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

11 May 2005 *

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

Saxonia Edelmetalle GmbH, established in Haslbrücke (Germany), represented by P. von Woedtke, lawyer,

applicant in Case T-111/01,

and

J. Riedemann as liquidator of ZEMAG GmbH, established in Zeitz (Germany), represented by U. Vahlhaus, lawyer, with an address for service in Luxembourg,

applicant in Case T-133/01,

* Language of the case: German.

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

defendant,

APPLICATION for annulment of Commission Decision 2001/673/EC of 28 March 2001 on State aid implemented by Germany for EFBE Verwaltungs GmbH & Co. Management KG, now Lintra Beteiligungsholding GmbH, together with Zeitzer Maschinen, Anlagen Geräte GmbH, LandTechnik Schlüter GmbH, ILKA MAFA Kältetechnik GmbH, SKL Motoren- und Systembautechnik GmbH, SKL Spezialapparatebau GmbH, Magdeburger Eisengießerei GmbH, Saxonia Edelmetalle GmbH and Gothaer Fahrzeugwerk GmbH) (OJ 2001 L 236, p. 3),

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

composed of B. Vesterdorf, President, M Jaeger, P. Mengozzi, M.E. Martins Ribeiro and M.F. Dehousse, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 29 June 2004,

gives the following

Judgment

Legal framework

1 Article 87(1) EC provides:

'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 Article 88(2) EC provides:

'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission ...'

3 On 22 March 1999 the Council adopted Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1).

4 According to Article 1(g) of Regulation No 659/1999, 'misuse of aid' means 'aid used by the beneficiary in contravention of a decision taken pursuant to Article 4(3) or Article 7(3) or (4) of this Regulation', that is, in violation of a decision not to raise objections to the granting of aid, or a decision declaring aid to be compatible with the common market, that decision possibly including, where applicable, conditions and obligations.

5 Article 6(1) of Regulation No 659/1999 provides:

'The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.'

6 According to Article 10 of Regulation No 659/1999:

'1. Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.

2. If necessary, it shall request information from the Member State concerned. Article 2(2) and Article 5(1) and (2) shall apply mutatis mutandis.

3. Where, despite a reminder pursuant to Article 5(2), the Member State concerned does not provide the information requested within the period prescribed by the Commission, or where it provides incomplete information, the Commission shall by decision require the information to be provided (hereinafter referred to as an "information injunction"). The decision shall specify what information is required and prescribe an appropriate period within which it is to be supplied.'

7 Article 13(1) of Regulation No 659/1999 provides:

'The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7. If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.'

8 Article 14 of Regulation No 659/1999 provides:

'1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

3. Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article [242] of the Treaty, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.'

9 Article 16 of Regulation No 659/1999, entitled 'Misuse of aid', states:

'Without prejudice to Article 23, the Commission may in cases of misuse of aid open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7, 9 and 10, Article 11(1), Articles 12, 13, 14 and 15 shall apply mutatis mutandis.'

Background to the dispute

10 In 1993, eight undertakings in the former German Democratic Republic (Zeitzer Maschinen, Anlagen Geräte (ZEMAG) GmbH, LandTechnik Schlüter GmbH, ILKA MAFA Kältetechnik GmbH, SKL Motoren- und Systembautechnik GmbH, SKL

Spezialapparatebau GmbH, Magdeburger Eisengießerei GmbH, Saxonia Edelmetalle GmbH and Gothaer Fahrzeugwerk GmbH) were reorganised into a holding company, EFBE Verwaltungs GmbH & Co. Management KG, held by the Treuhandanstalt (subsequently changed to the Bundesanstalt für vereinigungsbedingte Sonderaufgaben, 'the BvS') with a view to restructuring and privatisation.

11 Pursuant to a privatisation contract signed on 25 November 1994, the BvS made a block sale of the eight abovementioned undertakings to a partnership governed by German law, Emans & Partner GbR. The eight undertakings and the holding company EFBE Verwaltungs GmbH & Co. Management KG, later Lintra Beteiligungsholding GmbH ('the Lintra holding company'), then formed the Lintra group.

12 Since the privatisation project, as well as the related restructuring project, included aid measures, they were notified by the Federal Republic of Germany to the Commission by letter of 19 January 1995.

13 By decision SG (96) D/4218 of 13 March 1996, a brief summary of which was published in OJ 1996 C 168, p. 10 ('the decision of 13 March 1996'), the Commission authorised the payment of the notified aid measures, considered as being compatible with Article 92(3)(c) of the EC Treaty (now, after amendment, Article 87(3)(c) EC). That decision was notified to the German authorities by letter of 23 April 1996. The total amount of authorised aid to be paid to the Lintra group amounted to DEM 824 200 000.

14 Although originally it was planned that the subsidiaries of the Lintra holding company ('the Lintra subsidiaries' or 'the subsidiaries') would become profitable in 1998, at the end of 1997 the BvS had to intervene in order to prevent the entire group from going bankrupt. Under the terms of the contract signed on 6 January

1997 with the investors, the BvS released them from all liability relating to the privatisation contract. In return, BvS obtained the right to repurchase at any time any of the Lintra subsidiaries for the symbolic amount of DEM 1. Under the same contract, the Lintra holding company had as its principal objective the transfer of the Lintra subsidiaries in their entirety or in part to new investors.

15 After having retaken control of the Lintra group by contract of 6 January 1997, the BvS decided to sell the only company in the group which at that time was already profitable without the grant of new aid, namely Saxonia Edelmetalle. The applicant in Case T-111/01, which is involved in the striking of coins, was acquired by the company Vereinigte Deutsche Nickelwerke AG in 1997.

16 At the same time, the BvS decided to pursue the restructuring of several other subsidiaries, including the company ZEMAG, with a view to preparing those potentially profitable companies for sale to industrial partners as soon as possible. ZEMAG, the applicant in Case T-133/01, which is involved in machines for lignite mines, was sold to the investors Jacobi & Lobeck at the end of 1997.

17 Pursuant to a contract signed in September 1999 by the BvS, the Lintra holding company and the remaining investors, the BvS repurchased the Lintra holding company for the symbolic amount of DEM 1. That company has been in liquidation since 1 January 2000.

18 After receiving notification from the Federal Republic of Germany of new restructuring aid in 1998, the Commission sent a list of questions to the German authorities by letter of 25 June 1998.

19 By letter of 22 June 1999, the Commission informed the Federal Republic of Germany of its decision to open the procedure provided for in Article 88(2) EC. By that decision (OJ 1999 C 238, p. 4), the Commission found that the amount of aid actually paid since the first notification from the German authorities was lower than that authorised by the decision of 13 March 1996. It noted, however, that some parts of the aid paid, including a liquidity loan of DEM 12 000 000, were not covered by the decision of 13 March 1996. The Commission also expressed doubts on the following points:

— whether the information obtained prior to the decision of 13 March 1996 was complete and accurate;

— the use of the aid approved by the decision of 13 March 1996;

— the granting of other aid to the Lintra group.

20 By letters of 18 October 1999 and 10 March 2000, the German authorities responded to the questions and findings made by the Commission in its decision to open the procedure provided for by Article 88(2) EC. That correspondence indicates that:

— since the first notification from the German authorities, the total amount of aid paid by the BvS to the Lintra group was DEM 658 200 000;

— as at 31 December 1997, DEM 34 978 000 stood in the accounts of the Lintra holding company;

— the liquidity loan of DEM 12 000 000 had been granted in 1997 to the Lintra subsidiaries, the restructuring of which in particular that of ZEMAG, was to continue.

21 On 1 August 2000, the Commission, considering that information to be insufficient and acting pursuant to Article 10(3) of Regulation No 659/1999, requested the German authorities to provide it, within one month from receipt of the information injunction decision ('the information injunction decision of 1 August 2000'), with all information necessary in order to be able to determine the breakdown of the expenditure of the Lintra holding company amongst the different subsidiaries and allocate appropriately the amount of aid remaining in the accounts of the Lintra holding company. The Commission also requested the Federal Republic of Germany to state whether the fees paid by the subsidiaries to the Lintra holding company had been financed by aid and stated that, if it did not receive that information, it would make its decision on the basis of the information it did have. Lastly, the Commission requested the German authorities to forward immediately a copy of the information injunction decision of 1 August 2000 to any aid recipients.

22 The German authorities replied to that information injunction decision by letter of 2 October 2000, supplemented by a letter of 31 October 2000, to which was attached a report from a chartered accountant concerning a possible request for recovery of the aid from the Lintra group. In those documents, the German authorities confirmed that, as at 31 December 1997, the amount of DEM 34 978 000, granted by the Federal Republic of Germany to the Lintra group, stood in the accounts of the Lintra holding company. Moreover, it stated that that amount was composed, on the one hand, of an outstanding balance of DEM 22 978 000 which was part of the equity capital of the Lintra holding company, most of which (DEM 18 638 000) was made

up of group fees paid by the subsidiaries to the holding company and, on the other, of an amount of DEM 12 000 000 intended to cover expenses incurred by the Lintra holding company in order to restructure the Lintra subsidiaries which could become profitable after 1997.

