ORDER OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
27 November 2001 *

In Case T-222/00,

Otto Wöhr GmbH, established in Friolzheim (Germany), represented by C. Hebel and G. Walz,

applicant,

v

Commission of the European Communities, represented by K.-D. Borchardt, acting as Agent, assisted by M. Núñez Müller, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission Decision of 26 June 2000 not to the initiate the formal investigation procedure provided for in Article 88(2) EC following the complaint by the applicant concerning State aid granted by the

* Language of the case: German.

German authorities to Hydraulik Markranstädt GmbH and to Hydraulik Seehausen GmbH,

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

composed of: R.M. Moura Ramos, President, V. Tiili, J. Pirrung, P. Mengozzi and A.W.H. Meij, Judges,

Registrar: H. Jung,

makes the following

Order

Facts giving rise to the dispute

1 The applicant is a company present on the European market for the production and assembly of parking systems for cars. It manufactures mechanical and electronic parking systems as well as 'vehicle towers' used for the storage and presentation of motor vehicles.

2 Previously Hydraulik Markranstädt GmbH (hereinafter 'Markranstädt') and Hydraulik Seehausen GmbH (hereinafter 'Seehausen') were formerly State

undertakings of the German Democratic Republic and were part of the Kombinat VEB Orsta Hydraulik AG, Leipzig. On 10 December 1992 Otto Nussbaum GmbH & Co. KG (hereinafter 'Nussbaum'), whose registered office is in Kehl (Germany), bought Seehausen and then, on 3 May 1994, Markranstädt. The latter two undertakings are 100% subsidiaries of Nussbaum and dedicated to manufacturing certain essential components of parking systems for motor cars and parking systems that are subsequently marketed under the Nussbaum emblem. Nussbaum is in direct competition with the applicant. For several years now, it has been manufacturing parking systems as well.

3 On 7 April 1998 the Federal Republic of Germany notified the Commission of aid of 6.09 and 8.56 million German marks (DEM) in favour of Markranstädt and Seehausen respectively. By decisions of 26 October 1999 and 10 November 1999 the Commission, pursuant to Article 88(3) EC, declared that aid to be compatible with the common market in accordance with Article 87(3)(a) EC.

Administrative procedure

4 By letter of 12 November 1999 the applicant requested from the defendant the text of its decision concerning the State aid in favour of Markranstädt.

5 By letter of 2 December 1999 the applicant lodged a complaint as a precautionary measure against that decision, the full text of which had not yet been forwarded by it to the Commission. At the same time the applicant requested that a formal procedure be initiated to examine the aid allocated to Markranstädt and reiterated its request for the text of the same decision.

6 By letter of 8 December 1999 the Commission told the applicant that the decision relating to Markranstädt had been adopted pursuant to Article 88(3) EC and had been addressed to the German authorities for comment. It undertook to address the decision in question to the applicant as soon as it had received those comments. The Commission also indicated to the applicant that the full text of that decision would also be available on its internet site. The Commission concluded:

'It is not possible to initiate a main investigation procedure under Article 88(2) EC for the moment given that, in order to do so, we would have to be in possession of a comprehensive statement of reasons for the complaint.'

7 By letter of 4 January 2000 the applicant again requested the text of the decision concerning Markranstädt. Having stated that it had not received the Commission's letter of 8 December 1999, the Commission resent it by letter of 12 January 2000. By letter of 21 January 2000 the applicant once again asked for the full text of the same decision.

8 The decisions concerning Seehausen and Markranstädt were the subject of a succinct notification in the *Official Journal of the European Communities* of 19 February 2000 (OJ 2000 C 46, p. 4) and of 4 March 2000 (OJ 2000 C 62, p. 18) respectively and, according to the Commission, the full text of those decisions were available on the internet site indicated in the Official Journal.

9 According to the applicant, the defendant addressed a decision to it concerning Markranstädt by letter of 21 March 2000, which was received 27 March 2000, and thanks to that decision, the applicant was necessarily informed of the Commission decision relating to Seehausen.

10 By letter of 25 May 2000 the applicant sent to the Commission the statement of reasons for its complaint of 2 December 1999 on the decision concerning Markrandstädt. The applicant also again requested the Commission to initiate and implement the formal investigation procedure prescribed by Article 88(2) EC.

