ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
3 December 2002 *

In Case T-181/02 R,

Neue Erba Lautex GmbH Weberei und Veredlung, established in Neugersdorf (Germany), represented by Professor U. Ehricke, with an address for service in Luxembourg,

applicant,

supported by

Freistaat Sachsen, represented by M. Schütte, lawyer, with an address for service in Luxembourg,

intervener,

* Language of the case: German.

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

defendant,

APPLICATION for suspension of the operation of Commission Decision 2002/783/EC of 12 March 2002 on State aid C 62/2001 (ex NN 8/2000) implemented by Germany for Neue Erba Lautex GmbH and Erba Lautex GmbH in bankruptcy (OJ 2000 L 282, p. 48) and, in the alternative, for the repayment in instalments of the aid in question,

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

makes the following

Order

1 Point 7 of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2, 'the Guidelines') provides:

'For the purposes of these Guidelines, a newly created firm is not eligible for rescue or restructuring aid, even if its initial financial position is insecure. This is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over such firm's assets.'

2 Under footnote 10 of the Guidelines, which refers to point 7, cited above, 'the only exceptions to this rule are any cases dealt with by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben in the context of its privatisation remit and other similar cases in the new Länder, involving companies emerging from a liquidation or a take-over of assets occurring up to 31 December 1999'.

3 Under point 23(b) of the Guidelines, rescue aid, in order to be approved, must be linked to loans that are to be reimbursed over a period of not more than 12 months after disbursement of the last instalment to the firm.

4 It is stated, in point 40 of the Guidelines, which concerns restructuring aid, that 'aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including through the sale of assets that are not essential to the firm's survival, or from external financing obtained under market conditions.

...'

5 Paragraph 17 of the Insolvenzordnung (German insolvency rules, hereinafter 'the InsO') of 5 October 1994 (BGB1. I, p. 2866) specifies the circumstances in which it is appropriate, under German law, to initiate bankruptcy proceedings:

'1. The general reason for initiating proceedings is insolvency.

2. A debtor is insolvent when he is unable to meet his financial obligations as they become due. As a general rule, a debtor is presumed to be insolvent when he has stopped making payments.'

Facts

6 The applicant, Neue Erba Lautex GmbH ('NEL' or 'the applicant'), established in Neugersdorf in Saxony and active in the textile sector, was created on 23 December 1999 by the provisional administrator in bankruptcy of the company Erba Lautex GmbH ('the former Erba Lautex'). The former Erba Lautex was created in 1992 at the time of the splintering of the company Lautex AG, which had been founded in 1990 and which grouped together a series of undertakings active in the textile sector.

7 The former Erba Lautex was the subject of numerous restructuring measures financed, until 1999, by State aid in the amount of at least EUR 60.9 million. By Decision 2000/129/EC of 20 July 1999 on State aid implemented by Germany for Lautex GmbH Weberei und Veredlung (OJ 2000 L 42, p. 19, 'the unfavourable

decision of 1999'), the Commission held that that aid was incompatible with the common market and requested the Federal Republic of Germany to order its repayment.

8 In 1997, the former Erba Lautex (which was still called Lautex AG and which belonged to a public trust management company, the Treuhandanstalt, which subsequently became the Bundesanstalt für vereinigungsbedingte Sonderaufgaben, 'the BvS') was privatised by sale to two private investors, the Daun group and the Maron group. Under the privatisation agreement, those two investors, between April 1998 and August 1999, increased the share capital of the former Erba Lautex to EUR 3.067 million. The privatisation was subject to the Commission's approval of the aid granted to the former Erba Lautex. In the light of the unfavourable decision of 1999, the privatisation agreement was rescinded, and the two private investors requested repayment of the capital invested, in accordance with the privatisation agreement.

9 On 2 November 1999, the former Erba Lautex applied for the commencement of bankruptcy proceedings ('Gesamtvollstreckung'). In accordance with Article 60(1)(4) of the Gesetz betreffend Gesellschaften mit beschränkter Haftung (law on limited liability companies; RGBl. 1892, p. 477, as amended by BGBl. 1994 I, p. 2911), the commencement of the bankruptcy proceedings led to the dissolution of the former Erba Lautex on 31 December 1999. The claim for repayment of the aid which was the subject-matter of the unfavourable decision of 1999 was registered as part of the bankruptcy estate of the former Erba Lautex.

10 NEL, which was created on 23 December 1999 by the provisional administrator in bankruptcy of the former Erba Lautex, continued the activities of that company, of which it is a wholly-owned subsidiary. For that purpose, NEL rented all the assets of the former Erba Lautex necessary for pursuing its activities. All the employees of the former Erba Lautex signed new contracts with NEL, without receiving compensation. NEL currently employs about 270 persons.

11 By letter of 29 December 1999, which reached the Commission on 3 January 2000, the German authorities informed the Commission that NEL had been set up as a rescue company ('Auffanggesellschaft'). The letter contained the outline of a restructuring plan prepared by the firm of accountants Price Waterhouse Coopers Deutsche Revision and stated that NEL would be restructured in 2000, as soon as an investor had been found. The letter also stated that, in the interim, NEL would receive the sum of EUR 4.448 million, referred to as rescue aid, from the BvS and the Freistaat Sachsen (Land of Saxony), through a financial institution, the Sächsische Aufbaubank ('the SAB'), in the form of loans. The restructuring costs, estimated at a maximum of EUR 29.5 million — the amount which the BvS and the Land of Saxony had declared that they were prepared to grant — were deemed to cover the purchase *inter alia* of the assets of the former Erba Lautex and also the repayment of the two loans granted by the BvS and the SAB as rescue aid.

