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

3 May 2007 *

In Case T-357/02,

Freistaat Sachsen, represented by T. Lübbig, lawyer,

applicant,

v

Commission of the European Communities, represented by V. Kreuschitz and J. Flett, acting as Agents,

defendant,

ACTION for annulment of the second paragraph of Article 2 and of Articles 3 and 4 of Commission Decision 2003/226/EC of 24 September 2002 on an aid scheme which the Federal Republic of Germany is planning to implement — 'Guidelines on assistance for SMEs — Improving business efficiency in Saxony': Subprogrammes 1 (Coaching), 4 (Participation in fairs), 5 (Cooperation) and 7 (Design promotion) (OJ 2003 L 91, p. 13),

* Language of the case: German.

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

composed of M. Vilaras, President, M.E. Martins Ribeiro, F. Dehousse, D. Šváby and K. Jürimäe, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 21 March 2006,

gives the following

Judgment

Legal context

1 Article 87(1) EC states:

'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, in so far as it affects trade between Member States, be incompatible with the common market.'

2 Under Article 87(3) EC:

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

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

...

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

...'

3 The Commission's communication of 2 July 1992 to the Member States on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes (OJ 1992 C 213, p. 10) ('the Communication on accelerated clearance') states:

'...

In principle the Commission will not object to new or modified existing aid schemes notified pursuant to Article [88](3) [EC] meeting the following criteria:

1. new aid schemes, excluding those supporting industrial sectors covered by specific Community policy statements as well as aids in the agricultural, fisheries, transport and coal sectors.

   The schemes must be limited to small and medium-sized enterprises ...

   The schemes must also satisfy one of the following criteria:

   ...

   All aids to exports in intra-Community trade or operating aids are excluded from the procedure;

2. modifications of existing aid schemes which the Commission has previously approved, except in specific cases where the Commission strictly limited its authorisation to the period, budget and conditions then notified.

   The amendment may involve any of the following:

   — prolongation over time without increase in budgetary resources,

— increase in budget available up to 20% of original sum but no prolongation,

— prolongation over time with budget increases up to 20% of original sum,

— tightening the criteria of application of the scheme.

...

The Commission will decide on notifications within 20 working days.'

4 The guidelines on national regional aid (OJ 1998 C 74, p. 9, amended as mentioned in OJ 2000 C 258, p. 5) ('the Guidelines on regional aid') provide, under point 2, 'Scope', that the Commission is to apply them to regional aid granted in every sector of the economy apart from the production, processing and marketing of the agricultural products listed in Annex II to the Treaty, fisheries and the coal industry.

5 As regards operating aid, the Guidelines on regional aid state inter alia:

'4.15. Regional aid aimed at reducing a firm's current expenses (operating aid) is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) [EC] provided that it is justified in

terms of its contribution to regional development and its nature and its level is proportional to the handicaps it seeks to alleviate. It is for the Member State to demonstrate the existence of any handicaps and gauge their importance. Operating aid must be limited in time and progressively reduced.

...

4.17. Operating aid intended to promote exports between Member States is not allowed.'

6 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) ('the Regulation on procedure in State aid cases') sets out the procedures which apply to the exercise by the Commission of the power conferred on it by Article 88 EC to decide whether State aid is compatible with the common market.

7 Article 2(2) of the Regulation on procedure in State aid cases, concerning the notification of new aid, provides:

'In a notification, the Member State concerned shall provide all necessary information in order to enable the Commission to take a decision pursuant to Articles 4 and 7 (hereinafter referred to as "complete notification").'

8 Article 4 of the Regulation on procedure in State aid cases provides that the Commission is to examine notifications of new aid as soon as they are received and make, after a preliminary examination, a decision finding that the notified measure does not constitute aid (Article 4(2) of the Regulation on procedure in State aid cases), a decision finding that no doubts are raised as to the compatibility of the notified measure with the common market (Article 4(3) of the Regulation on procedure in State aid cases) or a decision to initiate the formal investigation procedure as regards the notified measure (Article 4(4) of the Regulation on procedure in State aid cases). Those decisions 'shall be taken within two months. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information ...' (Article 4(5) of the Regulation on procedure in State aid cases).

9 Article 4(6) of the Regulation on procedure in State aid cases states:

'Where the Commission has not taken a decision in accordance with paragraphs 2, 3 or 4 [of Article 4 of the Regulation on procedure in State aid cases] within the period laid down in paragraph 5 [of Article 4 of the Regulation on procedure in State aid cases], the aid shall be deemed to have been authorised by the Commission. The Member State concerned may thereupon implement the measures in question after giving the Commission prior notice thereof, unless the Commission takes a decision pursuant to this Article within a period of 15 working days following receipt of the notice.'

10 Article 5(3) of the Regulation on procedure in State aid cases provides:

'The notification shall be deemed to be withdrawn if the requested information is not provided within the prescribed period, unless before the expiry of that period, either the period has been extended with the consent of both the Commission and the Member State concerned, or the Member State concerned, in a duly reasoned

statement, informs the Commission that it considers the notification to be complete because the additional information requested is not available or has already been provided. In that case, the period referred to in Article 4(5) shall begin on the day following receipt of the statement ...'

11 Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles [87] and [88] of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 1998 L 142, p. 1) ('the enabling regulation') confers on the Commission, in Article 1(1)(a)(i), the power to declare, in accordance with Article 87 EC, that, in certain circumstances, aid to small and medium-sized enterprises is compatible with the common market and is not subject to the notification requirements of Article 88(3) EC.

12 Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ 2001 L 10, p. 33) ('the Regulation exempting SMEs') establishes the criteria which individual aid and aid schemes for small and medium-sized enterprises must fulfil in order to be compatible with the common market within the meaning of Article 87(3) EC and exempts those which fulfil them from the notification requirements of Article 88(3) EC.

13 Recital 4 in the preamble to the Regulation exempting SMEs states:

'This Regulation is without prejudice to the possibility for Member States of notifying aid to small and medium-sized enterprises. Such notifications will be assessed by the Commission in particular in the light of the criteria set out in this Regulation. The guidelines on State aid for small and medium-sized enterprises should be abolished from the date of entry into force of this Regulation, since their contents are replaced by this Regulation.'

Background to the dispute

1. *Administrative procedure*

14 Under the guidelines of the Ministry of the Economy and Labour of the Freistaat Sachsen on assistance for small and medium-sized enterprises relating to the improvement of business efficiency ('the guidelines'), which were first adopted in 1992, the Freistaat Sachsen, on application, grants non-refundable subsidies for projects to promote the economy to members of the professions and to small and medium-sized industrial or commercial enterprises with a registered office or place of business in its territory. The guidelines were notified for the first time to the Commission under Article 93(3) of the EC Treaty (now Article 88(3) EC) by letter of the Permanent Representation of the Federal Republic of Germany of 3 July 1992. It was authorised by letter of the Commission of 30 September 1992.

15 The period of validity of the guidelines was extended several times with each extension giving rise to a modification and an updating of the guidelines. The amendments put forward were notified, on expiry of each period of validity, in accordance with the Communication on accelerated clearance. Thus, the successive notifications of 26 February 1996 and 6 October 1998 were approved respectively by the Commission by letters of 3 April 1996 and 12 November 1998. The aid measure notified on 6 October 1998 and approved on 12 November 1998 came to an end on 31 December 2000 (*Official Gazette of the Freistaat Sachsen* of 8 April 1999, No 14, p. 289).

16 By letter of 29 December 2000, received by the Commission on 3 January 2001, the Federal Republic of Germany notified, under Article 88(3) EC, six subprogrammes which were part of a new version of the guidelines. The notification sought to obtain a further prolongation of the validity of the guidelines for a period of five years from

1 January 2001 to 31 December 2005. It was made, like the previous notifications, by means of the form provided by the Commission for the accelerated procedure.

17 On 12 January 2001, the Commission adopted the Regulation exempting SMEs, which had been discussed, at the planning stage, in the Advisory Committee on State Aid, composed of representatives of the Member States and set up under Article 7 of the enabling regulation. Under Article 10 of the Regulation exempting SMEs, that regulation entered into force on the 20th day following that of its publication in the Official Journal, namely on 2 February 2001, which is two days after the expiry of the period of 20 working days provided for by the Communication on accelerated clearance.

18 By letter of 5 February 2001, the Commission stated that it was not in a position to authorise the aid scheme under the accelerated clearance procedure. The Commission asked the Federal Republic of Germany to inform it 'whether the "soft aid" assisted activities [were] compatible with the [Regulation exempting SMEs], that is to say whether the volume of aid provided for in the notification concerned [could] be reduced to that provided for by the Regulation exempting SMEs ...' and stated that, '[w]here that [was] not possible, a precise statement of reasons [was] necessary (necessity and compatibility in terms of economic policy)'.

19 By letter of 12 March 2001, the Federal Republic of Germany made observations in which it set out the analysis which, in its view, justified the authorisation of the aid scheme. The Federal Republic of Germany sent another letter to the Commission on 13 March 2001.

20 By letter of 1 June 2001, the Ministry of the Economy and Labour of the Freistaat Sachsen took part in the procedure by sending to the Commission observations in support of the arguments put forward by the Federal Republic of Germany during the notification procedure.

21 On 14 June 2001, a meeting between representatives of the Federal Republic of Germany and the Commission took place in Berlin.

22 By communication of 2 August 2001, based on Article 9(1) of the Regulation exempting SMEs, the Federal Republic of Germany informed the Commission of its decision to implement the six subprogrammes constituting the aid scheme notified until 31 December 2008 or until the date of the decision authorising the aid scheme as notified, within the limits of their compliance with the provisions of the Regulation exempting SMEs.

23 On 5 September 2001, the Commission sent a further request for information to the Federal Republic of Germany seeking to ascertain whether it was maintaining the initial notification. By letter of 9 October 2001, the Federal Republic of Germany replied to that request in the affirmative.

