

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

3 March 2010*

In Joined Cases T-102/07 and T-120/07,

Freistaat Sachsen (Germany), represented by C. von Donat and G. Quardt, lawyers,

applicant in Case T-102/07,

MB Immobilien Verwaltungs GmbH, established in Neukirch (Germany), represented initially by G. Brüggen, and subsequently by A. Seidl, K. Lengert and W.T. Sommer, lawyers,

MB System GmbH & Co. KG, established in Nordhausen (Germany), represented by G. Brüggen, lawyer,

applicants in Case T-120/07,

* Language of the cases: German.

v

European Commission, represented by K. Gross and T. Scharf, acting as Agents,

defendant,

APPLICATIONS for annulment of Commission Decision 2007/492/EC of 24 January 2007 on the State aid C 38/2005 (ex NN 52/2004) implemented by Germany for the Biria Group (OJ 2007 L 183, p. 27),

THE GENERAL COURT (Fourth Chamber),

composed of O. Czúcz (Rapporteur), President, I. Labucka and K. O'Higgins, Judges,
Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 20 January 2009,

gives the following

Judgment

Legal context and background

1. Community law

- ¹ Article 87 EC provides:

‘1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

...

3. 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 ...'

² Point 2 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2) ('the 1999 Guidelines') provides as follows:

'2.1. Concept of "a firm in difficulty":

(4) There is no Community definition of what constitutes "a firm in difficulty". However, for the purposes of these Guidelines, the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to go out of business in the short or medium term.

(5) In particular, a firm is, in any event and irrespective of its size, regarded as being in difficulty for the purposes of these Guidelines:

- (a) in the case of a limited company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;

or

- (b) in the case of an unlimited company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;

or

- (c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

(6) The usual signs of a firm being in difficulty are increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value. In acute cases the company may already have become insolvent or may be the subject of collective

insolvency proceedings brought under its domestic law. In the latter case, these Guidelines apply to any aid granted in the context of such proceedings which leads to the firm continuing in business. In any event, a firm in difficulty is eligible only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or creditors.

...

- 3 As regards aid schemes for small and medium-sized enterprises (SMEs), point 4 of the 1999 Guidelines provides:

‘4.1. General principles

- (64) The Commission will authorise aid schemes for rescuing and/or restructuring small or medium-sized enterprises in difficulty only where the firms concerned correspond to the Community definition of SMEs. Subject to the following specific provisions, the compatibility of such schemes will be assessed in the light of the conditions set out in [points] 2 and 3. Any aid which is granted under a scheme and does not meet one of those conditions must be notified individually and approved in advance by the Commission.

4.2. Eligibility

- (65) Unless otherwise stipulated in rules on State aid in a particular sector, awards of aid, under schemes authorised from now on, to small or medium-sized enterprises will be exempted from individual notification only where the enterprise concerned meets at least one of the three criteria set out in [paragraph] 5. Aid to enterprises that do not meet any of those three criteria must be notified individually to the Commission so that it can assess whether they qualify as firms in difficulty.

...

- ⁴ Point 6 of the 1999 Guidelines concerns appropriate measures under Article 88(1) EC. As regards the adaptation of rescue or restructuring aid schemes, it provides as follows:

- ‘(94) Member States must adapt their existing rescue and restructuring aid schemes which are to remain in operation after 30 June 2000 in order to bring them into line with these Guidelines, and in particular with the requirements of [point] 4, after that date.

- (95) To enable the Commission to monitor the adaptation process, Member States must let it have a list of all such schemes before 31 December 1999. They must subsequently, and in any event before 30 June 2000, provide it with sufficient

information to enable it to check that the schemes have indeed been modified in accordance with these Guidelines.’

2. *Approved aid scheme*

- 5 The Bürgschaftsrichtlinien des Freistaates Sachsen für die Wirtschaft und die freien Berufe sowie die Land- und die Forstwirtschaft (the directives concerning the guarantee scheme for the *Land* of Saxony for the benefit of enterprises, the liberal professions, agriculture and forestry) provide for two types of guarantee: first, guarantees provided as aid in the form of operating aid and aid for investment for regional purposes (‘regional aid programme’) and, second, guarantees provided as rescue and restructuring aid (‘rescue and restructuring aid programme’). The Commission of the European Communities approved that scheme for Freistaat Sachsen by way of Decision SG (93) D/9273 of 7 June 1993 on State aid N 73/93. It is thus an approved aid scheme (‘approved aid scheme’). In that decision of 7 June 1993, the Commission stated that guarantees extended to undertakings in respect of which the guarantor – as a diligent operator – knows, or ought to know, that they are in difficulty, constitute aid that is not covered by the decision at issue and must be notified to the Commission in each individual case.
- 6 The approved aid scheme was brought into line with the 1994 version of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12) (‘the 1994 Guidelines’). Thus, on 13 March 1996, the Commission adopted Decision 96/475/EC on the compatibility with the common market of State guarantees for measures to restructure large firms in difficulty under the State guarantee schemes of the *Länder* of Saxony-Anhalt, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Bavaria, Bremen, Mecklenburg-Western Pomerania, Schleswig-Holstein and Saxony (OJ 1996 L 194, p. 25), which stated that the granting of guarantees for the restructuring of large firms in difficulty under a guarantee scheme such as the guarantee scheme for Freistaat Sachsen had to be notified to the Commission in each individual case. As regards the concept of a firm in difficulty, that

decision refers to the criteria set out in the 1994 Guidelines. By letter of 19 December 1996, the Federal Republic of Germany confirmed that that decision had been transposed correctly by Freistaat Sachsen.

- 7 Taking the view that the definition of the concept of a firm in difficulty was vague, the German authorities and the Commission deemed it necessary to render that concept operational for the purposes of the application of the guarantee programmes of the German *Länder*. A Commission letter of 2 March 1998 dealt with that issue.
- 8 In that letter, the Commission proposed appropriate measures for the application of the guarantee schemes of the German *Länder*, including the approved aid scheme, and in particular the following definition of the concept of a firm in difficulty ('appropriate measure E 16/94'):

'For the purposes of the application of the abovementioned guarantee schemes, an undertaking is considered to be in difficulty if one of the following criteria is fulfilled:

- the relevant undertaking is insolvent or over-indebted within the meaning of the [Konkursordnung (German Bankruptcy Code)] or the [Einführungsgesetz zur Insolvenzenordnung (Introductory Law to the German Insolvency Code)];
- in the case of a partnership, more than half of the registered capital or, in the case of a joint stock company, more than half of the authorised capital has been used up by losses within the meaning of Paragraph 92 [of the Aktiengesetz (German Companies Law)] and Paragraph 49 [of the Gesetz betreffend die Gesellschaften mit beschränkter Haftung (German Law on Limited Liability Companies)] and 25% of that capital has been lost over the 12 months preceding the request for a guarantee.

In addition, in applying that concept, [the following] must be borne in mind for the purposes of budgetary law and checked by the guarantor in each individual case:

- As a general rule, a guarantee may not be granted where it has to be expected, with a high degree of probability, that the guarantor will have to step in (Paragraph 39 of the provisional administrative regulations on the federal budget code and the corresponding provisions in the budget laws of the *Länder*); it follows that a guarantee may not be granted to firms in difficulty, within the meaning of the criteria set out above, unless the guarantor establishes, on the basis of an expert's report prepared by an (independent) accountant taking into account the guaranteed loan, that the prognosis for the beneficiary undertaking is positive.
- When a guarantee is granted, checks must be carried out in every individual case to establish whether no other source of financing is available on the financial markets.'

- 9 The Federal Republic of Germany confirmed in a letter of 29 June 1998 that that definition of the concept of a firm in difficulty was being used.
- 10 Furthermore, in a letter from the Commission to the Federal Republic of Germany of 11 November 1998, the Commission explained the following as regards the concept of a firm in difficulty:

'As regards the points that have not yet been settled conclusively, in particular the question of the definition of "a firm in difficulty" and the application of the "*de minimis*" rule to guarantees for firms in difficulty, the Commission proposes to wait for the adoption of the amended guidelines on State aid for rescuing and restructuring.

Once the decision has been taken, the outstanding points will be brought into line with those guidelines.’

- 11 The approved aid scheme was subsequently amended to reflect the 1999 Guidelines. In compliance with the appropriate measures set out in point 6 of the 1999 Guidelines (see paragraph 4 above), the Federal Republic of Germany sent to the Commission, by letter of 1 December 1999, a list of aid schemes that remained in force after 30 June 2000 and which therefore had to be amended in accordance with those appropriate measures (‘the letter of 1 December 1999’). That list included the approved aid scheme. By letter of 20 January 2000 (‘the letter of 20 January 2000’), the Federal Republic of Germany accepted those appropriate measures. In addition, in accordance with paragraph 95 of the 1999 Guidelines, the Federal Republic of Germany also sent various documents to the Commission in this regard (letters of 30 June 2000, 11 December 2000 and 26 March 2001) in order to show that the existing German aid schemes had been amended in accordance with those appropriate measures.
- 12 Against that background, the Federal Republic of Germany also sent, by letter of 30 June 2000 (‘the letter of 30 June 2000’), a Prüfraster für staatliche Bürgschaften aus den Bürgschaftsrichtlinien des Bundes und der Länder (checklist for State guarantees under the guarantee schemes of the Federal Government and the *Länder*; ‘the checklist’).

3. Undertakings at issue

- 13 The Biria Group was active in the manufacture and distribution of bicycles.

- 14 The first applicant in Case T-120/07, MB Immobilien Verwaltungs GmbH ('MB Immobilien'), is the legal successor to Biria AG (new), the former parent company of the Biria Group.
- 15 Biria AG (new) was created in 2003 as a result of the merger between Biria AG (old) and Sachsen Zweirad GmbH, with the undertaking first being renamed Biria GmbH and subsequently Biria AG (new). The sole owner of Biria AG (new) was Mehdi Biria.
- 16 The second applicant in Case T-120/07, MB System GmbH & Co. KG ('MB System'), is the legal successor to Bike Systems GmbH & Co., Thüringer Zweiradwerk KG ('Bike Systems'), which was one of the major companies within the Biria Group. MB System manufactured only bicycles, while another undertaking within the group was responsible for marketing them.

4. Measures at issue

- 17 Between March 2001 and December 2003, the Biria Group received three financial contributions.
- 18 First, in March 2001, gbb Beteiligungs AG ('gbb'), a subsidiary of Deutsche Ausgleichsbank, a German public law development bank which had the task of supporting the

German economy in the public interest, provided until the end of 2010 a silent participation to Bike Systems amounting to some EUR 2 070 732 ('Measure 1').

- ¹⁹ Second, on 23 March 2003, under the approved aid scheme, Freistaat Sachsen provided an 80% guarantee for an operating credit of EUR 5.6 million in favour of Sachsen Zweirad which was originally due to expire at the end of 2008 ('Measure 2'). That guarantee was given back on 5 January 2004 and replaced by a guarantee in favour of Biria GmbH (see paragraph 20 below).
- ²⁰ Third, on 9 December 2003, also under the approved aid scheme, Freistaat Sachsen provided an 80% guarantee for an operating credit of EUR 24 875 000 in favour of Biria GmbH ('Measure 3') which was to take effect on 5 January 2004, in exchange for the return of the guarantee provided to Sachsen Zweirad under Measure 2.

5. Administrative procedure

- ²¹ In July 2003 and August 2003, the Commission received complaints concerning a guarantee provided to the Biria Group as well as public participations in companies belonging to the group.
- ²² By letter of 9 September 2003, the Commission sought clarification from the Federal Republic of Germany, which the latter provided.

- 23 On 18 October 2004 the Commission called on the Federal Republic of Germany to provide additional information in view of the fact that it had doubts as to whether the aid measures granted to the Biria Group complied with the aid schemes under which they had ostensibly been granted. In response to that mandatory request, the Federal Republic of Germany submitted further information by letter of 31 January 2005 ('the letter of 31 January 2005'). By that letter, the Federal Republic of Germany informed the Commission that Measure 3 had also been granted on the basis of the approved aid scheme.
- 24 On 20 October 2005 the Commission initiated the formal investigation procedure with respect to three alleged State aid measures. It found, in the same decision, that several other aid measures that were alleged to have been granted unlawfully either did not constitute State aid or had been granted in compliance with approved aid schemes. That decision was published in the *Official Journal of the European Union* of 5 January 2006 (OJ 2006 C 2, p. 14). The Commission invited all interested parties to submit comments on the possible aid measures. Various complainant undertakings submitted comments, which were transmitted to the Federal Republic of Germany by letters of 6 February 2006 and 2 March 2006. The Federal Republic of Germany replied by letters of 5 April 2006 and 12 May 2006.
- 25 The Federal Republic of Germany's response to the initiation of the formal investigation procedure was submitted by letter of 23 January 2006 ('the letter of 23 January 2006').
- 26 By letter of 6 February 2006, the Commission requested further clarification from the Federal Republic of Germany, which the latter submitted by letter of 5 April 2006. The Commission sent a further request for information on 19 July 2006, to which the Federal Republic of Germany replied by letter of 25 September 2006.

6. *Contested decision*

- ²⁷ On 24 January 2007 the Commission adopted Decision 2007/492/EC on the State aid C 38/2005 (ex NN 52/2004) implemented by Germany for the Biria Group (OJ 2007 L 183, p. 27) ('the contested decision'). The operative part of the contested decision states:

'Article 1

The State aid [implemented by the Federal Republic of Germany] for [Bike Systems], [Sachsen Zweirad] and Biria GmbH (now Biria AG) is incompatible with the common market. The aid consisted of the following measures:

- (a) Measure 1: a silent participation of EUR 2 070 732 provided to [Bike Systems]. The aid element corresponds to the difference between the reference interest rate plus 1 000 basis points and the remuneration against which the silent participation was provided (fixed remuneration plus 50% of the variable remuneration);
- (b) Measure 2: a guarantee of EUR 4.480m to [Sachsen Zweirad]. The aid element corresponds to the difference between the reference interest rate plus 800 basis points and the interest rate at which the guaranteed loan was provided;
- (c) Measure 3: a guarantee of EUR 19.9m to Biria GmbH (now Biria AG). The aid element corresponds to the difference between the reference interest rate plus 700 basis points and the interest rate at which the guaranteed loan was provided.

Article 2

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

2. The silent participation and the guarantee for Biria GmbH (now Biria AG) shall be discontinued within two months following notification of this decision.

...'

