision be suspended until 17 February 2003 (‘the initial suspension’). In paragraph 2 of the operative part, the President made the suspension granted subject to compliance by the applicant with three conditions.
- 8 The principal facts of the present case preceding the lodging of the application for interim measures are described in paragraphs 7 to 21 of the initial order. Moreover, a more detailed summary of the contested decision can be found in paragraphs 22 to 27 of that order. The proceedings before the President of the Court of First Instance which led to the initial order are described in paragraphs 36 to 47 of that order. The initial order was upheld on appeal by order of the President of the Court of Justice of 18 October 2002 in Case C-232/02 P(R) *Commission v Technische Glaswerke Ilmenau* [2002] ECR I-8977.
- 9 By order of 15 May 2002 of the President of the Fifth Chamber, Extended Composition, of the Court of First Instance, the company Schott Glas was granted leave to intervene in the main proceedings in the present case in support of the form of order sought by the Commission.
- 10 On 2 October 2002 the Commission adopted Decision 2003/383/EC on State aid measure C 44/01 (ex NN 147/98) implemented by Germany for TGI (OJ 2003 L 140, p. 30; ‘the second decision’) following a different formal investigation procedure under Article 88(2) EC which was initiated by letter of 5 July 2001. In the second decision, the Commission found that the Federal Republic of Germany had granted the applicant State aid which was incompatible with the common market, including the conversion of the bank guarantee for the balance of the purchase price fixed by asset deal 1 and a loan of DEM 2 000 000 (EUR 1 015 677) from the Thüringer Aufbaubank (‘the TAB’), and imposed on the Federal Republic of Germany an obligation to recover the aid from the applicant immediately.

- 11 By application lodged at the Registry of the Court of First Instance on 18 December 2002, the applicant brought an action for annulment of the second decision, which was registered under number T-378/02. By application lodged at the Registry of the Court of First Instance on 14 February 2003, TGI also requested suspension of the operation of Article 2 of the second decision. By order of 1 August 2003 in that case (Case T-378/02 R *Technische Glaswerke Ilmenau v Commission* [2003] ECR II-2921), the President of the Court of First Instance ordered that operation of Article 2 of the second decision be suspended until 31 October 2003. Four conditions were attached to that suspension.
- 12 At the same time, the applicant, taking the view that it had complied with all the obligations imposed on it in paragraph 2 of the operative part of the initial order, brought before the President of the Court of First Instance, by application lodged on 17 February 2003, an action for extension of the initial suspension until the Court had given a definitive ruling on the main action.
- 13 By order made on 1 August 2003 in the present case (Case T-198/01 R [II] *Technische Glaswerke Ilmenau v Commission* [2003] ECR II-2895; 'the second order'), the President of the Court of First Instance ordered that operation of Article 2 of the contested decision be suspended until 17 February 2004, subject to the following three conditions:
- first, compliance by the applicant with the four conditions imposed in paragraph 2 of the operative part of the order of 1 August 2003 in Case T-378/02 R *Technische Glaswerke Ilmenau v Commission* ('the first condition');
 - second, repayment by the applicant to the BvS, by no later than 31 December 2003, of an additional sum of EUR 256 000 and the lodging at the Registry of the

Court of First Instance and at the Commission, within one week of repayment and by 7 January 2004 at the latest, of written proof of repayment ('the second condition');

- third, the lodging by the applicant at the Registry of the Court of First Instance and at the Commission, by 6 February 2004 at the latest, of a detailed auditor's report on its financial situation as at 31 December 2003 and, in particular, on the additional amount which it was able to pay before 30 June 2004 at the latest, in the event that the judgment in the main case had not been delivered by that date ('the third condition').

¹⁴ With respect, first of all, to the first condition, the applicant, by letter of 15 September 2003, registered at the Registry of the Court of First Instance on 18 September 2003, lodged a certificate issued by the TAB confirming that the applicant had repaid the debt owed to it. Moreover, by letter of 16 October 2003, which was registered at the Registry of the Court of First Instance on the following day, the applicant lodged documents indicating that the primary mortgage guarantee for the TAB on the fourth furnace had been released and given again to the BvS in order to secure its right to repayment of the purchase price of asset deal 1, and that a guarantee similar to the directly enforceable personal guarantee provided by Mr Geiß on 3 March 1998 for repayment of the loan from the TAB had been provided by it to the BvS in respect of the remaining purchase price of asset deal 1.

