JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
13 January 2004 *

In Case T-158/99,

Thermenhotel Stoiser Franz Gesellschaft mbH & Co. KG,

Vier Jahreszeiten Hotel-Betriebsgesellschaft mbH & Co. KG,

Thermenhotel Kowald,

Thermalhotel Leitner GesmbH,

established in Loipersdorf (Austria), represented by G. Eisenberger, lawyer, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by V. Kreuschitz and J. Macdonald Flett, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

supported by

Republic of Austria, represented by W. Okresek, H. Dossi, C. Pesendorfer and T. Kramler, acting as Agents, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of Commission Decision SG(99) D/1523 of 3 February 1999 declaring State aid in connection with a hotel project in Loipersdorf (Austria) compatible with the common market,

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

composed of: B. Vesterdorf, President, J. Azizi, M. Jaeger, H. Legal and M.E. Martins Ribeiro, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 1 April 2003,

gives the following

Judgment

Legal background to the dispute

1 Article 92 of the EC Treaty (now, after amendment, Article 87 EC) provides, in particular, as follows:

'1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

...

3. 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 Under Article 93 of the EC Treaty (now Article 88 EC):

'1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

...

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

Background to the case

3 By letter of 20 November 1997, the applicants, four operators of four-star hotels at the tourist resort of Loipersdorf in the Land Steiermark (Austria), informed the Commission of aid which that Land planned to grant Siemens AG Austria, for the purposes of the construction of a five-star hotel (hereinafter 'the Siemens hotel') in that same locality.

4 By letter of 12 December 1997, the Commission asked the Austrian authorities for information to enable it to take a view on the planned operation.

5 By letter dated 23 February 1998, which reached the Commission on 25 February 1998, the Republic of Austria notified the Commission of the aid project in question.

6 After several reminders and extensions of the period for reply, the Commission obtained additional information from the Austrian authorities on the notified aid project, by letter of 30 December 1998 delivered on 5 January 1999.

7 By decision adopted on 3 February 1999 and communicated to the Austrian authorities by letter of 2 March 1999 (hereinafter 'the contested decision'), the Commission declared the aid at issue compatible with the common market, under the derogation from the prohibition of State aid established by Article 92(3)(c) of the Treaty with regard to State aid intended to facilitate the development of certain economic areas.

8 The authorised aid consisted, first, of a subsidy amounting to EUR 810 302 (11 150 000 Austrian Schillings (ATS)) for the construction of the Siemens Hotel and, secondly, a subsidised property transaction of EUR 893 571 (ATS 12 295 810), that is a total sum of EUR 1 703 873 (ATS 23 445 810). The total capital invested in the construction of the Siemens Hotel was EUR 38 100 000 (ATS 524 000 000).

9 The contested decision states, among other things:

'As part of the project a contract was also concluded between the operator of the [Siemens] Hotel and Loipersdorf Spa. Under that agreement, the Spa undertakes to reserve 50 bedrooms per day for three years (that is to say, an occupancy rate of 16.7%) at a price equal to the average price for bedrooms actually obtained by the Siemens Hotel. In addition, the Spa undertakes, first, to enlarge the rest-rooms adjoining the thermal springs, in which 200 reclining beds will be reserved exclusively for the customers of the Siemens Hotel, and, secondly, not to allow other hotels direct access to the springs before 1 January 2003. In exchange, the operator of the Siemens Hotel undertakes to reserve at least 200 reclining beds per day and to pay the Spa the official daily entry fee. That obligation is for a fixed period of five years and may be varied subsequently.'

10 By letter of 6 April 1999, the applicants requested the Commission to send them a copy of the documents on the file.

11 By letter of 29 April 1999, the Commission sent the applicants a copy of the contested decision, while refusing to send them the documents on the file on grounds of confidentiality.

Proceedings before the Court

12 By application lodged at the Court Registry on 5 July 1999, the applicants brought this action for annulment against, first, the contested decision and, secondly and in the alternative, the refusal to send the file.

13 The summary of the contested decision, under reference N 136/98, was published in the *Official Journal of the European Communities* C 238 of 21 August 1999, p. 3.

14 The Commission raised a plea of inadmissibility against the action, by document lodged on 18 October 1999.

15 The applicants submitted their observations on that objection on 16 November 1999.

16 By document lodged on 14 January 2000, the Republic of Austria applied to intervene in these proceedings in support of the form of order sought by the Commission.

17 That application was granted by order of 25 February 2000 of the President of the Second Chamber, Extended Composition.

18 By document lodged on 4 April 2000, the Republic of Austria stated that it would not make any submissions on the admissibility of the action, but reserved its right to submit observations on that point should the Court reserve its decision on the plea of inadmissibility for final judgment.

19 The decision on the plea of inadmissibility was reserved for final judgment by order of the Court (Second Chamber, Extended Composition) of 16 June 2000.

20 The applicants lodged their reply on 11 January 2001, one day after the expiry of the prescribed time-limit.

21 The President of the Second Chamber, Extended Composition, ordered that that document should be entered in the Register, by decision of 12 January 2001.

22 In its rejoinder, the Commission asked the Court to reconsider that decision and not to admit the reply. The Commission stated that it was submitting its rejoinder only in case the Court did not accede to its request.

23 By decision of 20 September 2001, the Judge-Rapporteur was assigned to the First Chamber, Extended Composition, to which the case was, accordingly, allocated.

