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

6 April 2006 *

In Case T-17/03,

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,

APPLICATION for annulment of Commission Decision 2003/194/EC of 30 October 2002 on the State aid implemented by Germany for Schmitz-Gotha Fahrzeugwerke GmbH (OJ 2003 L 77, p. 41),

* Language of the case: German.

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

composed of H. Legal, President, P. Lindh, P. Mengozzi, I. Wiszniewska-Białecka and V. Vadapalas, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2006,

gives the following

Judgment

Legal framework

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.

...

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

...

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

...'

2 Article 88 EC provides:

'...

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 Point 2.4 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12; 'the Guidelines') states:

'Article [87](2) and (3) of the EC Treaty provide for the possibility of exemption of aid falling within Article [87](1).

...

The Commission considers that aid for rescues and restructuring may contribute to the development of economic activities without adversely affecting trade against the Community interest if the conditions set out in Section 3 are met, and will therefore authorise such aid under those conditions. ...'

4 Point 3.2.2 of the Guidelines provides:

'Subject to the special provisions for assisted areas and SMEs set out below, for the Commission to approve aid a restructuring plan will need to satisfy all the following general conditions:

...

(iii) Aid in proportion to the restructuring costs and benefits

The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Therefore, aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing. To limit the distortive effect, the form in which the aid is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process. Nor should any of the aid go to finance new investment not required for the restructuring. Aid for financial restructuring should not unduly reduce the firm's financial charges.

...'

Background to the dispute

5 In 1994, Gothaer Fahrzeugwerke GmbH ('GFW'), a former State undertaking, was, together with another eight East German companies, transferred to the group run by Lintra Beteiligungholding GmbH with a view to being privatised. The privatisation failed and in 1996 the Bundesanstalt für vereinigungsbedingte Sonderaufgaben, a State body, resumed control of GFW with the aim of preparing it for resale.

6 The Bundesanstalt für vereinigungsbedingte Sonderaufgaben found that it was impossible to sell GFW and decided to dispose of the company's assets. It did so in accordance with a procedure the stages of which are described in paragraphs 7 to 9 below.

7 By contract of 3 September 1997 GFW acquired all of the shares in Widahvogel Vermögensverwaltung ('Widahvogel'), whose manager was Mr Josef Koch, for 54 000 German marks (DEM).

8 By contract of 10 September 1997, the assets and orders pertaining to GFW's 'automobile construction' branch were transferred to Widahvogel. By another contract of the same date, all of GFW's shares were transferred to Weißstorch GmbH (30% of the shares), which subsequently became Josef Koch GmbH, and to Schmitz-Anhänger-Einkaufs- und Beteiligungs Gesellschaft GmbH & Co. KG (70% of the shares), which was held by Schmitz Cargobull AG. The investors paid DEM 1 for the assets. In addition, Mr Koch was appointed the sole manager of Widahvogel, whose name was changed to Schmitz-Gotha Fahrzeugwerke GmbH ('Schmitz-Gotha' or 'the applicant').

9 On 9 October 1997, the applicant acquired, for approximately DEM 3 700 000, the entire capital of one of its subcontractors, Trailer System Engineering ('TSE'), a company founded and run by Mr Koch, its majority shareholder.

10 By letter of 18 May 1998, the Federal Republic of Germany notified to the Commission aid measures for the restructuring of Schmitz-Gotha, which had been implemented since January 1997 ('the letter of notification of 18 May 1998').

11 By letters of 12 June 1998, 21 December 1999 and 17 May 2000, the Commission sought further information from the German authorities, who replied by letters of 15 October 1998, 21 July 1999, 27 April 2000, 1 December 2000 and 8 January 2001.

12 By letter of 23 May 2001, the Commission informed the Federal Republic of Germany that it had decided to initiate the procedure provided for in Article 88(2) EC (OJ 2001 C 211, p. 15). In the context of that procedure, the Commission examined the measures taken for the benefit of Schmitz-Gotha as new aid, implemented without prior notification, in the light of the Guidelines.

13 In that decision, the Commission raised doubts, in particular, as to the proportionate nature of the aid in issue by reference to the condition laid down in point 3.2.2(iii) of the Guidelines. On the basis of the available information, the Commission considered that it was not in a position to ascertain whether the acquisition of TSE was necessary for the restructuring of Schmitz-Gotha. Consequently, the Commission enjoined the German authorities to communicate to it all the information concerning Schmitz-Gotha's participation in TSE and, in particular, the necessity for that transaction by reference to the restructuring of the undertaking. In addition, the Commission requested the Federal Republic of Germany to forward its letter of 23 May 2001 to the beneficiary of the aid and stated that it would take its decision on the basis of the information available to it.

