ORDER OF THE PRESIDENT OF THE COURT
18 October 2002 *

In Case C-232/02 P(R),

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

appellant,

APPEAL against the order of the President of the Court of First Instance of the European Communities of 4 April 2002 in Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153 seeking to have that order set aside,

the other party to the proceedings being:

Technische Glaswerke Ilmenau GmbH, established in Ilmenau (Germany), represented by G. Schohe, Rechtsanwalt,

* Language of the case: German.

THE PRESIDENT OF THE COURT

makes the following

Order

1 By application lodged at the Court Registry on 18 June 2002, the Commission of the European Communities brought an appeal under the second paragraph of Article 50 of the EC Statute of the Court of Justice against the order of the President of the Court of First Instance of 4 April 2002 in Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153 ('the order under appeal'), seeking:

— to have that order set aside,

— the dismissal as inadmissible or, alternatively, as unfounded, of the application by Technische Glaswerke Ilmenau GmbH ('TGI') for suspension of the operation of Commission Decision 2002/185/EC of 12 June 2001 on State aid implemented by Germany for Technische Glaswerke Ilmenau GmbH, Germany (OJ 2002 L 62, p. 30, 'the contested decision'), and

— an order against TGI for the costs of the proceedings before the Court of Justice.

2 By document lodged at the Court Registry on 30 July 2002, TGI submitted its written observations to the Court.

3 As the parties' written observations contain all the information needed to give a decision on the appeal, there is no need to hear oral argument from the parties.

Legal background and facts

4 As regards the legal background, reference is made to paragraphs 1 to 6 of the order under appeal.

5 As for the facts, the order under appeal shows that TGI is a German company active in the field of glassware manufacture. By two contracts dated 26 September 1994 and 11 December 1995 ('asset deal 1' and 'asset deal 2' respectively), TGI acquired from the Treuhandanstalt (a public trust management company which subsequently became the Bundesanstalt für vereinigungsbedingte Sonderaufgaben, ('the BvS') four glass production lines from nationalised assets situated in Ilmenau, in the *Land* Thüringen. Encountering cashflow problems, TGI entered into negotiations with the BvS which culminated in a contract dated 16 February 1998 by which the BvS waived payment of DEM 4 000 000 of the purchase price under asset deal 1 ('the purchase price waiver').

6 By letter dated 1 December 1998, the Federal Republic of Germany notified the Commission of various measures adopted in favour of TGI, one of which was the purchase price waiver.

7 The Commission, after opening the formal investigation procedure provided for in Article 88(2) EC, — in the course of which it received, *inter alia*, TGI's observations on 28 August 2000 and those of Schott, one of TGI's competitors, on 28 September 2000 — adopted the contested decision on 12 June 2001.

8 According to Article 1 of the contested decision, the purchase price waiver constitutes State aid, implemented for TGI, within the meaning of Article 87(1) EC, incompatible with the common market. Under Article 2 of the decision, the Federal Republic of Germany is required to effect recovery of the aid, including interest, without delay and in accordance with the procedures of national law. Under Article 3 of the decision, Germany is also required to inform the Commission, within two months of notification of the decision, of the measures it has taken to comply with it.

The proceedings before the Court of First Instance and the order under appeal

9 By application lodged at the Registry of the Court of First Instance on 28 August 2001, TGI brought an action for the annulment of the contested decision. By separate document lodged at the Registry of the Court of First Instance on 15 October 2001, it also applied for suspension of the operation of Article 2 of the contested decision, either until judgment was given on the substance of the case or until another date, to be fixed.

10 By the order under appeal, the President of the Court granted the application for suspension until 17 February 2003, making that suspension subject to several conditions set out in paragraph 2 of the operative part of the order.

11 It is apparent from the order under appeal that the Commission was challenging the admissibility of the application on the ground that TGI should have waited for the BvS to bring proceedings for recovery of the disputed aid in the German courts and then have availed itself of all the remedies available before the national courts.

12 In that regard, on the basis of the judgments in Case C-188/92 *Textilwerke Deggendorf* [1994] ECR I-833, paragraphs 17 and 18, and Case C-178/95 *Wiljo* [1997] ECR I-585, paragraph 21) the President of the Court of First Instance held, in paragraph 54 of the order under appeal, that a recipient of aid cannot plead, in proceedings brought before the national courts, the invalidity of a Commission decision ordering recovery of the aid received by the recipient. He concluded that, in principle, such a recipient, if he brings an action for annulment of that decision before the Court of First Instance, may apply for interim relief to the judge responsible for hearing such applications. The case-law referred to by the Commission and cited in paragraphs 56 and 57 of the order under appeal cannot lead to the conclusion that an action brought before the Community judicature without waiting for recovery proceedings to be initiated formally in the national courts is inadmissible.

