ORDER OF THE PRESIDENT OF THE COURT

29 April 2005 *

In Case C-404/04 P-R,

APPLICATION under Articles 242 EC and 243 EC for interim measures, brought on 14 October 2004,

Technische Glaswerke Ilmenau GmbH, represented by C. Arhold and N. Wimmer, Rechtsanwälte, with an address for service in Luxembourg,

applicant,

the other parties to the proceedings being:

Commission of the European Communities, represented by V. Di Bucci and V. Kreuschitz, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: German.

Schott AG, formerly Schott Glas, represented by U. Soltész, Rechtsanwalt,

intervener at first instance,

THE PRESIDENT OF THE COURT,

having heard Advocate General C. Stix-Hackl,

makes the following

Order

1 By its application for interim measures, Technische Glaswerke Ilmenau GmbH ('the applicant') requests the President of the Court to grant, primarily, the suspension of operation of Article 2 of Commission Decision 2002/185/EC of 12 June 2001 on State aid implemented by Germany for Technische Glaswerke Ilmenau GmbH, Germany (OJ 2002 L 62, p. 30; 'the contested decision'), either until the Court gives a definitive ruling on the appeal lodged by the applicant on 22 September 2004 in Case C-404/04 P or until such date as the President of the Court shall determine or, in the alternative, any other or additional measure which the President of the Court may consider necessary or appropriate.

Background to this application for interim measures

2 By the contested decision, the Commission found that the Federal Republic of Germany had granted the applicant aid that was incompatible with the common market in the sum of DEM 4 million. In Article 2 of the decision, that Member State was ordered to demand repayment of that aid without delay.

3 The applicant asked the Court of First Instance of the European Communities to annul the contested decision. In the course of the proceedings, the President of the Court of First Instance granted interim relief on several occasions which had the effect, in substance, of suspending the obligation to repay the sum at issue until the end of the proceedings before the Court of First Instance, but on condition that the applicant repay a part of that sum, which it did indeed do (see the orders of the President of the Court of First Instance of 4 April 2002 in Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153, of 1 August 2003 in Case T-198/01 R[II] *Technische Glaswerke Ilmenau* v *Commission* [2003] ECR II-2895, and of 12 May 2004 in Case T-198/01 R III *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-1471).

4 The Court of First Instance having dismissed the action on the merits by a judgment dated 8 July 2004 (Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-2717; 'the judgment under appeal'), the applicant lodged an appeal against that judgment on 22 September 2004. It is in the context of that appeal that the applicant also seeks, in substance, the suspension of the contested decision until the conclusion of the proceedings before the Court.

5 The background to the present application for interim measures is set out in more detail in paragraphs 7 to 28 of the judgment under appeal:

'7 Technische Glaswerke Ilmenau GmbH is a German company established in Ilmenau in the Land of Thuringia. It is active in the field of glassware manufacture.

8 It was set up in 1994 by Mr and Mrs Geiß, with the aim of taking over four of the 12 glass production lines of the former Ilmenauer Glaswerke GmbH ("IGW"), a company which had been liquidated by the Treuhandanstalt (a public-law body responsible for the restructuring of undertakings of the former German Democratic Republic which subsequently became the Bundesanstalt für vereinigungsbedingte Sonderaufgaben, "the BvS"). The production lines in question came from the nationalised assets of the Volkseigener Betrieb Werk für Technisches Glas Ilmenau, which, before the reunification of Germany, had been the centre of glass manufacture in the former German Democratic Republic.

9 The sale of the four production lines by IGW to the applicant was carried out in two stages, namely by a first contract of 26 September 1994 ("asset deal 1"), approved by the Treuhandanstalt in December 1994, and by a second contract of 11 December 1995 ("asset deal 2"), approved by the BvS on 13 August 1996.

10 Under asset deal 1, the purchase price of the first three production lines came to a total of 5.8 million German marks ("DEM") (2 965 493 euros ("EUR")) and was to be paid in three instalments, on 31 December 1997, 1998 and 1999 respectively. Payment was secured by a charge of DEM 4 000 000 (EUR 2 045 168) and a bank guarantee of DEM 1 800 000 (EUR 920 325).

11 It is undisputed that none of those three instalments was paid.

12 Under asset deal 2, the fourth production line was also sold to the applicant by IGW at the price of DEM 50 000 (EUR 25 565).