23 On 1 March 2001, J. Riedemann was appointed receiver of the company ZEMAG, which had been put into liquidation.

24 By Commission Decision 2001/673/EC of 28 mars 2001 on State aid implemented by Germany for EFBE Verwaltungs GmbH & Co. Management KG (now Lintra Beteiligungsholding GmbH, with the companies Zeitzer Maschinen, Anlagen Geräte GmbH, LandTechnik Schlüter GmbH, ILKA MAFA Kältetechnik GmbH, SKL Motoren- und Systembautechnik GmbH, SKL Spezialapparatebau GmbH, Magdeburger Eisengießerei GmbH, Saxonia Edelmetalle GmbH and Gothaer Fahrzeugwerk GmbH) (OJ 2001 L 236, p. 3) ('the contested decision'), the Commission found that aid amounting to DEM 623 224 000 was granted in conformity with the decision of 13 March 1996 (Article 1 of the contested decision). However, in Article 2 of the contested decision, the Commission found that aid amounting to DEM 34 978 000, which it had authorised for the restructuring of the Lintra subsidiaries, had been misused within the meaning of Article 88(2) EC. The Commission therefore requested the Federal Republic of Germany to take all necessary measures to recover the amount of DEM 34 978 000 from the Lintra holding company and the Lintra subsidiaries as follows. First, the partial amount of DEM 12 000 000, which was granted in the form of liquidity loans to certain Lintra subsidiaries and considered as not being covered by the decision of 13 March 1996, was to be recovered from those subsidiaries, including a share of DEM 4 077 000 from ZEMAG. Second, the remaining aid in the amount of DEM 22 978 000 was to be recovered from the Lintra holding company, which was liable for the full amount as joint and several debtor, and from all of the Lintra subsidiaries, according to a given apportionment formula. Under that apportionment formula, Article 3 of the

contested decision requires the Federal Republic of Germany to recover an amount of DEM 3 195 559 from Saxonia Edelmetalle and an amount of DEM 2 419 271 from ZEMAG. Thus the Federal Republic of Germany was required to recover from the latter undertaking a total amount of DEM 6 496 271. The aid to be recovered was to be supplemented by interest as from the date from which the misused aid was made available to the beneficiaries until it was actually recovered.

Procedure and forms of order sought

25 By applications lodged at the Registry of the Court of First Instance on 23 May 2001 and 12 June 2001, registered as T-111/01 and T-133/01 respectively, the applicants brought the present actions.

26 By separate document, lodged at the Registry of the Court of First Instance on 14 June 2001, the applicant in Case T-111/01 also applied for a stay of execution of the contested decision.

27 By order of 2 August 2001 in Case T-111/01 R *Saxonia Edelmetalle* v *Commission* [2001] ECR II-2335, the President of the Court of First Instance dismissed the application for interim measures.

28 The written procedure was closed on 10 January 2002 in Case T-111/01 and on 11 January 2002 in Case T-133/01.

29 On hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition), by way of measures of organisation of procedure, requested the parties to reply to certain questions and to produce certain documents.

30 By order of 17 December 2003 of the President of the First Chamber, Extended Composition, of the Court of First Instance, Cases T-111/01 and T-133/01 were joined for the purposes of the oral procedure and judgment, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

31 Following the decision of the Court of First Instance to open the oral procedure, the arguments of the parties were heard as were their replies to the questions put by the Court of First Instance at the hearing on 29 June 2004.

32 The applicant in Case T-111/01 claims that the Court of First Instance should:

— annul the contested decision;

— order the Commission to pay the costs.

33 The applicant in Case T-133/01 claims that the Court of First Instance should:

— principally, annul the contested decision in so far as it relates to it;

— in the alternative, annul the contested decision in its entirety;

— order the Commission to pay the costs.

34 The Commission contends that the Court of First Instance should in Cases T-111/01 and T-133/01:

— dismiss the actions;

— order the applicants to pay the costs.

Law

35 In support of their forms of order seeking annulment, the applicants each put forward five pleas, including four common pleas, which the Court of First Instance considers appropriate to examine in the following order: first, the common plea relating to violation of the applicants' rights in the procedure provided for by Article 88(2) EC; second, the plea relating to factual errors in the contested decision (Case T-133/01); third, the plea relating to the alleged error in the finding of misuse of aid authorised by the decision of 13 March 1996 (Case T-111/01); fourth, the common plea relating to the error committed by the Commission in the determination of the beneficiary of the disputed aid; fifth, the common plea relating to the arbitrary nature of the manner in which the recovery of the partial amount of

DEM 22 978 000 was apportioned amongst the subsidiaries; lastly and sixthly, the common plea relating to the alleged error of assessment of the imputability of the obligation to repay the disputed aid owing to the termination of the respective partnership shares of Saxonia Edelmetalle and ZEMAG.

The common plea relating to violation of the applicants' rights in the procedure provided for in Article 88(2) EC

Arguments of the parties

— In Case T-111/01

36 The applicant in Case T-111/01 states that the considerations behind the decision to open the procedure provided for in Article 88(2) EC did not concern it or were not directed to it. Moreover, recital 36 of the contested decision confirms that the restructuring plan pertaining to it was implemented successfully. The fact that in that context the German authorities did not provide the information and documents requested by the Commission cannot operate to the detriment of the applicant. First of all, the applicant states that the Commission is required by Regulation No 659/1999 to carry out its own checks. Second, the applicant observes that the Commission is seeking to recover previously approved aid. That approval gave rise to a legitimate expectation on the part of the applicant that the aid was lawful. It adds that it was not informed of the risk of having to repay the disputed aid because it was not familiar with the content of the approval decision and had not been invited to participate in the investigation which preceded the opening of the

procedure under Article 88(2) EC. The applicant adds that the Lintra holding company left it completely in the dark as to which amounts were to be considered as aid. Lastly, the applicant states that had it known of the risk of having to repay the aid, it would have carried out its own checks and would have signed an agreement with the Lintra holding company with a view to precluding that risk.

37 The Commission observes first that, in the administrative procedure concerning State aid, only the Member States enjoy all of the rights conferred on parties. With respect to potential or actual aid beneficiaries, the Commission states that it is obliged merely to put the parties concerned on notice to submit their observations. It states that it is not in any way required to have the parties concerned check the information provided by the Member States. In the present case, the Commission states that it based its decision on the information provided by the Federal Republic of Germany, and that the applicant did not deem it necessary to intervene in the administrative procedure, even though the parties concerned were invited to submit their observations when the procedure was opened. It follows, in the Commission's view, that the applicant cannot now criticise it for having adopted the contested decision on the basis of insufficient information. The Commission states that it acted in accordance with the Court of Justice's case-law and the relevant provisions of Regulation No 659/1999.

38 Next, the Commission challenges the applicant's statement that it was not informed of the decision of 13 March 1996. According to the Commission, since the applicant does not deny that it received considerable financial assistance from the State, it is inconceivable that it did not notice that it received that aid. In the Commission's view, by virtue of the duty of diligence incumbent on any economic operator, the applicant should have ascertained that the disputed aid had been the subject of the necessary authorisation from the Commission. In those circumstances, the Commission submits that the applicant cannot rely on its own ignorance in order to avoid repaying the aid.

39 Lastly, in the Commission's view, the applicant is wrong to consider that it is required to repay aid only when it has committed a 'fault'. Nothing prevents the beneficiary of the aid from having to suffer the consequences of the fact that information provided by the State concerned to the Commission may not have been sufficient.

— In Case T-133/01

40 The applicant in Case T-133/01 maintains that, before adopting the contested decision, the Commission should have determined and assessed the facts by conducting a more thorough investigation. The applicant considers that the Commission was required to question it, particularly after the Commission had admitted that the German authorities were not able to provide all of the relevant information. In the applicant's view, only the Federal Republic of Germany was put on notice and interested third parties were not, contrary to what is provided for in Article 88(2) EC.

41 In response to the Commission's statement that it invited parties concerned to submit their observations when the administrative procedure was opened, the applicant, while acknowledging that its receiver did not participate in that procedure, states that he was not able to do so at the time, since the liquidation procedure for ZEMAG had not yet commenced. In any event, contrary to what the Commission maintains, the applicant considers that it cannot refrain from pointing to an inaccuracy in the contested decision on the ground that it did not participate in the administrative procedure. In its view, such a conclusion would render meaningless the rights of action of third parties.

42 The Commission states that, in the present case, one cannot speak of a 'hasty procedure', since the procedure provided for in Article 88(2) EC was commenced on 22 June 1999 and was closed only 21 months later, by the adoption of the contested decision on 28 March 2001. Accordingly, ZEMAG had sufficient time to participate in that procedure. The Commission also reiterates the position expressed in paragraph 37 above.

43 With respect to the applicant's argument that its receiver was unable to submit his observations because insolvency proceedings had not yet been opened, the Commission replies that the applicant thereby disregards the fact that the receiver does not act in his own name and that the applicant could have submitted its observations when the formal investigation procedure was opened.

