

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

12 September 2007*

In Case T-196/02,

MTU Friedrichshafen GmbH, established in Friedrichshafen (Germany), represented by F. Montag and T. Lübbig, lawyers,

applicant,

v

Commission of the European Communities, represented by V. Kreuzschitz, V. Di Bucci and T. Scharf, acting as Agents,

defendant,

APPLICATION for the annulment of Article 3(2) of Commission Decision 2002/898/EC of 9 April 2002 on the State aid implemented by Germany for SKL Motoren- und Systembautechnik GmbH (OJ 2002 L 314, p. 75),

* Language of the case: German.

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

composed of H. Legal, President, I. Wiszniewska-Białecka, V. Vadapalas, E. Moavero Milanesi and N. Wahl, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 10 May 2007,

gives the following

Judgment

Legal context

¹ Article 87 EC provides:

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

...’

2 Article 88 EC states:

‘...

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 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 Under Article 10 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] EC (O) 1999 L 83, p. 1):

‘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.'

4 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.'

5 Article 14 of the regulation 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.

...'

Background to the dispute

- 6 By letter of 9 April 1998, the German authorities notified a number of payments of financial aid to the Commission, granted inter alia through the Bundesanstalt für vereinigungsbedingte Sonderaufgaben ('the BvS'), to SKL Motoren- und Systemtechnik GmbH ('SKL-M'), in the context of its restructuring. Since a part of that aid had already been granted, the file was registered as non-notified aid, under reference NN 56/98.
- 7 SKL-M, which, before its restructuring, belonged to the group Lintra Beteiligungsholding GmbH, is an undertaking operating in the sector of manufacture of engines for ships and boats.
- 8 With the aid of BvS, SKL-M and MTU Friedrichshafen GmbH ('MTU' or 'the applicant'), operating in the sector of production of high-powered diesel engines, entered into contractual relations in 1997, with a view to MTU taking over SKL-M.
- 9 On 5 November 1997, two agreements were entered into between MTU and SKL-M. The first gave MTU an option to purchase shares in SKL-M, with the possibility to acquire the whole of the shares for the symbolic price of one Deutschmark before 1 December 1999, then for a 'reasonable price' before 31 December 2001. The second agreement (the *Wechselseitiger Lizenz- und Kooperationsvertrag zwischen SKL-M und MTU*, 'the WLKV'), for the creation of a joint-venture, laid down the framework of rules on the joint use of the two undertakings' know-how, as well as in relation to studies on, manufacture and sale of two new types of engines, that is, a gas engine and an in-line cylinder engine. A third agreement was entered into on the same day between BvS, the *Land* of Saxony-Anhalt and SKL-M, governing the payment of restructuring aid.

- 10 Despite the fact that MTU finally chose not to take up the option provided for in the first-mentioned agreement and therefore decided not to proceed with the takeover of SKL-M, given the lack of legal certainty regarding aid previously paid by the Federal Republic of Germany to SKL-M, SKL-M and MTU nevertheless continued their cooperation within the framework of the WLKV.
- 11 On 15 June 2000, MTU invoked Clause 5 of the WLKV and, in accordance with that provision, was granted exclusive use of the know-how falling within the WLKV with regard to third parties, including the industrial property rights and applications for registration of those rights which existed at least at that date. In return for that right, SKL-M received a one-off payment, intended to cover the development costs incurred, in the framework of the agreed budget set out in Annex I to the WLKV, namely DEM 4.31 million for the gas engines and DEM 2.4 million for the in-line cylinder engines, amounting to a total of DEM 6.71 million (EUR 3.43 million). Under Article 5 of the WLKV, SKL-M also benefited from the possibility of using its own know-how, including that transferred to MTU, regardless of the intellectual property rights referred to above.
- 12 In July 2000, an inventory of the know-how was taken and provided to MTU, which paid the sum provided for in the WLKV to SKL-M.
- 13 Since, following a preliminary examination of the information sent by the German authorities, the Commission considered that the contested measures raised serious doubts as to their compatibility with the common market, the Commission, by letter of 8 August 2000, informed the German authorities of its decision to initiate the procedure laid down in Article 88(2) EC. That decision was published in the *Official Journal of the European Communities* (OJ 2001 C 27, p. 5) and the Commission invited the persons concerned to submit their observations. In that letter, the

Commission also asked the German authorities whether MTU had benefited from the aid granted to SKL-M or whether it was likely to benefit from it (point 103 of the decision to initiate the formal investigation procedure).