¹⁵ Next, with respect to the second condition, the applicant, by letter of 22 December 2003, which was registered at the Registry of the Court of First Instance on the following day, lodged documents certifying that, on 16 December 2003, it had transferred EUR 256 000 to the BvS.

- 16 Lastly, with respect to the third condition, the applicant, by letter which was registered at the Registry of the Court of First Instance on 27 January 2004, requested that the final date for submission of the detailed auditor's report on its financial situation as at 31 December 2003 be postponed until 13 February 2004. On 28 January 2004 the President of the Court of First Instance granted that request.
- 17 By letter of 12 February 2004, which was registered at the Registry of the Court of First Instance on the following day, TGI submitted a report dated 10 February 2004 which had been drawn up by the firm Pfizenmayer & Birkel on the applicant's financial situation as at 31 December 2003 ('the sixth Pfizenmayer report'). By letter registered at the Registry on 17 February 2004, the applicant made an application under Article 116(2) of the Rules of Procedure of the Court of First Instance for confidential treatment, as regards the intervener, of certain information contained in its letter and in the sixth Pfizenmayer report.
- 18 Taking the view (on the basis of the facts summarised in paragraphs 14 to 17 above) that it had complied with all of the obligations imposed on it in paragraph 2 of the operative part of the second order, the applicant brought before the President of the Court of First Instance, by document lodged on 17 February 2004, an application for extension of the suspension of operation of the contested decision until the Court of First Instance had given a definitive ruling on the main action ('the application for extension').
- 19 Schott Glas and the Commission submitted their observations on the application for interim measures on 27 February 2004 and 1 March 2004 respectively.
- 20 By order of 3 March 2004, made under the second subparagraph of Article 105(2) of the Rules of Procedure, the President of the Court of First Instance ordered that operation of the contested decision be suspended provisionally until a ruling had been given on the application for an extension of the suspension.

21 At the request of the court ruling on its application for interim measures, the applicant submitted on 24 March 2004 its written observations on the Commission's observations of 1 March 2004.

22 On 6 April 2004 the Commission submitted written observations on the applicant's observations of 24 March 2004. Schott Glas did not submit observations.

Forms of order sought by the parties

23 The applicant claims that the President should:

- suspend operation of Article 2 of the contested decision until a definitive ruling has been given in the main case or, in the alternative, until 30 June 2004;

- order the defendant to pay the costs.

24 The Commission, supported by Schott Glas, contends that the President should:

- dismiss the application for extension of the suspension of operation of the contested decision;

— order the applicant to pay the costs.

Law

25 Under Article 242 EC in conjunction with Article 243 EC, and under Article 225(1) EC, the Court of First Instance may, if it considers that circumstances so require, order that operation of the contested measure be suspended or prescribe any necessary interim measures.

26 Article 104(2) of the Rules of Procedure provides that an application for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for suspension of operation must be dismissed if either one of them is not satisfied (order of the President of the Court of Justice of 14 October 1996 in Case C-268/96 P(R) *SCK and FNK v Commission* [1996] ECR I-4971, paragraph 30; order of the President of the Court of First Instance of 8 December 2000 in Case T-237/99 R *BP Nederland and Others v Commission* [2000] ECR II-3849, paragraph 34). Where appropriate, the judge hearing such an application must also weigh up the interests involved (order of the President of the Court of Justice of 23 February 2001 in Case C-445/00 R *Austria v Council* [2001] ECR I-1461, paragraph 73, and the initial order, paragraph 50).

27 Since the written observations of the parties contain all the information required for a ruling on the application for interim measures, there is no need to hear their oral argument.

The applications for confidential treatment of 17 February, and 11 and 25 March 2004

28 By letters registered at the Registry of the Court of First Instance on 17 February, and 11 and 25 March 2004, the applicant made applications under Article 116(2) of the Rules of Procedure for confidential treatment, as regards the intervener, of information contained in its application for interim measures, in the Commission's observations of 1 March 2004 and in its own observations of 24 March 2004. It also lodged a non-confidential version of each of those documents. Having had the non-confidential versions of those documents notified to it by the Registry of the Court of First Instance, the intervener did not raise objections or submit observations with respect to them.