12 Under that plan, the assets of the former Erba Lautex were to be transferred to NEL with a view to its being sold during 2000. Accordingly, a bidding procedure was opened in 2000. It had not yet been completed when the application for interim measures was brought.

13 By a letter which the Commission received on 27 February 2001, the German authorities informed the Commission that, following rescission of the privatisation agreement and in accordance with its provisions, the sum of EUR 3.289 million had been paid to the Maron and Daun groups; that amount corresponded to the reimbursement of the price they had paid for the former Erba Lautex and of the capital injection of EUR 3.067 million.

14 By letter of 30 July 2001, the Commission informed the German authorities of its decision to initiate the procedure under Article 88(2) EC in respect of aid C 62/2001 (ex NN 8/2000) — Neue Erba Lautex GmbH (OJ 2001 C 310, p. 3).

The Commission received comments from two German competitors and from a Belgian association of textile manufacturers, on which the Federal Republic of Germany submitted its own comments by letter of 7 February 2002.

15 On 12 March 2002, the Commission adopted Decision 2000/783/EC on State aid C 62/2001 (ex NN 8/2000) implemented by Germany for Neue Erba Lautex GmbH and Erba Lautex GmbH in bankruptcy (OJ 2002 L 282, p. 48, 'the contested decision').

16 Under Article 1 of the contested decision, '[t]he State aid amounting to EUR 7.834 million (DEM 15.324 million) granted by Germany to the group constituted by the bankrupt Erba Lautex GmbH and its wholly owned subsidiary, Neue Erba Lautex GmbH, is incompatible with the common market'. Under Article 2, the Federal Republic of Germany is required, without delay, and in accordance with the procedures of national law, to recover the aid, including interest. Article 3 of the decision provides that the Federal Republic of Germany is also required to inform the Commission, within two months of notification of the decision, of the measures taken to comply with it.

17 As regards the amount of EUR 4.448 million, notified by the letter of 29 December 1999, which, at the date of the Commission decision was EUR 4.767 million, the only amount at issue in the present proceedings, the Commission states that that amount was provided by the BvS and the SAB in the form of loans granted on 23 December 1999, 1 February, 19 May and 8 June 2000 (recital 18). The contested decision states that those loans were to be repaid during the six months following their grant, but that the repayment period was extended to 12 months. The loans were to be repaid at the rate of EUR 5 512 per month (EUR 2 556 to the SAB and the same sum to the BvS, respectively), from 1 July 2001.

18 After classifying that amount as State aid within the meaning of Article 87(1) EC, the Commission states that its recipient is the group constituted by the former Erba Lautex and NEL ('the Erba Lautex group'), which forms a single economic unit (recitals 36 to 38).

19 In recitals 39 to 59 of the contested decision, the Commission then considers whether that State aid may be declared compatible with the common market on the basis of Article 87(3)(c) EC.

20 In that regard, in recitals 44 to 47, the Commission considers, first, whether NEL may be classified as a rescue company ('Auffanggesellschaft') within the meaning of the exceptions stated in footnote 10 of the Guidelines. The contested decision raises the point that the footnote applies only to undertakings emerging from a liquidation or a takeover of assets. It finds that, in the case of the Erba Lautex group, there was neither a liquidation nor a takeover of assets. Accordingly, the Commission disagrees that the commencement of bankruptcy proceedings ('Gesamstvollstreckungsverfahren') is a form of liquidation (recital 45). In that regard, it notes that, whereas liquidation consists essentially in transforming assets into cash and usually refers to the selling of assets and the distribution of the company's assets among its creditors and members prior to its dissolution, bankruptcy, on the other hand, may result in the reorganisation and continued operation of the firm. As far as concerns the takeover of assets, the Commission rejects the argument that the leasing of assets can be considered comparable to their takeover (recital 46).

21 Having concluded that footnote 10 is not applicable,the Commission then examines whether the aid paid to the Erba Lautex group complies with the criteria set out in the Guidelines for being declared compatible with the common market (recitals 48 to 56).

22 In that regard, it points out that:

'... The usually accepted period of six months for which rescue aid can be approved is substantially exceeded in the present case without any justification being provided. The purported rescue aid, according to the information submitted, would be repaid by the company within some eight years, without counting repayment of any interest...' (recital 50).

23 It also states that 'the aim of rescue aid... is to allow the company to be kept in business until its future can be determined. Even applying a certain degree of flexibility, rescue aid cannot be approved for an unlimited period of time', and points out that '[t]wo years after launching the call for tender, the sale has not yet taken place. Moreover, some restructuring steps seem to have already been undertaken...' (recital 52).

24 It concludes that the aid in question cannot be considered as restructuring aid either. The contested decision states *inter alia* as follows:

'(54) First, Germany has never submitted a restructuring plan for the whole group. ... The sole plan submitted to the Commission concerns NEL, a part of the group.

(55) Second, there are no realistic expectations that the group or even part of it could restore its viability. Germany has never stated that the viability [of the former Erba Lautex] could be restored. In the report of the first assembly of creditors it is stated that the bankrupt company could not be revitalised. Although Germany claims that the viability of NEL can be restored, this would

depend on its being sold. However, as stated repeatedly, no investor seems willing to acquire the new legal entity. There is therefore no significant contribution from the aid recipient, nor can one be expected.'

25 Finally, in recital 57, referring to the judgment of the Court of Justice in Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, the Commission points out that:

'[W]hen [it] examines the compatibility of State aid with the common market, it must take all relevant factors into account. These include, where appropriate, the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State. It is [its] responsibility, when examining new aid, to assess the cumulative effect in terms of distortion of the market of new aid and unrecovered incompatible aid.'

