JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
6 October 1999 *

In Case T-110/97,

Kneissl Dachstein Sportartikel AG, a company incorporated under Austrian law, established at Molln, Austria, represented by Georg Diwok, of the Vienna Bar,

applicant,

v

Commission of the European Communities, represented by Paul F. Nemitz and Frank Paul, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: German.

supported by

Republic of Austria, represented by Christine Stix-Hackl, acting as Agent, assisted by Michael Krassnigg, of the Vienna Bar, with an address for service in Luxembourg at the Austrian Embassy, 3 Rue des Bains,

and by

HTM Sport- und Freizeitgeräte AG, a company incorporated under Austrian law, established at Schwechat, Austria, represented by Wolfgang Knapp, Avocat, Brussels and Rechtsanwalt, Frankfurt am Main, and by Till Müller-Ibold, Rechtsanwalt, Frankfurt am Main, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8-10 Rue Mathias Hardt,

interveners,

APPLICATION for annulment of Commission Decision 97/81/EC of 30 July 1996 concerning aid granted by the Austrian Government to Head Tyrolia Mares in the form of capital injections (OJ 1997 L 25, p. 26),

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

composed of: A. Potocki, President, K. Lenaerts, C.W. Bellamy, J. Azizi and A.W.H. Meij, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 24 March 1999,

gives the following

Judgment

Legal background to the dispute

1 Article 92(3) of the EC Treaty (now, after amendment, Article 87 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. ...'

2 For the purposes of application of that provision, the Commission has drawn up Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty (94/C 368/05) (OJ 1994 C 368, p. 12, hereinafter 'the Guidelines').

Facts

3 The Austrian company Head Tyrolia Mares (hereinafter 'HTM') comprises undertakings producing and marketing winter sports, tennis, diving and golf articles. In 1994, HTM had a turnover of about ATS 5 200 million, or about ECU 390 million, 45% of which was achieved in Western Europe. In June 1995, the group employed about 2 700 people. HTM's production centres are in the United States of America and in Europe (Germany, Austria, Italy, Czech Republic and Estonia). The Austrian locations are at Kennelbach (536 employees), Hörbranz (279 employees), Schwechat (395 employees) and Neusiedl (80 employees).

4 In 1993, the public holding company Austria Tabakwerke ('AT') acquired the controlling stake in HTM for a price of USD 20 million (about ECU 16 million). AT immediately recapitalised HTM with USD 100 million (about ECU 80 million). The same year HTM obtained from AT a non-preferential shareholder loan to replace its own capital, amounting to DEM 85.25 million (about ECU 45 million).

5 In spite of the announced rationalisation, diversification and new investment programmes, HTM incurred heavy losses in 1993 and in 1994, mainly due to the severe decline in the world ski market since the end of the 1980s and highly

negative performance in branches such as sportswear and golf equipment. High financial charges and some restructuring and extraordinary items further depressed the financial performance.

6 After being approached by AT in January 1995 to draw up a plan to turn HTM round, the merchant bank SBC Warburg (hereinafter 'Warburg') was instructed, in March 1995, to draw up a plan for HTM's privatisation and in May 1995 Warburg started a procedure to select potential buyers.

7 In order to avoid HTM's becoming insolvent, AT was forced, in April 1995, to inject ATS 400 million (about ECU 30 million) into the group and to convert the shareholder loan of about ECU 45 million granted in 1993 into new equity.

8 In July 1995 a restructuring plan was drawn up for HTM to enable it to return to viability by 1997. To finance this plan and to ward off the possibility of an insolvency procedure, the Austrian Ministry of Finance, in August 1995, approved AT's decision to inject further capital of up to ATS 1 500 million (about ECU 112 million) into HTM, to be paid in tranches between 1995 and 1997.

9 On 8 August 1995, the Austrian authorities informed the Commission of AT's intentions. On 1 September 1995, the Commission submitted a request for information to the Austrian Government, to which it responded on 21 September 1995.

10 On 30 September 1995, HTM received payment of a tranche of ATS 373 million (about ECU 28 million) from AT. During September 1995, owing to the deterioration in HTM's situation, the restructuring was abandoned in favour of immediate sale. On Warburg's advice, AT's board of directors decided to accept the preliminary offer of a group of international investors led by Johan Eliasch (hereinafter 'the Eliasch Group') and to negotiate an immediate privatisation of the entire HTM Group.

11 The agreement concluded with the Eliasch Group stipulated a sales price of ATS 10 million (about ECU 0.7 million) and a capital grant to HTM of ATS 1 190 million (about ECU 88 million) by AT, to be paid in several instalments. The Eliasch Group committed itself to injecting a further ATS 300 million (about ECU 22 million), of which ATS 25 million (about ECU 2 million) was to be paid as soon as AT's measures were approved by the Commission.