29 Given that the intervener has not raised any objections, the President takes the view that the applications for confidential treatment of 17 February, and 11 and 25 March 2004 may be granted, save in so far as they relate to sums already reimbursed by the applicant to the BvS in accordance with the initial order and the second order. Those sums are public knowledge given that the two orders were published in *Reports of Cases before the Court of Justice and the Court of First Instance* and/or were made available on the Court's website.

Prima facie case

Arguments of the parties

30 In its application for interim measures, the applicant takes the view, essentially, that, as regards the question whether a prima facie case has been established, there is no reason to depart from the assessment made by the President in the initial order and in the second order.

- 31 The Commission considers that, in dealing with the application for extension, the President cannot rely on the assessment of the prima facie case made in the initial order and in the second order. That assessment is based on the finding that the first and third pleas raised by the applicant are not manifestly unfounded. First, the assessment by the President of the Court of First Instance of the third plea was rejected by the President of the Court of Justice in his order relating to the appeal against the initial order (order in *Commission v Technische Glaswerke Ilmenau*, cited in paragraph 8 above, paragraph 76). Second, with respect to the first plea, the applicant produced the 'Agreement amending the privatisation contracts (contract I and contract II) between the BvS and TGI' in the main proceedings. That agreement shows that the BvS's waiver of the purchase price was not an amendment of the privatisation contract resulting from the fact that an essential condition of the contract was no longer satisfied but rather new aid, which, moreover, the applicant has always regarded as such.
- 32 In its observations of 24 March 2004, the applicant responds, in particular, to the arguments that the notification of a measure to the Commission does not amount to an acknowledgement that it is State aid.

Findings of the President

- 33 In the initial order, the President found that the first plea raised by the applicant in its main action could not, prima facie, be rejected (initial order, paragraphs 74 to 79). That finding was upheld by the President of the Court of Justice in the order in *Commission v Technische Glaswerke Ilmenau*, cited in paragraph 8 above (paragraphs 63 to 69 and 78) and subsequently reiterated by the President of the Court of First Instance in the second order (paragraphs 42 and 43).

34 However the Commission contends that, as regards the first plea raised by the applicant, the condition for a prima facie case is no longer fulfilled because of the evidence produced by the applicant at the Court's request on 12 September 2003 in the context of the main action, that is to say, after the second order. It should therefore be examined whether, as the Commission argues, it is impossible to restate in the present order the assessment which the President made of the first plea in the initial order and in the second order.

35 In that regard it must be borne in mind that the position adopted by the President in connection with the initial order was based, inter alia, on provisional findings as to the Commission's failure to challenge in the contested decision the existence of a promise made by the Land of Thuringia which might have formed part of an approved aid scheme (paragraphs 75 to 78 of the initial order).

36 The Commission argues that it appears, on the basis of the 'Agreement amending the privatisation contracts (contract I and contract II) between the BvS and TGI', that the BvS's waiver of the purchase price was not an amendment of the privatisation contract resulting from the fact that an essential condition of the contract was no longer satisfied but rather new aid, which the applicant has always regarded as such. The Commission relies, in particular, on a provision worded as follows:

'The parties are aware that the purchase price waiver of [DEM] 4 million, the conversion of the guarantee for the final instalment of the purchase price amounting to [DEM] 1.8 million and the grant by the TAB of a loan of [DEM] 2 million must be notified to the European Commission. The relevant procedure was initiated by the BvS on 3 December 1998 with the requisite cooperation of the parties and will be pursued further by the BvS.'

- 37 However the existence of that provision by no means calls into question the observation made by the President, in paragraph 75 of the initial order, that, in recital 82 in the preamble to the contested decision, the Commission failed to take into consideration the breaking of the alleged promise and its consequences and thus apparently failed to challenge the existence of that promise.
- 38 Moreover, the provision referred to by the Commission does not at this stage mean that the possibility can be ruled out that the promise alleged by the applicant did in fact exist or, a fortiori, that the applicant's argument that the aid in question is not new aid can be regarded as manifestly unfounded. The mere fact that the provision concerned contains no precise reference to a promise is, prima facie, insufficient to show that that promise was not given. It will be for the chamber ruling on the merits of this case to answer that factual question if necessary.
- 39 Therefore, having regard to the information made available to the President, the arguments put forward by the Commission do not, at this stage, make it possible to modify the assessment of the first plea made in the initial and the second orders. That plea still cannot be regarded as manifestly unfounded. Accordingly, the test for a prima facie case remains satisfied and it is unnecessary to rule on the other pleas raised in the main action.

