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

8 July 2004 *

In Case T-198/01,

Technische Glaswerke Ilmenau GmbH, established in Ilmenau (Germany), represented initially by S. Gerrit 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. Kreuschitz and V. Di Bucci, 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 annulment of Commission Decision 2002/185/EC of 12 June 2001 on State aid implemented by Germany for Technische Glaswerke Ilmenau GmbH (Germany) (OJ 2002 L 62, p. 30),

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

composed of: R. García-Valdecasas, President, P. Lindh, J.D. Cooke, H. Legal and M.E. Martins Ribeiro, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 11 December 2003,

gives the following

Judgment

Legal background

1 Article 87(1) EC declares that, save as otherwise provided for in the Treaty, any State aid liable to affect trade between Member States and to distort competition is incompatible with the common market.

2 Article 87(3) EC provides:

'The following may be considered to be compatible with the common market:

...

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest ...'.

3 On 23 December 1994, the Commission published a notice laying down Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12, 'the Guidelines on aid for rescuing and restructuring firms in difficulty'), which are applicable to the present case. According to those guidelines:

'1.2 ... there are circumstances in which State aid for rescuing firms in difficulty and helping them to restructure may be justified. It may be warranted, for instance, by social or regional policy considerations, by the desirability of maintaining a competitive market structure when the disappearance of firms could lead to a monopoly or tight oligopoly situation, and by the special needs and wider economic benefits of the small and medium-sized enterprise (SME) sector.

...

3.2 Restructuring aid

...

3.2.2 General conditions

... for the Commission to approve aid a restructuring plan will need to satisfy all the following general conditions:

(i) Restoration of viability

The *sine qua non* of all restructuring plans is that they must restore the long-term viability and health of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions. Consequently, restructuring aid must be linked to a viable restructuring/recovery programme submitted in all relevant detail to the Commission. The plan must restore the firm to competitiveness within a reasonable period.

...

(iii) Aid in proportion to the restructuring costs and benefits

The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Therefore, aid beneficiaries will

normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing. To limit the distortive effect, the form in which the aid is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process. Nor should any of the aid go to finance new investment not required for the restructuring. Aid for financial restructuring should not unduly reduce the firm's financial charges.

...'

4 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), which governs the procedure for monitoring State aid, entered into force on 16 April 1999.

5 Article 4(4) of Regulation No 659/1999 provides that the Commission is to initiate a formal investigation procedure with regard to the measure notified to it where, after a preliminary examination, it has doubts as to the compatibility of that measure with the common market. Under Article 6(1) of that regulation, it is to call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period. Article 6(2) provides that the comments received are to be submitted to the Member State concerned, which then has an opportunity to reply to those comments.

6 Article 20(1) of Regulation No 659/1999 provides:

'Any interested party may submit comments pursuant to Article 6 following a Commission decision to initiate the formal investigation procedure. Any interested

party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission pursuant to Article 7.'

Background to the dispute

7 Technische Glaswerke Ilmenau GmbH is a German company established in Ilmenau in the Land of Thuringia. It is active in the field of glassware manufacture.

8 It was set up in 1994 by Mr and Mrs Geiß, with the aim of taking over four of the 12 glass production lines of the former Ilmenauer Glaswerke GmbH ('IGW'), a company which had been liquidated by the Treuhandanstalt (a public-law body responsible for the restructuring of undertakings of the former German Democratic Republic which subsequently became the Bundesanstalt für vereinigungsbedingte Sonderaufgaben, 'the BvS'). The production lines in question came from the nationalised assets of the Volkseigener Betrieb Werk für Technisches Glas Ilmenau, which, before the reunification of Germany, had been the centre of glass manufacture in the former German Democratic Republic.

9 The sale of the four production lines by IGW to the applicant was carried out in two stages, namely by a first contract of 26 September 1994 ('asset deal 1'), approved by the Treuhandanstalt in December 1994, and by a second contract of 11 December 1995 ('asset deal 2'), approved by the BvS on 13 August 1996.

10 Under asset deal 1, the purchase price of the first three production lines came to a total of 5.8 million German marks ('DEM') (2 965 493 euros ('EUR')) and was to be paid in three instalments, on 31 December 1997, 1998 and 1999 respectively. Payment was secured by a charge of DEM 4 000 000 (EUR 2 045 168) and a bank guarantee of DEM 1 800 000 (EUR 920 325).

11 It is undisputed that none of those three instalments was paid.

12 Under asset deal 2, the fourth production line was also sold to the applicant by IGW at the price of DEM 50 000 (EUR 25 565).

13 It is likewise undisputed that the applicant had cash flow problems in 1997. In view of those problems, it entered into negotiations with the BvS. These culminated in a contract of 16 February 1998 by which the BvS agreed to reduce the purchase price under asset deal 1 by DEM 4 000 000 ('the price reduction').

14 By letter of 1 December 1998, the Federal Republic of Germany notified the Commission of various measures designed to bail out the applicant, which included the price reduction. Part of that notification related to a restructuring plan for the period 1998 to 2000, including, in particular, the search for a new private investor able to contribute DEM 3 850 000 (EUR 1 968 474).

15 By letter SG (2000) D/102831 of 4 April 2000, the Commission initiated the formal investigation procedure provided for in Article 88(2) EC. It considered that it was possible that the German authorities had made various grants of State aid in connection with asset deal 1 and asset deal 2. That alleged aid is described in the

notice published in the *Official Journal of the European Communities* of 29 July 2000 (Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, concerning aid measure C 19/2000 (ex NN 147/98) — Aid in favour of Technische Glaswerke Ilmenau GmbH — Germany (OJ 2000 C 217, p. 10)), in which the Commission found provisionally that two of the measures in question could be regarded as aid incompatible with the common market, namely the price reduction and a loan of DEM 2 000 000 granted to the applicant by the Aufbaubank of Thuringia (TAB) on 30 November 1998, under aid scheme NN 74/95 (approved by Decision SG (96) D/1946).

16 By letter received on 7 July 2000, the Federal Republic of Germany submitted to the Commission its observations on the initiation of the formal investigation procedure. In its view, the price reduction did not constitute State aid but was consistent with the behaviour of a private creditor seeking to recover the debt owed to him in circumstances in which a requirement that the debt be repaid in full would probably have led to the applicant's going into liquidation.

17 After having become aware of the communication of 29 July 2000, the applicant presented its observations to the Commission on 28 August 2000. It asked the Commission to grant it access to the non-confidential part of the file and subsequently to give it the opportunity to submit fresh observations.

18 By letter of 11 October 2000, the BvS extended the time-limit for payment by the applicant of the balance of the price fixed under asset deal 1, namely DEM 1.8 million, and also for payment of the interest outstanding between 1 January 1998 and 20 June 2000, which amounted to DEM 198 800 (EUR 101 645). Without requesting the payment of additional interest, the BvS fixed the new dates for payment as 31 December 2003, 2004 and 2005. It was thus envisaged that a sum of DEM 666 600 (EUR 340 827) would be repaid on each of those dates.

19 By communication of 20 November 2000, the Federal Republic of Germany presented to the Commission its comments on the observations submitted to the Commission on 28 September 2000 by one of the applicant's competitors, Schott Glas, in the course of the formal investigation procedure.

20 On 27 February 2001, the Federal Republic of Germany sent to the Commission, as an annex to its communication, a copy of a report dated 24 November 2000 on the applicant's position and profitability prospects which had been drawn up by a chartered accountant, Mr Arnold ('the Arnold report').

21 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 its right to examine, within the same formal investigation procedure, other potential aid, such as the conversion of the bank guarantee of DEM 1 800 000, constituted under asset deal 1, into a subordinated charge ('nachrangige Grundschuld') and the deferral until 2003 of payment of the remainder of the price fixed under that deal (recitals 42, 64 and 65 in the preamble to the contested decision), the Commission reached the conclusion that the price reduction would not have been accepted by a private creditor and constituted State aid which was incompatible with the common market within the meaning of Article 87(1) EC.

22 The Commission, for three reasons (recitals 76 to 80 in the contested decision), considered that, in granting the price reduction, the BvS had not behaved like a private creditor. Even if asset deal 2 were dependent on the price reduction, there is, according to the contested decision, no evidence to suggest that it was less expensive to carry out the transaction in that way than to insist on payment of the full price initially agreed on and waive performance of asset deal 2 (recital 81). The Commission also rejected the applicant's argument that, given the reduction in investment grants from the Land of Thuringia, the price reduction was no more

than an adjustment of the privatisation contract. The Commission took the view that the BvS and the Land of Thuringia were different legal entities (recital 82). The Commission concluded that the BvS had not acted to safeguard its financial interests but to ensure the existence of the company (recital 83).

23 According to the contested decision, the price reduction could not qualify for an exemption as ad hoc restructuring aid, since the conditions laid down in the Guidelines on aid for rescuing and restructuring firms in difficulty were not fulfilled. In particular, the plan for restructuring the applicant was not based on realistic assumptions and it was doubtful whether its long-term viability could be restored (recitals 92 to 97).

24 The Commission also drew attention to a condition imposed on restructuring aid, namely that the restructuring plan must contain measures to offset as far as possible any adverse effects on competitors (recitals 98 to 101). However, notwithstanding the observations of one of the applicant's competitors, which stated 'that there was structural overcapacity in some of the product markets in which [the applicant] was active', the Commission concluded that, according to the information available to it, 'the overall market does not seem to be suffering from overcapacity' (recital 101).

25 Finally, the Commission concluded that the condition as to the proportionality of the aid was not fulfilled, since there was no private investor contribution within the meaning of the guidelines referred to above (recitals 102 to 107). Furthermore, noting that, according to the same competitor, the applicant was systematically selling its products below market price, and even below cost price, and had received continuous cash injections intended to offset its losses, the Commission could not rule out the possibility that the company may have used those resources for market-distorting activities not linked to the restructuring process (recital 103). It concluded that the price reduction was therefore not compatible with the common market (recital 109).

