JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

1 December 2004 *

In Case T-27/02,

Kronofrance SA, established in Sully-sur-Loire (France), represented by R. Nierer, lawyer,

applicant,

v

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

defendant,

supported by

Glunz AG

and

OSB Deutschland GmbH,

* Language of the case: German.

established in Meppen (Germany), represented by H.-J. Niemeyer and K. Ziegler, lawyers, with an address for service in Luxembourg,

APPLICATION for annulment of Commission Decision SG (2001) D of 25 July 2001 not to object to the aid granted by the German authorities to Glunz AG,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of: H. Legal, President, V. Tiili, M. Vilaras, I. Wiszniewska-Białecka and V. Vadapalas, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 8 July 2004,

gives the following

Judgment

Legal background

1 The multisectoral framework on regional aid for large investment projects (OJ 1998 C 107, p. 7; 'the multisectoral framework'), in force at the material time, lays down the rules for assessing aid awarded for such projects, which falls within its scope.

2 Under the multisectoral framework, the Commission decides on a case-by-case basis the maximum allowable aid intensity for projects which are subject to the notification requirement.

3 Paragraph 3.10 of the multisectoral framework describes the calculation formula which the Commission uses to determine the maximum allowable intensity for aid notified to it. The formula is based, first, on determination of the maximum allowable intensity for aid to large companies in the area concerned, referred to as the 'regional ceiling' (factor R), which is then adjusted by three coefficients corresponding, in turn, to competition in the sector concerned (factor T), the capital/labour ratio (factor I) and the regional impact of the aid in question (factor M). The formula for the maximum allowable aid intensity is thus: R x T x I x M.

4 According to points 3.2 and 3.3 of the multisectoral framework, the 'competition factor' calls for an analysis aimed at determining whether the notified project will be implemented in a sector or subsector affected by structural overcapacity. In determining whether or not such overcapacity exists, the Commission considers, at the Community level, the difference between the average capacity utilisation rate for manufacturing industry as a whole and the capacity utilisation rate of the relevant sector or subsector. The analysis covers a reference period corresponding to the last five years for which data are available.

5 Structural overcapacity exists where, on average over the last five years, the capacity utilisation rate of the relevant sector or subsector is more than two percentage points below that of manufacturing as a whole. The sector or subsector is to be established at the lowest available segmentation of the general classification of economic activities in the European Communities (NACE) established by Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community (OJ 1990 L 293, p. 1), as amended. Serious structural overcapacity is deemed to exist when the difference with respect to the average for manufacturing is more than five percentage points (point 7.7 of the multisectoral framework).

6 Point 3.4 of the multisectoral framework states that, in the absence of sufficient data on capacity utilisation, the Commission is to consider whether the investment takes place in a declining market. For this purpose, the Commission is to compare the evolution of apparent consumption of the product(s) in question (that is, production plus imports minus exports) with the growth rate of European Economic Area (EEA) manufacturing industry as a whole.

7 The market for the product(s) in question will be deemed to be declining if, over the last five years, the average annual growth rate of apparent consumption of the product(s) in question is significantly (more than 10%) below the annual average of

EEA manufacturing industry as a whole, unless there is a strong upward trend in the relative growth rate of demand for the product(s). An absolutely declining market is one in which the average annual growth rate of apparent consumption over the last five years is negative (point 7.8 of the multisectoral framework).

8 Under point 3.10.1 of the multisectoral framework, an adjustment factor of 0.25, 0.5, 0.75 or 1 is applied to factor T (the competition factor), on the basis of the following criteria:

'(i) Project which results in a capacity expansion in a sector facing serious structural overcapacity and/or an absolute decline in demand: 0.25

(ii) Project which results in a capacity expansion in a sector facing structural overcapacity and/or a declining market and which is likely to reinforce high market share: 0.50

(iii) Project which results in a capacity expansion in a sector facing structural overcapacity and/or a declining market: 0.75

(iv) No likely negative effects in terms of (i) — (iii): 1.00.'

Facts

9 By letter of 4 August 2000, registered on 7 August 2000, the Federal Republic of Germany notified the Commission under 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) of a project to grant investment aid to Glunz AG for the construction of an integrated wood processing centre at Nettgau in the Land of Saxony-Anhalt (Germany), which fell within the multisectoral framework.

10 After receiving a letter from the Commission dated 28 August 2000 informing them that the notification could not be regarded as complete, the German authorities, by letters of 15 November 2000 and 12 January 2001, sent further information. As this communication did not fully satisfy the Commission, the German authorities, by letter of 2 March 2001, provided fresh information, whereupon the Commission was able to regard the notification as complete.

11 On 25 July 2001, the Commission adopted, under Article 4(3) of Regulation No 659/1999, a decision not to raise objections to the grant of that aid ('the Decision').

