ORDER OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
30 April 2003 *

In Case T-167/01,

Schmitz-Gotha Fahrzeugwerke GmbH, established in Gotha (Germany), represented by M. Matzat, lawyer,

applicant,

v

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

defendant,

* Language of the case: German.

APPLICATION for the 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
(Fourth Chamber, Extended Composition),

composed of V. Tiili, President, J. Pirrung, P. Mengozzi, A.W.H. Meij and M. Vilaras, Judges,

Registrar: H. Jung,

makes the following

Order

The facts

1 By decision of 13 March 1996 (a brief of summary of which was published in OJ 1996 C 168, p. 10), the Commission approved aid for the privatisation and restructuring of eight undertakings of the former German Democratic Republic operating in various economic sectors, which had been brought together into a

single holding company (known, lastly, as Lintra Beteiligungsholding GmbH, hereinafter 'Lintra') owned by the Treuhandanstalt (a body governed by public law responsible for restructuring the undertakings of the former German Democratic Republic) and which, on privatisation, became, together with Lintra, the Lintra group. The amount of the aid granted to the Lintra group by the Federal Republic of Germany and approved by the Commission was DEM 658 202 million.

2 One of the beneficiaries of the aid was Gothaer Fahrzeugwerk GmbH ('GFW'). Active until 1997 in the sector of motor technology, vehicle construction and car interior construction, GFW then transferred its assets in the motor technology and vehicle construction sectors to two other companies which it was intended to privatise.

3 In particular, by deed of 10 September 1997, in which the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (the body which succeeded the Treuhandanstalt, hereinafter 'the BvS') intervened, GFW's assets (land, plant, etc.) in the vehicle construction sector were transferred to Widahvogel Vermögensverwaltung GmbH, in which all the company shares had been acquired by GFW one week previously.

4 Next, by deed dated the same day, GFW transferred those company shares, 30% and 70% of them respectively, to the private companies Weißstorch Vermögensverwaltung GmbH and Schmitz-Anhänger Einkaufs- und Beteiligungsgesellschaft GmbH. Finally, the company name of Widahvogel Vermögensverwaltung became, lastly, Schmitz-Gotha Fahrzeugwerke GmbH (hereinafter 'Schmitz-Gotha' or 'the applicant').

5 GFW's assets relating to the motor technology sector were purchased by Gothaer Fahrzeugtechnik GmbH.

6 The assets relating to the car interior construction sector remained with GFW, which has been in liquidation since 1 January 2001.

7 Following an exchange of letters with the German authorities during 1998, the Commission informed them, by letter of 22 June 1999, that it had decided to initiate a procedure under Article 88(2) EC (procedure C 41/1999) in order to ascertain whether the aid authorised had been used in accordance with the aforementioned decision of 13 March 1996.

8 By 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 contested decision'), addressed to the Federal Republic of Germany, the Commission brought procedure C 41/1999 to an end and declared that, out of the total sum of DEM 658 202 million, the amount of DEM 34 978 million had not been used in accordance with the provisions of the restructuring plan approved by its decision of 13 March 1996 and that that constituted misuse of the aid within the meaning of Article 88(2) EC in conjunction with Article 1(g) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1). That part of the aid was therefore declared incompatible with the common market and the Federal Republic of Germany was ordered to recover it from Lintra and the eight companies it controlled.

9 One of the Lintra subsidiaries referred to in the contested decision is GFW, which was liable for DEM 7 100 736 ('the contested aid') of the total sum declared by the Commission to have been misused.

10 In the second sentence of the third paragraph of recital 46 of the same decision, the Commission maintains that '[a]ny sale of Lintra subsidiaries after the failure of the first restructuring operation cannot stand in the way of the full application of Community law and can therefore have no effect on the obligation to recover the aid in question'. In that regard, it refers, in a footnote, to Case C-303/88 *Italy* v *Commission* (known as '*ENI* v *Lanerossi*') [1991] ECR I-1433, paragraph 60.

11 By letter of 23 May 2001, the Commission informed the Federal Republic of Germany that it had decided to initiate a procedure to review the compatibility with the common market of new aid granted to GFW and Schmitz-Gotha from January 1997 (procedure C 31/2001).