26 According to Articles 1 and 2 of the contested decision:

'*Article 1*

The State aid which [the Federal Republic of] Germany has implemented for Technische Glaswerke Ilmenau GmbH in the form of a waiver of DEM 4 000 000 of the purchase price agreed in the context of asset deal 1 concluded on 26 September 1994 is incompatible with the common market.

Article 2

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

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipient until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.'

27 The applicant concedes that it had known of the contested decision since 19 June 2001, when representatives of the BvS sent it a copy.

28 By letter of 23 August 2001, the Federal Republic of Germany informed the Commission that it intended, subject to the latter's agreement, to defer recovery of the aid in question so as not to compromise negotiations between the applicant and a potential new investor.

Procedure before the Court

29 By application lodged at the Registry of the Court of First Instance on 28 August 2001, the applicant brought the present action.

30 By a separate document lodged at the Registry of the Court of First Instance on 13 November 2001, the Commission made an application for the case to be decided under an expedited procedure in accordance with Article 76a of the Rules of Procedure. The applicant objected to that application in its observations lodged in that regard on 11 December 2001. The parties were notified of the decision of the Fifth Chamber, Extended Composition, of the Court of First Instance not to grant the Commission's application on 17 January 2002.

31 By order of 4 April 2002 (Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153), the President of the Court, upon application by the applicant, suspended operation of Article 2 of the contested decision until 17 February 2003. Suspension was made subject to the requirement that the applicant meet three conditions, which it did.

32 By order of the President of the Fifth Chamber, Extended Composition, of the Court of First Instance of 15 May 2002, Schott Glas was granted leave to intervene in support of the form of order sought by the Commission.

33 By order of 18 October 2002 (Case C-232/02 P(R) *Commission* v *Technische Glaswerke Ilmenau* [2002] ECR I-8977), the President of the Court of Justice dismissed the appeal brought by the Commission against the order of 4 April 2002, cited above.

34 After hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure and, on 10 July 2003, decided to ask the main parties to reply, either in writing or at the hearing, to a number of questions and to produce certain documents. The parties complied with those requests.

35 By order of 1 August 2003 (Case T-198/01 R II *Technische Glaswerke Ilmenau* v *Commission* [2003] ECR II-2895), the President of the Court of First Instance, following a second application by the applicant, suspended operation of Article 2 of the contested decision until 17 February 2004 and subjected that suspension likewise to fulfilment by the applicant of three conditions.

36 By letter of 15 October 2003, the applicant requested that the Commission produce Annex 1 to the communication of the Federal Republic of Germany of 27 February 2001, which had been produced by the Commission as a measure of organisation of procedure. The applicant also asked the Court to grant it leave to reply in writing, and not at the hearing as had been required by the Court, to one of the questions which had been put to it and the Commission, on the ground that the Commission had itself replied to that question in writing. Those requests were granted.

37 By order of 12 November 2003, the President of the Fifth Chamber, Extended Composition, of the Court of First Instance granted the applications lodged by the applicant for confidential treatment of both the procedural documents served on the parties and, where appropriate, those to be served on them concerning certain information contained in the main parties' replies to the Court's questions and their responses to its requests for the production of documents, while at the same time reserving the right to uphold any objections which might be raised in that respect.

38 The parties' oral argument and replies to the questions put by the Court were heard at the hearing on 11 December 2003.

39 By application lodged on 17 February 2004, the applicant requested that the President of the Court extend the suspension of operation of the contested decision until the Court had given a definitive ruling on the main action.

40 By order of 3 March 2004, made pursuant to the second subparagraph of Article 105 (2) of the Rules of Procedure, the President of the Court 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.

41 By order made on 12 May 2004 (Case T-198/01 R (III) *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-1471), the President of the Court ordered that the contested decision be suspended until delivery of the present judgment.

Forms of order sought by the parties

42 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

43 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

44 The party intervening in support of the Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs, including those relating to its intervention.

Law

45 In support of its action, the applicant raises, essentially, five pleas alleging, first, infringement of Article 87(1) EC and a failure to state reasons; secondly, infringement of Article 87(3)(c) EC and that the statement of reasons is inadequate; thirdly, infringement of the rights of the defence and of the principle of sound

administration; fourthly, that the statement of reasons for the contested decision is inadequate; and, fifthly, infringement of the second sentence of Article 20(1) of Regulation No 659/1999.

The first plea: infringement of Article 87(1) EC and failure to state reasons

46 In connection with its first plea, the applicant submits, first of all, that the price reduction is not aid within the meaning of Article 87(1) EC. It submits that the reduction was an adjustment of asset deal 1 to which it was entitled on account of the Land of Thuringia's failure to honour its promise to grant a subsidy covered by an aid scheme previously authorised by the Commission. Moreover, the contested decision contains no statement of reasons in that regard. The applicant goes on to allege that the Commission misapplied the test of a private investor in a market economy and that the reasons given in the contested decision in that respect are inadequate. Finally, in the alternative, it challenges the calculation of the amount of aid which the Commission requires to be repaid.

The right to adjust asset deal 1

— Arguments of the parties

47 The applicant submits that the reduction by DEM 4 million of the price of DEM 5.8 million fixed under asset deal 1 is compensation for the Land of Thuringia's failure to honour its promise to pay DEM 4 million, which it made in 1994 during the negotiations preceding conclusion of that deal.

48 The Land of Thuringia's promise of aid was covered by the 23rd framework plan of the joint programme for 'improving regional and economic structures', a regional investment aid scheme authorised by the Commission under Article 87(3)(a) EC by Decision of 1 August 1994 (No 157/94, SG (94) D/11038). The applicant points out that, under that scheme, the Federal Republic of Germany was entitled to grant to an investor repurchasing an undertaking from the BvS aid to the amount of 27% of the sum invested in that undertaking. Further aid amounting to 16% of the sum invested could be granted if the investor was a 'small or medium enterprise' ('SME'). Within the framework of asset deal 1, that additional aid, which was equal to DEM 4 million, was promised to the applicant. However, the Land of Thuringia subsequently refused to pay that aid, without stating the precise reasons for that refusal. The applicant and the BvS therefore initiated negotiations at the end of 1996, with a view to adjusting asset deal 1, and, as a result, the purchase price fixed under that deal was reduced by DEM 4 million.

49 Contrary to what the intervener asserts, the aforementioned promise of aid was not inconsistent with the Community rules, as the applicant was, at least until the end of 1995, an SME.

50 Moreover, that argument of the intervener is irrelevant since the applicant and the BvS would have fixed the purchase price at DEM 1 million (EUR 511 292) in asset deal 1 had they known that the aid promised by the Land of Thuringia would not be paid. Further, it would not have been contrary to the rules governing State aid to fix the purchase price at DEM 1.8 million. In 1994, those rules did not preclude the BvS from selling undertakings with less than 1 000 employees to be privatised by it at a negative price, that is to say, for a symbolic amount together with promises on its part to pay aid.

51 The applicant points out that, during the formal investigation procedure, it claimed to have a right as against the BvS to adjustment ('zivilrechtlicher Anspruch auf Anpassung') of asset deal 1, as a result of the Land of Thuringia's failure to honour

its promise of aid. That right is derived from the rules of German civil law on the adjustment of agreements in the event that there is a fundamental change in the circumstances at the root of the agreement ('Wegfall der Geschäftsgrundlage'), which have been laid down by case-law and codified in Paragraph 313 of the Bürgerliches Gesetzbuch (German Civil Code). In the present case, one of the decisive reasons for the conclusion of asset deal 1 was the aforementioned promise. The two parties agreed to fix the purchase price at DEM 5.8 million on the basis of their common expectation that the promise would be honoured. Since the aid promised was not granted, the purchase price was adjusted, in accordance with Paragraph 313(3) of the German Civil Code, to the real value of the undertaking, which was equal to the price discussed by the parties before the promise was made.

52 Contrary to what the Commission claims, the German Government confirmed the applicant's assertions by declaring, in its communication of 27 February 2001, that it 'concurs with the statements made by the [applicant] in its observations on the initiation of the formal investigation procedure'.

53 In the contested decision (recital 82), the Commission conceded that it was possible that the Land of Thuringia had promised to grant aid and that the applicant had a right to adjust the contract as a result of the failure to honour that promise. However, it simply denied the legal relevance of those facts, which had been brought to its attention in the applicant's observations of 28 August 2000 and were confirmed by the German Government in its communication to the Commission of 27 February 2001. Since the Commission's argument is not to the point, the contested decision contains no reasons in that regard.

54 The Commission and the intervener are therefore wrong to challenge those facts for the first time before the Court, in order to justify the contested decision. Under Article 253 EC, the contested decision must be self-sufficient and the reasons on which it is based may not be stated in subsequent written or oral explanations (order of 4 April 2002 in *Technische Glaswerke Ilmenau*, paragraph 75 and the case-law cited).

55 The applicant argues that it was for the Commission to prove, in the contested decision, that aid had been granted, after examining carefully and impartially whether, in the factual and legal context of the case, the adjustment of the price fixed in asset deal 1 may be regarded as a decision which a reasonable private creditor would have taken. In the absence of such an examination, it is not established that State aid was granted and the contested decision is vitiated by a failure to state reasons. It must therefore be annulled and it is unnecessary to examine the rules of German civil law.

56 Moreover, should it nevertheless be held necessary for the matters which it puts forward to be corroborated, the applicant suggests that questions be put to the BvS and that Mr Geiß be heard as a witness since he took part in all the negotiations on privatisation.