13 In paragraph 55 of the order under appeal, the President of the Court of First Instance held that that interpretation was endorsed by Article 14(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) under which recovery of aid which is unlawful or incompatible with the common market is to be effected without delay and in accordance with the procedures under the national law of the Member State concerned, without prejudice, exclusively, to any order for interim measures made by the Community judicature.

14 The President of the Court therefore concluded that the application for suspension was admissible.

15 As regards the substance of the application, the order under appeal contains the findings of the President of the Court concerning, first, the requirement of a prima facie case, then urgency and, finally, the balancing of interests.

16 First of all, with regard to the establishment of a prima facie case, TGI referred to the pleas raised in its main application, in particular the first and third of those pleas, which allege, respectively, infringements of Article 87(1) EC and of the applicant's right to a fair hearing.

17 In respect of its first plea, TGI claimed that the promise of subsidies from the *Land* Thüringen did not constitute State aid, because it had been made within the framework of an aid scheme, approved by the Commission for small and medium-sized enterprises (SMEs), such as itself, in the region concerned, so that the purchase price waiver following the breaking of that promise was covered by the same scheme. In respect of its third plea, TGI maintained, *inter alia*, that, during the formal investigation procedure, the Commission, further to the observations submitted to it by Schott on 28 September 2000, had asked that company for additional information, which was sent on 23 January 2001; the additional information had not been notified to TGI, which was thus unable to comment on the key points as it was entitled to do.

18 In respect of those two pleas, the findings of the President of the Court in the order under appeal are as follows:

'74 It must be pointed out, first of all, with regard to the first plea, that the arguments, submitted by [TGI] in its further observations, concerning the

right to amendment of the contracts under German law do not appear to constitute new pleas within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance. They are more likely to be details, provided in the light of the Commission's written observations, of the effect of the breaking of the promise alleged to have been made by the *Land* of Thuringia.

75 As regards the evidence of the promise of the *Land* of Thuringia, it should be pointed out that the Commission refused to take into consideration, in the contested decision, the breaking of the alleged promise and its consequences and merely observed that "[a]ny claims which [TGI] may have against the [*Land* of Thuringia] and the BvS must be treated separately" (recital 82). It therefore appears, as [TGI] claims, that, in the contested decision, the Commission did not challenge the existence of the alleged promise. In that regard, it should be remembered a decision must be self-sufficient and that the reasons on which it is based may not be stated in written or oral explanations given subsequently when the decision in question is already the subject of proceedings brought before the Community Judicature (Case T-16/91 *Rendo and Others* v *Commission* [1996] ECR II-1827, paragraph 45; Case T-77/95 *Ufex and Others* v *Commission* [2000] ECR II-2167, paragraph 54; and Case T-323/99 *INMA and Itainvest* v *Commission* [2002] ECR II-545, paragraph 76). Consequently, the doubts relating to the existence of the promise expressed by the Commission in its additional observations cannot, at least prima facie, be supported.

76 State aid is a legal concept which must be interpreted on the basis of objective factors. Accordingly, the classification of State measures by the Commission as new or existing aid must, in principle, having regard both to the specific features of the case and to the technical or complex nature of its assessments, be subject to a comprehensive review by the Community judicature (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 52,

confirmed on appeal in Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25; and Joined Cases T-195/01 R and T-207/01 R *Government of Gibraltar* v *Commission* [2001] ECR II-3915, paragraph 75).

77 In the present case, [TGI] argues that the promise of a grant was made under a previously approved scheme of aid for the SMEs [...], and that, consequently, the purchase price waiver following the breaking of that promise must be regarded as being covered by the same scheme. According to the application in the main proceedings, to which the present application refers, under that scheme Germany was allowed to grant aid of up to 43% of the total investment, where an SME was involved, instead of the maximum of 27% imposed otherwise. The Commission did not contest the fact that that limit was not exceeded in the present case. The Commission's argument that the consequences of the breaking of the alleged promise should be regarded as that promise would be regarded, that is, as unnotified State aid, cannot rule out, at least without a more thorough examination, [TGI]'s argument.

78 In those circumstances, the Commission's further argument that it is irrelevant for [TGI] to invoke the abovementioned aid scheme, since [TGI] is not — in the absence of appropriate proof — an SME, likewise cannot, prima facie, be upheld. In that regard, it should be noted, first, that, during the formal investigation procedure, the German Government submitted information to prove that [TGI] is an SME (recital 48 of the contested decision). For its part, the Commission held, in the contested decision, that the question whether [TGI] is an SME or not "does not affect the outcome of the assessment of the compatibility of the purchase price waiver" (recital 55) although it had stated, in recitals 7 and 8, that, in 1997 TGI had 226 employees and a turnover of DEM 28 048 000 (14 340 715 euros), but that Mr Geiß, its main shareholder, was also at that time the sole shareholder of two other companies, no longer trading, one of which had 74 employees.

