



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

10 July 2012*

(State aid — Corrugated case materials — Aid for the construction of a paper mill — Guidelines on national regional aid — Decision declaring the aid compatible with the common market — Admissibility — Validity of the authority conferred by a legal person on its lawyers — Adoption of a decision upon conclusion of the preliminary examination phase — Standing to bring proceedings — Procedural rights of interested parties — Serious difficulties justifying the initiation of the formal investigation procedure — Exercise by the Commission of its discretion — Article 87(3)(a) EC — Article 88(2) and (3) EC — Article 4 of Regulation (EC) No 659/1999 — Article 44(5) and (6) of the Rules of Procedure)

In Case T-304/08,

Smurfit Kappa Group plc, established in Dublin (Ireland), represented by T. Ottervanger and E. Henny, lawyers,

applicant,

v

European Commission, represented by B. Martenczuk and C. Urraca Caviades, acting as Agents,

defendant,

supported by

Propapier PM 2 GmbH, formerly Propapier PM2 GmbH & Co. KG, established in Eisenhüttenstadt (Germany), represented by H.-J. Niemeyer and C. Herrmann, lawyers,

intervener,

ACTION for annulment of Commission Decision C(2008) 1107 of 2 April 2008 declaring compatible with the common market the national regional aid which the German authorities intend to grant to Propapier PM2 for the construction of a paper mill in Eisenhüttenstadt (region of Brandenburg-Nordost) (State aid N 582/2007 — Germany),

THE GENERAL COURT (First Chamber),

composed of J. Azizi, President, S. Frimodt Nielsen (Rapporteur) and A. Popescu, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 28 November 2011,

* Language of the case: English.

gives the following

Judgment

Background to the dispute

- 1 The applicant, Smurfit Kappa Group plc, is an international undertaking established in Ireland. It operates in the packaging sector, mainly in Europe and South America. It manufactures and markets corrugated case materials ('CCM products'), corrugated and solid board sheets, corrugated and solid boxes, graphic and specialty board. It also recovers recycled waste paper.
- 2 By letter of 8 October 2007, the German authorities notified the European Commission of their intention to grant investment aid of EUR 82 509 500 (EUR 72 154 700 in present value) ('the aid in question') to Propapier PM2 GmbH & Co. KG for the construction of a paper mill and power plant at Eisenhüttenstadt, in the Brandenburg-Nordost region (Germany). The Commission recorded the notification under the reference N 582/2007.
- 3 The paper mill financed by the aid in question was intended to produce two types of CCM products namely, testliner of up to 150 g/m² and fluting made from recycled fibre. The construction of the installation was to extend from December 2007 to the first half of 2010.
- 4 On 9 November 2007, the applicant lodged a confidential complaint with the Commission concerning the aid in question.
- 5 By letter of 7 December 2007, the Commission requested additional information from the Federal Republic of Germany. The German authorities replied by letter of 3 January 2008.
- 6 A meeting between the Commission services and the German authorities took place on 25 January 2008 in the presence of representatives of the intervener.
- 7 On 29 January 2008, two formal complaints were received by the Commission and forwarded to the Federal Republic of Germany for comments.
- 8 By letter of 1 February 2008 the Commission sent a further request for information to the Federal Republic of Germany.
- 9 By letters of 6 and 14 February 2008, the Federal Republic of Germany replied respectively to the complaints referred to in paragraph 7 above and to the request for information referred to in paragraph 8 above.
- 10 On 20 February 2008 the Commission received a third formal complaint which, as it was based on the same arguments as the first two complaints, was not sent to Germany.
- 11 On 2 April 2008, without initiating the formal investigation procedure provided for in Article 88(2) EC, the Commission adopted Decision C(2008) 1107, declaring the aid in question compatible with the common market ('the contested decision').

- 12 In the contested decision, the Commission found *inter alia* that the aid in question did not exceed the thresholds laid down in paragraph 68 of the Guidelines on national regional aid for 2007-2013 (OJ 2006 C 54, p. 13), which reads as follows:

‘Where the total amount of aid from all sources exceeds 75% of the maximum amount of aid an investment with eligible expenditure of EUR 100 million could receive, applying the standard aid ceiling in force for large enterprises in the approved regional aid map on the date the aid is to be granted, and where

- (a) the aid beneficiary accounts for more than 25% of the sales of the product(s) concerned on the market(s) concerned before the investment or will account for more than 25% after the investment, or
- (b) the production capacity created by the project is more than 5% of the market measured using apparent consumption data for the product concerned, unless the average annual growth rate of its apparent consumption over the last five years is above the average annual growth rate of the European Economic Area’s GDP,

the Commission will approve regional investment aid only after a detailed verification, following the opening of the procedure provided for in Article 88(2) [EC], that the aid is necessary to provide an incentive effect for the investment and that the benefits of the aid measure outweigh the resulting distortion of competition and effect on trade between Member States.’

