

Case T-198/01 R

Technische Glaswerke Ilmenau GmbH

v

Commission of the European Communities

(Proceedings for interim measures — Admissibility — State aid —
Obligation to recover aid — Prima facie case — Urgency —
Weighing up of interests)

Order of the President of the Court of First Instance, 4 April 2002 II-2158

Summary of the Order

1. *Applications for interim measures — Conditions for admissibility — Admissibility of the main application — Actions for annulment of a decision declaring State aid to be incompatible with the common market and ordering its recovery — Proceedings before national courts for recovery of the aid — No such proceedings — Main action appearing prima facie admissible — Application for interim measures — Admissible (Arts 230 EC, 242 EC and 243 EC; Council Regulation No 659/1999, Art. 14(3))*

2. *State aid — Planned aid — Investigation by the Commission — Inter partes procedure — Right of the parties concerned to information — Restricted — Right of the recipient of the aid to comment on all the points raised — Whether excluded*
(Art. 88(2) EC; Council Regulation No 659/1999, Art. 20)
 3. *Community law — General legal principles — Right to sound administration — Reference to the Charter of Fundamental Rights of the European Union — Duty not to discriminate between the parties concerned in an investigation procedure relating to alleged State aid — Obligation to communicate to the aid recipient the observations submitted by a competitor*
(Charter of Fundamental Rights of the European Union, Art. 41(1))
 4. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Serious and irreparable damage — Financial damage — Position that might imperil the existence of the applicant company*
(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))
 5. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Balancing of all the interests at stake — Decision on State aid — General interest in the name of which the Commission fulfils its tasks and interest of the recipient of aid*
(Arts 88(2) EC, 242 EC and 243 EC; Charter of Fundamental Rights of the European Union, Art. 47; European Convention on Human Rights, Arts 6 and 13; Rules of Procedure of the Court of First Instance, Art. 104(2); Council Regulation No 659/1999, Arts 7 and 14(3))
 6. *Applications for interim measures — Suspension of operation of a measure — Interim measures — Variation or cancellation — Condition — Change in circumstances*
(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 108)
1. An action for annulment of a decision declaring State aid to be incompatible with the common market and ordering its recovery is not inadmissible where no proceedings for recovery of the aid in question have been initiated and where the applicant has not exhausted all the legal remedies open to him. To allow a recipient of aid to plead, in proceedings brought before the national courts, the invalidity of a Commission decision ordering the Member State concerned to recover the aid granted to the recipient would effectively enable the recipient of the aid to circumvent the definitive nature which a decision necessarily assumes, by virtue of the principle of legal certainty, once the time-limit laid down by Article 230 EC for bringing proceedings has expired.

It follows that, in principle, a recipient of State aid who, after learning of the

adoption of such a decision, brings an action for annulment before the Court of First Instance may seek an order for interim measures under Articles 242 EC and 243 EC. That interpretation is endorsed by Article 14(3) of Regulation No 659/1999, under which recovery of aid which is unlawful or incompatible with the common market is to be effected without delay and in accordance with the procedures under the national law of the Member State concerned, without prejudice, exclusively, to any order for interim measures made by the Community judicature.

(see paras 54-55, 58)

2. In a formal investigation procedure relating to planned State aid, the parties concerned act as information sources for the Commission. Consequently, far from enjoying the same rights to a fair hearing as those which individuals against whom a procedure has been initiated are recognised as having, the parties concerned have only the right to be involved in the procedure to the extent appropriate in the light of the circumstances of the case. In particular, the recipient of State aid cannot be accorded the general right to comment on all the potentially key points raised during the formal investigation procedure. Such a right would exceed the right to be heard and might entitle a recipient to an exchange of

views and arguments with the Commission, a right which, until now, has always been denied to all the parties concerned within the meaning of Article 88(2) EC and Article 20 of Regulation No 659/1999.

(see paras 81, 84)

3. The Commission has the duty to treat impartially all the parties concerned in a formal investigation procedure relating to alleged State aid. The Commission's duty not to discriminate between the parties concerned is associated with the right to sound administration, which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States. In that regard, Article 41(1) of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 confirms that '[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union'. It follows that, notwithstanding the restricted nature of the aid recipient's rights to participate and receive information, the Commission, as the body responsible for the procedure, may have, at least *prima facie*, an obligation to communicate to the recipient observations which it has expressly requested from a competitor following observations initially lodged by that recipient. To allow the Com-

mission to choose, during the procedure, to ask a competitor of the recipient for specific further information without granting the recipient the opportunity to acquaint himself with the observations submitted in reply and, if appropriate, to respond to them, runs the risk of significantly reducing the practical effect of that recipient's right to be heard.

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.

(see paras 96, 99)

Such an irregularity results in annulment of the contested decision only if, had it not been for the irregularity, the outcome of the formal investigation procedure might have been different.

5. Article 104(2) of the Rules of Procedure of the Court of First Instance provides that an application for interim measures is to 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. Also, where appropriate, the judge hearing the application for interim measures weighs up the interests involved.

(see paras 85-86)

4. 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. 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. Nevertheless, an interim measure is

In the event of an application for suspension of operation of a decision on State aid, 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. That 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 judg-

ment is given in the main proceedings. However, it is possible for the recipient of aid to obtain interim measures provided that the conditions relating to a prima facie case and urgency are met. To decide otherwise would risk making it practically impossible to use the opportunity, granted by Articles 242 EC and 243 EC, as provided for in Article 14(3) of Regulation No 659/1999, of obtaining effective interim legal protection, even in cases relating to State aid. Such protection is a general principle of Community law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention on Human Rights and in Article 47 of the Charter of Fundamental Rights of the European Union.

(see paras 50, 113-115)

6. Under Article 108 of the Rules of Procedure of the Court of First Instance, the judge hearing an application for interim measures may at any time vary or cancel his order on account of a change in circumstances. That possibility reflects the fundamentally precarious nature in Community law of measures granted in interim relief proceedings.

(see para. 123)