24 Upon hearing the report of the Judge-Rapporteur, the First Chamber, Extended Composition, decided, on 18 January 2002, to invite the Commission to reply to several questions and to produce the notification of 23 February 1998 from the Austrian authorities concerning the State aid project in question, the correspondence between the Commission and those authorities, and all the documents provided in support of the notification.

25 On 13 February 2002 the Commission lodged its replies to the Court's questions and produced certain documents.

26 By letter of 12 March 2002, the Commission indicated that the Austrian authorities had requested that certain of the documents produced be treated as confidential.

27 The Commission subsequently stated, by letter lodged on 5 December 2002, that those authorities no longer considered it necessary that the documents in question be treated as confidential.

28 Those documents were therefore added to the file on the case and communicated to the applicants and to the intervener.

29 On 3 February 2003, following a reminder from the Court, the Commission also lodged a copy of a report on the regional development of Steiermark, drawn up in October 1994 by the Institut für Technologie- und Regionalpolitik (Technology and Regional Policy Institute) and referred to in paragraph 3.2.1 of the contested decision.

30 The parties presented oral argument and replied to the questions put by the Court at the hearing on 1 April 2003.

31 In the course of that hearing, the Commission withdrew its request that the Court should not admit the reply because of its late lodgment. For their part, the applicants, having received the documents in the administrative file on the aid in question, abandoned their alternative claims for the production of those documents and for the annulment of the Commission's refusal to send them to the applicants.

32 At that same hearing the reciprocal reservation agreement between Loipersdorf Spa and the Siemens Hotel was produced.

Forms of order sought

33 The applicants claim that the Court should:

— declare the action admissible and well-founded;

— annul the contested decision;

— order the Commission to pay the costs.

34 The Commission, supported by the intervener, contends that the Court should:

— dismiss the action as inadmissible;

— dismiss the action as unfounded;

— order the applicants to pay the costs.

Admissibility

35 The Commission pleads that the action is inadmissible on the ground, first, that the applicants' lawyer did not sign the application and, second, that they lack standing.

Failure of the applicants' lawyer to sign the application

Arguments of the parties

36 The Commission deduces from the first subparagraph of Article 43(1) of the Rules of Procedure of the Court of First Instance and from Article 6(3) of the

Instructions to the Registrar that the original of every pleading must be signed by the parties' representatives and that such signature must enable the name of a lawyer authorised to represent, in this instance, the applicants to be identified for the purpose of verifying that the signature on the pleading is that of the lawyer whom they have appointed.

37 The initials over the middle of the stamp of the lawyers' firm 'Eisenberger-Herzog-Nierhaus-Forcher & Partner OEG' on the first page of the original of the application do not permit recognition of the signature of Mr Georg Eisenberger, the applicants' representative in the proceedings.

38 In that regard, the copy of the practising certificate of the person concerned annexed to the application cannot be taken into consideration in order to establish the authenticity of the signature appearing on the original of the application. Contrary to the requirements of Article 6(4) of the Instructions to the Registrar, no schedule of annexes to the application was lodged. The reference to the annexes on the first page of the application cannot take the place of such a schedule, nor does it cure the failure to mention the annex in the application as required by the aforesaid Article 6(4).

39 The applicants reply that Mr Georg Eisenberger duly signed the original of the application and that that signature is identical to the signature on his practising certificate. The applicants state that they subsequently produced a specimen of Mr Georg Eisenberger's signature, certified by a notary, so as not to allow the slightest doubt to remain about the identity of the author of the signature on the application.

40 Moreover, the applicants submit that they have complied with Article 43(4) of the Rules of Procedure by setting out on the first page of the application the list of the annexes referred to in that document. The applicants state that they have lodged a separate document containing that same list to dispel any uncertainty in that regard.

Findings of the Court

41 It is appropriate to recall as a preliminary point that, under the first subparagraph of Article 43(1) of the Rules of Procedure, the original of every pleading must be signed by the party's agent or lawyer.

42 In this case, first, it must be observed that the first page of the original of the application is signed.

43 Secondly, the applicants have annexed to their application a copy of their lawyer's practising certificate, also containing a signature of the person concerned. In view of the fundamental nature of that practising certificate for the validity of the application and, consequently, for the admissibility of the action as such, that document cannot be disregarded, for the purposes of establishing the authenticity of the signature on the first page of the original of the application, on the sole ground that the application was not accompanied by a schedule of annexes.

44 Thirdly, the applicants have, for all practical purposes, voluntarily lodged a specimen, certified to be genuine by notarial act, of the signature of the lawyer concerned, as well as a schedule of annexes.

45 In view of those three factors, the Court has been able to satisfy itself that the condition laid down in the first subparagraph of Article 43(1) of the Rules of Procedure has been complied with. While it is true that the signature on the first page of the original of the application does not, in itself, enable the lawyer concerned to be easily identified and that it is, in addition, a simplified version of

that appearing on the copy of the practising certificate of the person concerned, the fact remains that the comparison of those three signatures has left the Court in no doubt that the application was, in any event, duly signed by the applicants' lawyer.

46 Accordingly, the plea of inadmissibility based on the failure of the applicants' lawyer to sign the application must be rejected.

The applicants' lack of standing to bring proceedings

Arguments of the parties

47 The Commission submits that the circumstances of local competitors of a State aid recipient, such as the applicants, are not within the compass of trade between Member States, within the meaning of Article 92(1) of the Treaty. That provision extends its field of protection only to competitors not carrying on their business in the Member State which grants the aid at issue.