57 The applicant likewise rejects the Commission's argument in recital 82 in the contested decision that the failure to grant the aid promised by the Land of Thuringia is irrelevant to the present case because the Land of Thuringia and the BvS are two separate legal persons. In the context of the monitoring of State aid, the conduct of the various territorial entities is in fact attributable to the Member State concerned as a whole (Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* v *Commission* [1999] ECR II-1871, paragraph 38). In the present case, the Land of Thuringia is merely a funding body. That Land's promise to grant aid and the price reduction granted by the BvS are therefore not attributable to distinct legal persons.

58 The Commission, supported by the intervener, rejects the above arguments in their entirety.

— Findings of the Court

59 With respect to the applicant's claim that there was a failure to state reasons inasmuch as the Commission did not state the true reasons for its failure to take into account in the contested decision the promise to grant aid of DEM 4 million allegedly made by the Land of Thuringia, it is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review. The requirement to state reasons must be assessed according to the circumstances of the case. 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 not only to its wording but also to its context and all the legal rules governing the matter in question (judgments in Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-113/00 *Spain* v *Commission* [2002] ECR I-7601, paragraphs 47 and 48; Case C-114/00 *Spain* v *Commission* [2002] ECR I-7657, paragraphs 62 and 63; and Case T-323/99 *INMA and Itainvest* v *Commission* [2002] ECR II-545, paragraph 55).

60 In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 31, and Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 35).

61 When examining whether the obligation to state reasons was satisfied in the present context, it should be pointed out that the procedure for reviewing State aid is a procedure initiated in respect of the Member State responsible for granting the aid and that the parties concerned within the meaning of Article 88(3) EC, which

include the recipient of the aid, cannot themselves seek to debate the issues with the Commission in the same way as may the abovementioned Member State (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 29, and Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraphs 81 and 82).

62 In the present case, contrary to what the applicant argues, the Federal Republic of Germany did not submit, during the administrative procedure, that the grant by the BvS of the price reduction was intended to compensate the failure by the Land of Thuringia to honour its promise to grant investment aid of DEM 4 million to the applicant. During the administrative procedure, the Federal Republic of Germany merely submitted that the grant of the price reduction was intended to prevent the applicant from going into liquidation.

63 Although, in its communication to the Commission of 27 February 2001, the Federal Republic of Germany stated that it 'concurs with the statements made by the [applicant] in its observations on the initiation of the formal investigation procedure', that statement appears in the introductory part of the communication relating to the application of Article 87(3)(c) EC. In any event, the fact is that the Federal Republic of Germany did not refer explicitly to the alleged promise by the Land of Thuringia to grant aid to the applicant as a reason for the price reduction agreed to by the BvS.

64 Accordingly, the Commission could not be required to state reasons for the rejection of the argument based on the right to adjustment of asset deal 1, raised by the applicant during the administrative procedure, which were as exhaustive as those which the Federal Republic of Germany was entitled to expect from the Commission when it rejected that State's arguments.

65 In the present case, the Commission responded to the argument raised by the applicant during the administrative procedure and based on its right to adjust asset deal 1 as a result of the fact that the Land of Thuringia failed to honour its promise of aid.

66 Recital 82 in the contested decision states:

'[The applicant] submits that the BvS's waiver does not constitute State aid but is an adjustment of the privatisation contract inasmuch as the Free State of Thuringia has disbursed less in the way of investment grants than was agreed in connection with the privatisation of the first three production lines. The BvS and the Free State of Thuringia are, however, different legal entities, so the Commission cannot accept this argument. Any claims which [the applicant] may have against the Free State of Thuringia and the BvS must be treated separately.'

67 That reasoning of the Commission enabled the applicant, as a party concerned, to understand why its argument had been rejected. Indeed it contests the relevance of those reasons and the Court is able to review their legality.

68 It follows that the complaint of a failure to state reasons in the contested decision in that regard must be rejected.

69 With respect to the soundness of the assessment made by the Commission in recital 82 in the contested decision, it should be observed that, contrary to what the applicant claims, the Commission did not accept that the Land of Thuringia had promised to grant the applicant investment aid of DEM 4 million. The Commission

merely contemplated a situation in which the applicant might be able to rely on such rights against the Land of Thuringia, as is confirmed by the fact that it made reference to 'any claims which [the applicant] may have against the Free State of Thuringia'.

70 Thus, even if the applicant were able to rely on such claims, the Commission took the view that its line of argument was irrelevant because the Land of Thuringia and the BvS are distinct legal entities.

71 It is true that the prohibition laid down in Article 87(1) EC covers all aid granted by the Member States or through State resources and does not distinguish between aid granted directly by the State and that granted by public or private bodies established or appointed by it to administer the aid (Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 21, and *Regione autonoma Friuli-Venezia Giulia*, cited above, paragraph 38).

72 Nevertheless, it cannot be held, on that mere basis, that the grant of the price reduction by the BvS was intended to compensate the failure by the Land of Thuringia to pay the alleged investment aid.

73 First of all, the alleged investment aid was not one of the measures of which the Federal Republic of Germany notified the Commission on 1 December 1998, which included the price reduction.

74 Moreover, according to the applicant, the Land of Thuringia promised in 1994 to pay it investment aid covered by the 23rd framework plan of the joint programme for 'improving regional and economic structures', which was a regional investment aid scheme.

75 However, as the Commission contends in its written pleadings, the price reduction was not covered by that specific aid scheme and therefore could not be assessed by the Commission in the light of its provisions. The price reduction was granted to the applicant by the BvS, a Federal trust-management body, in order to enable the applicant to deal with the financial difficulties facing it and to restore its viability, not to support the regional economy of the Land of Thuringia, which was the objective of the 23rd framework plan.

76 Moreover, the grant of that alleged investment aid fell within the separate competence of the Land of Thuringia and not that of the BvS, as is corroborated by the fact, which the applicant conceded at the hearing, that Thuringia would have had to grant that aid using its own resources.

77 Accordingly, even if the Land of Thuringia did in fact promise that investment aid to the applicant, it cannot be held that the Commission erred in its assessment by rejecting the argument, derived from the right to adjust asset deal 1, on the ground that the BvS and the Land of Thuringia are distinct legal entities.

78 In any event, the applicant has failed in its written pleadings to establish to the requisite legal standard that the Land of Thuringia actually promised to grant it investment aid of DEM 4 million.

79 Although the Commission did not rely on that consideration in the contested decision when rejecting the applicant's argument based on its right to adjust asset deal 1, the Court, by way of measures of organisation of procedure, requested the production of various documents which might demonstrate that the Land of Thuringia made a promise of aid. Thus, the applicant provided the Court, first of all, with the letter from the BvS of 18 February 1998 in which the essential elements of the joint action between the BvS, the Land of Thuringia and the private investor were communicated to the applicant, its letter to the BvS of 19 February 1998 and the agreement of 19 February 1999 on the price reduction. The applicant referred to those letters in its observations to the Commission of 28 August 2000 on the initiation of the administrative procedure.

80 However, although those documents specifically concern the grant of the price reduction to the applicant, none of them contains evidence of a promise by the Land of Thuringia to grant aid of DEM 4 million.

81 The applicant then produced a request for aid — referred to in the application — which it had made to the Land of Thuringia by letter of 5 February 2001. That letter states that 'during the discussions on privatisation, the Free State of Thuringia promised to support the project with investment subsidies amounting to 43% (27% + 16% [if the investor was an] SME) = DEM 10.75 million ... of which only 6.75 million have ultimately been authorised since, in the intervening period, the Community definition of SME has changed to the detriment of [the applicant], with the result that the Land is no longer able to honour its promises'. However, that letter of the applicant cannot be regarded as establishing to the requisite legal standard that the Land of Thuringia made a promise to grant aid of DEM 4 million which justified the BvS's consent to the price reduction of the same amount. Even if the alleged promise of a subsidy of 16% to which the applicant refers in that letter is the promise of aid of DEM 4 million in question, the Land of Thuringia withdrew that promise, as the applicant itself concedes.

82 Since the applicant had stated, moreover, that the price reduction was one of the decisive factors leading to the conclusion of asset deal 1, the Court also requested that it produce that contract. However, nothing contained in asset deal 1 makes it possible to conclude that the price reduction was justified by the alleged promise to grant aid which the Land of Thuringia failed to honour.

83 Finally, at the Court's request, the applicant produced a copy of a letter of 15 August 1996 — referred to in its observations to the Commission of 28 August 2000 — addressed to it by the Land of Thuringia, which shows that that land granted a subsidy of DEM 4 680 000 (EUR 2 392 846) and to which the applicant attached, on its own initiative, a copy of the subsidy decision of the Land of Thuringia of 19 August 1996. However, when questioned on the content of those letters at the hearing, the applicant stated that the aid which they concerned was not the promised aid of DEM 4 million which the Land of Thuringia allegedly undertook to grant it during the privatisation in question.

84 It follows from the above that the applicant has failed to establish to the requisite legal standard that the fixing of the purchase price of the first three production lines at DEM 5.8 million was justified by the alleged promise by the Land of Thuringia to grant investment aid of DEM 4 million. Indeed, at the hearing, the applicant conceded that it had no document formally proving that the Land of Thuringia made such a promise.

85 Taking the view that it has gained sufficient information from the measures of organisation of procedure adopted under Article 64 of the Rules of Procedure, the Court considers that there is no need to grant the applicant's request that questions be put to the BvS and that Mr Geiß be heard as a witness (see paragraph 56 above).

86 Accordingly, since the applicant has failed to substantiate the premiss on which its reasoning is based, namely that the Land of Thuringia promised to pay investment aid, there is no need either to examine the applicant's arguments as regards the notion of adjustment of contracts in the event that there is a change in the underlying circumstances or to determine whether the alleged aid was covered by the 23rd framework plan.