26 In recitals 58 and 59, the Commission states that, by the negative decision of 1999, it was declared that the State aid granted to the former Erba Lautex was not compatible with the common market and that the company continues its activities, through NEL, in the same market. Accordingly, it considers that the new aid has a negative cumulative effect on competition.

Procedure

27 On 13 June 2002, the applicant lodged an application for the annulment of the contested decision.

28 By a document lodged on 28 June 2002, the applicant lodged an application for:

— suspension of operation of Article 2 of the contested decision pursuant to Article 105(2) of the Rules of Procedure of the Court of First Instance, until the Court had considered and given a ruling on the application for suspension,

— suspension of operation of Article 2 of the contested decision until a ruling was given on the substance of the application for annulment or until another date to be determined by the Court,

and, in the alternative,

— suspension of operation of Article 2 of the contested decision on the condition that the applicant make monthly repayments to the BvS and the SAB of EUR 5 000 or other amount left to the discretion of the Court,

— the adoption of such different or additional interim measures as the Court might consider necessary or appropriate — a declaration that costs be reserved.

29 In the circumstances of the case, the President of the Court did not allow the applicant's claim under Article 105(2) of the Rules of Procedure of the Court of First Instance, and asked the Commission to submit its comments.

30 The Commission submitted its comments on the application for interim measures on 15 July 2002.

31 On 19 September 2002, the Land of Saxony applied for leave to intervene in the proceedings for interim measures in support of the forms of order sought by the applicant. By decision of 20 September 2002, the application to intervene was allowed by the President of the Court of First Instance.

32 The parties, including the intervener, presented oral argument at the hearing held on 20 September 2002.

33 At the end of the hearing, the President of the Court granted the Commission a period for considering the possible repayment of the State aid in question. By letter of 11 October 2002, the applicant submitted to the Court a proposal for an agreement, reflecting the proposal made by the President of the Court during the hearing. By letter of the same date, the Commission replied that it did not accept the proposal.

34 By letter of 28 October, the applicant submitted additional comments to the Court, in response to the Commission's rejection of its proposal. By letter lodged at the Court on the same day, the Commission submitted additional comments on the applicant's proposal.

Law

35 Under the combined provisions of Articles 242 EC and 243 EC and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that circumstances so require, order the suspension of operation of the contested measure or prescribe any other interim measures.

36 Article 104(2) of the Rules of Procedure provides that an application for interim measures shall state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case (*fumus boni juris*) for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30; Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II-2769, paragraph 25, and Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153, paragraph 50).

Admissibility of the application for interim measures

37 The Commission disputes the admissibility of the present application. It considers that the applicant should have waited for recovery proceedings to be brought by the BvS and the SAB and then availed itself of the national legal remedies available to it to challenge that recovery (Case C-276/99 *Germany* v *Commission* [2001] ECR I-8055; Case 310/85 R *Deufil* v *Commission* [1986] ECR 537, paragraph 22, and Case 142/87 R *Belgium* v *Commission* [1987] ECR 2589, paragraph 26).

38 This line of argument must be firmly rejected. It should be noted that, under Article 104(1) of the Rules of Procedure, an application to suspend the operation of a measure shall be admissible only if the applicant has challenged that measure in proceedings before the Court of First Instance (order of the President of the Court of Justice of 18 October 2002 in Case C-232/02 P(R) *Commission* v *Technische Glaswerke Ilmenau* [2002] ECR I-8977, paragraph 32).

39 According to paragraph 33 of the order of the President of the Court of Justice referred to in the previous paragraph, the Commission's arguments, which are based on considerations of expediency regarding the relative efficiency of the various procedures, cannot have the effect of amending, in the context of State aid, the general rule stated in the previous paragraph and, in the particular case of an undertaking which has brought an action for annulment against a Commission decision ordering recovery of incompatible aid, cannot lead to a refusal to grant the undertaking interim judicial protection before the Community judicature.

40 This application must therefore be declared admissible.

Substance of the application for interim relief

Arguments of the parties

— *Prima facie* case

41 In order to establish that the condition concerning a *prima facie* case is satisfied, the applicant puts forward four pleas, which it has developed more fully in its main application.

42 In connection with the first plea, the applicant maintains that it does not form a single economic unit with the former Erba. The Commission should not have held that the applicant was controlled by the former Erba Lautex, since the latter was dissolved when the bankruptcy proceedings commenced and is no longer operating.

43 Furthermore, NEL is a company 'emerging from a takeover of assets', within the meaning of the derogation established in footnote 10 of the Guidelines. That derogation applies to cases of companies created after a bankruptcy. As for the 'takeover of assets', it may consist of the leasing of assets of the liquidated company, since they make it possible to continue operating. The fact that the applicant, as a wholly owned subsidiary of the insolvent undertaking, carries on that company's activities does not preclude the derogation relating to the takeover of assets, especially because the applicant is the only entity still in the market.

44 It also claims that the Commission should have taken account of all the available information when it took its decision. It disregarded the letter sent to it by the German Federal Government on 27 February 2002, informing it about the main aspects of a report, forwarded subsequently, on the amendment to the restructuring plan, about the reduction in the aid for the planned restructuring and about the possibility of approving the aid on the basis of the amended plan, and promising to send it more detailed information shortly. Furthermore, the Commission should have waited and taken account of the information forwarded by the Federal Government in a letter dated 12 March 2002, because more than two years had elapsed since notification of the aid, and the Commission itself, in point 3.2.4 of the Guidelines, acknowledges the need to amend restructuring plans during the restructuring period. That manifest error of assessment had a decisive effect on the contested decision, since the aid would, in any event, have been eligible on the basis of that new document.