28 In essence, the following reasons are given for the contested decision. As regards Measure 1, the Commission took the view that the participation provided by gbb was attributable to the State and that it conferred an advantage on Bike Systems, as that company could not have obtained it on the market on the same conditions. Basing itself on point 3.2 of its Notice on the application of Articles 87 [EC] and 88 [EC] to State aid in the form of guarantees (OJ 2000 C 71, p. 14), the Commission took the view that the entire participation had to be considered to be an aid element, because Bike Systems was in difficulty when the participation was provided and the risk associated with it was such that, in a market economy, no investor would have provided it. As regards Measures 2 and 3, the Commission took the view that the beneficiaries were large undertakings which, according to the criteria in the 1999 Guidelines, and in particular paragraph 6 of those guidelines, were in difficulty at the time when the respective guarantees were provided. Those guarantees were therefore not covered by the approved aid scheme and ought to have been notified to the Commission in each individual case. In addition, the Commission found, in respect of Measures 1, 2 and 3, that the exemptions provided for in Article 87(2) and (3) EC did not apply and that, notably, it had not been provided with information, particularly with regard to the implementation of a restructuring plan as required by the 1999 Guidelines. In respect of Measures 2 and 3, the Commission furthermore stated in the contested decision that, given that Sachsen Zweirad had benefited from restructuring aid in April 1996 and March 1998, the 'one time – last time' condition was not met in granting the two

guarantees, since less than 10 years had elapsed since the end of the restructuring period and there were no exceptional circumstances in the present case. According to the Commission, the 1999 Guidelines had therefore not been complied with.

Procedure and forms of order sought by the parties

29 By applications lodged at the Registry of the General Court on 5 April 2007 and 16 April 2007, and registered, respectively, as Cases T-102/07 and T-120/07, Freistaat Sachsen, on the one hand, and MB Immobilien and MB System, on the other hand, brought the present actions.

30 By a separate document lodged at the Registry of the General Court on 13 August 2007, MB Immobilien brought an application for interim measures seeking suspension of the operation of the contested decision. That application was dismissed by order of the President of the General Court of 11 October 2007 and costs were reserved.

31 By order of the President of the Fourth Chamber of the General Court of 24 November 2008, after the parties had been heard, Cases T-102/07 and T-120/07 were joined for the purposes of the oral procedure and the judgment pursuant to Article 50 of the Court's Rules of Procedure.

32 In Case T-102/07, Freistaat Sachsen claims that the Court should:

— annul the contested decision in so far as it concerns Measures 2 and 3;

— order the Commission to pay the costs.

³³ In Case T-120/07, MB Immobilien and MB System claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

³⁴ In Case T-102/07, the Commission contends that the Court should:

— dismiss the action;

— order Freistaat Sachsen to pay the costs.

³⁵ In Case T-120/07, the Commission contends that the Court should:

— dismiss the action;

— order MB Immobilien and MB System to pay the costs.

Law

³⁶ The action in Case T-102/07 contains three pleas in law. The first plea alleges infringement of Community law by reason of an incorrect interpretation of the approved aid scheme. It comprises three parts. In the first part, Freistaat Sachsen claims that appropriate measure E 16/94 was not applied. In the second part, Freistaat Sachsen alleges a failure to provide a statement of reasons. In the third part, Freistaat Sachsen claims that the undertakings concerned are not firms in difficulty within the meaning of the approved aid scheme. The second plea alleges that the facts regarding the difficulties of the undertakings at issue were incorrectly assessed. This plea comprises two parts. In the first part, Freistaat Sachsen alleges that the contested decision is at variance with the Commission's practice. In the second part, it claims that the criteria set out in paragraph 6 of the 1999 Guidelines were misconstrued. The third plea alleges that the statement of reasons regarding the amount of the aid element is defective.

³⁷ The action in Case T-120/07 also involves three pleas in law. The first plea alleges that Community law was infringed by reason of an incorrect interpretation of the approved aid scheme. The second plea alleges misappraisal of the facts regarding the difficulties of the beneficiary undertakings. The third plea alleges a breach of the obligation to state reasons. The third plea consists of four parts. In the first part, MB Immobilien and MB System claim that the Commission did not provide reasons for its departure from the 1999 Guidelines. In the second part, they claim that the contested decision failed to provide reasons based on appropriate measure E 16/94. In the third part, the applicants claim that the Commission failed to state the reasons for its decision to depart from appropriate measure E 16/94. In the fourth part, the applicants claim that the statement of reasons provided in the context of determining the aid amount to be recovered contains a serious error.

38 The arguments put forward by Freistaat Sachsen in the context of Case T-102/07 and those put forward by MB Immobilien and MB System in the context of Case T-120/07 overlap to a large degree, even though the complaints of Freistaat Sachsen concern only Measures 2 and 3, whereas those of MB Immobilien and MB System also relate to Measure 1. Essentially, they claim, first, with regard to Measures 2 and 3, that there has been an infringement of the approved aid scheme because, instead of applying the narrow definition of the concept of a 'firm in difficulty' set out in appropriate measure E 16/94, the Commission used the definition in the 1999 Guidelines, in particular the signs set out in paragraph 6 of those guidelines. Second, the applicants claim that the Commission's assessment, classifying the beneficiary undertakings as firms in difficulty, is manifestly wrong. Third, the applicants allege that the duty to state reasons has been infringed. It is in that order that their complaints will be analysed below.

1. Complaints alleging failure to apply the definition of the concept of a firm in difficulty as set out in appropriate measure E 16/94

Arguments of the parties

39 The applicants do not contest the fact that firms in difficulty are excluded from the regional aid programme under the approved aid scheme. However, they claim essentially that the Commission's analysis, according to which the undertakings benefiting under Measures 2 and 3 were in difficulty, ought to have been based on the criteria set out in appropriate measure E 16/94 and not on the criteria set out in paragraphs 4 to 6 of the 1999 Guidelines, which are allegedly more extensive.

40 According to Freistaat Sachsen, the Commission was under an obligation, in the light of the case-law, to examine Measures 2 and 3 in the light of the conditions set out in the approved aid scheme (Case C-47/91 *Italy v Commission* [1994] ECR I-4635). However, in the contested decision, the Commission's finding that Measures 2 and 3 were incompatible with the approved aid scheme was not based on the definition of the concept of a firm in difficulty set out in appropriate measure E 16/94, but rather

on the criteria set out in paragraph 6 of the 1999 Guidelines. According to Freistaat Sachsen, the Commission thus overestimated the extent of its discretion in the context of the actual application of an aid scheme which it had, none the less, previously approved.

- 41 Freistaat Sachsen submits that the approved aid scheme provides for two types of guarantee programmes: a regional aid programme and a rescue and restructuring aid programme. Measures 2 and 3, it submits, were granted under the regional aid programme; therefore, the definition that should have been applied is the definition of the concept of a firm in difficulty laid down in appropriate measure E 16/94.
- 42 First, Freistaat Sachsen bases itself on the interpretation of the actual facts and the letters exchanged before the 1999 Guidelines were adopted.
- 43 It thus submits that the concept of a firm in difficulty was defined, initially, in Decision SG (93) D/9273 as being any undertaking of which the guarantor – as a diligent operator – knows, or ought to know, that that undertaking is in difficulty.
- 44 According to Freistaat Sachsen, the Commission took the view in Decision 96/475 concerning guarantees for measures to restructure large firms in difficulty granted under the State guarantee schemes of several German *Länder*, including Freistaat Sachsen, that the granting of guarantees to large firms in difficulty had to be notified on a case-by-case basis. It followed that, for the purposes of the rescue and restructuring aid programme under the approved aid scheme, guarantees could from then on be provided only to SMEs in difficulty. According to Freistaat Sachsen, the regional aid programme under the approved aid scheme was not affected, a fact confirmed by the letter of 19 December 1996 (see paragraph 6 above).

- ⁴⁵ Furthermore, Freistaat Sachsen submits that a review of the correspondence between the Federal Republic of Germany and the Commission, such as the letter of 2 March 1998 (see paragraph 7 above), indicates that similar guarantee programmes existed in several *Länder* as well as at federal level. Given the importance of a measure providing regional support, a working definition of the concept of a 'healthy firm' should have been found. According to Freistaat Sachsen, the search for a definition was the subject of several discussions and a protracted exchange of correspondence between the Commission and the Federal Republic of Germany which was able to be brought to a close only when the Commission suggested a definition of the concept of a firm in difficulty in appropriate measure E 16/94.
- ⁴⁶ Appropriate measure E 16/94 redefined the firms in difficulty to be excluded from regional aid. Henceforth, the following would no longer benefit from regional aid: first, firms that fulfil clear criteria, subsequently reproduced in paragraph 5 of the 1999 Guidelines, and, second, firms at risk of actually calling in the guarantee. That definition has not been amended since.
- ⁴⁷ Freistaat Sachsen also submits that, in the letter of 11 November 1998 (see paragraph 10 above), the Commission stated that the question of the definition of the concept of a firm in difficulty had not yet been settled conclusively, but that, in the interest of legal certainty, the criteria of appropriate measure E 16/94 were to be applied.
- ⁴⁸ Second, Freistaat Sachsen submits that the exchange of letters between the Federal Republic of Germany and the Commission that took place after the 1999 Guidelines had been adopted reveals that no changes were made to the definition of the concept of a firm in difficulty set out in appropriate measure E 16/94 as applied to the regional aid programme under the approved aid scheme.
- ⁴⁹ According to Freistaat Sachsen, the letter of 1 December 1999 relates exclusively to rescue and restructuring aid for firms in difficulty. It claims that the same is true in regard to the letter of 20 January 2000, by which the Federal Republic of Germany

accepted the appropriate measures provided for in point 6 of the 1999 Guidelines, since those appropriate measures likewise related only to aid schemes for rescue and restructuring aid. That letter also showed that, as regards SMEs in difficulty, the definition in paragraph 5 of the 1999 Guidelines had to be applied.

- 50 Furthermore, according to Freistaat Sachsen, the documents sent under cover of the letter of 30 June 2000 concerned exclusively aid schemes for rescue and restructuring aid. The checklist summarised programmes or parts of programmes dedicated to regional aid in point 3.5. By contrast, point 4 dealt exclusively with rescue and restructuring aid. The same was true for subsequent changes to point 4, which were the subject of an ensuing exchange of correspondence between the Commission and the German Government.
- 51 Third, Freistaat Sachsen submits that the application of two slightly different definitions of the concept of a firm in difficulty in the context of the regional aid programme and in that of the rescue and restructuring aid programme under the approved aid scheme is attributable to the different purposes served by those two types of programme.
- 52 The rescue and restructuring programme seeks to ensure that only SMEs which satisfy the criteria set out in paragraph 5 of the 1999 Guidelines can benefit from rescue and restructuring aid. Freistaat Sachsen points out that, as regards the regional aid programme, firms could benefit from regional aid if they were not in difficulty according to appropriate measure E 16/94, that is to say, according to criteria that have been clearly defined and which correspond to those set out in paragraph 5 of the 1999 Guidelines, or if it was unlikely that the guarantee would be called in.
- 53 Finally, Freistaat Sachsen claims that the signs that a firm is in difficulty set out in paragraph 6 of the 1999 Guidelines are too vague for Member States to use them as criteria for the purpose of assessing whether a proposed aid measure is compatible with an existing aid scheme.

- 54 For their part, MB Immobilien and MB System submit that the Commission ought to have examined Measures 2 and 3 in the light of the conditions of the approved aid scheme, and they also refer in that respect to appropriate measure E 16/94. They point out that the conditions set out in appropriate measure E 16/94 are worded more narrowly than those in the 1999 Guidelines. Rather than applying signs within the meaning of those guidelines, the budget law criterion laid down in appropriate measure E 16/94 ought to be applied in the present case. According to that criterion, guarantees must not be provided where it is to be expected, with a high degree of probability, that the guarantor will have to intervene. The Federal Republic of Germany accepted that definition and Freistaat Sachsen as well as the beneficiaries ought to have been allowed to rely on the fact that the approved aid scheme operated as a special aid scheme.
- 55 MB Immobilien and MB System submit that adapting the approved aid scheme in the light of the 1999 Guidelines affected the rescue and restructuring aid programme alone. The Commission had suggested that all guarantees benefiting large undertakings be notified irrespective of the type of aid involved, but made no mention of the fact that the Federal Republic of Germany had rejected that proposal. That question has not yet been settled conclusively.
- 56 According to MB Immobilien and MB System, guarantees supporting rescue and restructuring measures in favour of firms in difficulty within the meaning of the approved aid scheme were limited to SMEs. The criteria to be applied to regional aid in the form of operating aid and aid for investment, as set out in appropriate measure E 16/94, are the strict criteria laid down in paragraph 5 of the 1999 Guidelines complemented by the twin condition under budgetary law according to which a guarantee cannot be provided if it is very likely that it will be called in and that, therefore, guarantees cannot be provided to firms in difficulty unless the guarantor finds, on the basis of an expert's report prepared by an (independent) accountant, that, taking into account the guaranteed loan, the beneficiary undertaking stands a good chance of carrying on its activities. Furthermore, as regards the obligation to notify rescue and restructuring aid for large firms in difficulty resulting from Decision 96/475, MB Immobilien and MB System submit that the Federal Republic of Germany accepted that obligation in respect of both programmes for Baden-Württemberg (Germany) and Hamburg (Germany) only. As regards the regional aid programme, the approved aid scheme was not affected by Decision 96/475. Consequently, the criterion to be used to check whether such guarantees were permissible continued to be the budgetary

criterion mentioned above, which was not replaced by the signs set out in the 1999 Guidelines.

- ⁵⁷ The Commission contends that the complaints should be rejected. The Commission disputes the applicability of appropriate measure E 16/94 and claims that, in the contested decision, it was fully entitled in law to apply the criteria set out in paragraphs 4 to 6 of the 1999 Guidelines.

Findings of the Court

- ⁵⁸ The applicants do not contest the fact that firms in difficulty are excluded from the regional aid programme under the approved aid scheme. However, they submit that the Commission was not entitled, in respect of Measures 2 and 3, to base the contested decision on the definition of the concept of a firm in difficulty contained in paragraphs 4 to 6 of the 1999 Guidelines in order thus to exclude the undertakings at issue from the regional aid programme, but ought rather to have applied the definition in appropriate measure E 16/94, which is narrower. The Federal Republic of Germany did not accept that allegedly broader definition in the 1999 Guidelines for the regional aid programme under the approved aid scheme. Furthermore, they submit, the signs in paragraph 6 of the 1999 Guidelines are not precise enough to enable Member States to assess the compatibility of financial measures with an approved aid scheme.
- ⁵⁹ As regards the Commission's margin of discretion, it must be recalled that, when the Commission has before it a specific grant of aid alleged to have been made in pursuance of a previously authorised scheme, it cannot at the outset examine it directly in relation to the EC Treaty. Prior to the initiation of any procedure, it must first confine itself to examining whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving that general scheme. If it did not do so, the Commission could, whenever it examined an individual aid measure, go back on its decision approving the aid scheme, which had already involved an examination in the light of Article 87 EC (see, to that effect, *Italy v Commission*, cited in paragraph 40 above, paragraph 24).