44 Lastly, the Commission states that the applicant cannot rely on facts or circumstances of which it had knowledge at the time of the formal investigation procedure but which it did not communicate to the Commission after having been invited to submit its observations. Contrary to what the applicant alleges, the Commission considers that such an approach does not compromise the rights of action of interested parties, since they always have the possibility of relying on a plea not put forward during the assessment procedure or an error of assessment on the part of the Commission.

Findings of the Court

45 By this plea, the applicants essentially criticise the Commission for not having put them on notice individually to submit their observations before adopting the contested decision.

46 That plea cannot be accepted.

47 First, it should be borne in mind that the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in light of its Community obligations, for granting the aid (Case 234/84 *Belgium* v *Commission* (*Meura*) [1986] ECR 2263, paragraph 29, and Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 42), and not in respect of the beneficiary or beneficiaries of the aid (Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 83, and *Fleuren Compost* v *Commission*, paragraph 44).

48 Moreover, according to settled case-law, for the purposes of Article 88(2) EC 'parties concerned' refers to an undetermined group of addressees. It follows that Article 88 (2) EC does not require that specific parties be put on notice individually. Its sole purpose is to require the Commission to take steps to ensure that all parties potentially concerned are informed and given the opportunity to put forward their arguments. In that context, the publication of a notice in the *Official Journal of the European Communities* is an appropriate means of informing all the parties concerned that a procedure has been initiated (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 17, and Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 59). That case-law confers on the parties concerned essentially the role of information sources for the Commission in the administrative procedure instituted under Article 88(2) EC (Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 256, and *British Airways and Others* v *Commission*, paragraph 59).

49 In the present case, although it is common ground that the applicants did not participate in the formal investigation procedure, it is clear from the wording of the

notice published in the *Official Journal of the European Communities* on 21 August 1999 (OJ 1999 C 238, p. 4) that the parties concerned were invited to submit their observations within one month from the date of publication of the letter of 22 June 1999 from the Commission by which it notified the Federal Republic of Germany of its decision to open the procedure provided for in Article 88(2) EC. By that notice, which contained a summary of the aforementioned letter and the text thereof, the parties concerned were therefore informed of the Commission's decision to open the formal investigation procedure in the context of aid having been paid for the restructuring of eight undertakings, including Saxonia Edelmetalle and ZEMAG.

50 Of course, the mere fact of being informed of the opening of a formal procedure does not suffice to enable a party to effectively make known its observations. The Court notes that Article 6(1) of Regulation No 659/1999, which is also applicable, by virtue of Article 16 of that regulation, to misused aid, provides that '[t]he decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the ... measure and shall set out the doubts as to its compatibility with the common market'. It follows that the decision to open the formal investigation procedure, despite the necessarily temporary nature of the assessment it entails, must be sufficiently precise to enable the parties concerned to participate in an effective manner in the formal investigation procedure during which they will have the opportunity to put forward their arguments. To that end, it suffices that the parties concerned may familiarise themselves with the reasoning relied on by the Commission.

51 The Court notes, however, that the applicants have not pleaded that the decision to open the procedure did not contain sufficient reasons to enable them to exercise effectively their right to submit observations.

52 Even if the applicants had relied on such an argument, the Court notes that, by the notice referred to in paragraph 49 above, the Commission set out in a sufficiently

clear manner its doubts as to the compliance with the conditions laid down in the decision of 13 March 1996 and thus enabled the applicants to effectively exercise their right to submit observations. The Commission found, first, that the key elements of the restructuring plans, as they had been approved, had not been implemented. It found, second, that the decision of 13 March 1996 no longer covered the aid in question and gave several specific examples, including aid intended to cover the undertakings' losses and to finance investment after the failure of the restructuring plans. The Commission also stated that it was possible that supplementary aid had been granted to the undertakings in the Lintra group in an amount totalling over DEM 82 000 000. It also expressed doubts as to the compatibility of that aid with the common market, particularly because some of the aid may have been used for purposes other than restructuring of the Lintra subsidiaries and because the restructuring plans had not been fully implemented. In addition, the Commission specifically drew the attention of the German authorities and potential parties concerned to the fact that aid found to have been granted illegally would have to be recovered from the beneficiary.

53 Since the Commission did, through the notice published in the *Official Journal of the European Communities*, invite the beneficiaries of aid initially authorised by a previous decision to submit their observations on possible violation of the decision in question due to use of that aid in a manner contrary to that decision and those beneficiaries did not take advantage of that opportunity, the Commission did not violate any of their rights (*Falck and Acciaierie di Bolzano* v *Commission*, paragraph 84, and *Fleuren Compost* v *Commission*, paragraph 47). Moreover, the Commission cannot be held liable for the alleged failure by the Member State concerned or, as claimed by the applicant in Case T-111/01, by the Lintra holding company to inform it of the initiation of the formal investigation procedure.

54 This finding is not affected by the allegation of the applicant in Case T-133/01 that the liquidation procedure pertaining to it had not yet occurred at the time the procedure provided for in Article 88(2) EC was opened. As rightly pointed out by the Commission, it is clear from the application initiating proceedings that the receiver

acts only in that capacity and not on his own behalf. Moreover, as discussed in paragraph 49 above, at the time of publication of the decision to open the formal investigation procedure, the company ZEMAG, explicitly referred to in that decision, had sufficient time at its disposal to respond to the invitation to submit observations.

55 Likewise, the Court cannot accept the arguments of the applicant in Case T-111/01 that it was not concerned by the decision to open the formal procedure and was unaware of the risk of having to repay the aid. In the first place, since the applicant is referred to explicitly several times in the decision and the Commission expressed at the very least doubts whether all of the aid that it had authorised for the restructuring of the Lintra subsidiaries in the decision of 13 March 1996 had been used correctly, the applicant in Case T-111/01 was necessarily concerned by that decision. The Commission cannot be criticised for the fact that the applicant chose not to submit observations following the invitation made by the notice from the Commission referred to in paragraph 49 above.

56 In the second place, as stated in paragraph 52 above, the decision to open the formal investigation procedure stated in a sufficiently clear manner that the aid to which it referred would, if appropriate, be recovered from the beneficiary thereof, in accordance with Article 14 of Regulation No 659/1999. Accordingly, once the decision to open the formal procedure had been published, the applicant in Case T-111/01 could not be unaware of the risk of having to repay the aid in question. Consequently, it also could not rely on an alleged legitimate expectation that the aid in question was compatible with the common market, an allegation which is moreover contradicted by the applicant itself when it alleges that it was not informed of the decision of 13 March 1996.

57 Second, the applicants' argument that, following the failure by the Federal Republic of Germany to respond to the information injunction decision of 1 August 2000 to

provide certain information, they should have been questioned directly by the Commission before the Commission adopted the contested decision must likewise be rejected.

58 Even if the Federal Republic of Germany did actually fail to comply with the aforementioned information injunction decision, it follows from Article 13(1) of Regulation No 659/1999 that, in such a situation, the Commission is empowered to end the formal investigation procedure and to adopt a decision declaring that the aid is or is not compatible with the common market on the basis of the information available. That decision may, subject to the conditions provided for in Article 14 of Regulation No 659/1999, order the recovery of previously-paid aid from its beneficiary. Under Article 16 of Regulation No 659/1999, Articles 13 and 14 apply mutatis mutandis in the event of misuse of aid. Consequently, it follows from those provisions that, contrary to what the applicants allege, the Commission is not under a duty to consult the parties concerned in cases where a Member State fails to comply with the Commission's injunction to provide information.

59 The Court also notes that, in the present case, the applicants do not state that, acting pursuant to Article 20(3) of Regulation No 659/1999, they asked for a copy of the decision ordering the Federal Republic of Germany to provide information, or even that, despite the request from the Commission to the Federal Republic of Germany in the information injunction decision of 1 August 2000 to forward that invitation to all potential recipients of the aid in question, they provided the Commission with information which the latter did not take into consideration before adopting the contested decision.

60 Lastly, the applicant in Case T-111/01 criticises the Commission for not having carried out on-site checks, as required by Regulation No 659/1999.

61 That complaint, which does not concern the rights which parties concerned have in the procedure provided for by Article 88(2) EC, but rather the scope of the investigations undertaken by the Commission in its assessment of State aid, will be examined in paragraphs 98 to 100 below, as part of the plea alleging error in finding that there had been misuse of the aid authorised by the decision of 13 March 1996.

62 In those circumstances, it follows that the common plea alleging violation of the applicants' rights in the procedure provided for by Article 88(2) EC cannot be accepted.

The plea relating to factual errors in the contested decision (Case T-133/01)

Arguments of the parties

63 The applicant in Case T-133/01 criticises the Commission for having adopted the contested decision on the basis of four erroneous pieces of information. First, contrary to what is stated in recital 39 of the contested decision, the investments made by the company ZEMAG between 1994 and 1997 were not lower than what was initially planned. Second, the applicant received a lower amount (DEM 44 977 000) than that relied on by the Commission in recital 40 of the contested decision (DEM 65 617 000). Third, as to the aid referred to in the recovery order, it did not receive a liquidity loan but rather liquidity aid. Lastly, in the reply, the applicant challenges the Commission's statements relating, first, to the failure to adapt the production programme of the Lintra subsidiaries to market conditions and, second, to the qualifications and professional skills of the managers of the Lintra holding company.