12 Points 62 and 63 of that letter read as follows:

'62. Furthermore, the Commission points out that the final decision in case 41/99 Lintra imposes a debt of DEM 7 100 736 on [GFW] under the obligation to recover incompatible aid. According to recital 47 of that decision, the debt was assessed in the context of the second restructuring of the Lintra subsidiaries.

63. As has already been stated on several occasions, the second restructuring of [GFW], formerly a Lintra subsidiary, was effected by transferring various tangible assets to new investors and liquidating the former company. When Schmitz-Gotha is privatised, the amount of DEM 7 100 736 million should therefore be regarded, depending on the circumstances, as an additional asset which may affect the assessment of the criterion relating to viability. The Commission notes that Schmitz-Gotha is only one of the two successors of the

former company GFW, now in liquidation. Germany is therefore requested to inform the Commission how the debt of DEM 7 100 736 is taken into account in the restructuring of the former company and how it is divided, if at all, between the two companies which succeed it.'

13 On 23 May and 12 June 2001, the companies Saxonia Edelmetalle and Zeitzer Maschinen, Anlagen Geräte (ZEMAG), two other Lintra subsidiaries expressly mentioned in the contested decision as being, like GFW, beneficiaries of part of the misused aid, brought actions before the Court of First Instance under Article 230 EC for the annulment of the decision. Those cases (Case T-111/01 *Saxonia Edelmetalle* v *Commission* and Case T-133/01 *ZEMAG* v *Commission*) are currently pending.

14 On 22 June 2001, the sum of DEM 7 100 736, together with interest, was paid by GFW into the account of the BvS, as repayment of the contested aid.

15 By letter of 5 September 2001, the Commission informed the Federal Republic of Germany that it took formal note that the aid, together with interest, had been paid in full. In a letter dated 1 October 2001, sent to the Federal Republic of Germany in connection with procedure C 31/2001, the Commission stated that the matter of whether that repayment affected the restoration of the undertaking's viability could remain open.

Proceedings and forms of order sought by the parties

16 By application lodged at the Court Registry on 17 July 2001, Schmitz-Gotha brought the present action.

17 By a separate document, lodged at the Court Registry on 23 October 2001, the Commission raised a plea of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance.

18 The applicant submitted its observations on that plea of inadmissibility on 4 January 2002, the date on which the written procedure on admissibility ended.

19 In its application, the applicant claims that the Court should:

— annul the contested decision in that it extends to the applicant GFW's part of the liability for repayment of the aid;

— in the alternative, if it is not possible to challenge the contested decision in part, annul the decision in its entirety;

— order the defendant to pay the costs.

20 In its plea of inadmissibility, the defendant claims that the Court should:

— dismiss the application as inadmissible;

— order the applicant to pay the costs.

21 In its observations on the plea of inadmissibility, the applicant claims that the Court should:

— dismiss the plea of inadmissibility raised by the defendant;

— alternatively, if the application is dismissed as inadmissible, order the defendant to pay the costs.

Admissibility of the action

22 Under Article 114(1) of the Rules of Procedure, if a party so requests, the Court may decide the question of inadmissibility as a preliminary issue. By virtue of Article 114(3), the remainder of the proceedings are to be oral, unless the Court otherwise decides. In the present case, the Court is of the view that it is sufficiently well informed by the documents before it to answer the question without initiating the oral procedure.

Arguments of the parties

23 The defendant maintains, first, that the applicant is not individually and directly concerned by the contested decision within the meaning of the fourth paragraph of Article 230 EC.

24 It points out, to begin with, that the contested decision is addressed to the Federal Republic of Germany and that the applicant is neither named nor individualised therein in any way. Even the second sentence of the third paragraph of recital 46 of the decision (see paragraph 10 above) does not individualise the applicant within the meaning of the fourth paragraph of Article 230 EC. That recital contains a general statement which is valid in all similar cases and is not specific to that decision. It is, in short, merely a reference to the case-law, which cannot concern the applicant, *a fortiori* because the applicant did not acquire a Lintra subsidiary.

25 Furthermore, according to the defendant, its letter of 23 May 2001 cannot be interpreted as meaning that the applicant is regarded therein as an undertaking which succeeded GFW within the meaning of the aforementioned recital 46.