- ⁶⁰ Aid which constitutes the strict and foreseeable application of the conditions laid down in the decision approving the general aid scheme is thus considered to be existing aid which does not need to be notified to the Commission or examined in the light of Article 87 EC (Case C-321/99 P *ARAP and Others v Commission* [2002] ECR I-4287, paragraph 83, and Case T-176/01 *Ferriere Nord v Commission* [2004] ECR II-3931, paragraph 51).
- ⁶¹ By contrast, measures that are not covered by the general aid schemes relied on constitute new aid the compatibility of which with the common market has to be examined by the Commission. Article 2 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] EC (OJ 1999 L 83, p. 1) states that ‘any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned’.
- ⁶² In addition, a Commission decision ruling on whether an aid measure is consistent with the relevant scheme falls within the scope of the Commission’s obligation to ensure the application of Articles 87 EC and 88 EC. Consequently, the Commission’s examination of the conformity of an aid measure with that scheme does not constitute a step that exceeds its powers. Therefore, the Commission’s assessment cannot be limited by the assessment of the national authorities which granted the aid.
- ⁶³ As regards the argument that the Federal Republic of Germany did not accept the definition of firms in difficulty emerging from paragraphs 4 to 6 of the 1999 Guidelines for the regional aid programme under the approved aid scheme, Article 17(1) of Regulation No 659/1999 states that the Commission is to obtain from the Member State concerned all necessary information for the review, in cooperation with the Member State, of existing aid schemes pursuant to Article 88(1) EC. Where the Commission, in the light of the information submitted by the Member State, concludes that an existing aid scheme is not, or is no longer, compatible with the common market, it is required to issue a recommendation proposing appropriate measures to the Member State concerned, in order to either amend or abolish the aid scheme in accordance with Article 18 of Regulation No 659/1999.

- ⁶⁴ In that respect, Article 19 of Regulation No 659/1999 states that '[w]here the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding and inform the Member State thereof'. That article also states that '[t]he Member State shall be bound by its acceptance to implement the appropriate measures'.
- ⁶⁵ In the present case, in accordance with the appropriate measures in the 1999 Guidelines (see paragraph 4 above), the Federal Republic of Germany sent to the Commission, by letter of 1 December 1999, a list of aid schemes that would remain in force after 30 June 2000 and which, according to that letter, had to be brought into line with the appropriate measures. The approved aid scheme appeared on that list. By letter of 20 January 2000, the Federal Republic of Germany accepted the appropriate measures proposed in point 6 of the 1999 Guidelines.
- ⁶⁶ However, according to the applicants, the Federal Republic of Germany accepted the appropriate measures only in respect of aid schemes covering rescue and restructuring and, consequently, only in respect of the rescue and restructuring aid programme under the approved aid scheme. The applicants take this to mean that it was the definition of the concept of a firm in difficulty that appears in appropriate measure E 16/94 that continued to apply to the regional aid programme under the approved aid scheme.
- ⁶⁷ That reasoning must be rejected.
- ⁶⁸ The Commission rightly states that the letters from the Federal Republic of Germany in the file do not make a distinction between the different programmes under the approved aid scheme. Moreover, that aid scheme is mentioned in the letter of 1 December 1999 without further explanation. The letter of 20 January 2000 is also general in nature. Therefore, it has not been shown that application of the 1999 Guidelines to the regional aid programme under the approved aid scheme had in any way been expressly excluded.

69 Moreover, the checklist which, as per the letter of 30 June 2000, constitutes an integral part of the German guarantee schemes and transposes the appropriate measures with respect to those schemes, and in particular point 4.1 of that checklist, expressly refers to the obligation to notify in each individual case rescue and restructuring aid intended for large firms in difficulty within the meaning of the 1999 Guidelines. It thus follows from point 4.1 of the checklist that the Federal Republic of Germany accepted that any guarantee that may be classified as rescue and restructuring aid (with the exception of guarantees provided under an aid scheme for SMEs that satisfy at least one of the three criteria set out in paragraph 5 of the 1999 Guidelines; see paragraph 78 below) must be the subject of individual notification to the Commission, in accordance with the 1999 Guidelines.

70 It is true that, as Freistaat Sachsen submits, the correspondence at issue explicitly refers, in certain respects, to ‘rescue or restructuring aid schemes’. By way of example, the letter of 1 December 1999 mentions that all ‘existing rescue or restructuring aid schemes’ in force after 30 June 2000 had been brought into line with the 1999 Guidelines. The same is true for the checklist. That is entirely consistent with the wording of point 6.3 of the 1999 Guidelines, which requires adaptation of ‘existing rescue or restructuring aid schemes in the light of these Guidelines’.

71 Contrary to the submission of Freistaat Sachsen, however, it does not follow from those references to ‘rescue or restructuring aid schemes’ that the Federal Republic of Germany’s acceptance of the appropriate measures was limited to the rescue and restructuring aid programme under the approved aid scheme.

72 Even if it were to be assumed that acceptance of the appropriate measures in the 1999 Guidelines related only to existing rescue or restructuring aid schemes, that would none the less not have implied that Freistaat Sachsen could disregard the 1999 Guidelines – after they had entered into force on 9 October 1999 and after the Federal Republic of Germany had accepted the appropriate measures contained in them – when it granted financial benefits to undertakings that were potentially in difficulty. That is true even where those benefits appeared, at first sight, to fulfil the conditions of an

existing regional aid scheme for a region that, as stated in recital 10 to the contested decision, lies in an assisted area for the purposes of Article 87(3)(a) EC.

⁷³ In that respect, it must be recalled that the exception concerning regional aid provided for by Article 87(3)(a) and (c) EC requires, as far as rescue aid is concerned, the existence of a genuine restructuring plan, so that the positive effects of the aid on regional development can be of a lasting nature (see, to that effect, Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 36) and offset any distortion of competition.

⁷⁴ Similarly, according to paragraph 3 of the 1999 Guidelines, which the Commission was entitled to adopt in order to exercise the wide discretion that it enjoys for the purposes of the application of Article 87(3) EC and by which it is governed (see, to that effect, Case T-171/02 *Regione autonoma della Sardegna v Commission* [2005] ECR II-2123, paragraphs 94 and 95 and the case-law cited), ‘State aid for rescuing firms in difficulty from bankruptcy and helping them to restructure may only be regarded as legitimate subject to certain conditions’. That is the reason why the 1999 Guidelines provide, in particular in paragraph 17, that there is a duty to notify the Commission in advance of any funding provided or guaranteed by the State to an enterprise that is in financial difficulties, and also why, in the context of the examination of that notification, the Commission will take into account the regional considerations mentioned in Article 87(3)(a) and (c) EC, as stated in paragraphs 19 and 20 of the 1999 Guidelines.

⁷⁵ It follows from the foregoing that, at the material time, prior to granting aid to a large firm which found itself in an economic situation that was – to say the least – problematic, which in the case of the Biria Group cannot be denied, the Federal Republic of Germany ought first to have determined whether it was dealing with a firm in difficulty according to the criteria set out in paragraphs 4 to 6 of the 1999 Guidelines. If that had been the case, individual notification of the aid would have been mandatory.

⁷⁶ It also follows that the applicants' argument that there was a specific definition of the concept of a firm in difficulty for the purposes of the regional aid programme under the approved aid scheme must be rejected. Accepting that different definitions of the concept of a firm in difficulty can exist alongside each other might, in fact, create a situation in which a firm that is in difficulty according to the 1999 Guidelines might nevertheless benefit from State aid without that aid having to be notified and without the 1999 Guidelines being complied with. Such a situation would, however, be contrary to the broad logic of Article 87(1) and (3) EC and Article 88(3) EC as clarified by the 1999 Guidelines (see paragraph 74 above).

⁷⁷ Next, as regards the applicants' argument that the signs listed in paragraph 6 of the 1999 Guidelines are too vague to be capable of use by a Member State for the purpose of assessing the compatibility of a planned aid measure with an existing aid scheme, it must be noted, as the Commission correctly points out, that, in the case of doubt as to the classification of the situation of a beneficiary undertaking, the Member State must notify the measure at issue.

⁷⁸ Moreover, as regards the applicants' arguments relating to a comparison between the criteria in appropriate measure E 16/94 and those in paragraph 5 of the 1999 Guidelines, as well as to the fact that certain correspondence between the Commission and the Federal Republic of Germany that was exchanged after the 1999 Guidelines had been adopted referred only to the criteria of that paragraph 5, it must be stated that it is clear from the wording of the 1999 Guidelines, and particularly from point 4 of those guidelines (see paragraph 3 above), that the only aid schemes for firms in difficulty that are still permitted are those which relate to SMEs. It also follows that, in order to determine whether those SMEs are in difficulty, a priori only the strict criteria of paragraph 5 of the 1999 Guidelines are relevant. Where those strict criteria do not apply, individual notification is mandatory. Even though the correspondence between the Commission and the Federal Republic of Germany exchanged after the 1999 Guidelines had been adopted may thus have contained a discussion as to the definition of the concept of a firm in difficulty as it appears in paragraph 5 of the 1999 Guidelines in order to define the context in which aid schemes that were still authorised were to be assessed, that provides no ground for inferring, as the applicants

appear to claim, that the Federal Republic of Germany accepted that definition only, or that it refused the possibility of using the definition of a firm in difficulty that appears in paragraph 6 of the 1999 Guidelines outside the specific context of a rescue and restructuring aid scheme for SMEs.

⁷⁹ Finally, it must also be stated that, as the Commission contends and as is clear from the letter of 23 January 2006, the Federal Republic of Germany agreed with the assessment of Measures 2 and 3 in accordance with paragraph 6 of the 1999 Guidelines. Furthermore, neither the contested decision nor the file indicates that the Federal Republic of Germany relied on appropriate measure E 16/94 during the administrative procedure, and the applicants, moreover, do not make any claim to the contrary.

⁸⁰ It follows from the foregoing that all correspondence between the Commission and the Federal Republic of Germany prior to 1999 must be disregarded. Furthermore, the allegedly narrower definition of the concept of a firm in difficulty set out in appropriate measure E 16/94 must be disregarded on the ground that it is irrelevant to the outcome of the present case.

⁸¹ Consequently, the Commission infringed neither Community law nor the approved aid scheme when, in the contested decision, it assessed the situation of the undertakings at issue in the light of the criteria in the 1999 Guidelines, including paragraph 6 of those guidelines, and not in the light of the criteria in appropriate measure E 16/94.

⁸² The complaints submitted in the actions in Cases T-102/07 and T-120/07 alleging an infringement of the approved aid scheme in this respect must therefore be rejected.

2. *Complaints concerning the classification of the beneficiary undertakings as firms in difficulty*

- ⁸³ First, MB Immobilien and MB System submit that the undertaking which benefited from Measure 1, Bike Systems, was not in difficulty in March 2001. Given that the approved aid scheme concerns State guarantees, and given also that Measure 1 is a silent participation granted outside that aid scheme, MB Immobilien and MB System do not dispute the applicability to that aid scheme of the definition of the concept of a firm in difficulty contained in the 1999 Guidelines.
- ⁸⁴ Second, Freistaat Sachsen and MB Immobilien both submit that the two undertakings which benefited from Measures 2 and 3, namely Sachsen Zweirad and Biria GmbH respectively, were not in difficulty within the meaning of appropriate measure E 16/94 at the time when the guarantees were granted. In this respect, the above analysis shows that the Commission was right to base the contested decision on the definition of the concept of a firm in difficulty contained in the 1999 Guidelines. It follows that the complaints alleging that the beneficiary undertakings were not in difficulty according to the criteria of appropriate measure E 16/94 must be rejected as ineffective.
- ⁸⁵ Third, Freistaat Sachsen submits that Sachsen Zweirad and Biria GmbH were also not firms in difficulty, within the meaning of the criteria set out in the 1999 Guidelines, in March 2003 and December 2003, respectively.
- ⁸⁶ Furthermore, in their reply, MB Immobilien and MB System also submit, as a subsidiary plea, that, even if the 1999 Guidelines were applied, it would have to be found that Sachsen Zweirad and Biria GmbH were not in difficulty. That complaint must, however, be declared inadmissible because it infringes Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court, according to which every application must state the subject-matter of the dispute and provide a brief statement of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and sound administration

of justice, it is necessary that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (order in Case T-294/04 *Internationaler Hilfsfonds v Commission* [2005] ECR II-2719, paragraph 23).

⁸⁷ It follows that a review of possible errors of assessment committed by the Commission in the application of the criteria of the 1999 Guidelines to the situation of Sachsen Zweirad and Biria GmbH must be limited to a review of the arguments submitted in this respect by Freistaat Sachsen.

⁸⁸ Below, the Court will therefore examine, on the basis of the 1999 Guidelines, whether or not the Commission committed a manifest error of assessment when it classified, first, Bike Systems as having been a firm in difficulty in March 2001 and, second, Sachsen Zweirad and Biria GmbH as having been firms in difficulty in March 2003 and December 2003, respectively.

The question whether Bike Systems was a firm in difficulty in March 2001

Arguments of the parties

⁸⁹ First, MB Immobilien and MB System submit that the reasons given in recital 61 to the contested decision for taking the view that Bike Systems was a firm in difficulty do not correspond to relevant criteria or symptoms in the 1999 Guidelines and are incomplete. The Commission itself found that Bike Systems was not insolvent, but it did not make any findings in relation to the balance sheets of the beneficiary undertakings and, hence, in relation to the criteria of those guidelines. In addition, it cannot automatically be inferred from the fact that a limited restructuring took place that the future prospects of an undertaking are uncertain; for that purpose, wider-ranging findings would have been necessary. Furthermore, the Commission did not take

sufficient account of the fact that Bike Systems was taken over by a healthy undertaking. Since the owner changed as part of the recovery plan, the Commission ought to have examined the economic weight of the buyer in order to be in a position to give a valid opinion on the future prospects of the undertaking. In addition, losses and negative own capital may, but do not necessarily have to, be a sign that an undertaking is in difficulty, as the criteria of the 1999 Guidelines show.

- ⁹⁰ Second, MB Immobilien and MB System submit that the Commission did not analyse a binding comfort letter (*harte Patronatserklärung*) of 6 March 2001 from Biria GmbH ('the comfort letter'), notwithstanding the fact that the Federal Republic of Germany had mentioned the existence of that document in the letter of 31 January 2005. The Commission ought to have taken into account the fact that Biria GmbH had given a guarantee to gbb in respect of the obligations arising under the silent participation contract, and that, consequently, gbb could, in case of default, turn to an undertaking that was not a firm in difficulty. The Commission, moreover, admits that it did not examine the comfort letter that Biria GmbH had drawn up for the benefit of Bike Systems, even though it knew of its existence. A distinction has to be made between binding comfort letters (*harte Patronatserklärungen*) and non-binding comfort letters (*weiche Patronatserklärungen*). In the case of a binding comfort letter, the guarantor does not become liable only after the primary debtor has defaulted; rather, both are jointly and severally liable.