45 Moreover, the Commission did not take account of all the information communicated to it with the notification, since it did not assess the restructuring

aid of EUR 29.5 million which had been notified to it at the beginning, but stated that it had not been informed about the financing of the restructuring costs. That manifest error of assessment on the part of the Commission had considerable implications, since it prevented it from exercising the discretion conferred on it.

46 The second plea, which alleges infringement of essential procedural requirements, consists of two limbs. In the first limb, the applicant claims that the statement of reasons for the contested decision is defective, in that the contested decision does not state why its analysis differs from that which results from the previous practice followed by the Commission in taking decisions. In a series of decisions, the Commission accepted undertakings in a situation similar to that of the applicant as 'newly-created companies' benefiting from the derogation mentioned in footnote 10 of the Guidelines. Furthermore, the contested decision does not contain an adequate statement of grounds as regards the analysis of the distortion of competition and the effect on trade and is characterised by the lack of any analysis of the market share of the aid recipient and of the market trends for the products in question.

47 In the second limb, the applicant maintains that the Commission, by not taking into consideration certain new information relating to the restructuring plan, has infringed the rights of the Federal Republic of Germany — and, indirectly, of itself — to a fair hearing. If the Commission had taken that information into account, it would have approved the rescue and restructuring aid.

48 The third plea alleges misuse of powers. The contested decision was, it argues, adopted with an aim other than that which it is supposed to pursue. In the present case, the contested decision was used so as not to jeopardise the Commission's position in proceedings, announced to the press, brought against the Federal Republic of Germany for failure to comply with its obligations under the Treaty, relating to its alleged failure to implement the negative decision of 1999.

49 The fourth plea alleges infringement of the principle of sound administration, which requires that the Commission shall not make early assessments or exercise its discretion prematurely. When the formal examination procedure was opened, the Commission's opinion on the outcome of the aid examination procedure was already irrevocable.

50 In response to the first plea, the Commission argues that the former Erba Lautex and NEL form a group. That single fact justifies taking into account the aid already granted to the former Erba Lautex and the reference to the judgment in *TWD* v *Commission* (see recitals 57 to 59 of the contested decision).

51 It points out, in that regard, that the former Erba Lautex was not 'liquidated' and that NEL did not take over the assets of the former Erba Lautex within the meaning of footnote 10 of the Guidelines.

52 The fact that the former Erba Lautex has ceased normal trading and is no longer present in the market as a competitor is, the Commission maintains, of no relevance, given that NEL is a wholly owned subsidiary of the former Erba Lautex. The Commission also points out that, even if the legal solution of constituting NEL as a subsidiary of the undertaking which had ceased to make payments was chosen only while waiting for NEL to be sold to an investor, such an investor has not yet appeared.

53 Nor can it be considered that there has been a takeover of the assets. In the case of leasing, the possession and actual enjoyment of the assets are indeed transferred, but not ownership. Accordingly, for example, only the lessor, in the present case the former Erba Lautex, can sell the leased assets. The Commission adds that, given that the assets needed to operate the company had been rented for more than 27 months when the contested decision was adopted, the applicant's argument that the assets were only leased in the initial stages cannot be upheld.

54 In any event, the State aid in question is not compatible with the Guidelines. In that regard, the Commission points out that, under the Guidelines, rescue aid is limited to a maximum duration of six months, which may be extended, if there is a restructuring plan, until the Commission gives a ruling on the plan. Furthermore, it must be linked to loans that are to be reimbursed over a period of not more than 12 months after disbursement of the last instalment to the firm.

55 It claims that, in the present case, the aid was granted for a term of more than 930 months and, consequently, cannot be regarded as rescue aid (see recitals 49 to 53 of the contested decision).

56 As for the restructuring aid, that is subject *inter alia* to the condition that the amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring of the undertaking and be proportionate to the objective pursued from the Community point of view. Furthermore, aid recipients will be expected to 'make a significant contribution' to a 'restructuring plan from their own resources'. As is apparent from recitals 54 and 55 of the contested decision, the loans in question cannot be regarded as restructuring aid, since, specifically, that contribution is lacking. The sum needed to implement the restructuring plan is, in fact, wholly financed by the loans from the BvS and the SAB.

57 Furthermore, even if the Commission was wrong in considering that the undertakings formed a group, that would be a procedural defect which could not lead to the annulment of the contested decision, since the other recitals afford a sufficient statement of reasons for the operative part (Case 119/86 *Spain* v *Council and Commission* [1987] ECR 4121, paragraph 51).

58 As for the second plea, the Commission considers that it is unfounded and that the contested decision is adequately reasoned (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

59 The Commission adds that the cases cited by the applicant to illustrate the discriminatory treatment to which it is subjected do not relate to situations comparable to that of NEL, particularly because, in those cases, one or more private investors made a significant contribution to the restructuring.

60 Furthermore, so far as concerns the alleged failure to indicate the circumstances in which the aid hinders trade between Member States and distorts the conditions of trade to an extent contrary to the common interest, the Commission refers to recital 33 of the contested decision.

61 The alleged infringement of the right to a fair hearing is equally unfounded. According to the case-law of the Court of Justice (*Commission* v *Sytraval and Brink's France*, paragraph 59), the aid recipient is involved only in the administrative procedure and cannot therefore avail itself of the rights of the defence accorded to the persons against whom proceedings have been initiated. Thus, the procedural rights of aid recipients are observed if they are invited to submit their observations in the course of the administrative procedure.