87 It follows from all of the foregoing that the complaint based on the right to adjust asset deal 1 must be rejected as unfounded.

The alleged misapplication of the test of a private operator in a market economy

— Arguments of the parties

88 The applicant alleges that the Commission interpreted the private investor criterion too restrictively. The Commission ought to have examined the price reduction from the point of view of a private holding company or a group of private undertakings motivated by long-term viability prospects of the undertakings receiving the aid and by the credibility of its own image (order of 4 April 2002 in *Technische Glaswerke Ilmenau*, paragraph 65).

89 In particular, when applying the private investor test to the Federal Republic of Germany, the Commission ought to have taken account of the promise to grant aid made by Land of Thuringia in 1994 and found that the price reduction was merely a means of honouring that promise and thus did not give rise to a loss. Moreover, by

preventing the applicant from becoming insolvent and going into liquidation, that measure also enabled it to avoid losing aid which had been previously granted to it.

90 The applicant also complains that, in the contested decision (recitals 67 to 85), the Commission rejected the Federal Republic of Germany's line of argument that, from the point of view of a private creditor, the partial waiver of payment of the price fixed under asset deal 1 was to be preferred in order to enable the fourth production line to be transferred under asset deal 2. When considering the possibility of such a transfer, even in the event of liquidation of the applicant, the Commission not only substituted its own assessment for that of the Member State concerned but, moreover, went beyond the scope of the reasonable considerations taken into account by a private investor.

91 Furthermore, the reasons for the contested decision are inadequate in so far as no reference is made to the BvS report of 30 May 2000, which was attached to the Federal Republic of Germany's communication to the Commission of 3 July 2000. The Commission ought to have stated why it did not follow that report, which explained why the Federal Republic of Germany had concluded that the price reduction was consistent with the conduct of a private investor.

92 The Commission counters that the contested decision (recitals 78, 79 and 83) refers to the test of a private creditor and not to that, relied on by the applicant, of a private investor. The line of argument concerning the private investor is therefore irrelevant and the arguments relating to the test of a private creditor are inadmissible because they were not raised in the application.

93 The Commission denies that it applied the private creditor test too restrictively. The Federal Republic of Germany having informed him that the applicant had virtually ceased normal trading and was on the verge of insolvency, a private creditor would have taken steps to recover the debts owed to him. The Commission's calculations show that it would have been less onerous for the Federal Republic of Germany not to grant the price reduction.

94 The three reasons leading to the conclusion that the BvS did not behave as a private creditor are set out in detail in the contested decision (recitals 76 to 80). With specific respect to the fourth production line, which was the subject of asset deal 2, the Commission stated that at no time did it take the view that that line could, in any event, be sold to the applicant. The contested decision is based on the idea that, in the event of the applicant's liquidation, the fourth production line could be sold to a third party, together with the applicant's other plant. Moreover, there is nothing to suggest that asset deal 2 would not have been concluded if the price had not been reduced since the price fixed under that deal of DEM 50 000 was practically a gift. Finally, the applicant does not explain what impact the error allegedly committed by the Commission had on its calculations.

95 The intervener concurs with the Commission's line of argument.

— Findings of the Court

96 First, as regards the admissibility of the applicant's arguments relating to the private creditor test, Article 48(2) of the Rules of Procedure prohibits the introduction of new pleas in law in the course of proceedings unless they are based on matters of fact or law which have come to light in the course of the procedure. Here, the arguments relied on by the applicant in its reply with respect to the private creditor

test which the Commission applied in the contested decision are a response to the argument put forward by the Commission in its defence that the private investor test referred to in the application is irrelevant to the present case. Those arguments are therefore not a new plea but the development of a plea relied on the application which alleges infringement of Article 87(1) EC in so far as the Commission misapplied the test of a private operator in a market economy. The Commission's objection of inadmissibility must therefore be rejected.

97 Secondly, with respect to the merits of those arguments, it is appropriate to point out that the assessment by the Commission of the question whether a measure satisfies the test of a private operator in a market economy involves a complex economic appraisal. Where the Commission adopts a measure involving such an appraisal, it enjoys a wide discretion and, even though judicial review is in principle a comprehensive review of whether a measure falls within the scope of Article 87(1) EC, review of that measure is limited to establishing whether there has been compliance with the rules governing procedure and the statement of reasons, whether any error in law has been made, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (see, to that effect, Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraphs 125 to 127 and 129, and Case T-98/00 *Linde* v *Commission* [2002] ECR II-3961, paragraph 40).

98 In order to determine whether the reduction of some of the applicant's debts to the BvS constitutes State aid, it is appropriate, in the present case, to apply the test of a private creditor in a market economy, which was referred to in the contested decision and which, moreover, was not challenged by the applicant.

99 By granting the price reduction, the BvS did not act as a public investor acting in a manner comparable to that of a private investor pursuing a structural policy — whether general or sectoral — and guided by the longer-term prospects of profitability of the capital invested. That public body had in fact to be compared to a

private creditor seeking to obtain payment of sums owed to it by a debtor in financial difficulties (see, to that effect, Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 46, Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 24, and *HAMSA*, cited above, paragraph 167).

100 In this context, it should be observed that, during the administrative procedure, the Federal Republic of Germany stated that the applicant had been facing serious financial difficulties in 1997. Therefore, according to the German authorities, insistence by the BvS on payment of the purchase price fixed under asset deal 1 would probably have led to the applicant's liquidation and thus to non-performance of asset deal 2. Accordingly, the Federal Republic of Germany takes the view that it was more advantageous for the BvS to reduce the price by DEM 4 million to give a final cost of DEM 1 811 000 than to insist on the full purchase price fixed under asset deal 1, which would have given rise to costs of DEM 2 590 000 (recitals 73 to 75 in the contested decision).

101 The applicant challenges the reasons which led the Commission to reject, in the contested decision, the argument put forward by the Federal Republic of Germany during the administrative procedure that the reduction by DEM 4 million of the price fixed in asset deal 1 was intended to reduce the financial burden on the BvS and was therefore the most economically advantageous solution.

102 In its written pleadings, the applicant submits that the contested decision is based on the unrealistic assumption that asset deal 2 could have been performed even if it had gone into liquidation and claims that, in any event, since the Federal Republic of Germany's argument is based on rational economic considerations, the Commission may not substitute its own assessment for that of the Member State concerned.

103 Nevertheless, in support of that complaint, the applicant merely asserts that the Commission exceeded the monitoring powers conferred on it for the purpose of establishing whether the Member State concerned has acted as a private creditor in taking the view that 'there is no evidence to suggest that asset deal 2 would not have become effective if the BvS had not waived part of its claim.'

104 That unsubstantiated assertion cannot establish that the Commission committed a manifest error of assessment in finding that there was no evidence enabling it to regard the price reduction as a precondition for performance of asset deal 2 (recitals 76 to 78 in the contested decision).

105 In any event, in the contested decision, the Commission also considered the possibility that asset deal 2 would not have been performed if the BvS had insisted on payment of the full purchase price of the first three production lines that had been fixed in asset deal 1. In that connection, it relied on two other considerations which, in its view, establish that the Federal Republic of Germany cannot validly claim that the price reduction was the most economically advantageous solution.

106 First, the Commission found that, even if asset deal 2 could not have been performed had there been no price reduction, it was not established that the BvS had acted in the manner of a private creditor in granting that reduction (recital 79 in the contested decision). It took the view that, if the BvS had not granted the price reduction and thus allowed the applicant to go into liquidation, account would not have had to be taken of the costs of reclaiming the site of the fourth production line, contrary to what the Federal Republic of Germany did in the economic appraisals supporting its argument. That reclamation was in fact necessary for the purposes of developing a technology park. However, a private creditor would not have been obliged to undertake such a project.

107 In its written pleadings, the applicant has not challenged the Commission's arguments with respect to the reclamation of the site of the fourth production line necessary for the creation of a technology park. However, in its replies to the Court's questions, the applicant submitted that the BvS was under a legal obligation to reclaim that site and that the proposed development of a technology park was heavily subsidised.

108 Aside from the fact that it has not been substantiated by the applicant, that argument cannot call into question the Commission's assertion that a private creditor would not have been bound by an obligation to build a technology park. Since such a project was not linked to the objective of restructuring the applicant, the Commission was entitled to take the view that it is not an obligation which falls within the scope of the conduct of a private creditor but is part of the exercise of discretionary public powers falling within the authority of the State.

109 The Commission also found that the German authorities had fixed the price of purchasing that site from the applicant at DEM 1 047 000 (EUR 535 323) in the event that the price fixed in asset deal 1 was reduced by DEM 4 million. By contrast, the Federal Republic of Germany calculated it at just DEM 470 000 (EUR 240 307) in the event that the BvS did not reduce the price and thus cause the applicant to go into liquidation. The Commission stated that that reduction in the purchase price of the site had not been further elucidated (recital 79 in the contested decision).

110 Despite not having challenged the Commission's assessment in its written pleadings, the applicant submitted, in its replies to the Court's questions, that the reduction in the purchase price of the site was justified by the need to reclaim it. However, even if the BvS was under an obligation to reclaim the site of the fourth production line, account cannot be taken of both that reclamation for DEM 2 200 000 (EUR 1 124 842) and the reduction of the purchase price by DEM 1 047 000 to DEM 470 000.

111 It follows that the Commission was entitled not to take account of the costs of reclaiming the site of the fourth production line when calculating the costs which the BvS would have borne if it had insisted on payment of the full price fixed under asset deal 1, with the result that, in failing to do so, it did not commit a manifest error of assessment.

112 It can be found on the basis of that fact alone that the Commission was right to take the view that, contrary to the information provided by the Federal Republic of Germany in that regard, the costs arising for the BvS from the grant of the price reduction were higher than those which it would have had to pay if there had been no reduction.