14 The Commission received the Federal Republic of Germany's comments by letters of 10 August and 14 December 2001. However, no interested party submitted comments to the Commission.

15 By letter of 4 March 2002, the Commission again requested the German authorities to demonstrate that the acquisition of TSE was necessary for the purpose of the restructuring of Schmitz-Gotha.

16 The Commission received the comments of the Federal Republic of Germany by letters of 16 May, 28 May and 3 July 2002.

17 Following that procedure, the Commission adopted Decision 2003/194/EC of 30 October 2002 on the State aid implemented by Germany for Schmitz-Gotha Fahrzeugwerke GmbH (OJ 2003 L 77, p. 41; 'the contested decision'). It recalled that, according to point 3.2.2(iii) of the Guidelines, the criterion of proportionality required that the aid be limited to the strict minimum needed to enable restructuring to be undertaken, in order to limit the distortive effect on competition. The Commission further observed that the aid must not serve the beneficiary to finance new investment not required for the restructuring. In the instant case, according to the Commission, the acquisition of TSE, financed by the aid, must be qualified as new investment the need for which for the purposes of the restructuring had not been demonstrated by the German authorities. Therefore the Commission considered that the aid did not satisfy the criteria of the Guidelines and, in consequence, was incompatible with the common market. According to the contested decision, however, of the purchase price of TSE, only an amount of DEM 2 200 200 had not been limited to the strict minimum needed for the restructuring of Schmitz-Gotha, since the balance, an amount of DEM 1 500 000, was subject to conditions which, at the time when TSE was acquired, were not certain to be met. According to Article 1 of the contested decision, therefore, an amount of DEM 2 200 000 (EUR 1 120 000) was incompatible with the common market. Under Article 2 of the contested decision, the Federal Republic of Germany was required to recover that amount from Schmitz-Gotha.

Procedure and forms of order sought by the parties

18 By application lodged at the Registry of the Court of First Instance on 16 January 2003, the applicant brought the present action.

19 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure.

20 The parties submitted oral argument and their answers to the questions put by the Court at the hearing on 12 January 2006.

21 The Court took note, in the minutes of the hearing, of the fact that the confidentiality of TSE's name, which had been maintained in the contested decision and in the report for the hearing, could be lifted for the purposes of the oral procedure and the judgment.

22 The applicant claims that the Court should:

— principally, annul the contested decision;

— in the alternative, annul the decision in so far as the amount of aid which it orders to be repaid is too high;

— order the Commission to pay the costs.

23 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

24 The applicant puts forward three pleas in law in support of its action. The first plea alleges an error of assessment as to whether the aid recovery of which is demanded was necessary by reference to point 3.2.2(iii) of the Guidelines. The second plea alleges misuse of powers in the adoption of the contested decision. By its third plea, which is raised in the alternative, the applicant claims that the Commission erred in law when determining the amount of the aid to be recovered.

First plea, alleging an error of assessment as regards the need for the aid

Arguments of the parties

25 The applicant disputes the Commission's finding that the aid in issue is incompatible with the common market to the extent of a part of the amount used to acquire TSE (DEM 2 200 000) on the ground that it does not comply with the conditions laid down in the Guidelines.

26 In the first place, the applicant claims that the participation in TSE was at the outset an essential and integral part of the restructuring project and that the Commission had been informed that that was so.

27 In that regard, the applicant disputes the Commission's assertion that the restructuring project provided for Schmitz-Gotha to be returned to viability within four years without the acquisition of TSE, so that that acquisition was therefore, at the most, of use to the restructuring by helping to cut the relevant period by one year. It claims that the business plan of 2 September 1997 and the annexes thereto, such as the 'Development plan — Profits and losses', the financial management plan, the plan for the development of Schmitz-Gotha's real property, which it had presented to the German authorities, based all the forecasts concerning the restructuring of Schmitz-Gotha on the merger of that undertaking with TSE. The applicant also emphasises that the 'Development plan — Profits and losses' was sent to the Commission in the annex to the letter of notification of 18 May 1998. Furthermore, the investors were prepared to bring about the restructuring of Schmitz-Gotha solely in the context of the conditions set out in the business plan, which included the acquisition of TSE.

28 The applicant further submits that there is a contradiction in the Commission's position concerning its knowledge of the identity of the investors. In its written submissions, the Commission denies having been aware of the fact that Mr Koch was one of the partners of TSE, although detailed information concerning him had been sent to the Commission before the contested decision was adopted. In that regard, the applicant refers to the letter of notification of 18 May 1998 and also to the letters sent to the Commission on 16 May and 3 July 2002. The applicant further observes that in the contested decision the Commission itself states that Mr Koch was the partner of TSE.