79 Therefore, [TGI]'s arguments relating to the first plea cannot, prima facie, be ruled out.

80 As regards the third plea, it must be pointed out, first of all, that decisions adopted by the Commission in the field of State aid are addressed to the Member States concerned (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 45). However, it is clear that the interests of a recipient of aid risk being seriously affected by the decision adopted at the end of a formal investigation procedure. According to settled case-law, observance of the rights of the defence is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question (see to this effect the judgments in Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 99; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 29, and Case T-613/97 *Ufex and Others* v *Commission* [2000] ECR II-4055, paragraphs 85 and 86).

81 With regard to the Commission's duty to inform the parties concerned that a formal investigation procedure has been initiated, the Court of Justice has held that the Commission is under a duty "to carry out all the requisite consultations" if its initial examination leads it to doubt whether the measure in question is compatible with the common market (*Commission* v *Sytraval and Brink's France*, cited above, paragraph 39). Furthermore, according to settled case-law, the sole aim of publishing a notice in the *Official Journal* is "to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action" (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19, and Case T-266/94 *Skibsværfts-foreningen and Others* v *Commission* [1996] ECR II-1399, paragraph 256). This case-law confers on the parties concerned the role of information

sources for the Commission in a formal investigation procedure. It follows that, far from enjoying the same rights to a fair hearing as those which individuals against whom a procedure has been initiated are recognised as having, the parties concerned have only the right to be involved in the procedure to the extent appropriate in the light of the circumstances of the case (Joined Cases T-371/94 and T-394/94 *British Midland Airways* v *Commission* [1998] ECR II-2405, paragraphs 59 and 60, and *Ufex and Others* v *Commission*, cited above, paragraph 89).

82 Furthermore, an aid recipient's right to state his views in respect of a decision to initiate a formal investigation procedure is expressly recognised in Article 20(1) of Regulation No 659/99.

83 [TGI] claims, in essence, that it follows from the principles of sound administration and equity that, in view of the seriousness of the possible consequences for the aid recipient of the adoption of an unfavourable decision at the end of the formal investigation procedure, the Commission had the obligation to allow the applicant to comment on the main points raised during that procedure. Referring to the unprecedented nature of the question of the precise extent of the rights of the recipient, as against the other parties concerned in that procedure, TGI relies, by analogy, on the recent case-law of the Court of First Instance in respect of the rights of the defence (Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECT II-401, paragraphs 75 et seq.; Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring and Others* v *Commission* [2001] ECR II-1337, paragraph 153, and Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v *Commission* [2001] ECR II-1523, paragraphs 126, 128 and 130).

84 Without it being necessary to ascertain, for the purposes of the present proceedings, whether [TGI] may invoke the infringement of the rights of defence of the Member State to which the contested decision is addressed,

which the Commission committed and acknowledges, it must be stated that the recipient of State aid cannot be accorded the general right to comment on all the potentially key points raised during the formal investigation procedure. Indeed, it is apparent from the case-law cited in paragraph 80 above that that right is not recognised (see to the same effect the Opinion delivered by Advocate General Geelhoed in Joined Cases C-328/99 and C-399/00 *Italy* v *Commission* and *SIM 2 Multimedia* v *Commission*, pending before the Court, paragraphs 91 and 92). Such a right would exceed the right to be heard and might, in fact, entitle a recipient to an exchange of views and arguments with the Commission, a right which, until now, has always been denied to all the parties concerned within the meaning of Article 88(2) EC and Article 20 of Regulation No 659/1999 (*Commission* v *Sytraval and Brink's France*, cited above, paragraph 59).

85 However, the Commission apparently has the duty to treat impartially all the parties concerned in a formal investigation procedure. The Commission's duty not to discriminate between the parties concerned is associated with the right to sound administration, which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States (see, by analogy, Case T-54/99 *Max.mobil* v *Commission* [2002] ECR II-313, paragraph 48). In that regard, it should be pointed out that Article 41(1) of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1, hereinafter the "Charter of Fundamental Rights") confirms that "[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union". It follows that, notwithstanding the restricted nature of the aid recipient's rights to participate and receive information, as described above, the Commission, as the body responsible for the procedure, may have, at least prima facie, an obligation to communicate to the recipient observations which it has expressly requested from a competitor following observations initially lodged by that recipient. To allow the Commission to choose, during the procedure, to ask a competitor of the recipient for specific further information without granting the recipient the opportunity to acquaint himself with the observations submitted in reply and, if appropriate, to respond to them, risks significantly reducing the practical effect of that recipient's right to be heard.