- 13 In footnote 63, which appears under paragraph 68, it is stated that the Commission intended to draw up before the entry into force of the Guidelines, namely on 1 January 2007, further guidance on the criteria that it would take into account when assessing that the aid was necessary to provide an incentive effect for the investment and that the benefits of the aid measure outweighed the resulting distortion of competition and effect on trade between Member States.
- 14 In recitals 119 and 120 of the contested decision, the Commission rejected the arguments submitted in the complaints referred to it concerning the aid in question (see paragraphs 4, 7 and 10 above), stating that it was bound by the Guidelines, which, in its view, precluded it from initiating the formal investigation procedure in cases in which the thresholds laid down in paragraph 68 of those Guidelines were not exceeded. In that regard, according to the Commission, compliance with those thresholds for market shares and production capacity increases ensures for each project subsidised, first, that the potential distortion of competition does not exceed the expected benefits and, second, that there is a sufficient contribution to the objective of regional development.

Procedure and forms of order sought by the parties

- 15 By application lodged at the Registry of the Court on 5 August 2008, the applicant brought the present action.
- 16 By document lodged at the Registry of the Court on 12 December 2008, Propapier PM2 GmbH & Co. KG, which has become Propapier PM2 GmbH in the course of the proceedings, applied for leave to intervene in the present proceedings in support of the Commission. By order of 21 April 2009 the President of the Third Chamber of the General Court granted leave to intervene.
- 17 On 14 May 2009 the intervener claimed that it had not received the complete case file of the written procedure concerning it. It was assured by a letter from the Court Registry that it had been sent a complete set of the documents in the written procedure and it did not pursue the matter any further.

- 18 As the applicant had requested that certain parts of the pleadings exchanged in the course of the written procedure be treated confidentially with regard to the intervener and the intervener had objected to some of those requests, the President of the Third Chamber of the Court, by order of 5 July 2010, upheld in part the applicant's requests. Consequently, certain additional information was sent to the intervener, which was granted leave to supplement its statement in intervention.
- 19 The composition of the Chambers of the Court having been altered, the Judge-Rapporteur initially appointed was attached to the First Chamber, to which this case was accordingly assigned. As a member of the First Chamber was unable to sit, the President of the General Court designated another Judge to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure.
- 20 The applicant claims that the Court should:
- annul the contested decision;
 - order the Commission and the intervener to pay the costs.
- 21 The Commission contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.
- 22 The intervener contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.
- 23 On hearing the report of the Judge-Rapporteur, the General Court (First Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, put questions in writing to the parties.
- 24 The parties presented oral argument and replied to questions put by the Court at the hearing on 28 November 2011.
- 25 At the hearing, the Commission and the intervener abandoned their challenge to the admissibility of the application with respect to compliance with the obligation laid down in Article 44(5)(a) of the Rules of Procedure, formal note of which was taken in the minutes of the hearing.
- 26 At the end of the hearing, the Court gave the applicant, within a period of three weeks from reception of the minutes of the hearing, an opportunity to submit any evidence that it deemed useful in order to prove that its lawyers were properly authorised to bring the case before the Court.
- 27 The documents submitted by the applicant within the period specified were sent to the Commission and the intervener for comment. On 25 January 2012, after receiving those comments, the Court closed the oral procedure.

Law

Admissibility

- 28 The Commission and the intervener contest the admissibility of the application in the light of the requirements laid down in Article 44(5)(b) of the Rules of Procedure. The Commission also contests the applicant's standing to bring proceedings against the contested decision.

The validity of the authority conferred by the applicant on its lawyers

- 29 Under Article 44(5) of the Rules of Procedure, an application made by a legal person governed by private law is to be accompanied by proof that the authority granted to the applicant's lawyer has been properly conferred on him by someone authorised for the purpose. Pursuant to Article 44(6) of those rules, if an application does not comply with the aforementioned requirement, the Registrar is to prescribe a reasonable period within which the applicant is to comply with it whether by putting the application itself in order or by producing any of the abovementioned documents. If the applicant fails to put the application in order or to produce the required documents within the time prescribed, the General Court will decide whether the non-compliance with these conditions renders the application formally inadmissible.
- 30 It follows from those provisions that the Registrar of the General Court is required to request a legal person governed by private law to put its application in order where it has failed to fulfil its obligation to provide proof that the authority granted to its lawyers has been properly conferred on them and it is only if the applicant fails to comply with the Registrar's request within the period specified that the General Court has the power to declare the action inadmissible.
- 31 The present action was brought on 5 August 2008, on behalf of the applicant, by T. Ottervanger and E. Henny, lawyers at the bar of Amsterdam (Netherlands). The applicant annexed to its application a power of attorney authorising those lawyers to bring the present action. That power of attorney was drawn up by M. O'Riordan, in his capacity as Group Secretary.
- 32 Pursuant to Article 44(6) of the Rules of Procedure, the Registrar granted the applicant a period of time in which to provide proof that the person issuing that power of attorney was empowered to adopt that measure on behalf of the company. Within the period of time thus prescribed, the applicant, whilst maintaining that the Group Secretary was empowered under Irish law to grant authority to lawyers in order to bring legal proceedings on behalf of the company, submitted a second power of attorney, dated 28 August 2008 and drawn up by Mr McGann, in his capacity as Chief Executive Officer.
- 33 The intervener and the Commission having contested that both Mr O'Riordan and Mr McGann were so empowered, the applicant submitted, before the end of the oral procedure, a resolution, adopted on 8 December 2011 by the board of directors of the company, confirming that Mr McGann, as Chief Executive Officer and one of the directors of the company, was empowered to draw up the second power of attorney.
- 34 First, the intervener contests, where the obligation provided for in Article 44(5)(b) of the Rules of Procedure has not been complied with, that it is possible to put the application in order in the course of the proceedings. The Court must reject that claim, since the possibility of putting the application in order is provided for in Article 44(6) of those rules, which provides that the Registrar will prescribe a period within which the applicant is to put the application in order and that, if the applicant fails to do so within the period prescribed, the General Court must assess whether that renders the action inadmissible (see paragraph 29 above).