- ⁹¹ That reasoning is not gainsaid by the fact that the German Government stated, in the letter of 23 January 2006, that it agreed with the Commission's explanation that a silent participation is comparable to a subordinated loan for which the risk, in the absence of collateral, is higher than that associated with a traditional bank loan taken out for the purpose of financing an investment, with the result that remuneration for such a silent participation must be substantially higher than the reference rate of the European Union in force on the date on which it is granted. When the Commission mentions that it had no reason, taking into account that abstract statement, to examine the strength of the comfort letter in greater detail and to ask questions in

that regard, it forgets that it knew about it and was therefore under an obligation to examine or at least to put questions to the Member State.

- ⁹² Third, MB Immobilien and MB System submit that the Commission did not take into account the audit report relating to the 2002 annual statement of accounts drawn up on 31 December 2002 and to the management report of Bike Systems for 2002 ('the report on the 2002 accounts of Bike Systems'), of which it was aware and which stated that the presentation and valuation of the assets in the annual report of 31 December 2002 allowed the inference that the prognosis for the undertaking was positive. The Commission at no point mentions the financial strength of the buyer. MB Immobilien and MB System dispute the Commission's claim that the report on the 2002 accounts of Bike Systems was of no value for the purpose of assessing decisions taken in 2001. Indeed, the Commission itself used that kind of a posteriori justification.
- ⁹³ Fourth, MB Immobilien and MB System submit that the arguments submitted by the Commission that relate to periods after the contested decision had been adopted cannot be used to justify that decision.
- ⁹⁴ The Commission disputes the arguments put forward by MB Immobilien and MB System.

Findings of the Court

- ⁹⁵ By way of a preliminary point, it must be pointed out that the application in Case T-120/07 shows that the complaints of MB Immobilien and MB System, submitted in the context of their second plea in law, concern, first, the classification of Bike

Systems as a firm in difficulty and, second, the determination of the aid element, in particular the amount of the premium applied by the Commission.

⁹⁶ With regard to determination of the aid element in Measure 1, it must be held that the second plea in law has not been developed in relation to the complaint made by MB Immobilien and MB System as part of that plea in the application in Case T-120/07, according to which the Commission did not adequately take into consideration the fact that remuneration that is more than 600 basis points higher than the reference interest rate takes sufficient account of the higher risk of default of a firm in difficulty. It must for that reason be declared inadmissible, in accordance with the case-law cited in paragraph 86 above. The arguments against determining the aid element by reference to the market reference rate contained in the third plea in law in the application in Case T-120/07 regarding the failure to state reasons will be examined hereinafter as part of the examination of the complaints alleging a failure to provide reasons in the contested decision.

⁹⁷ The second plea in the application in Case T-120/07 and the examination of possible errors of assessment are thus limited to the question of whether the Commission committed an error of assessment when it took the view that Bike Systems was a firm in difficulty at the time when Measure 1 was granted, on the basis of the criteria in the 1999 Guidelines.

⁹⁸ It should be borne in mind, first, that the assessment which the Commission must conduct involves the consideration and assessment of economically complex facts and circumstances. Since the Court may not substitute its assessment of economically complex facts and circumstances for that of the Commission, the Court's review must be limited to verifying compliance with procedural rules and the obligation to state reasons, as well as the material accuracy of the facts, and ensuring that there has been no manifest error of assessment or misuse of powers (see Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle and ZEMAG v Commission* [2005] ECR II-1579, paragraph 91 and the case-law cited).

99 As regards the situation of Bike Systems in March 2001, it must be recalled that the Commission states the following in recital 61 to the contested decision:

‘... Bike Systems had just come out of insolvency through the adoption of an insolvency plan. Its future prospects were uncertain as only a limited operational restructuring had been carried out. According to the company’s annual report for 2001, the company still recorded losses that year. Its own capital was still negative although, thanks to hidden reserves, this did not trigger insolvency. Bike Systems must, therefore, be regarded as a company in difficulty at that time.’

100 The analysis of Bike Systems’ situation is thus based on the existence of an insolvency plan, the limited nature of its restructuring and the resulting uncertain future prospects of the firm, the losses recorded in the annual report for 2001 and the negative own capital.

101 First, MB Immobilien and MB System submit that those factors cannot be found in the 1999 Guidelines and do not substantiate to the requisite legal standard the Commission’s finding that Bike Systems was in difficulty.

102 That argument cannot be accepted.

103 As regards the framework of analysis provided by the 1999 Guidelines, it must be borne in mind that paragraph 4 of those guidelines merely states in general terms that a firm is regarded as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to go out of business in the short or medium term.

- 104 Furthermore, the wording of paragraphs 5 and 6 of the 1999 Guidelines shows that, although a firm is ‘in any event’ regarded as being in difficulty where a material part of its share capital has disappeared, other evidence, such as the factors set out in paragraph 6, may also be used to establish that it is in financial difficulty for the purposes of the 1999 Guidelines, even if it has not lost a significant part of its share capital (see, to that effect and by analogy, Case T-349/03 *Corsica Ferries France v Commission* [2005] ECR II-2197, paragraph 185).
- 105 It can be inferred from that case-law, on the one hand, that a material reduction in the share capital is a very serious factor signalling that an undertaking is in difficulty and, on the other hand, that there are a certain number of economic factors, of which paragraph 6 of the 1999 Guidelines contains a non-exhaustive list (see use of the words ‘such as’ in *Corsica Ferries France v Commission*, cited in paragraph 104 above, paragraph 185), which may also indicate that an undertaking is in difficulty, even if the undertaking has not lost a significant part of its share capital or is not insolvent within the terms of paragraph 5 of the 1999 Guidelines.
- 106 In the present case, the contested decision refers to the existence of negative own capital which, contrary to what MB Immobilien and MB System claim, may be considered to be an important indicator that an undertaking is in a difficult financial situation, even if it is not one of the specific circumstances set out in paragraph 5 of the 1999 Guidelines.
- 107 The contested decision also mentions other signs, in particular continued losses in the year in which Measure 1 was provided. Even though this latter factor is not mentioned in the non-exhaustive list of signs in paragraph 6, which refers to increasing losses, its relevance in the context of an analysis of the financial situation of an undertaking cannot be denied, in so far as it concerns the situation before or at the moment the aid is granted, a fact which MB Immobilien and MB System do not dispute.
- 108 As regards the existence of an insolvency plan, the explanations provided by MB System and the Commission in response to the Court’s written questions in Case

T-120/07 reveal that, under German law, insolvency proceedings are designed to turn around an insolvent undertaking at a moment when compulsory liquidation can still be avoided and require submission of an insolvency plan.

- 109 In this respect, it must be recalled that paragraph 5(c) of the 1999 Guidelines refers to the situation of an undertaking fulfilling 'criteria under its domestic law for being the subject of collective insolvency proceedings' as a factor signalling that it is in any event to be regarded as being in difficulty. It is true that the situation of Bike Systems in March 2001 did not correspond to the situation described in paragraph 5(c), since the undertaking had come out of insolvency proceedings. However, as the Commission confirmed in response to the Court's written questions and at the hearing, it took the view, in the contested decision, that the insolvency plan had allowed Bike Systems to emerge from insolvency, but that its situation remained delicate, in particular because the restructuring which it had undergone was limited, a factor which was taken into account as a sign of difficulty under paragraph 6 of the 1999 Guidelines.
- 110 Concerning, next, the extent of that restructuring, while conceding that the initial restructuring of Bike Systems was limited in the sense that the company had to be brought out of insolvency proceedings as quickly as possible in order to allow it to continue its activities and that what took place was therefore essentially a debt write-off, MB System submits that the Commission should have taken into account the fact that the situation of an undertaking which has emerged from insolvency proceedings is similar to that of a new company, since it no longer carries debts. Furthermore, according to MB System, the creditors believed in the possibility of turning Bike Systems around, since they accepted the insolvency plan. According to MB System, given that the Biria Group was number two on the relevant market, Bike Systems had, after its acquisition by the Biria Group, very different economic prospects.
- 111 In spite of the factors mentioned by MB Immobilien and MB System, it must be held that the insolvency proceedings in respect of Bike Systems were not brought to an end until December 2000, in other words, only three months before Measure 1 was granted. In those circumstances, and taking into account the fact that what was at issue was essentially a debt restructuring that did not involve major operational changes, the Court finds that the Commission was entitled to conclude, without committing

a manifest error of assessment, that the situation of Bike Systems in March 2001 remained delicate and that its future prospects were uncertain, notwithstanding the confidence that the banks might have shown with regard to those future prospects.

- 112 So far as concerns the alleged failure to take into account the situation of the healthy buyer of Bike Systems, a complaint which, as a response to the Court's written questions demonstrates, refers to the integration of Bike Systems into the Biria Group during the restructuring period, it must be held that MB Immobilien and MB System do very little to substantiate that argument and that they fail to explain, in particular, which of the specific arguments submitted during the administrative procedure were not taken into account by the Commission. The reference made at the hearing, in response to a question from the Court, to the market position of the Biria Group cannot be sufficient in this respect, with the result that this plea must be declared inadmissible, in accordance with the case-law cited in paragraph 86 above. In any event, as the Commission has stated, Bike Systems, and not the buyer, was the company responsible for payment of the remuneration for Measure 1 and it cannot be considered to have been established that a buyer would support its subsidiary for the purposes of settling such a debt.
- 113 Second, MB Immobilien and MB System claim that the Commission ought to have analysed the comfort letter.
- 114 In this respect, it must be borne in mind that, in order to fulfil its duty to cooperate with the Commission, the Member State concerned must provide all the information necessary to enable the Commission to verify that the conditions for the derogation from which it seeks to benefit are satisfied (see Case T-17/03 *Schmitz-Gotha Fahrzeugwerke v Commission* [2006] ECR II-1139, paragraph 48 and the case-law cited).
- 115 It is also settled case-law that the legality of a Community measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted and that the assessments made by the Commission must be examined solely on the basis of the information available to it at the time when those

assessments were made (see *Schmitz-Gotha Fahrzeugwerke v Commission*, cited in paragraph 114 above, paragraph 54 and the case-law cited).

- ¹¹⁶ Where the Commission has given the interested parties the opportunity to submit their comments, it cannot be criticised for having failed to take account of any elements of fact which could have been submitted to it during the administrative procedure but which were not, as the Commission is under no obligation to consider, of its own motion and on the basis of prediction, what elements might have been submitted to it (see *Schmitz-Gotha Fahrzeugwerke v Commission*, cited in paragraph 114 above, paragraph 54 and the case-law cited).
- ¹¹⁷ In the present case, it must be held that the comfort letter was not communicated to the Commission during the administrative procedure. However, it is true that the Federal Republic of Germany referred to its existence in the letter of 31 January 2005 in the following terms:

‘Given the strategic alliance created by the Biria Group (inter alia, joint purchasing and delivery of materials), it was possible to take the view that the future prospects of Bike Systems were positive and that its restructuring had been a success. A comfort letter which [Sachsen Zweirad] and Biria GmbH had to issue for the purposes of the payment [of the silent participation] was intended to ensure that those undertakings would actively support the future of Bike Systems.’

- ¹¹⁸ In this respect, it must be observed that, as the Commission submits, the fact that the Federal Republic of Germany mentioned in a single sentence that, in the context of the refinancing of the company at issue, that company received a guarantee of continued assistance from the parent company could not necessarily mean, without other supporting evidence, for example relating to the financial situation of the author of the comfort letter on the date on which Measure 1 was provided, that Bike Systems had to be assessed differently in future or that its future prospects had been altered by that guarantee. In any event, in order to be in a position to evaluate the binding

nature of the comfort letter, the Commission would have needed access to the original document.

- 119 To summarise, in the circumstances of the present cases as described and in accordance with the case-law cited in paragraphs 114 to 116 above, it was not the Commission's duty to ask the Federal Republic of Germany for explanations regarding the impact of the comfort letter on the financial situation of Bike Systems. It must therefore be held that the Commission did not act unlawfully in not following up the reference to the comfort letter in the letter of 31 January 2005 with an examination of that letter.
- 120 Third, as regards the failure to take into account the report on the 2002 accounts of Bike Systems in the contested decision, it is clear that the financial situation of Bike Systems in 2002 is not relevant when it comes to assessing the legality of Measure 1 implemented in March 2001. In this regard, the case-law states clearly that the question whether a measure constitutes aid within the meaning of Article 87(1) EC must be resolved having regard to the situation existing at the time when the measure was implemented. If the Commission took subsequent factors into account, it would be conferring an advantage on Member States which fail in their obligation to give notice at the planning stage of aid which they intend to grant (see, to that effect, Case T-152/99 *HAMSA v Commission* [2002] ECR II-3049, paragraph 53).
- 121 Fourth, for the same reasons as those set out in paragraph 120 above, the Commission's references to the situation of Bike Systems in 2002 and in 2003 and the circumstances in which Measure 1 was terminated in 2005 are not relevant for the purpose of assessing the legality of the contested decision.
- 122 It follows from the foregoing that the factors set out in recital 61 to the contested decision are consistent with the 1999 Guidelines and that the Commission did not commit any manifest errors of assessment when it concluded that Bike Systems was in difficulty in March 2001.

The question whether Sachsen Zweirad and Biria GmbH were firms in difficulty in March 2003 and December 2003, respectively

- ¹²³ Freistaat Sachsen submits, first, arguments of a general nature concerning the framework for the assessment of the situation of the undertakings that benefited from Measures 2 and 3 and, second, that manifest errors were made in the application of that framework to those undertakings.

Framework for the assessment of the situation of the undertakings that benefited from Measures 2 and 3

— Arguments of the parties

- ¹²⁴ Freistaat Sachsen submits that, in recitals 66 to 78 to the contested decision, the Commission merely listed a number of ‘symptoms’ typically shown by firms in difficulty by referring to paragraph 6 of the 1999 Guidelines, in which the category of firms that may be supported with rescue and restructuring aid was expanded to include firms that do not fulfil the criteria set out in paragraph 5. According to Freistaat Sachsen, firms in difficulty which, without State intervention, would become insolvent generally demonstrate the ‘symptoms’ listed in paragraph 6 of the Guidelines, or at least some of them. However, the fact that some of those ‘symptoms’ are present does not suffice for a finding that an undertaking is in such difficulties that, were it not for State aid, it would disappear from the market.
- ¹²⁵ Furthermore, according to Freistaat Sachsen, the Commission’s actual practice has been the opposite. In its most recent decisions, in respect of undertakings that did not fulfil the criteria set out in paragraph 5 of the 1999 Guidelines, the Commission did not consider it to be sufficient that they showed some ‘symptoms’.