24 By letter of 16 November 2001, the Commission informed the Federal Republic of Germany that the measure 'export associations', which was the subject-matter of the separate procedure CP 92/01 — Germany, had been joined with the procedure (C 89/01) relating to the aid scheme at issue as a constituent of the fourth subprogramme, entitled 'Cooperation'.

25 By letter of 11 December 2001, the Commission notified the Federal Republic of Germany of its decision to initiate the procedure provided for in Article 88(2) EC ('the decision to initiate the formal investigation procedure') with regard to the subprogrammes 'Coaching', 'Participation in fairs', 'Cooperation' and 'Design promotion' ('the aid scheme at issue'). On the other hand, the Commission raised no objection to the subprogrammes 'External trade consultancy' and 'Environmental management'.

26 In the decision to initiate the formal investigation procedure, the Commission reminded the Federal Republic of Germany that Article 88(3) EC had suspensory effect and highlighted the fact that individual aid which complied with all the conditions of the Regulation exempting SMEs were considered to be compatible with the common market according to Article 3(1) of that regulation.

27 By letter of 21 January 2002, the Federal Republic of Germany set out its position with regard to the initiation of the procedure. Thereafter, two more meetings between representatives of the Federal Republic of Germany and the Commission took place on 19 February 2002 in Brussels and on 10 June 2002 in Berlin.

28 On 7 February 2002, the decision to initiate the formal investigation procedure was published in the Official Journal (OJ 2002 C 34, p. 2). The Commission called on interested parties to submit their observations on the aid scheme at issue. It did not receive any observations.

2. *The contested decision*

29 On 24 September 2002, the Commission adopted Decision 2003/226/EC on an aid scheme which the Federal Republic of Germany is planning to implement — 'Guidelines on assistance for SMEs — Improving business efficiency in Saxony': Subprogrammes 1 (Coaching), 4 (Participation in fairs), 5 (Cooperation) and 7 (Design promotion) (OJ 2003 L 91, p. 13) ('the contested decision').

30 The operative part of the contested decision reads as follows:

'Article 1

The four subprogrammes "Coaching", "Participation in fairs", "Design promotion" and "Cooperation" of the guidelines promoting SMEs — Improving business efficiency ... constitute State aid within the meaning of Article 87(1) ... EC ...

Article 2

To the extent that they do not exceed the scope and aid intensities of Regulation ... No 70/2001, the four subprogrammes referred to in Article 1 can be regarded as being compatible with [the common market pursuant to] Article 87(3)(c) ... EC ...

To the extent that they provide for aid exceeding the scope and the aid intensities of Regulation ... No 70/2001, the four subprogrammes are incompatible with the common market.

Article 3

To the extent that the subprogramme "Cooperation" [referred to in Article 1] provides for operating aid, it is incompatible with the common market.

Article 4

Germany may implement the four subprogrammes referred to in Article 1 only if they have been brought into line with this Decision.

Article 5

Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 6

This Decision is addressed to the Federal Republic of Germany.'

Procedure and forms of order sought by the parties

31 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 4 December 2002.

32 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided, first, to adopt measures of organisation of procedure by requesting that the parties provide written answers to questions and produce documents and, secondly, to open the oral procedure. The parties complied with the Court's request within the period allowed.

33 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 21 March 2006.

34 The applicant claims that the Court should:

— annul the second paragraph of Article 2 and Articles 3 and 4 of the contested decision;

— order the Commission to pay the costs.

35 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

36 The applicant relies on five pleas in law in support of its action. The first concerns the procedural illegality of the contested decision which follows from the fact that the Commission did not apply the accelerated clearance procedure to the aid scheme at issue. The second plea concerns the material illegality of the contested

decision stemming from the fact that the Regulation exempting SMEs was not applicable in the present case. The third plea alleges that the aid scheme at issue could be authorised under the Community guidelines on State aid for small and medium-sized enterprises (OJ 1996 C 213, p. 4) ('the 1996 Community guidelines for SMEs'). The fourth plea alleges failure by the Commission to exercise its discretion during the investigation of the aid scheme at issue and infringement of the obligation to state reasons which stems from that. The fifth plea alleges that the Commission has not established that competition was actually or potentially distorted by the aid scheme at issue and the infringement of the obligation to state reasons which stems from that.

1. *The plea concerning the procedural illegality of the contested decision which follows from the fact that the Commission did not apply the accelerated clearance procedure*

Arguments of the parties

37 The applicant submits, first, that the Federal Republic of Germany notified the aid scheme in accordance with the Communication on accelerated clearance and that the Commission, instead of complying with the obligation incumbent on it to make a decision within 20 working days, waited for the Regulation exempting SMEs to enter into force before making a decision.

38 In reply to the Commission's argument that the Communication on accelerated clearance, dating from 1992, is not binding, since it has not been adopted in accordance with the provisions of the Regulation on procedure in State aid cases, the applicant submits that that regulation entered into force seven years after the adoption of the abovementioned communication and that the communication cannot therefore be assessed in the light of the regulation. Furthermore, although

the Regulation on procedure in State aid cases is subsequent to the Communication on accelerated clearance and does not contain any provision relating to it, the Commission has regularly referred to the accelerated clearance procedure in its practice subsequent to the entry into force of that regulation.

39 Secondly, the applicant disputes the Commission's finding, in the contested decision, that the accelerated clearance procedure was not applicable since the aid scheme at issue was not an 'existing scheme'. Point 2 of the Communication on accelerated clearance provides inter alia that that procedure is applicable where there are modifications of existing aid schemes authorised by the Commission if the amendment relates to a 'prolongation over time with budget increases up to 20% of original sum' or if it involves 'tightening the criteria of application of the scheme'.

40 Not only were the conditions for the application of the aid scheme at issue tightened as against the previous measures, but the Commission had already authorised the guidelines on two occasions. According to the applicant, a slight amendment to the content of the aid scheme, which goes beyond a mere prolongation and a budget increase, does not, on its own, preclude the use of the accelerated clearance procedure, as the Commission had until then indeed conceded by authorising under that procedure, in 1996 and 1998, guidelines extending the guidelines which were initially notified in 1992. That fact should, on its own, have precluded the Commission from refusing to use the accelerated clearance procedure, in accordance with the principle that no one may set himself in contradiction to his own previous conduct to the detriment of others.

41 Thirdly, the applicant submits that, even if the aid scheme at issue were to be regarded as a new scheme, the Commission should have carried out its examination and taken a decision under the accelerated clearance procedure within 20 days, since that time-limit applies both to existing schemes and to new measures. Furthermore,

the applicant considers, in contrast to the Commission, that the aid scheme at issue does not include any export aid.

42 Fourthly, the applicant submits that, even if the aid scheme at issue had included export aid, the Commission could have examined that part of the scheme outside the context of the accelerated clearance procedure, whilst the rest of the scheme, which was prima facie regarded as compatible with the common market, should have been examined and authorised according to that procedure.

43 The Commission submits, first, that the Communication on accelerated clearance does not confer any right to a decision by it within 20 working days. That time-limit is applicable only to favourable decisions with respect to certain straightforward cases which fulfil the necessary conditions.

44 Second, the Commission submits that compliance with the Communication on accelerated clearance cannot give rise to an action as it was adopted before the entry into force of the Regulation on procedure in State aid cases, in which the issue of the time-limits applicable was definitively settled. The subject-matter of the application for treatment according to the accelerated procedure was abolished by the Regulation on procedure in State aid cases, since Article 4 thereof lays down a rule concerning time-limits and does not provide for that procedure to be retained. In accordance with the principle that a later provision of equal or higher standing annuls or abrogates earlier conflicting provisions governing the same matters of fact and relating to the same subject-matter, the accelerated clearance procedure has become 'obsolete' and cannot therefore be binding. Even if the Commission continues, de facto, to comply with guidelines or other communications which are no longer in force or have become 'obsolete', it cannot be bound by them.

45 Lastly, the Commission objects to the applicant's arguments that the aid scheme at issue complies with the conditions required by the Communication on accelerated clearance in order to qualify for the authorisation granted under that procedure.

Findings of the Court

46 The Communication on accelerated clearance provides respectively, in the second and final paragraphs thereof, that in principle the Commission will not object to new or modified existing aid schemes notified pursuant to Article 88(3) EC which meet certain criteria set out in that communication and that it will decide on notifications within 20 working days.

47 In the contested decision, the Commission stated in recital 54 in the preamble thereto that, contrary to what the Federal Republic of Germany maintained, the aid scheme at issue should not be assessed under the accelerated clearance procedure, since the applicable procedural provisions in the circumstances were those of the Regulation on procedure in State aid cases.

48 First of all, in stating that the provisions of the Regulation on procedure in State aid cases were applicable, and not those of the Communication on accelerated clearance, the Commission implicitly submits that that communication has become devoid of purpose since the entry into force of the Regulation on procedure in State aid cases. That position is explicit in its written pleadings, in which it submits inter alia that the communication has become 'obsolete' on account of its incompatibility with the Regulation on procedure in State aid cases, on the ground that Article 4 of that regulation lays down a rule concerning time-limits and does not provide for the accelerated clearance procedure to be retained.

49 Secondly, the Commission however concerns itself with establishing, in point 1 of recital 54 in the preamble to the contested decision, not that the Communication on accelerated clearance has become 'obsolete', but that it was not applicable as the criteria which it imposes were not met in the present case.

50 Lastly, it is apparent from the documents before the Court that the Commission does not dispute the applicant's statement that it continued to refer to the accelerated procedure after the entry into force of the Regulation on procedure in State aid cases, but confines itself to stating that it is not bound by communications or guidelines which are no longer in force, even when it continues to comply with them de facto.

