

JUDGMENT OF THE COURT (Second Chamber)

11 December 2008 *

In Case C-334/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 17 July 2007,

Commission of the European Communities, represented by K. Gross, acting as Agent, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

Freistaat Sachsen, represented by Th. Lübbig, Rechtsanwalt,

applicant at first instance,

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot (Rapporteur), J. Makarczyk, P. Kūris and L. Bay Larsen, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- ¹ By its appeal, the Commission of the European Communities requests the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-357/02 *Freistaat Sachsen v Commission* [2007] ECR II-1261 ('the judgment under

appeal'), by which it annulled in part Commission Decision 2003/226/EC of 24 September 2002 on an aid scheme which the Federal Republic of Germany is planning to implement — 'Guidelines on assistance for SMEs — Improving business efficiency in Saxony': Subprogrammes 1 (Coaching), 4 (Participation in fairs), 5 (Cooperation) and 7 (Design promotion) (OJ 2003 L 91, p. 13) ('the contested decision').

Legal framework

- 2 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) sets out the procedures applicable to the exercise, by the Commission, of the power conferred on it by Article 88 EC to decide whether State aid is compatible with the common market.
- 3 The present appeal involves, more specifically, the following provisions of that regulation:
 - Article 1(f), which defines: 'unlawful aid' as 'new aid, put into effect in contravention of Article [88](3) of the Treaty';

— Article 1(h), which contains the following definition:

“‘interested party’ shall mean 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’.

— Article 2(2), which provides:

‘In a notification, the Member State concerned shall provide all necessary information in order to enable the Commission to take a decision pursuant to Articles 4 and 7 (hereinafter referred to as “complete notification”).’

— Article 4(1), which provides:

‘The Commission shall examine the notification as soon as it is received. Without prejudice to Article 8, the Commission shall take a decision pursuant to paragraphs 2 [decision that the notified measure does not constitute aid], 3 [decision not to raise objections] or 4 [decision to initiate the formal investigation procedure].’

— Article 4(5), which provides:

‘The decisions referred to in paragraphs 2, 3 and 4 shall be taken within two months. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. ...’

— Article 4(6), which reads as follows:

‘Where the Commission has not taken a decision in accordance with paragraphs 2, 3 or 4 within the period laid down in paragraph 5, the aid shall be deemed to have been authorised by the Commission. The Member State concerned may thereupon implement the measures in question after giving the Commission prior notice thereof, unless the Commission takes a decision pursuant to this Article within a period of 15 working days following receipt of the notice.’

⁴ In the field of aid to small and medium-sized enterprises, Article 1(1)(a)(i) of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles [87] and [88] of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 1998 L 142, p. 1) confers on the Commission the power to declare, pursuant to Article 87 EC, that, in certain circumstances, aid to small and medium-sized enterprises is compatible with the common market and is not to be subject to the notification requirements of Article 88(3) EC.

⁵ 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) lays down the criteria which individual aid and aid schemes for small and medium-sized enterprises must fulfil in order to be compatible with the common market within the meaning of Article 87(3) EC, and exempts those which fulfil them from the notification requirement of Article 88(3) EC.

- 6 Pursuant to Article 10 thereof, that regulation entered into force on 2 February 2001, that is, the 20th day following that of its publication in the *Official Journal of the European Communities*.
- 7 The last sentence of recital 4 in the preamble to that regulation states that '[t]he guidelines on State aid for small and medium-sized enterprises [adopted by the Commission (OJ 1996 C 213, p. 4)] should be abolished from the date of entry into force of this Regulation, since their contents are replaced by [it]'.

Background to the dispute

- 8 Under the guidelines of the Ministry of the Economy and Labour of the Land of Saxony on assistance for small and medium-sized enterprises established in its territory relating to the improvement of business efficiency, the Land grants non-refundable subsidies for projects to promote the economy to persons exercising a profession there and to small and medium-sized enterprises with a registered office or place of business there. Those subsidies are provided for by an aid scheme which was notified for the first time to the Commission in 1992, authorised by the Commission and extended on several occasions following further authorisations. That aid is intended to improve the production capacity and competitiveness of small and medium-sized enterprises.

