JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

14 January 2009 *

In Case T-162/06,

Kronoply GmbH & Co. KG, established in Heiligengrabe (Germany), represented by R. Nierer and L. Gordalla, lawyers,

applicant,

v

Commission of the European Communities, represented initially by K. Gross and T. Scharf, and subsequently by V. Kreuschitz, K. Gross and T. Scharf, acting as Agents,

defendant,

* Language of the case: German.

APPLICATION for annulment of Commission Decision 2006/262/EC of 21 September 2005 on State aid No C 5/2004 (ex N 609/2003) which Germany is planning to implement for Kronoply (OJ 2006 L 94, p. 50),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, M. Prek and V. Ciucă, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 3 September 2008,

gives the following

Judgment

Facts

1 The applicant — Kronoply GmbH & Co. KG ('Kronoply') — is a company governed by German law which manufactures timber products.

2 On 28 January 2000, Kronoply applied to the Investitionsbank des Landes Brandenburg (Investment Bank of the Land of Brandenburg) ('the ILB') for a grant of DEM 77 million (EUR 39.36 million) for the construction of a production plant for oriented strand board (OSB), the total cost of which was DEM 220 million (EUR 112.5 million).

3 By letter of 22 December 2000, the Federal Republic of Germany notified the Commission, pursuant to Article 2(1) of 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), of a plan to award Kronoply an investment grant of DEM 77 million for the construction of an OSB production plant under the multisectoral framework on regional aid for large investment projects (OJ 1998 C 107, p. 7) ('the 1998 multisectoral aid framework'), in the version in force at the material time. The notification was registered and processed by the Commission under number N 813/2000 ('the N 813/2000 proceedings').

4 The maximum allowable intensity of aid under the 1998 multisectoral aid framework is determined on the basis of a calculation which involves the application of a number of assessment factors and, in particular, the factor indicating the state of competition in the sector concerned ('Factor T'), for which there are four levels: 0.25, 0.5, 0.75 and 1. In the present case, the plan was first notified by the Federal Republic of Germany with a T factor of 1, which denotes a project with no negative effects on competition.

5 On 19 June 2001, following an exchange of letters with the Commission, the Federal Republic of Germany amended its notification with respect to the intensity of the aid. It informed the Commission, inter alia, that it '[had] decided to reduce the notified "competition" factor of 1 to 0.75'. The T factor of 0.75 applies to projects which result in a capacity expansion in a sector facing structural overcapacity and/or a declining market. The application of the T factor of 0.75 reduced the intensity of the aid from 35%

to 31.5%, that is to say, it reduced the total amount of the aid to DEM 69.3 million (EUR 35.43 million), instead of the DEM 77 million (EUR 39.36 million) originally notified.

6 On 3 July 2001, the Commission, pursuant to Article 4(3) of Regulation No 659/1999, adopted a decision not to raise objections to the grant of that aid. That decision was published in the *Official Journal of the European Communities* on 11 August 2001 (OJ 2001 C 226, p. 14).

7 By letter of 3 January 2002, the Federal Republic of Germany requested an amendment to the Commission's decision of 3 July 2001 on the ground that the relevant market could not be regarded as declining and that, accordingly, a T factor of 1 fell to be applied, and the intensity of the aid authorised increased from 31.5% to 35% of the eligible investment.

8 By letter of 5 February 2002, the Commission refused to amend its decision of 3 July 2001 on the ground that the aid had been assessed on the basis of a correct calculation of all the applicable criteria.

9 On the view that that letter constituted a Commission decision, Kronoply brought an action for its annulment, which was dismissed as inadmissible by the Court of First Instance in its order of 5 November 2003 in Case T-130/02 *Kronopoly* v *Commission* [2003] ECR II-4857, on the ground that there was no challengeable act.

10 By letter of 22 December 2003, the Federal Republic of Germany notified the Commission of its intention to award an investment grant to Kronoply of EUR 3 936 947 under the 1998 multisectoral aid framework. That aid was registered under number N 609/2003.

11 By letter of 18 February 2004, the Commission informed the Federal Republic of Germany of its decision to initiate the procedure provided for in Article 88(2) EC on the ground that it had serious doubts as to the incentive effect and necessity of the additional aid notified.

12 On 21 September 2005, having received the comments of the Federal Republic of Germany and Kronoply, the Commission adopted Decision 2006/262/EC on State aid No C 5/2004 (ex N 609/2003) which Germany is planning to implement for Kronoply (OJ 2006 L 94, p. 50; 'the Decision').