¹²⁶ In addition, the Commission overestimated the extent of its discretion. The Commission, it is argued, cannot substitute its assessment for that of the authority that granted the aid, since, in approving the aid scheme, the Commission conferred on the Member State a certain margin of discretion. Therefore, the only task that the Commission still has to accomplish under Article 88(1) EC is the constant monitoring of the application of the approved aid scheme. Consequently, Freistaat Sachsen submits that the assessment by a Member State authority or body for the purposes of granting aid would have to be manifestly wrong at the time when the decision is taken (and not in the light of information that the Commission obtains subsequently when that monitoring is being carried out) for the approved aid scheme not to produce its effects.

¹²⁷ Freistaat Sachsen submits further that, for the purposes of determining whether an undertaking may be considered to be a firm in difficulty, the margin of discretion is narrower in the context of regional aid schemes than in the context of rescue and restructuring aid. In the case of rescue and restructuring aid, the anti-competitive effect results from the fact that the firm in difficulty receives more favourable treatment in comparison with other undertakings. By contrast, in the case of regional aid, a firm in difficulty is treated less favourably than other undertakings which, for the same project, do receive regional aid.

¹²⁸ In that context, Freistaat Sachsen submits that it is also necessary to differentiate between the criteria in paragraph 5 and those in paragraph 6 of the 1999 Guidelines. Whereas the criteria in paragraph 5 of the 1999 Guidelines can be checked, the ‘symptoms’ listed in paragraph 6 can be found both in a firm that is in difficulty and in a firm that is not. Therefore, if a firm shows only some of those ‘symptoms’, it cannot be taken as established that the assessment by the authority that granted the aid, according to which the undertaking is not a firm in difficulty, was manifestly wrong. However, given that, at the relevant time, the two undertakings did not fulfil the criteria of paragraph 5 and did not show most of the ‘symptoms’ in paragraph 6, the finding in the contested decision that certain ‘symptoms’ were present is not sufficient to provide a justification, *a posteriori*, for not applying an approved aid scheme.

129 According to Freistaat Sachsen, the Commission's claim that the Court found in *Cor-sica Ferries France v Commission*, cited in paragraph 104 above, that the presence of two signs, namely increasing losses and mounting debt, sufficed for the assumption that the firm was in difficulty was wrong, because that case concerned a decision in which the Commission had also found that one of the criteria set out in paragraph 5 of the 1999 Guidelines was fulfilled. Furthermore, the two indicia mentioned above were specifically not present in the case of Sachsen Zweirad and Biria GmbH in March 2003 and December 2003, respectively.

130 In addition, it is argued, the Commission did not correctly assess the criteria set out in paragraph 6 of the 1999 Guidelines. In its comments on the opening of the formal investigation procedure, the Federal Republic of Germany submitted a table to the Commission which suggested that those criteria had not been fulfilled. That table concerned, first of all, the situation of Sachsen Zweirad, given that, in 2001 and 2002, that undertaking suffered losses whereas, following the takeover of Biria AG (former name), it once again made a profit in 2003 (as Biria GmbH). The criteria in paragraph 6 of the guidelines are based on a negative trend (increasing losses, growing stock inventories, declining cash flow, mounting debt and rising interest charges, reduction in or loss of capital). However, the table submitted by the Federal Republic of Germany showed that, in 2003, the situation improved and that none of the signs continued to be present. The question of the trend in economic development is crucial to the examination of the undertaking in the light of the criteria in paragraph 6 of the 1999 Guidelines. A solvent undertaking which still has more than half of its capital or which has lost less than a quarter of that capital during the preceding 12 months does not fulfil the criteria of a firm in difficulty within the meaning of paragraph 5 of the 1999 Guidelines. Consequently, as long as the thresholds laid down in paragraph 5 have not been reached, loss of capital cannot suffice to fulfil the loss criterion in paragraph 6 of the 1999 Guidelines and to place the undertaking in the category of a firm in difficulty. On the contrary, there must also be an obvious deterioration in the economic situation. In the contested decision, the Commission failed to recognise that the economic situation of the undertakings at issue had in fact improved since 2001.

¹³¹ As regards the Commission's claim that the proper definition of a firm in difficulty within the meaning of the 1999 Guidelines is set out in paragraph 4 of those guidelines, it suffices to state that it did not apply that definition in the contested decision. In addition, it must be noted that that criterion does not imply that a firm must be considered to be in difficulty as soon as it is incapable of either generating sufficient own capital or borrowing enough funds to finance projects that are necessary to improve its economic situation. That is apparent in particular from Commission document SEC(2005) 795 entitled 'State aid action plan – Less and better targeted State aid: a roadmap for State aid reform 2005-2009' ('the action plan'), according to which such a situation may also be explained by market failures. The regional aid programme under the approved aid scheme may be applied only when no alternative financing for the project can be found, and that applies equally to firms that are not in difficulty. Experience gained as part of the application of that regional support mechanism since 1993 has shown that undertakings that do not experience economic difficulties nevertheless need a guarantee from the *Land* to implement their projects. That is, for example, the case where the bank which they normally use restructures its portfolio and withdraws financing.

¹³² The Commission challenges the arguments submitted by Freistaat Sachsen.

— Findings of the Court

¹³³ The analysis in paragraphs 103 to 105 above shows that paragraph 6 of the 1999 Guidelines contains a non-exhaustive list of factors that may help to show that a firm is in difficulty even where its authorised capital has not been drastically reduced or it is not in insolvency proceedings as provided for in paragraph 5 of the 1999 Guidelines, two situations which, according to that paragraph 5, lead in any event to the firm being regarded as being in difficulty. Contrary to what Freistaat Sachsen claims, it is thus possible, within the framework of the 1999 Guidelines, to find on the basis of some of the signs listed in paragraph 6, or even on the basis of other signs, that a firm is in such difficulty that it would not survive the situation without public intervention.

- 134 Furthermore, as for parallels with other State-aid proceedings that Freistaat Sachsen seeks to draw, it must be borne in mind that the legality of a Commission decision declaring that new aid does not fulfil the conditions under which the exemption in Article 87(3)(c) EC applies must be assessed solely in the context of that article, and not in the light of the Commission's earlier decision-making practice, assuming that this is established (*Regione autonoma della Sardegna v Commission*, cited in paragraph 74 above, paragraph 177). Therefore, comparisons with other State-aid proceedings are irrelevant for the purpose of establishing whether there is a minimum number of the criteria in paragraph 6 of the 1999 Guidelines that must be fulfilled, irrespective of whether or not, for the purposes of paragraph 5 of the 1999 Guidelines, the company's capital is affected.
- 135 As regards Freistaat Sachsen's reference to the judgment in *Corsica Ferries France v Commission*, cited in paragraph 104 above, it must be pointed out that the Court held, in paragraph 191 of that judgment, that the level of losses and of financial indebtedness of the undertaking at issue were criteria that were capable by themselves of establishing that it was a firm in difficulty. However, that cannot be taken to mean that there is a minimum number of criteria that must be fulfilled in order that a firm can be classified as being in difficulty, because the Court's assessment in that respect related to the specific facts and aspects of that case. However, that case does show that not all the criteria listed in paragraph 6 of the 1999 Guidelines have to be fulfilled before an undertaking may be considered to be in difficulty within the meaning of the 1999 Guidelines.
- 136 Furthermore, as regards Freistaat Sachsen's argument that the Commission's margin of discretion is different in the context of an approved aid scheme, it was pointed out in paragraph 62 above that the Commission's examination of the conformity of an aid measure with an aid scheme does not constitute a step that exceeds its powers. Given that firms in difficulty are excluded from the regional aid programme under the approved aid scheme, and given that the definition of a firm in difficulty is laid down in the 1999 Guidelines, as is clear from the analysis in paragraphs 58 to 81 above of the legal framework applicable in the present case, the Commission had every right to check whether the 1999 Guidelines had been correctly applied in the present case. The arguments alleging that the Commission's margin of discretion is narrower in the context of regional aid than in the context of restructuring aid must be rejected for the same reasons.

137 Moreover, as regards Freistaat Sachsen's argument that, if there is no loss of own capital as described in paragraph 5 of the 1999 Guidelines, it is necessary to show, by means of the criteria in paragraph 6, that there is a negative trend, the case-law demonstrates that the importance which the guidelines attach to trend indicators does not necessarily render other kinds of indicators unsuitable. However, such indicators could appear to be suitable only if it is thereby possible to identify genuine and demonstrable difficulties (see, to that effect and by analogy, *Regione autonoma della Sardegna v Commission*, cited in paragraph 74 above, paragraph 111). It follows that, even though indicators of a negative trend are, indeed, particularly relevant for the purposes of establishing that a firm is in difficulty, it is not possible to interpret the wording of the criteria in paragraph 6 of the 1999 Guidelines as imposing any obligation on the Commission to prove the existence of a negative trend, on condition that it can demonstrate, to the requisite legal standard, that, without public intervention, the undertaking's survival would be at risk.

138 Finally, as regards Freistaat Sachsen's reference to the action plan, that document recommends more frequent use of an economic approach in State aid and indicates that one key element in that respect is the analysis of market failures which may constitute reasons why the markets do not achieve the desired objectives of common interest (paragraphs 22 and 23 of the action plan). It must, however, be held that those statements are very general in nature and bear no relation to the definition of the concept of a firm in difficulty. They do not in any way support Freistaat Sachsen's contention that the Commission ought to have taken into account the fact that an undertaking's funding problems may be attributable to periodic economic factors, such as a growth phase. Therefore, that argument must be rejected.

139 It follows that all the arguments raised by Freistaat Sachsen regarding the general analysis framework applied by the Commission to determine whether the beneficiary undertakings at issue were in difficulty must be rejected.

Assessment of the situation of Sachsen Zweirad

— Arguments of the parties

¹⁴⁰ Freistaat Sachsen submits that Sachsen Zweirad did not show increasing losses in March 2003. It admits that the company had suffered losses in 2001 and 2002, but that losses in 2002 were lower than in 2001, falling from EUR 1.274 million to EUR 733 000. At the time when Measure 2 was granted, a positive annual result was expected for 2003. Furthermore, the profits of the previous years had not been used up by losses. The own capital of Sachsen Zweirad continued to be positive. In addition, from 2001 to 2002, the undertaking's turnover decreased by 13.8% to EUR 51 million since, due to an economic situation that continued to be depressed, potential buyers in Germany were extremely cautious. The undertaking expected turnover to improve once again in 2003 and that plan had been judged realistic because, first, buyers' earlier caution meant that there was a need to catch up and, second, the 10 largest customers of Sachsen Zweirad had already placed firm orders before the beginning of the year for a volume of sales exceeding EUR 30 million. Therefore, the decline in sales did not last long. Freistaat Sachsen submits that, even though the Commission took note of the two signs mentioned above, it did not address their causes or examine their effects on the development of the undertaking. Unless such an examination is carried out, those signs do not allow conclusions to be drawn for the purposes of answering the question of whether or not an undertaking is in difficulty.

¹⁴¹ The Commission also refers to liquidity problems, but those cannot be treated in the same way as payment difficulties. The Commission itself explains that it is necessary to resort to external financing in order to ensure the undertaking's growth and the related build-up of working capital. However, difficulties in obtaining growth financing on the financial market do not allow classification of an undertaking as a firm in difficulty. That is equally true of the need referred to in the audit report relating to the annual accounts drawn up on 31 December 2002 and the management report of Sachsen Zweirad for 2002 ('the report on the 2002 accounts of Sachsen Zweirad') to comprehensively restructure the financing of the company in order to reduce its costs and to allow for secure planning over longer periods of time. A short remaining life of

a loan poses above all a risk in terms of costs and is not direct proof of existential difficulties. Moreover, the interest charges borne by Sachsen Zweirad went down (from EUR 2 million in 2001 to EUR 1.8 million in 2002), with the result that there was no reason to expect at the time when the guarantee was granted that those interest charges would lead to payment difficulties.

¹⁴² The Commission contests Freistaat Sachsen's arguments.

— Findings of the Court

¹⁴³ First of all, it should be noted that, according to settled case-law, the Commission enjoys a wide discretion in the application of Article 87(3) EC. Since the Court may not substitute its assessment of economically complex facts and circumstances for that of the Commission, the Court's review must consequently be limited to verifying compliance with procedural rules and the obligation to state reasons, as well as the material accuracy of the facts, and ensuring that there has been no manifest error of assessment or misuse of powers (see Case T-68/03 *Olympiaki Aeroporia Ypiresies v Commission* [2007] ECR II-2911, paragraph 150 and the case-law cited).

¹⁴⁴ In the present case, as regards Measure 2 and the situation of Sachsen Zweirad in March 2003, the contested decision states the following:

'(66) [The Federal Republic of] Germany argues that [Sachsen Zweirad] did not show any of the typical signs of a company in difficulty within the meaning of the [1999] Guidelines. The Commission points out that the typical signs of a firm being in difficulty, which are mentioned in [paragraph] 6 of the [1999] Guidelines, give merely an indication of when a company can be considered to be in

difficulty and do not have to be met cumulatively. [Sachsen Zweirad] recorded operating losses of EUR 1.274 m in 2001 and EUR 0.733 m in 2002. The losses were taken over by the parent company Biria under the profits and loss transfer agreement. Turnover decreased in 2002 compared with 2001.

- (67) According to the [report on the 2002 accounts of Sachsen Zweirad], [the latter] also faced liquidity problems. It is explicitly stated in the annual report that [Sachsen Zweirad's] liquidity situation was tight because of high expenditure for the pre-financing of the group's inventory and because of its growth and that its survival could be ensured only if the banks were prepared to keep open or to restructure the existing credit lines.
- (68) [The Federal Republic of] Germany argues that there never had been any danger of the banks not extending their credit lines. However, this does not invalidate the fact that the liquidity situation of the company was tight. According to the [report on the 2002 accounts of Sachsen Zweirad], a large majority of the credits had a remaining period to maturity of less than five years, which is by no means optimal for financing business activities and increases the risks facing the company. The short-term nature of the credits also led to high interest payments (albeit slightly lower in 2002 compared with 2001), placing a further burden on the company's liquidity.'

¹⁴⁵ That passage in the contested decision shows that the Commission based its finding that Sachsen Zweirad was in difficulty in March 2003 on the following factors: first, the existence of losses, even though they were decreasing, in 2001 and 2002; second, turnover that was lower in 2002 compared with 2001; and, third, the existence of serious liquidity problems recorded in the report on the 2002 accounts of Sachsen Zweirad, which were made worse by a preponderance of short-term credits at high interest rates.