86 However, such an irregularity results in annulment of the contested decision only if, had it not been for the irregularity, the outcome of the formal investigation procedure might have been different ([*Germany* v *Commission*, cited above], paragraph 101). This is not the position in the present case, according to the Commission, which concedes that it committed a procedural error on that point, because Schott's additional observations had had no influence on the contested decision. [TGI] argues, on the other hand, that they did indeed influence the Commission's decision not to approve the disputed aid, as is apparent, it claims, in particular, from recitals 102 and 103... . In that regard, it should be pointed out that those recitals constitute a significant part of the reasons for the Commission's conclusion that the disputed aid did not comply with the condition of proportionality which it had to fulfil in order to be regarded as restructuring aid compatible with the common market. The Commission stated at the second hearing, that the information supplied in Schott's additional observations were not taken into consideration. However, since the reference to the company in recital 103, if only as a "competitor" of [TGI], and to the alleged "aggressive, market-distorting activities" in recital 102 may, when read normally, be understood as applying both to that company's additional observations and to its initial observations, the court hearing the main action might decide that the Commission was influenced by all of Schott's observations when it adopted its conclusion on the measure under consideration. That is all the more true in the light of the fact that one of the questions the Commission asked Schott related specifically to the alleged "price war policy" applied by [TGI]. There is therefore a real possibility that, if the irregularity in question had not occurred, the formal investigation procedure might have culminated in a different result.

87 It must therefore be concluded that the third plea put forward by [TGI] is also, prima facie, well-founded.

88 In the light of the foregoing, the pleas of fact and law raised by [TGI] do not appear to be ungrounded (Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 26, and Case

T-237/99 R *BP Netherlands and Others* v *Commission* [2000] ECR II-3849, paragraph 37). In those circumstances, the present application cannot be dismissed on the ground that a prima facie case has not been made, out and it is therefore necessary to consider whether it satisfies the condition of urgency.'

19 The President of the Court of First Instance went on to find, next, in paragraphs 96 to 109 of the order under appeal, that the condition relating to urgency was also fulfilled, since, in his view, TGI had established that it was sufficiently likely that the immediate implementation of the contested decision would very soon, if not immediately, jeopardise its very existence.

20 Finally, as regards the balancing of interests, the President of the Court found as follows:

'113 It should be noted, first of all, that the first subparagraph of Article 88(2) EC provides that if the Commission finds that aid granted by a State or through State resources is not compatible with the common market it is to decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. It follows that the general interest in the name of which the Commission fulfils the tasks entrusted to it, by Article 88(2) EC and Article 7 of Regulation No 659/1999, in order to ensure, essentially, that the functioning of the common market is not distorted by State aid harmful to competition, is particularly important (see to this effect Case T-86/96 R *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* [1998] ECR II-641, paragraph 74, and *Government of Gibraltar* v *Commission*, cited above, paragraph 108). The purpose of the obligation of the Member State concerned to abolish aid which is incompatible with the common market is to re-establish the previously existing situation (Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 26, and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 23).

114 Consequently, in connection with an application for interim measures seeking the suspension of operation of the obligation imposed by the Commission to repay aid which it has declared to be incompatible with the common market, the Community interest must normally, if not always, take precedence over the interest of the aid recipient in avoiding enforcement of the obligation to repay it before judgment is given in the main proceedings.

115 However, it is possible for the recipient of such aid to obtain interim measures provided that the conditions relating to a prima facie case and urgency are met, as in the present case. To decide otherwise would risk making it practically impossible to use the opportunity, granted by Articles 242 EC and 243 EC, as provided for in Article 14(3) of Regulation No 659/1999, of obtaining effective interim legal protection, even in cases relating to State aid. In that regard, it must be pointed out that such protection is a general principle of Community law which underlies the constitutional traditions common to the Member States (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case T-77/01 *Diputación Foral de Álava* [2002] ECR II-81, paragraph 35). The principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and in Article 47 of the Charter of Human Rights.

116 It is therefore necessary to ascertain whether there are exceptional circumstances in the present case which might justify balancing the interests in favour of granting interim measures.