12 It follows from the Decision that the investment project must be carried out in an area eligible under Article 87(3)(a) EC for which the maximum intensity of the aid in favour of new investments in large undertakings, also known as the regional ceiling, comes to 35% overall. The aid consists of a non-reimbursable subsidy of

EUR 46 201 868 and an investment premium of EUR 23 596 120, or a total amount of EUR 69 797 988 for a total eligible investment cost of EUR 199 400 000.

13 That aid is intended, in part and up to an amount of EUR 28.61 million, for the construction of an oriented strand board factory and, for the remaining part, for the construction of a particle board factory.

14 On the basis of an assessment of the notified aid in the light of the criteria laid down in the multisectoral framework, the Commission sets out in the Decision the reasons for which the adjustment factors applicable to the rate of 35% corresponding to the maximum intensity which a large undertaking may obtain in the area concerned should be fixed at:

— 1 for factor T relating to competition in the relevant sector,

— 0.8 for factor I (capital/labour ratio),

— 1.5 for factor M in view of the regional impact of the proposed aid,

or a maximum allowable intensity of 42% (= 35% x 1 x 0.8 x 1.5).

15 As regards, more particularly, factor T, relating to competition, the Commission stated that, in accordance with points 3.3 and 3.4 of the multisectoral framework, it must limit its analysis of the competition factor to determining whether or not there was structural overcapacity in the relevant sector, when there is sufficient data relating to the capacity utilisation rate. Taking the view that the two products manufactured by Glunz represented a very significant share of all wood panel and board production in Europe, and referring to the lowest NACE level, the Commission chose to base its analysis on the data relating to the capacity utilisation rate of class 20.20 of NACE, which includes the manufacture of wood panels and boards.

16 On the basis of data covering the period 1994 to 1998 contained in a study provided by the German authorities, the Commission concluded that the investment project in question would entail an increase in capacity in a sector in which there was no overcapacity, which justified the application of the adjustment factor 1 to the competition factor.

17 Having established that the amount of aid which the Federal Republic of Germany proposed to award to Glunz was thus within the maximum allowable aid, calculated on the basis of the multisectoral framework, the Commission declared the notified aid compatible with EC Treaty.

Procedure and forms of order sought by the parties

18 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 4 February 2002, the applicant brought the present action.

19 By a document lodged at the Registry of the Court of First Instance on 3 July 2002, Glunz and OSB Deutschland GmbH sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

20 By order of 10 September 2002, the President of the Fourth Chamber, Extended Composition, of the Court of First Instance granted the application for leave to intervene. The interveners lodged their statement in intervention on 4 November 2002 and the applicant lodged comments thereon within the period prescribed for that purpose.

21 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 8 July 2004.

22 The applicant claims that the Court should:

— annul the Decision;

— order the Commission to pay the costs.

23 The Commission, supported by the interveners, contends that the Court should:

— declare the action inadmissible;

— dismiss the action as unfounded;

— order the applicant to bear the costs.

Admissibility

Arguments of the parties

24 At the hearing, the Commission and the interveners disputed the admissibility of the action.

25 They contended that the applicant's position on the relevant market was not substantially affected by the authorised aid. Having regard to the locality of the production sites and the area in which the products in question were delivered, which were determined by the cost of transport, any overlap between the sales areas of the applicant and the recipient of the aid is marginal.

26 The applicant claims that the Commission infringed its procedural rights by wrongly failing to initiate the formal investigation procedure provided for in Article 6 of Regulation No 659/1999, which would have allowed the applicant, as an interested party, to submit its comments before the Commission adopted its decision.

27 The applicant observes that the definition of 'interested party' in Article 1(h) of Regulation No 659/1999 covers competing undertakings. The applicant and Glunz are direct competitors, since they manufacture the same products which are then sold on the same market. The grant of the aid affects the applicant's competitive situation on the relevant market.

28 In those circumstances, the applicant claims that the Decision is of direct and individual concern to it and that it therefore has *locus standi* to bring an action for its annulment.

Findings of the Court

29 The Commission and the interveners presented for the first time at the hearing pleas alleging that the action was inadmissible on the ground that the applicant lacks *locus standi*.

30 It follows from the case-law that a plea of inadmissibility alleging that the applicant lacks *locus standi* constitutes a ground involving a question of public policy which may, and even must, be raised of its own motion by the Community judicature (Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 35) and, consequently, may be raised by the defendant at any stage of the proceedings (see, by analogy, Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 25, and Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 125).

31 The present action for annulment was brought against a Commission decision declaring compatible with the common market individual aid which was adopted at the close of a preliminary investigation.

32 In that regard, it should be borne in mind that, in the context of supervision by the Commission of State aid, the preliminary stage of the procedure for reviewing aid, established by Article 88(3) EC and governed by Article 4 of Regulation No 659/1999, which is intended merely to enable the Commission to form a prima facie opinion on the partial or complete compatibility of the aid in question with the common market, must be distinguished from the formal investigation procedure referred to in Article 88(2) EC and Article 6 of Regulation No 659/1999, which is designed to enable the Commission to be fully informed of all the facts of the case. It is only in the context of the latter procedure that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 38; and Case T-158/99 *Thermenhotel Stoiser Franz and Others* v *Commission* [2004] ECR II-1, paragraph 57).