- 146 First, as regards the decreasing turnover, it must be held that that criterion is mentioned in paragraph 6 of the 1999 Guidelines. Even though, where only two consecutive years are taken into consideration, that criterion, by itself, is not a strong sign that an undertaking has substantial difficulties, the Commission also examined other criteria to assess the financial situation of Sachsen Zweirad.
- 147 As regards the losses, it must be held that paragraph 6 of the 1999 Guidelines refers to increasing losses. Nevertheless, the Court takes the view that that cannot prevent the Commission from taking into account the continuous presence of losses over several consecutive years as a sign of financial difficulties, even though those losses were not increasing. Furthermore, in the case of an aid measure that is granted during the first quarter of 2003, it appears perfectly appropriate to take into account the financial results of the beneficiary undertaking during the preceding two years.
- 148 Moreover, as regards the table provided in the annex to the application, which indicates a profit of EUR 1.7 million at the time of an interim financial statement dated 31 May 2003, and which, according to Freistaat Sachsen, the Commission should have taken into account, it must be held that, as the Commission states, an improvement in the situation of the beneficiary undertaking during the year in which Measure 2 was granted cannot affect the assessment of the situation of that undertaking at the time at which the measure was granted, in particular because it is not inconceivable that the existence of that guarantee may have influenced that development. As recalled above, the case-law states that the question whether a measure constitutes aid within the meaning of Article 87(1) EC must be resolved having regard to the situation existing at the time when the measure was implemented. If the Commission took subsequent factors into account, it would be conferring an advantage on Member States which fail in their obligation to give notice at the planning stage of aid which they intend to grant (*HAMSA v Commission*, cited in paragraph 120 above, paragraph 53).
- 149 Furthermore, as regards the liquidity problems, paragraph 6 of the 1999 Guidelines does not mention these explicitly, even though it refers to declining cash flow as a sign of financial difficulties.

150 It must, however, be held that the liquidity situation was described clearly as being of concern in the report on the 2002 accounts of Sachsen Zweirad, on which the Commission based its analysis. That report stated, inter alia, the following:

“The undertaking has tried to counter the further worsening of its results compared with 2001 by means of cost-cutting measures which, considered in the absolute, it was able to implement in particular in respect of expenditure on wages and salaries as well as other operational costs. However, it turned out that those measures were not sufficient to prevent a negative result at the end of this year ...

As in 2001, the management board of [Sachsen Zweirad] considers the expansion of the group of companies headed by Biria AG, which gave rise to high borrowing requirements also in 2002, to be the primary source of risk. Following the cancellation of the guarantee from the *Bund/Land*, which had initially been approved pending a declaration of no objection from the [Commission], the existing liquidity crisis could, especially in the winter months, be remedied only by way of a financing plan drawn up together with the lending banks. At the moment, the survival of [Sachsen Zweirad] thus depends on its banks keeping in place current loans, in particular since [Sachsen Zweirad] provided extensive guarantees for the loans of the entire Biria Group. Given the large amounts provided under short-term credit lines, there is the risk associated with interest rate fluctuations, which may threaten the undertaking’s survival.

...

As a result of high expenditure for the pre-financing of the group’s inventory and its growth, the liquidity situation of the undertaking continues to be so tight that its survival can be ensured only if the banks are prepared to keep open existing credit lines

or to restructure and expand those credit lines in the light of the cancellation of the guarantee from the *Bund/Länder* ...

... Moreover, due to the short-term nature of the credit lines, there is an inherent risk associated with interest rate changes, which may pose a threat to the undertaking's survival ...'

- ¹⁵¹ It is clear from that quote that Sachsen Zweirad was in a difficult financial situation and that it was undergoing restructuring. The Court takes the view that, in particular in the light of the large amount of short-term credit subject to interest rate fluctuations, the Commission was entitled to regard the liquidity situation described in the report on the 2002 accounts of Sachsen Zweirad as a sign of a difficult financial situation that might compromise the undertaking's ability to survive without State intervention, inasmuch as an undertaking without liquid assets cannot settle its short- or medium-term debts.
- ¹⁵² In addition, with regard to the argument that the Commission should have taken into account the fact that the tight liquidity situation was caused by the financing of the growth of Sachsen Zweirad and that that situation was therefore not necessarily a sign of difficulties, it must be noted that the report on the 2002 accounts of Sachsen Zweirad does indeed mention expenditure for the pre-financing of the group's inventory and its growth. However, it must be held that the Commission did not commit a manifest error of assessment when it relied on that point on the worrying tenor of that report, because the latter clearly took into account the context of growth, but speaks nevertheless of a situation that continues to be tense.
- ¹⁵³ In addition, as regards Freistaat Sachsen's argument that the Commission ought to have taken into account the general economic situation and the existence of significant firm orders at the end of 2002, the Commission stated, in response to a written question from the Court, that it had not been given that information during the administrative procedure, but that it was mentioned for the first time in

the application. Questioned on this matter at the hearing, Freistaat Sachsen was unable to refute those claims or to show the documents by means of which that information was allegedly communicated during the administrative procedure; it merely stated that the weakening of the economic situation in 2002 was a problem of general knowledge.

¹⁵⁴ Accordingly, the Court takes the view that the Commission did not commit a manifest error of assessment in not taking those factors into account when it concluded that Sachsen Zweirad's economic and financial situation was precarious. The case-law cited in paragraph 115 above shows that the assessments made by the Commission must be examined solely on the basis of the information available to it at the time when those assessments were made.

¹⁵⁵ Finally, as regards the alleged failure to take into account the slight reduction in the interest charges from EUR 2 million in 2001 to EUR 1.8 million in 2002, the Commission stated, in response to a written question put by the Court, that recital 68 to the contested decision showed that it did take into account that reduction, but that, in order to assess whether an undertaking is in difficulty, it had to take into account its situation as a whole. Even having regard for the slight reduction in the financial charges, the Commission takes the view that Sachsen Zweirad was in difficulty because of its significant past losses and its cash-flow problems.

¹⁵⁶ In this respect, the Court finds that recital 68 to the contested decision does indeed mention the reduction in financial charges in 2002 compared with 2001. In the light of the clearly negative analysis of Sachsen Zweirad's liquidity situation in the above-mentioned report on the 2002 accounts of Sachsen Zweirad, the Court holds that the Commission did not commit a manifest error of assessment when it took the view that that particular factor could not have decisively influenced its overall assessment of Sachsen Zweirad's situation at the time when Measure 2 was granted.

157 To conclude, Freistaat Sachsen has not shown that the Commission committed a manifest error of assessment when it concluded, on the basis of the abovementioned factors, that Sachsen Zweirad was in difficulty in March 2003.

Assessment of the situation of Biria GmbH

— Arguments of the parties

158 Freistaat Sachsen notes that the Commission finds, in recital 72 to the contested decision, that Biria GmbH (new) took over the difficulties of Biria AG (as was) and of Sachsen Zweirad, but submits that that claim does not allow conclusions to be drawn in respect of the question whether the restructured undertaking was in difficulty. Sachsen Zweirad was not previously a firm in difficulty, with the result that the take-over of the assets and liabilities of Biria AG by Biria GmbH does not necessarily turn the latter into a firm in difficulty, as is shown clearly by the fact that the balance sheet total went up from EUR 24 million on 31 December 2002 to more than EUR 34 million on 31 December 2003, whereas liabilities increased only by EUR 4 million, namely from EUR 22 million to EUR 26 million. Only the financial ratios of the restructured undertaking are relevant and they show that it was not in difficulty.

159 In addition, Freistaat Sachsen continues, the Commission referred to Biria GmbH's serious liquidity problems, but failed to mention that those liquidity problems did not lead to the undertaking's insolvency or even to minor delays in payments. Furthermore, the Commission failed to take into account the fact that the undertaking had problems financing its growth rather than problems making payments that resulted from an unsustainable ratio of turnover to expenses.

160 Freistaat Sachsen also submits that the conclusion drawn by the Commission from the withdrawal of the consortium of banks in recital 77 to the contested decision is not necessarily inevitable. The consortium of banks at issue was led by D. bank, which was created only in 2001 following the merger of two other banks and whose strategy, according to press articles, is still the subject of debate today. Furthermore, that is the reason why the merger with W. bank, planned for years, has not yet taken place. In response to a request by the assignee of the guarantee, D. bank explained that the consortium of banks had withdrawn for strategic reasons in November 2003, as is clear from a letter provided in the annex to the application in Case T-102/07. Freistaat Sachsen submits that that explanation is not improbable when placed in the context of continuing internal discussions regarding the question whether D. bank was obliged to deal at all with business customers targeting the domestic market, in competition with the popular cooperative banks and savings banks, with which it was associated. The value of the claims was corrected as part of an internal restructuring of the bank and the proceeds from the buy-back were optimised with the help of a tax plan to avoid all, or almost all, losses. The other two banks also withdrew at the same time as D. bank since neither of them wanted to take over the position of lead bank of the consortium, a decision which is also not unusual and may not be used as evidence that there was a particularly high risk of default. Hence there was no basis for concluding that the undertaking at issue had to be classified as a firm in difficulty.

161 According to Freistaat Sachsen, it follows that, even though the undertakings undoubtedly followed a business strategy involving several risks and were for that purpose undercapitalised, an in-depth review of the symptoms listed by the Commission should nevertheless have led the latter to conclude that, at the time when Measure 3 was granted, those undertakings were not facing the kind of difficulties that, were it not for State aid, would have put the continuation of their activities at risk. The auditors mandated by Freistaat Sachsen concluded in respect of both undertakings that the risk that they would call in the guarantee was so minor that the granting of a guarantee could be justified.

162 Finally, Freistaat Sachsen submits that it would be appropriate to reject the Commission's argument that the origin of liquidity problems has no bearing on whether

an undertaking must be considered to be a firm in difficulty. *Corsica Ferries France v Commission*, cited in paragraph 104 above, which the Commission cites to show that a fares war is absolutely not incompatible with the existence of difficulties, is not capable of being applied to the present case since liquidity problems cannot be treated in the same way as losses. It is precisely in the context of the financing of growth that liquidity problems regularly arise, because there has to be a build-up of both fixed capital and working capital; however, that build-up of capital does not lead to losses. Therefore, tight liquidity is not proof that an undertaking must be considered to be a firm in difficulty.

¹⁶³ The Commission contests Freistaat Sachsen's arguments.

— Findings of the Court

¹⁶⁴ As regards Measure 3 and the situation of Biria GmbH at the time when that measure was granted in December 2003, the contested decision states as follows:

‘(70) Biria GmbH (now Biria AG) was created with effect from 1 October 2003 through a merger of Biria AG (as was) with its subsidiary [Sachsen Zweirad].

(71) According to [the Federal Republic of] Germany, Biria GmbH (now Biria AG) has to be clearly distinguished from its predecessors Biria AG (as was) and [Sachsen Zweirad] since, as a result of the merger, a new company was created. The assessment whether this company was in difficulty when the guarantee was provided on 9 December [2003] should therefore be based on the opening balance sheet of the newly merged company, which, according to [the Federal Republic of] Germany, demonstrates that Biria GmbH does not qualify as a company in difficulty.

- (72) The Commission does not agree. The newly merged company Biria GmbH cannot be viewed separately from Biria AG (as was) and [Sachsen Zweirad] since it was created through a merger of the two companies. Otherwise, it would be easy to circumvent the classification as a company in difficulty by merging economic entities or creating new companies. Biria AG (as was) recorded losses and faced liquidity problems in 2002 as did [Sachsen Zweirad]. Biria GmbH inherited all the debts and liabilities of Biria AG (as was) and [Sachsen Zweirad]. It also owns the same assets and carries out the same activities as Biria AG (as was) and [Sachsen Zweirad]. The Commission therefore considers that Biria GmbH took over the difficulties of Biria AG (as was) and [Sachsen Zweirad].
- (73) [The Federal Republic of] Germany claims that [Sachsen Zweirad] dominated the merger economically and was not in difficulty, from which it cannot automatically be assumed that the new Biria GmbH had found itself in difficulty. Contrary to what [the Federal Republic of] Germany claims, the Commission is most certainly of the view that [Sachsen Zweirad] was a company in difficulty. Consequently, the new Biria GmbH also “inherited” the difficulties of [Sachsen Zweirad].
- (74) Moreover, according to its annual report for 2003, the Biria Group continued its restructuring and reorganisation, which had started in 2002 and included a reordering of its financing. On the basis of the guarantee provided by the *Land* of Saxony for the EUR 24.875m loan, the Biria Group drew up a new plan for financing its activities in the medium term that included a significant adjustment of interest rates and thus a reduction in the high interest burden.
- (75) At the same time, the pool of banks was reorganised: three banks agreed to waive claims amounting to EUR 8.567m, which seems to have represented significantly more than 50% of their claims, in return for an immediate redemption of remaining claims. Consequently, the loan covered by the 80% guarantee under Measure 3 consists of EUR 8m to pay off working capital loans, EUR 7.450m in the form of an advance on current account and EUR 9.425m for seasonal financing needs.

(76) Biria GmbH (now Biria AG) thus faced serious liquidity problems at the time the guarantee was provided and so was a company in difficulty. This assessment is borne out by the fact that three banks withdrew from the financing of Biria's activities and even agreed to waive a large part of their claims in return for the immediate redemption of remaining claims. This shows that the banks had serious doubts as to whether Biria would be able to service its debts and was to be regarded as a viable company.

(77) [The Federal Republic of] Germany argues that the banks withdrew from the financing only because of a refocusing of their business strategy. The Commission notes that the banks agreed to waive probably around 50% of their claims, which, even if the banks withdrew because of a refocusing of their business strategy, is a sign that the banks considered it unlikely that they would be able to recover the full amount of the loans.'

¹⁶⁵ That passage from the contested decision shows that the Commission based its finding that Biria GmbH was in difficulty in December 2003 on the following factors: first, the fact that it had inherited the financial difficulties of the two companies from which it was created; second, serious liquidity problems at the time when Measure 3 was granted; and, third, the withdrawal of three banks and their waiver, at that moment, of a large part of their claims.

¹⁶⁶ First, as regards Biria GmbH's 'inheritance,' Freistaat Sachsen disputes the assertion that Sachsen Zweirad was in difficulty. However, it follows from the foregoing analysis (see paragraphs 144 to 157 above) that it has not been shown that the Commission committed manifest errors of assessment when it found to the contrary. Furthermore, recital 72 to the contested decision shows that the former Biria AG likewise recorded losses in 2002 and also had liquidity problems – something which Freistaat Sachsen does not contest.

¹⁶⁷ Freistaat Sachsen, however, submits that the Commission should have based itself exclusively on the balance sheet of the new company Biria GmbH, analysing its financial

ratios instead of drawing conclusions in the abstract according to which the merger of two firms in difficulty automatically creates a new firm that is equally in difficulty.

