

The applicant also submits that the application of Article 87(1) EC is not excluded by Directive 92/81/EEC. That directive does not create any exemption from the law on State aid, the directive being based exclusively on Article 93 EC but not also on Article 88(2) EC or Article 87(3)(e) EC. The Commission's view disregards the principles of the primacy of the Treaty over provisions of secondary law and leads to an incorrect application of Articles 87 and 88 EC.

(¹) Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12).

Action brought on 4 December 2002 by Freistaat Sachsen against the Commission of the European Communities

(Case T-357/02)

(2003/C 31/29)

(Language of the case: German)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 4 December 2002 by the Freistaat Sachsen (Germany), represented by T. Lübbig, lawyer.

The applicant claims that the Court should:

- annul Article 2(2), Article 3 and Article 4 of Commission Decision C(2002) 2606 of 24 September 2002 on Germany's intended aid rules 'Guidelines on the promotion of small and medium-sized businesses — Improvement of efficiency of enterprises in Sachsen';
- order the defendant to pay the costs.

Pleas in law and main arguments

In the context of its promotion of small businesses, the applicant grants members of the professions and small and medium-sized enterprises with a registered office or place of business in Sachsen, on application, subsidies by way of the promotion of projects in order to promote the economy. This promotion is based on the 'Guidelines of the Sachsen State Ministry for the Economy and Labour on the promotion of small and medium-sized businesses — Improvement of the

efficiency of enterprises'. These guidelines were first notified to, and approved by, the Commission in 1992. The purpose of the notification which gave rise to the contested decision was to acquire a renewed extension of the approval with effect from 1 January 2001 for a five-year period until 31 December 2006.

In its application the applicant complains that the Commission found that the four part-programmes 'coaching', 'participation in trade fairs', 'cooperation' and 'promotion of product design' of the above guidelines were not compatible with the common market inasmuch as they exceeded the scope and the intensity of aid laid down in Regulation (EC) No 70/2001 (¹). Moreover, the applicant challenges the finding that the part-programme 'cooperation' provides for operating aid that is incompatible with the common market and that Germany may implement the four abovementioned part-programmes only when they have been brought into conformity with the contested decision.

The applicant submits that the Commission's findings are in many respects incorrect both substantively and also procedurally. It claims that, the Commission, in breach of its Communication on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes (²), reached its decision under the normal procedure and wrongly based its conclusions as to the compatibility of the aid measure notified by the applicant exclusively on Regulation (EC) No 70/2001. The Commission ought to have based its decision on the Community guidelines on State aid for small and medium-sized enterprises (³) applicable at the time of the notification, under which the notified aid measure is compatible with the common market.

In the alternative, the applicant submits that the Commission ought to have authorised the notified aid measure even if this had been examined on the basis of Regulation (EC) No 70/2001, which entered into force only after the notification.

Finally, the applicant claims that the Commission has not adequately shown the existence of a restriction of competition.

(¹) Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ 2001 L 10, p. 33).

(²) OJ 1992 C 213, p. 10.

(³) OJ 1996 C 213, p. 4.