13 It is likewise undisputed that the applicant had cash flow problems in 1997. In view of those problems, it entered into negotiations with the BvS. These culminated in a contract of 16 February 1998 by which the BvS agreed to reduce the purchase price under asset deal 1 by DEM 4 000 000 ("the price reduction").

14 By letter of 1 December 1998, the Federal Republic of Germany notified the Commission of various measures designed to bail out the applicant, which included the price reduction. Part of that notification related to a restructuring plan for the period 1998 to 2000, including, in particular, the search for a new private investor able to contribute DEM 3 850 000 (EUR 1 968 474).

15 By letter SG(2000) D/102831 of 4 April 2000, the Commission initiated the formal investigation procedure provided for in Article 88(2) EC. It considered that it was possible that the German authorities had made various grants of State aid in connection with asset deal 1 and asset deal 2. That alleged aid is described in the notice published in the *Official Journal of the European Communities* of 29 July 2000 (Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, concerning aid measure C 19/2000 (ex NN 147/98) — Aid in favour of Technische Glaswerke Ilmenau GmbH — Germany (OJ 2000 C 217, p. 10)), in which the Commission found provisionally

that two of the measures in question could be regarded as aid incompatible with the common market, namely the price reduction and a loan of DEM 2 000 000 [(EUR 1 015 677)] granted to the applicant by the Aufbaubank of Thuringia (TAB) on 30 November 1998, under aid scheme NN 74/95 (approved by Decision SG(96) D/1946).

16 By letter received on 7 July 2000, the Federal Republic of Germany submitted to the Commission its observations on the initiation of the formal investigation procedure. In its view, the price reduction did not constitute State aid but was consistent with the behaviour of a private creditor seeking to recover the debt owed to him in circumstances in which a requirement that the debt be repaid in full would probably have led to the applicant's going into liquidation.

17 After having become aware of the communication of 29 July 2000, the applicant presented its observations to the Commission on 28 August 2000. It asked the Commission to grant it access to the non-confidential part of the file and subsequently to give it the opportunity to submit fresh observations.

18 By letter of 11 October 2000, the BvS extended the time-limit for payment by the applicant of the balance of the price fixed under asset deal 1, namely DEM 1.8 million, and also for payment of the interest outstanding between 1 January 1998 and 20 June 2000, which amounted to DEM 198 800 (EUR 101 645). Without requesting the payment of additional interest, the BvS fixed the new dates for payment as 31 December 2003, 2004 and 2005. It was thus envisaged that a sum of DEM 666 600 (EUR 340 827) would be repaid on each of those dates.

19 By communication of 20 November 2000, the Federal Republic of Germany presented to the Commission its comments on the observations submitted to the Commission on 28 September 2000 by one of the applicant's competitors, Schott Glas, in the course of the formal investigation procedure.

20 On 27 February 2001, the Federal Republic of Germany sent to the Commission, as an annex to its communication, a copy of a report dated 24 November 2000 on the applicant's position and profitability prospects which had been drawn up by a chartered accountant, Mr Arnold ("the Arnold report").

21 On 12 June 2001 the Commission adopted [the contested decision]. Having expressly waived its right to examine, within the same formal investigation procedure, other potential aid, such as the conversion of the bank guarantee of DEM 1 800 000, constituted under asset deal 1, into a subordinated charge ("nachrangige Grundschuld") and the deferral until 2003 of payment of the remainder of the price fixed under that deal (recitals 42, 64 and 65 in the preamble to the contested decision), the Commission reached the conclusion that the price reduction would not have been accepted by a private creditor and constituted State aid which was incompatible with the common market within the meaning of Article 87(1) EC.

22 The Commission, for three reasons (recitals 76 to 80 in the contested decision), considered that, in granting the price reduction, the BvS had not behaved like a private creditor. Even if asset deal 2 were dependent on the price reduction, there is, according to the contested decision, no evidence to suggest that it was less expensive to carry out the transaction in that way than to insist on payment of the full price initially agreed on and waive performance of asset deal 2 (recital 81). The Commission also rejected the applicant's argument that, given the reduction in investment grants from the Land of Thuringia, the price reduction

was no more than an adjustment of the privatisation contract. The Commission took the view that the BvS and the Land of Thuringia were different legal entities (recital 82). The Commission concluded that the BvS had not acted to safeguard its financial interests but to ensure the existence of the company (recital 83).