13 Recital 42 of the Decision is worded as follows:

'The Commission concludes that the notified aid constitutes State aid within the meaning of Article 87(1) [EC]. As the aid neither provides any incentive effect nor is necessary, none of the derogations in Article 87(2) or (3) [EC] apply. The aid therefore constitutes incompatible operating aid and may not be implemented.'

14 Article 1 of the Decision provides as follows:

'The State aid which, according to notification N 609/2003, Germany is planning to implement for Kronoply, amounting to EUR 3 936 947, is incompatible with the common market.

The aid may accordingly not be implemented.'

Procedure and forms of order sought

15 By application lodged at the Registry of the Court of First Instance on 26 June 2006, Kronoply brought the present action.

16 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. The parties presented oral argument and answered the questions put to them by the Court at the hearing on 3 September 2008.

17 Kronoply claims that the Court should:

— annul the Decision;

— order the Commission to pay the costs.

18 The Commission contends that the Court should:

— dismiss the action;

— order Kronoply to pay the costs.

Law

19 Kronoply relies on five pleas in law in support of its action: (i) infringement of Article 253 EC; (ii) infringement of the provisions of Regulation No 659/1999; (iii) infringement of Article 87(3)(a) and (c) EC, Article 88 EC and the Guidelines on

National Regional Aid (OJ 1998 C 74, p. 9; 'the Guidelines'); (iv) manifest errors on the part of the Commission in the finding of the facts; and (v) manifest errors on the part of the Commission in the assessment of the facts, and misuse of powers.

Plea alleging infringement of Article 253 EC

Arguments of the parties

20 Kronoply claims, first, that it is unable to ascertain the reasons on which the Commission relied, because the reasoning of the Decision is flawed: in effect, the Commission denies the existence of an incentive effect without, however, determining whether such an effect exists on the basis of the criteria that it has itself established. As provided in the Guidelines, an incentive effect exists where the aid application is made before the project is completed, which is in fact the position in the present case. By omitting to mention that fact, not only has the Commission made an incorrect finding of the facts, it has failed to state adequate reasons.

21 Kronoply asserts, secondly, that the Commission did not examine the possibility — expressly mentioned by the Court of First Instance in its case-law — of altering aid already granted and authorised, because in the Decision the Commission requires there to be another investment project involved, giving rise to a further request for aid. It follows that the Decision failed to state adequate reasons.

22 The Commission contends that the present plea should be rejected.

Findings of the Court

23 It is clear from the wording and content of Kronoply's arguments in support of the two complaints raised in connection with the plea alleging infringement of Article 253 EC that, strictly speaking, those complaints do not refer to a failure to state reasons, or to a failure to state adequate reasons, either of which is an infringement of an essential procedural requirement within the meaning of Article 230 EC. In fact, those complaints properly form part of the criticism of the merits of the Decision, hence of its legality in terms of the substance, their thrust being that the Decision is unlawful having regard, in particular, to the alleged infringement by the Commission of Article 87 EC and the Guidelines — on account, specifically, of an erroneous assessment of the incentive effect and necessity of the aid at issue — and to an alleged misuse of its powers.

24 In that connection, it is significant that the complaints relating to the failure by the Commission to take account of the date on which the original aid application was lodged or of the possibility, recognised by the Court, of altering aid already granted and authorised are expressly set out in the arguments by which Kronoply purports to show that the incentive effect and necessity of the aid at issue was incorrectly assessed and that the Commission misused its powers.

25 In any event, it must be held that the reasons given in the Decision satisfy the requirements of Article 253 EC, as interpreted by the case-law.

26 According to settled case-law, the statement of reasons required under Article 253 EC must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the need of the addressees, or of other parties directly and individually concerned by the act, to be informed. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19; Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16; and Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86).

27 It emerges from recital 42 of the Decision that the measure notified by the German authorities on 22 December 2003 was regarded by the Commission as unjustifiable operating aid which could not be authorised because of the lack of incentive effect and necessity.

28 It must be concluded that the Commission states explicit reasons in the Decision for its conclusion that the aid at issue had no incentive effect and was not necessary.

29 It should be pointed out, in particular, that the Commission — expressly referring to the order in *Kronopoly* v *Commission*, cited in paragraph 9 above — states that, in its view, it is possible for a Member State to notify additional aid or a change to an approved

project, or even different tranches of State aid for a given project, and that the Commission may itself authorise the aid, provided that both the incentive effect and the necessity of the aid can be established for each tranche (recital 24 of the Decision).