- 168 In this respect, the Court holds that the Commission did not commit a manifest error of assessment when it took into consideration, in addition to the factors linked to the economic and financial situation of the new company Biria GmbH, the situation of the two companies that merged to create it. As stated in recital 72 to the contested decision, and as the Commission mentioned before the Court, companies cannot be allowed to escape from the obligation to notify and to present a restructuring plan by simply merging economic entities or creating new companies.
- 169 Furthermore, as regards, first, the reference by Freistaat Sachsen to certain financial data relating to the 2003 accounting year, in particular as regards the balance sheet total and the operating results of Biria GmbH as of 31 December 2003, it must be recalled that the case-law cited in paragraph 120 above shows that the question whether a measure constitutes aid within the meaning of Article 87(1) EC must be resolved having regard to the situation existing at the time when the measure was implemented. Therefore, the Commission cannot be criticised for not taking into account information regarding the company's situation on 31 December 2003, given that that date was later than the date on which the aid was granted. As the Commission has indicated, that information was not available when the aid was granted. Therefore, the Commission was right to refer in that regard to the data relating to the 2002 accounting year. It follows that the arguments submitted by Freistaat Sachsen concerning, inter alia, the balance sheet on 31 December 2003 and the positive ordinary operating results of Biria GmbH for 2003 are ineffective.
- 170 Concerning, next, the argument submitted by Freistaat Sachsen that, leaving aside the balance sheet of the new company on 31 December 2003 and the operating results for 2003, account should have been taken of the provisional results and the interim financial statement of 31 May 2003, the Commission rightly notes that it cannot be established to what extent the positive development of the operating results in the course of 2003 was attributable to the granting in March 2003 of Measure 2 to Sachsen Zweirad, the company that merged to become Biria GmbH. In those circumstances, the few abstract references made by Freistaat Sachsen to the provisional

results of 2003 are not enough to establish that the Commission committed a manifest error of assessment by not basing its analysis of the financial situation of Biria GmbH on those provisional results.

- ¹⁷¹ Moreover, as regards the tight liquidity situation of Biria GmbH, the Commission refers to the audit report on the annual accounts drawn up on 31 December 2002 and that company's management report for the 2002 accounting year, in which the following is stated:

‘The company's liquidity problems became worse in 2002 and the situation continues to be so tense that Biria AG's survival cannot be guaranteed except on condition that the banks keep existing credit lines open, or, as the case may be, restructure or expand those credit lines in the light of the cancellation of the deficit guarantees from the *Bund/Länder* ...

From an accounting point of view, the company is over-indebted. Nevertheless, the management takes the view that the company is not over-indebted for the purposes of insolvency law, given that the negative capital in the balance sheet is offset by silent reserves arising from the participation in [Sachsen Zweirad], a letter of subordination from the owner and the goodwill of Biria AG.’

- ¹⁷² In this respect, it has already been held that a tense liquidity situation may indeed point to a situation of difficulty within the meaning of the 1999 Guidelines. Furthermore, it is appropriate to point out in this respect that the Commission submits, without being contradicted by Freistaat Sachsen, that the loans covered by Measure 3 were not intended to go towards investment, but that they consisted, inter alia, of an advance on current account and a loan for seasonal financing needs, as stated in recital 75 to the contested decision. Freistaat Sachsen's argument that the liquidity situation did not lead to insolvency is thus irrelevant, because the guidelines take into account the fact that a situation can be difficult even though, in strictly legal terms, the company is not insolvent. As regards Freistaat Sachsen's argument that the liquidity situation of Biria GmbH should have been put in the context of the undertaking's

growth, the Court finds that that fact in itself is not enough to allow the Commission not to take into account the liquidity problems of an undertaking, but that it must assess the situation of the undertaking as a whole.

- 173 Finally, as regards the withdrawal of the banks, it must be held that the letter of D. bank annexed to the application in Case T-102/07 does not prove, conclusively, that the arrangement at issue was put in place exclusively for reasons of the banks' internal strategies. Even though that letter states that negotiations concerning a restructuring of the loans that began in February 2003 were due to strategic reasons, that letter does not undermine the analysis in the contested decision that the waiver of 50% of claims in return for the immediate redemption of remaining claims is extraordinary. The Commission therefore did not commit a manifest error of assessment when it interpreted the banks' withdrawal and the waiver of the claims as a sign that the banks had lost confidence in Biria GmbH's ability to repay the loans in full.
- 174 It follows from the foregoing that none of Freistaat Sachsen's arguments provides evidence that the Commission committed manifest errors of assessment when it found that Biria GmbH was also a firm in difficulty at the material time.
- 175 Consequently, it is appropriate to reject all the claims submitted by the applicants alleging that manifest errors of assessment were committed in the classification of the beneficiary undertakings as firms in difficulty.

3. *Claims alleging failures to state reasons*

- 176 First, the applicants' arguments concern the inadequacy of the reasons provided in the contested decision in so far as the Commission does not provide the reasons why it did not there apply the definition of the concept of a firm in difficulty in appropriate

measure E 16/94 and also does not explain why it departed from the definition of the concept of a firm in difficulty in the 1999 Guidelines. Second, the applicants submit that the contested decision is vitiated by a failure to state reasons in the determination of the aid amounts in Measures 1 to 3.

Failure to state reasons for the non-application of appropriate measure E 16/94 and the departure from the 1999 Guidelines

Arguments of the parties

¹⁷⁷ Freistaat Sachsen submits that, even if the undertakings at issue had to be considered to be firms in difficulty according to the criteria set out in the approved aid scheme, the Commission did not set out the reasons for such a decision. Besides, the Commission also did not explain, in the contested decision, why it departed from the criteria laid down in the approved aid scheme. Furthermore, Freistaat Sachsen submits, the Commission does not explain in the contested decision why it did not apply the criteria in paragraph 5 of the 1999 Guidelines even though it had often questioned in other procedures whether a firm can be in difficulty even where the criteria in paragraph 5 do not apply. Given that paragraph 5 of the 1999 Guidelines contains the general rule and paragraph 6 the exception, the Commission ought to have provided reasons for not applying paragraph 5.

¹⁷⁸ MB Immobilien and MB System submit that, as regards the application of the 1999 Guidelines, the contested decision is vitiated by a failure to provide reasons in three respects. First, the Commission does not state the reasons why it did not examine the criteria in the 1999 Guidelines. Second, on the assumption that the Commission concluded that the aid beneficiaries had to be classified as firms in difficulty on the basis of the distinction between healthy undertakings and firms in difficulty, which the Commission had itself laid down, the contested decision is silent on that issue. Third,

as regards Measures 2 and 3, the Commission should have explained why it failed to apply the conditions of the approved aid scheme.

179 The Commission contests the applicants' arguments.

Findings of the Court

180 According to settled case-law, the scope of the duty to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, so as to enable the persons concerned to ascertain the reasons for it in order that they can defend their rights and ascertain whether or not the measure is well founded and to enable the Courts of the European Union to exercise their power of review. It is not necessary for the statement of reasons 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. In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see *Corsica Ferries France v Commission*, cited in paragraph 104 above, paragraphs 62 to 64 and the case-law cited).

181 In the present case, the contested decision does not indicate that the Federal Republic of Germany referred to appropriate measure E 16/94 in the context of the administrative procedure. The Commission confirmed before the Court that appropriate measure E 16/94 was not invoked during the administrative procedure and the applicants did not challenge that statement. Furthermore, the above analysis shows that the definition of the concept of a firm in difficulty pursuant to appropriate measure E 16/94 was not applicable in the present case and that the Commission was entitled to base itself in that respect on the 1999 Guidelines. In those circumstances, the claims alleging that the contested decision failed to state the reasons for the non-application of

appropriate measure E 16/94 must be declared unfounded, because it cannot be held that the Commission is under an obligation to provide reasons as to why it did not rely on rules that were neither applicable nor invoked.

- 182 It is also appropriate to reject as unfounded the claims alleging a failure to state the reasons as to why the criteria in the 1999 Guidelines were – or were not – taken into account. The Commission states in recital 66 to the contested decision that it is of the opinion that ‘the typical signs of a firm being in difficulty, which are mentioned in [paragraph] 6 of the [1999] Guidelines, give merely an indication of when a company can be considered to be in difficulty and do not have to be met cumulatively’. The Commission’s position in this respect is thus clear. With regard to the remainder, as the foregoing analysis has shown, the contested decision mentions the economic criteria that the Commission took into account in order to assess the financial situation of the beneficiary undertakings at issue. That statement of reasons is sufficient to allow the parties to ascertain the reasons for the contested decision and for the Court to judge whether that decision is lawful.

Failure to provide a statement of reasons with regard to the determination of the aid element

Arguments of the parties

- 183 Freistaat Sachsen states that it does not understand how the Commission calculated the interest rate at which, according to it, the loans should have been granted in order to be consistent with market conditions, so that they could be considered to be aid-free. According to Freistaat Sachsen, the Commission merely referred to the notice on the method for setting the reference and discount rates (OJ 1997 C 273, p. 3; ‘the Notice on reference rates’). However, simply referring to an earlier notice is not enough to demonstrate that the addition of 400 basis points would be normal market practice. Freistaat Sachsen claims that it also does not understand why, in respect of Measures 2 and 3, the Commission applied two premiums (recital 93 to the contested

decision). The two examples given in the Notice on reference rates (firm in difficulty and absence of collateral) relate to the risk of default, with the result that there appears to be no justification for aggregating the premiums.

¹⁸⁴ The Commission did not, in any event, establish any comprehensible link to normal market conditions. Moreover, it does not appear very likely that the market would have reacted to the alleged lack of security with fixed additional interest charges that are totally disproportionate to the interest rates in force at the time. It would be appropriate to assume that the credit services sector applies a fairly low premium in the case where interest rates are low and a fairly high premium in the case where interest rates are high.

¹⁸⁵ Freistaat Sachsen claims further that, in recital 92 to the contested decision, the Commission assumes that the collateral provided had very little economic value, but provides no evidence for that assumption. However, the annual statement of accounts for 2003 shows that the loans granted by the banks were not only secured by mortgages but also by an assignment of fixed and current assets, which are shown in the balance sheet to have a value of EUR 5.8 million and EUR 28.3 million, respectively. Therefore, the Commission was not entitled to take as a starting point that the economic value of the collateral was negligible; at the very least, it ought to have explained why it did so.

¹⁸⁶ Finally, Freistaat Sachsen submits, as regards the Commission's reference, in the course of the proceedings before the Court, to a study concerning an update of the reference rates applied to State aid in the European Union prepared by a firm of auditors and dated 26 October 2004 ('the study'), that that study does not appear in the file and that it is also not mentioned in the contested decision, with the result that, in this respect, the decision does not fulfil the requirements as to the statement of reasons. Prior to the adoption of the contested decision, the Commission, moreover, did not produce any document showing that, for the purposes of future decisions, it intended to adopt the study's findings as its own.

- 187 MB Immobilien and MB System submit, as regards Measure 1, that the Commission does not explain why remuneration for a silent participation that is already 600 basis points above the reference rate applied at the time did not take into account the higher risk associated with a firm in difficulty. Moreover, the Commission referred to the Notice on reference rates because it did not make any findings regarding market conditions.
- 188 The Commission does not provide a conclusive explanation for its assessment of the aid elements in Measure 1, but takes the aid element to be the difference between the remuneration that Bike Systems would have had to pay on the market and the remuneration that it actually did pay. For the purposes of determining the amount of interest, the necessary statement of reasons cannot be replaced by a simple reference to the Notice on reference rates and a further repetition of an assumption – ‘firm in difficulty’. That is true not only as regards the substance, but in particular as regards the aid amount, especially since, concerning the number of basis points, the Commission granted itself a certain amount of discretion in the Notice on reference rates.
- 189 It is, MB Immobilien and MB System submit, arbitrary to allocate 400 basis points each to different risks and to add them up without providing any reasons for that decision, either in terms of substance or in terms of the amount. The wording of the Notice on reference rates provides no indication that, faced with several risks, the Commission reserved for itself the right to allocate to each risk a premium of 400 basis points. For that reason in particular, the Commission was under an obligation to provide a more detailed explanation for its decision to apply a premium of 1 000 basis points, both in terms of substance and in terms of the amount.
- 190 As regards the allegation that Measure 1 constituted a particularly risky loan, MB Immobilien and MB System submit that the Commission’s inference from that assessment that it was dealing with distinct, cumulative risks is wrong in that, in the final analysis, all constitute the same risk, namely the risk of default. A look at the following connections makes that particularly obvious. Where an undertaking provides sufficient security, the question of whether or not a loan is subordinated is of little importance. Nothing less may apply where security that is allegedly insufficient has already been subject to a premium. Nevertheless, the Commission seeks in this case to apply a premium of 400 and 200 basis points, that is to say, a total of 600 basis

points, to the same situation, namely a lack of sufficient security. That approach, it is argued, is entirely contradictory.

- ¹⁹¹ MB Immobilien and MB System submit further that neither the Notice on reference rates nor the contested decision provides an explanation as to the risks supposedly taken into account by the premium of 400 basis points and the reasons why the figure is 400 basis points.
- ¹⁹² Furthermore, as regards the various forms of security, even though the Commission makes an attempt at describing the actual risk, the connection in terms of value between, on the one hand, the security mentioned and, on the other hand, its weighting for the purposes of the allocation of basis points remains unknown.
- ¹⁹³ In addition, in the contested decision, the Commission failed, when it examined the risks, to take into account aspects other than the security provided, for example, the undertaking's strength and its position on the market. A risk analysis that is limited to collateral and ignores more general economic factors does not fulfil the obligations of prudence and completeness.
- ¹⁹⁴ Furthermore, the Commission failed to evaluate the comfort letter (see paragraph 90 above). If it had evaluated the comfort letter, it could not have assumed that the risk was elevated.
- ¹⁹⁵ As regards Measure 2, MB Immobilien and MB System submit that the contested decision is also vitiated by a serious failure to provide a statement of reasons with regard to the determination of the aid elements and their value. In recitals 88 to 91 to the contested decision, the Commission refers once more to the Notice on reference rates but does not provide reasons as to why it considers that there is a justification for the application of a premium of 400 basis points because it was classified as a firm in difficulty and a premium of 400 basis points because of the low collateral. For the same

reasons as those submitted in respect of Measure 1, a mere reference to the Notice on reference rates is not sufficient.

¹⁹⁶ Moreover, in so far as the Commission relies on Sachsen Zweirad's losses in order to reach the conclusion that it is a firm in difficulty and that there are particular risks that must be taken into account by a premium, it must be noted that those losses are not decisive. The Commission did not sufficiently examine the profit transfer agreement and cash-pooling arrangements between Sachsen Zweirad and its parent company. At most, it could have examined whether the parent company was in difficulty. Therefore, the premium of 400 basis points is illegal.