- 35 In the present case, as was stated in paragraph 32 above, the applicant submitted the second power of attorney within the period prescribed by the Registrar of the General Court. It is therefore necessary to examine, second, whether the second power of attorney satisfied the requirements flowing from Article 44(5)(b) of the Rules of Procedure.
- 36 In that regard, the Commission and the intervener contend that Articles 66 to 68 of the Articles of Association annexed to the application which had been put in order, which they no longer dispute as being the applicant's Articles of Association, provide that the decision to bring proceedings and to grant authority to lawyers to act on behalf of the company falls within the collegiate power of the board of directors and that that power can be delegated to one or more directors. The Commission and the intervener contend, as a result, that, by failing to prove that the board of directors passed a resolution deciding to instruct the lawyers T. Ottervanger and E. Henny to bring an action for annulment of the contested decision or a resolution delegating such a power to Mr McGann, the applicant failed to fulfil the obligation provided for in Article 44(5)(b) of the Rules of Procedure.
- 37 Although the General Court cannot be certain, given that the applicant has not produced any earlier resolution of the board of directors of the company deciding to bring the present proceedings or conferring on Mr McGann the power to decide to bring such proceedings, that Mr McGann was at that time entitled to draw up the second power of attorney, it must in any event be pointed out that, by resolution of 8 December 2011, the board of directors confirmed that Mr McGann, Chief Executive Officer and a director of the company, was so empowered (see paragraph 33 above).
- 38 Whilst it is also true, as the intervener contends, that that confirmation was given more than three years after this action was brought and that it is possible that the composition of the board of directors had changed since the date of the second power of attorney, there can however be no doubt as the desire of the applicant, which is legally bound vis-à-vis third parties by the resolutions of its board of directors, for this action to succeed.
- 39 Accordingly, the plea of inadmissibility raised by the intervener and the Commission alleging that the application does not satisfy the obligations flowing from Article 44(5)(b) of the Rules of Procedure must be rejected (see, to that effect and by analogy, Joined Cases 193/87 and 194/87 *Maurissen and European Public Service Union v Court of Auditors* [1989] ECR 1045, paragraphs 33 and 34).

The applicant's standing to bring proceedings

- 40 The Commission, supported by the intervener, claims that the applicant, although an interested party, is not individually concerned by the contested decision. Consequently, it is not open to the applicant to challenge the merits of the assessments relating to the compatibility of the aid in question with the common market set out in the contested decision. Yet all the applicant's arguments in the application seek to call into question the merits of that assessment relating to the compatibility of the aid in question with the common market and not to claim that the applicant's procedural rights under Article 88(2) EC were disregarded.
- 41 Moreover, the Commission claims that the applicant's allegation that the duration of the administrative procedure shows that there were serious difficulties which necessitated the initiation of the formal investigation procedure provided for by Article 88(2) EC was put forward for the first time in the reply and is therefore also inadmissible. It follows that none of the applicant's pleas is admissible.
- 42 As a preliminary point, it must be stated that, despite the entry into force during the present proceedings, that is to say on 1 December 2009, of Article 263 TFEU, the question of the admissibility of the action for annulment must be decided on the basis of the fourth paragraph of Article 230 EC

alone (see, to that effect, orders in Case T-532/08 *Norilsk Nickel Harjavalta and Umicore v Commission* [2010] ECR II-3959, paragraphs 68 to 75, and in Case T-539/08 *Etimine and Etiproducts v Commission* [2010] ECR II-4017, paragraphs 74 to 81), and this is not contested by the parties.