48 The Commission does not have to consider either the effects of the aid in question on competition in a tightly circumscribed area, such as Loipersdorf, or its effects on competitors in the same Member State or in the same area, because such a question is extraneous to trade between Member States within the meaning of Article 92(1).

49 As they are established in the immediate vicinity of the undertaking receiving the aid, the applicants are therefore neither referred to in, nor, consequently, directly affected by, the contested decision. If it were otherwise, the fourth paragraph of Article 173 of the EC Treaty (now the fourth paragraph of Article 230 EC), would be distorted by making it a means of objective judicial reviews.

50 While submitting, at paragraph 16 of their application, that the Commission opened the formal procedure of investigation of State aid under Article 93(2) of the Treaty, the applicants allege, in paragraph 7 of the same document, that the Commission, in actual fact, decided on the compatibility of the disputed aid with the common market at the conclusion of the preliminary investigation procedure required by Article 93(3).

51 The applicants have thus been deprived of the opportunity, which is accorded them by Article 93(2) by reason of their status as interested parties for the purposes of that provision, of submitting their observations on the notified aid project.

52 It follows that the applicants can enforce observance of those safeguards only if they can challenge the contested decision before the Community Court.

53 The applicants submit, also, that the contested decision is of direct and individual concern to them. First, the decision directly harms their interests and their legal position, without requiring national application measures for its implementation. Secondly, the contested decision affects the applicants individually by reason of certain attributes peculiar to them and by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of the contested decision.

Findings of the Court

54 In view of the ambiguity of the applicants' arguments, it is appropriate to identify, at the outset, whether the stage of the investigation procedure at the conclusion of which the contested decision was adopted was preliminary or formal.

55 Under the first sentence of Article 93(3) of the Treaty, the Commission is to be notified of any plans to grant or alter State aid before those plans are implemented.

56 The Commission then conducts an initial review of the planned aid. If, at the end of that review, it considers a plan to be incompatible with the common market, it must without delay initiate the procedure under Article 93(2) of the Treaty (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 36).

57 In the context of the procedure laid down by Article 93 of the Treaty, the preliminary stage of the procedure for reviewing aid under Article 93(3), which is intended merely to allow the Commission to form an initial opinion on the partial or complete conformity of the aid in question, must therefore be distinguished from the formal investigation stage under Article 93(2), which is designed to enable the Commission to be fully informed of all the facts of the case (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16, and *Commission* v *Sytraval and Brink's France*, cited in paragraph 56 above, paragraph 38).

58 The preliminary stage of the procedure under Article 93(3) of the Treaty is intended merely to allow the Commission a sufficient period of time for reflection and investigation so that it can form an initial opinion on the draft aid plans notified to it, thus enabling it either to conclude, without the need for detailed examination, that the aid is compatible with the Treaty or, by contrast, to make a finding that the content of those plans raises doubts in that regard (Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraphs 53 and 54).

59 The formal investigation stage under Article 93(2) of the Treaty, which enables the Commission to be fully informed of all the facts of the case before taking its decision, is essential whenever the Commission has serious difficulties in determining whether an aid is compatible with the common market (*Matra* v *Commission*, cited in paragraph 57 above, paragraph 33).

60 Therefore, when taking a decision not raising any objection to an aid, the Commission may restrict itself to the preliminary investigation stage provided for under Article 93(3) of the Treaty only if it is able to satisfy itself after such an investigation that the aid is compatible with the Treaty.

61 If, on the other hand, the initial investigation leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to carry out all the requisite consultations and, for that purpose, to initiate the formal investigation procedure under Article 93(2) of the Treaty (Cases 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13; *Cook* v *Commission*, cited above in paragraph 57, paragraph 29; *Matra* v *Commission*, cited above in paragraph 57, paragraph 33; and *Commission* v *Sytraval and Brink's France*, cited above in paragraph 56, paragraph 39).

62 The latter procedure ensures that Member States, other than the notifying State, and the circles involved can be heard, since the Treaty obliges the Commission to give the parties concerned formal notice to submit their observations.

63 In this case, it does not appear from the facts of the case that the contested decision was adopted within the framework of the formal investigation stage under Article 93(2).

64 First of all, it is not alleged by the applicants that the Commission published a notice in the *Official Journal of the European Communities* inviting the parties concerned to submit their observations on the aid project in question, as that formal investigation procedure requires.

65 Next, the Commission stated, in reply to a question by the Court, that a summary of the contested decision had been published in the *Official Journal of the European Communities* under the heading 'Authorisation for State aid pursuant to Articles [92 and 93] of the EC Treaty — Cases where the Commission raises no objection'.

66 It is when it adopts a decision authorising aid without initiating the procedure under Article 93(2) that the Commission publishes such a notice. Such notice usually takes the form, as in this case, of a standard list of information on the State aid in question (see *Competition Law in the European Communities*, volume II A, 'Rules applicable to State aid' 1995, p. 35, paragraph 36).

67 Finally, it is clear from the summary of the background to the case that the Commission adopted the contested decision on 3 February 1999, that is to say, within the mandatory time-limit for reflection and investigation, assessed at two months by the Court of Justice, within which the Commission had to undertake the preliminary investigation of the notified project from the aforesaid date of 5 January 1999 (see, to that effect, Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 4, and *Austria* v *Commission*, cited in paragraph 58 above, paragraphs 56 and 72 to 74).