23 According to the contested decision, the price reduction could not qualify for an exemption as ad hoc restructuring aid, since the conditions laid down in the Guidelines on aid for rescuing and restructuring firms in difficulty were not fulfilled. In particular, the plan for restructuring the applicant was not based on realistic assumptions and it was doubtful whether its long-term viability could be restored (recitals 92 to 97).

24 The Commission also drew attention to a condition imposed on restructuring aid, namely that the restructuring plan must contain measures to offset as far as possible any adverse effects on competitors (recitals 98 to 101). However, notwithstanding the observations of one of the applicant's competitors, which stated "that there was structural overcapacity in some of the product markets in which [the applicant] was active", the Commission concluded that, according to the information available to it, "the overall market does not seem to be suffering from overcapacity" (recital 101).

25 Finally, the Commission concluded that the condition as to the proportionality of the aid was not fulfilled, since there was no private investor contribution within the meaning of the guidelines referred to above (recitals 102 to 107). Furthermore, noting that, according to the same competitor, the applicant was systematically selling its products below market price, and even below cost price, and had received continuous cash injections intended to offset its losses,

the Commission could not rule out the possibility that the company may have used those resources for market-distorting activities not linked to the restructuring process (recital 103). It concluded that the price reduction was therefore not compatible with the common market (recital 109).

26 According to Articles 1 and 2 of the contested decision:

"*Article 1*

The State aid which [the Federal Republic of] Germany has implemented for Technische Glaswerke Ilmenau GmbH in the form of a waiver of DEM 4 000 000 of the purchase price agreed in the context of asset deal 1 concluded on 26 September 1994 is incompatible with the common market.

Article 2

1. [The Federal Republic of] Germany shall take all necessary measures to recover from the recipient the aid referred to in Article 1 and unlawfully made available to the recipient.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision. The aid to be recovered shall include interest from

the date on which it was at the disposal of the recipient until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid."

27 The applicant concedes that it had known of the contested decision since 19 June 2001, when representatives of the BvS sent it a copy.

28 By letter of 23 August 2001, the Federal Republic of Germany informed the Commission that it intended, subject to the latter's agreement, to defer recovery of the aid in question so as not to compromise negotiations between the applicant and a potential new investor.'

Procedure before the Court and forms of order sought by the parties

6 Pursuant to the judgment under appeal, the BvS, by letter of 8 July 2004, demanded reimbursement from the applicant of the price reduction, together with interest and having deducted the payments already made in accordance with the orders of the President of the Court of First Instance referred to in paragraph 3 of this order, that is to say, a total amount of EUR 2 212 027.04. However, the BvS made it clear that it would refrain from taking steps to enforce the obligation to repay until the dismissal of any application for interim measures aimed at suspending the operation of the contested decision, provided that the applicant made such an application by a certain date.

7 In those circumstances, by separate document, the applicant made an application under Articles 242 EC and 243 EC for interim measures, for:

1. the grant of suspension of operation of Article 2 of the contested decision,

   — pending the Court's definitive ruling on the appeal lodged by the applicant on 22 September 2004 in Case C-404/04 P;

   — or until such date as the President of the Court should determine;

2. in the alternative, the grant of any other or additional measure which the President of the Court might consider necessary or appropriate;

3. the costs to be reserved.

8 The Commission contends that that application for interim measures should be dismissed as unfounded and that the applicant should be ordered to pay the costs.

9 Schott, which, by order of the President of the Fifth Chamber, Extended Composition, of the Court of First Instance of 15 May 2002, was granted leave to intervene in support of the form of order sought by the Commission, contends that the application should be dismissed and the applicant ordered to pay the costs, including those incurred by that company; in the alternative, it asks the President of the Court to reserve his decision on costs until the substance of the case has been determined.

The application for interim measures

10 It is settled case-law that the judge hearing an application for interim measures may order interim relief only if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Where appropriate, the judge hearing such an application must also weigh up the interests involved (see, in particular, the order of 23 February 2001 in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 73).

11 The conditions thus imposed are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (see, in particular, the order of 27 September 2004 in Case C-7/04 P(R) *Commission* v *Akzo and Akcros* [2004] ECR I-8739, paragraph 28).

Preliminary remarks

12 First of all, it must be noted that the fact that the interim relief requested is aimed at suspending the contested decision and thus goes beyond suspension of operation of the judgment under appeal does not make the present application for interim measures inadmissible.