- 43 Under the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to the former.
- 44 It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed by such a decision (see Case 25/62 *Plaumann v Commission* [1963] ECR 95, at 107; Case C-198/91 *Cook v Commission* [1993] ECR I-2487, paragraph 20; Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 14; Case C-78/03 P *Commission v Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 33; and Joined Cases C-75/05 P and C-80/05 P *Germany and Others v Kronofrance* [2008] ECR I-6619, paragraph 36).
- 45 As the present action concerns a Commission decision on State aid, it must be borne in mind that, in the context of the procedure for reviewing State aid, the preliminary stage of the procedure for reviewing aid under Article 88(3) EC, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the examination under Article 88(2) EC. It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (see, to that effect, *Germany and Others v Kronofrance*, paragraph 44 above, paragraph 37 and the case-law cited).
- 46 It follows that, where, without initiating the formal investigation procedure under Article 88(2) EC, the Commission finds, on the basis of Article 88(3) EC, that aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the Courts of the European Union. For those reasons, the Court will declare to be admissible an action for the annulment of a decision based on Article 88(3) EC, brought by a person who is concerned within the meaning of Article 88(2) EC, where he seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision (see *Germany and Others v Kronofrance*, paragraph 44 above, paragraph 38 and the case-law cited).
- 47 Pursuant to 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), an interested party for the purposes of Article 88(2) EC means inter alia any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, that is to say, in particular competing undertakings of the beneficiary of that aid. According to the case-law, in other words, that term covers an indeterminate group of addressees (Case C-83/09 P *Commission v Kronoply and Kronotex* [2011] ECR I-4441, paragraph 63; see also, to that effect, Case 323/82 *Intermills v Commission* [1984] ECR 3809, paragraph 16).
- 48 On the other hand, if the person bringing the action calls into question the merits of the decision assessing the compatibility of the aid with the common market, the mere fact that it may be regarded as concerned within the meaning of Article 88(2) EC cannot suffice for the action to be considered admissible. It must then demonstrate that it enjoys a particular status within the meaning of *Plaumann v Commission*, paragraph 44 above. That would in particular apply where the applicant's market position would be substantially affected by the aid to which the decision at issue relates (see *Germany and Others v Kronofrance*, paragraph 44 above, paragraph 40 and the case-law cited).

- 49 With regard to the condition that the applicant's market position must be substantially affected, the mere fact that a measure may exercise an influence on the competitive relationships existing on the relevant market and that the undertaking concerned is in a competitive relationship with the addressee of that measure cannot suffice. Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the addressee of the decision (Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, paragraphs 32 and 33, and Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, paragraphs 47 and 48).
- 50 Lastly, in accordance with settled case-law, it is not for the Courts of the European Union to interpret an action challenging exclusively the substance of a decision assessing whether aid is compatible with the common market as one seeking, in reality, to safeguard the applicant's procedural rights pursuant to Article 88(2) EC, where that person has not expressly put forward a plea to that effect. In such circumstances, the interpretation of the pleas of the action would lead to a reclassification of the action's subject-matter (*Commission v Kronoply and Kronotex*, paragraph 47 above, paragraph 55; see also, to that effect, judgment of 29 November 2007 in Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others v Commission*, not published in the ECR, paragraph 25).
- 51 Nevertheless, such a limit on its jurisdiction to construe pleas in law does not have the effect of preventing the Courts of the European Union from examining arguments which the applicant has put forward regarding the substance, in order to ascertain whether those arguments are moreover capable of establishing that a plea alleging expressly the existence of serious difficulties such as to justify initiation of the procedure under Article 88(2) EC is well founded (*Commission v Kronoply and Kronotex*, paragraph 47 above, paragraph 56).
- 52 Where an applicant seeks the annulment of a decision not to raise objections, it essentially contests the fact that the Commission adopted the decision in relation to the aid at issue without initiating the formal investigation procedure, thereby infringing the applicant's procedural rights. In order to have its action for annulment upheld, the applicant may invoke any plea to show that the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should have raised doubts as to the compatibility of that measure with the common market. The use of such arguments cannot, however, have the consequence of changing the subject-matter of the application or altering the conditions of its admissibility. On the contrary, the existence of doubts concerning that compatibility is precisely the evidence which must be adduced in order to show that the Commission was required to initiate the formal investigation procedure under Article 88(2) EC and Article 6(1) of Council Regulation No 659/1999 (see Case C-47/10 P *Austria v Scheucher-Fleisch and Others* [2011] ECR I-10707, paragraph 50 and the case-law cited).
- 53 It is in the light of those principles that the applicant's procedural position must be examined.
- 54 In that regard, it must be stated at the outset, as the Commission and the intervener agreed, that the applicant is a party concerned within the meaning of Article 88(2) EC. The applicant submits, without being contradicted by the Commission, the intervener or any documents in the file, that it is a direct competitor of the intervener. However, the parties do not agree on whether the applicant is individually concerned by the contested decision and whether, on that basis, it is open to the applicant to challenge, independently of the safeguarding of its procedural rights, the merits of the assessment of the compatibility of the aid in question with the common market set out in the contested decision.
- 55 Whilst the applicant has succeeded in providing sufficient evidence showing that its competitive position is capable of being affected by the aid in question, it has however failed to establish that its market position will be substantially affected for the purposes of the case-law recalled in paragraphs 48 and 49 above.