¹⁹⁷ With regard, next, to Measure 3, MB Immobilien and MB System submit that the contested decision is also vitiated by a serious failure to state reasons in respect of the aid elements (recital 93 to the contested decision). The Commission determines the aid element in terms of the difference between the interest rate that was actually applied and that interest rate increased by 700 basis points as per the Commission's decision, and it is not possible to understand, on the one hand, why the Commission decided to add a premium of exactly 400 basis points on the ground that it was a company in difficulty and not another figure, as well as, on the other hand, why it applied a further premium of 300 basis points because of low collateral. It is true that the Commission admits that the collateral provided has a certain economic value, but it does not explain how that leads to the deduction of 100, rather than 200, basis points from the 400 basis points which the Commission apparently had in mind. It is impossible to understand the grounds on which the Commission then finds that a premium of 300 basis points is justified, the more so as, according to the Notice on reference rates, in the case of special risks, it is appropriate to apply a premium of 400 basis points.

¹⁹⁸ As regards the Commission's reference to the study, MB Immobilien and MB System submit the same criticism as Freistaat Sachsen.

199 The Commission points out that the Notice on reference rates lays down a uniform reference rate calculated on the basis of the 'five-year interbank swap rate'. In situations involving a particular risk (for example, an undertaking in difficulty, or where the security normally required by banks is not provided), the method provides that the reference rate can be increased by 400 basis points, or even more.

200 As regards, first, Measure 1, in order to determine the normal market rate, the Commission used, in the contested decision, three premiums which were, however, not at all applied to the same risk, but to three risks, for which separate calculations were undertaken. The first risk covered related to the fact that Bike Systems was in difficulty. That made it more likely that the company would not be in a position to repay Measure 1 or to pay the remuneration agreed for it. The economic situation of the aid beneficiary was analysed in depth. For that reason alone, the argument that the Commission assessed only the collateral provided must be rejected. The second risk concerned the absence of collateral, which further increased the risk of default in case of insolvency. The third risk arose from the fact that, in case of insolvency, Measure 1 would be subordinated to other loans, increasing the risk of default even further. In the circumstances of this case, that was viewed as a separate risk. All three risks were described in detail in the contested decision and reasons were given.

201 The argument that all those risks concern, in the final analysis, the risk of default only and should therefore not be viewed as existing concurrently is irrelevant, given that it would be tantamount to considering that, in any event, as soon as an undertaking has provided sufficient collateral, the question of whether or not a loan is subordinated no longer matters. However, in the present case, the undertaking did not provide sufficient collateral, so that the question of whether the loan was subordinated or not did indeed matter. Furthermore, it is quite possible to envisage that an undertaking may be in difficulty but nevertheless able to provide significant collateral to allow it to cover a loan or a guarantee. The appropriate market rate for a loan granted to such an

undertaking would thus be lower than the interest rate applied to a loan granted to a company in difficulty and unable to provide comparable collateral.

202 A similar conclusion was reached by the study, which was devoted, in particular, to determining the appropriate increase of the floor rate in certain situations. It applies two criteria for such an increase, namely the rating of the undertaking and the collateral offered by that undertaking, thus treating the two risks as cumulative. The study proposed, for example, to apply to an undertaking in category C which, despite its difficulties, offered good collateral, a premium of 360 basis points (in other words, 3.6 percentage points). By contrast, the study took the view that the appropriate premium for an undertaking in the same category offering only low collateral should be 1 650 basis points (in other words, 16.5 percentage points). The premium at issue in the present case is therefore in no way applied three times for the same risk. Furthermore, the sole aim of the Commission's reference in its defence to the study was to show that the result arrived at and explained in the decision as regards the amount of the aid element did indeed represent economic reality; it was in no way intended to be an additional argument, which would, moreover, have been redundant.

203 As regards the question of whether an increase amounting to a total of 1 000 basis points is appropriate, the Commission stresses that, in the Notice on reference rates, it took the view that a premium of 400 basis points constitutes a minimum. The premium actually applied could very well be above 400 basis points. The study supports the view that the premiums are appropriate, taking the view that in the case of an undertaking in category C, that is to say, an undertaking in an unfavourable economic situation, it is appropriate to apply a premium of 1 000 basis points where the collateral provided is normal, and as many as 1 650 basis points if the available collateral is low. Accordingly, it would be more appropriate to consider the premium of 1 000 basis points applied by the Commission to be too low rather than too high.

204 As regards, finally, the alleged failure to take into account the comfort letter, the Commission merely states that that letter was not properly submitted during the formal investigation procedure, with the result that it was not in a position to examine it in greater detail and, if necessary, make greater use of it in its analysis.

205 Furthermore, as regards Measure 2, the claim that the Commission did not provide sufficient reasons for the premium of 800 basis points in total that was added to the reference rate must be rejected by reference to recitals 88 to 91 to the contested decision. A separate analysis of the various risks would have been necessary in order to determine the exact difference between the interest that would have been payable under market conditions if Measure 2 had not been granted and the interest which was in fact paid. The premium that it applied remained lower than the premium that the study recommended for similar situations.

206 The answer to the claim that the Commission did not take sufficient account of the profit transfer agreement and cash-pooling arrangements within the group must once more be that the Commission adopts its decision on the basis of information that is available to it when it closes the formal investigation procedure. However, during the administrative procedure, the Federal Republic of Germany at no time referred to that 'cash pool'.

207 Finally, as regards Measure 3, the Commission refers to its comments on the calculation of the aid elements in Measures 1 and 2.

208 In response to MB Immobilien and MB System's claim concerning the amount of the premium of 300 basis points because of low collateral, the Commission points out that, in the contested decision, it listed and examined each security provided for the guarantee (mortgages, assignment of claims, assignment of materials in the possession of the group companies and absolute guarantee on the part of the owner of Biria GmbH). Having examined them all, the Commission reached the conclusion that the security provided by Biria GmbH was of better quality than that provided by Sachsen Zweirad, which is why it applied a premium of 300 basis points because of low collateral (as opposed to 400 basis points in the case of Measure 2).

Findings of the Court

- 209 The scope of the Court's review of the legality of the contested decision in respect of the duty to state reasons is set out in paragraph 180 above.
- 210 It must also be noted, by way of a preliminary point, that the applicants' argument fails to distinguish between the formal statement of reasons and the assessment as regards the substance. In this respect, it is appropriate to recall the case-law according to which the duty to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. Claims and arguments intended to deny that the measure is well founded are thus of no effect in the context of a plea alleging the lack or inadequacy of a statement of reasons (*Olympiaki Aeroporia Ypiresies v Commission*, cited in paragraph 143 above, paragraph 79).
- 211 In the light of that case-law, it is necessary to examine whether the Commission provided sufficient reasons in law for the manner in which it calculated the aid elements.
- 212 As regards, first, MB Immobilien and MB System's argument that the Notice on reference rates provides no justification for the premium of 400 basis points that the Commission proposed as a risk premium, it must be held that the Notice on reference rates indeed merely states that the reference rate is a floor rate 'which may be increased in situations involving a particular risk (for example, an undertaking in difficulty, or where the security normally required by banks is not provided)' and that, in such cases, 'the premium may amount to 400 basis points or more if no private bank would have agreed to grant the relevant loan.' Therefore, it must be held that the content of the Notice on reference rates is not very detailed in this respect and that it does not, in itself, suffice as a statement of reasons for the calculation of the risk premium in any particular case. Therefore, it is appropriate to review the Commission's explanation for its application in the present case.

- 213 As for determining the aid elements in the present case, and in particular the amount of the risk premium, in respect of Measure 1, the Commission stated the following in recital 86 to the contested decision, after having recalled the principles set out in the Notice on reference rates and Bike Systems' difficult financial situation:

'... the Commission considers that Bike Systems would have had to pay an interest rate at least equal to the reference rate plus a premium of 400 basis points because it was in difficulty and a premium of a further 400 basis points because of the lack of any collateral. It also considers an additional 200 basis points appropriate because of the low ranking of the silent participation in the event of insolvency. This is in line with the indications given in the [Notice on reference rates], which states that in situations involving a particular risk (for example, an undertaking in difficulty or where the security normally required by banks is not provided) the premium may amount to 400 basis points or more. The aid element of the silent participation thus consists in the difference between the reference interest rate plus 1 000 basis points and the actual remuneration against which the silent participation was provided.'

- 214 As regards Measures 2 and 3, the Commission states the following in recitals 90 to 93 to the contested decision:

'(90) [... Sachsen Zweirad] and Biria GmbH were companies in difficulty at the time the guarantees were provided. The loan and the guarantee to [Sachsen Zweirad] involved an additional risk as the collateral provided was particularly low. The guarantee for the loan to [Sachsen Zweirad] was secured only by an absolute guarantee ("selbstschuldnerische Bürgschaft") provided by the group companies. The economic value of such general guarantees is very low.

(91) Therefore, in the present case, the Commission considers that, without the guarantee, [Sachsen Zweirad] would have had to pay an interest rate at least equal to the reference rate plus 400 basis points because it was a company in difficulty and plus a further 400 basis points because of the very low collateral. The aid element of the guarantee thus consists in the difference between the reference rate plus 800 basis points and the actual rate at which the guaranteed loan was provided.

(92) As regards the loan and the guarantee to Biria GmbH, the collateral provided had a higher economic value than that for the guarantee to [Sachsen Zweirad]. Nevertheless, the collateral is still lower than that normally required. The guarantee to Biria GmbH is secured by a first-rank mortgage on property of Bike Systems amounting to EUR 15m. The mortgage is, however, subordinated to another loan of EUR 2m. This first-rank mortgage therefore covers only just over 50% of the total sum of the loan. The other forms of collateral (mortgages, assignment of claims, assignment of materials in the possession of the group companies and absolute guarantee on the part of the owner of Biria GmbH) were of low economic value.

(93) Consequently, the Commission takes the view that, without the guarantee, Biria GmbH would have had to pay an interest rate at least equal to the reference rate plus 400 basis points because it was a company in difficulty and plus a further 300 basis points because of the low collateral (compared with the premium of 400 basis points for the guarantee to [Sachsen Zweirad] because of the very low collateral). The aid element of the guarantee thus consists in the difference between the reference rate plus 700 basis points and the actual rate at which the guaranteed loans were provided.'

²¹⁵ It is true that the Commission's explanations contain, in each case, a description of the method of calculation selected, in other words, that it used a reference rate plus a fixed premium to take account of the difficult financial situation of the undertaking at issue and either the lack of collateral or its low value. That method is consistent with the Notice on reference rates, a published document the relevance of which the applicants do not question, and, according to the Commission, its established practice, another point which the applicants do not contest.

²¹⁶ Contrary to the applicants' claims, the contested decision is not vitiated by a failure to provide a statement of reasons in respect of the Commission's finding regarding the lack of collateral or its low value. In recitals 59 to 78 to the contested decision, the Commission reviewed in detail the financial situation of the beneficiary undertakings at issue. Furthermore, as regards Measure 1, paragraphs 113 to 119 above show that

the Commission did not act unlawfully in not including the comfort letter in its analysis. As regards Measure 2, recital 90 to the contested decision states which collateral was available and the reason why it was considered to be low. Finally, recital 92 to the contested decision states, as regards Measure 3, that there was a first-rank mortgage covering only just over 50% of the total sum of the loan and classifies the other collateral available as of low economic value. Therefore, given the link between the principal collateral which the Commission took into account and the classification of the other forms of collateral as of low economic value, in the light of the percentage of the loan that was guaranteed by the principal collateral, referred to at the end of recital 92 to the contested decision, it is appropriate to take the view that the Commission's findings with regard to the low value of the collateral for Measure 3 is not vitiated by a failure to state reasons.

- 217 However, it must be held that the applicants are right to submit that, even though the Notice on reference rates does not preclude that possibility, it does not mention anywhere that risks can be cumulative. Furthermore, the Commission's analysis does not at all refer to the practice of the financial markets in this respect, with the result that the link between the premiums as fixed by the Commission and the specific situation of the three undertakings at issue does not become clear, creating the impression that the premiums may have been randomly chosen.
- 218 The Court therefore holds that the Commission should have explained why it resorted to additional premiums and how it chose their amounts by way of an analysis of market practice in order to allow the applicants to question whether the premiums were appropriate in the present case and to enable the Court to review their legality.
- 219 In the course of the proceedings before the Court, the Commission referred to the study in order to provide more detailed information in this respect; however, that was not done with the intention of providing an additional statement of reasons. For situations that are comparable to those in the present case, that study suggests a premium that corresponds to the ranking of the undertaking at issue in the light of the soundness of its finances and an additional premium to take account of the quality of the collateral provided. According to the study, premiums can be as high as 1 650 basis points for undertakings with a bad risk profile that are able to offer only weak collateral.

- 220 It must be held that the Commission's additional explanations, which refer to the different risk profiles of companies and the collateral that they can offer and puts those in relation to the interest rate premiums that typically correspond to them, does indeed put the level of the premiums chosen in the present case in perspective, by placing them in a larger comparative context and showing that they have been objectively chosen.
- 221 However, the applicants are right to submit that the study cannot be considered to be a statement of the reasons on which the contested decision is based because the latter does not mention the study and the applicants had no knowledge of it. The statement of reasons must in principle be notified to the person concerned at the same time as the decision adversely affecting him and a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Courts of the European Union (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraph 463; Case T-16/91 *Rendo and Others v Commission* [1996] ECR II-1827, paragraph 45; and *Corsica Ferries France v Commission*, cited in paragraph 104 above, paragraph 287).
- 222 In those circumstances, the Court holds that the contested decision contains an inadequate statement of reasons in respect of the essential considerations that led the Commission to choose the level of the risk premiums applied to Measures 1, 2 and 3, and thus does not fulfil the requirements of Article 253 EC.
- 223 The applicants' claims that the statement of reasons is defective in this respect must therefore be upheld. Consequently, the Court is not in a position to rule on the arguments relating to the correctness of the contested decision as regards the level of the risk premiums applied to Measures 1, 2 and 3.
- 224 The Court also holds that the calculation of the aid elements at issue is of essential importance in the general scheme of the contested decision and that, consequently, the decision must be annulled in its entirety.

225 It follows from all the foregoing that the contested decision must be annulled.

Costs

226 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 the Commission has been unsuccessful in Cases T-102/07 and T-120/07, it must, in accordance with the forms of order sought by the applicants, be ordered to pay the costs, including those relating to the interim proceedings in Case T-120/07.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls Commission Decision 2007/492/EC of 24 January 2007 on the State aid C 38/2005 (ex NN 52/2004) implemented by Germany for the Biria Group;**

2. Orders the European Commission to pay the costs, including those relating to the interim proceedings in Case T-120/07.

Czúcz

Labucka

O'Higgins

Delivered in open court in Luxembourg on 3 March 2010.

[Signatures]

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