12 AT was to receive 15% of any capital gain that the Eliasch Group might realise on the total or partial sale of HTM to third parties, by means of a sale of shares or a public offering. Finally, the Eliasch Group was obliged to maintain HTM's activities in Austria for at least three years and to maintain employment at the Schwechat plant at 50% of the then current level and at 80% of the current level at the Hörbranz and Kennelbach plants.

13 By letter of 10 October 1995, Kneissl Dachstein Sportartikel AG (hereinafter 'Kneissl Dachstein'), an Austrian company producing winter sports articles (skis, bindings and ski boots), asked the Commission to investigate the financial aid granted by AT to HTM.

14 In the last week of November 1995, the Commission was informed that the banks had agreed to contribute, after the change of ownership, to the restructuring of

HTM by means of a debt write-off of ATS 630 million (about ECU 47 million) and by debt rescheduling.

15 By decision of 20 December 1995, amended on 13 March 1996, the Commission initiated, pursuant to Article 93(2) of the EC Treaty (now Article 88(2) EC), the procedure for examining the compatibility with the common market, as restructuring aid for HTM, of capital injections totalling ATS 400 million (about ECU 30 million) made in April 1995 (see paragraph 7 above) and ATS 1 190 million (about ECU 88 million) (see paragraph 11 above) already made or planned by AT in accordance with the sales agreement with the Eliasch Group.

16 The Commission also considered that, after its conversion into a loan repayable at the market rate, the total amount of ATS 1 273 million (about ECU 95 million), of which 773 million (about ECU 58 million) (see paragraphs 7 and 10 above) had already been paid to HTM, could be authorised as rescue aid.

17 For that purpose, the Commission published a communication addressed to the Member States and other interested parties, pursuant to Article 93(2) of the Treaty, concerning aid granted by the Federal Austrian Government in the form of capital injections to the company HTM (OJ 1996 C 124, p. 5).

18 At the beginning of February 1996, the Commission was informed that the conclusion of the share purchase agreement had actually taken place by the transfer of the share ownership in HTM from AT to the Eliasch Group.

19 In the examination procedure, Kneissl Dachstein submitted its observations by a document dated 30 April 1996.

20 By Decision 97/81/EC of 30 July 1996 concerning aid granted by the Austrian Government to HTM in the form of capital injections (OJ 1997 L 25, p. 26, hereinafter 'the Decision'), the Commission concluded that the capital injections of ATS 400 million (about ECU 30 million) (see paragraph 7 above) and ATS 1 190 million (about ECU 88 million) (see paragraph 11 above), or ECU 118 million, constituted State aid but, subject to certain conditions, that aid could be declared compatible with the common market as restructuring aid.

21 In the Decision the Commission observes that the alpine ski market is saturated, that it has substantial overcapacity and that a concentration of a small number of large manufacturers is to be expected. In the Commission's opinion, the same trend is underway on the market for ski-bindings and ski-boots.

22 According to the Decision, the restructuring plan envisages a return by HTM to its core activities (tennis, skis, bindings, boots and diving equipment) with the main emphasis, in the short term, on the Head brand, on marketing initiatives, on innovative and high-technology products and on the US market. Once restructuring is completed, long-term objectives include extending activities by entering new product markets (by licensing arrangements) and new geographical areas. The restructuring plan envisages operational breakeven in 1996, return to profitability by 1997 and, as an ultimate objective, HTM's flotation on the stockmarket in 1998 or 1999.

23 The restructuring plan has the following points:

— adapting production capacity to the decline in the markets for winter-sports equipment (skis, boots and bindings) and tennis racquets. This includes use of outsourcing and the transfer of labour-intensive manufacturing processes to East European locations to bring down manufacturing costs;

— phasing-out of unprofitable product lines and reduction of stock-keeping;

— rationalisation and reduction of fixed costs of the sales and administrative organisation, including the merger of legal entities;

— development and installation of a logistics system to facilitate centralised control of inventory management, inventory and shipping as well as modernisation of internal management systems and manufacturing processes.

24 The restructuring plan envisages in particular annual capacity reductions of 39% for skis, 59% for ski-bindings, 9% for ski-boots and 38% for tennis racquets. Slimming-down of staffing levels is planned in these various sectors of activity.

25 The direct cost of the restructuring measures to be carried out from 1995 to 1997 is forecast to be USD 159 million (about ECU 127 million). The main cost items are the closure of the golf business, the closure of the sportswear business, production capacity reductions and the reorganisation of the facilities at Kennelbach, Schwechat and Hörbranz. In addition, there will be severance payments for the personnel made redundant.

26 The recapitalisation plan, which is part of the restructuring programme, provides, in addition to the capital injections by AT and debt forgiveness and interest waiver by the banks of ATS 630 million (about ECU 47 million) (see paragraph 14 above), for two capital injections from the Eliasch Group of about ECU 2 million and about ECU 20 million respectively (see paragraph 11 above) by 1998 and an international public offer which should earn USD 60 million (about ECU 48 million). Since the projected equity ratio of HTM in 1998 (7%) was regarded as being too low to compete successfully with its international competitors, the final equity contribution of the Eliasch Group and the public offer are considered vital to HTM's capital structure by further reducing the company's debts.