- 56 First, the applicant relies on its participation in the administrative procedure, on the basis that it lodged a confidential complaint after the notification of the aid in question. However, the participation of an undertaking in the preliminary examination phase provided for in Article 4 of Regulation No 659/1999 cannot establish, on the basis solely that it is a person making a complaint, that is individually concerned by the decision adopted at the end of that procedure (see, to that effect, Case C-319/07 P *3F v Commission* [2009] ECR I-5963, paragraphs 94 and 95).
- 57 Second, the applicant claims that the market for CCM products is an integrated one and that any State aid granted to a producer has effects on all its competitors in the European Economic Area (EEA). It is however apparent from information provided by the applicant in its confidential complaint that the CCM product sector in the EEA brings together approximately 130 companies. That argument of the applicant therefore highlights the fact that the aid granted will influence the competitive relationships between the operators, but does not suffice to establish that the applicant will suffer substantial harm to its competitive position in such a way as to distinguish it from the operators in general.
- 58 Third, the applicant submits that the aid in question will make it possible to build the largest factory for CCM products in Europe and that the entry into service of that factory will inevitably have an appreciable effect on price levels. Like the previous claim, this claim, which is moreover contested by the intervener, is in any event insufficient to show that the applicant is individually concerned by the contested decision, since the claim is not based on any specific feature of its situation which is capable of establishing that it will be affected by the opening of that factory to an extent which distinguishes it from the intervener's other competitors in general.
- 59 Fourth, the applicant states that the market for CCM products is undergoing a structural imbalance characterised by surplus production capacity and that it has been forced to close a large number of its own plants. However, as the intervener and the Commission contend, the plant closures may be explained by the fact that the applicant has taken independent management decisions, such as the adaptation of its existing plants to technical progress or the rationalisation of its production equipment, and the applicant has failed to adduce any evidence to show that it has not closed its plants because of their advanced age. In any event, and even if the applicant was forced to reduce its production capacity on account of a structural imbalance between the supply of and demand for CCM products, that would be not caused by the plant subsidised by the aid in question and would not be capable, in itself, of distinguishing the applicant from the intervener's other competitors (see, to that effect, Case T-375/04 *Scheucher-Fleisch and Others v Commission* [2009] ECR II-4155, paragraphs 59 and 60).
- 60 Fifth, lastly, the applicant's argument that it possesses six plants within a radius of 800 to 1 000 km of the plant subsidised by the aid in question and that that will have the effect of making the intervener its main direct competitor appears at first sight to contradict its second argument, according to which since the market for CCM products is perfectly competitive and integrated, any subsidy granted to any producer whatsoever will necessarily affect the price levels of all its competitors in the EEA. In any event, the mere fact that the applicant possesses six plants close to the subsidised plant and that the aid in question would enable the intervener to bring its production of CCM products up to nearly 1 million tonnes per year, whilst, by comparison, the applicant's total annual production capacity in those six factories is allegedly approximately [confidential]¹ does not permit the conclusion that the applicant's market position will be substantially affected. Indeed, the intervener claims, without being contradicted, that the applicant is not its most direct competitor, that its geographic sales markets differ from the applicant's and that, even if the criterion of the geographic proximity of the plants is the most relevant one, competitors other than the applicant possess plants which are closer to the one which was to be built in Eisenhüttenstadt.

1 — Confidential data omitted

- 61 It follows from the foregoing that the applicant has failed to establish that the aid in question is capable of causing substantial harm to its market position. In those circumstances, it is only open to the applicant, in its capacity as a party concerned, to seek the protection of the procedural rights that it derives from Article 88(2) EC and to challenge the Commission's refusal to initiate the formal investigation procedure, but not to challenge the merits of the assessments on the basis of which the Commission found that the aid in question was compatible with the common market. It is therefore necessary, given that the Commission and the intervener contend that none of the pleas of this action is aimed at safeguarding the procedural rights of a party concerned, to examine the nature of the pleas put forward by the applicant.
- 62 By virtue of the case-law recalled in paragraphs 50 to 52 above, the fact that the applicant has not succeeded in showing that its market position would be substantially affected by the aid in question does not mean that, in order to show that the Commission ought to have had doubts as to the compatibility of the aid in question with the common market justifying the initiation of the formal investigation procedure provided for in Article 88(2) EC it is precluded from submitting arguments relating to the merits of the Commission's assessment, provided however that at least one of the pleas of its action alleges that the Commission infringed its obligation to initiate the formal investigation procedure. In that regard, it must be observed that the Commission is required to initiate the formal investigation procedure in particular where, in the light of the information obtained during the preliminary examination procedure, it still faces serious difficulties in assessing the measure under consideration. That obligation follows directly from Article 88(3) EC, as interpreted by the case-law, and from Article 4(4) of Regulation No 659/1999, when the Commission finds, after a preliminary examination, that the unlawful measure raises doubts as to its compatibility with the common market (Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81, paragraph 328).
- 63 The applicant states, as a preliminary point, that it takes issue with the Commission for taking the view that it could adopt a positive decision without initiating the formal investigation procedure. The applicant submits inter alia that the Commission was not entitled to take refuge behind the thresholds that it laid down in its Regional Aid Guidelines in order to refuse to carry out a concrete assessment of the effects of the measure at issue. That weighing up of the effects entailed by the measure at issue necessitated the initiation of the formal investigation procedure provided for in Article 88(2) EC. In addition, the applicant claims that the fact that the formal investigation procedure was not initiated prevented it from exercising its procedural rights.
- 64 In that regard, the first plea of the action alleges that the Commission failed to fulfil the obligation incumbent on it in the present case to initiate the formal investigation procedure, contrary to Article 88(2) EC and Article 4(4) of Regulation No 659/1999.
- 65 Thus, at least one of the pleas of the action is aimed expressly at safeguarding the applicant's procedural rights. In those circumstances, contrary to the Commission's and the intervener's submission, even if the arguments submitted by the applicant concern the merits of the assessments relating to the compatibility of the aid in question with the common market, those arguments must be examined only in so far as they seek to show that the Commission did not succeed in overcoming the serious difficulties with which it was faced during the preliminary examination phase (see paragraph 52 above). It follows that the plea of inadmissibility raised by the Commission against the action as a whole cannot be upheld. Instead, the admissibility of the pleas submitted by the applicant and of the arguments submitted in each of those pleas must be examined on a case-by-case basis.