64 The Commission considers that the first three allegations of error of fact cannot be accepted. In the Commission's view, the findings in the contested decision are based on the information provided by the German authorities in response to the information injunction decision of 1 August 2000. According to the Commission, since the applicant did not participate in the administrative procedure, it waived its right to invoke any factual inaccuracies. The Commission also states that, by virtue of the case-law of the Court of Justice and the provisions of Regulation No 659/1999, the Commission is empowered to end the procedure and to take a decision on the basis of the particulars in its possession when a Member State, despite the Commission's injunction, fails to provide the information requested. Even if the Commission had committed the errors alleged by the applicant, that would not, in its view, affect the accuracy of the contested decision, which states that the aid was used essentially in accordance with the approved restructuring plan. As to the disputed aid, the recovery of that aid was ordered not because of the unlawful use thereof by the subsidiaries, but because, first, it was kept by the Lintra holding company and, second, because liquidity loans were granted after the manifest failure of the first restructuring.

65 As to the fourth error of fact relied on by the applicant, the Commission maintains that, since it was put forward for the first time at the stage of the reply and does not support any legal argument such as to establish the unlawfulness of the contested decision, it is inadmissible. In the Commission's view, the content of the allegations is in any event unfounded, because the Commission ascertained the veracity of the information in question with the German authorities.

Findings of the Court

66 The Commission states essentially that the applicant in Case T-133/01 may not put forward the factual arguments referred to in paragraph 63 above because it did not

rely on them in the investigation procedure relating to the disputed aid. It considers, moreover, that the fourth alleged error of fact is inadmissible because it was put forward late, that is, only at the stage of the reply.

67 According to settled case-law, in the context of an action for annulment under Article 230 EC the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. In particular, the assessments made by the Commission must be examined solely on the basis of the information available to the Commission at the time when those assessments were made (*British Airways and Others* v *Commission*, paragraph 81; Case T-110/97 *Kneissl Dachstein* v *Commission* [1999] ECR II-2881, paragraph 47; and Case T-123/97 *Salomon* v *Commission* [1999] ECR II-2925, paragraph 48).

68 It follows that an applicant who has participated in the investigation procedure provided for by Article 88(2) EC cannot rely on factual arguments of which the Commission was unaware and of which it did not inform the Commission in the course of the investigation procedure. By contrast, nothing prevents the party concerned from formulating against the final decision a legal plea which was not raised at the stage of the administrative procedure (see, to that effect, *Kneissl Dachstein* v *Commission*, paragraph 102, and *Salomon* v *Commission*, paragraph 55).

69 That case-law does not necessarily apply by extension to all cases where an undertaking has not participated in the investigation procedure provided for by Article 88(2) EC. Although that case-law may be held to be inapplicable to certain exceptional cases, the Court finds that it applies to the present case.

70 It should be borne in mind that the applicant did not exercise its right to participate in the investigation procedure, even though it is common ground that it was referred

to specifically several times in the decision to open the investigation procedure, particularly in the title and in points 2.1 and 2.4 of that decision, and that doubts were expressed in that decision as to the correct use of all of the aid intended for the restructuring of the Lintra subsidiaries having regard to the decision of 13 March 1996. It is equally common ground that the facts relied on by the Commission in recitals 39 and 40 of the contested decision are based on information provided by the German authorities in the investigation procedure. In those circumstances, the applicant's arguments relating to the amount of investments and the amount of aid received are factual arguments of which the Commission was unaware at the time it adopted the contested decision and which therefore cannot be raised for the first time before the Court of First Instance as a means of contesting that decision.

71 The same holds true for the alleged errors of fact committed by the Commission concerning the failure to adapt the production programme of the Lintra group subsidiaries to the conditions of the market and to the qualifications and professional skills of the managers of the Lintra holding company, referred to in recital 16 of the contested decision, without its being necessary to examine the objection raised by the Commission as to the tardiness of those arguments elaborated in the reply. In any event, the Court finds that, even if there were factual errors, those statements, which were of a general nature, are irrelevant to the choice made by the Commission in the contested decision.

72 Lastly, as to the legal — and not purely factual — issue of whether the ZEMAG company obtained liquidity aid instead of liquidity loans following the failure of the first restructuring plan, as indicated in the contested decision, the applicant, when questioned specifically by the Court on this point, merely stated that that distinction arose merely from a difference in the terms used by the Lintra holding company, but was unable to clarify what consequences that classification could have on the recovery of the disputed aid. It follows that that argument is irrelevant.

73 Consequently, the plea alleging errors of fact in the contested decision cannot be accepted.

The plea alleging errors in the finding of misuse of aid authorised by the Commission's decision of 13 March 1996 (Case T-111/01)

Arguments of the parties

74 First, the applicant in Case T-111/01 states that the aid paid to it until 1996 was used in accordance with the decision of 13 March 1996, as is apparent from the documents forwarded to the German authorities by the BvS. Although the contested decision does not give a breakdown of the amount of DEM 3 195 559 which the applicant has been ordered to repay as a share of the partial amount of DEM 22 978 000, which in itself, in the applicant's view, constitutes an illegality, the breakdown of the payments made shows that they were in accordance with the restructuring plan and had been authorised by the decision of 13 March 1996.

75 Thus, contrary to what the Commission states in the contested decision, the applicant maintains that the partial amount of DEM 22 978 000 was not used to pay for certain management services provided by the Lintra holding company, but solely to finance restructuring measures. The applicant states in that respect that the German Government, in its correspondence to the Commission dated 2 October 2000, stated that the services provided by the Lintra holding company to the subsidiaries were intended to ensure the restructuring of those subsidiaries, without which the restructuring would not have been possible. Moreover, even if the aid had been used to pay for services provided by the Lintra holding company, which it does

not agree is the case, the applicant submits that that would not constitute misuse. The applicant points out that the Commission was aware of the group structure chosen by the German authorities, in particular the fact that Lintra was a mere holding company, the services of which were billed to its subsidiaries using an internal apportionment formula. Since the Commission signalled its agreement for the use of the aid to pay for services provided by the Lintra holding company, that aid should be considered as covered by the decision of 13 March 1996.

76 Second, the applicant complains that the contested decision was based solely on assumptions as to the alleged misuse of the aid, assumptions which themselves are based on vague statements obtained from the German authorities. Referring to recital 42 of the contested decision, the applicant states that the Commission relies on the Federal Republic of Germany's statement that it could not exclude the possibility that the aid was used to pay for services provided by the Lintra holding company. In the applicant's view, it was necessary to demonstrate that that aid was actually used to pay for those services.

77 The Commission states, first, that the use of aid by the Lintra holding company was not provided for in the decision of 13 March 1996. Nor could this have been the case, since that company was not an undertaking in difficulty. The same holds true for the use of the aid by the Lintra subsidiaries to pay for services provided by the Lintra holding company. The Commission points out that, first, since the amount of DEM 22 978 000 remained in the accounts of the Lintra holding company and the German authorities were unable to provide specific information as to how it was used and, second, since the subsidiaries were responsible for the correct use of that amount, the entire sum should have been recovered from the Lintra holding company and its subsidiaries. The fact that the Commission was aware of the nature of the Lintra holding company does not mean that services provided by that company could be paid for using State aid which had been authorised to restructure the subsidiaries.

78 Second, the Commission submits that the applicant contradicted itself several times in relation to the management services provided by the Lintra holding company. The applicant has stated that the services provided by the Lintra holding company to its subsidiaries were necessary for their restructuring and that they should therefore be considered as aid covered by the decision of 13 March 1996. However, although the applicant received those services using State subsidies, that is, free of charge, it none the less states that it paid for those services using the aid granted. In the Commission's view, it follows that the applicant cannot seriously maintain that it obtained for consideration the aid which it is now being asked to repay. The Commission submits that, in any event, the aid must be recovered because it cannot be established with certainty that it was used in accordance with the decision of 13 March 1996. The reason for the recovery is therefore not the abstract group structure, but rather the fact that, pursuant to the decision of 13 March 1996, the Lintra subsidiaries were the beneficiaries of the aid.

79 Lastly, regarding the assumptions alleged by the applicant, the Commission replies that it did not rely on such suppositions. The contested decision merely had the effect of finding that the German authorities could not exclude the possibility that the subsidiaries had actually used the aid to pay for services provided by the Lintra holding company. The Commission adds that, in the event that the aid was spent by the Lintra holding company, it must be recovered from the subsidiaries which received management services from the holding company. If the applicant had evidence that it had not received such services free of charge, it should have provided that evidence to the Commission during the administrative procedure, in response to the Commission's invitation to submit observations.

Findings of the Court

80 The applicant in Case T-111/01 essentially denies that the partial amount of aid of DEM 22 978 000, on the basis of which the amount of DEM 3 195 559 the

repayment of which is claimed from it by the contested decision was calculated, was misused. In its view, that aid was used for its restructuring in accordance with the decision of 13 March 1996.