51 First, as regards the question whether the adoption of the Regulation on procedure in State aid cases has rendered the Communication on accelerated clearance 'obsolete', it must be pointed out that besides the fact that that regulation contains no information in that regard, it was only on 30 April 2004, that is to say five years after its entry into force, that a communication concerning the obsolescence of certain State aid policy documents (OJ 2004 C 115, p. 1) ('the Communication on obsolete documents'), which includes the Communication on accelerated clearance, was published in the Official Journal. In the third paragraph of that communication, it is stated that, 'from the date of publication of this communication in the *Official Journal of the European Union*, [the Commission] no longer intends to apply, in relation to any matter, the following documents, irrespective of their legal status: ... (13) [the Communication on accelerated clearance]'.

52 It must also be pointed out that the second paragraph of the Communication on obsolete documents states that it was following the adoption of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999 (OJ 2004 L 140, p. 1) ('the Regulation implementing the Regulation on procedure in State aid cases'), which was adopted on the basis of Article 27 of the Regulation on procedure in State aid cases, that a number of texts concerning

matters of procedure in the area of State aid became obsolete, 'including accelerated notifications'. The Communication on accelerated clearance, according to the very statement of reasons for the Communication on obsolete documents, thus became 'obsolete' only on account of and following the adoption of the Regulation implementing the Regulation on procedure in State aid cases. That circumstance is explained by the fact that Article 4 of the Regulation implementing the Regulation on procedure in State aid cases sets out a simplified notification procedure for certain alterations to existing aid, a procedure which in essence reproduces the same criteria as those provided for in point 2 of the Communication on accelerated clearance (an increase in the budget of an authorised aid scheme exceeding 20%, the prolongation of that scheme with or without an increase in the budget and the tightening of the criteria for the application of an authorised aid scheme) and which also provides for a shorter period than that provided for by Article 4 of the Regulation on procedure in State aid cases, in this instance a month, in which the Commission is to use its best endeavours to take a decision under that procedure.

53 Furthermore, and contrary to what the Commission maintained in its written pleadings, no incompatibility can be discerned between the Regulation on procedure in State aid cases, which lays down, in accordance with the case-law resulting from the Court of Justice's judgment in Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 4, a maximum period of two months as the preliminary examination period for aid notified under the normal, generally applicable notification procedure, and the Communication on accelerated clearance, which provides for a period of 20 days only in the context of a simplified notification procedure concerning specific cases.

54 Clearly it is only as of 30 April 2004, the date of publication of the Communication on obsolete documents and of the Regulation implementing the Regulation on procedure in State aid cases, that the Communication on accelerated clearance has ceased to apply.

55 In those circumstances, it must be considered, secondly, whether the Commission was entitled to state, in recital 54 in the preamble to the contested decision, that the Communication on accelerated clearance was not applicable in the circumstances,

in so far as the aid scheme in dispute was neither a new scheme nor the modification of an existing scheme within the meaning of that communication.

56 First, as the Court has already held, it is clear from the wording of the second and final paragraphs of the Communication on accelerated clearance that, even where a planned aid scheme satisfies all the conditions required in order for the period of 20 working days to apply, the Commission undertakes only 'in principle' not to object after that period has expired, thus reserving its full powers 'to decide', that is, where appropriate to adopt a decision to initiate the formal investigation procedure and, at the end of that procedure, a final positive, conditional or negative decision (Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 34).

57 Secondly, it must be pointed out that the criteria which the notified aid schemes must meet so that the Commission does not, in principle, object to them within a period of 20 working days must be strictly interpreted, since the nature of the accelerated clearance procedure is such that it derogates from the normal examination procedure for notifications.

58 It must also be borne in mind that, under point 2 of the Communication on accelerated clearance, the modification of an existing scheme which has been accepted for the accelerated clearance procedure may involve prolongation over time without increase in budgetary resources, increase in budget available up to 20% of original sum but no prolongation, prolongation over time with budget increases up to 20% of original sum and, lastly, tightening the criteria of application of the scheme. It follows that any other modification of an existing aid scheme, in particular in so far as it has the effect of relaxing the conditions for the granting of aid or of increasing the aid intensity, precludes notification thereof from being covered by an accelerated clearance procedure.

59 In the present case, it must be noted that, on 29 December 2000, the aid scheme at issue formed the subject-matter of a notification to the Commission, pursuant to Article 88(3) EC and under the accelerated clearance procedure, as an 'amendment and prolongation' of a previously approved aid scheme, which was still in force, but whose period of validity was expiring on 31 December 2000. It is therefore common ground that the Federal Republic of Germany intended to rely on the accelerated clearance procedure.

60 As regards, firstly, the subprogramme 'Coaching', and, specifically, new enterprises, the maximum amount of daily aid, as an absolute value, was raised to EUR 500, whereas it was DEM 800 (EUR 409.03) in the previously approved scheme.

61 As regards, secondly, the subprogrammes 'Participation in fairs', 'Cooperation' and 'Design promotion', and in particular certain specific projects, notably those run in areas defined as 'areas facing particular development problems', the maximum aid intensity provided for by the aid scheme at issue was increased as against that which characterised the previously approved aid scheme.

62 Thus, as regards the subprogramme 'Participation in fairs', the maximum rate of aid was increased from 50% in the previously approved aid scheme to 60% in the aid scheme at issue with respect to small localised enterprises in areas facing particular development problems.

63 As for the subprogramme 'Cooperation', although the maximum aid intensity generally applicable was lowered from 70 to 65%, the maximum conceivable rates of aid were increased to 80% for the financing of feasibility studies and projects run

under the Community initiative Interreg III involving at least five small and medium-sized enterprises as well as for projects carried out by small enterprises.

64 As regards, lastly, the subprogramme 'Design promotion', the maximum rate of aid was increased from 50% in the previously approved aid scheme to 70% in the aid scheme at issue for small localised enterprises in areas facing particular development problems.

65 It is apparent from the above that the amendments made to the existing aid scheme went beyond those which allow the notification to be dealt with under the accelerated clearance procedure. Each of the subprogrammes constituting the aid scheme at issue is characterised by an increase, as regards at least some recipients, of the maximum conceivable rate of aid. As is apparent from paragraph 58 above, the Communication on accelerated clearance allows that procedure to be used only if the amendments at issue involve a prolongation of the aid scheme, an increase of up to 20%, with or without prolongation, in the overall available budgetary provision concerned, or a tightening of the criteria of application of the scheme. In the present case, the amendments made, in particular through the increase in the intensity of the rate of aid, are thus excluded from that procedure inasmuch as they constitute a relaxing of the aid scheme at issue.

66 As regards the applicant's argument that, even if the aid scheme at issue were to be regarded as a new scheme, the Commission should have carried out its examination under the accelerated procedure anyway, it must be noted that the aid measure contained in the subprogramme 'Cooperation' concerns the creation, by at least three small and medium-sized enterprises, of export associations with a view to the joint search for and development of foreign markets (gemeinsame Erschliessung ausländischer Märkte). It is stated in the last paragraph of point 1 of the Communication on accelerated clearance, that '[all] aids to exports in intra-Community trade or operating aids are excluded from the procedure'.

67 Therefore, the Commission was entitled to take the view, as stated by it in point 1 of recital 54 in the preamble to the contested decision, that the scheme at issue provided for an aid to export in intra-Community trade and could not be covered by an approval under the accelerated procedure in so far as it could not therefore be regarded as a new aid scheme.

68 In this connection, it should be added that, even if it is apparent from a detailed analysis that the measure in question did not constitute an 'aid to export in intra-Community trade', the Commission was none the less justified in not using the accelerated clearance procedure since at first sight there could have been a doubt in this regard. As the Commission submits in its written pleadings, that procedure is intended to facilitate the accelerated clearance of aid schemes which raise no doubts as regards their compatibility with the rules applicable on State aid and which are thus at first sight likely to be positively assessed. That is particularly so because, as was pointed out in paragraph 56 above, the Commission undertakes only 'in principle' not to object after the period of 20 working days has expired.

69 As for the applicant's argument that, in so far as the Commission considered that the aid scheme notified included export aid, the measures in question could have been dissociated from the rest of the aid scheme, which could have been approved under the accelerated procedure, that argument must be rejected. Not only does the Communication on accelerated clearance not provide for the option of granting such a partial approval, but it is also apparent from the foregoing that, in the light of the nature of the amendments made, the necessary conditions to qualify for the accelerated clearance procedure were not fulfilled.

70 It must therefore be held that the Commission rightly took the view, in recital 54 in the preamble to the contested decision, that the notification of the aid scheme at

issue could not be covered by the accelerated clearance procedure on the ground that the aid scheme notified was neither a new scheme nor the modification of an existing scheme within the meaning of that communication.

71 The first plea in law must therefore be rejected.

2. *The plea concerning the material illegality of the contested decision stemming from the non-applicability of the Regulation exempting SMEs*

Arguments of the parties

72 The applicant submits, first, that the contested decision is unlawful in so far as the Commission should have examined the aid scheme at issue in the light of the law in force at the time when the Commission received the notification, that is to say on the basis of the 1996 Community guidelines for SMEs, which were applicable on 3 January 2001, and not in the light of the Regulation exempting SMEs, which entered into force on 2 February 2001. The contested decision therefore has no legal basis, which is sufficient to warrant its annulment. Furthermore, the Commission's analysis in recital 55 in the preamble to the contested decision, which is based on the absence of transitional measures and on the repeal of the 1996 Community guidelines for SMEs as at the entry into force of the Regulation exempting SMEs, has the effect that the conditions of assessment were replaced and, in this case, tightened up in the course of the procedure, which is unlawful.