Substance

- 66 The first plea of the action alleges that the Commission failed to fulfil the obligation incumbent on it in the present case to initiate the formal investigation procedure, contrary to Article 88(2) EC and Article 4(4) of Regulation No 659/1999. Although it has not been formally set out in two parts, this

plea covers two separate complaints. First, the applicant alleges in essence that the Commission erred in law when it inferred from paragraph 68 of the Guidelines that, if the thresholds laid down therein were not exceeded, it was justified in finding that the aid in question is compatible and that it could dispense with initiating the formal investigation procedure. Second, the applicant puts forward several arguments to the effect that the Commission was faced with difficulties in assessing the criteria provided for in paragraph 68 of the Guidelines which justified the initiation of the formal investigation procedure.

Admissibility of the first plea

- 67 The Commission contests that the first plea is admissible, because the applicant relies in that plea on arguments aimed at challenging the merits of the assessments made in the contested decision.
- 68 However, the Court would point out that it is open to the applicant, in its capacity as a party concerned, to claim that the Commission ought to have initiated the formal investigation procedure. To that end, it is also open to the applicant to submit, in support of such a plea, arguments showing that the assessment of the information and evidence at the Commission's disposal during the preliminary examination phase of the aid in question ought to have raised doubts as to its compatibility with the common market (see, to that effect, *Austria v Scheucher-Fleisch and Others*, paragraph 52 above, paragraph 50).
- 69 It should be recalled that, in the contested decision, the Commission attached decisive weight in its assessment of the compatibility of the aid in question to the fact that the thresholds laid down in paragraph 68 of the Guidelines were not exceeded.
- 70 It is therefore open to the applicant, in order to seek to safeguard its procedural rights, to challenge the error of law which, in its submission, the Commission committed in inferring that the aid in question was compatible with the common market from the fact that the thresholds laid down in paragraph 68 of the Guidelines were not exceeded and to challenge the factual assessments that enabled the Commission to state with certainty that those thresholds would not be exceeded in the present case.
- 71 The Commission is however justified in submitting that the complaint, submitted for the first time in the reply, based on the duration of the preliminary examination phase is new in character and has no link with the arguments contained in the application. That latter complaint is therefore inadmissible under Article 48(2) of the Rules of Procedure of the General Court, according to which no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.
- 72 It follows that the plea of inadmissibility raised by the Commission against the first plea must be rejected, except in relation to the complaint based on the duration of the preliminary examination phase.

Whether the first plea is well founded

- 73 In the first plea, the applicant claims that it follows from Article 88(2) EC and Article 4(4) of Regulation No 659/1999 that the Commission is required to open the formal investigation procedure when it does not succeed in eliminating all doubts as to the compatibility with the common market of a State aid in the context of the preliminary examination provided for in Article 88(3) EC. According to the applicant, it was not evident that the measure at issue was compatible with the common market and certain difficulties of assessment ought to have led the Commission to initiate the formal investigation procedure, as a more detailed investigation and more information proved to be necessary.