27 Article 1 of the operative part of the Decision provides that the grants from Austria Tabakwerke AG to Head Tyrolia Mares in the form of capital injections amounting to ATS 1 590 million (about ECU 118 million) (see paragraph 20 above) constitute State aid within the meaning of Article 92(1) of the Treaty. That aid is considered compatible with the common market pursuant to Article 92(3)(c) as it facilitates the development of certain economic activities without adversely affecting trading conditions to an extent contrary to the common interest.

28 Payment of that sum of ATS 1 590 million, which includes the sum of ATS 1 273 million (about ECU 95 million) already approved by the Commission as rescue aid (see paragraph 16 above), was effected in the following way: ATS 400 million

(about ECU 30 million) was paid in April 1995 (see paragraph 7 above) and ATS 373 million (about ECU 28 million) on 30 September 1995 (see paragraph 10 above). Finally, provision is made for the payment of an amount of ATS 27 million (about ECU 2 million) and the staggering of payment of the balance from 31 December 1995 to 31 March 1998.

29 In Article 2, the Decision states that, in order to ensure the compatibility of the aid with the common market, the Commission requires the Austrian Government to undertake to guarantee that the following conditions are met:

— the restructuring plan is to be carried out as submitted to the Commission. By the end of August and the end of February each year until 1999, HTM has to deliver a report on the progress of the restructuring, showing the economic development and financial results of the company and their compliance with the restructuring plan. It must also submit the annual accounts of the companies in the group for the years 1995 to 1999 by the end of June of the following year at the latest;

— the capacity reductions provided for in the restructuring plan are to be carried out on an irreversible basis;

— the capital injection into HTM by the Eliasch Group of ATS 25 million (about ECU 2 million) (see paragraph 11 above) is to be effected within one month of the date of the Decision;

— the capital injection into HTM by the Eliasch Group of ATS 275 million (about ECU 20 million) (see paragraph 11 above) is to be effected by 31 December 1998;

— an additional contribution of fresh equity capital of at least ATS 600 million (about ECU 48 million) (see paragraph 26 above) by way of an international public offer of HTM on the capital market or by means having the same effect is to be completed by the end of 1999;

— past losses of ATS 1 590 million (about ECU 118 million) may not be used to reduce taxable profits.

30 Finally, Article 3 provides that the Decision is addressed to the Republic of Austria.

31 The Decision was notified to the Austrian Government on 21 August 1996 and published on 28 January 1997.

Procedure before the Court

32 By application lodged on 14 April 1997, Kneissl Dachstein brought an action for annulment of the Decision.

33 By orders of 26 November 1997, the Republic of Austria and HTM were granted leave to intervene in the proceedings in support of the Commission.

34 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, it asked the parties to answer certain questions in writing.

35 The parties present oral argument in reply to the Court's questions at the hearing on 24 March 1999.

Forms of order sought by the parties

36 Kneissl Dachstein claims that the Court should:

— Declare the Decision null and void, or alternatively,

— Annul the Decision *ex nunc*;

— Order the Commission to pay the costs;

— Order the interveners to bear their own costs.

37 The Commission contends that the Court should:

— Dismiss the action;

— Order the applicant to pay the costs.

38 The Republic of Austria submits that the Court should:

— Dismiss the action;

— Order the applicant to pay the costs.

39 HTM submits that the Court should:

— Declare the action inadmissible, or

— Dismiss the action as manifestly unfounded;

— Order the applicant to pay HTM's costs.

Admissibility

40 The Commission, supported in substance by the Republic of Austria and HTM, expresses doubts about the admissibility of the action, which, having been brought on 14 April 1997, it considers to be out of time, as the Decision was adopted on 30 July 1996. Since the Decision was neither published nor formally notified to the applicant, the period for commencing proceedings began to run, as regards the applicant, on the day on which it learnt of the existence of the Decision. Since it was reported in the press at the time of its adoption, the applicant should then have asked the Commission, within a reasonable period of time, to communicate the Decision to it. Since the applicant did not submit such a request until 18 September 1996, that lapse of time cannot be regarded as reasonable.

41 The Court merely observes that, according to the actual wording of the fifth paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230 EC), the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point for the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure (judgment of the Court of Justice in Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 35).

42 Moreover, the Commission has committed itself to publishing in the L Series of the *Official Journal of the European Communities* the complete text of decisions granting conditional authorisation for State aid adopted, as in this case, at the end of the procedure provided for by Article 93(2) of the Treaty [see *Droit de la concurrence dans les Communautés Européennes*, Volume II A, 'Règles applicables aux aides d'État', 1995, p. 43, paragraph 53, and p. 55, paragraph 90(d)].

43 Since the Decision was published in Official Journal L 25 of 28 January 1997, it is that latter date which started the period running as against the applicant.