68 In those circumstances, it must be held that the contested decision was adopted in the context of the preliminary investigation procedure under Article 93(3) of the Treaty.

69 The applicants can enforce observance of the safeguards which they would have had under a formal investigation procedure under Article 93(2) of the Treaty, if the Commission had had to initiate such a procedure, only if they are entitled to challenge before the Community Court a decision adopted, as in this case, in the context of the preliminary investigation procedure under Article 93(3).

70 Among the parties concerned referred to in Article 93(2), who are, as such, entitled to the procedural safeguards afforded in the course of the formal investigation procedure of aid projects under that provision, are undertakings whose interests might be affected by the grant of the disputed aid, including undertakings competing with the recipient of the aid (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16).

71 In that regard, it is established that the applicants are direct competitors of the hotel receiving the aid in question and that the contested decision recognised their status as such.

72 It must in that regard be pointed out that the applicants submit formally, in paragraph 2 of their application, that they were not heard in their capacity as competing undertakings, contrary to the requirements of Article 93(2) of the Treaty.

73 In the light of the above considerations, the Court concludes that the applicants have the status of parties concerned for the purposes of Article 93(2) of the Treaty. They must therefore be regarded as directly and individually concerned by the contested decision in so far as the Commission declared the aid granted by the Austrian authorities compatible with the common market without initiating the procedure under Article 93(2) of the Treaty (see, to that effect, *Cook* v *Commission*, cited in paragraph 57 above, paragraph 26, and Case T-188/95 *Waterleiding Maatschappij* v *Commission* [1998] ECR II-3713, paragraphs 57 and 86).

74 The Commission's argument that the applicants' circumstances are not within the compass of trade between Member States within the meaning of Article 92(1) of the Treaty, is, in that respect, irrelevant.

75 That question concerns only the characterisation of a measure as State aid for the purposes of the Community competition rules, and does not concern the conditions in which an action for annulment can be brought under the fourth paragraph of Article 173 of the Treaty.

76 It follows that consideration of that question relates to the merits of the action rather than its admissibility.

77 The applicants therefore have standing to seek the annulment of the contested decision.

78 It follows from the foregoing that the plea that the action is inadmissible must be rejected.

Merits

79 The arguments developed by the applicants in support of their claim for annulment of the contested decision can be grouped into eight pleas in law based, respectively, on breach of their right to be heard, on the inadequate reasoning of the contested decision, on disregard of Articles 92(1) and 92(3)(c) of the Treaty, on infringement of the principle of non-discrimination and of the right to establishment of the local competitors of the aid recipient, on contravention by the contested decision of the Community provisions relating to environmental protection and, finally, on misuse of powers.

The first plea in law, alleging breach of the right to be heard under Article 93(2) of the Treaty

Arguments of the parties

80 The applicants submit that the Commission had to give them the opportunity to be heard, in accordance with the requirements of Article 93(2) of the Treaty, before the adoption of the contested decision.

81 The Commission, which had been informed of the aid project in question on 20 November 1997, clearly adopted the contested decision, on 3 February 1999, in the context of the formal investigation procedure laid down by Article 93(2).

82 In any event, the Commission could confine itself to the preliminary stage of Article 93(3) of the Treaty only if it had encountered no serious difficulties in that initial investigation. If that was not the case, it had to open the formal investigation procedure under Article 93(2) of the Treaty in order to be able to determine the compatibility of the aid with the common market.

83 By failing to proceed to that formal procedure, the Commission committed a serious procedural error and disregarded Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

84 The Commission submits that it lawfully adopted the contested decision in the context of the preliminary investigation procedure under Article 93(3) of the Treaty without having to initiate the formal investigation procedure under Article 93(2).

85 In the context of the preliminary investigation procedure established by Article 93(3) of the Treaty, the possible competitors of the aid recipient have no procedural rights and the Commission is obliged, not to consider their objections, but to form an initial view on the compatibility of the notified aid projects with the common market.

Findings of the Court

86 In order to establish that they were deprived of the procedural safeguards provided by the formal investigation procedure under Article 93(2) of the Treaty, the applicants maintain, first, that the investigation procedure was actually conducted, in this case, under that provision, but without their being heard as, in that context, they should have been.

87 It suffices to state that, as has already been found in paragraphs 62 to 67 above, the contested decision was adopted at the conclusion of the preliminary investigation procedure under Article 93(3) of the Treaty, that is to say without opening the formal procedure of Article 93(2), which provides that the parties concerned should be invited to submit their observations.

88 Secondly, the applicants maintain that they were, in any event, entitled to the safeguards which Article 93(2) provides, since the Commission was required, if there were serious difficulties, to proceed in accordance with the requirements of that provision and to give them a hearing before the adoption of the contested decision.

89 In that regard, in order to determine whether the Commission was required to open the formal investigation procedure under Article 93(2) of the Treaty and, in that context, to hear the applicants, it must be ascertained, as was pointed out in paragraph 59 above, whether the Commission was entitled to decide that the question of the compatibility of the aid in question with the common market raised no serious difficulties of assessment in the light of the evidence in its possession.

90 If there were no serious difficulty in assessing the compatibility of the aid with the common market, no provision of the Treaty or other rule of law required the Commission to proceed otherwise than it did in the context of the preliminary investigation procedure of Article 93(3) of the Treaty or, in particular, to hear the parties concerned as it would have had to do if it had opened the formal investigation procedure under Article 93(2).