73 The case-law relied on by the Commission in support of the argument that it had to apply the Regulation exempting SMEs, in the light of the fact that new rules must apply immediately to the future effects of a situation which arose under the old rules (Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraphs 49 to 55), is

not relevant. In the present case, it is not a question of the future effects of specific measures, but of the criterion of assessment applicable within a clearly defined period. The Commission cannot therefore rely on the fact that the aid measure will continue to have a bearing after the entry into force of the Regulation exempting SMEs as that, in the present case, is a characteristic of all the other existing, approved aid.

74 Secondly, the applicant maintains that the principle that an aid scheme is subject to the legislation in force at the time of notification corresponds to the decision-making practice of the Commission, which uses that criterion itself, as is apparent from point 6.1 of the Guidelines on regional aid, points 98 and 100 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2), point 2.6 of the Community framework for State aid to the motor vehicle industry (OJ 1997 C 279, p. 1) and point 39 et seq. of the multisectoral framework on regional aid for large investment projects (OJ 2002 C 70, p. 8).

75 The Commission cannot, therefore, implicitly amend the abovementioned principle by means of an individual decision, as the Court of Justice clearly determined in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 44. However, that is what the Commission has done in the present case by also departing from the case-law according to which it is judicially bound by its administrative practice (*CIRFS and Others* v *Commission*, paragraphs 34 and 36, and Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57), which implies that it is in the light of the rules which the institution has laid down for itself that the contested decision falls to be reviewed (Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraph 61). It follows that the Commission cannot claim, in order to dispute the principle that the aid has to be assessed in relation to the criteria applicable at the time of notification, that the examples cited in paragraph 74 above concern cases in which the legislature clearly established a rule diverging from the rule developed in the case-law. Besides the fact that the Commission is itself the legislature, such a line of argument would allow it to free itself from any obligation to ensure the continuity of its decision-making practice.

76 The Commission's argument that it was required to apply the Regulation exempting SMEs on the ground that it had examined a number of aid schemes notified before the entry into force of that regulation with reference to it is also irrelevant, particularly because those schemes mainly concern educational and investment aid. Furthermore, the aid which was notified by the Member States before the entry into force of the Regulation exempting SMEs and was consistent with it could clearly also be approved under that legislation.

77 In addition, the applicant submits that only an examination of an aid scheme in the light of the law in force at the time of notification allows Member States to assess reliably the question of its compatibility with the common market. The Commission's approach, on the other hand, makes it necessary for Member States to define the implementation of an aid measure on the basis of the uncertain future course of development of the law, which is incompatible with the principle of legal certainty and the principle of the protection of legitimate expectations. Member States cannot, in advance, know the date of entry into force and the wording of regulations, guidelines or Community guidelines which are still under discussion. The request to present observations relating to the draft regulation exempting SMEs was published almost two years before that regulation entered into force, which shows that it was impossible to predict the date of entry into force or even the entry into force of the new regulation.

78 Thirdly, the approach followed by the Commission leads to absurd results. Thus, according to settled case-law, the Commission is entitled to call for the recovery of aid which was granted in spite of a prohibition against its implementation only if the aid scheme is also incompatible with the common market as to the substance (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 20 et seq.). Compatibility with the common market has to be assessed at the time of the (procedurally unlawful) implementation of the scheme, as expressly provided for by the Commission in point 82 of the Community guidelines on State aid for environmental protection (OJ 2001 C 37, p. 3) ('the Community guidelines on aid for environmental protection'). According to the applicant, it follows that, if it had

implemented the aid scheme at issue instead of notifying the Commission in accordance with Community law, the 1996 Community guidelines for SMEs would have been applicable. It is thus prevented from implementing that scheme because it complied with the law.

79 Fourthly, the applicant also submits that the initial notification was complete. The Commission is not justified in stating that the Regulation exempting SMEs was applicable on account of the fact that the information which it requested was received by it only after the entry into force of that regulation, since a notification cannot be regarded as incomplete on the sole ground that the Commission demands supplementary information. The question whether a notification is complete is in no way a matter which the Commission can decide because otherwise it could arbitrarily and indefinitely prolong the period of examination.

80 The applicant points out that, according to the case-law of the Court of Justice, a notification is complete if it contains, either from the beginning or once the Member State has replied to questions raised by the Commission, such information as will enable the Commission to form a prima facie opinion of the compatibility of the aid with the Treaty (*Lorenz*, cited in paragraph 53 above, and Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraphs 54 and 56). A Member State can claim that a notification is complete even if it chooses not to implement it and therefore not to rely, pursuant to Article 4(6) and Article 5(3) of the Regulation on procedure in State aid cases, on the initially complete nature of the notification. In that regard, the applicant adds that the cooperation of a Member State with the Commission, in the preliminary examination procedure, cannot be interpreted as a waiver of any subsequent objections.

81 The requests in the Commission's letter to the German authorities of 5 February 2001, relating to, first, an assessment of the compatibility of the aid with the common market and, secondly, the question whether the aid scheme at issue could,

by means of an amendment, be made compliant with the Regulation exempting SMEs, which had entered into force only three days beforehand, shows that the Commission had already formed an initial opinion on the aid scheme at issue, which contradicts its statement that it was not able to examine the notification without the requested information. Likewise, the Commission cannot claim that certain aspects of the subprogramme 'Cooperation' had not been expressly set out in the notification and that it was necessary to request information regarding them under the CP 92/01 procedure linked to this notification procedure (see paragraph 24 above). Those questions concerned an ancillary aspect of the notification so the answers to those questions were not necessary for the Commission to form its opinion.

82 By proceeding as it did in the present case, the Commission went against the principles underlying its administrative practice. After having, with full knowledge of all the circumstances, let the 20-day period of examination laid down under the accelerated clearance procedure elapse and after having waited for the Regulation exempting SMEs to enter into force, it attempted, by sending a request to the Federal Republic of Germany, to suggest that the notification was incomplete. That manner of proceeding constitutes an infringement of the obligation laid down in Article 4(1) of the Regulation on procedure in State aid cases to examine the notification 'as soon as it is received'.

83 The Commission submits, as a preliminary point, that the exemption regulations fulfil the dual function, firstly, of exempting certain aid from the notification requirement and the procedure of approval by the Commission and, secondly, of replacing previous guidelines or Community guidelines. They enter into force at a point in time chosen by the Commission, are generally applicable for five years and provide that, when their period of validity expires, the aid schemes exempted under their provisions remain exempt for an adjustment period of six months.

84 As regards, first, the applicant's argument regarding the application *ratione temporis* of legal provisions, the Commission refers to the case-law of the Court of Justice according to which the immediate applicability of a substantive rule to the future effects of a situation which arose under the old rules constitutes a principle of Community law which applies without restriction (Case 270/84 *Licata* v *ESC* [1986] ECR 2305, paragraph 31; Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraphs 12 to 14; and *Pokrzeptowicz-Meyer*, cited in paragraph 73 above, paragraphs 49 to 55). The Commission was thus required to apply the Regulation exempting SMEs in the present case, given that, though the notification did indeed take place under the old provisions, the fact remains that the future effects of the notified measures had to be assessed during their period of validity.

85 Secondly, the Commission submits that the examples relied on by the applicant in respect of the continuity of its decision-making practice (see paragraph 74 above) all concern cases in which the legislature has expressly provided for the applicability of the legislation in force at the time of notification (*Saldanha and MTS*, cited in paragraph 84 above, paragraph 14), whilst the Regulation exempting SMEs contains no provision in that regard. Furthermore, the argument that the Commission cannot depart from its practice has the absurd consequence of conferring on a given practice a status higher than that of a binding and duly published legal provision, which amounts to a complete negation of the Commission's capacity to lay down rules.

86 According to the Commission, the aid scheme at issue, deliberately notified just before the 1996 Community guidelines for SMEs expired, did not correspond with its new policy on aid for SMEs. Furthermore, it argues that its approval practice is consistent by citing numerous examples in which aid schemes notified before the entry into force of the Regulation exempting SMEs were examined in the light thereof. It adds that the aid scheme at issue, if it had been approved on the basis of the 1996 Community guidelines for SMEs, would have remained in force for the entire period of validity of the Regulation exempting SMEs.

87 As regards, thirdly, the applicant's argument that it would have been more advantageous for it to implement the guidelines without notifying them, the Commission contends that, in that case, it would have had to initiate the formal investigation procedure and apply the legislation in force at the time of the decision, namely the Regulation exempting SMEs, at the very least in respect of the period following its entry into force, with the known outcome. The applicant's reference to the Community guidelines on aid for environmental protection is totally irrelevant given, firstly, that the provision in those guidelines concerns unnotified aid whereas in the present case the aid scheme was notified and, secondly, that the Commission cannot, as regards the scope of the Regulation exempting SMEs, be bound by the Community guidelines on aid for environmental protection.

88 Fourthly, as regards the applicant's argument that the notification was complete, the Commission submits that the information requested was necessary and that it is incorrect to state that the Federal Republic of Germany submitted no more new facts. In the communication annexed to the letter of 12 March 2001, it stated the aid intensities for the section 'Intensive advisory services/Coaching' regarding which there is no information in the notification. Furthermore, it was only in that communication that the issue of 'areas facing particular development problems' was explained in more detail. In addition, the abovementioned letter and its annexes, which were sent at a later stage on 20 March 2001, contain a large number of new points of information concerning the facts and the background to them.

89 According to the Commission, the applicant thus misconstrues the wording of the provisions laid down in Article 4(6) and Article 5(3) of the Regulation on procedure in State aid cases, which derogates from the case-law stemming from *Lorenz*, cited in paragraph 53 above, paragraph 4; see also *Austria* v *Commission*, cited in paragraph 80 above, paragraph 29, and the Opinion of Advocate General Jacobs in that case (ECR I-1105, points 24 to 28). It is apparent from those provisions that non-compliance with the time-limits provided for in Article 4 of the Regulation on procedure in State aid cases is not absolutely prohibited although exceeding them may have serious consequences from the Commission's point of view.