13 Although it is the case that, in terms of Article 242 EC, the measures requested may not, in principle, overstep the procedural framework of the appeal to which they are

attached, it must also be pointed out that, according to settled case-law, an application for suspension of operation cannot be envisaged against a negative decision save in exceptional circumstances, since the grant of suspension could not have the effect of changing the applicant's position (see the order of 21 February 2002 in Joined Cases C-486/01 P-R and C-488/01 P-R *Front National and Martinez* v *Parliament* [2002] ECR I-1843, paragraph 73 and the case-law cited).

14 As the judgment under appeal is comparable to a negative decision inasmuch as the Court of First Instance thereby dismissed the action in its entirety, and taking into account the fact that the obligation to repay the sum at issue stems from the contested decision, for reasons connected with the right to effective judicial protection, which are explained in detail in the order of 31 July 2003 (Case C-208/03 P-R *Le Pen* v *Parliament* [2003] ECR I-7939, paragraphs 78 to 88), the applicant must be entitled to request the suspension of operation of the contested decision in this case.

15 It must be added that the present application for interim measures is also founded on Article 243 EC, according to which the Court may prescribe any necessary interim measures in any cases before it.

16 The fact that the application for interim measures is for the grant of suspension of operation of the contested decision, and not of the judgment under appeal, nevertheless entails consequences for the assessment as to whether there is a prima facie case.

17 However solid the pleas and arguments put forward by the applicant against the judgment under appeal may be, they cannot suffice to justify prima facie in law suspension of operation of the contested decision. In order to establish that the condition relating to a prima facie case is satisfied, the applicant would also have to

succeed in showing that the pleas and arguments relied on against the legality of that decision in the action for annulment are such as to justify prima facie grant of the suspension of operation sought (order in *Le Pen* v *Parliament*, paragraph 90).

18 Secondly, as regards the background to the present case, it must be observed that it is apparent from the first of the orders for interim measures referred to in paragraph 3 of the present order, in particular paragraphs 79, 87 and 88 thereof, that the President of the Court of First Instance found that the first and third pleas put forward by the applicant in its substantive action did not appear to be entirely unfounded. Furthermore, in terms of the weighing up of interests, whilst emphasising that the Community interest must normally, if not always, take precedence over the interest of the aid recipient in avoiding enforcement of the obligation to repay the aid before judgment is given on the merits, he held that there were 'exceptional and very particular circumstances in the present case which lean in favour of granting interim measures', as is apparent from paragraph 118 of the order referred to. The Court of First Instance, in the substantive action, nevertheless dismissed in their entirety the pleas put forward by the applicant.

19 Therefore, as regards the present application for interim measures, in assessing the condition relating to the existence of a prima facie case, account must be taken of the fact that the contested decision has already been considered by a Community court, both as to the facts and the law, and that that court held the action against that decision to be unfounded.

20 Thirdly, in the context of the present application for interim measures, the necessity of putting forward points of law which appear, prima facie, to be particularly significant follows also from the fact that those pleas must be capable, first, of rebutting the assessment made by the Court of First Instance in giving judgment on

the merits of the applicant's case and, second, of confirming the assessment by which the President of the Court of First Instance acknowledged the existence, in the present case, of exceptional and very particular circumstances.

Prima facie case

21 The applicant has set out its pleas under five headings, namely, the fundamental change in the circumstances at the root of the contract ('Wegfall der Geschäftsgrundlage'), the private creditor test, the erroneous determination of the amount of the aid, the restructuring plan and the failure to send the intervener's replies to the Federal Republic of Germany.

Pleas relating to the fundamental change in the circumstances at the root of the contract

22 In its arguments based on the fundamental change in the circumstances at the root of the contract, the applicant raises seven pleas. It describes two of them as substantive pleas whereas the other five relate to alleged irregularities in the procedure before the Court of First Instance. For the reasons set out in paragraph 17 of this order, those alleged procedural irregularities will not be considered in the present proceedings for interim measures.

23 By the first substantive plea, the applicant argues that the Court of First Instance erred in law in accepting that the reasoning, set out by the Commission in the contested decision in order to justify the failure to take into account the fundamental change in the circumstances at the root of the contract, complied with Article 253 EC.

24 By the second substantive plea, it submits that the Court of First Instance erred in law in ruling that the dismissal in the contested decision of its arguments as to the fundamental change in the circumstances at the root of the contract was not based on an error of assessment by the Commission in the light of Article 87(1) EC.