29 In the second place, the applicant maintains that the Commission was incorrect to find, in recital 64 of the contested decision, that TSE's participation was not necessary for the purposes of the restructuring. The applicant claims that the Commission made a manifest error of assessment, since essential facts of which the Commission was aware were not taken into consideration in the assessment of the proportionality of the aid.

30 The applicant claims that, in order to ensure the success of the restructuring, Schmitz-Gotha was to develop its own products in order to become independent of internal group orders and competitive on the market. TSE's participation meant that the know-how necessary for the development of Schmitz-Gotha's own products could be integrated directly within Schmitz-Gotha, since TSE's partners assumed responsibility, first, for management and, second, for the construction and development department within Schmitz-Gotha. The applicant therefore disputes the Commission's argument that the only motive for acquiring TSE was to reduce Schmitz-Gotha's production costs.

31 The applicant further submits that only the acquisition of TSE could ensure the integration of the know-how necessary for the restructuring. In support of its claim, it refers to the excessive costs of a proposal of TSE concerning operations for the development of the know-how by external suppliers.

32 The applicant refers to the information attached to the annex to the application, which sets out in the form of a table the development of Schmitz-Gotha's turnover resulting from sales to third undertakings (the document entitled 'Development of Schmitz-Gotha's turnover') and asserts that the significant increase in its turnover shows the impact which the direct integration of an autonomous development service, which was achieved through the acquisition of TSE, had on the success of the restructuring.

33 The applicant also claims that the Commission was in a position to assess the necessity of the participation in TSE for the purposes of the restructuring, on the basis of the information available to it, and to conclude, in consequence, that the aid was consistent with the 'strict minimum needed' criterion, within the meaning of point 3.2.2(iii) of the Guidelines. In particular, that is clear from the German authorities' letter of 3 July 2002, according to which the proportion of supplies in Schmitz-Gotha's production costs had fallen and only the participation in TSE had enabled Schmitz-Gotha to compensate for its lack of know-how.

34 The Commission observes, in the first place, that it has a wide discretion when examining the compatibility of State aid with the common market under Article 87(3) EC. The applicant's arguments do not demonstrate the existence of a manifest error of assessment in the present case and the applicant is attempting to substitute its own assessment for the Commission's.

35 The Commission emphasises, in the second place, that according to the case-law of the Court of Justice and the provisions 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), it has the power to close the procedure and to take a decision on the basis of the evidence available to it where a Member State, notwithstanding the injunction which the Commission addresses to it, omits to supply the information sought.

36 In that regard, the Commission observes that the applicant bases the alleged necessity to acquire TSE, which permitted the success of the restructuring of Schmitz-Gotha, essentially on information of which the Commission was not aware when it adopted the contested decision and which, consequently, cannot be taken into consideration by the Court.

37 In spite of the injunction addressed to the Federal Republic of Germany in the decision to initiate the formal examination procedure to supply information concerning the identity of the owners of TSE and the necessity for the investment in question, and in spite of the letter sent to the German authorities on 4 March 2002, the contracts relating to the acquisition of TSE which are annexed to the application were not communicated to the Commission before it adopted the contested decision. That is also true of the business plan, the project for the development of the applicant's know-how drawn up by TSE, both of which are annexed to the application, and also of the detailed observations on that subject in the application itself. The Commission further maintains that it never claimed to know the partner, Mr Koch. However, it observes that in the information supplied by the German authorities during the administrative procedure, Mr Koch had been mentioned rather incidentally as a partner of TSE. The Commission further claims that it was never informed of the identity of TSE's other partners.

38 The Commission contends that, on the basis of the information available to it when it adopted the contested decision, it was merely in a position to assess the utility of the acquisition of TSE, but that the necessity for that investment financed by the aid in issue was not demonstrated. The information concerning the acquisition of TSE contained in the letter of notification of 18 May 1998, and also in the letters of 10 August 2001 and 16 May, 28 May and 3 July 2002, annexed to the defence, did not permit the conclusion that the investment constituted a necessary part of the restructuring, within the meaning of the Guidelines.