44 The argument that the action is inadmissible must therefore be dismissed.

Substance

Scope of the Court's review of the compatibility of the restructuring aid in question

45 Acts of the Community institutions are presumed to be valid (see, to this effect, the judgment of the Court of Justice in Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 10). It is for parties seeking their annulment to rebut that presumption by producing convincing evidence to cast in doubt the assessments made by the defendant institution.

46 It is also established in case-law that the Commission enjoys a broad discretion in the application of Article 92(3) of the Treaty. Since that discretion involves complex economic and social appraisals, the Court must, in reviewing a decision adopted in such a context, confine its review to determining whether the Commission complied with the rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based are accurately stated and whether there has been any manifest error of assessment or any misuse of powers. In particular, it is not for the Court to substitute its own economic assessment for that of the author of the decision (judgment in Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1988] ECR II-2405, paragraph 79).

47 Furthermore, in the context of an action for annulment under Article 173 of the Treaty, the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. In particular, the complex assessments made by the Commission must be examined solely on the basis of the information available to it at the time when those assessments were made (see, to this effect, *British Airways and Others* v *Commission*, cited above, paragraph 81).

48 The pleas and arguments raised by the applicant must therefore be examined in the light of the principles mentioned above.

Objection of illegality raised against the Guidelines

49 Kneissl Dachstein objects that the Guidelines are unlawful in that they authorise aid not meeting the conditions laid down by Article 92(3)(c) of the Treaty. In basing its decision on the Guidelines, the Commission thus contravened that provision.

50 The Commission and the interveners observe that the Guidelines flesh out the application of the derogations from incompatibility of aid in accordance with the aforementioned provision, and that they have never been held to be illegal by the Community judicature.

51 The Court would reiterate here that the Guidelines indicate the course of conduct which the Commission intends to follow. They cannot therefore derogate from the provisions of Article 92 of the Treaty (see, to this effect, the judgment of the Court of Justice in Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 22).

52 Since the applicant has not shown to what extent the Commission based its decision on elements of the guidelines contrary to Article 92(3)(c) of the Treaty, its objection of illegality must be dismissed, without prejudice to the examination of its pleas of annulment in the light of the aforementioned provision.

The first plea concerning the premiss relating to HTM's disappearance from the market

53 Kneissl Dachstein challenges the premiss on which the Decision is based to the effect that HTM's disappearance would have harmful effects on the structure of the market by causing even tighter oligopolies to emerge. Even if the restructuring aid in question (hereinafter 'the Aid') had been prohibited, HTM would very probably have been taken over in its entirety by an investor from another sector.

54 The Commission observes that a take-over of HTM after bankruptcy would have been undertaken by a competitor and not by investors from outside the sector and would not therefore have altered the repercussions, found in the Decision, on the structure of the market.

55 According to HTM, there is no indication that, even in the event of bankruptcy and without AT's contributions, it would have been possible, or even probable, that its business would have been taken over by undertakings from outside the sector.

56 The Court finds that it follows from its very exposition that this plea is based on the unproven premiss that, if the Aid had not been authorised, HTM would not have disappeared from the market as a competitor distinct from other economic operators but would in any event have been bought by undertakings from outside the winter sports equipment sector. Quite on the contrary, the observations submitted by Kneissl Dachstein during the examination procedure show that it was keenly interested in buying HTM.

57 It is not therefore established that the Commission committed a manifest error in considering that, if the Aid had not been authorised, HTM might have disappeared from the market as an independent manufacturer.

58 In those circumstances, the plea must be dismissed.

The second plea: infringement of the general conditions governing the authorisation of aid laid down by Article 92(3)(c) of the Treaty

59 Kneissl Dachstein argues that the Aid does not meet the conditions laid down by Article 92(3)(c) of the Treaty. It does not promote an economic activity but only a single undertaking. The Aid does not facilitate the development of a certain area

because HTM's production sites are dispersed. Finally, the Aid has no Community interest since it shifts to other undertakings and other territories the problems affecting the production and sale of winter sports articles.

60 The Court finds first of all that, since the Commission was justified in finding that HTM's survival will contribute to the maintenance of a competitive market structure, the Aid cannot be regarded as favouring a single undertaking.

61 Secondly, it is clear from the disjunctive nature of the conjunction 'or' used in Article 92(3)(c) of the Treaty that aid to facilitate development either of certain activities or of certain economic areas may be regarded as compatible with the common market. It follows that the grant of authorisation for aid is not necessarily subordinate to the provision's regional aim.

62 Finally, the complaint that the Aid presents no Community interest overlaps with the other complaints contesting the validity of its authorisation.

63 Subject to the answers to be given to those other complaints on substantive issues, this plea must therefore be dismissed.