62 The Commission points out, with regard to the two letters which it did not take into account, that the first, dated 27 February 2002, was addressed personally to the Director-General for Competition and does not constitute official correspondence with the Commission, but a simple request for personal intervention. The second letter reached the Commission on 12 March 2002, the day on which the

contested decision was adopted, and when the meeting at which the decision to adopt the contested decision was taken had already commenced. Finally, the Commission maintains that, even if it had taken the documents in question into consideration, the information they contained was not such as to alter its assessment of the aid.

63 The third and fourth pleas should be rejected as manifestly misconceived.

— Urgency and balancing of interests

64 The applicant argues, first of all, that, if the contested decision is implemented, its manager will have to apply for the commencement of bankruptcy proceedings, which will lead to the dissolution of the company even before the Court gives a ruling in the main proceedings. That damage indicates the urgency for ordering suspension (Case T-53/01 R *Poste Italiane* v *Commission* [2001] ECR II-1479, paragraph 120).

65 For the purposes of its illustration, the applicant refers to an accountant's report dated 20 June 2002, prepared by Price Waterhouse Coopers Deutsche Revision ('the PWC report'), which sets out three scenarios.

66 According to the first scenario, repayment of the aid would make NEL immediately insolvent and, as a result, would prevent it from operating subsequently. The second scenario, based on the assumption that judgment will

be given in the main proceedings in 2004, shows that suspension of the operation of the contested decision would enable the applicant to survive until judgment was given in the main proceedings. Finally, the third scenario indicates that dismissal of the application in the main proceedings, notwithstanding the grant of the interim measure, would lead to the commencement of bankruptcy proceedings.

67 As regards the first scenario, the applicant points out that it does not actually have the necessary financial resources to repay the loans constituting the amount of the aid in question. It would be unable to obtain loans in order to repay that amount. It does not have assets of its own which could effectively be realised for that purpose or serve as a guarantee for obtaining such loans. The constituents of insolvency defined in Paragraph 17 of the InsO are therefore present. The applicant points out, in that regard, that the BvS and the SAB, in letters dated 3 April 2002 and 15 April 2002, gave it formal notice to repay the aid together with interest. Those letters are specific measures designed to recover the aid. If operation of the contested decision is not suspended, the debts will be payable. The applicant refers, in that regard, to two letters from the BvS dated 2 April and 20 June 2002, which show that the BvS will bring an action for recovery if the court does not order suspension of operation.

68 If the present application were dismissed, the result would be that NEL's manager would immediately have to apply for the commencement of bankruptcy proceedings. In that case, the power to sell the company's assets would be transferred to a liquidator. Referring to paragraphs 34 to 46 and paragraph 71 of the PWC report, the applicant points out that, after the commencement of bankruptcy proceedings, it would very probably no longer be possible to continue to operate the company and to ensure its recovery.

69 The commencement of bankruptcy proceedings would inevitably lead to NEL's dissolution, owing to the loss of confidence of its customers, suppliers and creditors, and liquidity problems would follow. The applicant adds that it is very unlikely that an investor would still wish to invest in a bankrupt company.

70 Finally, the applicant claims that those insolvency problems could not be overcome by resorting to the takeover solution used in its case, since the derogation established in the Guidelines expired on 31 December 1999.

71 The dissolution of the company which would occur when the bankruptcy proceedings commenced is enough to constitute urgency (Joined Cases T-231/94 R, T-232/94 R and T-234/94 R *Transacciones Marítimas and Others* v *Commission* [1994] ECR II-885, paragraph 42).

72 As regards the second scenario in the PWC report, the applicant points out that it is sufficiently likely that it will survive if suspension is granted, as is evidenced by the sustained improvement in its financial situation. Accordingly, it is clear from the figures annexed to the report for the years 2000 and 2001 that NEL's production level has risen steadily and will very probably show an upward trend from 2002 to 2004.

73 Finally, the prospect of the undertaking being taken over by an investor gives grounds for anticipating that its progress will be even more positive than described in the PWC report.

74 More generally, the applicant argues that the damage described above could not be prevented if it had to wait for the BvS and the SAB to bring proceedings for recovery of the aid before the German courts and then exhaust all the available national remedies.

75 Furthermore, legal proceedings brought against the applicant in Germany would do nothing to alter the fact that the debt was payable or, therefore, that the

manager would have to apply for the commencement of bankruptcy proceedings. In that case, the applicant would have no influence on the development of civil proceedings, which would be suspended under Article 240 of the German Code of Civil Procedure and could be reopened only by the liquidator and only in specific circumstances.

76 Even if the applicant's existence were not jeopardised by the operation of the contested decision, its manager would, in that case, nevertheless have to apply for the commencement of bankruptcy proceedings and also it would be unable, in the foreseeable future, to regain its position in the market (Case T-74/00 R *Artegodan* v *Commission* [2000] ECR II-2583, paragraphs 45 and 51). That loss of position in the market would lead to the redundancy of numerous employees, which is a constituent of urgency (Case T-41/96 R *Bayer* v *Commission* [1996] ECR II-381, paragraph 59).

77 As regards the balancing of interests, the applicant draws attention *inter alia* to the fact that the harm to the Community would be so trivial as to be scarcely quantifiable, since the applicant company's market share in the common market is extremely small. Furthermore, substantial and irreparable damage to competition can also be ruled out because the Commission did not think it was necessary to recover the aid provisionally pursuant to Article 11(2) of 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). Lastly, in view of the considerable length of the proceedings, basically owing to the Commission's conduct during the 19 months of the preliminary investigation of the aid in question, it seems reasonable for the dissolution of the applicant undertaking to be provisionally postponed.