90 The Commission adds, in that regard, that a Member State must do its best to cooperate with the Commission, while retaining the possibility, if the Commission fails to fulfil its obligations, of immediately protecting its rights. In the present case, the Federal Republic of Germany should have informed the Commission, by means of a duly reasoned statement, that it considered the notification to be complete pursuant to Article 5(3) of the Regulation on procedure in State aid cases. Subsequently, the Freistaat Sachsen could, after informing the Commission and failing a reaction from it within a period of 15 working days, have implemented the notified measures in accordance with Article 4(6) of the Regulation on procedure in State aid cases.

91 As the Federal Republic of Germany did not utilise such an option, which was afforded to it by the Regulation on procedure in State aid cases, it therefore waived the legal protection attached to it. In any event, the Federal Republic of Germany and the Freistaat Sachsen did not oppose the initiation of the formal investigation procedure, thus acknowledging the legality of that procedure and the need to collect further information (*Austria* v *Commission*, cited in paragraph 80 above, and Case C-398/00 *Spain* v *Commission* [2002] ECR I-5643).

92 Furthermore, in the light of the provisions of the Regulation on procedure in State aid cases, it is of little importance to know whether the information demanded by letter of 5 February 2001 was actually necessary. Even if the Court were to answer that question in the negative, that would not result in the nullity of the contested decision because the Federal Republic of Germany had the opportunity to oppose the initiation or the pursuit of the formal investigation procedure. The applicant cannot subsequently submit, at the end of the formal investigation procedure and after the adoption of the final decision, reservations which it should have put forward at an earlier stage in the procedure. For that reason, the claim relating to the exhaustiveness of the initial notification is inadmissible.

Findings of the Court

93 It must be ascertained whether, as the applicant submits, the Commission should have examined the aid scheme at issue on the basis of the 1996 Community guidelines for SMEs, which were in force at the time of the notification, or whether the Commission was justified in examining that scheme, as it did, on the basis of the Regulation exempting SMEs, which entered into force after the time of the notification, in so far as it is necessary to assess the future effects of notified measures during their period of validity. To that end, it must therefore be determined whether that regulation was intended to apply to notifications which were pending as at its entry into force.

The applicability of the Regulation exempting SMEs to notifications which were pending as at its entry into force

94 According to settled case-law, although procedural rules are generally deemed to apply to legal situations arising before their entry into force (Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 9, and Joined Cases T-142/01 and T-283/01 *OPTUC* v *Commission* [2004] ECR II-329, paragraph 60), the same is not true of substantive rules. According to equally settled case-law, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to them (*Salumi and Others*, paragraph 9; Case 21/81 *Bout* [1982] ECR 381, paragraph 13; Case C-34/92 *GruSa Fleisch* [1993] ECR I-4147, paragraph 22; Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 119; Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraph 55; and Case T-180/01 *Euroagri* v *Commission* [2004] ECR II-369, paragraph 36).

95 Following that approach, the Court of Justice has stated that, although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (Case 98/78 *Racke* [1979] ECR 69, paragraph 20, and *Salumi and Others*, cited in paragraph 94 above, paragraph 10). Such case-law, as the Court has pointed out, also applies where the retroactivity is not expressly laid down by the measure itself but is the result of its content (Case C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraph 17; Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 59; and Case C-376/02 *Goed Wonen* [2005] ECR I-3445, paragraph 33).

96 The Commission submits, however, that that case-law is not applicable in the present case, given that the immediate application of a substantive rule to the future effects of a situation which arose under the old rules constitutes a principle of Community law which is applicable without restrictions.

97 According to settled case-law, new rules apply immediately to the future effects of a situation which arose under the old rules (*Licata* v *ESC*, cited in paragraph 84 above, paragraph 31; *Saldanha and MTS*, cited in paragraph 84 above, paragraph 14; and *Pokrzeptowicz-Meyer*, cited in paragraph 73 above, paragraph 50). In that regard, the Court of Justice has also stated that the scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying (Case 203/86 *Spain* v *Commission* [1988] ECR 4563, paragraph 19; Case C-60/98 *Butterfly Music* [1999] ECR I-3939, paragraph 25; and *Pokrzeptowicz-Meyer*, cited in paragraph 73 above, paragraph 55).

98 It is apparent from the abovementioned case-law, firstly, that provisions of Community law have no retroactive effect unless, exceptionally, it clearly follows from their terms or general scheme that such was the intention of the legislature, that the purpose to be achieved so demands and that the legitimate expectations of

those concerned are duly respected (see the case-law cited in paragraphs 94 and 95 above). In those circumstances, the exception is constituted by the retroactive application of the new rules. Secondly, Community law normally applies to the future effects of a situation which arose under the old law unless the immediate application of a particular provision is contrary to the protection of the legitimate expectations of the parties concerned (see the case-law cited in paragraph 97 above). In those circumstances, the exception is constituted by the non-application of the new rules to an existing legal relationship. The case-law concerning that second situation in no way implies a retroactive application of the law, given that the new rules involved are applied as from their entry into force to the remainder of a contract (*Saldanha and MTS*, cited in paragraph 84 above, and *Pokrzeptowicz-Meyer*, cited in paragraph 73 above, paragraph 52), a term of office (*Licata* v *ESC*, cited in paragraph 84 above, paragraph 31) or another legal relationship (*Butterfly Music*, cited in paragraph 97 above), whose effects thus continue to unfold only with respect to the future.

99 In view of that case-law, it must be ascertained, firstly, whether the assessment of the compatibility of the aid scheme at issue carried out on the basis of the criteria laid down by the Regulation exempting SMEs, which entered into force after the notification of that scheme, is due to the retroactive application of that regulation or whether, as the Commission claims, it is simply a question of the immediate application of new rules, in the present case the Regulation exempting SMEs, to the future effects of a situation which arose under the 1996 Community guidelines for SMEs, but which was still ongoing as at the entry into force of that regulation.

100 In that regard, it must be pointed out that, as against the final decision of the Commission, which authorises the aid notified or declares it to be incompatible, the situation in which the Member State and the beneficiary of the aid find themselves is obviously ongoing and provisional in so far as the notification confers no right to authorisation. However, as regards ascertaining the criteria on the basis of which the assessment of the compatibility of that aid has to be carried out, the time of the notification must be taken into account, in the light of the importance of its role and its legal effects in the procedure involving the examination of State aid.

101 Under Article 4(1) of the Regulation on procedure in State aid cases, it is the task of the Commission to examine a notification 'as soon as it is received', thus on the basis of the rules in force at that time. Furthermore, it is as from that time that the period of two months within which the preliminary examination stage must be completed begins to run, the exceeding of which may give rise to significant legal consequences for the Commission and the Member State concerned, such as the opportunity for the latter to implement the aid notified and to thus convert it into existing aid in accordance with the provisions of Article 4(6) of the Regulation on procedure in State aid cases.

102 The application, for the purposes of the assessment of the compatibility of aid, of criteria laid down by rules which entered into force after the notification of the aid in question is thus necessarily tantamount to making those rules have a retroactive effect. In those circumstances, the point from which the new rules have effect is inevitably fixed as a date prior to their entry into force, namely that on which the Commission receives the notification. If it were held that the examination of the compatibility of aid could be carried out on the basis of rules which entered into force after the aid was notified, that would amount to accepting that the Commission may decide upon the law applicable by reference to the time at which it chooses to undertake such an examination. Such a position would be difficult to reconcile not only with the fact that Article 4(1) of the Regulation on procedure in State aid cases provides in mandatory terms that the Commission has to examine a notification 'as soon as it is received', but also with the requirement that the criteria on the basis of which the Commission assesses the compatibility of aid be transparent and predictable, which, as the Commission itself stated during the procedure, constitutes the logical reason for the existence of the legislation which it publishes on State aid.

103 A change in the assessment criteria for the compatibility of notified aid in the course of the procedure, on the ground of the entry into force of new rules, cannot therefore be regarded as an application of the case-law according to which new rules apply immediately to the future effects of a situation which arose under the old rules. That case-law lays down that new rules apply only with respect to the future

whereas, in the case of aid notified before their entry into force, the application of the new rules makes them apply retroactively to the time of notification as the assessment as to compatibility is carried out in the course of one single examination even if the final decision is a measure which is drawn up in several stages.

104 It must also be pointed out that, as regards aid covered by the CS Treaty, which was paid without having been notified beforehand, the Court of Justice has held that applying the rules of the code in force on the date on which the Commission makes a determination on the compatibility of aid paid under an earlier code does indeed result in the retroactive application of Community rules (*Falck and Acciaierie di Bolzano* v *Commission*, cited in paragraph 94 above, paragraph 118). The Court held that no provision of the code in force on the date on which the Commission adopted the decision provided that it could be applied retroactively and that it was clear from the general scheme and the objectives of successive aid codes that they had been adopted according to the needs existing during a given period, after that during which the aid had been paid (*Falck and Acciaierie di Bolzano* v *Commission*, cited in paragraph 94 above, paragraph 120).

105 Likewise, as regards aid properly notified before the entry into force of new rules, the Court has found that the Commission rightly examined an aid scheme in the light of the rules deriving from its previous practice and not from the new rules which had entered into force in the meantime, given that the latter applied only in respect of aid entering into or remaining in force after a certain date following the period concerned by the disputed aid (Case T-190/00 *Regione Siciliana* v *Commission* [2003] ECR II-5015, paragraphs 94 to 96).

106 By contrast, having regard to the fact that the new Community guidelines on environmental protection, which entered into force subsequent to the notification of the aid at issue, expressly provided, in point 82, that the Commission was to apply the guidelines 'to all aid projects notified in respect of which it [would be] called

upon to take a decision after the guidelines [had been] published in the Official Journal, even where the projects [had been] notified prior to their publication', the Court held that the Commission was entitled to apply them and not the guidelines in force at the time of the notification (Case T-176/01 *Ferriere Nord* v *Commission* [2004] ECR II-3931, paragraph 137).