117 It must be stated, first of all, that the contested aid, since it is only DEM 4 000 000 (2 045 167 euros), represents less than 6% of the total of DEM 67 425 000 (34 473 855 euros) of aid granted to [TGI] under asset

deal 1 and asset deal 2. Furthermore, with the exception of the purchase price waiver, the Commission does not dispute the compatibility of most of the other aid with various existing aid schemes (recitals 56 to 65 of the contested decision). It is only from the time the purchase price was waived in 1998 that [TGI] actually began its financial activities. It is therefore probably unrealistic, in the present case, to consider that, if it had to repay the contested aid immediately, it would be able to regain its previous specific competitive position on the glass market or markets in question (since no specific market is identified in recitals 35 and 36 of the contested decision). As [TGI] claims, such repayment could easily serve only to consolidate the dominant position occupied by Schott, [TGI]'s main competitor in the Community and the only one to express its views during the formal investigation procedure. Schott, whose dominant position is not denied by the Commission, has a turnover which is very significantly higher than that of [TGI]. It cannot therefore be accepted that that competitor would suffer considerable damage if interim measures were granted in this case. Furthermore, Schott is also established in the *Land* of Thuringia.

118 It follows that there are exceptional and very particular circumstances in the present case which lean in favour of granting interim measures.

119 However, in the light of the Community interest in actual recovery of the State aid, including restructuring aid which is, a priori, granted to companies experiencing financial difficulties, full suspension of the operation of the contested decision until judgment is delivered in the main proceedings cannot be justified.

120 On the hand, in the very particular circumstances of this case, the grant of limited interim measures is justified and is an appropriate response to the need to afford effective interim legal protection.'

21 In those circumstances, suspension of operation of the contested decision was granted until 17 February 2003, subject to the conditions mentioned in paragraph 2 of the operative part of the order under appeal.

The appeal

22 The appeal is based on three pleas in law, alleging that the order under appeal contains errors of law regarding the admissibility of the application for suspension, the findings in respect of the requirement of a prima facie case and the balancing of interests.

The first plea

Arguments of the parties

23 According to the plea in support of the appeal, the President of the Court of First Instance erred in law by holding that TGI's application was admissible, thus affirming that he had jurisdiction.

24 Referring to the orders in Case 310/85 R *Deufil* v *Commission* [1986] ECR 537, paragraph 22, and Case 142/87 R *Belgium* v *Commission* [1987] ECR 2589, paragraph 26, the Commission claims that TGI should first have brought an action before a national court in order to avoid possible damage. In those two orders, the applications for suspension had been dismissed as inadmissible because the applicants had not first availed themselves of the national legal

remedies. The order under appeal, which, in substance, authorises the simultaneous use of two remedies, one before the Community judicature and the other before the national courts, infringes the principle that recourse to multiple jurisdictions on the same point of law should be avoided.

25 The Commission submits that only if national remedies are exhausted may an undertaking be justified in invoking the need for and urgency of the suspension before the Community judicature.

26 That view has the advantage of enabling the undertaking concerned to raise additional complaints before the national courts, relating, *inter alia*, to irregularities in the national recovery proceedings, or based on legitimate expectations and legal certainty.

27 As for Article 14(3) of Regulation No 659/1999, referred to by the President of the Court of First Instance in paragraph 55 of the order under appeal, it applies, first of all, to Member States, which, in fact, can seek suspension only before the Community judicature.

28 In its written observations, TGI argues that the Commission's approach, if it were upheld, would upset the division of powers between the national courts and the Community judicature, under which the latter alone is empowered to rule on the legality of a Commission decision and to suspend its operation.

29 TGI adds that, in the present case, there is no nationally enforceable act which it could challenge in the national courts and that it cannot be required to wait for

the adoption of such an act in order to challenge it before the national courts and, at the same time, under the rule in *TWD Textilwerke Deggendorf*, cited above, to seek annulment of the contested decision before the Community judicature.

Findings

30 The first plea in support of the appeal is manifestly unfounded and must be rejected at the outset.

31 First, contrary to what the Commission states in point 16 of its appeal, the application for suspension in *Deufil* v *Commission*, cited above, was not dismissed as inadmissible but was subjected to an examination on the merits, at the end of which the judge hearing the application for interim relief held that the applicant had not proved that the condition concerning the existence of serious and irreparable damage was fulfilled. The situation was the same in *Belgium* v *Commission*, in which, moreover, the application had been made not by the beneficiary of the aid, but by the Member State which was paying it.

32 For the rest, it should be pointed out that, under the first subparagraph of Article 104(1) of the Rules of Procedure of the Court of First Instance, the sole condition for an application to suspend the operation of a measure adopted by an institution to be admissible is that the applicant must be challenging that measure in proceedings before the Court of First Instance.

33 The Commission's arguments, which are based on considerations of expediency regarding the relative efficiency of the various procedures, cannot have the effect of amending, in the context of the monitoring of State aid, the general rule stated

in the previous paragraph and, in the particular case of an undertaking which has brought an action for annulment against a Commission decision ordering recovery of incompatible aid, cannot lead to a refusal to grant the undertaking interim judicial protection before the Community judicature.