33 Where, without initiating the procedure under Article 88(2) EC, the Commission finds on the basis of Article 88(3) EC that an aid is compatible with the common market, the persons intended to benefit from the procedural guarantees provided for in Article 88(2) EC may secure compliance therewith only if they are able to challenge that decision by the Commission before the Community judicature (*Cook* v *Commission*, paragraph 23; *Matra* v *Commission*, paragraph 17; *Commission* v *Sytraval and Brink's France*, paragraph 47; and *Thermenhotel Stoiser Franz and Others* v *Commission*, paragraph 69).

34 Therefore, where, by an action for annulment of a Commission decision taken at the end of the preliminary stage, an applicant seeks to secure compliance with the procedural guarantees provided for in Article 88(2) EC, the mere fact that it has the

status of a 'party concerned' within the meaning of that provision is sufficient for it to be regarded as directly and individually concerned for the purposes of the fourth paragraph of Article 230 EC (*Cook* v *Commission*, paragraphs 23 to 26; *Matra* v *Commission*, paragraphs 17 to 20; and Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraphs 89 and 90).

35 In the present case, it is common ground that the applicant is seeking annulment of the Decision on the ground, set out in its second plea in law, that the Commission wrongly refused to initiate the formal investigation procedure provided for in Article 88(2) EC.

36 The applicant further claims the status of interested party on the ground that it is a direct competitor of Glunz, since it manufactures at its factory at Sully-sur-Loire (France) the same products as Glunz, which are then sold on the same markets.

37 According to the case-law, 'parties concerned' are the persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16). Article 1(h) of Regulation No 659/1999 adopts the approach thus established in the case-law and states that 'interested party' is to mean 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations'.

38 In the present case, it is common ground that the applicant and the undertaking in receipt of the aid both manufacture wood boards and panels and that their sales areas do indeed overlap.

39 At the hearing, Glunz stated, contrary to the Commission's assertion that the undertaking for which the aid was intended sells its products to undertakings situated almost exclusively on the territory of the former German Democratic Republic, that it distributes its products throughout the whole of the territory of the Federal Republic of Germany and to a large extent to undertakings in the furniture industry concentrated in an area in the north-west of Germany.

40 Glunz also acknowledged that the applicant was present on the German furniture-manufacturing market, but with a very small market share, although that assertion was not supported by any probative material.

41 Furthermore, although the Commission considered in the Decision that, as wood boards and panels are heavy and bulky products, long-distance transport was too costly and that the transport radius was therefore limited to around 800 km, it none the less concluded that the relevant geographic market was the EEA.

42 In that regard, if an undertaking competes in its natural supply area with other undertakings whose supply areas overlap with its own, since each of those undertakings has its own radius of supply, competition by an undertaking with those within its radius tends to extend to their natural supply areas and it may therefore be appropriate to consider the Community as a whole, or the EEA as in the present case, to be the reference geographic market (see, to that effect, Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraphs 84 to 95).

43 It is also apparent from the Decision that Glunz is a subsidiary of Tableros de Fibras SA, which has factories in France active in the wood industry which were transferred to it by Glunz in 1999.

44 In those circumstances, it must be concluded that the applicant is indeed a competitor of the undertaking for which the aid is intended and that it may therefore be classified as an interested party for the purposes of Article 1(h) of Regulation No 659/1999.

45 In that regard, the Commission's express reference to the order of the Court of First Instance of 27 May 2004 in Case T-358/02 *Deutsche Post and DHL* v *Commission* [2004] ECR II-1565 as a basis for its claim that the action is inadmissible, in that the applicant's position on the relevant market would not be substantially affected by the grant of the aid, is irrelevant. That order of inadmissibility, based on the absence of any substantial effect on the competitive position of the two applicant undertakings, was made in a case which is distinguished from the present case by the fact that the action had been brought against a Commission decision adopted at the close of the procedure provided for in Article 88(2) EC and in which the interested parties had been duly invited to submit their comments.

46 It follows from the foregoing considerations that the present action must be declared admissible.

Substance

Preliminary observations

47 The applicant relies, in substance, on four pleas in support of its claim for annulment of the Decision, alleging, first, infringement of Article 87 EC and of the

multisectoral framework; second, infringement of Article 88(2) EC; third, misuse of powers by the Commission; and, fourth, breach of the obligation to state reasons.

48 In the context of its second plea, the applicant maintains that by authorising the aid granted to Glunz by the German authorities after carrying out only the preliminary examination, the Commission infringed Article 88(2) EC and Article 4(4) of Regulation No 659/1999, which requires that the Commission initiate the formal investigation procedure when 'doubts are raised' as to the compatibility of the aid with the common market.