107 The abovementioned judgments confirm that the application, with a view to assessing the compatibility of aid with the common market, of criteria laid down in rules which entered into force after the date on which the aid concerned was paid or notified is tantamount to making those rules have a retrospective effect. In terms of the case-law cited in paragraphs 94 and 95 above, such an application is permissible only if it clearly follows from the terms, objectives or general scheme of the new rules concerned that they are intended to apply retroactively.

108 In the light of the above finding, it must be ascertained, secondly, whether the Regulation exempting SMEs was intended to apply retroactively. To that end, one must consider not only its wording, but also its content and in particular the objective it has, as well as ascertaining, if necessary, whether the legitimate expectations of those concerned are duly respected.

109 Firstly, clearly in this case, the Regulation exempting SMEs does not include any transitional provision relating to the question of its possible application to aid schemes notified before its entry into force.

110 Contrary to the Commission's submission, the absence of transitional provisions cannot be interpreted as meaning that the Regulation exempting SMEs applied to notifications being examined at the time of its entry into force. The fact that the examination of an aid scheme on the basis of the legislation in force at the time of

the notification is expressly provided for by the provisions of some pieces of legislation, such as those of point 6.1 of the Guidelines on regional aid, those of points 98 and 100 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty, those of point 2.6 of the Community framework for State aid to the motor vehicle industry, those of points 39 and 40 of the multisectoral framework on regional aid for large investment projects and those of Article 9a of the Regulation exempting SMEs, as amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 amending [the] Regulation [exempting SMEs] as regards the extension of its scope to include aid for research and development (OJ 2004 L 63, p. 22), in no way leads to the conclusion that the rules in force at the time of the notification apply only where such provisions are expressly provided for by the subsequent rules.

111 In that regard, it must be pointed out, firstly, that the Commission has, in other legislation, inserted provisions expressly providing for the applicability of new criteria to aid notified before their entry into force, such as the provisions of point 82 of the Community guidelines on aid for environmental protection and those of Article 11(2) of Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment (OJ 2002 L 337, p. 3). Secondly, whilst nothing prevents the Commission from laying down, in legislation specifying the criteria which it intends to use in order to examine the compatibility of aid or an aid scheme, the measures specifically governing the application *ratione temporis* of the provisions specifying those criteria, the existence of such a possibility cannot call into question the principle identified from the case-law cited in paragraphs 94 and 95 above, according to which, in the absence of such measures, the provisions specifying the new criteria are not intended to apply to aid notified before their entry into force.

112 Secondly, the Regulation exempting SMEs contains no particulars, not even implicitly, which permit the inference that it was intended to apply retroactively.

113 The objective of the Regulation exempting SMEs is, firstly, to implement the enabling regulation, by laying down, in respect of the category of aid to small and medium-sized enterprises, the conditions which that aid must meet for Member States to be exempt from the obligation to notify it, in order, inter alia, to simplify administration without weakening monitoring and also to increase transparency and legal certainty. It is self-evident that, in the light of such an objective, in particular that of allowing Member States to determine themselves whether an aid project complies with the criteria laid down by the Regulation exempting SMEs and is not therefore subject to the notification obligation laid down by Article 88(3) EC, that regulation could apply only with respect to the future and cannot therefore have been intended to apply to notifications already effected.

114 Secondly, the Commission has explained that the Regulation exempting SMEs also has the objective of replacing the criteria laid down by the 1996 Community guidelines for SMEs, as is apparent from the wording of recital 4 in the preamble to that regulation which states that those guidelines 'should be abolished from the date of entry into force of this Regulation, since their contents are replaced by this Regulation'. As the question is whether the new criteria apply to pending notifications, it must however be borne in mind that, in the same recital, it is stated that the regulation 'is without prejudice to the possibility for Member States of notifying aid to small and medium-sized enterprises' and that, in those circumstances, '[s]uch notifications will be assessed by the Commission in particular in the light of the criteria set out in this Regulation'. The wording of the abovementioned recital, in providing that Member States retain the possibility of notifying aid which falls within the category covered by the Regulation exempting SMEs, can therefore only refer to notifications — which are made in exceptional cases — subsequent to the entry into force of that regulation.

115 It is true that the replacement of the 1996 Community guidelines for SMEs by the Regulation exempting SMEs, as announced in the abovementioned recital 4, could implicitly show that the Commission also intended to follow a stricter policy on State aid for small and medium-sized enterprises as regards notified aid. However, that sole fact cannot be considered to be sufficient to arrive at the conclusion that the Regulation exempting SMEs was intended to apply retroactively, particularly because the same recital provides, as regards aid to be notified in the future, that it

will be assessed 'in particular', that is to say not exclusively, in the light of the criteria set out in that regulation. If an aid scheme properly notified after the entry into force of the Regulation exempting SMEs is not to be assessed solely on the basis of the criteria set out therein, it cannot therefore be claimed that the aim to be achieved by that regulation requires retroactive effect to be conferred on it in exceptional cases.

116 Furthermore, a retroactive application of the Regulation exempting SMEs could be accepted only if the legitimate expectations of those concerned were duly respected. In that regard, it must be pointed out that the fact, relied on by the Commission, that the Federal Republic of Germany was aware of the impending changes to the criteria for assessing the aid scheme at issue at the time of the notification of that scheme in no way alters that finding. Although it is true that the Member States were involved in the legislative process which resulted in the adoption of the Regulation exempting SMEs, the fact remains, firstly, that the Member States are not able to prescribe either the final wording of the legislation which will ultimately be adopted or the date of its entry into force and, secondly, that the regulation aims to lay down the conditions to which the exemption from the notification obligation laid down in Article 88(3) EC is subject and not the conditions to which the authorisation of notified aid is subject. Furthermore, the draft regulation exempting SMEs, in the version published in the Official Journal on 28 March 2000 (OJ 2000 C 89, p. 15), contained neither the recital mentioned in paragraph 114 above nor any other statements as regards the fact that the 1996 Community guidelines for SMEs would be repealed and replaced by that regulation. In those circumstances, a retroactive application of that regulation would meet neither the condition that the legitimate expectations of those concerned be respected nor that of respect for the principle of legal certainty.

117 Furthermore, the fact that the legislation which the Commission publishes on State aid has, as it has itself stated, the objective of ensuring that its practice concerning State aid is transparent and predictable precludes the Commission, in principle, from assessing the compatibility of aid on the basis of rules which entered into force when the notification had already been made and the assessment as to the compatibility of the aid had already begun. Evidently, such a way of proceeding has

the result of reducing, if not eliminating, the predictability of the Commission's practice regarding authorisation and cannot but place Member States in a position of legal uncertainty, in so far as they cannot have any confidence in the fact that an aid project which they have drafted in the light of the criteria laid down by the rules in force at the time of notification will be assessed by the Commission on the basis of those same criteria.

118 In this connection, it must be pointed out that, by a notice on the determination of the applicable rules for the assessment of unlawful State aid (OJ 2002 C 119, p. 22), the Commission, for the purpose of transparency and legal certainty, informed Member States and third parties of the fact that it would always assess the compatibility with the common market of unnotified State aid in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted. It cannot be accepted that, for the purposes of ascertaining the rules applicable for assessing the compatibility of aid with the common market, a situation must be regarded as 'established' where it concerns aid granted in breach of the notification obligation, to the effect that that aid must be assessed in the light of the criteria in force at the time when it was paid, in accordance with that notice and *Falck and Acciaierie di Bolzano* v *Commission*, cited in paragraph 94 above, paragraph 118, and as being 'provisional' where it concerns properly notified aid in respect of which the assessment criteria could legitimately change until the eve of the final decision although the whole procedure had been carried out in the light of the criteria laid down by the rules previously in force.

119 The practical application of such an argument would be a source of legal uncertainty for Member States and could have negative effects since, in anticipation of changes towards greater strictness in the rules applicable, Member States could be moved to implement aid rather than notify it to the Commission. Furthermore, such an outcome goes against the case-law according to which any interpretation which would have the effect of according a favourable outcome to the non-observance of Article 88(3) EC by the Member State concerned is to be avoided (see, to that effect, Case C-354/90 *Fédération nationale du commerce extérieur* [1991] ECR I-5505, paragraph 16, and Joined Cases C-261/01 and C-262/01 *Van Calster and Others* [2003] ECR I-12249, paragraph 63). If, for any particular aid plan, whether

compatible with the common market or not, failure to comply with Article 88(3) EC carried no greater risk or penalty than compliance, the incentive for Member States to notify and await a decision on compatibility would be greatly diminished (Opinion of Advocate General Jacobs in Case C-368/04 *Transalpine Ölleitung in Österreich and Others* [2006] ECR I-9957, point 50).

120 Lastly, it is apparent from the terms as well as the objective of the Regulation exempting SMEs and also from the requirements arising from respect for the principle of the protection of legitimate expectations and the principle of legal certainty that the regulation was not intended to apply retroactively.

121 That finding cannot be called into question by the fact that, as set out in paragraph 86 above, the Commission has authorised numerous aid schemes notified before the entry into force of the Regulation exempting SMEs on the basis thereof since it did not take a decision on those schemes before the entry into force of that regulation. In this connection, it is sufficient to point out that a practice of the Commission which is contrary to the principles identified by the case-law cannot outweigh them. Furthermore, as the applicant has stated, without being challenged by the Commission on that point, what was in issue were aid measures concerning investment and education, in respect of which the assessment criteria, in particular that of the aid intensity allowed, had remained unchanged as against those of the previous rules (see paragraph 76 above), so that the legitimate expectations of those concerned could not in any event be affected.