25 Those two pleas, which must be considered together, are based in substance on the error which the Court of First Instance is alleged to have made in not censuring the Commission for having refused, first, to accept that the price reduction was the logical consequence of the fundamental change in the circumstances at the root of the contract and, second, for having given insufficient reasons for the contested decision in that regard.

26 In paragraph 82 of the grounds for that decision, the Commission stated, as regards the alleged fundamental change in the circumstances at the root of the contract, that the BvS and the Land of Thuringia were distinct legal entities, and it concluded that it was not possible to accept the applicant's argument that, in view of the reduction in grants promised by that Land, the price reduction was no more than an adjustment of the privatisation contract.

27 In the contested judgment, the Court of First Instance interpreted that statement to mean that the Commission had taken the view that the applicant's arguments were irrelevant in that respect. It stated that the aid allegedly promised by the Land of Thuringia was investment aid covered by the 23rd framework plan of the Joint programme for 'improving regional and economic structures', a regional investment aid scheme, whereas the price reduction was not covered by that particular scheme and could not therefore be assessed by the Commission in the light of its provisions. Moreover, according to the Court of First Instance, the grant of that claimed investment aid fell within the separate competence of the Land of Thuringia and not that of the BvS. The Court of First Instance subsequently held that, in those circumstances, even if the Land of Thuringia had in fact promised that investment

aid to the applicant, it could not be held that the Commission erred in its assessment by rejecting the argument, derived from the right to adjust asset deal 1, on the ground that the BvS and the Land of Thuringia were distinct legal entities (see contested judgment, paragraphs 70 to 77).

28 The Court of First Instance added that, in any event, the applicant had failed in its written pleadings to establish to the requisite legal standard that the Land of Thuringia had actually promised to grant it investment aid of DEM 4 million. In the absence of such proof, it considered that the applicant had failed to substantiate the premiss on which its reasoning was based, namely that that Land had promised to pay investment aid, and that there was therefore no need either to examine the applicant's arguments as regards the notion of adjustment of contracts in the event that there was a change in the underlying circumstances or to determine whether the alleged aid was covered by the 23rd framework plan (see judgment under appeal, paragraphs 78 to 86).

29 The applicant argues before the Court that it matters little whether or not the Land of Thuringia had promised the aid referred to. What is decisive, in its view, is the fact that at the time the purchase contract was completed, the parties both presumed that the support granted by that Land would be more substantial.

30 The Commission, which describes that as a new argument compared with that which the applicant presented to the Court of First Instance, submits that acceptance of that argument would be tantamount, in practice, to ending the system of control of State aid provided for in the Treaty. The public authority and the recipient of the aid would merely need to indicate that they were both proceeding on the basis that a third party would contribute financially to the purchase and, in the more than likely event that that third party did not make that contribution, they could then go on to make a price reduction in order to keep that aid outside the control arrangements provided for under Community law.

31 It is certainly beyond the parameters of the present application for interim measures for the Court to rule on the question as to whether and, if appropriate, how a national law concept, such as that of a fundamental change in the circumstances at the root of a contract, can fall to be applied to the system of control of State aid.

32 However, such an examination is not necessary at this stage of the proceedings, given that there is not enough information to allow the conclusion to be drawn, prima facie, that one of the conditions for the application in the present case of the concept of a fundamental change in the circumstances at the root of the contract has been met.

33 Indeed, according to the applicant's written pleadings, the application of that concept is based on the premiss that both the BvS and the applicant proceeded on the basis that greater support would be granted by the Land of Thuringia. As far as the BvS is concerned, it appears that that premiss was unfounded.

34 It must be stated in that regard that, as the Court of First Instance pointed out in paragraph 75 of the contested judgment, the price reduction 'was granted to the applicant by the BvS, a Federal trust-management body, in order to enable the applicant to deal with the financial difficulties facing it and to restore its viability, not to support the regional economy of the Land of Thuringia, which was the objective of the 23rd framework plan'.

35 Furthermore the Court of First Instance stated in paragraph 16 of the judgment that when the Federal Republic of Germany submitted to the Commission its observations on the initiation of the formal investigation procedure, it stated that 'the price reduction did not constitute State aid but was consistent with the behaviour of a private creditor seeking to recover the debt owed to him in circumstances in which a requirement that the debt be repaid in full would probably have led to the applicant's going into liquidation'.

36 Those are findings of fact which cannot be put in issue before the Court. The Court of First Instance has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice in the context of an appeal (see, in particular, Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 29, and the order in *Front National and Martinez* v *Parliament*, paragraph 84).