The third plea: absence of any link between certain capital injections and the restructuring plan

64 Kneissl Dachstein criticises the Commission for not taking the view that the additional contribution of approximately ECU 28 million made on 30 September 1995 (see paragraph 10 above), the first tranche of approximately ECU 30 million having already been paid in April 1995 (see paragraph 7 above), had the sole purpose of warding off the risk of HTM's insolvency and was not linked to the restructuring plan. The Aid is therefore prohibited *pro tanto*.

65 According to the Commission, supported in substance by the interveners, the contributions in question could be considered to be rescue aid during the period needed to elaborate the restructuring plan and the new aid element involved in their subsequent characterisation as capital injections was authorised on the basis of the restructuring plan.

66 The Court finds that it is clear from the exposition of the facts (see paragraphs 15 and 16 above) that the contested contributions were originally approved as rescue aid, without prejudice to their subsequent authorisation as restructuring aid. It was under this new characterisation that those funds were authorised at the end of the examination procedure, on condition that the restructuring plan approved by the Decision was put into effect.

67 It follows that the contested capital injections are to be regarded as tied into HTM's restructuring plan, irrespective of their initial approval as rescue aid, the legality of which is not the subject of this action.

68 The plea must therefore be dismissed.

The fourth plea: the reasonable time-limit laid down for the elaboration of the restructuring plan was exceeded

69 Kneissl Dachstein contends that the period of six months to which the Guidelines limit the period for drawing up a restructuring plan was clearly exceeded and that this in itself was sufficient to justify refusal to authorise the Aid.

70 The Commission, supported in substance by the intervening parties, observes that the period of six months indicated in the Guidelines concerns the authorisation of rescue aid and not restructuring aid. Moreover, whilst a restructuring plan may normally be drawn up within a period of six months, everything depends on the circumstances of the case. In the present case, complex assessments had to be carried out.

71 The Court holds that the six-month time-limit referred to by the applicant is not of a binding nature and does not relate to the stage at which a restructuring plan as such is elaborated. That time-limit is in fact the period considered in the Guidelines to be necessary, from the time when rescue aid is paid, to determine the measures necessary to restore the recipient undertaking to financial health.

72 Moreover, from the facts of the case set out above it does not appear that the period taken to elaborate the restructuring plan conceived by the Eliasch Group and approved by the Decision was excessive, taking into account the complexity of the case.

73 The plea must therefore be dismissed.

The fifth plea: the restructuring plan was inadequate

74 Kneissl Dachstein alleges first of all that the price paid by the Eliasch Group for HTM, which was much lower than the amount of the Aid, does not, on its own, allow the minimum return on capital required by the second paragraph of point 3.2.2 A of the Guidelines. Even in the event of sale by the Eliasch Group of its shares in HTM, the sum to be paid to AT does not represent an appropriate return.

75 The Commission and the intervening parties state in reply that the minimum return on capital relates not to the aid granted and to the aid donors but to future economic development and to the financial results of the recipient undertaking.

76 The Court observes that, as is explained in the second paragraph of point 3.3.2 A of the Guidelines, the restructuring plan must, in order to satisfy the viability test, enable the undertaking to cover all its costs, including depreciation and financial charges, and to obtain a minimum return on capital such that, after completing its restructuring, the undertaking will not require further injections of State support and will be able to compete in the marketplace on its own merits alone.

77 If AT's capital injections are not to lose their characterisation as State aid, the condition of a minimum return on capital must relate not to a fair return that AT is supposed to derive from its contributions but to the restoration of the recipient undertaking's competitiveness on the basis of the approved restructuring plan.

78 The applicant's argument is based on a false premiss and must therefore be dismissed.

79 Kneissl Dachstein observes, secondly, that the Commission wrongly considered that HTM would recover its viability in the long term. The simple fact of making an operating profit, as contended by HTM, does not amount to the 'viability threshold' mentioned in the Decision. The fact alone that the recovery measures consisted only partially of internal measures already made it quite clear at the date of the Decision that, according to the market data, those measures were based on exaggeratedly optimistic assumptions about the development of the market. Although the Commission did determine in part the nature of the measures which ATM had to take, it did not estimate their specific cost. The plan did not make any differentiation between tennis articles, which the Commission in its Decision considered necessary, however, in order to enable manufacturers to maintain or increase their prices. Finally, the plan does not explain how the financing envisaged through a stockmarket flotation will operate, which the Commission described, however, as decisive.

80 The Commission and the intervening parties observe that Kneissl Dachstein has not advanced any argument to show that, after its restructuring, HTM's viability would not be guaranteed.

81 HTM states that in 1996 it was again able to make an operating profit owing to the restructuring plan put into effect.

82 The Court finds that the applicant's argument consists essentially of mere conjecture and contains nothing to show that the Commission made a manifest error in concluding that HTM would recover its long-term viability on the basis of the restructuring plan approved by the Decision.

83 In particular, the applicant has not sought to establish in what way the assumptions made by the Commission are exaggeratedly optimistic, when provision has been made for HTM to abandon unprofitable product lines, to concentrate on its core activities, to reduce administrative, manufacturing and distribution costs and to slim down its workforce.