78 The Commission claims that the PWC report does not establish with sufficient certainty that suspension of the operation of the contested decision would ensure NEL's survival until a ruling is given in the main proceedings.

79 The positive operating results forecast in the PWC report for 2000 in the order of approximately EUR 0.4 million does not indicate NEL's lasting financial stability, particularly in the light of the need to cover the financial losses made in the previous years. Furthermore, the anticipated operating results assume, according to the PWC report, an 'ambitious' increase in turnover of approximately EUR 1.5 million for 2002 which NEL could achieve by taking advantage of a 'continued steady improvement in the economic climate in the second half of 2002'. The uncertainty of an improvement in the overall economic climate in the short and medium term is evidenced by a weekly press release dated 11 July 2000 issued by the Deutsches Institut fur Wirtschaftsforschung forecasting a downturn in activity in 2003.

80 It is also clear from the PWC report that the financing of NEL's investment requirements is 'at the moment still largely undecided' and that 'better opportunities' would arise if the international call for tenders resulted in the sale of NEL to a 'strategic investor'. However, it would be extremely risky, at the present stage, to make predictions regarding the possibility of such a solution. The Commission does not know of any possible purchasers whose interest has materialised into a commitment.

81 Finally, the Commission considers that the Community's interest in an end being put to the distortion of competition by repayment of incompatible aid should almost always prevail, unless exceptional circumstances plead in favour of another solution. In the present case, there are no exceptional circumstances.

Findings of the President of the Court

82 It is established that the urgency of an application for interim measures must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the interim

measure (Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 18; Joined Cases T-195/01 R and T-207/01 R *Government of Gibraltar* v *Commission* [2001] ECR II-3915, paragraph 95). It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of this kind (order of the President of the Court of First Instance of 25 June 2002 in Case T-34/02 R *B* v *Commission* [2002] ECR II-2803, paragraph 85).

83 It is not necessary for the imminence of the damage to be demonstrated with absolute certainty, it being sufficient, especially when the occurrence of the damage depends on the concurrence of a series of factors. to show that damage is foreseeable with a sufficient degree of probability. However, the applicant is required to prove the facts forming the basis of its claim that serious and irreparable damage is likely (order of the President of the Court of Justice of 14 December 1999 in Case C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67; *B* v *Commission*, paragraph 86).

84 Although it is firmly established that damage of a pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation (orders of the President of the Court of Justice in Case C-471/00 P(R) *Commission* v *Cambridge Healthcare Supplies* [2001] ECR I-2865, paragraph 113, and of the President of the Court of First Instance in Case T-339/00 R *Bactria* v *Commission* [2001] ECR II-1721, paragraph 94), it is also settled case-law that an interim measure is justified if it appears that, without that measure, the applicant would be in a position that could imperil its existence before final judgment in the main action (*Poste Italiane* v *Commission*, paragraph 120).

85 It is therefore necessary to examine whether the applicant has established to the requisite legal standard that the implementation of Article 2 of the contested decision will inevitably cause it to go into liquidation and disappear from the market before a ruling is given in the main action.

86 Referring to the PWC report (see paragraphs 67 to 69 above), the applicant argues that the dismissal of the application for suspension will mean the immediate recovery of the aid granted to it. Furthermore, according to the explanations provided at the hearing by the applicant, which was not contradicted in that regard by the Commission, an unconditional letter of notice from the BvS and the SAB to repay the contested aid is enough to render the debt to them 'payable' within the meaning of Paragraph 17(2) of the InsO. According to the applicant, that would inevitably lead to the commencement of bankruptcy proceedings.

87 The applicant has also stated, without being contradicted by the Commission, that, after bankruptcy proceedings are commenced, the power to sell its assets will be transferred to a liquidator (Paragraph 80(1) of the InsO) and that, in that case, it would be possible for the undertaking to continue operating only if all the creditors were paid off. In that regard, the applicant has attempted to prove that the commencement of bankruptcy proceedings will inevitably lead to its dissolution, pointing out *inter alia* that the commencement of those proceedings will irreparably harm its relations with its 'key customers', its suppliers and creditors and make its sale to a private investor very unlikely.

88 It should be noted, first of all, that a situation in which an undertaking is compelled to apply for the commencement of bankruptcy proceedings may indeed constitute serious and irreparable damage, given the risk that that implies for the very existence of the undertaking and the serious consequences to which such proceedings give rise, hindering normal operations (*HFB and Others* v *Commission*, paragraph 56).

89 However, such an assessment must be carried out on a case-by-case basis, having regard to the facts of each case and the legal issues involved (*HFB and Others* v *Commission*, paragraph 57).

90 In the present case, the President of the Court considers that the applicant has not established sufficiently that implementation of Article 2 of the contested decision would inevitably lead to its liquidation and disappearance from the market.

91 It should be pointed out, first, that the applicant has not put forward persuasive arguments to show that it would be prevented from receiving financial assistance from the former Erba Lautex in order to repay the contested aid.

92 It is undisputed that, in the examination of an undertaking's financial viability, the assessment of its material circumstances may include consideration, in particular, of the characteristics of the group to which it is linked (Case C-43/98 P(R) *Camar* v *Commission and Council* [1998] ECR I-1815, paragraph 36, and *Commission* v *Technische Glaswerke Ilmenau*, paragraph 56).

93 Furthermore, in the examination of an undertaking's financial capacity, it is irrelevant whether the person who controls it is an undertaking or a natural person (*HFB and Others* v *Commission*, paragraph 64).

94 The argument put forward by the applicant that the former Erba Lautex has been dissolved as a company and consequently has no 'group' relationship with the applicant, therefore seems *prima facie* irrelevant to the appraisal of a 'group' relationship.