39 The Commission also asserts that the information available to it essentially based the acquisition of TSE on savings achieved owing to the disappearance of an intermediate supplier and the corresponding gain, whereas in the application that aspect was placed in its context. On the assumption that that information did show that the acquisition of TSE had also made it possible to acquire the technical know-how to develop new types of products, the Commission observes that no reasons or explanation had been given for that assertion. Only in the application did Schmitz-Gotha provide a detailed and reasoned explanation for the need to acquire TSE in

order to acquire the know-how necessary for its restructuring. Throughout the administrative procedure, however, the German authorities did not explain the necessity of that transaction for the purpose of eligibility for restructuring aid.

40 In the third place, the Commission contends that the objectives of that investment, namely to reduce production costs and to acquire the know-how necessary to develop new products, could be achieved independently of the acquisition of TSE, since the manager of Schmitz-Gotha was also the manager and majority shareholder of TSE and since, consequently, he could have established special cooperation between the two undertakings.

Findings of the Court

— Preliminary observations

41 In the application of Article 87(3) of the Treaty, the Commission has a wide discretion the exercise of which involves economic and social assessments which must be made in a Community context. Judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error of assessment in regard to the facts or misuse of powers (see Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 83 and the case-law cited).

42 Furthermore, the Commission may lay down for itself guidelines for the exercise of its discretionary powers by way of documents such as the Guidelines in question,

provided that they contain directions on the approach to be followed by that institution and do not depart from the Treaty rules (Case T-214/95 *Vlaamse Gewest* v *Commission* [1998] ECR II-717, paragraph 79). Such measures reflect the Commission's desire to publish directions on the approach it intends to follow, in the light of its individual decisions in the field concerned (Case T-187/99 *Agrana Zucker und Stärke* v *Commission* [2001] ECR II-1587, paragraph 56).

43 In order to be declared compatible with the common market in application of Article 87(3)(c) EC, a restructuring aid plan for a firm in difficulty must be linked to a restructuring programme designed to reduce or redirect its activities (Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 67; and Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 45).

44 Point 3.2.2 of the Guidelines, which lays down that requirement, stipulates, in particular, that the restructuring plan must fulfil three material conditions. It is essential, first, that it restore the viability of the beneficiary firm within a reasonable timescale and on the basis of realistic assumptions (point 3.2.2(i)); second, that it avoid undue distortions of competition (point 3.2.2(ii)); and, third, that it be in proportion to the restructuring costs and benefits (point 3.2.2(iii)).

45 As those conditions are cumulative, the Commission must declare a restructuring aid plan to be incompatible if even one of those conditions has not been satisfied (Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 128; see also, to that effect, *France* v *Commission*, paragraphs 49 and 50).

46 In the present case, the contested decision was adopted on the basis of the Guidelines and, more particularly, point 3.2.2(iii).

47 It follows from that provision that the aid in question must be strictly necessary to restore the viability of the beneficiary, that is to say, that it must not only meet the objective pursued of the restructuring of the undertaking concerned, but also be proportionate to that objective, that is to say, that any aid in excess of the strict return to viability of the beneficiary cannot in principle be eligible under the Guidelines.

48 Furthermore, in order to fulfil its duty to cooperate with the Commission, the Member State concerned must provide all the information necessary to enable the Commission to verify that the conditions for the derogation from which it seeks to benefit are satisfied (see *Regione autonoma della Sardegna* v *Commission*, paragraph 129, and the case-law cited).

49 It is in the light of those considerations that the contested decision, in so far as it is, in the applicant's submission, vitiated by a manifest error of assessment, must be examined.

— The manifest error of assessment alleged by the applicant

50 In recitals 62 to 64 of the contested decision, the Commission states the following:

'(62) ... Mr Koch was one of the investors [in Schmitz-Gotha] and at the same time the founder and managing partner of TSE and the future manager of both firms. The

Commission would point out once again that, despite the information injunction, neither the purchase contract nor detailed written information on the original ownership structure of TSE were provided by Germany. Consequently, in the light of other circumstances and of information provided orally, the Commission cannot exclude the possibility that, prior to the takeover, a substantial part of TSE was directly or indirectly owned by Mr Koch or his family. Germany has stated that Schmitz-Gotha could not itself manufacture the parts obtained from TSE and was not in a position to appreciably improve the terms of delivery, and that consequently the main purpose of the takeover was to cut production costs. The Commission cannot exclude the possibility that, through the takeover of TSE, a substantial amount that should have been used to finance the restructuring was in fact paid to one of the new investors. At any rate, the takeover of TSE was not necessary in order to ensure good cooperation with TSE. Since Mr Koch was the founder and managing partner of TSE and subsequently also became the manager of Schmitz-Gotha, it appears improbable that better purchase terms could not have been agreed with TSE. Furthermore, a competitive firm should in principle be able to finance its subcontracting requirements at market prices without thereby getting into financial difficulties.

