ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
2 August 2001 *

In Case T-111/01 R,

Saxonia Edelmetalle GmbH, established in Halsbrücke (Germany), represented by P. von Woedtke, 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 the suspension of operation of Commission Decision C (2001) 1028 of 28 March 2001 on State aid implemented by the Federal Republic of Germany for EFBE Verwaltungs GmbH & Co. Management KG (now Lintra Beteiligungsholding GmbH, a holding company which includes Zeitzer Maschi-

* Language of the case: German.

nen, 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),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES,

makes the following

Order

Facts and procedure

1 Following the procedure under Article 88 EC, the Commission adopted on 28 March 2001 Decision C (2001) 1028 on State aid implemented by the Federal Republic of Germany for EFBE Verwaltungs GmbH & Co. Management KG (now Lintra Beteiligungsholding GmbH, a holding company which includes 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) ('the decision'), in which part of the said aid was declared to be incompatible with the common market.

2 Under Article 2 of the decision, that part of the aid was in the sum of DEM 34.978 million.

3 Under Article 3 of the decision the Commission required the Federal Republic of Germany to take all necessary measures to recover DEM 34.978 million from Lintra Beteiligungsholding GmbH and its subsidiaries, of which the applicant was one. As far as the applicant was specifically concerned, it was jointly and severally liable with Lintra Beteiligungsholding GmbH for the repayment of the sum of DEM 3 195 559, plus interest thereon.

4 The Federal Republic of Germany brought proceedings for the recovery of the sums in issue. Thus, by letters of 17 April and 9 May 2001, the applicant was requested to repay the sum of DEM 3 195 559, together with interest of DEM 907 406.47.

5 On 23 May 2001 the applicant brought an action before the Court of First Instance seeking the annulment of the decision, pursuant to Article 230 EC.

6 By separate document, lodged at the Court Registry on 14 June 2001, the applicant also introduced the present application for suspension of operation of the decision. That application was based on Article '243 EU'.

7 On 2 July 2001, the Commission lodged its observations on that application.

8 Although not invited to do so the applicant submitted, on 10 July 2001 further written observations in reply to those of the Commission. The President of the

Court of First Instance decided to add the applicant's further observations to the file, and the Commission lodged further observations in reply on 12 July 2001.

9 With the file as such, the President of the Court of First Instance deems that he has all the necessary information to determine the present application for interim measures, without needing to hear the parties' oral submissions.

Law

10 In accordance with the combined provisions of Articles 242 EC and 243 EC, and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court may order, if it considers that circumstances so require, that application of the contested act be suspended, or prescribe any necessary interim measures.

11 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case (*fumus boni juris*) for the interim measures applied for. These conditions are cumulative, so that an application to suspend the operation of any measure must be dismissed if one of them is lacking (order of the President of the Court of First Instance in Case T-211/98 R *Willeme* v *Commission* [1999] ECR-SC I-A-15 and II-57, paragraph 18). Where appropriate, the judge hearing the application must also balance the interests involved (order of the President of the Court in Case C-107/99 R *Italy* v *Commission* [1999] ECR I-4011, paragraph 59).

12 In the context of that general examination, the judge hearing the application has a wide discretion, and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (order of the President of the Court in Case C-363/98 P(R) *Emesa Sugar* v *Council* [1998] ECR I-8787, paragraph 50).

Admissibility

Arguments of the parties

13 The Commission points out, by way of a preliminary remark, and without formally raising a plea of inadmissibility, that the applicant has brought its application on the basis of Article 243 EU instead of Article 242 EC. It submits that the reference to the EU Treaty is clearly wrong, as that treaty does not have an Article 243, which means that the applicant can, undoubtedly, only be referring to Article 243 EC. Furthermore, it submits that Article 243 EC does not regulate the suspension of application of a contested measure by separate application, but gives the Court the power to prescribe interim measures. The present application rather leads the Commission to conclude that the applicant, in fact, seeks the suspension of application of the decision pursuant to Article 242 EC.

14 Next, the Commission submits that the applicant has no interest, in the context of the main action, in obtaining the annulment of the decision. If the Court found in favour of the application, the Commission would have to adopt a new decision in which it could only find the subsidiaries of Lintra Beteiligungsholding GmbH jointly and severally liable for the whole of the debt, so that the applicant would have to contribute a much higher amount to the repayment of the aid. It follows that the application for interim measures must be dismissed, given that the application on which it is based is inadmissible.

Findings of the President of the Court

15 It is clear, as the Commission has pointed out, that the application for interim measures must be read as meaning that, instead of being based on Article 243 EU, which does not exist, it is based on Article 243 EC. Furthermore, notwithstanding the fact that Article 242 EC expressly provides that the Court has the power to order that application of the contested act be suspended, as is applied for in the present case, Article 243 EC can also provide a legal basis for such an application.

16 According to settled case-law the issue of the admissibility of the main application should not, in principle, be examined in proceedings relating to an application for interim measures. Where, however, as in this case, it is contended that the main application from which the application for interim measures is derived is manifestly inadmissible, it may prove necessary to establish the existence of certain factors which would justify the prima facie conclusion that the main application is admissible (orders of the President of the Court in Case 221/86 R *Groupe des droites européennes and Front national* v *Parliament* [1986] ECR 2969, paragraph 19, and in Case 376/87 R *Distrivet* v *Council* [1988] ECR 209, paragraph 21; order of the President of the Court of First Instance in Case T-222/99 R *Martinez and de Gaulle* v *Parliament* [1999] ECR II-3397, paragraph 60).