91 In order to rule on the first plea in law, it is appropriate to consider the applicants' other pleas in law against the contested decision, in order to ascertain whether they enable any serious difficulty to be identified which should have led the Commission to open the formal investigation procedure.

The second plea in law, alleging inadequate reasoning of the contested decision

Arguments of the parties

92 The applicants claim that the contested decision is not based on sufficient information concerning the circumstances of the market in question, the anticipated share of the market that would be held by the Siemens Hotel or the position of competing undertakings, in particular, their shares of the market and their capacities.

93 The Commission contends that the contested decision considers in detail, in point 3.2.2, the effects of the planned aid on the market and that it was neither necessary nor possible to carry out a more detailed investigation. The Commis-

sion rightly confined itself to stating that only the hotels already present in the spa area of Steiermark and targeting an international clientele were in direct competition with the aid recipient.

Findings of the Court

94 It must be borne in mind that, according to settled case-law, the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) 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 in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirement to state reasons must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty 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 (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraphs 35 and 36; and Case T-266/94 *Skibsvaerftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 230).

95 In this case, the Court finds that point 3.2.2 of the contested decision contains a statement of the essence of the relevant considerations of fact and law, in particular the development of the regional market in question, the occupancy rate of the existing hotels and the relationship between the amount of the disputed aid and the overall investment and operating costs.

96 Such reasoning suffices to enable the applicants to ascertain the justification for the contested decision and the Court to review its legality on the basis of Article 173 of the Treaty.

97 Furthermore, in so far as the applicants' arguments may be understood as intended to criticise the inadequacy of the Commission's investigation to assess the compatibility of the aid in question with the common market, it must be noted that that question does not go to the issue of infringement of essential procedural requirements capable of rendering the contested decision unlawful but to that of the soundness of the assessment by the Commission of the compatibility of the said aid (see, to that effect, *Commission* v *Sytraval and Brink's France*, cited at paragraph 56 above, paragraph 67).

98 The second plea in law must therefore be dismissed.

The third plea in law, alleging infringement of Article 92(1) of the Treaty

Arguments of the parties

99 The applicants start by complaining that the Commission has not correctly included in the amount of the State aid of EUR 1 703 873 (ATS 23 445 810) granted to the Siemens Hotel the commitment by Loipersdorf Spa, a public undertaking, to reserve 50 bedrooms per day in the Siemens Hotel at market price for a period of three years.

100 Such a commitment involves a subsidy of EUR 7 267.28 (ATS 100 000) per day, that is nearly EUR 7 957 675 (ATS 109 500 000) over three years. In those

circumstances, the overall amount of the aid in question is no longer EUR 1 703 873 (ATS 23 445 810) but EUR 9 661 549 (ATS 132 945 810). Having regard to the total investment of EUR 38 100 000 (ATS 524 000 000), the Commission should have calculated the net rate of subsidy not at 4.45 %, but at 25.4 %.

101 That reservation of bedrooms, whatever their number, has no effect on the income of the thermal springs in respect of entrance fees and orders for refreshments except that it will be possible for 100 persons to be lodged without charge every day in the Siemens Hotel.

102 The applicants, secondly, accuse the Commission of failing also to take into consideration the obligation assumed by Loipersdorf Spa to make exclusively available to the Siemens Hotel 200 *chaises longues* in the rest-rooms adjoining the thermal springs, at the daily official entrance price, and to reserve direct and exclusive access to the springs for that hotel.

103 The Commission counters that the agreement between the Siemens Hotel and Loipersdorf Spa does not include promises of hidden State aid. Since the Spa is a commercial undertaking, it was not envisaged at any stage of the project's conception that bedrooms would be reserved without charge. On the contrary they were to be marketed as a part of the overall package offered to customers of the Spa.

104 The guarantee of bedroom reservations cannot be described as aid, because the total revenue guaranteed to the Spa undertaking by the provision for the reservation of 200 *chaises longues* per day substantially exceeds the total costs of the firm reservation of 50 bedrooms for three years.

105 In addition, the obligations to reserve bedrooms and *chaises longues* are for respective periods of three and twenty years. From the sixth year, the provision for reservation of *chaises longues* can be adjusted by reducing the actual average number of required places. None the less, the reservation of 200 entry tickets to the rest-rooms adjoining the Spa seems realistic for a 500-bed hotel. It could be argued that the Siemens Hotel will not need to seek the adjustment of the provision for reservation of *chaises longues*, having regard to the occupancy rate of 77 % for the spa hotels put forward by the applicants. In those circumstances, there is no need to anticipate, from the sixth year of the agreement's operation, a substantial reduction in the hire of *chaises longues* guaranteed to the Spa.

Findings of the Court

106 State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25).

107 A measure which a public undertaking adopts, as in this case, with regard to a private undertaking in the form of a reservation agreement cannot, merely because the two parties have undertaken reciprocal supply commitments, be excluded in principle from the concept of State aid within the meaning of Article 92(1) of the Treaty (see, to that effect, Case T-14/96 *BAI* v *Commission* [1999] ECR II-139, paragraph 71).

108 The classification of a measure as State aid depends on whether the recipient undertaking receives an economic advantage which it would not have received under normal market conditions (Case T-98/00 *Linde* v *Commission* [2002] ECR II-3961, paragraph 39).

109 In this case, the applicants cannot accuse the Commission of not having included, in the amount of the State aid in question, the financial costs to the Spa arising from the obligation to reserve 50 bedrooms per day in the Siemens Hotel.