49 It must be borne in mind that the preliminary examination established by Article 88(3) EC and governed by Article 4 of Regulation No 659/1999 is intended merely to allow the Commission a sufficient period of time for reflection and investigation so that it can form a prima facie opinion of the aid plans notified to it and then conclude, without any extensive review being called for, whether it is compatible with the Treaty or whether, on the other hand, the content of the aid raises doubts as to its compatibility (Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraphs 53 and 54).

50 The formal investigation stage which enables the Commission to be fully informed of all the details of the case before adopting its decision becomes essential whenever the Commission has serious difficulties in determining whether the aid is compatible with the common market (*Matra* v *Commission*, paragraph 33).

51 The Commission may therefore restrict itself to the preliminary examination before adopting a decision raising no objections to new aid only if it is able to satisfy itself after that examination that the project is compatible with the Treaty.

52 If, on the other hand, that initial examination leads the Commission to the opposite conclusion, or does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to obtain all the requisite opinions and for that purpose to initiate the formal investigation procedure provided for in Article 88(2) EC (Case 84/82 *Commission* v *Germany* [1984] ECR 1451, paragraph 13; *Cook* v *Commission*, paragraph 29; *Matra* v *Commission*, paragraph 33; and *Commission* v *Sytraval and Brink's France*, paragraph 39).

53 In the context of its plea alleging infringement of Article 88(2) EC, the applicant claims not only that the duration and the circumstances of the preliminary examination indicate the existence of serious difficulties but also that a detailed investigation of the situation on the market in particle boards should have led the Commission to have doubts, making it necessary to initiate the formal investigation procedure. The applicant further states that during that procedure it would have communicated to the Commission the data relating to apparent consumption of particle boards showing that the investment in question is taking place in a declining market.

54 However, it follows from the Decision that the Commission deliberately restricted itself to examining only the existence of any structural overcapacity and considered, on the basis of the wording of points 3.2 to 3.4 of the multisectoral framework and of the fact that it had sufficient data on the capacity utilisation rate in the relevant sector, that it was not required to ascertain whether the investments in question would take place in a declining market. In such an approach, the communication by the applicant of data relating to particle board consumption was in any event of no practical purpose.

55 It thus appears that a preliminary general question arises in regard to the interpretation, in the light of Article 87 EC, of the relevant points of the multisectoral framework, in order to determine the criterion or criteria to be employed in the 'competition factor'.

56 It is for the Court, in exercising its review of legality, to resolve that initial question concerning the interpretation of the applicable rules and therefore to determine whether the Commission was correct to arrive at the conclusion referred to at paragraph 54 above, which the applicant expressly disputes in its first plea in support of its claim for annulment, alleging infringement of Article 87 EC and of the multisectoral framework.

Infringement of Article 87 EC and of the multisectoral framework

Arguments of the parties

57 The applicant disputes the Commission's assessment of the maximum allowable aid intensity and more particularly of factor T, relating to competition. In the present case the Commission has made an incorrect analysis of the market situation by omitting, first, to distinguish the particle board market from the oriented strand board market and, second, to take into account the fact that the particle board market is a declining market.

— The failure to distinguish the particle board market from the oriented strand board market

58 The applicant asserts that the aid in question should have been examined and assessed differently depending on whether it was intended for the production of particle boards or for the production of oriented strand boards. It points out that in the part of the Decision relating to the determination of the relevant products market, the Commission states: 'In those circumstances, we propose to consider

[oriented strand boards] and laminated boards, on the one hand, and particle boards, on the other, as each constituting a market.' The applicant criticises the Commission for having specifically failed to take that delimitation into account when assessing the 'competition' factor and for having, on the contrary, adopted a uniform approach.

59 The applicant maintains that the markets in particle boards and in oriented strand boards are too different to be treated as one and the same market. The two products are interchangeable only to a very limited extent, only 10% according to the Commission itself. Furthermore, the markets associated with the two products are evolving in different ways, in the sense that the market in particle boards is declining whereas the market in oriented strand boards is growing.

60 The Commission states that the purpose of the investment project in issue is to set up an integrated wood processing centre consisting of two closely-linked production lines with shared facilities. It claims that, in accordance with point 7.2 of the multisectoral framework, it had to consider the project as 'one entity and treat it as such', since the precise purpose of the project was to create an 'establishment' within the meaning of point 7.2. The Commission also complied with point 7.7 of the multisectoral framework by basing its assessment on the data connected with class 20.20 of NACE, which includes particle boards and oriented strand boards.

