

Joined Cases T-111/01 and T-133/01

**Saxonia Edelmetalle GmbH and J. Riedemann
as liquidator of ZEMAG GmbH**

v

Commission of the European Communities

(State aid — Restructuring — Misuse of State aid — Recovery of aid —
Article 88(2) EC — Regulation (EC) No 659/1999)

Judgment of the Court of First Instance (First Chamber, Extended Composition), 11 May 2005 II - 1585

Summary of the Judgment

1. *State aid — Administrative procedure — Obligation for the Commission to put the parties concerned on notice to submit their observations — Form and content of the notice (Art. 88(2) EC; Council Regulation No 659/1999, Arts 6(1) and 16)*

2. *State aid — Administrative procedure — Obligation for the Commission, where the Member State has failed to comply with its injunction to supply information, to consult the parties concerned — None*
(Council Regulation No 659/1999, Arts 13(1), 14 and 16)
3. *Actions for annulment — Pleas in law — Pleas that may be raised against a Commission decision on State aid — Pleas not raised in the administrative procedure — Distinction between admissible pleas in law and inadmissible pleas of fact*
(Arts 88(2) EC and 230 EC)
4. *State aid — Aid authorised by the Commission — Misuse of the aid by the beneficiary — Burden of proof on the Commission — Refusal by the Member State concerned to obey the injunction to provide information — Consequences*
(Art. 88(2) EC; Council Regulation No 659/1999, Arts 1(g), 13 and 16)
5. *State aid — Aid authorised by the Commission — Misuse of the aid by the beneficiary — Discretion of the Commission — Judicial review — Limits*
6. *State aid — Recovery of unlawful aid — Obligation resulting from the unlawfulness — Subject-matter — Restoration of the prior situation — Application mutatis mutandis in the event of misuse of aid*
(Art. 88(2) EC; Council Regulation No 659/1999, Arts 1(g), 14 and 16)
7. *Acts of the institutions — Statement of reasons — Obligation — Scope — Refusal to take into consideration, in a decision ordering the reimbursement of unlawful aid, the information provided by the Member State concerned following an injunction*
(Art. 253 EC; Council Regulation No 659/1999, Arts 10(3) and 13(1))

1. The procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in the light of its Community obligations, for granting the aid and not in respect of the beneficiary or beneficiaries of the aid.

For the purposes of Article 88(2) EC ‘parties concerned’ refers to an undetermined group of addressees. It follows that Article 88(2) EC does not require that specific parties be put on notice individually. Its sole purpose is to require the Commission to take steps

to ensure that all parties potentially concerned are informed and given the opportunity to put forward their arguments. In that context, the publication of a notice in the *Official Journal of the European Communities* is an appropriate means of informing all the parties concerned that a procedure has been initiated. Consequently, that solution confers on the parties concerned essentially the role of information sources for the Commission in the administrative procedure instituted under Article 88(2) EC.

Since the Commission did, through the notice published in the *Official Journal of the European Communities*, invite the beneficiaries of aid initially authorised by a previous decision to submit their observations on possible violation of the decision in question due to use of that aid in a manner contrary to that decision and those beneficiaries did not take advantage of that opportunity, the Commission did not violate any of their rights.

(see paras 47-48, 50-51, 53)

Of course, the mere fact of being informed of the opening of a formal procedure does not suffice to enable a party to effectively make known its observations. The Court notes that Article 6(1) of Regulation No 659/1999 laying down detailed rules for the application of Article [88 EC], which is also applicable, by virtue of Article 16 of that regulation, to misused aid, provides that the decision to open the formal investigation procedure, despite the necessarily temporary nature of the assessment it entails, must be sufficiently precise to enable the parties concerned to participate in an effective manner in the formal investigation procedure during which they will have the opportunity to put forward their arguments. To that end, it suffices that the parties concerned may familiarise themselves with the reasoning relied on by the Commission.

2. It follows from Article 13(1) of Regulation No 659/1999 laying down detailed rules for the application of Article [88 EC] that, where the Member State fails to respond to the Commission's injunction decision ordering that certain information be provided, the Commission is empowered to end the formal investigation procedure and to adopt a decision declaring that the aid is or is not compatible with the common market on the basis of the information available. That decision may, subject to the conditions provided for in Article 14 of Regulation No 659/1999, order the recovery of previously-paid aid from its beneficiary. Under Article 16 of Regulation No 659/1999, Articles 13 and 14 apply *mutatis mutandis* in the event of

misuse of aid. It follows from those provisions that the Commission is not under a duty to consult the parties concerned in cases where a Member State fails to comply with the Commission's injunction to provide information.