(63) The information supplied by Germany shows that the takeover of TSE was a useful investment for the company, since it resulted in substantial savings which helped to shorten the restructuring period by a year. However, this does not necessarily mean that the investment was required in order to carry out the restructuring. If a company receives aid for the purposes of financing its restructuring, in principle not every investment which increases its efficiency is permissible, since such investment also inevitably simultaneously reduces the aid recipient's ability to finance the restructuring from its own resources. Only if, without the investment, the success of the restructuring as a whole would be jeopardised or unreasonably delayed can an investment be regarded as being required for the restructuring, since the purpose of the aid is restricted to restoring the viability of the firm within a reasonable timescale. Any investment which goes beyond what is required for restoring viability within a reasonable time scale inevitably uses up financial resources which should have been used for the restructuring costs actually required and which would thus have reduced the amount of aid required for the restructuring. It follows that investment not thus

required for the restructuring results in an aid intensity that goes beyond the necessary minimum which, according to the proportionality criterion, is required for the restructuring.

(64) The cutting of supply costs cannot on its own justify the need to carry out the acquisition for the purposes of the restructuring. Furthermore, Germany has never claimed that, without the takeover of TSE, the success of the restructuring would have been jeopardised or delayed to an unreasonable extent. Even without taking account of the takeover of TSE, the original plan foresaw the achievement of a positive business result by the end of the fourth business year. According to the most recent information, this period was shortened by one year as a result of the takeover. However, a period of four years in order to achieve the profitability threshold cannot be regarded as an unreasonable period for the purposes of restructuring. On the contrary, the original plan provided for the fairly rapid restoration of viability. It must therefore be noted that, even without the takeover of TSE, the restructuring could have been carried out successfully within an appropriate period and the acquisition was not therefore necessary in order for the restructuring to be successful. Consequently, the Commission finds that the acquisition of TSE was not essential to achieving the objectives of the plan. It follows from this that the resources used for the acquisition should have been used elsewhere for the financing of the restructuring so as to reduce the amount of aid required for the restructuring.'

51 In support of its first plea, the applicant alleges, first, in substance, that the contested decision is based on an incorrect factual premiss, namely that the acquisition of TSE simply enabled the restructuring period to be shortened by one year. In support of its argument, the applicant refers to the business plan and the annexes thereto, including, in particular, the 'Development plan — Profits and losses', the financial management plan and the plan for the development of Schmitz-Gotha's fixed assets, which had been presented to the German authorities and which are to be found in the annex to the application. The applicant also claims that the Commission's assertions concerning the information which it had about the identity of TSE's shareholders are contradictory. In support of its claims, the applicant refers to the letter of notification of 18 May 1998 and also to the letters sent to the Commission on 16 May and 3 July 2002, which are annexed to the parties' submissions.

52 That line of argument cannot be upheld.

53 It should be noted at the outset that at the time of adopting the contested decision the Commission did not have the business plan on which the applicant relies, with the exception of the 'Development plan — Profits and losses', which had been annexed to the letter of notification of 18 May 1998.

54 It must be borne in mind that the legality of a Community measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted and that the assessments made by the Commission must be examined solely on the basis of the information available to it at the time when the assessments were made (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16; Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 81; Case T-123/97 *Salomon* v *Commission* [1999] ECR II-2925, paragraph 48; and Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraph 33). Consequently, the applicant cannot rely, in order to challenge the lawfulness of the contested decision, on elements of which the Commission was not aware during the administrative procedure (see, to that effect, *Spain* v *Commission*, paragraph 31). The same applies where, as in the present case, the applicant did not participate in the administrative procedure, although it was mentioned by name during that procedure as being the beneficiary of the aid in question and although the Commission had requested the German authorities and any interested parties to produce evidence that the acquisition of TSE was necessary (see, to that effect, Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle* v *Commission* [2005] ECR II-1579, paragraphs 67 to 70). Once the Commission has given the interested parties the opportunity to submit their comments, it cannot be criticised for having failed to take account of any elements of fact which could have been submitted to it during the administrative procedure but which were not, as the Commission is under no obligation to consider, of its own motion and on the basis of prediction, what elements might have been submitted to it (see, to that effect, Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraphs 48 and 49). The applicant cannot therefore rely, in support of its complaint, on the business plan enclosed with the annex to the application.