37 Finally, as regards the grounds which the Commission set out in the contested decision, it must be pointed out that that institution cannot be expected to justify its decision in the same detail in responding to arguments which it regards as irrelevant or only slightly relevant.

38 That being so, it must be held that, by the pleas relating to the fundamental change in the circumstances at the root of the contract and the allegedly inadequate reasoning of the contested decision in that regard, the applicant has failed to adduce the proof required to establish a prima facie case.

Plea relating to the private creditor test

39 By this plea, the applicant submits, in substance, first, that the Court of First Instance erroneously ruled out the claimed infringement of the duty to give reasons for the contested decision so far as concerns the Commission's response to the argument as to how a private creditor would behave in dealing with the difficulties facing the applicant and, second, that it had responded inadequately to the arguments which the applicant had put forward to that effect.

40 In addition to the fact that the applicant, with this plea, to a large extent simply repeats the arguments it has already put to the Court of First Instance, it must be pointed out that the contested decision contains grounds, in paragraphs 76 to 83, which, prima facie, appear to be sufficiently detailed to show, in a clear and unequivocal fashion, as required by settled case-law, the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (see, in particular, Cases C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35).

41 In the light of that case-law, it does not appear that the applicant has, by the present plea, adduced the proof required to establish a prima facie case.

Plea relating to the erroneous determination of the amount of the aid

42 By this plea, the applicant submits that the Court of First Instance erred in law in dismissing the applicant's arguments that the Commission had wrongly demanded repayment of the whole of the price reduction, whereas the aid element, assuming that it is aid, was in fact less than the amount of the price reduction. The reasoning followed by the Court of First Instance fails to have regard to the fact that, although it is plausible that a private creditor would not agree to a price reduction comparable to that which was granted by the BvS, such a creditor would nevertheless take into consideration the possibility of the applicant's insolvency and the resulting additional costs and would therefore declare himself in favour of a corresponding downwards adjustment in the purchase price.

43 Referring to the Court's case-law, the Court of First Instance has stated inter alia in that regard that abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful and that, consequently, the full recovery of aid unlawfully granted, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aids (see, in particular, Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 47).

44 It must therefore be held that the applicant has failed by the present plea to adduce the proof required to establish a prima facie case.

Plea relating to the failure to take account of the amended restructuring plan

45 By this plea, the applicant argues that the Court of First Instance should have censured the Commission for failing, when taking its decision, to take into account the amended restructuring plan drawn up in 2001, which replaced that of 1998.

46 However, in the submission which it made as to the reasoning of the Court of First Instance for dismissing that plea, the applicant fails to mention that the Court of First Instance recalled, in paragraph 158 of the contested judgment, that the German authorities had, in their communication addressed to the Commission of 27 February 2001, stated that '[h]owever, the Federal Government assumes that, in view of the typical market behaviour of the BvS, the Commission is able to close the

procedure without examining the adjustments to the restructuring plan, the details of which must still be agreed upon'.

47 Prima facie, there is nothing to prevent that factual statement alone from being regarded as a sufficient basis for the Commission to be able, according to the information given by the German Government itself, to rely on the 1998 restructuring plan.

48 It must therefore be held that the applicant has failed by this plea to adduce the proof required to establish a prima facie case.

Plea relating to the failure to send the intervener's replies to the Federal Republic of Germany

49 By this plea the applicant submits that the Court of First Instance erred in law in holding that the infringement of the rights of defence which it had pointed out and which resulted from the failure to send the intervener's replies to the Federal Republic of Germany was not so significant that the failure to observe those rights could, by itself, result in the annulment of the contested decision.

50 According to settled case-law holding that such an infringement of the rights of defence results in annulment only if, had it not been for such an irregularity, the

outcome of the procedure might have been different (see, in particular, Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 101) and in the absence of information leading, prima facie, to the conclusion that the failure to send the items in question would have had a bearing on the wording of the contested decision, it must be held that the applicant has failed by this plea to adduce the proof required to establish a prima facie case.

51 It follows from all of the above that the applicant has been unable, by any of the pleas put forward, to establish a prima facie case to meet the criteria specified in paragraphs 12 to 20 of this order and which could justify the suspension of the contested decision.

52 Accordingly, the application for the suspension of operation of the decision at issue or for the grant of interim relief must be dismissed.

On those grounds, the President of the Court hereby orders:

1. The application for interim measures is dismissed.

2. The costs are reserved.

Signatures