- 74 In particular, the applicant submits that the Commission erred in law in taking the view, first, that the fact that the thresholds laid down in paragraph 68 of the Guidelines had not been exceeded precluded an in-depth investigation of the compatibility of the measure at issue with the common market and, second, that the Commission was bound by that erroneous interpretation of the provision.
- 75 In that regard, it should be recalled that, under Article 88(3) EC, the Commission carries out an examination of proposed State aid which is intended to enable it to form a *prima facie* opinion as to whether the aid in question is partially or entirely compatible with the common market. The formal investigation procedure provided for in Article 88(2) EC seeks to protect the rights of interested third parties and must, moreover, enable the Commission to be fully informed of all the facts of the case before taking its decision, in particular by receiving the observations of interested third parties and Member States. Whilst its powers are circumscribed as far as the decision to initiate the formal procedure is concerned, the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether they present serious difficulties. In accordance with the objective of Article 88(3) EC and its duty of sound administration, the Commission may, amongst other things, engage in talks with the notifying State or with third parties in an endeavour to overcome, during the preliminary examination procedure, any difficulties encountered (see Case T-388/03 *Deutsche Post and DHL International v Commission* ECR II-199, paragraph 87 and the case-law cited).
- 76 According to settled case-law, the procedure provided for in Article 88(2) EC is essential whenever the Commission has serious difficulties in determining whether aid is compatible with the common market (see *Deutsche Post and DHL International v Commission*, paragraph 75 above, paragraph 88 and the case-law cited).
- 77 Accordingly, it is for the Commission to decide, on the basis of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the aid require the initiation of that procedure. That decision must satisfy three requirements (see *Deutsche Post and DHL International v Commission*, paragraph 75 above, paragraph 89 and the case-law cited).
- 78 First, under Article 88 EC the Commission's power to find aid to be compatible with the common market upon the conclusion of the preliminary examination procedure is restricted to aid measures that raise no serious difficulties. That criterion is thus an exclusive one. Thus, the Commission may not decline to initiate the formal investigation procedure in reliance on other circumstances, such as third-party interests, considerations of economy of procedure or any other ground of administrative or political convenience (see *Deutsche Post and DHL International v Commission*, paragraph 75 above, paragraph 90 and the case-law cited).
- 79 Second, where it encounters serious difficulties, the Commission must initiate the formal procedure, having no discretion in this regard (*Deutsche Post and DHL International v Commission*, paragraph 75 above, paragraph 91).
- 80 Third, the notion of serious difficulties is an objective one. Whether or not such difficulties exist requires investigation of both the circumstances under which the contested measure was adopted and its content. That investigation must be conducted objectively, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the common market. It follows that judicial review by the General Court of the existence of serious difficulties will, by nature, go beyond consideration of whether or not there has been a manifest error of assessment (see, to that effect, *Deutsche Post and DHL International v Commission*, paragraph 75 above, paragraph 92 and the case-law cited).

- 81 It is also apparent from the case-law that if the examination carried out by the Commission during the preliminary examination procedure is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (see *Deutsche Post and DHL International v Commission*, paragraph 75 above, paragraph 95 and the case-law cited).
- 82 When the Commission assesses the compatibility of State aid with the common market in the light of the derogation provided for in Article 87(3)(a) EC, it must take into account the Community interest and may not refrain from assessing the impact of those measures on the relevant market or markets in the EEA as a whole. In such cases the Commission is bound not only to verify that the measures are such as to contribute effectively to the economic development of the regions concerned, but also to evaluate the impact of the aid on trade between Member States, and in particular to assess the sectorial repercussions they may have at Community level (Case C-113/00 *Spain v Commission* [2002] ECR I-7601, paragraph 67).
- 83 In the application of Article 87(3) EC, the Commission enjoys wide discretion, the exercise of which involves complex economic and social assessments which must be made in a Community context. In that context, judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with, and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error in the assessment of the facts or misuse of powers (see *Germany and Others v Kronofrance*, paragraph 44 above, paragraph 59 and the case-law cited).
- 84 However, in adopting rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its aforementioned discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations, unless it gives reasons justifying, in the light of those principles, its departure from its own rules (see 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 211, and *Germany and Others v Kronofrance*, paragraph 44 above, paragraph 60 and the case-law cited).
- 85 It should be recalled, in that regard, that paragraph 68 of the Guidelines establishes a market share threshold (25%) and, in respect of sectors whose growth rate is not above the long-term average annual growth rate of the European Economic Area's GDP, such as the corrugated cardboard sector, a threshold for an increase in production capacity (5%) the exceeding of which requires the Commission to initiate the formal investigation procedure provided for in Article 88(2) EC.
- 86 In the contested decision, the Commission took the view that it was entitled to infer from paragraph 68 of the Guidelines that, since it had found in the present case that the thresholds in question would not be exceeded, it was bound to consider the aid in question to be compatible with the common market, without initiating the formal investigation procedure. It is therefore necessary to examine whether, as the applicant submits, the Commission, in so doing, committed an error of law such as to prevent it from eliminating all doubt as to the compatibility of the aid in question with the common market.
- 87 The Commission, as it indeed confirmed at the hearing, took the view that it was required not to initiate the formal investigation procedure in the present case, because the thresholds laid down in paragraph 68 of the Guidelines were not exceeded. For that same reason, the Commission also took the view that the complainants' arguments should, in any event, be rejected.
- 88 Although paragraph 68 of the Guidelines establishes a procedural obligation without exception for the Commission, which is required to initiate the procedure provided for in Article 88(2) EC where the thresholds have been exceeded, even if, *prima facie*, the Commission is of the opinion that the aid in question is compatible with the common market, it is however not apparent from paragraph 68 that

the initiation of the formal investigation procedure is precluded where those thresholds have not been exceeded. The sole effect of that provision is to require the Commission to initiate the formal investigation procedure where those thresholds have been exceeded; that provision certainly does not have the effect of preventing it from doing so in cases in which the thresholds in question have not been reached. In such a case, the Commission does admittedly have the power not to initiate the formal investigation procedure, but it cannot justify that decision by claiming that it is required by paragraph 68 of the Guidelines not to initiate the procedure.