26 It points out that the letter contains not the slightest reference to that recital and that although, in the letter, reference is made to the applicant and to Gothaer Fahrzeugtechnik as undertakings which succeeded GFW, it was 'only in the sense that [they] have carried on GFW's activities with the means of production transferred from the previous company and taken over a significant number of its staff'.

27 The defendant points out, secondly, that recovery of the contested aid from the applicant cannot, in any event, be based on the contested decision because this, so far as concerns the aid, has direct effect only for GFW. According to the defendant, if the total amount of that aid could not be recovered from GFW owing to insolvency, the Federal Republic of Germany, on its own initiative — not by virtue of recital 46 of the contested decision, which is inapplicable in this instance —, should have asked itself whether aid incompatible with the common market had not also been transferred at the same time as assets were assigned without consideration to the applicant, which at the time was still a subsidiary of GFW. If so, the Federal Republic of Germany should have called for it to be repaid by the applicant, which would have had an adverse effect on its financial situation and compromised its return to viability. It was only with a view to that possibility that the applicant's liability was raised in point 63 of the letter of 23 May 2001, which therefore does not work on the assumption that the applicant is a surety for GFW.

28 The defendant, secondly, pleads that the applicant has no legal interest in bringing proceedings.

29 In that regard it points out, first, that, as the Court of Justice has consistently held, the proceedings provided for in Article 230 EC can be brought only against an act adversely affecting a person's interests, in other words against an act capable of affecting a given legal position (Case 60/81 *IBM* v *Commission* [1981] ECR 2639), and that only the operative part of an act, not the grounds on which it is based, is capable of producing legal effects and, as a consequence, of adversely affecting such interests (Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 31).

30 The defendant points out, secondly, that an applicant must show a vested and present interest in the annulment of the contested act; a future and hypothetical

interest is not adequate (Case 204/85 *Stroghili* v *Court of Auditors* [1987] ECR 389, paragraph 11, and *NBV and NVB* v *Commission*, cited above, paragraph 33).

31 In the present case, since GFW had already repaid the contested aid before this action was brought, the applicant invokes only future and uncertain situations to establish its legal interest in seeking the annulment of the contested decision, namely the following situations, which would expose it to an order to repay the contested aid:

(a) if the Commission rejected as irregular the notification from the Federal Republic of Germany concerning the implementation of the contested decision and the payment made by GFW;

(b) if the amount paid by GFW were to be included in the general insolvency mass on the initiative of a judicial liquidator appointed after the company was declared insolvent.

32 However, the situations mentioned by the applicant clearly show that, when this action was brought, there was already no infringement of its rights within the meaning established by the case-law. Furthermore, it is almost inconceivable that those hypotheses would become a reality. First, the defendant has already stated that it agreed to the form chosen by GFW for carrying out its obligation to repay and has no grounds for going back on that decision. Secondly, according to the

Insolvenzordnung of 5 October 1994 (German law of insolvency), actions in the interest of the body of creditors in bankruptcy can be brought only against legal acts adopted during the three months preceding the opening of insolvency proceedings. Since the contested aid was repaid by GFW on 22 June 2000, it could not be called back into question if insolvency proceedings were opened, which would anyway occur well after the three months following the repayment.

33 Thirdly, the defendant points out that the action has become devoid of purpose. Since GFW has made the repayment ordered by the contested decision and since, shortly after the action was brought, it became impossible, under national law, to challenge that repayment, the applicant could never be required by the German authorities to pay the amount owed by GFW.

34 The applicant, first, claims to be individually and directly concerned by the contested decision.

35 The condition that the applicant should be individually concerned is fulfilled, since, in recital 46 of the decision the defendant held it to be GFW's legal successor and therefore jointly and severally liable for repaying the contested aid, which is evident from the letter of 23 May 2001, particularly point 63. Consequently, the applicant considers that its acquisition of GFW's assets individualises it, in relation to the contested decision, just as the addressee of the decision and the companies referred to therein are individualised (Case 25/62 *Plaumann* v *Commission* [1963] ECR 197, 223; Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraph 11, and Joined Cases 250/86 and 11/87 *RAR* v *Council and Commission* [1989] ECR 2045).