61 Even accepting the argument that the investment should be assessed differently according to the factories concerned, the Commission asserts that it would have had to consider together the two products manufactured in them pursuant to the final sentence of point 3.2 of the multisectoral framework, according to which it is necessary first to carry out a sectoral analysis and not an analysis of the different product markets. Furthermore, even if the capacity utilisation rate for particle

boards and that for oriented strand boards had been taken into account separately, an adjustment factor for factor T equal to 1 would have been obtained for both sectors, which do not have structural overcapacity.

62 The interveners state that the project for which the aid is intended is a single investment project for the creation of an integrated wood processing centre, which constitutes an establishment within the meaning of point 7.2 of the multisectoral framework, that is, one unit from an organisational point of view. In those circumstances, the fact that oriented strand boards and particle boards belong to different product markets or that the aid can be attributed to two production lines from a purely accounting point of view is irrelevant.

63 The interveners maintain that, in any event, the determination of the capacity utilisation rates, which is alone of relevance in the present case, definitely does not depend on the investment project being treated as a single project. Even in a situation where two aid proposals are clearly distinguished, the factor relating to competition must be determined on the basis of the capacity utilisation rate in the NACE sub-sector to which the two products in question belong, in accordance with points 3.2 and 3.3, in conjunction with point 7.7, of the multisectoral framework.

— The failure to ascertain and to take into account the declining situation on the particle board market

64 The applicant states that, in accordance with points 7.7 and 7.8 of the multisectoral framework, it is for the Commission to examine the relevant figures for the period 1995 to 1999 inclusive, in order to ascertain whether there was structural overcapacity and/or a declining market, such assessment being a necessary precondition of the determination of the 'competition factor'.

65 Referring to a study annexed to the application, the applicant states that the average annual growth rate, in value, of apparent consumption of particle boards in the EEA was -3.72% in the years 1995 to 1999 (as against +24.57% for oriented strand board), which shows that, according to point 7.8 of the multisectoral framework, that product market was in absolute decline at the time when the Decision was adopted. In view of the finding of a product market in absolute decline, the applicable adjustment factor for 'competition', as concerns aid for the particle board factory, is therefore not 1 but 0.25, in accordance with point 3.10 of the multisectoral framework.

66 The applicant disputes the reasoning in the Decision whereby the Commission arrives at an adjustment factor of 1 for the 'competition factor'.

67 The applicant criticises the Commission for having confined itself, arguing that it had sufficient information on capacity utilisation in the sector in question, to taking into account whether or not there was structural overcapacity, without examining the question whether the market was declining, whereas if one of those two questions had been answered in the affirmative an adjustment factor of 1 for the 'competition factor' would have been precluded.

68 It follows, first, from the wording of point 3.10 of the multisectoral framework that the obligation to examine whether the investments are made in a declining market applies even where information as to capacity utilisation is available.

69 Second, the Commission's obligation to examine where there is structural overcapacity and/or a declining market follows from Article 87(1) and (3) EC. The requirement that the Commission take account of the common interest when it applies that article should have caused it to examine in the present case whether it was faced with a declining market.

70 The Commission observes that it is bound by the multisectoral framework and that in the present case it was not open to it to examine whether the investment took place in a declining market, since, in accordance with point 3.4 of the multisectoral framework, such an examination is allowed only as a subsidiary exercise, where there are insufficient data on capacity utilisation. At the date of notification of the aid, the Commission had data concerning the capacity utilisation rate for the sector concerned, for the period 1993 to 1998, which served as the basis for the Decision.

71 The Commission claims that the applicant's interpretation of the multisectoral framework is incorrect. In its submission, it follows automatically from the order of points 3.3 and 3.4 of the multisectoral framework and also from the condition which, according to point 3.4, must be satisfied if it is to consider whether the investment takes place in a declining market, namely the fact that the data on capacity utilisation are insufficient, that it is necessary to determine the apparent consumption of the products concerned. Furthermore, the term 'and/or' is merely intended to make clear that, in any event, where the data on capacity utilisation are insufficient, it is necessary to determine the apparent consumption of the relevant products. Unless it is accepted that the rules contain a contradiction, it cannot be inferred from point 3.10 of the multisectoral framework, where the question of the order in which the two methods of assessing competition are to be applied does not arise, that it is necessary to derogate, even in part, from points 3.2 and 3.4 of that framework.

72 The overriding importance of the capacity utilisation rate criterion is to be explained by the fact that it gives a distinctly more reliable view of the situation in a given sector than that given by apparent consumption. Apparent consumption is subject to numerous fluctuations which are independent of the situation in the sector and of the capacity utilisation rate, leading to appreciably different conclusions as to the state of the market following the five-year period taken into account. The Commission states that the objectives of the multisectoral framework are attained when its specific provisions are observed, as in the present case.

73 It cannot be inferred from the multisectoral framework on regional aid for large investment projects (OJ 2002 C 70, p. 8), point 19 of which makes express reference to the capacity utilisation rate, that 'examination of structural overcapacity does not permit a useful assessment of the situation on the market' or that the Commission accepted that the criterion based on that rate is irrelevant.