34 As for the Commission's findings concerning Article 14(3) of Regulation No 659/1999, referred to in paragraph 27 of this order, there is no need to consider these further.

35 The observations made in respect of that provision by the President of the Court of First Instance in paragraph 55 of the order under appeal complete the line of reasoning which culminated in his declaration that the application for suspension was admissible.

36 The President of the Court of First Instance was therefore right in declaring the application for suspension admissible.

The second plea

Arguments of the parties

37 By its second plea, the Commission claims that the President of the Court of First Instance erred in law in his appraisal of the question whether a prima facie case had been made out for granting the relief sought.

38 The Commission makes the preliminary point that the logic of the order under appeal implies that, in respect of restructuring aid which is, by its very nature, granted to avoid a threat of insolvency, there will always be urgency and that, in the case of a decision requiring recovery of such aid, it will therefore always be necessary to order, without a closer examination, suspension of the operation of that decision, thus ensuring the artificial survival of the undertaking concerned. In order to ensure that the conditions of fair competition are maintained, it is better, in connection with the suspension of operation of a decision relating to the repayment of restructuring aid, to apply particularly strict criteria for assessing whether there is a prima facie case, since suspension must be granted only in exceptional cases.

39 According to the Commission, the order under appeal shows that the President of the Court of First Instance did not take that restrictive approach when assessing whether a prima facie case had been established.

40 According to the first plea relating to the requirement of a prima facie case put forward at first instance by TGI, whose arguments in support the President of the Court held could not, prima facie, be ruled out, the payment waiver is not an aid but compensation for a promise previously made — but not kept — to TGI to enable it to benefit from an approved aid scheme.

41 In that connection, the Commission puts forward a number of arguments to challenge the order under appeal.

42 First, TGI's plea presupposes that a Member State may avoid the aid rules if, in connection with a private contract relating to the sale of an undertaking, it promises aid, some of which is unlawful and manifestly incompatible with the

common market, since, if it subsequently fails to pay that aid, the beneficiary can plead elimination of an essential term of the contract in order to claim benefits which would lose the status of aid and take on the nature of civil-law compensation.

43 Next, that explanation was never offered by the Federal Republic of Germany, during the administrative procedure, in order to justify the payment waiver.

44 Furthermore, TGI has adduced no proof that the promise existed.

45 Finally, the Commission contends that the President of the Court of First Instance could not properly criticise it, as he did in paragraph 75 of the order under appeal, for not stating reasons for the contested decision on that point, since no such complaint had been raised by TGI in its application. In any event, the reasoning of the contested decision is adequate, since the Member State concerned had not raised the matter in the administrative procedure while TGI, although it had mentioned it, had not adduced any evidence to support its claims.

46 According to the third plea put forward by TGI at first instance on the question of a prima facie case, its right to a fair hearing had been infringed since the Commission had failed to contact it directly during the formal investigation procedure, whereas it had posed questions to a competitor undertaking, which had given it a reply. TGI considered that it should have been able to comment on the key points arising during the formal investigation procedure.

47 The Commission points out that, as is apparent from paragraphs 80 to 87 of the order under appeal, the President of the Court of First Instance held that the Commission, by not forwarding to TGI observations received from a competitor, had committed, at least prima facie, an irregularity and that there was a real possibility that, if the irregularity in question had not occurred, the formal investigation procedure might have culminated in a different result.

48 In this connection, the Commission points out, first, that it had stated in the proceedings before the President of the Court of First Instance that it had not based the contested decision on the competitor's observations.

49 Above all, the Commission contends, second, that paragraphs 85 and 86 of the order under appeal are flawed by an error in law, since they are based on the Commission's alleged duty, in connection with the formal investigation procedure, to forward for an aid beneficiary's comments the observations submitted to the Commission by a competitor of that beneficiary.

50 According to the Commission, TGI, which had submitted observations during the formal investigation procedure, had no other right, either by reason of an alleged obligation not to discriminate between the parties concerned, or under Article 41(1) of the Charter of Fundamental Rights, or through application by analogy of the principles stated in the judgment in *Max.mobil* v *Commission*, cited above.

51 In its written observations regarding the second plea in support of the appeal, TGI first disputes the need, in a case such as this, for particularly strict criteria for assessing whether there is a prima facie case.

52 The general approach taken by the Commission makes it impossible or extremely difficult in practice to provide interim judicial protection, which is contrary to the principle of the effectiveness of the protection of rights.

