ORDER OF THE COURT (Third Chamber)
5 November 2002 *

In Case C-321/01 P,

Agrana Zucker und Stärke AG, established in Vienna (Austria), represented by W. Barfuß and H. Wollmann, Rechtsanwälte, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fifth Chamber, Extended Composition) in Case T-187/99 *Agrana Zucker und Stärke* v *Commission* [2001] ECR II-1587, seeking to have that judgment set aside,

* Language of the case: German.

the other party to the proceedings being:

Commission of the European Communities, represented by M. Erhart and D. Triantafyllou, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Third Chamber),

composed of: J.-P. Puissochet, President of the Chamber, F. Macken and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

after hearing the views of the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 20 August 2001, Agrana Zucker und Stärke AG brought an appeal under Article 49 of the EC Statute of the Court of Justice, against the judgment of the Court of First Instance in Case T-187/99 *Agrana Zucker und Stärke* v *Commission* [2001] ECR II-1587 ('the judgment under appeal'), in which the Court dismissed its application for annulment of Commission Decision 1999/342/EC of 30 September 1998 concerning aid which Austria plans to grant to Agrana Stärke-GmbH to build and convert starch production facilities (OJ 1999 L 131, p. 61, 'the contested decision').

Legal background

2 Article 16(5) of Council Regulation (EC) No 951/97 of 20 May 1997 on improving the processing and marketing conditions for agricultural products (OJ 1997 L 142, p. 22), which replaces in identical terms the same provision in Council Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products (OJ 1990 L 91, p. 1), provides:

'[W]ithin the field of application of this Regulation, Member States may take aid measures which are subject to conditions or rules concerning granting which

differ from those provided for in this Regulation, or, where the amounts of aid exceed the ceilings specified therein, on condition that such measures comply with Articles 92 to 94 of the Treaty.'

3 Article 151(1) of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1, 'the Act of Accession') provides:

'The acts listed in Annex XV to this Act shall apply in respect of the new Member States under the conditions laid down in that Annex.'

4 Point VII D 1 of Annex XV to the Act of Accession reads:

'... [Regulation (EEC) No 866/90]..., as last amended by Council Regulation (EEC) No 3669/93 of 22 December 1993 (OJ No L 338, 31.12.1993, p. 26).

When applying Article 16(5), the Commission:

— ...

— will implement these provisions with respect to Austria and Finland in accordance with the declaration No 31 set out in the Final Act.

...'

5 Joint Declaration No 31 on the processing industry in Austria and Finland, annexed to the Final Act of the Treaty concerning the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union (OJ 1994 C 241, p. 371, 'Declaration No 31') provides:

'The Contracting Parties agree on the following:

...

(ii) flexibility on transitional national aid schemes designed to facilitate restructuring.'

Background to the dispute

6 The background to the action, as set out in paragraphs 5 to 18 of the judgment under appeal, may be summarised as follows for the purposes of the appeal.

7 Agrana Stärke-GmbH was a company governed by Austrian law which, amongst other activities in the agricultural sector, produced and processed maize starch at its plant in Aschach (Austria) and potato starch at its plant in Gmünd (Austria).

8 On 19 May 1995 it lodged with the Austrian authorities an application for aid for a range of investments in the starch sector planned for its sites at Gmünd and Aschach. That investment was implemented in September 1995 without waiting for a decision on the aid in question.

9 By letter of 28 June 1996 the Austrian Government notified the Commission of each of the investment aid measures which Agrana Stärke-GmbH had implemented at the Aschach and Gmünd sites.

10 The aid for the Gmünd plant was approved by the Commission by letter of 23 January 1997. So far as the aid for the Aschach plant was concerned, the Commission decided to initiate the procedure laid down in Article 93(2) of the EC Treaty (now Article 88(2) EC).

11 On 30 September 1998 the Commission adopted the contested decision, in which it declared that the aid planned for the Aschach plant was incompatible with the common market.

The judgment under appeal

12 On 20 August 1999 Agrana Zucker und Stärke AG, which had succeeded Agrana Stärke-GmbH ('Agrana'), brought an action before the Court of First Instance for annulment of the contested decision based on four pleas, alleging, first, that the time-limit for investigation had expired, second, infringement of the provisions of Article 151(1) of the Act of Accession, of Declaration No 31 and of Article 87(3)(c) EC, third, misappreciation of the criterion of whether the aid was needed and, fourth, failure to provide an adequate statement of reasons.