74 The defendant observes that the applicant overlooks the fact that the 'competition factor' is only one of the four relevant factors used to determine the maximum allowable intensity of the aid and that, even applying its calculation method, the notified project is still eligible. Furthermore, the reservations expressed do not concern the multisectoral framework as such, but a particular case of its application, and are based on an incorrect premiss, namely that the only useful criterion is that of a declining market and that for the purpose of defining that market only apparent consumption must be taken into account.

75 The interveners claim that the Commission's approach is consistent with both the wording of point 3.10 of the multisectoral framework and the objective of that framework.

76 They state, first of all, that the term 'and/or' at point 3.10 of the multisectoral framework has no particular meaning. The relationship between the criteria based on overcapacity and on a declining market has already been settled at points 3.3 and 3.4 of the multisectoral framework, in the sense that priority is given to an examination of possible overcapacity. Point 3.10 simply sets out the formula for calculating the three factors of the maximum allowable intensity of the aid. Furthermore, the Commission could have properly relied on the capacity utilisation rate for the period 1994 to 1998. The interveners claim that, at the date of notification of the aid project, the data relating to the capacity utilisation rate for NACE class 20.20 were not yet available and that the data relating to the manufacturing industry for 1999 had not yet been drawn up by Eurostat.

77 They claim, second, that the factor for competition constitutes only an element which goes to formalise the balance which the Commission must strike between the two conflicting objectives of the EC Treaty, namely free competition and Community solidarity, the latter of which constitutes the basis of the derogations provided for in Article 87(3)(a) and (b) EC in favour of regional aid. Taking that element into account should ensure that aid measures do not create a sectoral problem at Community level which is more serious than the initial regional problem (Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 101).

78 The applicant also ignores that fact that, under Article 87 EC and the multisectoral framework, the only important question is always whether overcapacity is created in the common market. The increase in market volume does not take account of the sources whereby apparent consumption is satisfied. The interveners state that if that consumption is largely satisfied by imports, when Community capacities are fully used, an investment which takes place in a declining market does not necessarily contradict Article 87(3)(a) and (c) EC and the multisectoral framework. Any eviction effect to the detriment of producers from non-member countries plays no part in that assessment.

Findings of the Court

79 It must be borne in mind at the outset that although the Commission, for the purposes of applying Article 87(3) EC, enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context, it may adopt a policy as to how it will exercise its discretion in the form of measures such as guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the Treaty (Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 62, and Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraphs

45 and 52). When the Commission adopts guidelines which are consistent with the Treaty and are designed to specify the criteria which it intends to apply in the exercise of its discretion, it itself limits that discretion in that it must comply with the indicative rules which it has imposed upon itself (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 89). In that context, it is for the Court to verify whether those rules have been observed by the Commission (Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, paragraph 77).

80 In the present case, the applicant disputes the Commission's assessment in the Decision of factor T, relating to competition, in the light of the terms of the multisectoral framework and of Article 87 EC.

81 It follows from the applicant's written submissions that the first complaint, relating to the determination of the relevant product markets, is closely linked with the complaint concerning the Commission's failure to carry out an examination for the purpose of establishing whether or not the market in question was a declining market, which is the essential point of contention between the parties.

82 It is common ground that, after considering that particle boards and oriented strand boards corresponded to different product markets, the Commission, in accordance with point 7.7 of the multisectoral framework, considered whether there might be structural overcapacity on the basis of a study containing data on the capacity utilisation rate in the sector corresponding to NACE class 20.20, which refers to the manufacture of wood boards, which clearly include particle boards and oriented strand boards.

83 On the basis of that study, the Commission concluded that there was no structural overcapacity, from the aspect of both the analysis of the capacity utilisation rate for wood boards in general and the analysis for the capacity utilisation rate for particle boards and oriented strand boards taken individually. The applicant does not criticise the results of that study or the Commission's conclusion that there was no structural overcapacity.

84 In reality, the applicant's assertion that a distinction must be drawn between the particle board market and the oriented strand board market makes complete sense in the context of the assessment of the existence of a declining market which it undertakes in its written submissions. Furthermore, that assessment, unlike the assessment concerning the possible existence of structural overcapacity, does not entail the determination of a sector according to the NACE classifications but the definition of the relevant product market (see points 7.7 and 7.8 of the multisectoral framework).

85 In the context of its analysis, the applicant applies and takes as a specific basis the distinction between the particle board market and the oriented strand board market and concludes that the former is facing an absolute decline or, at least, a decline in demand, which justifies the application of an adjustment factor for 'competition' of 0.25 or 0.75, unlike the latter, for which an adjustment factor for 'competition' of 1 could be applied.

86 It therefore appears that the essential question is whether, in the present case, the Commission was or was not entitled to conclude that there was no need to consider whether or not the market in question was a declining market.