- 9 By letter of 29 December 2000, received at the Commission on 3 January 2001, the Federal Republic of Germany notified a new version of that aid scheme ('the initial notification').
- 10 On 12 January 2001, the Commission adopted Regulation No 70/2001, which entered into force on 2 February 2001.
- 11 In December 2001, the Commission initiated a formal investigation procedure with regard to some of the measures provided for by the notified aid scheme, namely the measures provided for by the subprogrammes 'Coaching', 'Participation in fairs', 'Cooperation' and 'Design promotion' (together 'the four subprogrammes at issue'). On the other hand, the Commission decided that the other measures notified did not raise any objections.
- 12 At the end of its investigation, the Commission adopted the contested decision, by which it found, first of all, that the measures provided for by the four subprogrammes in question constituted State aid. It stated, secondly, that, in order to be considered compatible with the common market, that aid must come within the scope of Regulation No 70/2001 and not exceed the intensity thresholds laid down therein, with the exception of the operating aid provided for by the subprogramme 'Cooperation', which it found to be incompatible with the common market.

The procedure before the Court of First Instance and the judgment under appeal

¹³ By the judgment under appeal, the Court of First Instance allowed the application of the Freistaat Sachsen for annulment of a number of provisions of the contested decision, namely:

- the second paragraph of Article 2 thereof, to the effect that aid exceeding the scope and the aid intensities of Regulation No 70/2001 is incompatible with the common market;

- Article 3 thereof, to the effect that operating aid provided for by the subprogramme 'Cooperation' is incompatible with the common market, and

- Article 4 thereof, to the effect that the Federal Republic of Germany may implement the four subprogrammes at issue only if they have been brought into line with that decision.

¹⁴ The Court of First Instance considered that, in examining the compatibility of the aid in question in the light of Regulation No 70/2001, when that regulation was not in force at the time notification of the aid was received by the Commission, the Commission had applied retroactively the new rules concerning small and medium-sized enterprises laid down in that regulation.

- 15 The Court of First Instance based itself essentially on the legal effects of the notification in the context of the procedure for investigating proposed State aid. It noted in particular that Article 4(1) of Regulation No 659/1999 provides that the Commission is to examine the notification as soon as it is received, and Article 4(5) provides that the two-month period prescribed for it to conduct the preliminary examination of that notification is to begin on the day following receipt thereof.
- 16 The Court of First Instance thus inferred that, as a rule, the examination of the compatibility of planned aid with the common market must be done on the basis only of the rules in force at the date of receipt of the notification of that aid by the Commission. It stated that that approach is justified by the requirements of transparency and predictability in that it avoids giving the Commission the opportunity to decide unilaterally the legal rules which are applicable to the aid it must examine.
- 17 The Court of First Instance also found that this line of reasoning is supported by the case-law. It referred in that regard to Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869 concerning the temporal application of successive decisions adopted by the Commission on the grant of State aid to the steel industry in certain specific cases, commonly termed 'Steel Aid Codes'. In that judgment, the Court held that the application of the rules of the Steel Aid Codes in force at the date on which the Commission takes a decision on aid paid under an earlier code constitutes retroactive application of the later code.
- 18 Next, the Court of First Instance found that it is apparent from the terms as well as the objective of Regulation No 70/2001 and also from the requirements arising from compliance with the principles of the protection of legitimate expectations and legal certainty that the regulation is not intended to apply retroactively.

19 The Court of First Instance also decided that any awareness on the part of the Federal Republic of Germany, at the time of the initial notification, of impending changes to the criteria for examining the aid thus notified does not justify application of Regulation No 70/2001.

20 Lastly, the Court of First Instance referred to the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (OJ 2002 C 119, p. 22), by which the Commission decided to assess the compatibility with the common market of such aid under the rules in force at the time when the aid was granted. The Court of First Instance held that, if notified proposed aid were, by contrast, to be assessed in the light of the rules in force at the date of adoption of the Commission's decision on that aid, that would provide an incentive for Member States not to comply with their procedural obligations when planning to grant aid for which the applicable rules are likely to become stricter.

Forms of order sought

21 By its appeal, the Commission asks the Court to set aside the judgment under appeal, to give final judgment on the substance of the case by dismissing the application for annulment brought by the Freistaat Sachsen and to order the latter to pay the costs of the two sets of proceedings.

22 The Freistaat Sachsen contends that the Commission's appeal should be dismissed and that the Commission should be ordered to pay the costs of the appeal proceedings.