36 As regards the condition that the applicant should be directly concerned, the applicant considers that, as a rule, an individual is directly concerned by a decision if he is individually concerned as a third party by that decision. In any event, the applicant would satisfy that condition even if it were to be understood as meaning that it is fulfilled only if the Member State is required, when implementing the decision which has been notified to it, to adopt a measure which is unfavourable to the individual or if it is certain or likely that, if the decision had not been adopted, that State would not have adopted the measure. In that regard, the applicant points out that the Federal Republic of Germany, as addressee of the contested decision, was urged to take into account, when implementing procedure C31/2001 at the latest, the possibility that the undertakings which had acquired GFW's assets might also be jointly and severally liable.

37 In its observations on the plea of inadmissibility, the applicant expresses surprise that the defendant now interprets the contested decision as meaning that only GFW was directly liable for repayment of the contested aid. It points out that recital 46 of the contested decision must be read in conjunction with recital 49, which states that 'the amount of misused aid totalling DEM 34,978 million must be recovered from [Lintra] and the Lintra subsidiaries as follows: the amount of DEM 12 million must be recovered from the Lintra subsidiaries as laid down in recital 45, and the amount of DEM 22,978 million must be recovered jointly and severally from [Lintra] and each of the Lintra subsidiaries as laid down in recital 46'. It follows that the reference to the liability of potential purchasers of the Lintra subsidiaries, in the second sentence of the third paragraph of recital 46 of the contested decision, must not be understood as a general mention which does not relate to the applicant and that the applicant, in so far as it is regarded as a purchaser of the undertaking GFW, incurs direct joint and several liability.

38 The applicant points out that the German authorities themselves followed that interpretation of the contested decision, as it discovered at a meeting held on 7 May 2001, to which it was invited by the BvS. On that occasion, the applicant was given a copy of the contested decision and told categorically that, if GFW

could not make the repayment, the Federal Republic of Germany would have to take steps directly against the applicant in order to obtain repayment of the amount to be recovered.

39 As regards point 63 of the letter of 23 May 2001, the applicant points out that the defendant is now attempting to interpret it in a way that conflicts with its wording and is out of context and that, for the purposes of examining the applicant's *locus standi,* it is necessary to start from the perspective of an informed observer faced with both the contested decision and the letter of 23 May 2001. Such an observer could not contemplate any interpretation of those measures other than that the defendant took as its basis, in points 46 and 49 of the contested decision, the premiss that the applicant had joint and several liability, and envisaged that it might be sent a letter of formal notice.

40 Secondly, the applicant maintains that its legal interest in bringing proceedings still exists notwithstanding repayment of the contested aid by GFW.

41 It points out that the Court has held, on several occasions, that the fact that a decision has been implemented does not necessarily preclude a legal interest in bringing an action for annulment of that decision (Case 76/79 *Könecke* v *Commission* [1980] ECR 665, paragraph 9, and Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 74 et seq.).

42 It points out, in the application, that it may still be sent a letter of formal notice as jointly and severally liable, particularly if there is an irregularity in the communication sent by the German authorities to the Commission concerning

the implementation of the contested decision or if the repayment is challenged by a judicial liquidator appointed after a possible declaration of insolvency by GFW.

43 The applicant also points out, in its observations on the plea of inadmissibility, that the defendant, in its pleadings, did not wish expressly to rule out the possibility of a letter of formal notice being sent to the applicant on the basis of the contested decision. If only for that reason, the applicant still has a legal interest in bringing proceedings. In order to assess that interest, it is important only to ascertain to what extent the possibility of a letter of formal notice exists in principle. In that regard, the applicant also raises the point that composition proceedings may be opened in respect of GFW's assets. In that situation, if it were found that GFW had already ceased normal trading when it repaid the aid and that at that time the level of indebtedness was known, it would still be possible, under Article 133 of the German law of insolvency, to reverse the suspect operations during a period of 10 years and the payment in question might be cancelled.

44 The applicant points out that, in such situations, its legal protection would be inadequate if it were based only on the possibility of invoking the unlawfulness of the contested decision in an action brought before the national court against the order for repayment addressed to it and of prompting, in that regard, a reference to the Court of Justice for a preliminary ruling determining validity.

45 In this regard, the applicant points out, in particular, that the contested decision is the subject of two other actions for annulment brought by other affected undertakings before the Court of First Instance (*Saxonia Edelmetalle* v *Commission* and *ZEMAG* v *Commission*, cited above). If the Federal Republic of Germany seeks payment from the applicant after a final decision on the substance has been given in those cases by the Community judicature, the

question for a preliminary ruling on the validity of the contested decision which it might raise through the national court would already be prejudged by that decision, to which it would have been unable to contribute its own arguments.