95 However, in the present case, without it being necessary to settle the matter of whether the former Erba Lautex and NEL belong to the same group of undertakings as defined by Community law (judgments of the Court of Justice in

Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 134, Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11, Case 66/88 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraph 35, and Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraph 16), it need only be pointed out that the applicant has not adequately established the lack of financial links between itself and the former Erba Lautex.

96 First, it should be noted that, as is apparent from the contested decision, NEL is an undertaking wholly owned by the former Erba Lautex.

97 Also, as the applicant has stated, NEL was created by the administrator in bankruptcy of the former Erba Lautex, in the context of a takeover of the latter's assets and with the agreement of its creditors, with the sole aim of providing the creditors, *inter alia*, with a better payment, through the subsequent sale of NEL to a private investor. It is also established that, prior to the sale of NEL to an investor, the assets (machines and premises) of the former Erba Lautex are being leased to NEL for a monthly rent enabling the former Erba Lautex to have regular financial returns which, according to the explanations given by the applicant, have been larger than those which would have resulted if the former Erba Lautex had been immediately dismantled. It should also be stated that NEL's staff, including the management, is the same as that of the former Erba Lautex.

98 Finally, at the hearing, the applicant stated that the former Erba Lautex is obviously concerned that NEL's reputation should not be adversely affected by the commencement of bankruptcy proceedings.

99 It is therefore clearly established that the former Erba Lautex and NEL have shared interests, and that the viability and proper working of NEL are the main concerns of the administrator in bankruptcy of the former Erba Lautex.

100 At the hearing, the applicant drew attention to the fact that the financial assets held by the former Erba Lautex must be used solely to pay off its creditors, and to the fact that the administrator in bankruptcy of the former Erba Lautex runs the risk of criminal sanctions if he does not comply with that obligation.

101 In that regard, it should be noted that the applicant merely made a general reference to the German legislation on the matter without adducing the slightest evidence to show that, in a situation such as the one in this case, the capital of a bankrupt company cannot be used, to a certain extent, to help a subsidiary, wholly owned by that undertaking, whose survival will have a significant effect on the possibility of paying off the latter's creditors as fully as may be.

102 On the contrary, the applicant's statements suggest rather that the administrator in bankruptcy of the former Erba Lautex has a certain room to manœuvre and may, at least to a certain extent, use the assets of the former Erba Lautex to help NEL to repay the aid granted by the BvS and the SAB. Indeed, at the hearing, the applicant stated that the administrator in bankruptcy of the former Erba Lautex would be entitled to grant a reduction in the monthly rent paid by NEL in order to enable it to repay the contested aid in instalments. This was confirmed by the written proposal sent to the Court on 11 October 2002, in which the administrator in bankruptcy of the former Erba Lautex proposes that the monthly rent paid by NEL should be reduced by 50% provided that NEL uses the reduction to repay the aid to the BvS and the SAB, in monthly instalments, until judgment is given in the main proceedings.

103 It is also important to point out that the applicant has not adduced evidence to show that the former Erba Lautex does not have the financial capacity to give financial assistance to NEL. On the contrary, it is common ground that the former Erba Lautex is the owner of the machinery and premises leased to NEL. However, it has not been established that those assets could not be used, with the consent of the former Erba Lautex, for example as a guarantee for German

banks, to enable NEL to obtain a bank loan. Furthermore, it is apparent from the contested decision that, after the applicant was created, it rented the machines and buildings of the former Erba Lautex for a monthly sum of EUR 215 626. At the hearing, the applicant stated that that amount was actually paid from January 2000. Although, at the hearing, the applicant stated that those sums were partly used to make a series of payments, *inter alia* to finance the receivership and although, in its proposal of 11 October 2002, it points out that it now pays a monthly rent of EUR 57 643, it has nevertheless not denied that the assets of the former Erba Lautex have been increased, during recent years, by significant sums and that the former Erba Lautex still holds a substantial part of those sums.

104 Although it is likely that the commencement of the bankruptcy proceedings, assuming that it follows automatically from the request for repayment presented by the BvS and the SAB, without the former Erba Lautex having the opportunity to intervene at that stage, risks harming relations between NEL and its customers, suppliers and creditors, the President of the Court considers that the applicant has not established to the requisite legal standard that the financial intervention of the former Erba Lautex at an early stage in the bankruptcy proceedings could not prevent NEL from going into liquidation and thus ensure its survival until a ruling is given in the main proceedings. As the applicant itself explained, it may be able to continue operating after the commencement of the bankruptcy proceedings if those proceedings allow it to meet all its debts. It should be noted in that regard that, in the first scenario, the PWC report examines NEL's financial situation without taking financial assistance from the former Erba Lautex into account, merely stating that, 'in all probability', NEL will have to cease operating if bankruptcy proceedings are commenced.

105 However, even if the applicant were to establish to the requisite legal standard that the former Erba Lautex would be prevented from providing the financial assistance necessary to enable all NEL's creditors to be paid off, no serious argument has been put forward to show that the applicant will be prevented from contesting the recovery measures, and pleading the illegality of the contested decision, before the national courts.

106 As is apparent from the application and the explanations provided by the applicant at the hearing, if the applicant refuses to pay, the national proceedings to recover the aid from the applicant should take the form of an application by the BvS and the SAB before the national courts for an order to pay.