55 The position having thus been made clear, it is appropriate to observe that, although TSE was mentioned twice in the letter of notification of 18 May 1998, those references to it were clearly incidental to those relating to the restructuring of the applicant and did not indicate that the acquisition of TSE would be financed by the notified aid measures. Thus, Mr Koch was stated to be the manager of TSE, of which he was the founder. Furthermore, that document, in the section relating to Schmitz-Gotha's production, stated that '[i]n addition, vehicle production [would] be organised along particularly rational lines owing to the acquisition of the supplier TSE and to the separation of the [vehicle] construction and pre-assembly units' and that '[t]he partners of the new undertaking [would] provide production and "re-engineering" know-how'. Questioned specifically on that point at the hearing, the applicant did not succeed in explaining the reason why, in spite of its argument that the acquisition of TSE was necessary for the restructuring of Schmitz-Gotha, only those two incidental references were to be found in the letter of notification of 18 May 1998. It follows from the very terms of that letter, moreover, which are reproduced in the decision to initiate the procedure, that the restructuring of Schmitz-Gotha, which began in 1997, was to be completed during 2000. The Court finds, like the Commission in the contested decision, that that information appears entirely independently of the acquisition of TSE by Schmitz-Gotha.

56 As regards the applicant's complaint in relation to the Commission's allegedly contradictory position concerning its knowledge of Mr Koch's identity, it must be observed that, as it stated in recital 62 of the contested decision, the Commission was aware of the personal ties between Mr Koch and TSE. Admittedly, it is true that in its submissions the Commission nuanced its degree of knowledge of those links. None the less, and in any event, those remarks, made at the hearing, cannot affect the content and the lawfulness of the contested decision on that point. The applicant's criticisms in that regard are therefore inoperative.

57 Second, in relying on a number of documents annexed to the application, namely the two contracts of 9 October 1997, the business plan, the letter of notification of 18 May 1998, the document entitled 'Development of Schmitz-Gotha's turnover', TSE's plan relating to the development of know-how by external suppliers, and also the letters annexed to the defence and sent to the Commission by the Federal

Republic of Germany on 10 August 2001 and 16 May, 28 May and 3 July 2002, the applicant claims, in substance, that the acquisition of TSE, financed by the aid in issue, was consistent with the 'strict minimum needed' criterion, because the integration of TSE within Schmitz-Gotha was indispensable to enable it to develop its own products and thus become independent and competitive on the market. The applicant claims that the Commission confined itself in its assessment to considering the impact solely in terms of reducing the cost of acquiring TSE by Schmitz-Gotha, without taking into consideration the integration of the know-how, which, in the applicant's submission, could only be achieved by means of that acquisition.

58 That line of argument cannot be upheld either.

59 First of all, as the Court concluded in paragraph 54 above in respect of the business plan, which, as it was produced for the first time during the proceedings before the Court, cannot be taken into account by the Court for the purpose of examining the lawfulness of the contested decision, the two contracts of 9 October 1997 and TSE's plan for the development of know-how by external suppliers cannot be taken into account, as it is common ground that those documents were not communicated to the Commission before it adopted the contested decision.

60 It follows that the complaint alleging manifest error of assessment by the Commission in recitals 62 to 64 of the contested decision must be examined solely on the basis of the documents available to the Commission at the time when it adopted that decision, namely the letter of notification of 18 May 1998 (including Schmitz-Gotha's 'Development plan — Profits and losses' annexed to that letter), the document entitled 'Development of Schmitz-Gotha's turnover' and also the letters sent to the Commission by the Federal Republic of Germany on 10 August 2001 and 16 May, 28 May and 3 July 2002.

61 Last, as regards those documents, it must be borne in mind that in the letter of notification of 18 May 1998 the Federal Republic of Germany observed, first, that vehicle production within Schmitz-Gotha was organised along particularly rational lines owing to the acquisition of the supplier TSE and to the separation of the vehicle construction and the pre-assembly units and, second, that the partners of the new undertaking provided production and 're-engineering' know-how.

62 In their letter of 10 August 2001, the German authorities set out two consequences of the acquisition of TSE. First, they stated that that acquisition permitted 'a reduction in production costs owing to the elimination of an intermediate supplier and of its profit margin'. Second, they asserted that the acquisition led to 'the acquisition of technical know-how ... which [allowed] production properly so-called to be tied in with technical development capacities in order to achieve competitiveness'.

63 In their letter of 16 May 2002, moreover, concerning the interest in acquiring TSE, the German authorities emphasised that 'for Schmitz-Gotha, the acquisition of TSE assumed ... considerable interest, primarily in terms of costs'. Furthermore, as regards know-how, they stated: 'Schmitz-Gotha had no other means of obtaining the technology developed by TSE in the manufacture of components. The cost of developing components internally and of manufacturing them for the undertaking's own production would have been too high in money and time to maintain Schmitz-Gotha's profitability, particularly as Schmitz-Gotha had virtually no know-how in that area'.