30 The Commission also refers, in recital 28 of the Decision, to the terms of Point 4.2 of the Guidelines, according to which there is a presumption that the aid has an incentive effect where the beneficiary makes its aid application before the start of the project. It is clear on the face of recitals 24 and 26 to 35 of the Decision that the Commission did in fact examine the condition concerning the incentive effect of the aid, explaining why the particular circumstances of the present case enabled it to rebut the presumption arising under point 4.2 of the Guidelines and to conclude that there was no incentive effect.

31 Similarly, the Commission stated clearly, in recitals 24 and 36 to 39 of the Decision, the reasons enabling it to conclude that the aid at issue was not necessary.

32 It is thus apparent, first, that it was made entirely possible for Kronoply to understand the reasons which led the Commission to declare the aid at issue incompatible with the common market, as evidenced by the lengthy arguments in Kronoply's pleadings concerning the Commission's allegedly erroneous assessment of the incentive effect and necessity of the aid at issue and, secondly, that the Court is able to carry out its review.

33 It follows that the plea alleging infringement of Article 253 EC must be rejected.

Plea alleging infringement of the provisions of Regulation No 659/1999

Arguments of the parties

34 Kronoply maintains that Article 9 of Regulation No 659/1999 provides a legal basis which enables aid already granted to be altered and in particular to be increased, and that in the present case the Commission infringed the provisions of that regulation.

35 Kronoply claims that if the Council grants the Commission the power to revoke a decision and to order the restitution of aid where the information provided is inaccurate, then, a fortiori, the Commission must have the power to alter and to increase aid granted. The alteration and increasing of aid constitute interferences with the rights of the persons concerned which are substantially less serious than the revocation of aid.

36 The Commission contends that the present plea should be rejected.

Findings of the Court

37 Although Kronoply pleads infringement 'of the provisions' of Regulation No 659/1999, it mentions only Article 9 of that regulation in its arguments.

38 Article 9 of Regulation No 659/1999, entitled 'Revocation of a decision', is worded as follows:

'The Commission may revoke a decision taken pursuant to Article 4(2) or (3), or Article 7(2), (3), (4), after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision. Before revoking a decision and taking a new decision, the Commission shall open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7 and 10, Article 11(1), Articles 13, 14 and 15 shall apply *mutatis mutandis*.'

39 It is clear from a literal reading of Article 9 of Regulation No 659/1999 that the sole aim of that provision is to confer on the Commission power to revoke its decisions and that that provision applies only where incorrect information has been sent to the Commission and where, on the basis of that information, the Commission has adopted a decision finding that there is no aid or declaring aid to be compatible with the common market.

40 As the Commission rightly states, Kronoply expressly acknowledges in its application that 'such a situation does not arise in this case because the information provided was not incorrect'. It should also be noted that, in the present case, Kronoply does not criticise the Commission for not revoking its decision of 3 July 2001.

41 Kronoply's '*a fortiori*' reasoning consists in reality in inferring from Article 9 of Regulation No 659/1999 that it is possible for the Commission to adopt, on the basis of that provision, a decision approving the alteration of aid already granted and

authorised. This cannot be accepted by the Court since it is based on an interpretation which is particularly broad and manifestly *contra legem* with respect to the provision concerned.

42 In any event, even if Article 9 of Regulation No 659/1999 could be regarded as an appropriate legal basis for the adoption of such a decision, this would not mean that any additional aid notified to the Commission, as in the present case, would necessarily be compatible with the common market.

43 The plea alleging infringement of the provisions of Regulation No 659/1999 must therefore be rejected.

Plea alleging infringement of Article 87(3)(a) and (c) EC, Article 88 EC and the Guidelines

Arguments of the parties

— Lack of incentive effect

44 Kronoply states first that, under the third subparagraph of point 4.2 of the Guidelines, it is sufficient, in order to satisfy the criterion of incentive effect, that the aid application have been submitted before the start of the project. That sole criterion is satisfied in the

present case, because the aid application was submitted to the competent national body on 28 January 2000, that is to say, before the start of the works implementing the project. Although the Commission referred in the Decision to the criterion mentioned in point 4.2 of the Guidelines, it did not examine the incentive effect by reference to the date on which Kronoply notified the project to the national authorities, but by reference to the date on which the Member State notified the aid at issue: this led the Commission to infringe the provision in question.

45 The approach followed by the Commission in the Decision, as regards both the taking into account of the date of notification and the fact that the project had been completed before the notification, is irrelevant for the purposes of determining the incentive effect; it runs counter to the judgment in Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427; and it ignores the economic realities.