107 Contrary to the applicant's assertions, Community law does not preclude the national court from ordering suspension of operation of the application for recovery lodged by the BvS and the SAB pending settlement of the case before the Court of First Instance or from referring a question to the Court of Justice for a preliminary ruling under Article 234 EC. Since the applicant has contested the legality of the contested decision under Article 230 EC, the national court is not bound by the definitive nature of that decision (see to that effect the judgments in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraphs 13 to 26, Case C-178/95 *Wiljo* [1997] ECR I-585, paragraphs 20 and 21, and Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 30, and the order in *B* v *Commission*, paragraph 92).

108 Furthermore, the fact that an application for suspension has not been successful before the Community judicature does not prevent suspension being ordered by the national court. Thus, the judgment in *Germany* v *Commission* shows *inter alia* that the German court (the Landgericht Amberg) in the case which gave rise to that judgment considered it necessary to suspend the national recovery proceedings after the President of the Court of Justice, by order of 3 May 1996 (Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441), dismissed the application for suspension of the operation of the Commission decision brought by the Federal Republic of Germany before the Court of Justice.

109 In the light of the case referred to in the previous paragraph, the applicant has failed to demonstrate in what respect the domestic remedies available to it under German law allowing it to oppose immediate repayment of the aid would not enable it to avoid serious and irreparable damage (orders in *Deufil* v *Commission*, paragraph 22, *Belgium* v *Commission*, paragraph 26, and Case T-155/96 R *Ville de Mayence* v *Commission* [1996] ECR II-1655, paragraph 25).

110 In view of the foregoing, the applicant has not managed to establish that, if suspension of the operation of the contested decision were not granted, it would suffer serious and irreparable damage and, consequently, that the condition concerning urgency is satisfied in this case.

111 Even if the applicant had fully established the existence of serious and irreparable damage, it would still be for the President of the Court to weigh the applicant's interest in obtaining the interim measures requested against the public interest in the operation of decisions taken in connection with the monitoring of State aid.

112 In that regard, it should be noted, first of all, that the first subparagraph of Article 88(2) EC provides that, if the Commission finds that aid granted by a State or through State resources is not compatible with the common market, it is to decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. It follows that the general interest in the name of which the Commission fulfils the tasks entrusted to it, by Article 88(2) EC and Article 7 of Regulation No 659/99, in order to ensure, essentially, that the functioning of the common market is not distorted by State aid harmful to competition, is particularly important (see to that effect Case T-86/96 R *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* [1998] ECR II-641, paragraph 74, and *Government of Gibraltar* v *Commission*, paragraph 108). The purpose of requiring the Member State concerned to abolish aid which is incompatible with the common market is to restore the previously existing situation (Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 26, and *Alcan Deutschland*, paragraph 23).

113 Consequently, in connection with an application for interim measures seeking the suspension of operation of the obligation imposed by the Commission to repay aid which it has declared to be incompatible with the common market, the Community interest must normally, if not always, take precedence over the

interest of the aid recipient in avoiding enforcement of the obligation to repay it before judgment is given in the main proceedings (*Technische Glaswerke Ilmenau* v *Commission*, paragraph 114).

114 In the present case, in seeking to establish that there are exceptional circumstances justifying the grant of suspension, the applicant argues that the harm to the Community would hardly be measurable, since its share of the market in the common market is extremely small, that the Commission has not considered it necessary to recover the aid provisionally under Article 11(2) of Regulation No 659/1999 and that the Commission's preliminary examination of the aid in question lasted 19 months.

115 The argument that the applicant has a small market share must be rejected. According to settled case-law, the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected (Case 259/85 *France* v Commission [1987] ECR 4393, paragraph 24, Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 43, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 48). Furthermore, it is established that even relatively little aid may adversely affect trading conditions to an extent contrary to the common interest, since the aid enables the undertakings benefiting from it to reduce their investment costs, thereby strengthening their position as against that of other undertakings competing with them in the Community (Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11, and *France* v *Commission*, paragraph 24). Thus, the fact that the undertaking benefiting from the aid does not have a large market share does not preclude there being a Community interest in the immediate withdrawal of State aid harmful to competition.

116 As regards the absence of a decision to recover the aid provisionally pursuant to Article 11(2) of Regulation No 659/1999, it need only be pointed out that the fact that the Commission considers that the conditions for adopting a decision to

effect provisional recovery are not met in no way prevents it from finding, at the end of the *inter partes* proceedings, that the Community interest justifies the immediate withdrawal of the aid in question and the immediate restoration of the situation which prevailed prior to payment of that aid.

117 Finally, the fact that the Commission, after 19 months of investigation, reached the conclusion that the aid in question was incompatible with the common market does not alter in any way the Community interest in that aid being repaid without delay in order to restore the situation which prevailed before the aid was paid and to suppress the anti-competitive effects on the common market resulting from it.

118 Furthermore, it should be pointed out that the Commission, in the context of Article 87(3) EC, enjoys a wide discretion and, when examining the anti-competitive effects of an aid, must take all the relevant factors into account, including, where appropriate, the circumstances already considered in a prior decision and the obligations which that prior decision may have imposed on a Member State (Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 20, and *TWD* v *Commission*, paragraph 26).

119 In the present case, to uphold the applicant's argument would be tantamount to failing to have regard to the wide discretion enjoyed by the Commission and its duty to take account of the fact that aid has already been granted to the former Erba Lautex and has been the subject of a negative decision but has not, however, been repaid to the Federal Republic of Germany.

120 Since the condition regarding urgency is not satisfied and the balance of interests favours not suspending operation of the contested decision, the present application must be dismissed without the need to consider the other arguments put forward by the applicant to justify grant of the relief sought.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The application for interim measures is dismissed.**

2. **Costs are reserved.**

Luxembourg, 3 December 2002.

H. Jung

Registrar

B. Vesterdorf

President