

Case T-27/02

Kronofrance SA

v

Commission of the European Communities

(State aid — Commission decision not to raise objections — Action for annulment
— Admissibility — Multisectoral framework on regional aid
for large investment projects)

Judgment of the Court of First Instance (Fourth Chamber, Extended Composition), 1 December 2004 II - 4182

Summary of the Judgment

1. *Actions for annulment — Pleas in law — No capacity to bring proceedings — Ground involving a question of public policy — Consequences*
2. *Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Commission decision addressed to a Member State finding State aid compatible with the common market without initiating the formal investigation procedure — Actions by parties concerned within the meaning of Article 88(2) EC — Admissibility (Arts 88(2) and (3) EC and 230, fourth para., EC; Council Regulation No 659/1999, Arts 4 and 6)*

3. *State aid — Plans to grant aid — Examination by the Commission — Preliminary review and main review — Compatibility of aid with the common market — Difficulties in making assessment — Commission's duty to initiate the inter partes procedure*
(Art. 88(2) and (3) EC; Council Regulation No 659/1999, Art. 4)
4. *State aid — Examination by the Commission — Discretion of the Commission — Possibility of adopting guidelines — Aid falling within the multisectoral framework — Binding effect — Judicial review*
(Art. 87(3) EC)
5. *State aid — Plans to grant aid — Examination by the Commission — Multisectoral framework on regional aid for large investment projects — Calculation of the maximum allowable aid intensity — Assessment of the competition factor — Assessment criteria*
(Art. 87 EC; Multisectoral framework on regional aid for large investment projects, points 3.4 and 3.10.1)

1. A plea of inadmissibility alleging that the applicant lacks *locus standi* constitutes a ground involving a question of public policy which may, and even must, be raised of its own motion by the Community judicature and, consequently, may be raised by the defendant at any stage of the proceedings.

(see para. 30)

prima facie opinion on the partial or complete compatibility of the aid in question with the common market, must be distinguished from the formal investigation procedure referred to in Article 88(2) EC and Article 6 of Regulation No 659/1999, which is designed to enable the Commission to be fully informed of all the facts of the case. It is only in the context of the latter procedure that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments.

2. In the context of supervision by the Commission of State aid, the preliminary stage of the procedure for reviewing aid, established by Article 88(3) EC and governed by Article 4 of Regulation No 659/1999, which is intended merely to enable the Commission to form a

Where, without initiating the procedure under Article 88(2) EC, the Commission finds on the basis of Article 88(3) EC that an aid is compatible with the

common market, the persons intended to benefit from the procedural guarantees provided for in Article 88(2) EC may secure compliance therewith only if they are able to challenge that decision by the Commission before the Community judicature. Therefore, where, by an action for annulment of a Commission decision taken at the end of the preliminary stage, an applicant seeks to secure compliance with the procedural guarantees provided for in Article 88(2) EC, the mere fact that it has the status of a 'party concerned' within the meaning of that provision is sufficient for it to be regarded as directly and individually concerned for the purposes of the fourth paragraph of Article 230 EC. The 'parties concerned' are any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

(see paras 32-34, 37)

without any extensive review being called for, whether it is compatible with the Treaty or whether, on the other hand, the content of the aid raises doubts as to its compatibility.

The formal investigation stage which enables the Commission to be fully informed of all the details of the case before adopting its decision becomes essential whenever the Commission has serious difficulties in determining whether the aid is compatible with the common market. The Commission may therefore restrict itself to the preliminary examination before adopting a decision raising no objections to new aid only if it is able to satisfy itself after that examination that the project is compatible with the Treaty. If, on the other hand, that initial examination leads the Commission to the opposite conclusion, or does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to obtain all the requisite opinions and for that purpose to initiate the formal investigation procedure provided for in Article 88(2) EC.

3. The preliminary examination established by Article 88(3) EC and governed by Article 4 of Regulation No 659/1999 is intended merely to allow the Commission a sufficient period of time for reflection and investigation so that it can form a *prima facie* opinion of the aid plans notified to it and then conclude,

(see paras 49-52)

4. Although the Commission, for the purposes of applying Article 87(3) EC, enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context, it may adopt a policy as to how it will exercise its discretion in the form of measures such as guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the Treaty. When the Commission adopts guidelines which are consistent with the Treaty and are designed to specify the criteria which it intends to apply in the exercise of its discretion, it itself limits that discretion in that it must comply with the indicative rules which it has imposed upon itself. In that context, it is for the Court to verify whether those rules have been observed by the Commission.

In determining whether aid within the multisectoral framework is compatible with the common market, the adjustment factor to be applied for the competition factor is derived from an analysis of the structural and economic situation on the market which the Commission must make, when adopting its decision, on the basis of the objective criteria laid down in the multisectoral framework. The Commission's assessment with regard to the specific factor applicable determines the amount of aid

which may be declared compatible with the common market.

(see paras 79, 102)

5. Where, when called upon to apply the multisectoral framework on regional aid for large investment projects, the Commission makes an assessment of the 'competition factor', which is relevant for determining on a case-by-case basis the maximum allowable aid intensity for projects subject to notification, the analysis carried out for the purpose of determining whether the sector in question is suffering from structural overcapacity constitutes the first analysis that must be made. It follows, however, from point 3.10.1 of that framework that that priority given to determining whether structural capacity does or does not exist does not mean that the Commission may in any case confine itself to carrying out that analysis alone when it has data on the capacity utilisation rate in the sector concerned. The application of the highest adjustment factor, which provides the maximum amount of the aid capable of being declared compatible with the common market, implies a prior finding that there is no structural overcapacity in the sector concerned and also that the market is a declining market, unless it were to be interpreted as meaning that the absence of such overcapacity necessarily implies the

absence of a declining market for the products in question, which would amount to denying the specificity of those two criteria for the assessment of the 'competition factor'.

In those circumstances, point 3.4 of the multisectoral framework must be understood as meaning that, where the data on capacity utilisation in the sector concerned do not allow the Commission to

reach the positive conclusion that there is structural overcapacity, the Commission must consider whether the market in question is a declining market. That interpretation of the multisectoral framework is the only interpretation consistent with Article 87 EC and with the objective of undistorted competition which that provision seeks to achieve.

(see paras 90-91, 96-98)