11 By letter of 26 May 2000 the applicant also submitted a complaint against the approval of the aid in favour of Seehausen and requested that a formal investigation procedure be initiated under Article 88(2) EC in respect of that State aid.

12 By letter of 26 June 2000 the defendant replied to the applicant that the two decisions in question were 'definitive and therefore [could] not be contested by means of a complaint accompanied by a request to initiate a formal investigation procedure under Article 88(2) EC'.

13 By letter of 5 July 2000 the applicant asked the Commission for explanations on that matter, while pointing out that the Commission had indicated, by letter of 8 December 1999, that the initiation of a formal investigation procedure would be possible on the basis of a duly reasoned complaint.

14 By letter of 7 August 2000 the Commission replied to the applicant that Article 9 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) only allowed for the revocation of a decision if it was based on incorrect information. On the other hand, the Commission added that if, in a complaint, an error of law or assessment were alleged, the decision in question could be contested only in court proceedings.

Procedure and forms of order sought by the parties

15 By application lodged at the Court Registry on 25 August 2000 the applicant brought the present action.

16 By separate document lodged at the Court Registry on 30 October 2000 the Commission raised a plea of inadmissibility in accordance with Article 114(1) of the Rules of Procedure of the Court of First Instance.

17 The applicant submitted its written observations with regards to that plea on 11 December 2000.

18 By document lodged at the Court Registry on 30 January 2001 the Federal Republic of Germany applied for leave to intervene in the proceedings in support of the defendant.

19 The defendant claims that the Court should:

— dismiss the application as inadmissible;

— give a preliminary decision on the admissibility of the application;

— order the applicant to pay the costs.

20 The applicant contends that the Court should:

— reject the plea of inadmissibility;

— annul the Commission Decision of 26 June 2000 not to undertake a formal investigation procedure concerning the aid allocated to Markranstädt and Seehausen;

— order the Commission to pay the costs.

Admissibility

21 Under Article 114(4) of the Rules of Procedure the Court of First Instance, without examining the substance of the case, may rule on the admissibility of an

action at the request of one of the parties. Under Article 114(3) the remainder of the proceedings is to be oral unless the Court decides otherwise. In the present case the Court considers itself sufficiently informed by the documents in the file to give a decision without taking further steps in the proceedings.

Arguments of the parties

22 The Commission claims that its letter of 26 June 2000 does not constitute an actionable measure and that the applicant is seeking, in reality, to have the decisions of 26 October and 10 November 1999 concerning the approval of the aid accorded to Markranstädt and Seehausen annulled. The Commission also argues that its reply, contained in its letter of 8 December 1999, according to which it could not initiate a main investigation procedure at that stage because in order to do so it required the full statement of reasons for the complaint, cannot effectively be invoked in support of the admissibility of the present action. Finally, the Commission submits that the applicant's reference to procedural rights is not well founded and that the present action is not admissible, even assuming that it concerns the rejection of a request to revoke the decisions of 26 October and 10 November 1999 under Articles 9 and 19(3) of Regulation No 659/1999.

23 The applicant contends that its action is admissible. It argues that it is directly and individually concerned, with respect to its opportunities on the market, by the distortion of competition thus maintained by the decision of 26 June 2000 for the benefits of Markranstädt, Seehausen and Nussbaum in particular.

24 The applicant claims that if the defendant had acted in accordance with Regulation No 659/1999, it would have initiated a main investigation procedure and would have enabled the applicant to present its observations pursuant to Article 20 of that regulation. By not respecting that obligation, the defendant, on

the one hand, refused the applicant the protection under Article 87(1) EC and, on the other hand, prejudiced the applicant's right to a fair hearing. Similarly, the applicant considers itself directly concerned because its request was rejected, which infringed the rules of procedure contained in Regulation No 659/1999, which are also intended to protect the applicant.

25 The applicant claims that the letter of 26 June 2000 constitutes a decision that may be challenged under the fourth paragraph of Article 230 EC. That letter does not constitute merely an information letter addressed to the applicant for the purposes of clarification. By letter of 8 December 1999 the defendant had already mentioned the possibility of initiating a formal investigation procedure should the applicant's reasoned complaint contain assertions that would make this necessary. The applicant contends that, in this way, the Commission did not confine itself to referring to an ancillary refusal to initiate a formal investigation procedure but expressly invited the applicant to give reasons for its complaints in order that the Commission could decide whether there was a need to initiate that procedure, which would have enabled the applicant to present its observations on the disputed aid in accordance with Article 20 of Regulation No 659/1999.