64 In its letter of 28 May 2002, the Federal Republic of Germany also claimed that the necessity of the TSE acquisition was based, first, on the need to obtain automobile components of a high technical and qualitative standard that 'Schmitz-Gotha could not ... buy in sufficient quantities to benefit from the price conditions essential for a

reduction in costs, which allow[ed] a more competitive price policy' and, second, on the fact that Schmitz-Gotha 'had no other means of obtaining the technology developed by TSE in the manufacture of components'.

65 In its letter of 3 July 2002, which was again referred to by the applicant at the hearing, the Federal Republic of Germany expanded on the information set out above. Thus, it stated that, owing to the participation in TSE, the proportion of supplies in Schmitz-Gotha's production costs had fallen, that the acquisition represented a potential saving, over the period 1998 to 2002, of a little under DEM 5 000 000 and that Schmitz-Gotha had attained profitability one year before the projected end of the restructuring period. The German authorities concluded, in particular, that the acquisition of TSE was essential in order to reduce the applicant's supply costs, that only the participation in TSE had enabled Schmitz-Gotha to make up for the lack of know-how and that Schmitz-Gotha was not in a position to negotiate discounts of the size of those granted to other undertakings.

66 The document entitled 'Development of Schmitz-Gotha's turnover' attached to the annex to the application sets out, in the form of a table, Schmitz-Gotha's turnover on sales to third undertakings between 1997 and 2000.

67 It follows from all of the above letters that the German authorities, first, essentially emphasised the savings in production costs which the acquisition of TSE would entail for Schmitz-Gotha, by eliminating the intermediary of a supplier, and, second, asserted that that transaction had brought the know-how which the applicant needed in order to develop its products.

68 As regards the first explanation, the Court observes, as the Commission correctly stated, that such cost savings do not demonstrate that the restructuring of Schmitz-

Gotha would not have succeeded within the period initially envisaged without the acquisition of TSE, that is to say, ultimately, by investments less costly in State resources. In particular, the fact, highlighted in the letter of 3 July 2002, on which the applicant relies, that Schmitz-Gotha was able to make such savings between 1998 and 2002, that is to say, after payment of the aid in issue, does not constitute proof that the acquisition of TSE by the applicant was strictly necessary to Schmitz-Gotha's restructuring and that that transaction could thus be financed by State aid.

69 As regards the integration of TSE's know-how within the applicant's activities, it follows from the abovementioned letters that the German authorities confined themselves to confirming the necessity of the acquisition of TSE, without explaining why the acquisition of TSE was strictly necessary in order to arrive at such a result, in accordance with point 3.2.2(iii) of the Guidelines. The German authorities did not succeed in explaining why the most economical means in terms of the use of public funds of acquiring the know-how necessary for the development of Schmitz-Gotha's automobile components consisted in financing the acquisition of TSE in its entirety.

70 It is admittedly true, as the applicant suggests, that in the grounds of the contested decision the Commission briefly analysed the German authorities' argument that the acquisition of TSE was necessary in order to allow Schmitz-Gotha to obtain the know-how relating to the development of automobile components.

71 However, apart from the fact that the correct place for that question is not in an analysis of an alleged manifest error of assessment but in a possible failure to state adequate reasons, it must be borne in mind that in recital 62 of the contested decision the Commission indicated, in substance, that in any event the acquisition of TSE was not necessary in order to ensure good cooperation with that undertaking,

since, in particular, Mr Koch, as manager of both Schmitz-Gotha and TSE and majority shareholder in TSE, could probably have obtained better purchase terms from TSE.

72 Nor can the Court accept the applicant's assertion that it was impossible for the applicant to acquire the necessary know-how from external suppliers of services, owing to the excessive costs of such services, which in the applicant's submission was demonstrated by the TSE project, dated 17 August 1997, on the development of know-how by external suppliers, which appears in the annex to the application.

73 It must be borne in mind that, in the context of a review of the lawfulness of the contested decision, a document in that annex cannot be taken into consideration by the Court (see paragraph 59 above). Furthermore, even on the assumption that that document might be taken into account, it is not in itself sufficient to demonstrate that the acquisition of TSE in its entirety was strictly necessary to enable the applicant to obtain the know-how necessary for the purposes of its restructuring, within the meaning of point 3.2.2(iii) of the Guidelines.