110 In point 2.2 of the contested decision the Commission considered the reciprocal reservation agreement between the Spa and the Siemens Hotel.

111 In addition, it is not apparent that the Commission was wrong in thinking that the Austrian authorities had provided it with sufficient evidence to show that the Spa had made that agreement for purely economic reasons and that its provisions contained no element of State aid.

112 The applicants' argument does not permit the conclusion that the stipulations agreed between the Siemens Hotel and Loipersdorf Spa exceed the bounds of a normal commercial transaction between two private operators.

113 First, contrary to the applicants' submission, the provision for the reservation of 50 bedrooms per day in the Siemens Hotel does not at all mean that 100 persons per day can be lodged there without charge at the expense of the Spa.

114 On the one hand, the revenue from the price of bedrooms paid by guests of the Siemens Hotel, if all or some of the 50 bedrooms are occupied, cannot be categorised, appropriately, as resources of State origin.

115 On the other hand, the possible loss of profit resulting for the Spa from their obligation to pay the average price of 50 bedrooms for three years, if they are not actually occupied, has its counterpart in the revenue to the Spa in respect of the guaranteed hiring by the Siemens Hotel of 200 *chaises longues* in the rest-rooms adjoining the thermal springs.

116 On the basis of the occupancy rate of 77 % with which the applicants themselves credit the spa hotels of Loipersdorf, the Siemens Hotel, with a capacity of 500 beds, must be regarded as capable of honouring in any event the clause for the reservation of 200 *chaises longues* for the benefit of the Spa.

117 In the light of the unit price for the daily hire of *chaises longues* of EUR 18.09 (ATS 249), suggested by the intervener, without objection on that point by the applicants, the clause for the reservation of 200 places is such as to generate for the benefit of the Spa daily receipts of some EUR 3 618 (ATS 49 800), that is, on the basis of an agreed number of 357 operating days per year, annual receipts in the order of EUR 1 291 626 (ATS 17 778 600), and some EUR 25 832 520 (ATS 355 572 000) for the period of the clause's validity fixed by the parties at 20 years.

118 There is no need to assume a downwards revision of the clause for the reservation of 200 places from the sixth year of the agreement's application, since the Siemens Hotel must be regarded, on the basis of the occupancy rate of 77 % put forward by the applicants, as being able in all circumstances to ensure the full use of the 200 places by its clients.

119 In view of the consideration of more than EUR 25 000 000 (ATS 344 000 000) capable of accruing to the Spa over twenty years by virtue of the provision for the reservation of 200 *chaises longues*, it cannot be accepted, as the applicants suggest, that the Spa's commitment to reserve 50 bedrooms in the Siemens Hotel every day for three years entails a subsidy of EUR 7 957 675 (ATS 109 500 000).

120 It is furthermore appropriate to point out that the amount of receipts which the applicants attribute to the Siemens Hotel under the provision for the reservation of 50 bedrooms is based on an unsubstantiated evaluation of a price per night of EUR 145.35 (ATS 2 000), although, for example, the Royal Bank of Scotland had estimated the price at an amount of some EUR 87.20 (ATS 1 200) in the market study which it had been asked to carry out for the purposes of the construction of the Siemens Hotel.

121 The discount of 10 %, not contemplated by the contested decision, and laid down in favour of the Siemens Hotel in the provision for the reservation of 200 *chaises longues*, is not such as to cast any substantial doubt on the preceding conclusions.

122 The applicants have therefore failed to prove the presence of elements of State aid in the provisions of the reciprocal reservation agreement.

123 It must be held that the third plea in law discloses no serious difficulty which would have required the Commission to open the formal investigation procedure under Article 93(2) of the Treaty.

The fourth plea in law, alleging infringement of Article 92(3)(c) of the Treaty

Arguments of the parties

124 The applicants submit that, in order to assess the compatibility of State aid with the common market, it is necessary to take into account existing over-capacity, reduced growth of demand, the situation of the recipient on the market in question and the details of the aid.

125 The bed occupancy rate continues to decrease both in the commune of Loipersdorf and in the spa area of Steiermark. A figure of 133 196 nights, that is an overall occupancy of 60.8 % of bed capacity, was recorded in 1996. Five years previously, the hotels of Loipersdorf experienced 266.9 days' occupancy, that is a rate of 73 %. That trend is similar in the other spa resorts in Steiermark.

126 The hopes of establishing an entirely new market segment to remedy the saturation of the spa area in question have been disappointed. Lacking a sufficient occupancy rate, the international hotel group Steigenberger withdrew its operations from Bad Waltershof, since it was unable to attract a steady

German clientele. At the spa of Bad Blumau, the anticipated success did not materialise, in spite of an unprecedented marketing campaign to attract the international market.

127 The Austrian authorities provided the Commission with only one study on the Blumau Spa going back to 1994. The other studies to which the Commission refers evaluate the project at issue only by reference to standards of business management and relate to financial justification for the investment on the part of investors and the viability of that project. In that regard, the study by Pannell Kerr Forster Associates cited by the Commission concludes that it is not a particularly attractive investment.

128 As a result of the opening of the Siemens Hotel, demand, particularly internationally, cannot match the supply of beds created. Consequently, an investment of that order accompanied by the disputed State aid leads to ruinous competition between hotels and distorts the conditions of competition.

129 State aid should not be granted when the market is precariously balanced or where the recipient of the aid has available, as in this case, substantial means of its own. Furthermore, Siemens AG Austria has already received State aid on several occasions (Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507).