113 Secondly, the Commission also argues in the contested decision (recital 80) that, when comparing the financial burden to be borne by the BvS, on the one hand, in the event of a price reduction and, on the other, in the event of payment of the full price initially fixed under asset deal 1, the Federal Republic of Germany failed to take account of investment aid of DEM 1 million granted by the BvS under asset deal 2. If that aid had been taken into account, it would have been clear that the costs to be borne by the BvS would be higher if it granted the price reduction.

114 The applicant submitted, in response to a question of the Court, that that aid of DEM 1 million, provided for in Article 5 of asset deal 2, was an irrecoverable cost ('sunk cost'). According to the applicant, since the fourth production line could be operated only if its components were renewed, the BvS undertook to reimburse the applicant for the costs of maintaining that line up to the amount of DEM 1 million which, in view of their purpose, could not be recovered and would not give rise to rights in the event of insolvency.

115 However, in its reply to the Court's question, the applicant merely stated that the aid of DEM 1 million agreed by the BvS was an irrecoverable cost, without supplying evidence made available to the Commission during the administrative procedure.

116 Moreover, such a circumstance cannot justify the omission of that aid from the calculation of the costs arising for the BvS from performance of asset deal 2. Even if that aid was a cost which the BvS could not recover in the event of the applicant's liquidation and the subsequent non-performance of asset deal 2, the BvS nevertheless granted that aid in connection with performance of asset deal 2. It therefore had to be taken into account when calculating the costs arising for the BvS from performance of asset deal 2, in addition to the grant of the price reduction.

117 It follows that the applicant has failed to show that the Commission committed a manifest error in the findings set out in recital 80 in the contested decision.

118 Since it has been found that the price reduction was already the most costly option (see paragraph 112 above), the same would have been true, *a fortiori*, if the BvS had had to pay additional aid of DEM 1 million.

119 Accordingly, the argument by which the applicant complains that the Commission failed to take account of the fact that the price reduction could be justified in the interest of avoiding the loss of the aid which had previously been granted with a view to concluding asset deal 1 cannot be upheld.

120 Moreover, in its written pleadings, the applicant alleges that the aim of maintaining the credibility of the BvS and of promoting its public image is a factor which might reasonably be taken into account by a private operator. The Commission ought to have taken account of the promise to grant aid made by the Land of Thuringia in 1994 and found that the price reduction was simply a means of fulfilling that promise.

121 However, as has already been held, the applicant has failed to show that the Commission committed a manifest error of assessment in taking the view that the applicant was not entitled to rely on a right to adjust asset deal 1. Accordingly, it cannot be found that the credibility of the BvS could have been affected by insistence on payment of the purchase price of the first three production lines that had been fixed at DEM 5.8 million under asset deal 1.

122 It is clear from the above that the Commission did not commit a manifest error of assessment in finding that the BvS had not behaved like a private creditor operating under normal market conditions, and that the Commission did not misapply that test.

123 Thirdly, with respect to the claim that the statement of reasons in the contested decision is inadequate in so far as the Commission failed to explain why it did not take account of the BvS report of 30 May 2000, it should be observed that, in stating its reasons, the Commission was entitled to restrict itself to setting out the facts and legal considerations having decisive importance in the context of its decision (see paragraph 60 above).

124 That report, which was drawn up two years after the grant of the price reduction, states:

'From an economic point of view, the better solution, both for the BvS and for [the applicant], would be that it succeed in finding, as it intends, an investor in 2000 who

is able to make available capital of DEM 3 850 000 and that the BvS's claim for the purchase price of DEM 5 800 000 be extinguished by payment of DEM 1 800 000 plus interest.'

125 The report thus makes continuation of the applicant's activities subject not only to the price reduction but also to a new contribution by an investor of DEM 3 850 000. The need for such a contribution had already been referred to in the 1998 restructuring plan. However, it is undisputed that no new private investor could be found (recital 95 in the contested decision).

126 Moreover, in its communication to the Commission of 27 February 2001, the Federal Republic of Germany stated that the BvS report of 30 May 2000 was merely an initial approach which did not take account, for the purposes of adjusting the 1998 restructuring plan, of certain quarters of recession in 1998 and 1999.

127 Accordingly, the Commission was rightly able to take the view that that report was not a relevant fact which had to be referred to in the contested decision. The contested decision is therefore not vitiated by an inadequate statement of reasons in that regard.

128 In light of all the above, that complaint must also be rejected.

The allegedly erroneous determination of the amount of aid

129 The applicant submits, in the alternative, that the Commission erred in its determination of the amount of aid to be repaid under Article 2 of the contested decision. The Commission failed to adduce evidence that the aid did actually

amount to DEM 4 million. Since Article 87(1) EC refers to aid granted 'through State resources', the amount of aid declared incompatible with the common market is equal to the loss of revenue suffered by the BvS as a result of granting the price reduction.

130 The Commission does not deny that the applicant would have gone into liquidation if the BvS had required payment of the price fixed under asset deal 1. However, it presumes that, had that been the case, asset deal 2 would nevertheless have been performed, which, in the applicant's view, is unrealistic. Therefore, in determining the amount of alleged aid, the Commission failed to take account of the additional losses which the BvS would have suffered if the second contract had not been performed. In addition, according to the calculation in the contested decision, the BvS's loss of revenue in the event of the applicant's liquidation would only have been equal to the amount available to the creditors and not DEM 4 million. Since the Commission calculated the amount of aid in question at an amount which is inconsistent with its own findings, the contested decision must be annulled.

131 The Commission, supported by the intervener, rejects that line of argument.

132 The Court observes that it is settled case-law that the aim pursued by the Commission when it requires repayment of unlawful aid is to make the recipient forfeit the advantage which it has enjoyed over its competitors on the market and to restore the situation prior to payment of the aid (see, to that effect, Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 66, and Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 27). Moreover, recovery cannot depend on the form in which the aid was granted (Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 16).

133 It has also been held (see, inter alia, Case 310/85 *Deufil* v *Commission* [1987] ECR 901) that the withdrawal of unlawful aid by recovery is the logical consequence of the finding that it is unlawful. Consequently, the recovery of unlawfully granted State aid for the purpose of re-establishing the previously existing situation cannot, in principle, be regarded as disproportionate to the objectives of the Treaty provisions on State aid (Case C-142/87 *Belgium* v *Commission*, cited above, paragraph 16).

134 Article 2(1) of the contested decision is worded as follows:

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

135 Where, as in the present case, aid is unlawfully granted in the form of a reduction of the price fixed under a sales contract, it is wrong to claim, as the applicant does, that the amount of aid to be recovered is less than the amount of that reduction.

136 Under asset deal 1, the BvS was to sell the first three production lines for DEM 5.8 million. As a result of the price reduction, the applicant obtained an economic advantage of DEM 4 million from which its competitors did not benefit.

137 The applicant cannot reasonably claim that, from the point of view of a private creditor, the amount constituting State aid was less than the amount of the price reduction and that full payment of the price fixed under asset deal 1 would have given rise to further losses for the Federal Republic of Germany as it has already been held that such a creditor operating under normal market conditions would not have granted that reduction (see paragraph 122 above).

138 The applicant submits that, in any event, the loss suffered by the Federal Republic of Germany was not DEM 4 million but rather the provision in respect of that amount available for creditors in connection with the liquidation which would have taken place if the BvS had not granted the price reduction.

139 However, since the purpose of recovering unlawfully granted aid is to restore the situation which existed prior to payment of that aid, the Commission was entitled to order the reimbursement of that aid. By requiring reimbursement of the price reduction, which is likely to lead to the applicant's liquidation, the applicant will find itself in a position similar to that in which it would have been if the price reduction had not been granted, that is to say — according to the applicant — in liquidation. If the applicant does indeed go into liquidation, it is for the Federal Republic of Germany to ensure, in accordance with the relevant rules provided for under national law, that the aid is in fact recovered and that liquidation does not preclude enforcement of the contested decision (see, to that effect, Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraphs 16 and 17).

140 It follows that this complaint and the first plea in its entirety must be rejected as unfounded.

The second plea: infringement of Article 87(3)(c) EC and inadequate statement of reasons

Arguments of the parties

141 The applicant observes, first of all, that the Commission must take account of the market structure when examining the proportionality of aid under Article 87(3)(c) EC (Case T-123/97 *Salomon* v *Commission* [1999] ECR II-2925, paragraph 79, and Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, paragraph 88). It relies on the Guidelines on aid for rescuing and restructuring firms in difficulty. Those guidelines refer, by way of example, to cases in which the disappearance of firms could lead to a monopoly or oligopoly situation. The applicant adds that the Commission is under an obligation to establish whether the grant of aid is accompanied by an infringement of other provisions of Community law, such as Article 82 EC and Article 2 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 13) (Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 78; Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175, paragraph 41 et seq.; and Case T-156/98 *RJB Mining* v *Commission* [2001] ECR II-337, paragraph 112 et seq.).

142 In the present case, the Commission committed a manifest error of assessment by failing to take into consideration, among all the factors weighed up for the purpose of assessing the proportionality of the aid under Article 87(3)(c) EC, the fact that, if the applicant were to disappear, the Schott Glas group would acquire or strengthen a dominant position in certain sectors of glass manufacturing.

143 More specifically, the applicant complains that the Commission ignored its explanations of the market structure and failed to examine whether its

disappearance was likely to give rise to a narrow oligopoly situation, as the German Government had demonstrated in its communication of 20 November 2000. It refers to several figures relating to market shares which were set out in that communication and submits that the intervener's challenge to those figures is unsubstantiated; it is the leading undertaking in that sector. In particular, the intervener failed to refute the argument that it would have a quasi-monopoly on a market for raw materials for 'sight glass' if the applicant were to disappear.