84 It does not appear that the Commission was bound, contrary to what Kneissl Dachstein maintains, to estimate the specific cost of each of the measures to be undertaken by HTM. Besides the fact that a precise evaluation of the various items of expenditure would in any event have been uncertain owing to the prospective nature of the measures envisaged, the Commission could, in the exercise of its broad discretion, properly confine itself to an overall assessment.

85 The applicant cannot rely on the lack of measures for differentiating tennis articles allowing prices to be maintained or increased. The Decision provides generally for HTM to concentrate on innovative and high-technology products and, in particular, on the use of the latest technology for the manufacture of tennis racquets and indicates that this should, in particular, allow higher sales prices to be obtained.

86 Finally, the Commission cannot be criticised for not explaining in the Decision the details of the financing envisaged through a stockmarket flotation planned for the end of 1999, which will occur a considerable length of time after the adoption of the Decision. It does not appear that the Commission was manifestly wrong to confine itself to laying down the principle of a fresh capital injection and stipulating that it be effected by the end of 1999 whilst leaving it to the undertaking to choose the time and means best suited to its situation as it might evolve (international issue or similar measures).

87 It follows from the foregoing that this plea must be dismissed in its entirety.

The sixth plea: the reduction of capacity imposed on HTM is insufficient

88 Kneissl Dachstein contends that the employment guarantees stipulated by the HTM sale agreement, covering a period of three years from the conclusion of that agreement, for 50% or even 80% of the staff at one of the production sites, demonstrate that the capacity reductions required by the Decision on the market in winter sports articles are insufficient, having regard in particular to the contraction in the ski and ski-boots markets which occurred between 1992 and 1997.

89 The obligation to maintain such a level of employment prevents, for example, production capacity from being closed down for good. Furthermore, the 87% reduction in its Community ski-boot production capacity cited by HTM in its statement in intervention is in fact the result of its shifting that production to Estonia.

90 Finally, it was clear from an article in the *Salzburger Nachrichten* of 2 February 1998 that HTM could have increased both sales of skis and the profit from ski sales on a world market still in decline.

91 The Commission, supported in substance by the intervening parties, observes that the applicant has not explained to what extent it committed a manifest error in assessing the facts or a misuse of power in requiring, in the second indent of Article 2 of the Decision, the capacity reductions provided for in the restructuring plan to be carried out on an irreversible basis.

92 The Austrian Republic explains that the employment guarantee clause concerns only three of the group's plants and considers the reduction of 20% to 50% of the numbers employed at the three Austrian plants to be objectively significant. Furthermore, the number of HTM's employees was reduced from 2 700 to 2 000.

93 The Court considers that, as the Commission has rightly pointed out, the reductions in capacity cannot be equated with the reduction in jobs, since the relationship between the number of employees and production capacity depends on a number of factors, in particular the products manufactured and the technology used. The employment guarantees, limited to three of the group's sites and to three years, did not prevent the closure of the assembly plant at Neusiedl. The shifting to Estonia of ski-boot manufacture using inexpensive labour is mainly intended to reduce manufacturing costs but does not in any way exclude capacity reductions.

94 The applicant has adduced no evidence to show that the capacity reductions required of HTM on the ski, ski-bindings and ski-boot markets, which, however, represented approximately 45% of HTM's turnover in 1994, were manifestly insufficient.

95 In particular, the statistics on the contraction of the ski and ski-boot markets which the applicant cited at the hearing relate to a period beginning in 1992 and ending only in 1997. To that extent, they have no evidential value, since the Decision provides that the capacity reductions are essentially to be made in the very first year of the restructuring.

96 In order to dismiss the contention concerning the increase in HTM's ski sales, it is sufficient to point out that it relates to the 1997 financial year, after the date of adoption of the Decision, and that it shows that 425 000 pairs of skis were sold,

which represented a sales volume appreciably below the 596 000 pairs sold in 1995.

97 Finally, in the exercise of its broad discretion, the Commission could properly consider that even more severe capacity reductions would have compromised the return to viability of HTM, whose existence was considered necessary to prevent the emergence of a stronger oligopolistic structure on the markets in question. In this regard, account has to be taken of the closure of the golf business and the closure of the sportswear business as envisaged in the restructuring plan.

98 In those circumstances, the plea must be dismissed.

The seventh plea: the Aid was disproportionate

99 This plea may be broken down into five parts.

The first part of the plea

100 Kneissl Dachstein complains that the Decision did not take into consideration the capital injection of approximately ECU 80 million and the shareholder loan of approximately ECU 45 million granted by AT to HTM in 1993 (see paragraph 4 above).

— Admissibility

101 The Commission, supported in substance by HTM, relies on the principle that the submissions in the administrative procedure and in the application should be strictly the same and objects that this first argument is not therefore admissible on the ground that the applicant did not raise it in the procedure in which the Aid was examined.