- 89 By inferring from the fact that the thresholds laid down in paragraph 68 of the Guidelines were complied with that the aid in question was compatible with the common market, the Commission therefore misconstrued the scope of that paragraph.
- 90 Moreover, as the applicant rightly claims, as a result of that error, the Commission did not exercise its discretion on whether the aid in question was compatible with the common market to the full, as it was required to do (see, to that effect, Case T-357/02 *RENV Freistaat Sachsen v Commission* [2011] ECR II-5415, paragraph 45).
- 91 In that regard, according to the case-law (see paragraphs 82 and 83 above), the Commission is required to exercise its wide discretion under Article 87(3) EC as to whether State aid granted in a region in difficulty is compatible in order to ascertain whether the expected benefits in terms of regional development outweigh distortions of competition and the impact of the subsidised project on trade between Member States.
- 92 It is not apparent from the contested decision that, in reaching the conclusion that the aid in question was compatible with the common market, the Commission in fact carried out that assessment. In recital 119 of the contested decision, the Commission stated that it was not required to undertake a detailed verification as to whether the benefits of an aid measure outweigh the distortions of competition that it may bring about where the thresholds laid down in paragraph 68 of the Guidelines were not reached. Moreover, in recital 120 of the contested decision, the Commission took the view that compliance with the Guidelines was sufficient on its own to guarantee the contribution of an aid measure to regional development.
- 93 In that regard, when the Guidelines are applied, the conditions verified — apart from whether the thresholds relating to market shares and to the increase in production capacity laid down in paragraph 68 have been complied with — are limited to the following: first, that the region where the subsidised project is located is eligible for the grant of State aid ‘to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment’ (Article 87(3)(a) EC); second, that the maximum allowable aid intensity has been complied with, which will depend on the degree of the regional handicap; third, and lastly, that a number of conduct-related requirements have been complied with, such as the submission by the recipient of an application for a subsidy before the work begins and a commitment by the recipient to use the subsidised plant for a period of at least five years. However, it must be stated that the fact that a measure complies with such conditions is not sufficient to demonstrate that it will have a positive effect on regional development.
- 94 It is true that the Commission enjoys wide discretion in identifying and evaluating the circumstances of the case in order to determine whether State aid can be declared compatible with the common market (see *Germany and Others v Kronofrance*, paragraph 44 above, paragraph 59 and the case-law cited). However, in the present case, the Commission confined itself to verifying that the disadvantages caused by the subsidised project in terms of distortions to competition would be kept at a limited level, but not that the advantages in terms of regional development would outweigh the disadvantages, however minimal the latter might be.

- 95 The Court would point out, in that regard, that the Commission intended to adopt, before 1 January 2007, further guidance to supplement that contained in the Guidelines in which it would set out the criteria that it would take into account when assessing that the aid examined was necessary to provide an incentive effect for the investment and that the benefits of the aid measure outweighed the resulting distortion of competition and effect on trade between Member States (see paragraph 13 above).
- 96 Accordingly, the applicant is justified in submitting that the assessments made in the contested decision could not alone enable the Commission to eliminate all doubts as to the compatibility of the aid in question with the common market in the light of the derogation provided for in Article 87(3)(a) EC. As was stated in paragraph 91 above, the application of that derogation presupposes that the benefits of the measure at issue outweigh its disadvantages, however limited the latter might be (see, to that effect, *Spain v Commission*, paragraph 82 above, paragraph 67).
- 97 It follows from the foregoing that, by inferring from the fact that the aid in question complied with the Guidelines, without assessing the importance of the subsidised project in terms of regional development, that that aid was compatible with the common market and that it was required not to initiate the formal investigation procedure, the Commission not only misconstrued the scope of the Guidelines, but also failed to exercise its discretion. The applicant is therefore justified in submitting that, by failing to take account of the criteria required for its assessment, the Commission did not put itself in a position to overcome all doubts as to the compatibility of the aid in question with the common market.
- 98 Accordingly, without there being any need to assess the admissibility of the other arguments of the action or to rule on whether they are well founded, the Court finds that the contested decision must be annulled.

Costs

- 99 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. As the Commission and the intervener have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Annuls Commission Decision C(2008) 1107 of 2 April 2008 declaring compatible with the common market the national regional aid which the German authorities intend to grant to Propapier PM2 for the construction of a paper mill in Eisenhüttenstadt (region of Brandenburg-Nordost) (State aid N 582/2007 — Germany);**
- 2. Orders the European Commission and Propapier PM 2 GmbH to pay the costs.**

Azizi

Frimodt Nielsen

Popescu

Delivered in open court in Luxembourg on 10 July 2012.

[Signatures]