144 Finally the statement of reasons for the contested decision is inadequate in so far as it does not make it possible to establish whether, when assessing the price reduction under Article 87(3)(c) EC, the Commission took account of the alteration of the market structure which would follow the applicant's disappearance if the full purchase price were maintained.

145 Secondly, the applicant alleges that the Commission based its assessment under Article 87(3)(c) EC on incorrect facts, namely the restructuring plan sent to it on 1 December 1998. That plan was inconsistent with the restructuring of the applicant proposed at the time of the adoption of the contested decision on 12 June 2001, which was the decisive date in the present case (Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v *Commission* [2001] ECR II-1523, paragraph 93). The Commission had assured the German authorities that it would inform them before adopting the contested decision so that they could send it the new restructuring plan which they had proposed to send to it in their communication of 27 February 2001. Accordingly, the applicant takes the view that the Commission ought not to have based the contested decision on the 1998 restructuring plan.

146 Finally, the reasons for the contested decision are inadequate in so far as no reference is made to the Arnold report drawn up at the request of the Land of Thuringia and annexed to the Federal Republic of Germany's communication to the Commission of 27 February 2001. It is the only document on the administrative file

which contains a systematic analysis of the applicant's economic position. It shows that the applicant was on the way to recovery in 2000. However, in the contested decision (recitals 96 and 97), the Commission concluded, in complete contrast to that report, that the restructuring plan would not enable the applicant's viability to be restored. Moreover, doubt has since been cast on the Commission's assessment by the Pfizenmayer report of 10 December 2001.

147 The Commission, supported by the intervener, rejects the applicant's line of argument.

Findings of the Court

148 The Commission has wide discretion in matters falling under Article 87(3) EC (Case C-142/87 *Belgium* v *Commission*, cited above, paragraph 56, and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 36). Judicial review of that measure must therefore be limited to establishing whether there has been compliance with the rules governing procedure and the statement of reasons, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 170). The Court is not entitled to substitute its own economic assessment for that of the Commission (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 56, and *HAMSA*, cited above, paragraph 48).

149 Nevertheless, the Commission is bound by the guidelines and notices that it issues in the area of supervision of State aid inasmuch as they do not depart from the rules in the Treaty and are accepted by the Member States (*Deufil*, cited above, paragraph 22; Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph

36; and Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraph 43; and Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 53). Under Article 253 EC, the Commission is to state the reasons for its decisions, including those refusing to declare aid compatible with the common market on the basis of Article 87(3)(c) EC.

150 It is appropriate, first, to examine the applicant's argument that the Commission based the contested decision on the restructuring plan of December 1998 and not on that of 19 April 2001 and that it failed to take account of the Arnold report of 24 November 2000.

151 As regards, first, the restructuring plan on which the Commission based its decision, Paragraph 3.2.2 of the Guidelines on aid for rescuing and restructuring firms in difficulty states, inter alia, that the aid must be linked to a viable restructuring/recovery programme submitted in all relevant detail to the Commission and that the plan must restore the firm to competitiveness within a reasonable period.

152 First, in the present case, the reduction by DEM 4 million of the price fixed under asset deal 1 was granted to the applicant by the BvS before being notified to the Commission on 1 December 1998. It is common ground that, when notifying the price reduction, the German authorities sent the restructuring plan of December 1998, which covered the period from 1998 to 2000. It is likewise common ground that the restructuring plan of 19 April 2001 was not sent to the Commission during the administrative procedure.

153 In response to a question put by the Court of First Instance, the applicant submitted that the restructuring plan of 19 April 2001 was not sent to the Commission at the outset in order to avoid the simultaneous submission of various alternative plans.

154 Secondly, it is apparent from the Federal Republic of Germany's communication to the Commission of 27 February 2001 that there was a need to adjust the restructuring plan of 1998 as a result of the absence of the contribution by a private investor provided for in that plan and of the extremely weak state of the economy in the first quarter of 1999, which contributed to the deterioration of the applicant's financial position. The need to adopt a new restructuring plan in 2001 therefore shows that the restructuring plan drawn up in 1998 was a failure in so far as it did not enable the applicant's viability to be restored within a reasonable period.

155 Thirdly, none of the evidence on the file shows that, as the applicant claims, the Commission actually undertook to inform the German authorities that adoption of the contested decision was imminent.

156 It has been held that the Commission's obligation to inform the Member State concerned that the adoption of a negative decision is imminent is liable to create procedural delays preventing the Commission from closing the administrative procedure under way (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 231).

157 Furthermore, in their communication of 27 February 2001, the German authorities merely stated that 'Should the Commission consider it necessary, the Federal Government will inform it shortly of the final outcome of the decision on adjustment of the restructuring plan'. The applicant therefore cannot properly claim that, in the aforementioned communication, the German Government suggested sending a new restructuring plan, since no such plan was in fact available at that time.

158 Moreover, although reference was made in that communication to the need to adjust the 1998 restructuring plan, the German authorities stated the following:

'However, the Federal Government assumes that, in view of the typical market behaviour of the BvS, the Commission is able to close the procedure without examining the adjustments to the restructuring plan, the details of which must still be agreed upon.'

159 Fourthly, as the Commission points out, the applicant did not consider it appropriate to send that plan to the Commission between 19 April 2001, the date of its adoption, and 12 June 2001, the date of adoption of the contested decision.

160 It follows from all of those findings that the applicant's claim that the Federal Republic of Germany formally requested from the Commission permission to submit an updated restructuring plan is unfounded. Therefore, it cannot be concluded that the Commission committed a manifest error of assessment in basing the contested decision on the restructuring plan of December 1998.

161 Secondly, in the introduction to the Arnold report of 24 November 2000, it is stated that the Land of Thuringia instructed that it be drawn up for the purpose of examining the risk linked to the grant of additional aid.

162 In addition, the following is stated in the conclusion to that report:

'The company's results from 1997 to 2002 show that the company's development has been positive.

As a result of increases in turnover and of reductions in costs, the results have improved continuously since 1997, except in 1999. Taking extraordinary income into account, it will be possible to achieve a balanced result in 2000. The company will break even in 2002, with a turnover of DEM 40 million.

This presupposes that there will be no exceptional factors affecting this development.

However, the development thus envisaged is conditional on the necessary investments being made, which the forecasts estimate at DEM 11 500 000. In 2000, it has been possible to make investments of just DEM 1 000 000.

The state of the company's cash flow is very worrying. In addition to the resources intended to be used as replacement and renovation investments, which amount to DEM 11 500 000, there are existing loans of DEM 20 538 000 to be repaid.

According to our calculations, the company will have a cash flow shortage of DEM 7 842 000 in 2001 and of DEM 2 215 000 in 2002.

According to our estimates, the company will not be in a position to finance itself with its own future resources. Should the outcome of the procedure of notification to the European Union prove to be negative, it will be necessary to contribute new financial resources of DEM 6 000 000.

The company is not in a position to do this.

In our opinion, in order to safeguard the production site, additional grants and aid or else further remission of existing loans are essential.'

163 In light of the above, it is not apparent from the Arnold report that the applicant had long-term profitability prospects.

164 Moreover, in the aid application submitted to the Land of Thuringia of 5 February 2001, which the Court of First Instance asked it to produce, the applicant stated the investments envisaged in the Arnold report were, 'in the company's current position, contrary to the rules on aid' and that, therefore, the report's conclusions in that regard were not to be adopted.

165 It therefore cannot be held that, as the applicant claims in its pleadings, the 1998 restructuring plan was based on the Arnold report, since the applicant itself considered it inappropriate to adopt the findings made in that report.

166 Accordingly, and, more specifically, in the light of the findings of the Arnold report and the applicant's assessment thereof, the Commission was entitled to find that there was no need to refer to that report in the contested decision. The applicant's argument that the reasons for the contested decision are inadequate in that respect must therefore be rejected.

167 As regards the applicant's reliance on the Pfizenmayer report of 10 December 2001, it is settled case-law that the question whether a decision on aid is lawful must be assessed in the light of the information that was available to the Commission when the decision was adopted (Case 234/84 *Belgium* v *Commission*, cited above, paragraph 16). It is sufficient to point out that, since the Pfizenmayer report, which the applicant produced in connection with the interlocutory proceedings for the purpose of assessing its chances of economic survival in the event that the present action is dismissed, was not drawn up until after the contested decision was adopted, it was not available to the Commission during the administrative procedure.

168 It follows that the applicant has failed to establish that the Commission based its assessment under Article 87(3) EC on incorrect facts or that the contested decision is vitiated in that respect by a failure to state adequate reasons.

169 Secondly, it is necessary to examine, in the light of the guidance provided by the Guidelines on aid for rescuing and restructuring firms in difficulty, whether the Commission committed a manifest error of assessment by refusing to declare the price reduction compatible with the common market under Article 87(3)(c) EC without taking into account the oligopoly situation which would be created if the applicant were to disappear.

170 Paragraph 1.2 of the abovementioned Guidelines (see paragraph 3 above), which appears in the introduction, states, by way of example, a number of circumstances in

which aid for rescuing or restructuring an undertaking in difficulty may be justified by way of an exception to the principle laid down in Paragraph 1.1 of the Guidelines that it is undesirable for Member States to grant subsidies to firms which in the new market situation ought to disappear or restructure. However, it cannot be held that the existence of one of those circumstances suffices, in itself, to justify the granting of an exemption. The grant of State aid to rescue undertakings in difficulty and to promote their restructure may be justified by one of those circumstances only if the general conditions for the authorisation of rescue or restructuring aid, as laid down in the guidelines, are satisfied.