87 The Commission, supported by the interveners, claims that the multisectoral framework provides that two criteria may be used in assessing the 'competition

factor', namely the structural overcapacity criterion and the declining market criterion, but that there is a hierarchy between them. Thus, they allege, examination of the declining market criterion is allowed only as a subsidiary exercise, only when the data relating to the capacity utilisation rate for the sector in question are insufficient, because they do not cover the whole reference period or do not apply specifically to the relevant products, and when it is therefore impossible to arrive at a conclusion on the question of structural overcapacity, whether positive (i.e. there is structural overcapacity) or negative (i.e. there is no structural overcapacity).

88 That interpretation of the multisectoral framework by the Commission was reflected in the Decision by the application to factor T of an adjustment factor equal to 1, i.e. of the highest adjustment factor, and therefore the one most favourable to the undertaking for which the aid was intended; and the sole basis for doing so was the finding that there was no structural overcapacity in the sector concerned.

89 While it is certainly true that, on the basis of its wording alone, the multisectoral framework could be understood in the sense claimed by the Commission, the framework must none the less be interpreted in the light of Article 87 EC and of the principle of incompatibility of public aid set out therein, in order to attain the objective sought by that provision, namely undistorted competition in the common market.

90 The content of points 3.2 to 3.4 of the multisectoral framework shows that the analysis carried out for the purpose of determining whether the sector in question is suffering from structural overcapacity does indeed constitute the first analysis which the Commission must carry out first when it evaluates the 'competition factor'.

91 It follows from point 3.10.1 of the multisectoral framework that the fact that priority is given to determining whether structural capacity does or does not exist does not however mean that the Commission may in any case confine itself to carrying out that analysis alone when it has data on the capacity utilisation rate in the sector concerned.

92 Point 3.10.1 supplements points 3.2 to 3.6 of the multisectoral framework concerning the 'competition factor' by specifying the various adjustment factors which may be applied to that factor in four different hypotheses, set out at point 3.10.1(i) to (iii), and cannot therefore be dissociated from those points.

93 It is apparent upon reading point 3.10.1 of the multisectoral framework that the Commission's finding that an investment project entails an increase in capacity in a sector with structural overcapacity is sufficient to apply an adjustment factor of 0.75 to factor T. That adjustment factor is fixed at 0.50 when the project is also likely to reinforce high market share and at 0.25 when structural overcapacity can be described as serious.

94 The use of the conjunction 'or' in the descriptions of the hypotheses in point 3.10.1 (i) to (iii) of the multisectoral framework permits the assertion that the Commission's finding that an investment project entails an increase in capacity in a sector characterised by a declining market is also sufficient to apply an adjustment factor of 0.75 to factor T. That adjustment factor is fixed at 0.50 when the project is also likely to reinforce high market share and at 0.25 when an absolute decline in demand is observed.

95 Point 3.10.1(iv) of the multisectoral framework allows the Commission to apply an adjustment factor equal to 1 to the 'competition factor' only where '[n]o likely negative effects in terms of (i) to (iii)' are found.

96 The wording of point 3.10.1 of the multisectoral framework therefore shows that the application of the highest adjustment factor, which provides the maximum amount of the aid capable of being declared compatible with the common market, implies a prior finding that there is no structural overcapacity in the sector concerned and also that the market is a declining market, unless it were to be interpreted as meaning that the absence of such overcapacity necessarily implies the absence of a declining market for the products in question, which would amount to denying the specificity of those two criteria for the assessment of the 'competition factor'.

97 In those circumstances, the first sentence of point 3.4 of the multisectoral framework, which states that '[i]n the absence of sufficient data on capacity utilisation, the Commission will consider whether the investment takes place in a declining market', must be understood as meaning that, where the data on capacity utilisation in the sector concerned do not allow the Commission to reach the positive conclusion that there is structural overcapacity, the Commission must consider whether the market in question is a declining market.

98 That interpretation of the multisectoral framework is the only interpretation consistent with Article 87 EC and with the objective of undistorted competition which that provision seeks to achieve.

99 An interpretation such as that made by the defendant in the present case, which permits a situation in which State aid is granted to an undertaking marketing products belonging to a declining market, without that circumstance being taken into account by the Commission when it examines the aid, cannot be accepted. It is clear that investments in such a market entail serious risks of distorting competition, which is plainly contrary to the objective of undistorted competition pursued by Article 87 EC.

100 In that regard, it must be borne in mind that, at point 1.1 of the multisectoral framework, it is stated that the completion of the single market makes it more important than ever to maintain tight controls on State aid for large investment projects, since the distortive effect of aid is magnified as other government-induced distortions of competition are eliminated and markets become more open and integrated. The Commission's aim in adopting the multisectoral framework was to limit aid for large-scale projects to a level which avoids as much as possible adverse effects on competition but which at the same time maintains the attraction of the assisted area (point 1.2).