14 In the letter and the accompanying summary, the Commission stated *inter alia* that MTU had never been the legal owner of SKL-M, that the first agreement, referred to in paragraph 9 above, gave it only an option and, in the light of the information provided by the German authorities, it was not certain whether MTU had taken up that option. The Commission also stated that, in June 2000, MTU had terminated its cooperation with SKL-M in the framework of the WLKV. The Commission found, however, that SKL-M had been under MTU's operational control since November 1997. It also had doubts as to whether MTU had been selected on the basis of a procedure comparable to an open call for tenders. The Commission thus concluded that MTU had been able to or would be able to benefit in the future from the State aid granted to SKL-M in various ways: first, directly, if it transpired that a part of the aid had been used for the purposes of serving MTU's interests rather than those of SKL-M; secondly, by means of the WLKV, as a result of the option enabling MTU to acquire, for a fixed price, all the know-how created by SKL-M before entering into the arrangements for cooperation or in the context thereof, if it decided to exercise that option and if the price did not reflect the current or expected market value of the know-how.

15 On 1 September 2000, insolvency proceedings were initiated against SKL-M.

16 On 16 October 2000, 6 April and 17 October 2001, the Federal Republic of Germany submitted its observations on the decision to initiate the formal investigation procedure. No interested third party submitted observations directly to the Commission.

- 17 By letter of 19 September 2001, the Commission invited the German authorities to provide the information necessary to assess the compatibility of the aid granted to SKL-M, pursuant to Article 10 of Regulation No 659/1999. In its letter, the Commission observed, in particular, that the information at its disposal did not enable it to ascertain whether a part of the aid awarded to SKL-M had been used in MTU's interests rather than in those of SKL-M, or to establish whether MTU had exercised the option to acquire the know-how developed by SKL-M prior to and during the currency of the WLKV for a fixed price and whether the price paid reflected its current or expected market value. The Commission stated that, in the absence of this information, it would adopt a final decision on the basis of the information in its possession. It also invited the German authorities to send the injunction letter to the potential beneficiary of the aid.
- 18 On 9 November 2001, the Commission reminded the German authorities that if they did not comply with the information injunction, the decision would be taken on the basis of the information available, pursuant to Article 13(1) of Regulation No 659/1999.
- 19 By letters of 23 January, 26 February and 11 March 2002, the German authorities replied to the information injunction.
- 20 By letter of 5 March 2002, they also sent the Commission MTU's observations on the decision to initiate the formal investigation procedure, in particular as regards the use of the know-how and the price paid by MTU to SKL-M under the WLKV.

- 21 On 9 April 2002, the Commission adopted Decision 2002/898/EC on the State aid implemented by Germany for SKL Motoren- und Systembautechnik (OJ 2002 L 314, p. 75; 'the contested decision').
- 22 In the grounds of the contested decision, under the heading 'Assessment of the aid', the Commission (i) found that the restructuring aid paid to SKL-M did not satisfy the conditions in the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12) and (ii) took the view that the Federal Republic of Germany had not provided sufficient information to enable the Commission to rule out the possibility that MTU had benefited indirectly by way of the WLKV from the aid which had been granted to SKL-M for loss cover during the restructuring period. In that regard, the Commission noted in particular that the purchase price of the know-how paid by MTU to SKL-M, calculated on the basis of the development costs estimated in 1997, turned out to be DEM 5.30 million less than the actual development costs incurred by SKL-M. Since the German authorities had not provided any objective information on the actual or expected market value of the know-how, the Commission found that the restructuring aid granted to SKL-M could have at least partly covered the losses resulting from the development of the know-how which might have been used in the interests of MTU rather than in the interests of SKL-M, which, being State-controlled, had to assume a cost risk that was not in line with the market economy investor principle. According to point 86 of the contested decision, the transfer of know-how could thus rank as a transfer to MTU of State resources amounting to DEM 5.30 million.
- 23 The operative part of the contested decision states, in Article 1, that the State aid which Germany has implemented for SKL-M, amounting to DEM 67.017 million (EUR 34.26 million), is incompatible with the common market, while, in Article 3(2), it is stated that of the total amount which must be recovered by the German authorities, DEM 5.30 million (EUR 2.71 million) is to be recovered jointly and severally from SKL-M and MTU.

Procedure and forms of order sought by the parties

- 24 It is in those circumstances that, by application registered at the Registry of the Court of First Instance on 28 June 2002, the applicant brought the present action under Article 230 EC.
- 25 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) then decided to open the oral procedure.
- 26 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 10 May 2007.
- 27 The applicant claims that the Court should:
- annul Article 3(2) of the contested decision, in so far as that provision orders it to repay jointly and severally DEM 5.30 million (EUR 2.71 million);

 - order the Commission to pay the costs.

28 The Commission contends that the Court should:

- dismiss the application as unfounded;

- order the applicant pay the costs.