46 Kronoply states, secondly, that it applied for aid of DEM 77 million, representing 35% of the investment cost, and obtained from the ILB DEM 69.3 million, which represents 31.5% of the amount of the investment. Kronoply's application for aid worth DEM 7.7 million — 3.5% of the amount of the investment — remains valid, since the administrative opposition procedure before the ILB is still open.

47 Kronoply claims that, in the Decision, the Commission was wrong to hold that the original aid application was 'exhausted' by the adoption of the decision of 3 July 2001, as that decision settled matters only in respect of part of the aid applied for. Kronoply also observes that the Decision was adopted in response to an 'application for amendment', as was expressly mentioned in the notification of 22 December 2003 from the German authorities.

48 Kronoply submits, thirdly, that the Commission disregards the fact that, for the authorisation of other aid in addition to that already granted, it is not necessary for there to be further eligible costs. The fact that it is in principle possible to obtain aid in a number of forms for the same project — hence for the same eligible costs — follows from the last sentence of recital 5 in the preamble to Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ 2001 L 10, p. 30). That approach is applicable to regional aid, subject to compliance with the 35% aid ceiling fixed in accordance with the 1998 multisectoral aid framework. In the present case, an aid intensity of 35% is compatible with the common market, since the 'state of competition' factor to be adopted was not 0.75, but 1.

— Lack of necessity

49 Kronoply claims that, in the context of regional aid, the Commission has defined and limited the criterion of necessity to mean that it is sufficient, in order for the necessity of aid to be recognised, that the application have been submitted before the start of the project. To that extent, the examination of the criterion of necessity corresponds to that of the criterion of incentive effect.

50 Kronoply submits that the criterion of the date of submission of the aid application also applies where aid granted is altered, and observes that the Commission itself acknowledges that the possibility of increasing aid, mentioned in the case-law of the Court, is not reserved exclusively for completely new projects. As well as the examples given by the Commission of cases in which an alteration to aid or additional aid may be granted, mention should be made of the situation where, as in the present case, the

Commission has made an incorrect assessment of the market, a uniform approval practice on the part of the Commission is sought and the original national administrative proceedings are still open.

51 The interpretation of the concept of necessity given by the Commission in recital 39 of the Decision is also incorrect, since the Commission disregards the fact that Kronoply was obliged, under the applicable national rules, to complete the project within 36 months — that is to say, by 1 January 2005 — failing which it would lose the aid in its entirety. It would be contradictory to require Kronoply to complete the project within a certain period, while holding that completion within the period prescribed results in forfeiture of the possibility of having an aid increase authorised. Such an approach amounts to a repudiation of the case-law of the Court, which provides for the possibility that aid may be altered or additional aid granted.

— Classification of the aid as operating aid

52 Kronoply claims that, in the Decision, the Commission's classification of the aid as operating aid is incorrect, since the notification made by the Federal Republic of Germany concerned regional aid and all the information provided to the Commission by that State concerned the requirements under the 1998 multisectoral aid framework.

53 The Commission contends that the present plea should be rejected.

Findings of the Court

— Admissibility of the plea

54 It should be borne in mind that, under Article 44(1) of the Rules of Procedure of the Court of First Instance, the application initiating proceedings must contain a summary of the pleas in law on which it is based. That summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The application must accordingly specify the nature of the grounds on which the action is based, so that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 68, and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 333).

55 Such an infringement of Article 44(1) of the Rules of Procedure constitutes an absolute bar to proceeding with a case, which, under Article 113 of the Rules of Procedure, the Court may consider at any time of its own motion, after hearing the parties (Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraphs 73 and 74, and Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 75).

56 In the present case, it must be stated that Kronoply simply alleges infringement of Article 88 EC without putting forward any argument in support of that claim. When questioned about this by the Court at the hearing, Kronoply did not provide any explanation.

57 The present plea must therefore be declared inadmissible in so far as it alleges infringement of Article 88 EC.

— Substance of the present plea

58 It is common ground that the Commission held that none of the derogations provided for in Article 87(2) and (3) EC were applicable to the State aid of EUR 3 936 947 that the Federal Republic of Germany planned to grant to Kronoply and that the aid had therefore to be declared incompatible with the common market.

59 It follows, both from the structure of the Decision and from the content of its recitals, that the Commission's conclusion is based on two separate pillars: the lack of any incentive provided by the aid at issue and the lack of necessity for that aid. Thus, the Commission states in recital 20 of the Decision that 'the two fundamental elements of incentive and necessity are missing in the present case'.

