

Case T-20/03

Kahla/Thüringen Porzellan GmbH

v

Commission of the European Communities

(State aid — Existing aid or new aid — Firms in difficulty — Principle of legal certainty — Principle of the protection of legitimate expectations — Private investor test — Compatibility with the common market — Conditions)

Judgment of the Court of First Instance (Fifth Chamber, Extended Composition), 24 September 2008 II - 2309

Summary of the Judgment

1. *State aid — General aid scheme approved by the Commission — Individual aid presented as covered by the approval*
(Arts 87 EC and 88 EC)
2. *State aid — Definition — Measure with a social purpose*
(Art. 87(1) EC)

3. *State aid — Definition — Financial aid granted to an undertaking by public authorities*
(Art. 87(1) EC)
4. *State aid — Definition — Application of the private investor test*
(Art. 87(1) EC)
5. *State aid — Prohibition — Exceptions — Discretion of the Commission — Possibility of adopting guidelines*
(Art. 87(3) EC; Commission Notice No 94/C 368/05)

1. Once a general scheme of aid has been approved by the Commission, the individual implementing measures do not need to be notified to the Commission, unless the Commission has issued certain reservations to that effect in the approval decision. Since the individual grants of aid are merely individual measures implementing the general aid scheme, the factors to be taken into consideration by the Commission in assessing that aid are the same as those which it applied on examining the general scheme. It is therefore unnecessary for the individual grants of aid to be subject to examination by the Commission. By contrast, if the individual measures are not covered by the general schemes relied on they constitute new aid measures whose compatibility with the common market has to be examined by the Commission.

falls within the scope of the Commission's obligation to ensure the application of Articles 87 EC and 88 EC. Consequently, the Commission's examination of the consistency of an aid measure with that scheme does not constitute a step that exceeds its powers. Therefore, the Commission's assessment cannot be limited by the assessment of the national authorities that granted the aid.

(see paras 92, 94, 95)

A Commission decision ruling on whether an aid measure is consistent with an approved general aid scheme

2. Action by the public authorities intended to relieve an undertaking of financial burdens constituting a cost inherent in its economic activity, such as labour costs, amounts to an economic advantage of the kind referred to in Article 87(1) EC. The social character of State intervention is not sufficient to

exclude it outright from being categorised as aid for the purposes of Article 87 EC.

Even though nothing precludes public authorities from taking into consideration social, regional or sectoral policies, a subscription of capital by them must be assessed in the light of the private investor test, leaving aside all social considerations or regional or sectoral policy.

(see paras 194, 197)

3. In order to determine whether investment by public authorities in the capital of undertakings, in whatever form, may constitute State aid, it is necessary to consider whether in similar circumstances a private investor of a size comparable to that of the public investor might have been prompted to engage in a transaction of such an extent. In that regard, although the conduct of a private investor with which the intervention of a public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term. In addition, the comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of the transaction in question, having regard to the available information and foreseeable developments at that time.

Even though no State aid is involved where an intervention by public authorities takes place at the same time as a significant intervention by private operators and under comparable conditions, the presence of aid cannot however be ruled out where private investments in the same undertaking occur only after the allocation of public funds.

(see paras 236-238, 242, 254)

4. The assessment by the Commission of the question whether a measure satisfies the test of a private operator in a market economy involves a complex economic appraisal. Where the Commission adopts a measure involving such an appraisal, it enjoys a wide discretion and, even though judicial review is in principle a comprehensive review of whether a measure falls within the scope of Article 87(1) EC, review of that measure is limited to establishing whether there has been compliance with the rules

governing procedure and the statement of reasons, whether any error of law has been made, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision.

(see para. 239)

5. Article 87(3) EC confers on the Commission a wide discretion to authorise State aid by way of derogation from the general prohibition laid down in Article 87(1) EC, since the determination in such a case of the question whether aid is or is not compatible with the common market raises problems which presuppose the examination and appraisal of complex economic facts and conditions. Since it is not for the Community judicature to substitute its own assessment of the facts, particularly the economic circumstances, for that of the author of the decision, the Court must, in such a context, confine its review to determining whether the Commission complied with the rules governing procedure and the provision of the statement of reasons, whether the facts are accurately stated and whether there has been any manifest error of assessment or misuse of powers.

Moreover, the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure

was adopted and the complex assessments made by the Commission must be examined solely on the basis of the information available to it at the time when those assessments were made.

In addition, the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as the Community guidelines on State aid for rescuing and restructuring firms in difficulty, 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.

Therefore, aid granted to a firm in difficulty cannot be declared compatible with the common market on the sole ground that restructuring was envisaged, even if the restructuring ends up being successful. In order for the Commission to be in a position to assess whether the aid granted can encourage the beneficiary undertakings to act in a way that contributes to achieving the aim set out in Article 87(3)(c) EC, it must first check whether the restructuring plan fulfils all the substantive conditions laid down in the said guidelines on aid for rescuing and restructuring firms in difficulty.

(see paras 268-270, 280)