13 The Court of First Instance dismissed the application in its entirety. As regards the second plea in particular, which is the only plea the appellant has retained in the appeal, the Court held as follows:

> '60 The applicant claims that the Commission applied Declaration No 31 in a manifestly erroneous manner since, on the one hand, it laid down the prior condition that aid cannot be allowed if the investment in question is intended to increase production capacity and, on the other hand, it did not weigh the advantages gained by the Community from the Republic of Austria's accession to the European Union without a transitional period against the disadvantages of the aid concerned being paid.
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> 61 In that regard, it should be pointed out at once that the wording of Declaration No 31 does not contain any restrictions relating to production capacity... As a result, the Commission cannot exclude in advance from

the scope of that declaration all cases in which investment by a potential recipient of aid is designed to increase production capacity. The Commission is not entitled to add a general restriction to the scope of Declaration No 31 which is not derived from the text of the declaration itself.

62 However, even if it is true that the Commission, at least as regards paragraph 53 of the contested decision, may have given the impression that it would under no circumstances approve aid to an investor which was intended to increase capacity, in accordance with its approach as set out in the guidelines on aid for rescuing and restructuring, the fact remains that a more exhaustive reading of the contested decision shows that the Commission did consider whether it was possible to grant the aid in question on the basis of Declaration No 31 in the light of the particular circumstances of this case.

...

65 The Commission went on to stress that the contested aid "promotes increased production capacity in a sector which is not regulated by a quota system and is experiencing structural over-capacity" (paragraph 46 of the contested decision). According to the Commission, starch producers in other Member States which export to Austria might find their competitive position on the Austrian market affected by Agrana's increased capacity and might be exposed to greater competition on other markets (paragraph 52 of the contested decision). In conclusion, it considered that the contested aid "affects trading conditions to an extent contrary to the common interest by helping to increase supply in a market where there is limited demand and thereby distorts competition" (paragraph 54 of the contested decision).

66 Therefore, notwithstanding the flexibility clause in Declaration No 31, the Commission considered [that] the aid could not be regarded as compatible with the common market pursuant to Article 92(3)(c) of the EC Treaty [now, after amendment, Article 87(3)(c) EC] (paragraph 56 of the contested decision).

67 In the light of the reasons given by the Commission in the contested decision, that institution cannot be regarded as having committed a manifest error of assessment in considering that the contested aid plan could not be justified solely on the basis of Declaration No 31.

68 The Commission cannot be criticised for considering that the grant of that aid might seriously affect its policy in the sector concerned. The fact that it bases itself to a large extent on the structural situation in that sector within a Community context does not mean that it failed to assess this case individually.

69 As regards the failure to weigh the advantages the Community gained from the Republic of Austria's accession to the European Union without a transitional period against the disadvantages involved in the aid in question being paid, it must be observed that the Commission was not required to take that aspect into account. When making its assessment of the compatibility of the contested aid, in which it had to take Declaration No 31 into account, the Commission was, admittedly, required to consider, as it pointed out in paragraph 49 of the contested decision, whether the aid was likely to promote the development of an economic sector or area without affecting trading conditions to an extent contrary to the common interest. However, the advantages which the Community was able to gain as a result of the Republic of Austria's accession to the European Union do not constitute a relevant factor in the context of a specific assessment of aid.

70 It is clear from all the foregoing considerations that the Commission did not commit a manifest error in its assessment of the question whether the contested aid was compatible with the common market. It is also clear that it did not infringe the provisions of Article 151(1) of the Act of Accession, read in conjunction with Declaration No 31 and Article 87(3)(c) EC.

71 The second plea must therefore be rejected.'

The appeal

14 Agrana has asked the Court to set aside the judgment under appeal and, substituting its own ruling on the substance of the case, to annul the contested decision.

15 In support of its appeal, the appellant submits a single plea alleging that the Court of First Instance committed an error of law by adopting the Commission's incorrect assessment of Declaration No 31.

16 In the first limb of that plea Agrana contends that it is a contradiction on the part of the Court of First Instance, in paragraphs 67 and 68 of the judgment under appeal, to conclude its analysis of the contested decision with the finding that the

Commission did not commit any manifest error of assessment, having correctly acknowledged in paragraph 62 of the judgment under appeal that the Commission did not, on principle, intend to approve any increase in the capacity of the starch industry.

17 Moreover, Declaration No 31 requires the Commission, as the body responsible for implementing the Community rules on aid, to have a flexible attitude with regard to the measures for restructuring the Austrian processing industry made necessary as a result of the accession of the Republic of Austria to the European Union. In recital 28 in the preamble to the contested decision, the Commission makes express reference to the principle that Article 87(3) EC must be strictly interpreted. That position influences the contested decision in its entirety. The Court of First Instance did not notice that fundamental error of law and committed it itself.