60 Even though, in certain circumstances, they may be mutually supportive, those two conditions governing the compatibility of aid each have their own specific meaning, so that the two pillars of the Decision relating to the lack of incentive and the lack of necessity must each be regarded as autonomous. In the context of the present plea, Kronoply specifically challenges each of the pillars on which the Decision rests.

61 When questioned at the hearing, both parties confirmed that interpretation of the Decision, as well as the need to apply cumulatively the two conditions relating to incentive effect and necessity of the aid if the compatibility of that aid with the common market is to be recognised. Formal note of this was recorded in the minutes of the hearing.

62 It should be borne in mind at this stage that, where some grounds of a decision on their own provide a sufficient legal basis for the decision, any errors in other grounds of the decision have, in any event, no effect on its enacting terms (see, by way of analogy, Joined Cases C-302/99 P and C-308/99 P *Commission and France* v *TF1* [2001] ECR I-5603, paragraphs 26 to 29, and Case T-201/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 42). Moreover, where the enacting terms of a Commission decision are based on several pillars of reasoning, each of which would in itself be sufficient to justify those terms, that decision should, in principle, be annulled only if each of those pillars is vitiated by an illegality. In such a case, an error or other illegality which affects only one of the pillars of reasoning cannot be sufficient to justify annulment of the decision at issue because that error could not have had a decisive effect on the enacting terms adopted by the Commission (see, by analogy, *Graphischer Maschinenbau* v *Commission*, cited in paragraph 45 above, paragraphs 49 to 51, and *General Electric* v *Commission*, paragraph 43).

63 Accordingly, it is appropriate first of all to examine Kronoply's criticisms, as set out in the plea alleging infringement of Article 87(3)(a) and (c) EC, in relation to the second pillar of the Decision, concerning the lack of necessity of the aid at issue.

64 Article 87(3) EC states that the following may be considered to be compatible with the common market:

‘(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

…

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

…’

65 As stated in recital 36 of the Decision, the Commission can declare aid compatible with Article 87(3) EC only if it can establish that the aid contributes to the attainment of one of the objectives specified, something which, under normal market conditions, the recipient firms would not achieve by their own actions. In other words, the Member States must not be permitted to make payments which, although they would improve the financial situation of the recipient undertaking, are not necessary for the attainment of the objectives specified in Article 87(3) EC (see, to that effect, Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, paragraph 17).

66 It is not acceptable for aid to include arrangements, in particular as regards its amount, whose restrictive effects exceed what is necessary to enable the aid to attain the objectives permitted by the Treaty (see, to that effect, Case 74/76 *Iannelli & Volpi* [1977] ECR 557, paragraph 15).

67 It follows from the Decision that the Commission reached the conclusion that the aid at issue is not necessary essentially on the basis of two objective findings.

68 The Commission first pointed out that the aid, in the amount of EUR 3 936 947, notified by the Federal Republic of Germany on 22 December 2003, did not concern either a new investment project on Kronoply's part or the creation of employment, but related solely to the construction of an OSB production plant, the subject of the notification of 22 December 2000.

69 In its written pleadings, the Commission therefore cites — without being contradicted on that point by Kronoply — a sentence from point 3.2.2 of the notification of 22 December 2003, according to which 'all eligible investments are limited to investments originally applied for'. It is also clear from the figures cited in point 3.3.1 of that notification that the amount of the contested aid corresponds to 3.5% of the cost of the initial investment, thereby raising the intensity of the aid from 31.5% to 35% of the cost.

70 Secondly, the Commission took account of the fact that the investment project for the construction of an OSB production plant had been fully completed by Kronoply by means of the authorised grant of EUR 35.43 million, representing an aid intensity of

31.5% of the investment cost, and that it was completed well before the second notification of 22 December 2003.

71 Thus the parties are agreed that Kronoply pursued its activities after receiving an aid intensity of no more than 31.5% and that the works for the construction of the plant, which had started in February 2000, were finally completed at the end of January 2003, in other words, almost one year before the second notification.

72 The Commission inferred from the second circumstance that Kronopoly ran a viable economic operation or that it did not in any event need more aid and that, at that stage, any further aid would provide a windfall profit for Kronoply (recital 39 of the Decision).