The appeal

23 The Commission puts forward two pleas in support of its appeal. It submits that the Court of First Instance erred in law, principally, in finding that the Commission was incorrect in having examined the proposed aid scheme notified by the Federal Republic of Germany in the light of Regulation No 70/2001, since that regulation was not in force at the date of receipt of the initial notification and, in the alternative, in holding that that notification had to be regarded as being complete.

The first plea

Arguments of the parties

24 By its first plea, the Commission claims that the Court of First Instance infringed Article 88(2) and (3) EC, Article 249(2) EC, the second sentence of Article 254(2) EC, Article 3 et seq. of Regulation No 659/1999 and Article 10(1) of Regulation No 70/2001, in holding that the application of the latter regulation to a proposed aid scheme notified prior to the entry into force of that regulation is contrary to the principle of non-retroactivity and thus renders the contested decision unlawful.

25 The Commission considers that the application of Regulation No 70/2001 to the aid scheme in question is in no way retroactive in nature, but is consistent with the principle of immediate application, under which a provision of Community law applies as from the time it enters into force to current and ongoing situations.

26 The Commission submits that, in holding that the notification of proposed State aid gives rise to a legal situation from which it is apparent that the rules in force at the date on which that notification was made must be applied, the Court of First Instance adopted a legally flawed position.

27 The Commission submits that such a notification has only procedural effects. It adds that the examination it must carry out does not concern that notification as such, but rather the notified aid, and that it must be conducted not in the light only of the information provided in the context of that notification, but also in the light of the relevant facts and the legal rules in force at the time it adopts its decision. It refers in that regard to Articles 3, 4(2) to (4) and (6), 5(1), 6 and 7(2) to (4) of Regulation No 659/1999.

28 The Commission adds that the notification of proposed State aid is an obligation imposed by the Treaty on the Member States and does not create any rights.

29 It states that the immediate examination of the notification provided for in Article 4(1) of Regulation No 659/1999 does not preclude the Commission from requiring additional information from the Member State concerned under Article 5 of that regulation.

30 The Commission asserts that the two-month period which, under Article 4(5) of Regulation No 659/1999, starts to run as from receipt of the notification, and upon expiry of which, under Article 4(6) thereof, the aid will automatically be deemed to have been authorised, is merely a procedural period. It states that, under the second sentence

of Article 4(6) of that regulation, it is in any event empowered to take a decision upon expiry of that period and, if necessary, initiate a formal investigation procedure.

31 The Commission adds that the Federal Republic of Germany was fully aware of the draft which led to the adoption of Regulation No 70/2001, inter alia because it took part in the work on that draft.

32 It submits that *Falck and Acciaierie di Bolzano v Commission* is not relevant to the present case because it concerned unlawful aid and the approach adopted by the Court in that judgment was justified, furthermore, by the particular nature of the Steel Aid Codes.

33 The Commission also disputes the analysis of the Court of First Instance to the effect that the fact that Regulation No 70/2001 allows Member States to determine themselves whether an obligation to notify exists shows that that regulation is not intended to apply to earlier notifications. It observes that, in the present case, following the entry into force of that regulation, the Federal Republic of Germany could have determined whether the measures it had notified were exempt and, where appropriate, withdrawn its notification under Article 8 of Regulation No 659/1999. The Commission adds that it follows from recital 4 in the preamble to Regulation No 70/2001 that Member States may notify State aid falling within the scope of that regulation. It further maintains that that regulation does not preclude maintaining existing notifications upon its entry into force.

34 The Commission further submits that the statement in the second sentence of recital 4 in the preamble to Regulation No 70/2001, to the effect that notified schemes will be examined by the Commission 'in particular' in the light of the criteria set out in that regulation, cannot be interpreted as allowing the application of the Community

guidelines on State aid for small and medium-sized enterprises adopted in 1996, as they were repealed by that regulation, as specifically noted in that recital.

35 Lastly, the Commission considers that the parallel drawn by the Court of First Instance between the notified proposed aid scheme and unlawful aid is not relevant. It submits in that regard that the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid referred to by the Court of First Instance would not in any event have been applicable if the aid notified by the Federal Republic of Germany had been unlawful. That notice concerns solely the application of directives or similar instruments, the fourth paragraph moreover stating that it 'is without prejudice to the interpretation of Council and Commission regulations in the field of State aid'.

36 The Freistaat Sachsen contends that the Court of First Instance did not err in law in holding that the application of Regulation No 70/2001 to a proposed aid scheme notified before the entry into force of that regulation constituted retroactive application thereof such as to render the contested decision unlawful.