171 The applicant has failed to establish that the Commission committed a manifest error of assessment in taking the view that, contrary to what is required by the Guidelines, the 1998 restructuring plan would not enable the applicant to restore its viability (see paragraph 154 above).

172 Moreover, contrary to what the applicant maintains, it is not apparent from the Treaty rules or from the abovementioned Guidelines that unlawful rescue or restructuring aid must be authorised where the disappearance of the recipient undertaking will give rise to a monopoly or tight oligopoly situation on a specific market.

173 Nor can the case-law relied on by the applicant in support of its line of argument cast doubt on the finding made in the preceding paragraph. In paragraph 79 of the judgment in *Salomon*, cited above, the Court of First Instance merely held that, in the decision contested in that case, the Commission had not found that the aid was compatible merely because of the oligopolistic nature of the relevant markets since the Commission had referred to the market structure in question simply to support its line of argument that the aid was not liable to give rise to undue distortions of competition contrary to the common interest within the meaning of Article 87(3)(c) EC. In paragraph 88 of the judgment in *Keller*, cited above, the Court of First Instance merely found that the structure of the relevant market on which the applicants were active was not oligopolistic.

174 Moreover, as regards the applicant's claim that insufficient reasons are given in the contested decision in that regard, it should be noted that the Commission took the view, in that decision, that the reduction of the price fixed under asset deal 1 was not covered by the exception provided for in Article 87(3)(c) EC. In addition, during the administrative procedure, the applicant did not rely, in support of its alternative request for an exemption of the measure in question under Article 87(3)(c) EC, on the argument relating to the impact on the market structure of its possible disappearance from that market.

175 Accordingly, having regard to the requirements as to the statement of reasons set out in paragraphs 59 and 60 above, it must be held that, in the circumstances of the present case, the Commission was under no obligation to examine further the risk of creating an oligopoly situation on the relevant market and the complaint alleging that the statement of reasons for the contested decision was inadequate must be rejected.

176 In light of all of the foregoing, the present plea must be rejected.

The third plea: infringement of the rights of defence and of the principle of sound administration

Arguments of the parties

177 The applicant submits that the general procedural principles governing the formal procedure for the investigation of State aid confer on the recipient of the aid guarantees over and above the right to submit comments after initiation of the procedure which Article 88(2) EC gives to the parties concerned. The conferment of additional rights is consistent with the case-law relied on by the Commission, in which it was held that the recipient is merely a 'party concerned' within the meaning of the aforementioned provision.

178 The position of aid recipients differs from that of interested third parties in that, although they are not direct parties to the procedure, their existence may be threatened by a final decision ordering recovery of the aid. That fact justifies the conferment of further rights.

179 More specifically, the right to a fair hearing (Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraph 77) and the rights of the defence place the Commission under an obligation to give the aid recipient an opportunity to present effectively its point of view on the factual and legal evidence coming to light in the course of the formal investigation procedure on which the Commission intends to base its decision. That guarantee arises from the case-law laying down that the rights of the defence of any person who may be adversely affected by a measure must be protected (Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring and Others* v *Commission* [2001] ECR II-1337, paragraph 153). That right to be heard and the principle of sound administration entail a right of access to the file (Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraph 75 et seq.). Finally, the limitation of the rights of the aid recipient to that of submitting its comments under Article 88(2) EC also runs counter to the rules on the hearing of undertakings concerned which are laid down in the context of the procedures for applying Articles 81 EC and 82 EC and the control of concentrations.

180 In addition, observance of the principle of sound administration requires a diligent and impartial investigation (*Commission* v *Sytraval and Brink's France*, cited above, paragraph 62, and Case T-54/99 *max.mobil* v *Commission* [2002] ECR II-313, paragraph 48). The Commission is therefore under an obligation to obtain, on its own initiative, all the necessary points of view, in particular by requesting information from the recipients, in order to make a finding in full knowledge of all the facts relevant at the time of adoption of its decision (*ESF Elbe-Stahlwerke Feralpi*, cited above, paragraphs 93, 126, 128 and 130).

181 Given the discretion enjoyed by the Commission in monitoring State aid, and in particular in applying Article 87(3) EC, it is all the more important that observance of the right to be heard be guaranteed (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 13 et seq.; Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 129; and *Kaufring*, paragraph 152). If that right were limited in the administrative procedure to the submission of comments under Article 88(2) EC, the aid recipient, whilst remaining entitled to state its position fully before the Court of First Instance, would enjoy only partial judicial protection.

182 In the present case, the Commission failed to observe the applicant's procedural rights in three respects. First, it refused the request made by the applicant in its observations of 28 August 2000 under Article 88(2) EC for access to, and the opportunity to comment on, the non-confidential part of the Commission's file.

183 Secondly, the Commission did not accept the offer made by the German Government in its communication of 27 February 2001 to send it the most recent plan for the applicant's restructuring so that it could examine the measure in question under Article 87(3)(c) EC in the event that it took the view that, contrary to what that government argued, the measure was State aid within the meaning of Article 87(1) EC. In particular, the Commission failed to honour its undertaking vis-à-vis the German Government to inform it in advance of the adoption of its decision, which would have prompted it to send the new restructuring plan to the Commission immediately.

184 Moreover, it was all the more important that the applicant's rights of defence be observed because the Commission intended to reject the argument of the Member

State concerned that no State aid had been granted (*Kaufring*, at the end of paragraph 152). In particular, contrary to the intervener's argument, the position adopted by the Member State does not take precedence over that taken by the aid recipient and, therefore, it would not have been superfluous to hear the recipient.

185 Accordingly, the applicant complains, first, that the Commission failed to examine seriously its argument based on its right to adjust asset deal 1. Secondly, the Commission was under an obligation to inform the applicant that it intended to treat the price reduction as State aid. Moreover, its obligation to carry out a detailed and impartial review required it to ask the applicant directly to send it the new restructuring plan or, failing that, an outline thereof and inform it of the date on which it would be available.

186 In its communication of 27 February 2001, referred to above, the Federal Republic of Germany stated, in essence, that the Arnold report of 24 November 2000, which was sent to the Commission, was the basis for the adjustment of the restructuring plan. The adjustment had been necessary as a result of the lack of a private investor and the cash flow shortage linked to the recession which affected the 1998/1999 period. According to the Arnold report, the applicant would have broken even in 2002. In the applicant's view, the Commission, having thus been informed of the improvement in the applicant's financial position at the beginning of 2001 as compared with its situation in 1998, was not entitled to rely on the 1998 restructuring plan, as it did in the contested decision (recitals 34 and 108).

187 Thirdly, the Commission failed to send to the German Government or to the applicant, before termination of the administrative procedure, the questions which it had put to the Schott Glas group, following its observations of 28 September 2000 and its additional observations of 23 January 2001, in order to give them an opportunity to make their views known. By thus obtaining information unilaterally from the applicant's chief competitor — on points which it considered to be important as is shown by the very fact that it put those questions (see the Opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhône-Poulenc* v

Commission [1991] ECR II-867, II-869) — the Commission acted in breach of its duty of impartiality towards all the parties concerned, the principles of equal treatment of those parties and of sound administration and the applicant's right to a fair hearing. Moreover, it significantly reduced the practical effect of the applicant's right to be heard (order of 4 April 2002 *Technische Glaswerke Ilmenau*, paragraph 85).

188 Moreover, in acting in this way, the Commission also infringed the German Government's rights of defence. Contrary to what the intervener claims, the applicant can rely on that infringement as evidence of the failure to observe its own rights. The Member State concerned appears to be the aid recipient's 'authorised representative' in so far as the Commission regarded the recipient as a mere source of information. The recipient cannot, however, require the Member State to bring an action.

189 Those irregularities justify annulment of the contested decision since, had it not been for them, the outcome of the formal investigation procedure could have been different (Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 101). In particular, the submission by the German Government and the applicant of comments on Schott Glas's additional observations could have influenced the tenor of the contested decision. In that decision (recitals 35 and 36), the Commission examined the market on the basis of, inter alia, the abovementioned additional observations and rejected the argument, put forward by the German Government in its communication of 20 November 2000, that the applicant's disappearance would lead to an oligopoly situation. Moreover, it relied on those observations, which concerned, inter alia, the existence of excess capacity and an allegedly aggressive price policy of the applicant, in finding that the measure in question did not satisfy the test of proportionality (recitals 102 and 103 of the contested decision).

190 The Commission and the intervener contest the applicant's line of argument.

Findings of the Court

191 It is settled case-law that the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in light of its Community obligations, for granting the aid (Case 234/84 *Belgium* v *Commission*, paragraph 29, and *Falck and Acciaierie di Bolzano*, cited above, paragraph 81).

192 In the procedure for reviewing State aid, interested parties other than the Member State responsible for granting the aid therefore cannot themselves claim a right to debate the issues with the Commission in the same way as may that Member State (*Commission* v *Sytraval and Brink's France*, paragraph 59, and *Falck and Acciaierie di Bolzano*, paragraph 82). Therefore, essentially, they play the role of a source of information for the Commission (*Skibsværftsforeningen*, paragraph 256, and Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 59).

193 None of the provisions on the procedure for reviewing State aid reserves a special role, among the interested parties, to the recipient of aid. Moreover, the procedure for reviewing State aid is not a procedure initiated 'against' the recipient of the aid that entails rights on which it may rely and which are as extensive as the rights of the defence as such (*Falck and Acciaierie di Bolzano*, paragraph 83).

194 In that connection, it should be pointed out that the Community Court cannot, on the basis of the general legal principles relied on by the applicant, such as those of the right to due process, the right to be heard, sound administration or equal treatment, extend the procedural rights which the Treaty and secondary legislation confer on interested parties in procedures for reviewing State aid. Similarly, it is inappropriate to refer to the case-law on, inter alia, the application of Articles 81 EC and 82 EC and the control of concentrations, which concern procedures initiated against undertakings — which therefore enjoy specific procedural rights — and not against a Member State.