Urgency

Arguments of the parties

- 40 In its application for interim measures and in its observations of 24 March 2004, the applicant argues, in essence, that, with respect to the urgent need to order interim

measures, the arguments which it previously put forward in this case remain valid. As is apparent from the sixth Pfizenmayer report, it continues to be established that, despite the improvement in the financial position of TGI, the turnover of which increased by ...¹% in 2003, it cannot repay the aid in question without becoming insolvent. TGI adds that, given the premature loan repayment to the TAB and the exceptional payment to the BvS required in the initial order and the second order, and given the unexpected sharp fall in the dollar, the assets available to it on 31 December 2003 have been almost entirely used up.

- 41 The Commission, however, makes several points in its written observations intended to show that the applicant's financial position is very difficult and that it will therefore become bankrupt in any case.
- 42 First, the Commission observes that, according to the sixth Pfizenmayer report, the undertaking's finances are in such a critical state that it will not even be able to pay again the sum previously paid in compliance with the conditions imposed in the initial order and in the second order.
- 43 Second, the sixth Pfizenmayer report does not specify the origin of the funds essential to the investments which the applicant declares are now impossible to postpone.
- 44 Third, in the sixth Pfizenmayer report, on the one hand, the unrealistic view is taken that the applicant's suppliers will give it time to pay but, on the other, it is not stated why the applicant is in a position to overcome the fall in the dollar which has contributed to its difficulties.

¹ — Confidential information omitted.

- 45 Moreover, the Commission takes the view that precisely those factors show that Mr Pfizenmayer cannot be regarded as an objective and impartial expert.
- 46 In its observations, Schott Glas takes the view, essentially, that the applicant's viability is more uncertain than ever.

Findings of the President

- 47 It is appropriate, first of all, to reiterate the findings in paragraphs 96 to 99 of the initial order.
- 48 In addition, it should be noted that, according to the sixth Pfizenmayer report, while the applicant's financial position remains difficult, it is nevertheless tending towards recovery.
- 49 It thus appears, first, that although TGI's position remains strained and uncertain, particularly in view of the decrease in its available resources, it is still not possible to postulate with sufficient certainty that it is in any event likely to become insolvent before delivery of the judgment in the main proceedings. In particular, it appears that its turnover increased in 2003 and that the level of its available financial means, which continues to be positive, is likely to improve slightly between now and 30 June 2004. Since the hearing in the main proceedings took place on 11 December 2003, delivery of the judgment in the main proceedings is now very close. It therefore seems unlikely that, in such a short space of time, the applicant's position will deteriorate to such an extent that it will have to be declared insolvent.

- 50 Second, it is clear from the sixth Pfizenmayer report that, if the applicant had to repay the sums claimed by the BvS which have not yet been repaid, its financial position may immediately deteriorate to the point where it would have to be declared insolvent.
- 51 In particular, it is clear from the sixth Pfizenmayer report that the resources available to the applicant on 31 December 2003 amounted to EUR ... and that, whilst they cannot be precisely calculated and assessed, the levels of TGI's short-term cash assets remain, albeit positive, low in total. Likewise, the cash funds forecast for 30 June 2004, which are in the order of EUR ..., remain low. Finally, it seems that the risk of insolvency may become reality even if TGI does not undertake certain significant investments, in particular the reconstruction of the fourth furnace.
- 52 Finally, the President considers that the Commission's claims as to the lack of objectivity and the inaccuracies in the sixth Pfizenmayer report are, in part, based on subjective or exaggerated interpretations of that audit and are in any event insufficient to alter the plausibility of the conclusion reached in paragraphs 48 to 51 above.
- 53 In light of the above, the applicant has succeeded in showing to the requisite legal standard that it will survive economically at least until the judgment in the main action is delivered and that immediate operation of the contested decision would in the near future, if not immediately, imperil its existence.
- 54 Consequently, the condition of urgency remains satisfied in the present case. It is therefore necessary to weigh up the interests at stake.