Findings of the Court

46 According to settled case-law, a natural or legal person may challenge, pursuant to the fourth paragraph of Article 230 EC, only measures the legal effects of which are binding on, and capable of affecting the interests of, that person by bringing about a distinct change in his legal position (*IBM* v *Commission*, cited above, paragraph 9; Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 27, and Case T-178/94 *ATM* v *Commission* [1997] ECR II-2529, paragraph 53).

47 Also, it is settled case-law that a claim for annulment brought by a natural or legal person is not admissible unless the applicant has an interest in seeing the contested measure annulled (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 59; Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 40, and Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347, paragraph 33). That interest must be vested and present (*NBV and NVB* v *Commission*, cited above, paragraph 33) and is evaluated at the date on which the action is brought (Case 14/63 *Forges de Clabecq* v *High Authority* [1963] ECR 719, 748; and Case T-159/98 *Torre and Others* v *Commission* [2001] ECR-SC I-A-83 and II-395, paragraph 28). If the interest which an applicant claims concerns a future and legal situation, he must demonstrate that the

prejudice to that situation is already certain. Therefore, he cannot rely upon future and uncertain situations to justify his interest in applying for annulment of the contested act (*NBV and NVB* v *Commission*, cited above, paragraph 33).

48 It is therefore necessary to consider whether the contested decision, which is addressed to the Federal Republic of Germany and orders it to recover State aid totalling DEM 34 978 million from Lintra and the Lintra subsidiaries, affects the applicant's interests by significantly altering its legal situation. Only if that is the case does the applicant have an interest in the annulment of the contested decision (see to that effect *ATM* v *Commission*, cited above, paragraph 54).

49 It should be pointed out that the applicant seeks, principally, the annulment of the contested decision in so far as it maintains that the applicant is jointly and severally liable for repayment of the contested aid on the ground that it acquired GFW assets.

50 However, it must be stated that that claim is clearly the product of an incorrect reading of the contested decision. Neither the operative part nor the grounds of the decision refer to the joint and several liability of the purchasers of assets of the undertakings which were the recipients of the aid to repay the aid declared incompatible with the common market

51 In particular, the second sentence of the third paragraph of recital 46 of the contested decision, on which the applicant bases its arguments, merely points out that any sale of Lintra subsidiaries to third parties before the adoption of the decision has no effect on the German authorities' obligation to recover the aid. Even the reference, made in a footnote, to paragraph 60 of the judgment in *ENI* v

Lanerossi, cannot give the contested decision the scope attributed to it by the applicant. In that judgment, the Court was led to examine the consequences, for the Member State's obligation to claim repayment of aid declared incompatible with the common market, of a change in ownership of the company shares, not merely assets, of the companies which received the aid. However, it is not disputed in this case that the applicant did not acquire shares in GFW and that it is therefore not an assignee of a Lintra subsidiary.

52 As regards the reference in recital 49 to recital 46, it cannot be interpreted as having the meaning suggested by the applicant. Indeed, the joint and several liability referred to in recital 49 lies with Lintra and its subsidiaries in respect of aid in the amount of DEM 22 978 million; also, the reference to recital 46 concerns the 'procedure' described therein, namely the rules for limiting the joint and several liability of each of the Lintra subsidiaries with Lintra for repayment of that sum, rules which are stated in the first two paragraphs of recital 46, whereas that part of the recital on which the applicant relies is contained in the third paragraph.

53 It must therefore be stated, first, that the applicant is in no way concerned by the second sentence of the third paragraph of recital 46 of the contested decision.

54 That conclusion is unaffected by the applicant's arguments relating to the wording of the defendant's letter of 23 May 2001. In that regard, it must be stated that, as the defendant has rightly pointed out, point 63 of the letter makes no reference to recital 46 of the contested decision. Furthermore, since it is a subsequent decision, the object of which is to open a procedure under Article 88(2) EC concerning restructuring aid for the applicant, its content cannot, under any circumstances, alter the objective scope of the contested decision as established by its own content.