122 It must nevertheless be pointed out that, although the Commission is deemed to begin an assessment of the compatibility of aid as soon as the notification is received, thus on the basis of the criteria laid down by the rules in force on that date, such an assessment cannot actually be undertaken until all the necessary information has been communicated, that is to say as from the time when the notification is complete. From that point of view, but also in order to avoid a notification being made at a stage where it does not contain all the information

necessary for its assessment and the date of the notification perhaps being chosen in the light of and in anticipation of a change of the criteria on the basis of which the compatibility of the aid is to be assessed, it must be held that the applicable rules are those in force at the time when the notification is complete.

123 It must thus be ascertained whether, in the present case, as the applicant claims, the initial notification was complete, with the result that the Commission could not plead, as it did in recital 56 in the preamble to the contested decision, that the notification became complete only after the entry into force of the Regulation exempting SMEs in order to submit that that regulation was applicable.

The claim relating to the exhaustiveness of the initial notification

— Admissibility of the claim

124 The Commission pleads that the applicant's claim relating to the completeness of the initial notification is inadmissible on the ground, firstly, that it did not raise it during the formal investigation procedure and, secondly, that the Federal Republic of Germany and the applicant did not oppose either the initiation or the pursuit of the formal investigation procedure, thus acknowledging the legality of that procedure and the necessity for the requested information. The applicant cannot therefore dispute the final decision by submitting reservations which it should have put forward at an earlier stage in the procedure. In the rejoinder, the Commission stated that the inadmissibility of that claim was closely linked to the fact that the Federal Republic of Germany had not utilised the option afforded to it by Article 4(6) of the Regulation on procedure in State aid cases and that the applicant consequently had no legal interest in bringing an action in that regard.

125 The Court cannot regard this claim as inadmissible.

126 First, it must be pointed out that the applicant, in submitting that the initial notification was complete, seeks to show that the aid scheme at issue should not have been assessed on the basis of the Regulation exempting SMEs, which entered into force following that notification. Contrary to the Commission's assertions in that regard, this is a position which the Federal Republic of Germany expressed in particular in its observations concerning the initiation of the formal investigation procedure in which it states that 'the German authorities do not share the Commission's view that the assessment of the aid scheme could not be carried out on the basis of the documents sent on 3 January 2001 and consequently retain their opinion that the aid scheme has to be assessed on the basis of [the 1996 Community guidelines for SMEs] which [were] in force at the time of the notification'.

127 Secondly, it must be noted that, as is apparent from the case-law, the right to challenge a decision to initiate the formal investigation procedure may not diminish the procedural rights of interested parties by preventing them from seeking the annulment of the final decision and relying in support of their action on defects at any stage of the procedure leading to that decision. The decision to initiate the formal investigation procedure, even if it produces independent legal effects, is a preparatory step for the final decision which determines the definitive Commission position and in which the Commission may alter the assessment made in the initiating decision. To accept the Commission's argument would be to anticipate issues of substance and to confuse the different stages of administrative and judicial procedures by depriving of meaning the main objective of the formal investigation procedure, which is to allow the parties concerned to submit their comments on all the disputed aspects of the file and the Commission to take a final decision in the light of those comments (see, to that effect, *Regione Siciliana* v *Commission*, cited in paragraph 105 above, paragraphs 47, 48 and 51).

128 In the present case, the contested decision is the final decision which concludes the procedure and produces binding and definitive legal effects for the parties concerned, including as regards a decision on the rules applicable. The applicant must therefore have the right to bring an action for the annulment of the decision in its entirety, including in so far as it determines that the initial notification became complete only on a date after the entry into force of the Regulation exempting SMEs (see, to that effect, *Regione Siciliana* v *Commission*, cited in paragraph 105 above, paragraph 49).

129 As for the Commission's argument that the applicant has no legal interest in bringing an action concerning the alleged exhaustiveness of the initial notification, on the ground that it did not utilise the option afforded to it by Article 4(6) of the Regulation on procedure in State aid cases of implementing the aid scheme in question after giving the Commission prior notice thereof, it must be pointed out that the only inference to be drawn from that is that the project notified could not gain the status of an existing aid scheme. As the aid scheme in question thus retained its status as new aid, the Commission was entitled to decide to initiate the formal investigation procedure in relation thereto (see, to that effect, *Regione autonoma della Sardegna* v *Commission*, cited in paragraph 56 above, paragraph 49), which is not disputed by the applicant.

130 It is apparent from the above that it cannot reasonably be maintained that, since it did not bring an action within the prescribed period against the decision to open the formal investigation procedure and did not utilise Article 4(6) of the Regulation on procedure in State aid cases, the applicant may no longer submit, in the context of this action brought against the final decision, that the Commission incorrectly regarded the notification as being incomplete and that it therefore improperly delayed the assessment of the notification.

131 The claim relating to the exhaustiveness of the initial notification is thus admissible.

— Substance

132 Under Article 4 of the Regulation on procedure in State aid cases, which sets out the time-limits to which the examination of notified aid is subject, the Commission has a period of two months to find, after a preliminary examination, that a notified measure does not constitute aid or that no doubts are raised as to the compatibility with the common market of a notified measure or that doubts are raised as to the compatibility with the common market of a notified measure, in which case the Commission will decide to initiate proceedings pursuant to Article 88(2) EC. The period of two months begins on the day following the receipt of a complete notification (second sentence of Article 4(5) of the Regulation on procedure in State aid cases).

133 It must also be borne in mind that, according to settled case-law which laid down the principles applicable before the entry into force of the Regulation on procedure in State aid cases, for a notification to be regarded as complete it is sufficient if the Commission has at its disposal, during the preliminary examination phase, all such information as will enable it to conclude, without any extensive review being called for, whether a given State measure is compatible with the Treaty or raises doubt as to its compatibility (*Austria* v *Commission*, cited in paragraph 80 above, paragraph 54). It is therefore sufficient, for the purposes of the preliminary phase, for the notification to contain, either from the outset or once the Member State has replied to questions raised by the Commission, such information as will enable the Commission to form a prima facie opinion of the compatibility of the aid with the Treaty (*Lorenz*, cited in paragraph 53 above, paragraph 3; *Austria* v *Commission*, cited in paragraph 80 above, paragraph 56; and *Regione autonoma della Sardegna* v *Commission*, cited in paragraph 56 above, paragraph 40).

134 As regards the Regulation on procedure in State aid cases, Article 2(2) provides that a notification is complete where 'the Member State concerned ... provide[s] all necessary information in order to enable the Commission to take a decision pursuant to Articles 4 and 7 (hereinafter referred to as "complete notification")'. The same regulation sets out, in the third sentence of Article 4(5) and in Article 5(3), by

means of a second definition ('[t]he notification will be considered as complete' or '[the Member State] considers the notification to be complete'), the time as from which the Commission must be considered to be in possession of all the necessary information, that is to say when the Commission does not request any further information or else following a duly reasoned statement to that effect on the part of the Member State concerned. That second definition thus has the fundamental aim of fixing the day on which the period of two months laid down by Article 4(5) of the Regulation on procedure in State aid cases begins, which gives rise to important consequences not only for Member States, but also for the Commission.

135 The definition of complete notification contained in the third sentence of Article 4(5), as well as that which is a consequence of Article 5(3) of the Regulation on procedure in State aid cases, must be read in conjunction with, and in relation to, the objectives of Article 4(6) of the regulation, which provides that, if the Commission has not taken a decision within the period of two months with regard to a complete notification within the meaning of the abovementioned provisions, 'the aid shall be deemed to have been authorised by the Commission' and '[t]he Member State concerned may thereupon implement the measures in question after giving the Commission prior notice thereof'. Such a provision thus makes it possible for Member States to avoid the artificial extension by the Commission of the duration of the preliminary examination stage thus leaving them in a position of legal uncertainty as regards the treatment of the planned aid.

136 It follows that the fact that the Member State concerned does not, on the basis of Article 5(3) of the Regulation on procedure in State aid cases, oppose possible delaying tactics of requesting additional information can, as was pointed out in paragraph 129 above, have no adverse effect other than that expressly provided for by the scheme in question, namely the inability to rely on the option provided for by Article 4(6) of that regulation to implement the planned aid scheme and therefore see it converted into an existing aid scheme.

137 That same fact in no way leads to the conclusion that the notification was not complete, the determinative criterion in that regard, in accordance with the case-law cited in paragraph 133 above, being that the notification contains all such information as is necessary to enable the Commission to form a prima facie opinion of the compatibility of the aid with the Treaty.

138 That finding is not called into question by the fact that Article 2(2) of the Regulation on procedure in State aid cases requires, in order for the notification to be complete, that all necessary information be communicated to the Commission either for the purposes of the decision which it has to make at the end of the preliminary examination or for the adoption of the final decision on the compatibility of the aid and does not therefore restrict the body of information required in the notification to that which is necessary to enable the Commission to make the decision which has to be made at the end of the preliminary examination stage. Article 2(2) of the Regulation on procedure in State aid cases has to be read in the light of the fact that the Commission is required to initiate the formal investigation procedure if doubts are raised as to the compatibility with the common market of a notified measure and that it must therefore be in a position to acquaint itself with all the facts necessary for that purpose. As regards all the other information which may prove necessary for the purposes of the adoption of the final decision on the compatibility of the aid, it is sufficient to point out that neither the Member State concerned nor the Commission knows ex ante which information will prove necessary for the final decision as the need for such information may only become apparent in the course of the formal investigation procedure, in particular when the Commission has received the comments of interested third parties (see, to that effect, the Opinion of Advocate General Jacobs in *Austria* v *Commission*, cited in paragraph 80 above, points 90 and 91).