81 The Court finds that this plea must be examined in two stages. First, it is necessary to ascertain the precise scope of the decision of 13 March 1996. Next, in the light of that examination, the Court will ascertain whether the Commission, in the contested decision, could make a finding of misuse within the meaning of Article 88(2) EC of the amount of the aid on the basis of which the amount to be repaid by the applicant in Case T-111/01 was calculated.

— The scope of the decision of 13 March 1996

82 In the decision of 13 March 1996, the Commission first examined the economic and social aspects of the individual situations of the eight subsidiaries managed by the Lintra holding company, including the applicant in Case T-111/01, and their presumed viability having regard to the restructuring planned by the German authorities. It also stated that, following a tendering procedure launched with a view to the restructuring and privatisation of the undertakings, the acquisition offer made by Emans & Partners GbR for all of the undertakings was the one accepted by the German authorities, since that offer was considered to be the best one, particularly in terms of maintenance of employment, the investment plan, the personal commitment of the purchaser, the financial obligation to the Treuhandanstalt and the prospects for each of the undertakings. Consequently, the Treuhandanstalt (subsequently the BvS) transferred to the purchasers 100% of the shares in the undertakings held by the Lintra holding company. The Commission then gave a breakdown of the financial measures planned by the German authorities for the restructuring and privatisation in due course of the undertakings in the Lintra group, including aid in the amount of DEM 970 200 000, subsequently reduced to

DEM 824 200 000. In its analysis of the compatibility of the aid, the Commission stated that 'despite the tendering procedure, it was not possible to find an investor willing to take on the economic risk of restructuring the undertakings in question without State aid' and that 'because the undertakings were sold to the highest bidder, the State aid provided for in the privatisation contract was limited to what was strictly necessary, in order to give the undertakings the opportunity to re-establish their long-term competitiveness'. It stated that 'the undertakings as a whole are involved in growing markets where there is no structural overcapacity' and that 'the financial aid was limited in time'. The Commission inferred therefrom that 'the aid complies with the conditions imposed for restructuring (competitivity, proportionality, reduction of capacity)'.

83 The Commission concluded at the end of its assessment, first, that 'if one considers together all of the restructuring aid, [its] view is that that aid is compatible with the common market within the meaning of Article 92(3)(c) of the Treaty ... because it is limited to what is strictly necessary and does not confer any advantage on the undertakings in relation to competitors'. Second, the Commission also found that 'because the undertakings are all established in a region coming within the exception provided for by Article 92(3)(a) of the Treaty ..., in the light of the number and the size of the undertakings aided, because their range of products is varied and it is therefore not possible to obtain a synergy effect, and given the relatively low amount of the aid, the aid in question is declared compatible with the common market within the meaning of Article 92(3)(a) of the Treaty'.

84 A reading of the decision of 13 March 1996 shows that the beneficiaries of the authorised aid were the eight Lintra subsidiaries, including the applicant in Case T-111/01, whose economic and social situation and viability were described specifically in pages 1 to 5 of the decision, although not that of the Lintra holding company, whose functions consisted of ensuring the management of the group with a view to enabling the restructuring and privatisation of the subsidiaries as soon as possible. Although the financial measures envisaged by the German authorities were intended for the recapitalisation of the companies and the financing of the restructuring measures, particularly through the participation of the BvS in the losses, investment aid and the covering of the liquidity needs of the companies, the

decision of 13 March 1996 did not authorise the aid to be used by the Lintra holding company in order to finance its own activities. Moreover, the fact that that aid may have been paid by the German authorities to the Lintra holding company as part of the management activities of the Lintra group does not prevent the subsidiaries of that group from being considered as deriving a benefit therefrom (see, to that effect, Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 34) and being, in reality, the beneficiaries of the aid authorised by the decision of 13 March 1996. It follows that, in its decision of 13 March 1996, the Commission authorised only the aid intended for the restructuring of the Lintra subsidiaries, including the applicant in Case T-111/01.

— The finding of misuse of the amount of aid which the applicant in Case T-111/01 is being asked to repay

85 The Court notes, as a preliminary point, that under Article 88(2) EC, if the Commission finds that aid is being misused, it is to decide that the State concerned must abolish or alter it within the period of time determined by it.

86 A reading of Article 88(2) EC together with Article 1(g) and Article 16 of Regulation No 659/1999 shows that it is in principle for the Commission to establish that all or part of the aid previously authorised by it by an earlier decision has been misused by the beneficiary. If it fails to do so, that aid is to be considered as being covered by its previous approval decision. Nevertheless, the reference in Article 16 of Regulation No 659/1999 to Article 13 authorises the Commission, in cases where a Member State fails to comply with an order to provide information, to adopt a decision closing the formal investigation procedure on the basis of the information available. Thus, when a Member State fails to provide sufficiently clear and precise information on the use of the aid about which the Commission, on the basis of

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

87 Moreover, it should be borne in mind that, in the present case, the Commission stated in recital 42 of the contested decision that:

'In so far as aid granted to the Lintra group was not used for the purposes envisaged under the approved restructuring plan, it falls outside the scope of the decision of 13 March 1996. It follows from that decision that all aid should have been used directly for the purpose of restructuring the Lintra subsidiaries. Neither the notified restructuring plan nor the decision explicitly provides for any use of aid in [the] Lintra [holding company], which, moreover, would not even have been eligible for restructuring aid as it was not a company in difficulty. Nor was any use of aid by the subsidiaries for the purpose of purchasing services from [the] Lintra [holding company] expressly provided for in the restructuring plan or the decision of 13 March 1996. Germany has confirmed that it cannot rule out that aid may in fact have been used by the subsidiaries to pay for services provided by that company. In addition, in reply to the information request Germany provided only a very rough set of figures on the overall expenses of [the] Lintra [holding company] (personnel costs, legal costs, office rents, etc.) without demonstrating exactly what services the company provided at what time to which subsidiaries in return for payment. As Germany has been unable to provide enough evidence in this respect, the Commission must consider that the amount of DEM 34 978 000 which remained within [the] Lintra [holding company] is not covered by its decision of 13 March 1996.'

88 From that it concluded, in recital 43 of the contested decision, that:

'The part of the aid granted that remained in [the] Lintra [holding company], namely DEM 34 978 000, has not been used in accordance with the provisions of the approved restructuring plan. It was therefore used by the recipient in contravention of the decision of 13 March 1996 and constitutes misuse of aid within the meaning of Article 88(2) of the EC Treaty, read in conjunction with Article 1(g) of Regulation (EC) No 659/1999. ...'

89 Regarding the partial amount of DEM 22 978 000, the Commission found in recital 44 of the contested decision that 'Germany was unable, in its answer to the request for information, to give a detailed account' of the use thereof. It also stated in recital 45 of the contested decision that 'Germany has not proved that the amount was passed on to the subsidiaries', and went on to state that 'on the basis of the information provided by Germany, [the] Lintra [holding company] has undoubtedly received the whole aid amount'. Consequently, the Commission asked that the entire sum be recovered from the Lintra holding company and its subsidiaries, in the manner described in recital 46 of the contested decision. According to that recital, the Federal Republic of Germany is required to demand reimbursement of the amount of DEM 3 195 559 from the applicant in Case T-111/01.

90 In the light of the aforementioned recitals of the contested decision and on the basis of the evidence in the file, it is common ground that the partial aid amount of DEM 22 978 000 remained in the accounts of the Lintra holding company. It is equally common ground that, as part of its management activities within the Lintra group, the Lintra holding company provided various services for the Lintra subsidiaries. The point in dispute in the present plea, however, is whether the Commission was able to find that the amount of DEM 22 978 000 had been misused, despite the fact

that it was not able to determine the actual use of that amount, given the lack of detailed evidence provided by the German authorities following the information injunction decision of 1 August 2000.

91 It should be borne in mind that the assessment which the Commission must conduct involves the consideration and assessment of economically complex facts and circumstances. Since the Community Court may not substitute its assessment of economically complex facts and circumstances for that of the Commission, the Court's review must be limited to verifying compliance with procedural rules and the obligation to state reasons, as well as the material accuracy of the facts, and ensuring that there has been no manifest error of assessment or misuse of powers (Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, paragraph 25; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 25; Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 104; Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraph 140; *Skibsværftsforeningen and Others* v *Commission*, paragraph 170; and Case T-243/94 *British Steel* v *Commission* [1997] ECR II-1887, paragraph 113).

92 In the present case, the Commission's finding that the amount of DEM 22 978 000 was misused is not vitiated by a manifest error of assessment.

93 The Commission cannot be criticised for having adopted the contested decision in spite of the fact that it was not in a position to determine the actual use of the amount in question. In the light of paragraph 86 above, although in principle it is for the Commission to establish that aid previously authorised by it was misused, it nevertheless remains for the Member State to provide all the information requested

by the Commission following an information injunction, failing which the Commission is empowered to adopt its decision closing the formal investigation procedure on the basis of the information available.