37 The Freistaat Sachsen considers that the notification of proposed aid is not only a mere obligation for the Member States, but that that measure also entails specific obligations for the Commission and starts a period the expiry of which gives rise to important legal consequences for the parties concerned.

38 The Freistaat Sachsen contends that, as a rule, legal certainty precludes retroactive application of Community legislation which does not contain any specific provision to that effect.

- 39 It considers that the approach adopted by the Court on unlawful aid in *Falck and Acciaierie di Bolzano v Commission* must apply to notified aid.
- 40 It asserts that the notification of proposed aid by a Member State provides a basis for a legitimate expectation on the part of that Member State that the examination criteria will be those in force at the time of that notification. It makes an exception, however, for the situation in which the rule which entered into force after the notification of proposed aid is more favourable for the Member State in question than that which was in force at the time of that notification.
- 41 Next, the Freistaat Sachsen submits that, since the Commission argues that unlawful aid falls to be assessed under the provisions in force at the time it is granted, it is also appropriate to apply the law in force at the time when duly notified aid ‘comes into being’, that is, when it is notified, in order not to put Member States which comply with their procedural obligations at a disadvantage.
- 42 In the alternative, the Freistaat Sachsen contends that, if the Commission’s first plea is upheld by the Court, the contested decision should in any event be annulled on the ground that the Commission did not actually exercise its power of assessment. It failed to take account of the particularities of the Land of Saxony and of the notified aid scheme when it applied Regulation No 70/2001.

Findings of the Court

- ⁴³ According to settled case-law, new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule (see to that effect, *inter alia*, Case 68/69 *Brock* [1970] ECR 171, paragraph 7, and Case 270/84 *Licata v ESC* [1986] ECR 2305, paragraph 31). The Court has also held that the principle of legitimate expectations cannot be extended to the point of generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule (see, *inter alia*, Case 278/84 *Germany v Commission* [1987] ECR I, paragraph 36, and Case 203/86 *Spain v Council* [1988] ECR 4563, paragraph 19).
- ⁴⁴ By contrast, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them (see, *inter alia*, Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 49).
- ⁴⁵ The notification of proposed State aid, provided for in Article 88(3) EC, is a central element of Community rules for supervising that aid and undertakings to which such aid has been granted may not entertain a legitimate expectation that the aid is lawful if it has not been granted in compliance with that procedure (Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25, and Case C-408/04 P *Commission v Salzgitter* [2008] ECR I-2767, paragraph 104).

- 46 According to the last sentence of Article 88(3) EC, a Member State planning to grant aid is not to put its proposed measures into effect until that procedure has resulted in a final decision by the Commission.
- 47 The prohibition laid down by that provision is designed to ensure that a system of aid cannot become operational before the Commission has had a reasonable period in which to study the proposed measures in detail and, if necessary, to initiate the procedure provided for in Article 88(2) EC (Case C-301/87 *France v Commission* [1990] ECR I-307 ('*Boussac Saint Frères*'), paragraph 17, and Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 36).
- 48 Article 88(3) EC thus institutes prior control of plans to grant new aid (Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 2, and *CELF and Ministre de la Culture et de la Communication*, paragraph 37).
- 49 As part of that control, Article 4(1) of Regulation No 659/1999, which provides that the Commission must examine a notification 'as soon as it is received', imposes merely an obligation of particular diligence on the Commission, and therefore is not a rule of application *ratione temporis* of the criteria for assessment of the compatibility of notified proposed aid with the common market. Nor may such a rule be inferred from the second sentence of Article 4(5) of the same regulation, which provides that the two-month period during which the Commission undertakes the preliminary examination of the notification begins on the day following the receipt of a complete notification.

50 By contrast, the question whether aid is State aid within the meaning of the Treaty must be determined on the basis of objective elements, which must be appraised on the date on which the Commission takes its decision (see, to that effect, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 137, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste v UFEX and Others* [2008] ECR I-4777, paragraph 95). Accordingly, it is the appraisal of the situation carried out by the Commission on that date which is to be reviewed by the Community Courts (*Chronopost and La Poste v UFEX and Others*, paragraph 144).

51 In addition, the rules, principles and criteria of assessment of the compatibility of State aid in force at the date on which the Commission takes its decision may, as a rule, be regarded as better adapted to the context of competition.