139 It must therefore be held that, as is apparent from Article 2(2) of the Regulation on procedure in State aid cases and in accordance with the case-law mentioned in paragraph 133 above, for a notification to be regarded as complete, for the purposes of the preliminary examination phase, it is sufficient for it to contain such information as will enable the Commission to form a prima facie opinion on the compatibility of the measure notified with the common market and to decide, in case of doubts in that regard, to initiate the formal investigation procedure.

140 In the light of the foregoing, it is necessary to examine the content of the correspondence between the Commission and the Federal Republic of Germany and to ascertain whether, as the applicant claims, the initial notification was complete.

141 In that regard, it must be borne in mind that, following the initial notification of 29 December 2000, the Commission requested additional information from the Federal Republic of Germany on two occasions, namely 5 February and 5 September 2001. The Federal Republic of Germany replied by letters of 12 March and 9 October 2001 respectively.

142 As regards the first request for information, made by letter of 5 February 2001, the Commission simply asked the Federal Republic of Germany 'whether the "soft aid" assisted activities [were] compatible with the [Regulation exempting SMEs], that is to say whether the volume of aid provided for in the notification concerned [could] be reduced to that provided for by the Regulation exempting SMEs ...' and stated that, '[w]here that [was] not possible, a precise statement of reasons [was] necessary (necessity and compatibility in terms of economic policy)'.

143 As the applicant rightly notes, the Commission, in its letter of 5 February 2001, asked the Federal Republic of Germany, firstly, for an opinion as regards the compatibility of aid concerning advisory services with the Regulation exempting SMEs and, secondly, whether it was prepared to reduce the volume of aid in question in order to make it compatible with that regulation. Such a request cannot be regarded as seeking to obtain the factual information necessary to assess the compatibility of the aid scheme notified, but rather, besides the request for an opinion, as a suggestion that the Federal Republic of Germany should make the amendments necessary for the aid scheme at issue to comply with the provisions of the Regulation exempting SMEs, which had entered into force three days earlier.

144 As regards the Commission's second request for information which was addressed to the Federal Republic of Germany by letter of 5 September 2001, it sought, as the Commission itself stated in replying in writing to a question asked by the Court, to ascertain whether, in view of the entry into force of the Regulation exempting SMEs, the Federal Republic of Germany was maintaining the notification in relation to all the subprogrammes initially notified. That type of information, which had moreover already been given in the Federal Republic of Germany's communication of 2 August 2001, also in no way related to the facts necessary to carry out an examination of the compatibility of the aid scheme notified.

145 In the light of the foregoing, it must be held that neither the request of 5 February 2001 nor that of 5 September 2001 may be categorised as being requests for factual information necessary to complete the initial notification and enable the Commission to carry out the examination of the compatibility of the aid scheme notified by the Federal Republic of Germany. The very wording of the two requests made by the Commission shows that it had already formed an opinion as regards the incompatibility of the aid scheme at issue with the common market on account of its inconsistency with the Regulation exempting SMEs.

146 That finding cannot be called into question by the wording of the replies given by the Federal Republic of Germany to the Commission's letters of 5 February and 5 September 2001.

147 Thus, in its reply 12 March 2001 to the Commission's letter of 5 February 2001, the Federal Republic of Germany, under point I of the communication attached thereto, clearly set out its position concerning the question whether 'the aid items in respect of "soft aid" [were] to be made compliant with the conditions of the Regulation

exempting SMEs'. In that respect, the Federal Republic of Germany mentions the following considerations:

'... at the time of the notification of the aid scheme, the Regulation exempting SMEs was not yet in force. Therefore, the German authorities could not, at the time of the notification, take as their basis the criteria of the Regulation exempting SMEs ... For the purposes of an assessment of State aid, it is the legal position at the time of the notification that is relevant ... The German authorities therefore take the view that this aid scheme must still be assessed on the basis of the criteria of the [1996] Community guidelines for SMEs.'

148 Under point II of the same communication, the Federal Republic of Germany stated that, in any event, in its opinion, the aid scheme notified was also capable of being authorised on the basis of the criteria of the Regulation exempting SMEs. Even though it is true that the scheme did not comply in all respects with that regulation, the Commission could nevertheless have examined it directly in the light of the EC Treaty by applying its broad discretion.

149 In expressing that view concerning its maintaining of the initial notification, the Federal Republic of Germany made a statement as regards the subprogramme 'Intensive advisory services/Coaching' concerning the aid intensity. The communication annexed to the reply of 12 March 2001 states:

'To supplement the guidelines currently notified, a general aid ceiling of 50% in accordance with the provision of the Regulation exempting SMEs is envisaged in addition to the absolute aid ceiling. A higher aid intensity of up to 65% is envisaged for small enterprises (according to the EU definition) subject to the same absolute aid ceilings.'

150 In the light of the foregoing, clearly, first, the only specific question in the Commission's letter of 5 February 2001 relates solely to one aspect, namely the aid intensity of only one of the six subprogrammes constituting the aid scheme notified, that is to say the subprogramme concerning the 'Intensive advisory services/ Coaching'. Secondly, the statement made by the Federal Republic of Germany in respect of that question, which admittedly contains a new element, cannot be categorised as information necessary to assess the compatibility of the aid, given that the Commission could deduce from the notification that the fact that only a ceiling as an absolute value was provided for would inevitably lead to aid intensities of more than 50%.

151 As the applicant stated in its reply to the Court's questions and as could be deduced by making a simple calculation, the ceiling fixed as an absolute value meant that the enterprise concerned qualified, at best, for aid of 72.73% and of 83.3% if it was a new enterprise. By means of the introduction of a ceiling as a percentage, the Federal Republic of Germany raised the rate of aid to 50% and in respect of new enterprises to 65%, thus retaining for those enterprises a maximum aid intensity exceeding that of 50% provided by the Regulation exempting SMEs. In that regard, it must be added that a rate of aid exceeding 50% is also envisaged as regards the subprogramme 'Participation in fairs' (a rate of 60% for small localised enterprises in areas facing particular development problems), the subprogramme 'Cooperation' (a generally applicable rate of 65% and up to 80% for certain specific projects) and the subprogramme 'Design promotion' (a rate of 70% for small localised enterprises in areas facing particular development problems).

152 It follows that the impact on the assessment of the compatibility of the aid scheme at issue of the introduction, as regards the subprogramme 'Intensive advisory services/ Coaching', of a ceiling as a percentage, in addition to the ceiling as an absolute value of the planned aid, is of a minor nature, as the Commission's doubts as to the incompatibility of the scheme as a whole with the common market are based on the exceeding of the rate of 50% of aid intensity, as laid down by the Regulation exempting SMEs. In any event, the answer to the question set out in the

Commission's letter of 5 February 2001 was, on account of its restricted scope, in no way necessary for the Commission to form a prima facie opinion on the compatibility of the body of the aid scheme notified with the common market.

153 As regards the reply of 9 October 2001 to the Commission's letter of 5 September 2001, the Federal Republic of Germany, besides the fact that it provided ancillary information following a meeting of 14 June 2001 between the Commission and the German authorities, confined itself to repeating that it was maintaining the initial notification, in particular on account of the fact that the scheme notified was in compliance with the 1996 Community guidelines for SMEs and that it was in relation to those guidelines, which were in force at the time of its notification, that it had to be assessed. In the same letter, the Federal Republic of Germany also pointed out that, in accordance with its communication of 2 August 2001, the aid scheme in question had meanwhile been implemented, on the basis of Article 9(1) of the Regulation exempting SMEs, until the date of authorisation of the aid scheme as notified.

154 The very fact that, as is apparent from the abovementioned communication of 2 August 2001, the Federal Republic of Germany implemented the aid scheme at issue, within the limits of its compliance with the provisions of the Regulation exempting SMEs, by fixing as its period of validity 31 December 2008 or the date of authorisation of the scheme as notified, confirms that it had never amended its initial notification to make it comply with the Regulation exempting SMEs. The Federal Republic of Germany utilised the possibility afforded by that regulation to implement an aid scheme without notifying it and forwarded it to the Commission, in accordance with Article 9(1) of the same regulation, while retaining its initial notification, precisely on account of the fact that the notification had been made before the regulation had entered into force.

155 Lastly, it cannot be accepted that the initial notification is not regarded as complete on account of the fact that it did not meet all the conditions, in particular as regards aid intensity, required by the rules which entered into force following the initial

notification, namely the Regulation exempting SMEs. Not only did the applicant dispute the applicability of that regulation precisely on the ground that it had entered into force after the date on which the Commission received the initial notification, but it also expressly declared that it was maintaining the initial notification, while utilising the possibility of implementing its aid scheme, without prior notification, as provided for by that regulation.

156 It is apparent from the foregoing that the initial notification was complete in that it contained all the information necessary to enable the Commission to assess its compatibility with the common market on the basis of the criteria laid down by the rules in force at the time when the initial notification was received.

157 It follows that the applicant's second plea must be upheld.

158 It is thus necessary, in the light of the foregoing and without having to examine the other pleas raised by the applicant, to uphold the action and annul the second paragraph of Article 2 and Articles 3 and 4 of the contested decision.

Costs

159 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant.

On those grounds,

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

hereby:

1. **Annuls the second paragraph of Article 2 and Articles 3 and 4 of Commission Decision 2003/226/EC of 24 September 2002 on an aid scheme which the Federal Republic of Germany is planning to implement — 'Guidelines on assistance for SMEs — Improving business efficiency in Saxony': Subprogrammes 1 (Coaching), 4 (Participation in fairs), 5 (Cooperation) and 7 (Design promotion);**

2. **Orders the Commission of the European Communities to pay the costs.**

Vilaras Martins Ribeiro Dehousse

Šváby Jürimäe

Delivered in open court in Luxembourg on 3 May 2007.

E. Coulon M. Vilaras

Registrar President

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