102 The Court considers that it would not be admissible for the applicant to rely on factual arguments which were unknown to the Commission and which it had not notified to the latter during the examination procedure (see, to this effect, the judgment of the Court of Justice in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31, and the judgment of the Court of First Instance in Case T-37/97 *Forges de Clabecq* v *Commission* [1999] ECR II-859, paragraph 93). On the other hand, nothing prevents the interested party from raising against the final decision a legal plea not raised at the stage of the administrative procedure (see, to this effect, *Forges de Clabecq* v *Commission*, cited above, paragraph 93).

103 The Commission's argument is based on the incorrect premiss that the examination procedure under Article 93(2) of the Treaty amounts to a prelitigation procedure against a final decision whereas its purpose is, on the contrary, to enable the Commission to be fully informed about all aspects of the case before it takes its decision (see, to this effect, *British Airways and Others* v *Commission*, cited above, paragraph 58).

104 However, as is clear from an annex to the observations which it submitted in response to HTM's submissions in intervention, Kneissl Dachstein did in fact mention during the examination procedure that in 1993 AT had provided HTM with a capital contribution of approximately ECU 80 million (see paragraph 4 above) to reduce HTM's debt.

105 The Commission's objection of inadmissibility to the first part of the plea must therefore be dismissed.

— Substance

106 Kneissl Dachstein criticises the Commission for not having addressed, in its examination of the proportionality of the Aid, the aid of approximately ECU 80 million and approximately ECU 45 million granted by AT to HTM in 1993 (see paragraph 4 above). Although Article 92 of the Treaty was not applicable before the Republic of Austria acceded to the European Communities on 1 January 1995, the Commission took no account of the prohibition of aid laid down by Article VI of the General Agreement on Tariffs and Trade (hereinafter 'GATT') and by Article 23(1)(iii) of the Free Trade Agreement between the European Economic Communities and the Republic of Austria (OJ 1972 L 300, p. 2, hereinafter 'the Free Trade Agreement'). In those circumstances, the total amount of the aid paid to HTM is disproportionate.

107 Alternatively, the applicant submits that, if the Commission had assessed all the payments, it would have reached the conclusion that the aid granted constituted existing aid, within the meaning of Article 93 of the Treaty. The sole fact that the examination procedure provided for by that provision was not respected is in itself sufficient to warrant annulment of the Decision.

108 The Commission and the intervening parties argue in substance that neither Article 92 of the Treaty, which was not applicable at the relevant time, nor the provisions of the GATT or of the Free Trade Agreement obliged the Commission to undertake the applicable procedures in relation to the 1993 payments or to

take those payments into consideration. Even supposing that the 1993 payments could be characterised as State aid, they had to be considered to be existing aid and as such were not covered by the procedure provided for in Article 93(2) of the Treaty but by the procedure laid down by paragraph (1) of that provision.

109 The Court observes that, at the time when the Commission opened the examination procedure in question (see paragraph 15 above), Article VI of the GATT and Article 23(1)(iii) of the Free Trade Agreement could no longer constitute the legal basis for assessing the compatibility with the common market of the capital grants made by AT to HTM. Moreover, Article VI of the GATT, relating to anti-dumping and compensating duties, was irrelevant and Article 23(1)(iii) of the Free Trade Agreement merely gave the contracting parties the power to intervene against public aid. The Commission could not therefore have disregarded those two provisions.

110 Furthermore, the applicant cannot validly argue that all the aid paid in 1993 and 1995 constitutes existing aid when AT's capital grants to HTM were not made on the basis of generally applicable provisions of domestic law.

111 Nor is it relevant for the applicant to claim that the amount of the Aid is disproportionate on the basis that the Commission failed to take into consideration the 1993 payments. In assessing proportionality, the Commission could only compare the capital injections made with the restructuring plan of which they constituted the necessary *quid pro quo* and support.

112 Moreover, the time which elapsed between the payments in 1993 and the capital injections granted from April 1995 (see paragraph 7 above) and authorised by the Decision meant that it would not have been appropriate to include them in the same single assessment of HTM's financial situation in the context of the procedure for the examination of the Aid.

113 The first part of the plea must therefore be dismissed.

The second part of the plea

114 Kneissl Dachstein contends that, in spite of the 1993 capital injections, HTM was able to carry over losses, the fiscal use of which gave it a supplementary advantage. However, according to point 3.2.2 C of the Guidelines, any tax credits attaching to the losses must be extinguished where aid is used to write off debt resulting from past losses.

115 The Commission replies that a carry-over of losses is unlawful only if it is attributable to aid. In the present case, it is excluded from the outset that the two injections in question constitute aid and, even if they did constitute aid, there were no grounds for taking this into account.

116 The Court may confine itself to the observation that, in reply to one of its questions, HTM stated, without being challenged on this point, that, owing to the

insufficiency of its taxable profits, it was not able, in any event, to make use of the carry-over of losses from the 1993 accounting year to the years 1994 to 1997.