73 It must be stated in that connection that Kronoply does not claim that the full implementation of the investment project at issue ultimately gave rise to additional costs that it had to finance by means of own resources or a loan and which therefore compromised its financial position. Kronoply therefore fails to establish that the additional aid of EUR 3 936 947 notified to the Commission on 22 December 2003 was financially necessary for the full implementation of the investment project at issue.

74 Thus it appears that, in the circumstances, the Commission was right to hold that the aid at issue did not require the beneficiary either to pay consideration or to contribute to an objective in the common interest and that, in consequence, it was operating aid intended to cover the normal running costs that Kronopoly had to bear and, as such, could not be authorised.

75 It should be borne in mind in that regard that, as a rule, operating aid — that is to say, aid which is intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities — distorts the conditions of competition (see Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 30 and the case-law cited).

76 None of the arguments put forward by Kronoply are capable of invalidating the conclusion set out in paragraph 74 above.

77 Kronoply claims, first, that it is clear from the Commission's decision-making practice as set out in the Guidelines that, just as for incentive effect, it is sufficient, in order to demonstrate the necessity of aid, that the national application for aid have been lodged before work was started on the investment project.

78 It must be held, however, that Kronoply does not provide any reference to Commission decisions which demonstrate the alleged practice, and that an examination of the Decision reveals, to the contrary, that the third subparagraph of point 4.2 of the Guidelines concerns only the condition relating to the incentive effect of aid.

79 Under that provision, 'aid schemes must lay down that an application for aid must be submitted before work is started on the projects'.

80 It should be observed that that provision refers to a circumstance of a chronological nature and therefore points to an examination *ratione temporis*, which is perfectly suitable for determining whether an incentive effect exists. That examination must be made by reference to the decision to invest taken by the undertaking concerned, which marks the beginning of the dynamic process that an operating investment such as that undertaken by Kronoply necessarily constitutes.

81 As stated in recital 30 of the Decision, the aim of applying the criterion set out in point 4.2 of the Guidelines is to ascertain the existence of incentive effect without unduly delaying the investment by carrying out a full analysis of the economic circumstances of the recipient's investment decision, which might prove very difficult or time-consuming. The latter concern explains why the finding that the aid application was made before the start of the investment project is enough in itself, according to the Commission, to raise the presumption that an incentive effect exists.

82 However, the issue raised in the present dispute as regards the condition relating to the necessity of the aid is that of the assessment of the actual terms of the implementation of the investment project concerned and the existence of a consideration, to be provided by Kronoply, justifying the grant of the additional aid notified on 22 December 2003.

83 Kronoply's argument amounts, in reality, to maintaining that the assessment of the objective and substantive condition of the necessity of the aid must be made in the light of a purely formal criterion. That cannot be accepted.

84 Kronoply submits, secondly, that the Commission's interpretation of the concept of the necessity of the aid fails to take account of the fact that Kronoply was obliged, under the applicable national legislation, to complete the project within 36 months — that is to say, by 1 January 2005 — failing which it would lose all the aid, and amounts to a repudiation of the case-law of the Court, which provides for the possibility that an increase in aid already granted may be authorised.

85 It is common ground that, after a notification by a Member State of an aid project and its authorisation by the Commission, that State may notify a plan to introduce new aid in favour of an undertaking or to alter aid already granted to it (Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347, paragraph 47, and the order in *Kronopoly* v *Commission*, cited in paragraph 9 above, paragraph 50). The new notification is subject to review by the Commission, which, after checking that the conditions laid down in Article 87(2) and (3) EC are satisfied, may declare the aid compatible with the common market (see, to that effect, *Nuove Industrie Molisane* v *Commission*, paragraph 46).

86 Far from denying that that possibility is open to the Member States, the Commission expressly mentions it in recital 24 of the Decision. The Commission clearly accepts that several forms of aid may be accumulated with respect to a single investment project, but on condition that each of them may be considered to be compatible with the common market and that the condition that the aid is necessary is therefore satisfied.

87 Furthermore, as the Commission rightly states in its written pleadings, the fact that national legislation provides that a project must be completed within a certain period does not automatically lead to the loss of the possibility of applying for and obtaining authorisation, after the expiry of that period, for an increase in the aid already granted for that project.

88 It is thus conceivable that a Member State may notify the Commission, after the expiry of a period laid down by national law, of additional aid for a particular project whose implementation has, on account of unforeseeable external factors, generated additional costs.

89 It is for the Commission, in such a situation, to determine whether the additional aid notified may be regarded as necessary, by taking into account — particularly in the case of regional aid covered by the 1998 multisectoral aid framework — the maximum allowable intensity of aid applicable.