53 TGI also rejects the Commission's criticisms of the assessment of the existence of a prima facie case made in the order under appeal. As regards the assessment of the first plea concerning the prima facie case raised by TGI at first instance, TGI contends, in essence, that the Commission merely repeats the arguments it submitted at first instance, which makes that part of the second plea inadmissible. As regards the assessment of the third plea concerning a prima facie case raised by TGI at first instance, relating to the procedural error committed by the Commission, TGI submits that the Commission, by denying that it had a duty to forward the observations to TGI, in fact seeks to alter the subject-matter of the proceedings before the President of the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice, since it had conceded at first instance that it had committed that error.

Findings

54 It is appropriate to consider, first, the Commission's preliminary argument that, in the case of a decision ordering the recovery of restructuring aid, there is always urgency, because of the aid beneficiary's insolvency problems, so that it is necessary to apply particularly strict criteria for acknowledging that there is a prima facie case.

55 That argument cannot be accepted in terms as general and absolute as those in which it is presented by the Commission.

56 The fact that an undertaking may become insolvent does not necessarily mean that the condition concerning urgency is fulfilled. When assessing an undertaking's financial viability, the judge hearing the application for interim relief may assess its material circumstances by taking into consideration *inter alia* the characteristics of the group to which the applicant is linked by way of its shareholders (Case C-43/98 P(R) *Camar* v *Commission and Council* [1998] ECR I-1815, paragraph 36), which may lead him to hold that the condition concerning urgency is not fulfilled, in spite of the foreseeable insolvency of the undertaking.

57 It must also be observed that, on several occasions, undertakings have been unable to establish the condition of urgency in support of applications for suspension of decisions ordering recovery of State aid, including restructuring aid (see the orders in *BP Nederland and Others* v *Commission*, cited above; Case T-111/01 R *Saxonia Edelmetalle* v *Commission* [2001] ECR II-2335, and Case T-91/02 R *Klausner Nordic Timber* v *Commission* [2002], not published in the ECR.

58 Furthermore, although it is true that suspension of the operation of a decision ordering recovery of incompatible aid may prolong the adverse effects of that aid on competition, the fact remains, conversely, that the immediate implementation of such a decision will usually give rise to irreversible effects for the beneficiary undertaking, without its being possible a priori to exclude the possibility that continuance of the aid will finally be judged lawful owing to the defects which the aforementioned decision may contain.

59 The Commission's approach therefore cannot be accepted without reservations, because it might reduce interim judicial protection to an excessive extent and limit the broad discretion which the judge hearing an application for interim relief must have in order to exercise the powers conferred on him (see, to that effect, order in Case C-481/01 P(R) *NDC Health* v *IMS Health and Commission* [2002] ECR I-3401, paragraph 58).

60 That conclusion applies *a fortiori* in the present case because TGI disputes the classification of the payment waiver as restructuring aid; it submits that the waiver does not even constitute aid within the meaning of Article 87(1) EC. In those circumstances, the extent of examination of the issue of a prima facie case which must be carried out by the judge hearing the application for interim relief cannot depend on a premiss, namely the existence of restructuring aid, which is at the very heart of the assessment of the prima facie case.

61 It is when the interests concerned, which include interest in undistorted competition, are balanced, rather than when it is assessed whether there is a prima facie case, that the concerns expressed by the Commission may properly be addressed.

62 Since the Commission's preliminary arguments have been rejected, it is necessary to examine the merits of the specific complaints it makes against the assessment carried out by the President of the Court of First Instance in respect of the first and third pleas raised by TGI at first instance in order to establish a prima facie case.

63 First, as regards the part of the order under appeal which relates to the first plea, according to which the payment waiver was not aid within the meaning of Article 87(1) EC (paragraphs 74 to 79 of the order under appeal), it must be observed that the appeal consists in essence of an objection to the assessment of the facts and the examination of the evidence carried out by the President of the Court.

64 It was on the basis of his examination of the documents in the case, including the contested decision, as reasoned, that the President of the Court of First Instance made certain interim findings as to the existence of a promise made by the *Land* Thüringen (paragraph 75 of the order under appeal), and to the fact that the

promise may have been covered by an approved aid scheme (paragraph 77 of the order under appeal), findings from which he deduced that, notwithstanding the Commission's observations, TGI's arguments relating to its first plea concerning a prima facie case could not, at first sight, be discounted.

65 Those findings cannot be called in question in the context of the appeal.

66 Under Article 225 EC and Article 51, first paragraph, of the EC Statute of the Court of Justice, any appeal must be limited to points of law and must lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the applicant or infringement of Community law by the Court of First Instance. The Court of First Instance alone has jurisdiction to make findings of fact, except where the documents before it caused it to make a material error in so doing, and to assess the facts as so found.