130 The Commission replies that the contested decision is based on the studies and advice cited in point 2.2 thereof. Far from having no evidential value, the 1994 study deals with the long-term prospects of spa tourism in Steiermark and makes some suggestions for its development. Therefore the studies cannot be regarded as outdated after only a few years during which their implementation has hardly started.

131 The reference in the study by Pannell Kerr Forster Associates to the fact that the project does not represent a particularly attractive investment opportunity does not mean that it is not viable, but rather that the profit forecasts are relatively modest compared to those of other investments. It is thus shown that State aid was necessary as an incentive. The study was therefore correctly regarded as decisive in the contested decision.

Findings of the Court

132 Article 92(3)(c) of the Treaty provides that 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, may be considered to be compatible with the common market.

133 In that regard, contrary to the applicants' assertion, it does not seem that the assessments on which the Commission based its conclusion that the authorised State aid was likely to promote the development of an area eligible for the regional development aid contemplated by Article 92(3)(c) of the Treaty presented serious difficulties such as to justify the opening of the formal investigation procedure under Article 93(2).

134 The Court thus cannot take as established either the alleged decrease in bed-occupancy in the area of the Steiermark spas or the precarious nature attributed by the applicants to the market considered. The applicants themselves ascribe a current occupancy rate of 77 % to the Spa hotels, whilst also pointing out that overall occupancy was only 60.8 % of bed capacity in 1996.

135 The Court does not therefore consider that the Commission should have carried out a detailed analysis of the market concerned in order to be able to note, at point 3.2.2 of the contested decision, the consistently upward trend and non-saturated character of the regional health and fitness tourism market concerned by the aid in question, the high operating rate of the four four-star hotels at Loipersdorf and, finally, the capacity of the Siemens Hotel to attract additional international customers without bringing about excesses of capacity.

136 Furthermore, the applicants have confined themselves to a general allegation, without any attempt to produce evidence, that the report on the regional development of Steiermark made in October 1994 by the Institut für Technologie- und Regionalpolitik is obsolete.

137 As the contested decision states, that report emphasises, without this having been disputed by the applicants, that the improvement of the existing infrastructure in the region of the spas of Steiermark is a precondition for development of its tourism. That report recommends setting up tourism involving spas and health care, targeted at the international market, in the region and, to that end, both diversifying the tourist services on offer and targeting them specifically at certain categories of customer. It was considered essential, in that regard, to extend hotel capacity to a standard higher than that of the existing hotels and it is clear that the Siemens Hotel is of such a standard.

138 The applicants have not put in question the anticipated positive impact of the subsidised investment on the regional employment market where the project is presented as being likely to lead to the direct creation of 150 jobs. Nor have the applicants denied the forecast reductions in unemployment for manual workers, particularly female, affected by the jobs that may be created in the sector of health and fitness tourism.

139 Nor have the applicants made good their allegation that Siemens AG Austria has already received State aid on several occasions. The case cited in support of that allegation concerned State aid to Siemens SA, a company established in Brussels under Belgian law and carrying on its business in a sector other than the hotel industry. The compatibility with the common market of the aid granted to the Siemens Hotel must therefore be evaluated having regard to its characteristics alone.

140 The reference in the study by Pannell Kerr Forster Associates to the low profitability of the hotel project at issue is not in itself such as to show that the project is fundamentally unsuited to promoting the development of the region of the Steiermark spas.

141 It must be held that the fourth plea in law reveals no serious difficulty which would have required the Commission to open the formal investigation procedure under Article 93(2) of the Treaty.

The fifth plea in law, alleging infringement of the first paragraph of Article 6 of the EC Treaty (now, after amendment, the first paragraph of Article 12 EC)

Arguments of the parties

142 The applicants submit that the promise of guaranteed occupancy linked to the reservation of direct access to the Spa disregards the principle of non-discrimination laid down by the first paragraph of Article 6 of the Treaty.

143 According to the Commission, the applicants do not explain at all how they have been discriminated against on the ground of their nationality within the meaning of the aforesaid provision. Those concerned do not allege that the Siemens Hotel has received preferential treatment compared to its Austrian competitors by reason of its being a subsidiary of a German group.

Findings of the Court

144 The first paragraph of Article 6 of the Treaty provides that '[w]ithin the scope of application of [the] Treaty' and 'without prejudice to any special provisions contained therein', any discrimination on grounds of nationality is prohibited.

145 On the one hand, it is clear that the undertaking receiving the disputed aid is a company incorporated under Austrian law and it has not even been suggested that the aid was approved because the recipient was a subsidiary of a non-Austrian group.

146 On the other hand, the first paragraph of Article 6 of the Treaty applies independently only to situations governed by Community law for which the Treaty lays down no specific rules prohibiting discrimination (Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 11, and Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 18).

147 It follows that the first paragraph of Article 6 is not apt to be applied independently in the context of this action, by reason of the existence of the competition rules of the EC Treaty. They cover discrimination, not in relation to the nationality of the undertakings allegedly affected, but by reference to the geography and sector of the market considered.

148 It must be held that the fifth plea in law has shown no serious difficulty which would have required the Commission to open the formal investigation procedure under Article 93(2) of the Treaty.