90 In the present case, the Commission rightly confined itself to finding that the investment project concerned had been fully implemented by Kronoply by means of the aid initially authorised and before the notification of the aid at issue.

91 It should be borne in mind that Kronoply has never claimed that the completion of the investment project concerned, hence the attainment of one of the objectives laid down in Article 87(3) EC, had given rise to additional expenditure and that the proposed increase in the initial aid to EUR 3 936 947, notified to the Commission on 22 December 2003, was to compensate, wholly or in part, for that additional expenditure and, to that extent, had to be regarded as necessary.

92 Kronoply merely alleges that additional aid for the investment project must be authorised where, as in the present case:

— the Commission has made, in its decision declaring the initial aid compatible, an erroneous assessment of the market for the goods concerned;

— a uniform approval practice for aid for that market is sought;

— the national administrative procedure relating to the initial aid application is still open.

93 It should be noted, first, that the allegation of an erroneous assessment by the Commission of the market for the relevant goods is at odds with the assertion that the information supplied by the German authorities — in the light of which the decision of 3 July 2001 was adopted — was correct. Secondly, Kronoply's submissions, as set out in the preceding paragraph, have no bearing on the condition that the aid must be necessary, as defined in paragraphs 65 and 66 above.

94 It is clear from the documents before the Court that the true position is that the notification of the contested aid was intended quite simply to reach an aid intensity of 35%, corresponding to the initial aid application, as Kronoply had clearly not accepted

the setting of a 0.75 coefficient for the 'state of competition' factor, when the Commission had approved a coefficient of 1 for the aid project notified in favour of the competing undertaking Glunz AG, in its decision on aid for that undertaking which was adopted several weeks after the decision of 3 July 2001.

95 Thirdly, Kronoply criticises the classification of the aid at issue as operating aid, relying essentially on the terms of the notification of 22 December 2003.

96 It must be observed, however, that the mere fact that the notification by a Member State 'relates to' regional investment aid does not mean that the measure concerned cannot be operating aid.

97 It should be borne in mind that, as is clear from Article 88 EC and the relevant case-law, the implementation of the system for the control of State aid is a matter essentially for the Commission, which, for the application of Article 87(3) EC, enjoys a broad discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context (Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 34, and *Germany* v *Commission*, cited in paragraph 75 above, paragraph 67).

98 In the present case, the Commission rightly held that the condition regarding the necessity of the aid was not satisfied and that the contested aid had to be classified as operating aid because it was granted without the recipient being required to provide consideration and it was intended to improve the finances of the recipient undertaking.

99 It is clear from the above considerations that Kronoply has failed to demonstrate that the Commission was wrong in concluding that the aid was not necessary.

100 Accordingly, and even supposing the Commission to have been wrong in holding that the aid at issue did not satisfy the condition concerning incentive effect in the particular circumstances of the case, those circumstances being that a notification was made of additional aid for an investment project which had already been authorised and which formed an economically indissociable whole, it must be held that, in accordance with the considerations set out in paragraphs 59 to 62 above, the Decision would remain well founded, solely on the basis of the finding that the aid was not necessary.

101 It follows that the plea alleging infringement of Article 87(3)(a) and (c) EC and the Guidelines must be rejected.

Plea alleging manifest errors on the part of the Commission in the finding of the facts

Arguments of the parties

102 Kronoply claims first that, in recital 22 of the Decision, the Commission is incorrect in stating that, in the N 813/2000 proceedings, it recognised the relevance of the information provided by the Federal Republic of Germany and accepted the conclusions drawn by the latter as to the market for the goods concerned. It is clear

from the Commission decision of 3 July 2001 that the Commission and the Federal Republic of Germany were not in agreement as regards the question whether or not the investment was made in a declining market.

103 Kronoply submits, secondly, that another comment made in recital 22 of the Decision, namely that the Commission decision of 3 July 2001 was accepted both by the Federal Republic of Germany and by Kronoply, is incorrect. The fact that no action was brought against the decision declaring the aid to be entirely compatible with the internal market cannot be construed as acceptance, because such an action would have been inadmissible for lack of *locus standi*. Furthermore, Kronoply had an obligation under national law to complete the project as notified within 36 months of its approval by the Commission.

104 Kronoply states, thirdly, that the Commission was wrong to find in the Decision that Kronoply had already been refused an aid intensity of 35%. According to Kronoply, the difference between the aid intensity of 31.5% authorised in the decision of 3 July 2001 and the aid intensity of 35% resulting from the correct application of the 1998 multisectoral aid framework had not yet been the subject of a State aid procedure before the notification of 22 December 2003, and it was only in the Decision that the Commission refused an (accumulated) aid intensity of 35%.