Weighing up of the interests

Arguments of the parties

- 55 In its application for interim measures and in its observations of 24 March 2004, the applicant invokes the same interests as those put forward in its first application for interim measures (paragraphs 110 and 111 of the initial order). It argues that two additional factors support the argument in favour of an extension of the suspension of operation of the contested decision without any special conditions.
- 56 First, since the hearing in the main action took place on 11 December 2003, an extension would be limited to a short period. Second, the exceptional payments necessary for compliance with the conditions imposed by the President of the Court of First Instance have made it impossible for the applicant to create cash reserves. Given the need to reconstruct the fourth furnace, the applicant is no longer in a position to make any additional payment.
- 57 In its observations, the Commission takes the view that the situation in the present case in no way involves exceptional and highly specific circumstances which might support the argument for the grant of interim measures.
- 58 First, as was found in the contested decision, there are 10 undertakings on the market on which the applicant is active which may therefore benefit from repayment of the sums in question. In addition, it is established that repayment of the aid in question will by no means reinforce the dominant position of Schott Glas since that undertaking is not dominant on the relevant market.

59 Second, the Commission calls into question the assessment made by the President in the second order. First, the second order differs from the initial order in that it merely pointed out that Schott Glas has a much higher turnover than the applicant, whereas the initial order was, according to the Commission, based on the strengthening of Schott Glas's dominant position, which is of no relevance whatsoever to the present case. Second, the second order does not explain why Schott Glas's turnover is a relevant factor in weighing up the interests. To the extent that that turnover must be interpreted as meaning that Schott Glas may receive from its parent company virtually unlimited funds to cover any losses, the position adopted by the President is inconsistent with the case-law (Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 21, and Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 23).

60 Third, no account is taken in the second order of the position of the eight competitors of TGI and Schott Glas referred to in the contested decision.

61 Finally, the second order is based on erroneous findings of fact in so far as it is stated that Schott Glas has apparently received considerable amounts of aid from the Land of Thuringia. The decision to which the Court refers relates to an undertaking which is neither the intervener nor its parent company.

Findings of the President

62 The President, following the findings set out in paragraphs 115 to 117 of the initial order and in paragraphs 66 and 67 of the second order, takes the view that there

continue to be exceptional and very particular circumstances in the present case which tend to support the argument in favour of an extension of the interim measures.

- 63 First, it must be noted that, in its observations on the weighing up of the interests, the Commission essentially confines itself to criticising the findings made by the President in the second order, against which it did not bring an appeal, and does not refer to any change in circumstances which might require the President to modify those findings.
- 64 Second, the Commission's arguments do not, in any event, affect the finding, already made in paragraph 117 of the initial order and in paragraph 67 of the second order, that, in view of the very particular circumstances of the present case, in particular the very low amount of the aid in question as compared with the total amount of aid granted to the applicant, it is unrealistic to consider that, if the applicant had to repay the aid immediately, it would be able to regain its previous specific competitive position on the glass market or markets in question. Nor can those arguments call into question the fact that Schott Glas's turnover, which is considerably higher than that of the applicant, precludes it from suffering a substantial loss as a result of the grant of interim measures. Moreover, as has already been found in paragraph 67 of the second order, in view of its financial position, it remains unlikely in any event that TGI will be in a position to act in a way which distorts competition and is liable to affect either Schott Glas or TGI's other competitors.
- 65 Finally, in the specific context of the present order, account must be taken of the fact that delivery of the judgment in the main action is now imminent. Consequently, even if suspension of the operation of the contested decision could, by maintaining TGI's presence on the glass market or markets in question, lead to distortion of competition or have an adverse effect on other interests at stake, those effects would now be produced for only a very limited period.

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Accordingly, in the very particular circumstances of the present case, the grant of interim measures is justified and adequately meets the need to guarantee effective provisional legal protection. Moreover, given that the date of delivery of the judgment in the main action is very close, there is no need to attach any specific conditions to the suspension of operation or for that suspension to be of short duration.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

- 1. The operation of Article 2 of Commission Decision 2002/185/EC of 12 June 2001 on State aid implemented by Germany for Technische Glaswerke Ilmenau GmbH is suspended until delivery of the judgment in the main action.**
- 2. The costs, including those of the intervener, are reserved.**

Luxembourg, 12 May 2004.

H. Jung

Registrar

B. Vesterdorf

President