That solution may, subject to certain exceptional cases, apply by extension to cases where an undertaking has not participated in the investigation procedure provided for by Article 88(2) EC.

(see para. 58)

(see paras 67-69)

3. In the context of an action for annulment under Article 230 EC 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 assessments made by the Commission must be examined solely on the basis of the information available to the Commission at the time when those assessments were made.
4. A reading of Article 88(2) EC, together with Article 1(g) and Article 16 of Regulation No 659/1999 laying down detailed rules for the application of Article [88 EC], shows that it is in principle for the Commission to establish that all or part of the aid previously authorised by it by an earlier decision has been misused by the beneficiary. If it fails to do so, that aid is to be considered as being covered by its previous approval decision.

It follows that an applicant who has participated in the investigation procedure provided for by Article 88(2) EC cannot rely on factual arguments of which the Commission was unaware and of which it did not inform the Commission in the course of the investigation procedure. By contrast, nothing prevents the party concerned from formulating against the final decision a legal plea which was not raised at the stage of the administrative procedure.

Nevertheless, the reference in Article 16 of Regulation No 659/1999 to Article 13 authorises the Commission, in cases where a Member State fails to comply with an order to provide information, to adopt a decision closing the formal investigation procedure on the basis of the information available. Thus, when a Member State fails to provide sufficiently clear and precise information on the use of the aid about which the

Commission, on the basis of the information it has available, expresses doubts as to compliance with its earlier approval decision, the Commission is empowered to find that the aid in question has been abused.

(see paras 86, 93)

5. When the assessment which the Commission must conduct involves the consideration and assessment of economically complex facts and circumstances, given that the Community Court may not substitute its assessment for that of the Commission, the Court's review must be limited to verifying compliance with procedural rules and the obligation to state reasons, as well as the material accuracy of the facts, and ensuring that there has been no manifest error of assessment or misuse of powers. Such is the case when the Commission's assessment is of whether all or part of the aid previously authorised by it was misused by the beneficiary.

(see paras 90-91)

6. In accordance with Community law, when the Commission finds that aid is

incompatible with the common market, it may require the Member State which paid the aid to recover it from the recipient. Removing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful and seeks to re-establish the previous situation. That purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored. Consequently, the main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded by the unlawful aid.

It cannot in principle be otherwise as regards the repayment of aid paid by a Member State which, pursuant to a decision adopted by the Commission, is considered to have been misused pursuant to Article 88(2) EC and Article 1 (g) of Regulation No 659/1999 laying down detailed rules for the application of Article [88 EC]. The Court notes in this respect that Article 16 of Regulation No 659/1999 provides *inter alia* that Article 14 of the same regulation, in so far as it requires recovery from the beneficiary of aid found to be illegal, applies *mutatis mutandis* in the event of

aid being misused. Consequently, mis-used aid must, in principle, be recovered from the undertaking which has had the actual use thereof, which may be different from the undertaking listed as the beneficiary in the decision authorising the aid, in order to eliminate the distortion of competition caused by the competitive advantage afforded by it.

(see paras 111-115, 125)

7. In order to satisfy the requirements of Article 253 EC, the statement of reasons for a decision must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Community judicature to exercise its power of review. Although it is not necessary for the reasoning to go into all the relevant facts and points of law, it must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

Although when the Commission, acting pursuant to Article 10(3) of Regulation No 659/1999 laying down detailed rules for the application of Article [88 EC], issues an information injunction it may, pursuant to Article 13(1) of that regulation, 'where ... the Member State concerned does not provide the information requested', adopt a decision to close the investigation procedure on the basis of the information available, it is not released from its obligation to state sufficiently the reasons which have led it to consider that the information provided by a Member State, in response to the information injunction, cannot be relied on in the final decision which it intends to adopt. Such a situation cannot be likened to one where a Member State fails to provide any information to the Commission in response to an injunction issued pursuant to Article 10(3) of Regulation No 659/1999, in which case the reasons may be limited to merely stating that the Member State has failed to respond to the injunction.

(see paras 138, 145)