26 According to the applicant, the fact that the Commission contemplated, in its letter of 8 December 1999, the possibility of initiating a formal investigation procedure distinguishes this case from those which gave rise to the judgments of the Court of First Instance in Case T-154/94 *CSF and CSME* v *Commission* [1996] ECR II-1377 and of the Court of Justice in Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, in which a subsequent refusal to initiate a formal investigation procedure had not been explicitly mentioned and could be inferred only indirectly from the non-initiation of that procedure.

27 As, later, by the decision of 26 June 2000, the Commission rejected that possibility which it had previously mentioned, that decision is actionable given its autonomous nature and the fact that it places the applicant in a less favourable situation than it had been in previously.

28 The applicant acknowledges that the defendant's argument might have been correct if the defendant had not asked the applicant to give the reasons for the complaints against the decisions relating to aid in order that it might determine whether there was a need to initiate a formal investigation procedure. The applicant maintains that if, following those complaints, the defendant had merely informed it that the decisions taken on the subject of the aid were final, the contested letter of 26 June 2000 would not have had a new and autonomous decision-making character.

29 The applicant states that, on the contrary, the defendant asked it to provide reasons, implying that after those reasons had been given the Commission would decide whether it was appropriate to initiate a main investigation procedure. Moreover, the Commission said nothing to suggest that, in accordance with Article 9 of Regulation No 659/1999, only a revocation of the decision was contemplated, but it expressly mentioned the possibility of initiating a main investigation procedure.

30 The applicant contends that, in those circumstances, the admissibility of the present action cannot result in frustration of the fifth paragraph of Article 230 EC.

31 In the alternative, the applicant argues that the present action can equally be interpreted as challenging the refusal to initiate a procedure for revocation of the decisions concerning the aid allocated to Markranstädt and Seehausen under Articles 9 and 13(3) of Regulation No 659/1999. The revocation of a decision in accordance with Article 9 of that regulation is envisaged if the decision taken is based on information, given during the procedure, which was incorrect and was a determining factor in that decision. The applicant takes the view that those conditions are specifically fulfilled as far as the abovementioned decisions are concerned. As shown in detail in the statement of reasons for the complaints, the information provided by the marketing agency Rehberg, whose study forms the basis for the Commission decision approving the aid, is incorrect and incomplete.

Findings of the Court

32 It should be borne in mind that the formal investigation procedure provided for in Article 88(2) EC precedes the adoption of a decision on the compatibility of State aid with the common market. Such a procedure is initiated by the Commission when it takes the view, after a preliminary examination, that the measure notified gives rise to doubts as to its compatibility with the common market.

33 Moreover, since the entry into force of Regulation No 659/1999, and in accordance with Article 9 thereof, it is also for the Commission to initiate a formal investigation procedure when it intends to revoke a decision declaring State aid to be compatible with the common market on the ground that that decision is based on incorrect information which was submitted during the procedure and which was a determining factor for the purposes of that decision.

34 Furthermore, it must be pointed out that if the Commission declares State aid to be compatible with the EC Treaty without initiating the formal investigation procedure provided for in Article 88(2) EC, and if an interested party seeks to safeguard its procedural rights under the same provision, that party must bring an action before the Court of First Instance against that decision within the time-limit prescribed in the fifth paragraph of Article 230 EC (judgments of the Court of Justice in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 23 and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 17; judgments of the Court of First Instance in Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 45 and Case T-188/95 *Waterleiding Maatschappij* v *Commission* [1998] ECR II-3713, paragraph 53).

35 In the present case the action seeks the annulment of the Commission decision of 26 June 2000 not to initiate the formal investigation procedure provided for in Article 88(2) EC in relation to the State aid accorded by the Federal Republic of Germany to Markranstädt and Seehausen.

36 That aid was declared compatible with the common market by the Commission decisions of 26 October 1999 and 10 November 1999 respectively. Thus, those decisions preceded the applicant's requests of 25 and 26 May 2000, which gave rise to the decision of 26 June 2000.

37 According to the applicant, the defendant addressed the decision of 26 October 1999 concerning Markranstädt to the applicant by letter of 21 March 2000, which it received on 27 March 2000, and thanks to that decision, the applicant was necessarily informed of the Commission decision of 10 November 1999 concerning Seehausen.