Law

29 In support of its application for annulment, the applicant raises, in essence, two pleas in law. The first alleges defective reasoning and errors of law relating to the existence of the constituent elements of State aid in favour of the applicant. The second plea in law alleges erroneous application of Article 13(1) of Regulation No 659/1999 and infringement of the procedural safeguard requiring correct and impartial assessment of the facts.

30 The Commissions contests the substance of each of those two pleas.

31 It is appropriate to examine, first of all, the second plea, alleging erroneous application of Article 13(1) of Regulation No 659/1999 and infringement of the procedural safeguard requiring correct and impartial assessment of the facts.

Arguments of the parties

- 32 The applicant submits that, pursuant to Article 13(1) of Regulation No 659/1999, the Commission may take a final decision on the basis of the information available if a Member State fails to comply with an information injunction. In the present case, however, the applicant takes the view that, contrary to what is stated in the contested decision, the Commission had all the necessary information at the time of adopting the decision. Consequently, it considers that the Commission was wrong to confine itself to basing the contested decision on 'the information available' within the meaning of Article 13(1) of Regulation No 659/1999, and to refer in particular to the letter of 9 January 2002 from SKL-M's insolvency administrator, a document which had not been adopted by the German authorities.
- 33 The applicant also considers that, according to the case-law of the Court of First Instance (Case T-206/99 *Métropole Télévision v Commission* [2001] ECR II-1057, paragraph 57), the Commission is required to examine carefully and impartially all the relevant aspects of the individual case. In its view, the Commission discounted the information put forward by the applicant while taking into account only that information which was unfavourable to it. The applicant goes on to state that if the Commission had doubts as to the applicant's information, it could have referred to the Federal Government or itself in order, for example, to request an expert's report.
- 34 The applicant also takes the view that it is contrary to the principles of the rule of law and sound administration for the Commission to require an undertaking to repay a sum which has been precisely calculated before establishing that the sum was paid to it by way of aid declared to be incompatible with the common market. It thus raises the question of the Commission's power to adopt Article 3(2) of the contested decision, since that institution may only require aid to be repaid by its beneficiary. The applicant also submits that Regulation No 659/1999 does not contemplate joint and several liability, which, moreover, cannot be provided for in an administrative procedure subject to the principle of the rule of law without an

express legal basis. Finally, the Commission's arguments as to joint and several liability for fines imposed on undertakings participating in anti-competitive agreements, are not relevant to the present case.

35 The Commission considers that it adopted the contested decision in the light of the evidence on the file and that it did not have relevant information as to the advantage which MTU could have benefited from or as to the question of the market value of the know-how in question. It submits, in this regard, that MTU, through its observations sent via the German authorities on 5 March 2002, impliedly admitted that the costs of developing the know-how exceeded the market value of the prototypes. Consequently, the Commission takes the view that the contested decision was correctly taken in the light of the evidence on the file alone.

36 The Commission goes on to state that, in accordance with the principles governing State aid proceedings, only the Federal Republic of Germany, in the present case, had the full rights enjoyed by parties to proceedings. It is therefore the information put forward by that State which is decisive for the contested decision. The Commission contends that, while the potential or actual beneficiary may participate in the investigation procedure, it does not, in its view, have any right to require that institution to allow it to verify the information transmitted by the Member State in question. Referring to the case-law of the Court of Justice (Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraph 84), the Commission considers that since MTU failed to make use of the opportunity of submitting its comments during the procedure investigating the aid at issue, none of its rights was infringed.

37 In addition, the Commission submits that the information available to it when adopting the contested decision did not enable it to make a finding against one undertaking alone. Consequently, it had to order the aid to be paid back by SKL-M and MTU jointly and severally.

38 According to the Commission, such joint and several liability cannot be called into question under Community law. Such responsibility has already been accepted in the field of competition law, even in the absence of wording providing for it expressly (Joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others v Commission* [1998] ECR II-1727, paragraph 42 et seq.). Therefore, nothing prevents a similar approach from also being allowed in State aid proceedings.

Findings of the Court

39 Article 13(1) of Regulation No 659/1999 has reproduced and enshrined the case-law of the Court to the effect that the Commission is empowered to adopt a decision on the basis of the information available when it is faced with a Member State which fails to comply with its obligation of cooperation and refuses to provide information requested from it for the purpose of assessing the compatibility of aid with the common market (Case C-301/87 *France v Commission* [1990] ECR I-307, 'Boussac', paragraphs 19 and 22, and Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington v Commission* [1994] ECR I-1173, paragraph 26).