94 It is, moreover, apparent from the evidence in the file that the German authorities, despite being instructed by the Commission to provide 'all information for determining how the expenses of the Lintra holding company were apportioned amongst the subsidiaries', 'all information relating to other possible allocations of the amount [DEM 22 978 000] remaining in the holding company to the subsidiaries, that is, specific information concerning the turnover and the total aid obtained by the subsidiaries during the first restructuring phase (1994-1996)', as well as 'all information necessary in order to determine to what extent the group fees paid by the subsidiaries were financed by aid', did not provide the necessary information. In their letter of 2 October 2000 in response to the information injunction decision of 1 August 2000, the German authorities merely gave overall figures as to the allocation of the amount of DEM 22 978 000, which had remained in the accounts of the Lintra holding company, to various services provided by that company, without giving specific information on the exact apportionment of that amount amongst the subsidiaries.

95 In those circumstances, the fact that the amount of DEM 22 978 000 was in the accounts of the Lintra holding company could be interpreted by the Commission in only one of two ways: either the Lintra holding company, to which the BvS was paying the restructuring aid for the subsidiaries, had not passed on the amount of DEM 22 978 000 to the subsidiaries, in which case there was a violation of the decision of 13 March 1996 authorising the payment of restructuring aid in favour of the Lintra subsidiaries; or the subsidiaries had paid the Lintra holding company for services which, although they may have been provided for the purpose of restructuring the subsidiaries, had not been the subject of any specific evidence provided by the German authorities as to their nature, purpose and date of payment, which could then lead the Commission to consider, as it stated in recital 45 of the contested decision, that the amount of DEM 22 978 000 had not been passed on to the subsidiaries, which was also in violation of the decision of 13 March 1996.

96 It is true that under Regulation No 659/1999 aid cannot be considered to have been misused unless that practice may be attributed to the beneficiary thereof.

97 A combined reading of recitals 43 and 44 of the contested decision shows that the Commission considered that the beneficiary to which the misuse of the amount of DEM 22 978 000 was to be attributed was the Lintra group as a whole, as initial beneficiary of the aid approved by the decision of 13 March 1996. Moreover, as found in paragraph 84 above, the initial beneficiaries of the aid approved by the decision of 13 March 1996 could only be the Lintra subsidiaries and not the group as a whole. However, since the amount of DEM 22 978 000 remained in the accounts of the Lintra holding company, the Commission, in the light of the information in its possession at the time of adoption of the contested decision, could rightly consider that that aid had not been used in accordance with the decision of 13 March 1996.

98 Lastly, contrary to what the applicant maintains, the Commission was also not required to conduct on-site checks pursuant to Article 22(1) of Regulation No 659/1999 before being able to adopt the contested decision.

99 It should be borne in mind that, under that provision, 'where the Commission has serious doubts as to whether decisions not to raise objections, positive decisions or conditional decisions with regard to individual aid are being complied with, the Member State concerned, after having been given the opportunity to submit its comments, shall allow the Commission to undertake on-site monitoring visits'. Article 22(1) of Regulation No 659/1999 must be read in the light of recital 20, according to which 'on-site monitoring visits are an appropriate and useful instrument, in particular for cases where aid might have been misused'.

100 In the present case, the Court finds that in the response of the German authorities of 2 October 2000 to the information injunction decision of 1 August 2000, the Commission, faced with the two possibilities discussed in paragraph 95 above, could no longer have serious doubts as to non-compliance with the decision of 13 March 1996 as regards the use of the amount of DEM 22 978 000. In those circumstances, it was not under any alleged obligation to carry out an on-site monitoring visit in order to ascertain whether the decision of 13 March 1996 was being complied with.

101 For all of the foregoing reasons, the plea alleging error in the finding that there had been misuse of aid authorised by the Commission's decision of 13 March 1996 cannot be accepted.

The common plea alleging error by the Commission in the determination of the beneficiary of the disputed aid

Arguments of the parties

— In Case T-111/01

102 The applicant in Case T-111/01 states that the aid authorised by the Commission's decision of 13 March 1996 was paid directly by the Federal Republic of Germany to the Lintra holding company. The applicant, like all of the Lintra subsidiaries, therefore received the aid only indirectly. According to the applicant, this is confirmed by the Commission itself. In its information injunction decision of 1 August 2000 addressed to the German authorities, the Commission recognised that, according to the information available, there was no reason to consider that the amount of DEM 34 978 000 had been paid to the subsidiaries. In the applicant's

view, it follows that only the Lintra holding company may be ordered to repay the disputed aid. The applicant invites the Court to consider whether the sole shareholder of Lintra between 1994 and 1997, as well as the BvS and the Federal Republic of Germany itself, should not be required to repay the aid.

103 The applicant also challenges the attribution of joint and several liability to the Lintra holding company and its subsidiaries in the contested decision. Such joint and several liability has no legal basis and is tantamount to allowing 'reverse group liability', under which a subsidiary is liable for the debts of the parent company. The applicant submits that such a concept does not exist either in German law or, to the best of its knowledge, in Community law. Moreover, such joint and several liability was accepted by the Commission only on grounds of convenience relating to the insolvency of the Lintra holding company.

104 The Commission replies that the decision of 13 March 1996 designated the Lintra subsidiaries as being the beneficiaries of the approved aid. It follows, in the Commission's view, that those subsidiaries are jointly responsible for the correct use of the aid. It is therefore not arbitrary on the part of the Commission to order that the misused aid be recovered from them as well if it is not possible to recover from the Lintra holding company. The Commission explains that, in the present case, since the German authorities were not able to provide reliable information on the end-use of the aid granted, joint and several liability of all the subsidiaries seemed to be the only possible solution.

105 According to the Commission, the applicant is not therefore being held liable for the obligations of the parent company by virtue of 'reverse group liability', but rather because of its own obligation which it has in its capacity as beneficiary of aid. In the Commission's view, the only reason why the contested decision provides for joint and several liability is that, because it was aware of the structure of the group and their plans to channel the aid through the Lintra holding company, the Commission could not exclude the possibility that aid might end up partly in the accounts of the

Lintra holding company. The Commission adds that, in any event, it does not matter that the legal situation described in the statement in defence is 'foreign to German law', since Community law does not fall to be assessed in the light of national law. The Commission adds that the applicant's invitation to the Court to consider whether the repayment of the disputed aid by the Federal Republic of Germany or by the BvS was necessary makes no sense and that the issue of whether the sole shareholder of the Lintra holding company should be required to repay the aid is a matter falling within the scope of national law.

— In Case T-133/01

106 The applicant in Case T-133/01 maintains that the Commission misused its powers of assessment in requiring the recovery of aid from it. In the applicant's view, only the Lintra holding company received aid. Moreover, by the decision of 13 March 1996, the Commission gave its agreement for aid intended for restructuring measures in the context of the privatisation of the Lintra holding company. In those circumstances, the applicant challenges the attribution of joint and several liability to the Lintra holding company and its subsidiaries in a contested decision as regards the partial amount of DEM 22 978 000, as well as its partial liability (in the amount of DEM 4 077 000) for the repayment of the aid in the form of liquidity loans. The applicant states that there can be no question of repaying, even partially, the amount of DEM 4 077 000 determined in the contested decision, and in any event it does not know how that amount was determined by the Commission.

107 The Commission states first that, according to the decision of 13 March 1996, the beneficiaries of the aid granted were the eight Lintra subsidiaries. It is in that capacity that they are responsible for the correct use of the aid.

108 It states next that it is for the Commission, when it finds that State aid is incompatible with the common market, to order that it be repaid. The Commission has no margin of discretion in that connection, as laid down in Article 14 of Regulation No 659/1999. The objective of re-establishing the earlier situation, which is the reason for the obligation of the State to cancel aid, is achieved when the aid, including, where applicable, default interest, has been repaid by the beneficiary.

109 Regarding the partial amount of DEM 12 000 000, the Commission submits that that amount did not come within the scope of the decision of 13 March 1996 and should therefore be repaid. The Commission states that the aid authorised by the decision of 13 March 1996 was intended for the group made up of the subsidiaries with a view to joint restructuring and privatisation. The Commission adds that the amount of DEM 12 000 000 was paid in April and June 1997, following the failure of the first restructuring and at a time when the group was virtually in a situation of being re-nationalised, since the BvS had reassumed control of the group. In those circumstances, the Commission submits that it is obvious that the amount of DEM 12 000 000 could not be covered by the decision of 13 March 1996 and that the instructions to repay the aid were fully justified.

110 Lastly, regarding the issue of joint and several liability, the Commission states that that issue was referred to in the contested decision only because the Commission could not exclude the possibility that part of the aid might be in the accounts of the Lintra holding company. The Commission states that, contrary to what the applicant alleges, the applicant is not being held liable for the debts of the Lintra holding company. On the contrary, it is the Lintra holding company which is being held as a joint and several debtor for the debts of the subsidiaries.

Findings of the Court

111 As a preliminary observation, it should be pointed out that, in accordance with Community law, when the Commission finds that aid is incompatible with the

common market, it may require the Member State to recover that aid from the recipient (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 20; Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 65; and Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 73).