52 It follows from the foregoing that, if the notification of proposed aid is an essential requirement of the control of that aid, it is nevertheless only a procedural obligation, intended to allow the Commission to ensure both preventive and effective control of the aid which Member States intend to grant to undertakings. It cannot therefore have the effect of setting the legal framework applicable to the aid notified.

53 Consequently, the notification by a Member State of aid or a proposed aid scheme does not give rise to a definitively-established legal situation which requires the Commission to rule on their compatibility with the common market by applying the rules in force at the date on which that notification took place. On the contrary, it is for the Commission to apply the rules in force at the time when it gives its decision, the only rules on the basis of which the lawfulness of the decision it takes in that regard falls to be assessed.

- 54 Contrary to the submission of the Freistaat Sachsen, this approach is not such as to encourage Member States to implement planned aid immediately without giving notification, in order to avail themselves of the legal rules in force at the time of that implementation. Even if the compatibility of unlawful aid with the common market is to be assessed in any event at the date when it was paid, Member States cannot easily anticipate the details of changes to the rules. Furthermore, the grant of unlawful aid may lead to the Member State which paid it having to recover it and also make reparation for damage caused by reason of the unlawful nature of that aid (see, to that effect, *inter alia*, *CELF and Ministre de la Culture et de la Communication*, paragraph 55).
- 55 It must be noted, however, that it follows from Article 88(2) EC and Article 1(h) of Regulation No 659/1999 that, where the Commission decides to initiate the formal investigation procedure in respect of proposed aid, it must give interested parties, including the undertaking(s) concerned, an opportunity to submit their comments. This rule is in the nature of an essential procedural requirement.
- 56 It follows that, where the legal rules under which a Member State notified proposed aid change before the Commission takes its decision, the Commission must, with a view to giving its decision, as it is obliged to do, on the basis of the new rules, ask the interested parties to express their views on the compatibility of that aid with those rules. The situation is different only if the new legal rules do not contain any substantial amendments in relation to those previously in force (see, to that effect, judgment of 8 May 2008, Case C-49/05 P *Ferriere Nord v Commission*, paragraphs 68 to 71).
- 57 In the present case, it is common ground, first, that the aid scheme planned was notified to the Commission prior to the entry into force of Regulation No 70/2001, secondly, that, at the date on which that regulation entered into force, the Commission had not yet given its decision and, thirdly, that that regulation was in force at the date of the contested decision.

58 The case-file also shows that the Commission asked the interested parties to express their views on the application of that regulation to the notified aid scheme.

59 It follows from all the foregoing that, in holding that the contested decision infringes the principle of non-retroactivity, the Court of First Instance made an error of law in its judgment. It follows that the Commission's first plea is well founded. Accordingly, without its being necessary to consider the second plea, the judgment under appeal must be set aside.

Referral of the case back to the Court of First Instance

60 Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

61 In the present case, since the plea alleging that the application of Regulation No 70/2001 to the contested decision is retroactive in nature is unfounded, it is appropriate to rule on the fourth and fifth pleas put forward by the Freistaat Sachsen before the Court of First Instance, alleging, first, failure by the Commission to exercise its discretion during the investigation of the aid at issue and the infringement of the obligation to state reasons which stems from that and, secondly, that the Commission has not established that competition would actually or potentially be distorted by that aid and the infringement of the obligation to state reasons which stems from that.

62 The response to those pleas entails complex factual assessments on the basis of evidence which was not considered by the Court of First Instance. Before this Court, the Freistaat Sachsen merely stated, without further explanation, that the contested decision must be annulled because of the Commission's failure to exercise its discretion, on the ground that it did not take account of either the particularities of the Land of Saxony or those of the notified proposed aid scheme when it applied Regulation No 70/2001.

63 It follows that the state of the proceedings does not permit the Court to give final judgment, with the result that the case must be referred back to the Court of First Instance for judgment on those two pleas.

Costs

64 Since the case is to be referred back to the Court of First Instance, the costs relating to the present appeal proceedings must be reserved.

On those grounds, the Court (Second Chamber) hereby:

- 1. Sets aside the judgment of the Court of First Instance of the European Communities of 3 May 2007 in Case T-357/02 *Freistaat Sachsen v Commission*;**

- 2. Refers the case back to the Court of First Instance of the European Communities;**

- 3. Reserves the costs.**

[Signatures]