40 However, given the Commission's very wide discretion, before taking such a decision, it must comply with certain procedural requirements (Case T-318/00 *Freistaat Thüringen v Commission* [2005] ECR II-4179, paragraph 73). Those

requirements are set out in Article 5(2), Article 10(3) and Article 13(1) of Regulation No 659/1999.

- 41 In particular, Article 10(3) of Regulation No 659/1999 provides that ‘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’. In addition, according to the last sentence of that provision, that information injunction must specify ‘what information is required’ and prescribe ‘an appropriate period within which it is to be supplied’. Finally, under Article 13(1) of the regulation it is only ‘if a Member State fails to comply’ with such an information injunction that the Commission has the power to terminate the procedure and take a decision as to whether or not the aid is compatible with the common market ‘on the basis of the information available’.
- 42 In the light of those considerations, it is appropriate to examine, first, whether in the present case the Commission was entitled under Article 13(1) of Regulation No 659/1999 to take the contested decision, and, in particular, to require MTU to pay back jointly and severally a part of the aid granted to SKL-M, on the basis of the information available to it.
- 43 First of all, it is apparent from the administrative procedure, referred to in paragraphs 13 to 20 above, that the Commission complied with all the procedural requirements initially established by case-law and subsequently laid down in Articles 10(3) and 13(1) of Regulation No 659/1999, in order to adopt the contested decision on the basis of the information available.

- 44 On at least three occasions, the Commission requested the German authorities to provide it with the necessary information to ascertain the compatibility of the contested aid with the common market. This being so, it did not fail to specify 'what information [was] required' or to prescribe 'an appropriate period within which it [was] to be supplied'. Finally, the Commission again reminded the German authorities that if they did not comply with the information injunction within a period of 10 days, the decision would be taken on the basis of the information available.
- 45 Secondly, it must be pointed out that Article 13(1) of Regulation No 659/1999 allows the Commission to close the formal investigation procedure by way of a decision under Article 7 of the regulation. In particular, where the Member State concerned does not provide the Commission with the information requested, the Commission may take a decision that the aid is incompatible on the basis of the information available and, if appropriate, order the Member State concerned to recover the aid from the beneficiaries in accordance with Article 14 of Regulation No 659/1999.
- 46 However, Article 13(1) of Regulation No 659/1999 does not allow the Commission to impose on a particular undertaking an obligation to repay, even jointly and severally, a fixed part of the amount of the aid declared to be incompatible, where the transfer of State resources from which that undertaking benefited is hypothetical.
- 47 First, as is apparent from the findings of the contested decision, set out in particular in point 88, the Commission merely finds that 'on the basis of the information available, it cannot be ruled out' that MTU benefited from a transfer of resources by the State-aided company SKL-M, when the know-how was acquired on conditions deemed to be favourable.

48 It follows that the obligation to repay jointly and severally, set out in the contested decision, was based on assumptions that the information available to the Commission allows it neither to confirm or rebut.

49 Second, since the contested decision imposes on the applicant an obligation to repay part of the aid jointly and severally, it will be for the national authorities to recover it from the applicant if SKL-M is not capable of making the repayment, and those national authorities are not entitled to review the correctness of the obligation of joint and several liability.

50 Such a situation is not in any way a logical consequence of the implementation of the procedure laid down by the EC Treaty in relation to State aid, since the State providing the aid which is ordered to be recovered is, in any event, under an obligation to require recovery from the actual beneficiaries under the Commission's supervision, without it being necessary to name those beneficiaries expressly in the recovery decision and, *a fortiori*, to specify the amount of the sums which must be repaid by each beneficiary.

51 It follows that, in the circumstances of the present case, the Commission cannot legitimately rely on Article 13(1) of Regulation No 659/1999 to impose on MTU, pursuant to the contested decision, an obligation to repay jointly and severally a part of the aid granted to SKL-M.

52 Accordingly, without there being any need to examine the other plea in law relied on by the applicant, Article 3(2) of the contested decision must be annulled in so far as it orders the applicant to repay jointly and severally a sum of EUR 2.71 million.

Costs

- 53 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful in its pleadings and the applicant has applied for costs, the Commission must be ordered to pay the costs.

On those grounds,

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

hereby:

- 1. Annuls Article 3(2) of Commission Decision 2002/898/EC of 9 April 2002 on the State aid implemented by Germany for SKL Motoren- und Systembautechnik GmbH, in so far as it orders MTU Friedrichshafen GmbH to repay jointly and severally a sum of EUR 2.71 million;**

2. Orders the Commission to bear its own costs and to pay the costs incurred by MTU Friedrichshafen.

Legal

Wiszniewska-Białecka

Vadapalas

Moavero Milanesi

Wahl

Delivered in open court in Luxembourg on 12 September 2007.

E. Coulon

Registrar

H. Legal

President