The sixth plea in law, alleging infringement of Community legislation relating to freedom of establishment

Arguments of the parties

149 The applicants point out that the disputed aid contravenes the general programme relating to freedom of establishment intended to ensure, in accordance with Article 54(3)(h) of the EC Treaty (now Article 44(2)(h) EC), that the conditions of establishment are not distorted by aid granted by the Member States. Those provisions are aimed at preventing foreign undertakings, when they establish themselves in a Member State, from receiving advantages which are not available to the undertakings of that Member State.

150 The Commission submits that an individual aid cannot fall within Article 54(3)(h) of the Treaty. Any decision authorising State aid necessarily benefits only the recipient undertaking, thus making its competitors' conditions of establishment

more difficult. Consequently, the applicants' argument implies that individual aid is totally prohibited under that provision, a result which the High Contracting Parties certainly never envisaged.

151 It must rather be considered, therefore, that the provision relied upon is intended to prohibit aid to establishment abroad. The contested decision does not concern that type of aid.

Findings of the Court

152 It follows from the foregoing, particularly the consideration of the fifth plea in law, that the contested decision upholds the compatibility with the common market of aid granted by the Austrian authorities to the setting up of an undertaking incorporated under Austrian law in Austrian territory.

153 As is clear from the first paragraph of Article 52 of the EC Treaty (now, after amendment, the first paragraph of Article 43 EC) and from the first paragraph of Article 58 of the EC Treaty (now the first paragraph of Article 48 EC), the provisions relating to the right of establishment seek to abolish restrictions on the freedom of establishment of nationals and companies of a Member State in the territory of another Member State, a case different from this.

154 It follows that the provisions relied upon do not apply to this case.

155 It must be held that the sixth plea in law has shown no serious difficulty which would have required the Commission to open the formal investigation procedure under Article 93(2) of the Treaty.

The seventh plea in law, alleging disregard of Community legislation relating to environmental protection

Arguments of the parties

156 The applicants submit that the Commission disregarded the provisions of Article 130 R of the EC Treaty (now, after amendment, Article 174 EC), in that the construction project required an assessment of its effects on the environment, pursuant to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40). However, the Commission did not examine, in the statement of reasons for the contested decision, the extent to which the adverse environmental effects of the project would affect the development of Steiermark spa region.

157 The Commission concedes that the hotel project might have required an investigation of its compatibility with the environment. However, it has not been said that such an investigation did not take place nor established whether the fact that such examination should have taken place entails the illegality of the contested decision. Moreover, the Commission does not have power to determine the compatibility of individual aid projects with the environment, particularly in the context of a decision under Article 93(3) of the Treaty.

Findings of the Court

158 The only ground of incompatibility of the hotel project in question with Article 130 R of the Treaty relied on by the applicants is the lack of an assessment of the effects of the project on the environment. While 'hotel complexes' are indeed among the projects listed under Point 12 of Annex II to Directive 85/337, as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5), they are subject as such, by virtue of Article 4(2) of that directive, to an environmental impact assessment only where the Member States consider that their nature requires it.

159 Therefore, the possible disregarding of Directive 85/337 by the competent national authorities is liable, in an appropriate case, to proceedings for a declaration that the Member State has failed to fulfil its obligations under Article 169 of the EC Treaty (now Article 226 EC) but cannot constitute a serious difficulty as regards the Commission's assessment of the compatibility of the disputed aid with the common market.

160 For the sake of completeness, it may be noted that the Verwaltungsgerichtshof (Administrative Court) of the Republic of Austria, by judgment of 23 May 2001, rejected the objection raised by, among others, three of the applicants against the construction permit for the Siemens Hotel project, on the ground that it did not require an environmental impact study.

161 It must therefore be held that the seventh plea in law has shown no serious difficulty which would have required the Commission to open the formal investigation procedure under Article 93(2) of the Treaty.

The eighth plea in law, alleging misuse of powers

Arguments of the parties

162 The applicants allege that the contested decision was adopted for purposes other than those stated. First, it excluded the reciprocal reservation agreement between the Spa and the Siemens Hotel from the assessment of the State aid in question. Secondly, the contested decision refers to the study by Pannell Kerr Forster Associates, although that study does not regard the hotel project in question as a 'particularly attractive investment'.

163 The Commission excludes any possibility of misuse of powers. The reciprocal reservation agreement is a transaction under ordinary law for consideration. The fact that the investment in question was not particularly attractive, as pointed out by the aforesaid study, means only that the investor concerned cannot expect spectacular profits.

Findings of the Court

164 According to settled case law, a measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated by the institution or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (Case T-266/97 *Vlaamse Televisie Maatschappij* v *Commission* [1999] ECR II-2329, paragraph 131).

165 There is nothing in the file which provides any ground for giving credence to the suggestion that the procedure which led to the adoption of the contested decision was initiated for a purpose other than that of authorising aid for the development of an area eligible for such aid.

166 The eighth plea in law cannot therefore succeed.

167 In those circumstances, none of the pleas in law put forward by the applicants enable the Court to find that the Commission was faced with serious difficulties requiring it to open the formal investigation procedure under Article 93(2) of the Treaty.

168 The action must therefore be dismissed in its entirety.

Costs

169 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 applicants have been unsuccessful, they must be ordered to pay the Commission's costs, in accordance with the form of order sought by the Commission.

170 Under the first paragraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in a dispute are to bear their own costs. It follows that the Republic of Austria must bear its own costs.

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicants to pay the Commission's costs;**

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

Vesterdorf Azizi Jaeger

Legal Martins Ribeiro

Delivered in open court in Luxembourg on 13 January 2004.

H. Jung B. Vesterdorf

Registrar President