112 Removing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful and seeks to re-establish the previous situation (*Germany* v *Commission*, paragraph 74).

113 That purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (see, to that effect, Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 22; Case C-457/00 *Belgium* v *Commission* [2003] ECR I-6931, paragraph 55; and *Germany* v *Commission*, paragraph 75).

114 Consequently, the main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded by the unlawful aid (*Germany* v *Commission*, paragraph 76).

115 It cannot in principle be otherwise as regards the repayment of aid paid by the State which, pursuant to a decision adopted by the Commission, is considered to have been misused pursuant to Article 88(2) EC and Article 1(g) of Regulation No 659/1999. The Court notes in this respect that Article 16 of Regulation No 659/1999

provides inter alia that Article 14 of the same regulation, in so far as it requires recovery from the beneficiary of aid found to be illegal, applies mutatis mutandis in the event of aid being misused. Consequently, misused aid must, in principle, be recovered from the undertaking which has had the actual use thereof, in order to eliminate the distortion of competition caused by the competitive advantage afforded by that aid.

116 It is in the light of those considerations that it is appropriate to consider the lawfulness of the order to recover the disputed aid contained in Article 3 of the contested decision. The Court will assess, first, the lawfulness of the recovery order concerning the partial aid amount of DEM 22 978 000 addressed to both the company Saxonia Edelmetalle, for the amount of DEM 3 195 559, and the company ZEMAG, for the amount of DEM 2 419 271. Second, the Court will examine the repayment order for the amount of DEM 12 000 000 addressed to the company ZEMAG for the amount of DEM 4 077 000.

— The order to recover disputed aid as regards the partial aid amount of DEM 22 978 000 contained in Article 3 of the contested decision (Cases T-111/01 and T-133/01)

117 The Court notes as a preliminary point that, as found in the consideration of the previous plea put forward by the applicant in Case T-111/01, the Commission did not make a manifest error of assessment in finding that the partial aid amount of DEM 22 978 000 had been misused. Moreover, the applicant in Case T-133/01 has not seriously contested the Commission's findings regarding the misuse of that amount in so far as it is concerned.

118 Next, the Court recalls that the Commission found, first, in recital 44 of the contested decision, that:

'Since the aid was originally granted to the Lintra group as a whole and since that group no longer exists, the Commission is not required to examine to what extent the individual companies within the group benefited from the aid. The repayment obligation should accordingly be imposed on all the companies which belonged to the group at the time the aid was granted.'

119 Next, the Commission stated in recital 45 of the contested decision:

'On the basis of the information provided by Germany, [the] Lintra [holding company] undoubtedly received the whole aid amount. As regards the DEM 22 978 000, Germany has not proved that the amount was passed on to the subsidiaries. Under these circumstances the whole amount must be recovered from [the] Lintra [holding company] and the subsidiaries.'

120 The Commission then stated how the amount of DEM 22 978 000 was to be recovered from the Lintra subsidiaries, according to an apportionment formula based on the level of aid that those undertakings had received and which were declared, by the contested decision, as having been used in accordance with the decision of 13 March 1996.

121 In the contested decision, the Commission therefore found that, in the absence of information to the contrary from the German authorities, the amount of DEM 22 978 000 which had remained in the accounts of the Lintra holding company had

not been passed on to the subsidiaries. In its written pleadings, as highlighted in paragraph 64 above, the Commission also acknowledged that the recovery of the amount DEM 22 978 000 from the applicants had been required not because of the unlawful use of that aid by the subsidiaries, but rather because it had been kept by the Lintra holding company.

122 In those circumstances, the Court finds that the Commission could not require the Federal Republic of Germany to recover from the applicants the amounts indicated in the second table in Article 3 of the contested decision since, according to the contested decision itself and the Commission's own written pleadings, those undertakings were not beneficiaries of the amount of DEM 22 978 000, since they had not had actual use of that amount which had been misused.

123 This finding is not affected by the statement in recital 44 of the contested decision to the effect that it was to the Lintra group as a whole that the aid had initially been granted by virtue of the decision of 13 March 1996 and that, consequently, the Commission was not required to ascertain to what extent the different undertakings in the group had been able to benefit from that aid. Suffice it to note that, as stated in paragraph 84 above, although the Lintra group, through the Lintra holding company, received the aid paid by the BvS, the initial beneficiary of all of the aid was not the Lintra group, composed of the subsidiaries and the Lintra holding company, but could only be the subsidiaries for the purpose of their restructuring and their privatisation. Moreover, the Court notes that the Commission, particularly by stating in recital 42 of the contested decision that the Lintra holding company could never have used the aid because it was not a company in difficulty, acknowledged that it was not just the group as such which was to be the initial beneficiary of the aid approved by the decision of 13 March 1996. In those circumstances, the premiss on which the Commission relied in order to find that it was not required to ascertain to what extent the different undertakings in the group had been able to benefit from the amount of DEM 22 978 000 is mistaken.

124 However, in the light of the circumstances of the present case, the Commission was not required to determine in the contested decision to what extent each undertaking had benefited from the amount of DEM 22 978 000, but could merely instruct the German authorities to recover that aid from the beneficiary or beneficiaries thereof, that is, from the undertaking or undertakings which had had actual use thereof. It was thus for the Federal Republic of Germany, pursuant to its Community obligations, to proceed to recover the amount in question. If a Member State encounters unforeseen difficulties in implementing an order for recovery, it can submit those problems for consideration by the Commission. In such a case the Commission and the Member State concerned must, in accordance with the duty of genuine cooperation, as expressed inter alia in Article 10 EC, work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions, in particular the provisions on aid (see inter alia Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 58, and Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 50).

125 By contrast, in the absence of more specific information and given that the amount of aid was in the accounts of the Lintra holding company, the Commission is not entitled to impose automatically the obligation to repay the disputed aid on the applicants on the sole ground that they were designated as the initial beneficiaries of the aid authorised by the decision of 13 March 1996, as it maintained in the pleadings. That approach in effect disregards the rule that it is for the undertaking which had actual use of the misused aid to give back the advantage conferred on it.

126 Consequently, the Commission erred in requiring the repayment of DEM 3 195 559 by the company Saxonia Edelmetalle and the amount of DEM 2 419 271 by the company ZEMAG.

127 It follows that Article 3 of the contested decision must be annulled in so far as it requires the Federal Republic of Germany to recover from the applicant in Case T-111/01 the amount of DEM 3 195 559 and from the applicant in Case T-133/01 the amount of DEM 2 419 271.

— The order to recover the disputed aid as regards the partial amount of DEM 12 000 000 contained in Article 3 of the contested decision (Case T-133/01)

128 According to recital 29 of the contested decision:

'The amount of DEM 12 million was granted after the known failure of the first restructuring operation in the form of liquidity loans to the Lintra subsidiaries in preparation for further restructuring. ... It was used to repay overdue bills and was granted between April and June 1997 to those subsidiaries for which a second restructuring seemed feasible. As this aid was granted by the BvS after the known failure of the first restructuring of the Lintra group and in preparation for the second restructuring, it cannot be regarded as being covered by the decision of 13 March 1996.'

129 According to recital 45 of the contested decision, the amount of DEM 12 000 000 can 'clearly be linked to those subsidiaries to which it was granted after the failure of the first attempt to restructure the Lintra group came to light'. On the basis of the information supplied by the German authorities, the repayment of the amount of DEM 12 000 000 was demanded from the different subsidiaries concerned according to the table contained in the same recital, which is reproduced in Article 3 of the contested decision.

130 Next, the Court notes that the applicant in Case T-133/01 does not deny that the disputed aid was misused, as found in the contested decision. The Court also notes that, according to the letter of 10 March 2000 from the German authorities to the Commission, the amount of DEM 12 000 000 was not covered by the Commission's decision of 13 March 1996. The German authorities did not contradict that position

in the letter of 2 October 2000 in response to the information injunction decision of 1 August 2000. Consequently, at the time of adopting the contested decision, the Commission was entitled to consider that the amount of DEM 12 000 000 was neither covered by the decision of 13 March 1996 nor even legal, because it had not been formally notified to the Commission.

131 The applicant in Case T-133/01 challenges, however, first, the finding that it received part of the amount of DEM 12 000 000 the repayment of which is now claimed by the Commission, and questions the manner in which the amount of DEM 4 077 000 being claimed from it was determined.

132 Regarding the issue of whether the company ZEMAG had actual use of part of the amount of DEM 12 000 000, the Court considers, in the light of the information which the Commission had in its possession at the time of adopting the contested decision, that it certainly did.

133 The Court notes that, in the letter of 10 March 2000 referred to above, the German authorities confirmed that the amount of DEM 12 000 000 had been paid to the subsidiaries in April and June 1997 because a second privatisation was planned for those undertakings. The German authorities presented a 'preliminary distribution of those funds' amongst the subsidiaries concerned, which was the subject of an annex to that letter. The company ZEMAG is referred to three times in the table annexed to the letter of 10 March 2000, each time next to an amount, with the total amounting to DEM 4 077 000.