195 In view of those findings, the applicant's claim that the position of an aid recipient differs from that of interested third parties must be rejected.

196 In the present case, it is undisputed that the applicant was asked to submit its comments in accordance with Article 88(2) EC and Article 6(1) of Regulation No 659/1999 and that it took the opportunity to do so, submitting its comments to the Commission on 28 August 2000. Moreover, according to the eighth recital in Regulation No 659/1999, the rights of the interested parties are best protected by compliance with the formal investigation procedure provided for in Article 88(2) EC.

197 Thus, since the interested parties other than the Member State concerned cannot rely on a right to participate in an adversarial procedure with the Commission, it cannot be held that the applicant ought to have been granted access to the non-confidential part of the file on the administrative procedure or that the Commission necessarily had to send it the comments or replies to the Commission's questions submitted by Schott Glas.

198 Moreover, it has already been held that neither the provisions on State aid nor the case-law require the Commission to hear the views of the recipient of State resources on its legal assessment of the measure in question or to inform the Member State concerned — or, *a fortiori*, the recipient of the aid — of its position before adopting its decision, where the interested parties and the Member State concerned have been given notice to submit their comments (see, to that effect, *Neue Maxhütte Stahlwerke*, paragraphs 230 and 231).

199 As regards the argument raised by the applicant during the administrative procedure that it had a right to adjust asset deal 1 as a result of an unkept promise by the Land of Thuringia to grant investment aid, it is sufficient to point out that the Commission rejected that argument and that its statement of reasons for that rejection is sufficient (see paragraphs 67 and 77 above). Accordingly, the applicant is wrong to claim that the Commission failed to examine diligently its line of argument in that regard.

200 Finally, with respect to infringement of the rights of defence of the Federal Republic of Germany, the applicant complains that the Commission failed to accept that State's proposal that it send it the restructuring plan of 19 April 2001. It also complains that the Commission failed to send to the Federal Republic of Germany Schott Glas's replies of 23 January 2001 to the questions put to it by the Commission following the submission of its observations of 28 September 2000 on the initiation of the formal procedure.

201 It is settled case-law that observance of the rights of the defence requires that the Member State concerned be placed in a position in which it may effectively make known its views on the observations submitted by interested third parties under Article 88(2) EC and on which the Commission proposes to base its decision and that, in so far as the Member State has not been afforded the opportunity to comment on such observations, the Commission may not incorporate them in its decision against that State. However, in order for such an infringement of the right to be heard to result in annulment, it must be established that, had it not been for

such an irregularity, the outcome of the procedure might have been different (Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraphs 12 and 13; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 29 to 31; Case C-142/87 *Belgium* v *Commission*, cited above, paragraphs 46 to 48; and *Germany* v *Commission*, cited above, paragraphs 100 and 101).

202 In the present case, the Federal Republic of Germany was, in accordance with the requirements of Article 88(2) EC and Article 6(2) of Regulation No 659/1999, given an opportunity to submit its comments on the decision to initiate the procedure and the observations submitted in that connection by the interested parties, namely the applicant and Schott Glas, were sent to it. However, it is undisputed that the Commission failed to send to the Federal Republic of Germany the replies submitted by Schott Glas on 23 January 2001 to the questions put to it following its initial observations on the initiation of the procedure.

203 However, such an infringement of the rights of the defence is not so significant as to mean, of itself, that the contested measure must be annulled. That infringement is therefore a procedural defect, which means that the Member State concerned must demonstrate the specific prejudice to its individual rights caused by the breach and that the impact of the procedural error on the content of the measure in question must be assessed. The Federal Republic of Germany has, however, failed to do so in this case.

204 Accordingly, the argument of the applicant based on infringement of the Federal Republic of Germany's rights of defence is irrelevant.

205 In any event, with respect to production of the restructuring plan, it has already been found that the German authorities did not formally propose sending the restructuring plan of 19 April 2001 to the Commission and that, moreover, they took the view that the Commission was able to make a finding on the basis of the information already available to it (see paragraph 160 above). Consequently, the

Commission did not commit a manifest error of assessment by failing to ask the Federal Republic of Germany or, *a fortiori*, the applicant to produce that plan.

206 The Court finds that, in any event, the mere fact that the Commission, as it has conceded, failed to send to the German authorities Schott Glas's replies of 23 January 2001 to its questions cannot lead to annulment of the contested decision.

207 First, the Commission did not, in the contested decision, endorse the view taken by Schott Glas in those replies that there was structural overcapacity on some of the product markets on which the applicant was active (recital 101).

208 Secondly, as regards Schott Glas's claims that the applicant pursued an aggressive pricing policy, the Commission, when examining in the contested decision the condition that the aid in question be proportional, stated the following (recital 103):

'In its comments on the initiation of the procedure, a competitor of [the applicant] claimed that [the applicant] was systematically selling its products below market price and below production cost. Continuous loss compensation had been provided to [the applicant]. As no feasible restructuring plan has been submitted, the Commission cannot rule out the possibility that these resources might be used for market-distorting activities not linked to the restructuring process.'

209 Even if, contrary to the statement in that recital, the Commission had based its reasons not only on Schott Glas's observations but also on that company's replies to its questions of 23 January 2001 when finding that the condition that the aid be proportional was not satisfied, that could not lead to annulment of the contested decision. As has already been found, the Commission was entitled to take the view that restoration of the applicant's viability could not be envisaged in the absence of an appropriate restructuring plan. That finding was, in itself, sufficient justification for the view that the aid in question was incompatible.

210 Therefore, even if Schott Glas's replies of 23 January 2001 had been available to the Federal Republic of Germany, the content of the decision could not have been different.

211 In light of all the above, the present plea must be rejected.

The fourth plea: inadequate statement of reasons

Arguments of the parties

212 In addition to the inadequacy of the statement of reasons relied on in relation to the other pleas, the applicant complains that the Commission failed to give adequate reasons for the contested decision with regard to the questions whether there were effects on trade between the Member States within the meaning of Article 87(1) EC and whether there was an adverse effect on trading conditions to an extent contrary to the common interest within the meaning of Article 87(3)(c). The Commission merely found that there were competitors and that trade takes place on the relevant

product market (recital 51). It ought to have defined that market, or at least given a broad outline thereof, identified the applicant's main competitors in the other Member States, described the basic patterns of trade in the Community and explained the impact of the applicant's disappearance from the market, particularly because, in some sectors, the Schott Glas group is its only competitor (*British Airways*, cited above, paragraph 273).

213 Moreover, in the statement of reasons for the contested decision account was not taken of the background to the measure in question (Case C-355/99 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 26). When applying the private investor test, the Commission ought to have examined that measure in the context of the previous aid, which was the subject of a separate procedure (recitals 37, 42, 63, 65, 85 and 110).

214 The Commission and the intervener reject the arguments put forward by the applicant in connection with the present plea.

Findings of the Court

215 Whilst it is undisputed that, in the statement of reasons for its decision, the Commission is bound to refer at least to the circumstances in which aid has been granted where those circumstances show that the aid is such as to affect trade between Member States, it is not bound to demonstrate the actual effect of aid already granted. If it were so bound, that requirement would ultimately give Member States which grant unlawful aid an advantage over those which notify aid at the planning stage (see, to that effect, C-113/00 *Spain* v *Commission*, cited above, paragraph 54 and the case-law cited there).

216 In the light of that case-law, it is apparent that the Commission did not, in the present case, fail to fulfil its obligation to state adequate reasons for the contested decision.

217 In recitals 35 and 36 in the contested decision, the Commission defined the relevant product market, namely that for special glass, and found that the applicant was one of the ten Community undertakings active on that market. In addition, recital 51 contains an appropriate and adequate statement of the facts and legal considerations taken into account in assessing the requirement that trade between Member States be affected, namely that the applicant has competitors established in the Community on the relevant product market, that there is trade on that market and that the competitors did not benefit from a financial advantage such as that enjoyed by the applicant.

218 Accordingly, the fourth plea must likewise be rejected.

The fifth plea: infringement of the second sentence of Article 20(1) of Regulation No 659/1999

219 The applicant submits that the Commission failed to comply with an essential procedural requirement by failing to send, on its own initiative, a copy of the contested decision in accordance with the second sentence of Article 20(1) of Regulation No 659/1999. The purpose of that provision is to give the recipient of the aid, who is affected to a far greater degree than the other parties, absolute certainty that it is in possession of the measure adopted by the college of Commissioners. The principle of legal certainty requires the Commission to fulfil that obligation within two months of the date of the decision.

220 The Court finds that the Commission was correct in its submission that the second sentence of Article 20(1) of Regulation No 659/1999 does not give rise to an obligation on its part to send the decision closing the monitoring procedure until after it has been adopted and notified to the Member State concerned. Since the legality of a measure must be assessed by reference to the facts and legal factors prevailing at the time of its adoption, infringement of the abovementioned provision cannot lead to a finding that the contested decision is unlawful and, therefore, to its annulment.

221 Accordingly, the fifth plea must be rejected, as must be the present action in its entirety.

Costs

222 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful in its pleadings, it must be ordered to pay, in addition to its own costs, those of the Commission, including those relating to the interlocutory proceedings, in accordance with the form of order sought by the Commission.

223 The applicant must likewise pay the costs of the intervener, in accordance with the form of order sought by that party.

On those grounds,

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

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to bear its own costs and to pay those incurred by the Commission and by the intervener in the main action and the interlocutory proceedings.**

García-Valdecasas Lindh Cooke

Legal Martins Ribeiro

Delivered in open court in Luxembourg on 8 July 2004.

H. Jung R. García-Valdecasas

Registrar President