55 Therefore, even if point 63 were to be interpreted as meaning that the Commission regarded the applicant as jointly and severally liable for the contested aid, in whole or in part, on the ground of its alleged capacity as a successor of GFW, it cannot be held that that joint and several liability was established in the contested decision.

56 Secondly, it should be pointed out that the documents in the case do not show that the contested decision adversely affects the applicant other than by allegedly imposing a joint and several liability on the acquirers of assets of Lintra subsidiaries, which is the subject of its principal claim.

57 In so far as, by its subsidiary claim, the applicant also seeks annulment of the contested decision inasmuch as it creates a liability which the applicant might incur in its capacity as joint and several debtor following its acquisition of GFW assets and by reason of the application of other legal rules, it must be stated that it has in no way established or even claimed that it has that capacity.

58 In that regard, it must be pointed out that it is the applicant itself which must prove that it has an interest in making its application, which is an essential and fundamental prerequisite for any legal proceedings (order of the President of the Second Chamber of the Court of Justice in Case C-206/89 R *S* v *Commission* [1989] ECR 2841, paragraph 8) and which, according to the case-law, must be actual and present, not merely hypothetical (see *Stroghili* v *Court of Auditors*, cited above, paragraph 11; *NBV and NVB* v *Commission*, cited above, paragraph 33, and Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 30).

59 A mere reference to the observations made by the defendant in point 63 of its letter of 23 May 2001 is not enough to satisfy the burden of proof which lies with the applicant.

60 First, the wording of that text does not show that the Commission considers that the applicant is personally required to repay all or part of the amount owed by GFW according to the contested decision, since the institution merely formulated a hypothesis (as is apparent from its wording and, in particular, the terms 'should' and 'depending on the circumstances').

61 Secondly, the passage in question is contained in a decision to open a procedure under Article 88(2) EC concerning aid granted to the applicant and is designed to explain the Commission's need to ask the German authorities for information for the purpose of the assessments which it would need to carry out, in the final decision bringing an end to that procedure, with regard to the possibility of the applicant becoming viable again.

62 In those circumstances, it must be concluded that the contested decision is not an act adversely affecting the applicant and that the applicant therefore has no interest in seeking its annulment.

63 Furthermore, it should be pointed out that the finding that the applicant has no legal interest in bringing proceedings is required *a fortiori* because GFW's full payment of the contested aid even before this action was brought discharged the obligation to repay the contested aid, also releasing any possible joint and several debtors from that liability.

64 In the light of the foregoing considerations, since the applicant has no legal interest in bringing proceedings, the action must be dismissed as inadmissible, and it is not necessary to examine the other arguments raised by the defendant.

Costs

65 In its observations on the plea of inadmissibility, the applicant states that, if the court finds that the action is inadmissible, the defendant should be ordered to pay the costs, at least those occasioned by the confused wording of its measures. Indeed, it is the defendant which, by the references contained in the contested decision and in its letter of 23 May 2001, which it now itself claims are incorrect, prompted the applicant to bring the action.

66 Under Article 87(2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 87(3) of the Rules of Procedure, the Court may depart from the rules laid down in Article 87(2) if certain conditions are met. Thus, first, it may, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, order that the costs be shared or that each party bear its own costs; secondly, it may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur.

67 In the present case, it should be noted, first, that the text of the contested decision does not contain any ambiguity which may have led the applicant, in the absence of any negligence on its part, to believe that, in the decision, it was regarded as jointly and severally liable for repayment of the contested aid. That also applies, secondly, to the letter of 23 May 2001, owing to the hypothetical nature of the assessments contained in point 63 and of the context in which the letter was sent. Thirdly, the applicant still has to establish that it was under a personal obligation to repay the contested aid. Fourthly, it brought the action knowing full well that the aid had been repaid by GFW; the applicant itself refers in the application to the repayment, which, as is stated in paragraph 63 above, was a further factor precluding its legal interest in bringing proceedings.

68 In those circumstances, the Court considers that it is not necessary to apply Article 87(3) of the Rules of Procedure and that the applicant must be ordered to pay the costs in accordance with the defendant's pleadings.

On those grounds,

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

hereby orders:

1. The action is dismissed as inadmissible.

2. The applicant is ordered to pay the costs.

Luxembourg, 30 April 2003.

H. Jung
Registrar

V. Tiili
President