134 On 1 August 2000, the Commission, acting pursuant to Article 10(3) of Regulation No 659/1999, instructed the Federal Republic of Germany to provide inter alia 'all

information enabling it to determine how the expenses of the [Lintra holding company] have been distributed amongst the subsidiaries'. The Commission also stated that if not all the relevant information, figures and documents for assessing the legality of the aid were provided, it would be obliged to adopt a decision on the basis of the information in its possession.

135 The German authorities responded to the information injunction decision of 1 August 2000 by letter of 2 October 2000, to which they annexed the report of a chartered accountant. According to that information, DEM 7 910 000 DEM (out of a partial amount of DEM 12 000 000) was to be ascribed to the subsidiaries who had had actual use of the aid. As to the company ZEMAG, the synoptic table forwarded by the German authorities (also contained in the report of the charted accountant) stated an amount of DEM 107 000 to be ascribed to that undertaking. For the remainder of DEM 4 090 000 (12 000 000 – 7 910 000), the German authorities explained that that amount was to be ascribed only to the Lintra holding company because that amount had in part (in the amount of DEM 421 000) been allocated to other privatisation activities in 1998, with the rest (DEM 3 669 000) having gone to finance the Lintra holding company for plant and personnel expenditure. The German authorities added that the amount to be ascribed to the subsidiaries had been notified to the Commission as part of the second round of privatisation of the undertakings concerned.

136 The aforementioned items of information sent by the German authorities to the Commission show that the Commission was able to find, at the time of adopting the contested decision, that the company ZEMAG had had actual use of part of the partial amount of DEM 12 000 000 considered to have been misused.

137 However, regarding the applicant's argument alleging essentially that there was an insufficient statement of reasons for recovery of the amount of DEM 4 077 000 from it, the Court considers that, for the reasons set out below, that complaint is well founded.

138 According to settled case-law, in order to satisfy the requirements of Article 253 EC, the statement of reasons for a decision must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Community judicature to exercise its power of review. Although it is not necessary for the reasoning to go into all the relevant facts and points of law, it must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86; Case C-5/01 *Belgium* v *Commission* [2002] ECR I-11991, paragraph 68; *Skibsværftsforeningen and Others* v *Commission*, paragraph 230; and Case T-158/96 *Acciaierie di Bolzano* v *Commission* [1999] ECR II-3927, paragraph 167).

139 In the present case, the only reason for the obligation imposed on the Federal Republic of Germany to recover the amount of DEM 4 077 000 from the company ZEMAG, as set out in recital 45 of the contested decision, is based on 'information which Germany has supplied'.

140 Given the context of which the contested decision forms a part, the Court finds that such reasoning is inadequate.

141 As noted in paragraph 133 above, the Court observes that in their letter of 10 March 2000, referred to above, the German authorities had stated expressly that the information they were forwarding to the Commission was only a 'preliminary distribution' of the amount of DEM 12 000 000 amongst the subsidiaries. In their letter of 2 October 2000, the German authorities, in response to the information injunction decision of 1 August 2000 requesting them to provide 'all information

enabling it to determine how the expenses of the [Lintra holding company] were distributed amongst the subsidiaries', provided calculations, referred to in paragraph 135 above, according to which an amount of DEM 107 000 (out of a partial amount of DEM 12 000 000) was to be ascribed to the company ZEMAG, that allocation being, in the view of the German authorities, the 'actual use of the aid'.

142 When questioned by the Court about the reasons for which the amount of DEM 4 077 000 had been ascribed to the company ZEMAG by Article 3 of the contested decision, the Commission stated that the information provided by the German authorities in response to the information injunction decision of 1 August 2000 did not explain how the remainder of DEM 107 000, made up of claims based on payments made by the Lintra holding company to the subsidiaries and claims allegedly held by the subsidiaries against the holding company, was calculated. Nor is the figure obtained explained in further detail by the German authorities. The Commission added, however, that it is indisputable that the liquidity loan of DEM 12 000 000 must be recovered in its entirety and that it is the apportionment indicated in the letter of 10 March 2000 from the German authorities referred to above which served as a basis for the Commission's recovery order, issued in the absence of more specific and comprehensible information.

143 It follows from the foregoing that the Commission ordered the recovery of the amount DEM 4 077 000 from the company ZEMAG without having proven or even explained why such an amount was being claimed.

144 It is true that, as stated by the Commission, the objective of recovering the amount of DEM 12 000 000 must be achieved. However, the manner in which the aid is distributed amongst actual beneficiaries cannot be established without stating adequate reasons in the contested decision and on the basis of mere suppositions.

145 Although when the Commission, acting pursuant to Article 10(3) of Regulation No 659/1999, issues an information injunction it may, pursuant to Article 13(1) of that regulation, 'where ... the Member State concerned does not provide the information requested', adopt a decision to close the investigation procedure on the basis of the information available, it is not released from its obligation to state sufficiently the reasons which have led it to consider that the information provided by a Member State, in response to the information injunction, cannot be relied on in the final decision which it intends to adopt. Such a situation cannot be likened to one where a Member State fails to provide any information to the Commission in response to an injunction issued pursuant to Article 10(3) of Regulation No 659/1999, in which case the reasons may be limited to merely stating that the Member State has failed to respond to the injunction. In the present case therefore, the Commission was required to state in the contested decision the reasons for which it considered that the information provided by the German authorities in response to the information injunction decision of 1 August 2000 could not be taken into consideration for the purposes of determining the amount of aid to be repaid by the company ZEMAG.

146 The Court also notes that the Federal Republic of Germany, in its letter of 2 October 2000 referred to in paragraph 135 above, had drawn the Commission's attention to the fresh notification of aid granted to the subsidiaries concerned as part of their second restructuring, an observation moreover included in recital 41 of the contested decision. The Commission could not have been unaware, at the time it adopted the contested decision, that it had decided on 1 February 2001, that is, approximately two months before the adoption of the contested decision, to open a formal investigation procedure with respect to restructuring aid for the company ZEMAG, the text of which is included in the invitation to submit observations published in the *Official Journal of the European Communities* (OJ 2001 C 133, p. 3), in which it stated that of the amount of aid to that company as from 1 January 1997, 'aid amounting to DEM 107 000 is assessed as part of the decision on the Case C-41/99 *Lintra Beteiligungsholding GmbH*', as part of the procedure having led to the adoption of the contested decision. In those circumstances, it was for the Commission at least to state the reasons for the difference between that amount ascribed to the company ZEMAG and the amount used in the contested decision.

147 It follows that the statement of reasons on which the contested decision is based is inadequate having regard to Article 253 EC in so far as it relates to the obligation for the Federal Republic of Germany to recover aid in the amount of DEM 4 077 000 from the company ZEMAG.

148 In the light of the foregoing, Article 3 of the contested decision must be annulled in so far as it instructs the Federal Republic of Germany to recover, first, aid in the amount of DEM 3 195 559 from the applicant in Case T-111/01, including the appurtenant interest and, second, aid totalling DEM 6 496 271 from the applicant in Case T-133/01, including the appurtenant interest.

149 In those circumstances, it is not necessary to rule on the applicants' common plea relating to the arbitrary nature of the manner in which the apportionment formula was set amongst the applicants for the amount of DEM 22 978 000 to be repaid, since the order to repay the disputed aid, calculated on the basis of the aforementioned amount, has been annulled in so far as regards the applicants. Nor is it necessary to rule on the common plea relating to the alleged error as to the imputability of the obligation to repay the disputed aid, owing to the transfer of the shares of the applicant in Case T-111/01 and the applicant in Case T-133/01 respectively, since the order to repay the disputed aid in both cases is to be annulled.

Costs

150 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. Since the Commission has been unsuccessful, it must, having regard to the form of order sought by the applicants, be ordered to pay the costs, including those relating to the interim proceedings in Case T-111/01.

151 On those grounds,

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

hereby:

1. **Annuls Article 3 of Commission Decision 2001/673/EC of 28 March 2001 on State aid implemented by Germany for EFBE Verwaltungs GmbH &Co. Management KG (now Lintra Beteiligungsholding GmbH, together with Zeitzer Maschinen, Anlagen Geräte GmbH; LandTechnik Schlüter GmbH; ILKA MAFA Kältetechnik GmbH; SKL Motoren- und Systembautechnik GmbH; SKL Spezialapparatebau GmbH; Magdeburger Eisengießerei GmbH; Saxonia Edelmetalle GmbH and Gothaer Fahrzeugwerk GmbH) in so far as it requires the Federal Republic of Germany to recover an amount of DEM 3 195 559, including the appurtenant interest, from the company Saxonia Edelmetalle GmbH and a total aid amount of DEM 6 496 271, including the appurtenant interest, from the company Zeitzer Maschinen, Anlagen Geräte (ZEMAG) GmbH;**

2. Dismisses the remainder of the action;

3. Orders the Commission to pay the costs, including those relating to the interim proceedings in Case T-111/01.

Vesterdorf Jaeger Mengozzi

Martins Ribeiro Dehousse

Delivered in open court in Luxembourg on 11 May 2005.

H. Jung B. Vesterdorf

Registrar President

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