117 It follows that the second part of the plea must be dismissed as factually groundless.

The third part of the plea

118 Kneissl Dachstein maintains that unlawful aid was provided through the fact that in April 1995 AT allowed HTM to convert the shareholder loan of about ECU 45 million (see paragraphs 4 and 7 above), granted in 1993, into equity. On its view of HTM's balance sheets, that operation was a loan which, despite its non-preferential character, constituted a debt owed by the borrower. Except in the event of insolvency, which did not arise in this case, the creditor has the right to repayment of his debt. The extinction of HTM's debt occurred only at the time of the conversion of the loan into equity. The extinction of a repayment obligation, even a conditional one, led to a transfer of resources from AT to HTM.

119 The Court considers that, even if the shareholder loan had to be classified as State aid, it was from the outset, irrespective of how it was described in HTM's accounts, a non-preferential loan to replace its equity capital. Owing to HTM's serious over-indebtedness at the time when the loan was formally converted into equity, repayment of the loan was *de facto* excluded and the loan could not therefore be regarded as a debt of HTM *vis-à-vis* AT, the remission of which would have constituted an additional advantage in reality.

120 It follows that, in so far as the conversion of the loan into equity involved AT's waiver of repayment of an irrecoverable debt, it did not in itself procure HTM any economic advantage in the form of a transfer of public resources at AT's expense.

121 Consequently, the Commission did not commit any error in law in not treating that loan conversion as State aid for the purposes of assessing the proportionality of the Aid.

122 The third part of the plea must therefore be dismissed.

The fourth part of the plea

123 Kneissl Dachstein maintains that *de facto* the Aid finances the entire restructuring programme, with HTM's buyer only having to repay old debts. A private shareholder acting as vendor would have required the Eliasch Group to take on much greater risks and to make a much higher payment. In its view, the Commission has not established any relationship between the amount paid by the investors, the costs of the restructuring and, finally, the amount of the Aid.

124 The Commission, supported in substance by the intervening parties, considers that the Aid was set at the amount necessary to restore HTM's economic viability, that it was accompanied by a large reduction in HTM's capacity and that HTM had to make other considerable efforts to achieve financial health.

125 The Court observes that the direct restructuring costs evaluated by the Commission at approximately ECU 127 million in section 8.2 of the Decision represent only a part of the total amount of the costs of restructuring HTM envisaged in point 8.3 of the Decision.

126 In response to questions from the Court, the Commission explained that, in addition to the direct restructuring costs, there are other expense items related to HTM's financial restructuring, such as investments to achieve rationalisation, the repayment and the restructuring of debt.

127 The Commission also explained that the total amount of the restructuring costs is financed from four different sources: Eliasch's capital injection of approximately ECU 22 million (see paragraph 11 above), the partial write-off by the banks of their debts and interest amounting to ECU 47 million (see paragraph 14 above), the Aid (approximately ECU 118 million) (see paragraph 20 above) and, finally, HTM's contribution from its own resources, amounting to 36% of the entire restructuring costs.

128 It follows that the total amount of the restructuring costs is in fact more than ECU 290 million and that the amount of the Aid is less than half of that sum.

129 To that extent, the fourth part of the plea must be dismissed for being based on incorrect factual premisses.

The fifth part of the plea

130 Kneissl Dachstein contends that, if it had not been coupled with job guarantees, the sale of HTM would have yielded a higher sale price, which would have been the aim of any private investor. To that extent, the Decision is vitiated by a misuse of power in that it authorises aid which, for reasons of employment policy, exceeds the amount strictly necessary. The question which should have been asked was whether the closure or shutdown of the entire undertaking would not have been the least expensive option and therefore the proper step.

131 The Court observes first of all that the behaviour of a private investor is the test for assessing the existence of State aid but that it is irrelevant in assessing its proportionality.

132 Secondly, as is clear from the text of the Decision, the job guarantee clause concerns only three of HTM's plants, is limited in time and provides for staff reductions of 20 to 50% in those plants. In any case, the applicant overlooks the fact that HTM would have had to pay additional severance pay if the staff reductions had been more substantial.

133 Thirdly, the Court has already found that the Commission did not commit any manifest error in considering that HTM's disappearance would have been

harmful as regards the maintenance of a competitive market structure. To that extent, the question whether the closure or shutdown of all of HTM's plants would have been the least costly step is irrelevant.

134 It follows that the fifth part of the plea must be dismissed.

135 In those circumstances, the entire plea must be dismissed.

136 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

137 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, it must be ordered to pay the costs incurred by the Commission and by the intervener HTM in accordance with their applications.

138 Under the first paragraph of Article 87(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. The Republic of Austria must therefore bear its own costs.

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs incurred by the Commission and by the intervener Head Tyrolia Mares;**

3. **Orders the Republic of Austria to bear its own costs.**

Potocki Lenaerts Bellamy

Azizi Meij

Delivered in open court in Luxembourg on 6 October 1999.

H. Jung A. Potocki

Registrar President

Summary