101 To that end, the Commission must fix, on a case-by-case basis, the maximum allowable aid intensity for projects subject to notification, and must apply different factors, including the 'competition factor'.

102 In determining whether aid within the multisectoral framework is compatible with the common market, the adjustment factor to be applied for the competition factor is derived from an analysis of the structural and economic situation on the market which the Commission must make, when adopting its decision, on the basis of the objective criteria laid down in the multisectoral framework. The Commission's assessment with regard to the specific factor applicable determines the amount of aid which may be declared compatible with the common market (Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347, paragraphs 39 and 40).

103 It follows from the foregoing considerations that, in applying an adjustment factor equal to 1 to the 'competition factor' without having first ascertained whether the aid project in question would take place in a declining market, the Commission infringed Article 87 EC and also the multisectoral framework, which was adopted in order to specify the conditions of application of that article and, more particularly, Article 87(3)(a) EC, which provides that aid to promote the economic development

of areas where the standard of living is abnormally low or where there is serious underemployment may be considered to be compatible with the common market.

104 That conclusion is not invalidated by the Commission's decision-taking practice. At the hearing, the defendant referred to four decisions in which it analysed only the existence of structural overcapacity, but it is common ground that only one of them applied, as in this case, the adjustment factor equal to 1 to the 'competition factor' on the sole basis of a finding that there was no such overcapacity (Decision of 19 June 2002, State aid N 240/02 in favour of Zellstoff Stendal GmbH).

105 On the other hand, it is appropriate to emphasise the reasoning followed by the Commission in its decision of 8 June 2000 not to raise objections to the aid granted to Pirna AG.

106 In that decision, the Commission first concluded that there was no structural overcapacity, on the basis of the data relating to the capacity utilisation rate in the sector concerned, corresponding to class 21.11 of NACE, and then ascertained and found the absence of a declining market for cellulose fibres, which, in accordance with point 3.10.1(iv) of the multisectoral framework, expressly referred to at point 35 of the decision, allowed it to apply an adjustment factor equal to 1 as the 'competition factor', but not without having first found that the investment project concerned did not reinforce high market share. In that regard, the wording of the decision, which clearly brings out the stage-by-stage reasoning of the institution, contradicts the explanations given by the Commission, which tend to present the analysis seeking to determine whether the relevant market is a declining market as superfluous.

107 A comparison of the decision of 8 June 2000 concerning Pirna AG with the decision referred to at paragraph 104 above and with the Decision therefore reveals a contradictory decision-making practice on the part of the Commission as regards the application of the highest adjustment factor provided for by the multisectoral framework for factor T.

108 It should further be noted that the relevance of the 'declining market' criterion is borne out by the new multisectoral framework on regional aid for large investment projects, which provides that no regional investment aid will be authorised in favour of sectors with serious structural problems. For the purpose of drawing up the list of those sectors, serious structural problems are in principle to be measured on the basis of apparent consumption data for the product or products concerned. Point 32 of the new multisectoral framework states clearly that serious problems will be deemed to exist when the sector concerned is declining.

109 It follows from all of the foregoing considerations that the Decision must be annulled, without there being any need to examine the applicant's other complaints.

110 Last, it must be emphasised that, owing to that error of law on the part of the Commission, there has been no assessment in the present case of the compatibility of the notified aid on the basis of all the applicable criteria.

111 In complying with the present judgment, it will be for the Commission, in the light of the data relating to the apparent consumption of the relevant products during the reference period, to assess the compatibility of the notified aid and, in so far as it encounters serious difficulties in that regard, to initiate the formal examination procedure provided for in Article 88(2) EC.

The application for measures of organisation of procedure

112 The applicant requests the Court to order, in accordance with Article 64(3)(d) of the Rules of Procedure of the Court of First Instance, communication by the Commission of the file relating to the aid in question, a request opposed by the defendant and the interveners.

113 The Court finds that there is no need to grant the application for measures of organisation of procedure made by the applicant, which, as matters now stand, is of no interest in the resolution of the dispute (Case T-311/00 *British American Tobacco (Investments)* v *Commission* [2002] ECR II-2781, paragraph 50).

Costs

114 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. Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

115 Since, on the other hand, the applicant did not request that Glunz or OSB Deutschland be ordered to pay the costs associated with their intervention, those interveners need therefore pay only their own costs (Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *M6 and Others* v *Commission* [2002] ECR II-3805, paragraph 89).

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision SG (2001) D of 25 July 2001 not to object to the aid granted by the German authorities to Glunz AG;**

2. **Orders the Commission, in addition to bearing its own costs, to pay those incurred by the applicant;**

3. **Orders Glunz AG and OSB Deutschland GmbH to bear the costs which they incurred in connection with their intervention.**

Legal Tiili Vilaras

Wiszniewska-Białecka Vadapalas

Delivered in open court in Luxembourg on 1 December 2004.

H. Jung
Registrar

H. Legal
President