18 In the second limb of its plea Agrana maintains that the function of Declaration No 31 is to reach a compromise between the Community's interest in the immediate accession of the Republic of Austria to the European Union and the interest that Member State has in granting aid to its processing industry. Given a teleological interpretation, Declaration No 31 requires the Commission to carry out a comparative study in each particular case of the respective advantages and disadvantages for the Community and the Republic of Austria and to take that study into account in its assessment of the aid in question.

19 Therefore, the position adopted by the Court of First Instance that the advantages stemming from the Republic of Austria's immediate accession to the European Union do not constitute a factor to be taken into account in evaluating the planned aid in question is wrong.

20 The Commission contends that the appeal should be dismissed as inadmissible and/or unfounded and that Agrana should be ordered to pay the costs.

Findings of the Court

21 Under Article 119 of the Rules of Procedure of the Court of Justice, where the appeal is clearly inadmissible or clearly unfounded, the Court may at any time dismiss the appeal by reasoned order.

The first limb of the plea

22 As regards the alleged contradiction in the reasoning of the Court of First Instance, it should be pointed out that the Court, having stated in paragraph 62 of the judgment under appeal that 'the Commission did consider whether it was possible to grant the aid in question on the basis of Declaration No 31', noted in paragraph 66 of the judgment that 'notwithstanding the flexibility clause in Declaration No 31, the Commission considered [that] the aid could not be regarded as compatible with the common market pursuant to Article 92(3)(c) of the Treaty'.

23 The finding made by the Court of First Instance in paragraph 67 of the judgment that the Commission did not commit a manifest error of assessment therefore by no means contradicts the Commission's statement of reasons.

24 Contrary to what Agrana maintains, the Court of First Instance stated in paragraph 62 of the judgment under appeal that the impression that the Commission would under no circumstances approve aid to an investor which was intended to increase capacity, which the Commission had given, at least as regards paragraph 53 of the contested decision, was not confirmed by a fuller reading of that decision. According to the Court of First Instance, such a reading allowed it to be seen that the Commission had in fact taken Declaration No 31 into account at the time the assessment was made as to whether the aid in question was compatible with the common market.

25 As regards moreover the argument concerning failure on the part of the Court of First Instance to recognise that the interpretation of Declaration No 31 adopted by the Commission was incorrect, it should be pointed out that, having considered in paragraphs 63 to 66 of the judgment under appeal the Commission's assessment of the consequences of the aid concerned on the market and established that in that assessment the Commission had taken Declaration No 31 into account, the Court of First Instance held in paragraph 68 of the judgment under appeal that 'the Commission cannot be criticised for considering that the grant of that aid might seriously affect its policy in the sector concerned' and that 'the fact that it bases itself to a large extent on the structural situation in that sector within a Community context does not mean that it failed to assess this case individually'.

26 The Court of First Instance was therefore right to find that the Commission had applied the Community provisions relating to State aid taking account of the particular circumstances of the case concerned.

27 The first limb of Agrana's single plea must therefore be rejected as unfounded.

Second limb of the plea

28 As regards the Commission's allegedly incorrect interpretation of Declaration No 31 which the Court of First Instance wrongly accepted, it should be noted that that declaration requires the Commission to make a flexible assessment of the transitional schemes of national aid granted by the Austrian Government.

29 Such a provision should be interpreted as meaning that it precludes application of the Community rules on State aid to national measures notified by the Austrian authorities in a manner which fails to take into account the particular aspects of the case in question, where the aid is included in a transitional arrangement intended to facilitate the restructuring of the processing industry in Austria.

30 In order to comply with such an obligation the Commission was required to assess, as it did in paragraphs 49 to 52 of the contested decision, whether the aid was likely to promote the development of an economic sector or area without affecting trading conditions to an extent contrary to the common interest.

31 Declaration No 31, however, by no means required the Commission to weigh the advantages which the Community would gain from the Republic of Austria's accession to the European Union without a transitional period.

32 The Court of First Instance did not therefore commit an error of law when it held in paragraph 69 of the judgment under appeal that 'as regards the failure to weigh the advantages the Community gained from the Republic of Austria's accession to the European Union without a transitional period against the disadvantages involved in the aid in question being paid, it must be observed that the Commission was not required to take that aspect into account'.

33 The second limb of that plea should therefore be rejected as manifestly unfounded.

34 It is clear from all the foregoing considerations that the appeal must be dismissed in its entirety as being clearly unfounded.

Costs

35 Under Article 69(2) of the Rules of Procedure, made applicable under Article 118 to the procedure on appeal, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for the appellant to be ordered to pay the costs and the appellant has been unsuccessful, the appellant must be ordered to pay the costs

On those grounds,

THE COURT (Third Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Agrana Zucker und Stärke AG to pay the costs.**

Luxembourg, 5 November 2002.

R. Grass

Registrar

J.-P. Puissochet

President of the Third Chamber