67 Furthermore, the Court of Justice does not in principle have jurisdiction to examine evidence which the Court of First Instance has accepted in support of its finding or assessment of the facts. Where the general principles of law and rules of procedure governing the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the weight to be attributed to the evidence adduced before it (order in Case C-159/98 P(R) *Netherlands Antilles* v *Council* [1998] ECR I-4147, paragraph 68).

68 As for the Commission's argument that, even if the payment waiver made up for non-payment of previously promised aid, that waiver none the less constitutes aid in the same way as the measure compensated for, that argument does not take account of TGI's assertion that the aid initially promised was covered by an approved aid scheme, an assertion which was not discounted by the President of the Court of First Instance.

69 The second plea in support of the appeal, in so far as it applies to paragraphs 74 to 79 of the order under appeal, must therefore be rejected as partly inadmissible and partly unfounded.

70 Second, as regards the part of the order under appeal relating to the third plea raised by TGI at first instance to establish a prime facie case, according to which its right to a fair hearing had been infringed (paragraphs 80 to 87 of the order under appeal), the Commission contends that the President of the Court of First Instance was wrong in imposing on the Commission an obligation to forward to the beneficiary the observations received from a competitor during the formal investigation procedure, and in holding that failure to forward those observations had, in the present case, an effect on the final decision.

71 TGI's argument that that plea is new and therefore out of time cannot be accepted. Although the Commission acknowledged at first instance that it should have communicated that information to the German Government, it is clear, on the other hand, from the pleadings before the Court of First Instance, that it denied, at least indirectly, that it had an obligation to forward it to the undertaking in receipt of the aid.

72 The second plea in support of the appeal, in so far as it refers to paragraphs 80 to 87 of the order under appeal, is therefore admissible.

73 As to the substance, it should be noted at the outset that the plea raised by the Commission is based on a partial misreading of the order under appeal, since the Commission seems to start from the idea that the President of the Court of First

Instance imposed on it a requirement to forward to the beneficiary of the aid, for its comments, the observations made by a competitor during the formal investigation procedure.

74 As is apparent from paragraph 85 of the order under appeal, the obligation to forward the observations, which, according to the President of the Court of First Instance, rests on the incumbent Commission, applies only to 'specific' observations 'which it has expressly requested from a competitor following observations initially lodged by that recipient'.

75 The plea raised by the Commission must therefore be understood to dispute that obligation as so defined.

76 In that regard, it must be observed that, even thus defined, the procedural obligation in question which the President of the Court of First Instance held, provisionally, in paragraph 85 of the order under appeal, to be incumbent on the Commission, finds no basis either in Regulation No 659/1999 or in the case-law of the Court of Justice.

77 However, even assuming that the Commission's plea were well founded on this point, it could not, as such, have the effect of undermining the conclusion of the President of the Court of First Instance on the issue of a prima facie case expressed in paragraph 88 of the order under appeal.

78 As has been found in paragraphs 63 to 69 of this order, the Commission has been unable to invalidate the finding of the President of the Court of First Instance as to whether there was a prima facie case with respect to the first plea raised by TGI at first instance.

79 In those circumstances, without its being necessary to examine further the validity of the Commission's arguments, the second plea in support of the appeal must be rejected.

The third plea

Arguments of the parties

80 Under its third plea, the Commission states that it does not agree with the finding of the President of the Court of First Instance with respect to the existence of 'exceptional and very particular circumstances' which might justify balancing the interests in question in favour of granting suspension, and maintains that he erred in law.

81 The Commission contends that the exceptional and very particular circumstances which might speak in favour of granting interim judicial protection as an exceptional measure can only be those which can be taken into consideration in a procedure authorising aid, which is not the position in the present case, and that it is wrong to take as a basis the fact that the aid to be repaid represents only part of the total amount of aid granted.

Findings

82 It is clear at the outset that this plea cannot succeed, since it calls directly into question the factual assessments made by the President of the Court of First Instance, which cannot be accepted in the context of an appeal (see paragraphs 66 and 67 of this order).

83 The order under appeal shows that the President of the Court of First Instance concluded, in the light of the particular circumstances of the case and on the basis of evidence which, it may be said, appears to be relevant, that there were exceptional and very particular circumstances.

84 Furthermore, the Commission, in its appeal, confines itself to making the assertions set out in paragraph 81 of this order, without developing them further.

85 The third plea in support of the appeal must therefore be rejected as inadmissible.

86 It follows from all the foregoing considerations that the appeal must be dismissed.

Costs

87 Since the Commission has been unsuccessful in its appeal, it must be ordered to pay the costs.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. **The appeal is dismissed.**

2. **The Commission of the European Communities is ordered to pay the costs.**

Luxembourg, 18 October 2002.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President