38 In order to safeguard its procedural rights under Article 88(2) EC and to secure the initiation of the formal investigation procedure prescribed in the same provision, the applicant ought to have brought an action in good time before the Court of First Instance against the decisions authorising the contested aid.

39 The applicant never brought such an action against those decisions. After becoming aware of the decisions, the applicant merely lodged a complaint with the Commission against each decision by letters of 25 and 26 May 2000 (see paragraphs 11 and 12 above).

40 The requests for the formal investigation procedure to be initiated under Article 88(2) EC that are contained in the same letters were irrelevant. Since a decision on the compatibility of State aid with the common market was adopted

and was not annulled following an action brought before the Community judicature, there can be no question of initiating such a procedure. In those circumstances, the refusal to initiate a formal investigation procedure does not constitute an act producing legal effects with regard to the applicant since it only confirms the two decisions authorising the aid.

41 As regards the alternative case put forward by the applicant, namely that its action could be interpreted as directed to the Commission's refusal to initiate the revocation procedure provided for in Articles 9 and 13(3) of Regulation No 659/1999 (see paragraph 31 above), it is necessary to determine whether the present action may be regarded as having such an object.

42 In that regard, it is clear both from the application and the letters sent by the applicant to the Commission, and, in particular, from the applicant's reasoned complaints, that the object of the request by the latter to the defendant was not the initiation of a formal investigation procedure as a preliminary step prior to a revocation of the decisions on the aid in question, as provided for in Article 9 of Regulation No 659/1999, that procedure being limited to the question whether the decisions were based on incorrect information that was submitted during the procedure and was a determining factor for the purposes of those decisions.

43 The applicant did not request the revocation of the Commission decisions of 26 October 1999 and 10 November 1999, which declared the State aid in favour of Markranstädt and Seehausen to be compatible with the common market.

44 Nor did it argue before the Commission that those decisions had to be revoked because they were based on incorrect information that was submitted during the procedure and was a determining factor for the purposes of the decisions.

45 On the contrary, the applicant explicitly asked the defendant to initiate the formal investigation procedure which is provided for in Article 88(2) EC and which must be initiated by the Commission when it doubts the compatibility of State aid with the common market and before it adopts a decision on that aid. Such a procedure necessarily involves a legal analysis of the situation in question and, unlike the analysis which precedes a possible revocation decision, is not restricted to establishing the facts.

46 In those circumstances, the present action cannot be interpreted as directed to an alleged refusal of the Commission to initiate the revocation procedure provided for in Articles 9 and 13(3) of Regulation No 659/1999 (see paragraph 31 above).

47 That conclusion cannot be called into question by the content of the Commission's letter of 8 December 1999 (see paragraph 6 above).

48 Even though it is regrettable that the Commission did not correctly and fully inform the applicant of its legal position, that cannot change the rule applicable in this case concerning the remedies available for challenging Commission decisions on State aid. Furthermore, those rules, as defined in the case-law, are in any event sufficiently clear to prevent the applicant from relying on the Commission's letter of 8 December 1999 as a basis for the admissibility of its action.

49 Consequently, contrary to the applicant's request, its action cannot be interpreted as being directed to the Commission's refusal to initiate the revocation procedure provided for in Articles 9 and 13(3) of Regulation No 659/1999.

50 It follows that the application must be dismissed as inadmissible pursuant to Article 114 of the Rules of Procedure.

51 In those circumstances, there is no need to rule on the Federal Republic of Germany's application for leave to intervene.

Costs

52 Under Article 87(3) of the Rules of Procedure, the Court of First Instance may order that each party bear its own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

53 In that regard, the Commission must be criticised for having, by its letter of 8 December 1999, allowed the applicant to believe that a formal investigation procedure under Article 88(2) EC remained possible and for having explained only after the expiry of the time-limit for the bringing of an action against the decisions on the compatibility of the contested aid with the common market that a challenge founded on an error of law or assessment could be mounted only by court proceedings.

54 As a result, the Court considers that each party must bear its own costs.

On those grounds,

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

hereby orders:

1. **The application is dismissed as inadmissible.**

2. **The parties shall bear their own costs.**

3. **There is no need to rule on the application of the Federal Republic of Germany for leave to intervene.**

Luxembourg, 27 November 2001.

H. Jung
Registrar

R.M. Moura Ramos
President