17 As to the issue of whether the applicant has a legal interest in bringing proceedings, it suffices to point out that the decision imposes joint and several liability on the applicant to repay the sum of DEM 3 195 559, plus interest thereon. It follows that it has a legal interest in obtaining the annulment of that measure. The Commission's argument that in the event of the main application succeeding it would have to adopt a new decision that would necessarily be more unfavourable to the applicant cannot be upheld. The Commission cannot yet be in a position to determine the content of a measure that it might be required to adopt if the main application were held to be well-founded.

18 Since it cannot be excluded that the main application is admissible, it is necessary to go on to consider the condition of urgency.

Urgency

Arguments of the parties

19 The applicant simply states as follows in support of its application to suspend application of the decision:

'On the basis of the defendant's contested decision, the BVS ordered the applicant, by letters of 17 April 2001 (Annex K2) and 9 May 2001 (Annex K1), to repay the sum of DEM 3 195 559 plus interest thereon of DEM 907 406.47 within a limited time.

The necessary urgency for the purposes of an order suspending application of the measure arises from the BVS's letters. There is a very real risk that the BVS will attempt to recover the sum claimed, whether by administrative means or by separate proceedings against the applicant. In either case, the applicant would defend itself. By letter of 16 May 2001, it has already refused outright to accede to the BVS's request. If only because of the costs involved, such proceedings should be avoided.

2. Urgency arises from the enclosed letters of the BVS.

If the applicant were to comply with the measures sought by the BVS, it would suffer significant loss. The sum of about DEM 4 million puts the applicant in serious difficulty. According to information available to us, the applicant is not in a position to meet that sum without jeopardising its existence. That constitutes irreparable damage.

Payment of the sum demanded will result in a real threat to the applicant's existence.'

20 The Commission argues that the applicant has not shown that it risks suffering serious and irreparable damage should no order suspending application be made. In the Commission's observations of 12 July 2001, in reply to those of the applicant, it pointed out amongst other things that the applicant has not challenged the Commission's analysis on the question of urgency, set out in its observations of 2 July 2001.

Findings of the President of the Court

21 According to settled case-law, the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for those measures. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that kind (orders of the President of the Court of First Instance in Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] II-2769, paragraph 36, and in Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 43; order of the President of the Court in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 14).

22 Whilst it is true that, in order to establish the existence of such damage, it is not necessary for the occurrence of the damage to be demonstrated with absolute certainty, it being sufficient to show that the damage is foreseeable with a sufficient degree of probability, the applicant is required to prove the facts forming the basis of its claim of serious and irreparable harm (orders of the President of the Court in Case C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67, Case C-377/98 R *Netherlands* v *Parliament and Council* [2000] ECR I-6229, paragraph 51, and *Greece* v *Commission*, cited above, paragraph 15).

23 In the present case the damage alleged by the applicant is of a financial nature. In this respect it must be pointed out that, as the Commission has argued, according to well established case-law such damage cannot, in principle, be regarded as irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation (orders of the President of the Court in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 24, and of the President of the Court of First Instance in Case T-70/99 R *Alpharma* v *Council* [1999] ECR II-2027, paragraph 128).

24 Applying these principles, the suspension requested would only be justified in the circumstances of this case if it appeared that, without such a measure, the applicant would be placed in a situation likely to endanger its very existence.

25 In this case it must be held that the applicant has not adduced any evidence as to its financial position. It merely asserts, without giving reasons, that if no order suspending application of the decision were made repayment of the aid in question would jeopardise its existence. By contrast, it appears from the documents produced by the Commission, annexed to its observations, and this point was not challenged by the applicant in its observations of 10 July 2001, that the Vereinigte Deutsche Nickel-Werke AG group, which acquired the applicant company on 13 June 1997, has considerable financial strength enabling it prima facie to repay the aid in question.

26 It should be noted, in this respect, that it appears from the same documents that neither the applicant nor this group appears to be in financial difficulty. Indeed, it appears from the annual report for the year 2000, and from a press release from the group in question, that the annual profit of the latter increased from DEM 48.9 million in 1999 to DEM 64.3 million in 2000, being an increase of 31.5%. It also appears from this document that, for the year 2000, the applicant had a turnover of DEM 312 million, which was an increase of 86.8% on that of the preceding year when the figure was DEM 167 million.

27 It should be noted that, in the examination of the applicant's financial viability, the assessment of its material circumstances may include consideration, in particular, of the characteristics of the group to which it is linked by way of its shareholders (order of the President of the Court in Case C-43/98 P (R) *Camar* v *Commission and Council* [1998] ECR I-1815, paragraph 36; orders of the President of the Court of First Instance in Case T-260/97 R *Camar* v *Commission and Council* [1997] ECR II-2357, paragraph 50, and in Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 155, confirmed by the order of the President of the Court in Case C-329/99 P(R) *Pfizer Animal Health* v *Council* [1999] I-8343, paragraph 67).

28 The applicant having failed to substantiate its assertions of irreparable damage arising from the enforcement of the decision, the condition of urgency is not satisfied. In this respect, it must be noted that it is not for the judge hearing the application for interim measures to compensate of his own motion for such a lack of evidence.

29 Accordingly, the application for the adoption of interim measures must be dismissed, without it being necessary to consider whether the condition of *fumus boni juris* is met.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The application for interim measures is dismissed.**

2. **The costs are reserved.**

Luxembourg, 2 August 2001.

H. Jung
Registrar

B. Vesterdorf
President