105 Kronoply observes, fourthly, that in assessing whether the aid had an incentive effect, hence in determining whether the aid application had been submitted before the start of the project, the Commission does not mention even once in the Decision the date of Kronoply's aid application, namely 28 January 2000. Clearly, therefore, the Commission is relying on incomplete facts.

106 Kronoply concludes that if the Commission had established the facts correctly, it would have reached a different conclusion, and that the manifest errors made by the Commission in finding the facts are in themselves sufficient justification for the annulment of the Decision.

107 The Commission contends that the present plea should be rejected.

Findings of the Court

108 It is clear from the case-law that, in order to annul the contested act, it is not sufficient to establish that the latter is vitiated by an error of fact. That error must also have had an impact on the content of the act itself; or, in other words, it must be established that, in the absence of that error, the act might have been different (see, to that effect, Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381, paragraph 115; Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663, paragraph 167; and Case T-107/04 *Aluminium Silicon Mill Products* v *Council* [2007] ECR II-669, paragraph 66).

109 In the present case, it is sufficient to note that, even if the Commission had committed the four errors of fact alleged by Kronoply, the conclusion relating to the lack of necessity of the aid would remain well founded in the light of the considerations set out in paragraphs 68 to 74 above.

110 The four alleged errors of fact committed by the Commission in the Decision — relating to the acknowledgement of the relevance of the information provided by the Federal Republic of Germany, to the acceptance of the decision of 3 July 2001, to the refusal of an aid intensity of 35% and to the failure to mention the exact date on which the initial aid application was submitted — do not in fact have any bearing on the above conclusion, or on the declaration of the incompatibility of the aid at issue, which derives from that conclusion.

111 The present plea must therefore be rejected as being, in any event, irrelevant.

Plea alleging manifest errors on the part of the Commission in the assessment of the facts, and a misuse of powers

Arguments of the parties

112 Kronoply claims that the Commission manifestly made an erroneous assessment in relation to the criterion of incentive effect, since it failed to carry out the examination of the criterion provided for in point 4.2 of the Guidelines or to take account of the fact that Kronoply was obliged, under rules of national law authorised by the Commission, to complete its project within a given time. In the Decision, the Commission's approach is at variance with the case-law of the Court, according to which it is possible to grant further aid or to alter aid already granted.

113 The Commission also failed to make use of its discretion, as confirmed by the Court in the abovementioned case-law and conferred by Article 9 of Regulation No 659/1999.

114 By basing the entire Decision solely on the fact that the project was completed with an aid intensity of 31.5% before the notification from Germany reached the Commission, the latter reveals its intention of arriving at a particular finding by basing the Decision only on the material circumstances, without classifying them in legal terms or assessing them from a legal point of view. Clearly, the reason why the criterion of incentive effect was not fully examined was to enable it to be concluded that there was no such effect. That falls to be construed as a misuse of powers by the Commission.

115 The Commission contends that the present plea should be rejected.

Findings of the Court

116 As regards the plea alleging manifest errors of assessment, it is clear from the examination of the application that, in that respect, Kronoply is putting forward arguments which it has already adduced in support of the pleas alleging infringement of Article 9 of Regulation No 659/1999, and of Article 87 EC and the Guidelines.

117 As stated above, those last-mentioned two pleas provide no sound basis for the annulment of the Decision.

118 As regards the plea alleging misuse of powers, Kronoply's argument is based on the assertion that 'clearly, the reason why the criterion of incentive effect was not fully examined was to enable it to be concluded that there was no such effect' and that 'that falls to be construed as a misuse of powers by the Commission'.

119 It is clear on the face of the Decision that the plea concerned is based on a false premiss, in that the Commission did in fact examine the condition concerning the incentive effect of the aid, by explaining why the particular circumstances of the present case enabled the presumption under point 4.2 of the Guidelines to be rebutted and the conclusion to be drawn that there was no incentive effect.

120 It must therefore be held that Kronoply has failed to show that the Commission misused its powers in the present case.

121 It follows from all the foregoing considerations that the present plea cannot succeed and that, in consequence, the action must be dismissed in its entirety.

Costs

122 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Kronoply has been unsuccessful, it must be ordered to pay the costs, in accordance with form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action.

2. Orders Kronoply GmbH & Co. KG to pay the costs.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 14 January 2009.

[Signatures]

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