74 Last, as regards the document entitled 'Development of Schmitz-Gotha's turnover', which is also annexed to the application, although that document does admittedly state that Schmitz-Gotha's turnover increased significantly during the period 1997 to 2000, it does not in itself establish either the link between that increase and the acquisition of TSE or a fortiori the need to acquire TSE for the purposes of the applicant's restructuring, within the meaning of point 3.2.2(iii) of the Guidelines. It follows that, even by failing specifically to analyse that document in the contested decision, the Commission did not vitiate its assessment by a manifest error.

75 For the sake of completeness, the Court observes that in all the documents mentioned above which were available at the time of adoption of the contested decision, the German authorities did not at any time describe precisely the nature of the know-how from which Schmitz-Gotha was able to benefit owing to the acquisition of TSE.

76 It follows that, on the basis of the information available to the Commission at the time of adopting the contested decision, the applicant has not succeeded in showing that that decision, in that it considered that the German authorities had not adduced proof of the need to acquire TSE for the purposes of the restructuring of Schmitz-Gotha, within the meaning of point 3.2.2(iii) of the Guidelines, was vitiated by a manifest error of assessment.

77 The first plea in law must therefore be rejected.

Second plea, alleging misuse of powers

Arguments of the parties

78 The applicant maintains, in substance, that the contested decision reveals a misuse of powers in so far as the Commission relied on subjective considerations when adopting it.

79 More specifically, the applicant contends that the contested decision was adopted with the aim of sanctioning an alleged enrichment of Mr Koch, who is alleged to have acted for his own gain, by using public funds to buy an undertaking which already belonged to him. The applicant claims that when the Commission adopted the contested decision it failed to take into account the considerations of fact relating to the need to acquire TSE in order to ensure the success of the restructuring of Schmitz-Gotha.

80 The Commission replies that this plea is unfounded.

Findings of the Court

81 According to the case-law, a decision is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the sole, or at least the decisive, aim of achieving purposes other than those stated (Case T-46/89 *Pitrone* v *Commission* [1990] ECR II-577, paragraph 71, and Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1385, paragraph 84).

82 It must be held that in support of its plea the applicant has not put forward any objective factor from which it might be concluded that the real aim pursued by the Commission when it adopted the contested decision was to sanction an alleged enrichment of the manager of Schmitz-Gotha.

83 Admittedly, in recital 62 of the contested decision, the Commission referred to the particular feature of the transaction in question, observing, in substance, that Mr Koch, as an investor in the applicant and its sole manager, had sold to the applicant

an undertaking which he ran and which already belonged to him and that he had had the purchase price paid by the Federal Republic of Germany by means of the aid in issue.

84 However, as explained above in the context of the assessment of the applicant's first plea, it clearly follows from recitals 63 and 64 of the contested decision that the Commission relied on objective factors to find that the conditions laid down in point 3.2.2(iii) of the Guidelines were not satisfied in the present case.

85 Consequently, the applicant's second plea must be rejected.

Third plea, put forward in the alternative, alleging an error on the part of the Commission as regards the amount of the aid to be recovered

Arguments of the parties

86 The applicant submits that even if the Court were to consider that the acquisition of TSE was incompatible with the common market, only the amount of DEM 1 500 000 could be recoverable. The applicant claims that part of the purchase price, around DEM 700 000, does not contravene the State aid rules, since there was no risk of a loss. The applicant refers, in particular, to its liquid assets, accrued annual surpluses and capital, which it had at its disposal and on which it could have drawn immediately.

87 The Commission contends that the applicant's claims should be rejected.

Findings of the Court

88 As indicated above, the assessment of the compatibility of the aid in issue is based on whether or not it was necessary for the purposes of the restructuring of the undertaking concerned. Contrary to the applicant's contention, the risk involved in the investment in question has no bearing on that question. The fact that the aid was used to finance what proved to be a risk-free investment is therefore irrelevant in the present case.

89 Furthermore, it must be borne in mind that, according to point 3.3.3(iii) of the Guidelines, '[t]o limit the distortive effect, the form in which the aid is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process'. In the circumstances of the present case, any partial recovery of the incompatible aid would have entailed the risk that Schmitz-Gotha would have surplus cash, within the meaning of point 3.2.2 of the Guidelines. The Commission was therefore correct to require, in Article 2 of the contested decision, recovery of the amount of DEM 2 200 000.

90 Accordingly, the third plea must be rejected and the action must be dismissed in its entirety.

Costs

91 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 are applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

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

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Legal Lindh Mengozzi

Wiszniewska-Białecka Vadapalas

Delivered in open court in Luxembourg on 6 April 2006.

E. Coulon H. Legal

Registrar President