Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

14 February 2012 *

((State aid — Restructuring aid for a manufacturer of large home appliances notified by the French Republic — Decision declaring the aid compatible with the common market subject to conditions — Manifest errors of assessment — Guidelines on State aid for rescuing and restructuring firms in difficulty))

In Joined Cases T-115/09 and T-116/09,

Electrolux AB, established in Stockholm (Sweden), represented by F. Wijckmans and H. Burez, lawyers,

applicant in Case T-115/09,

Whirlpool Europe BV, established in Breda (Netherlands), represented initially by F. Tuytschaever and B. Bellen, and subsequently by H. Burez and F. Wijckmans, lawyers,

applicant in Case T-116/09,

v

European Commission, represented by L. Flynn and C. Giolito, acting as Agents,

defendant,

supported by

French Republic, represented initially by G. de Bergues and A.-L. Vendrolini, and subsequently by G. de Bergues and J. Gstalter, acting as Agents,

and by,

Fagor France SA, established in Rueil-Malmaison (France), represented by J. Derenne and A. Müller-Rappard, lawyers,

interveners,

APPLICATION for the annulment of Commission Decision 2009/485/EC of 21 October 2008 on State aid No C 44/2007 (ex N 460/07) which France is planning to implement for FagorBrandt (OJ 2009 L 160, p. 11),

* Language of the case: English.

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and M. van der Woude, Judges,

Registrar: V. Nagy, Administrator,

having regard to the written procedure and further to the hearing on 29 June 2011,

gives the following

Judgment

Background to the dispute

1 The applicant in Case T-115/09 Electrolux AB and the applicant in case T-116/09 Whirlpool Europe BV ('Whirlpool') are undertakings operating in the sector of the manufacture and marketing of large home appliances. Electrolux and Whirlpool ('the applicants') are competitors of Fagor France SA ('FagorBrandt').

2 On 21 October 2008, the Commission of the European Communities adopted Decision 2009/485/EC on State aid No C 44/07 (ex N 460/07) which France [was] planning to implement for FagorBrandt (OJ 2009 L 160, p. 11) ('the contested decision').

3 The contested decision is divided into seven parts. In Part 1, entitled 'Procedure', the Commission states, first of all, that, on 6 August 2007, the French Republic notified it of aid for FagorBrandt ('the aid at issue'). The Commission then states that, on 10 October 2007, it informed the French Republic of its decision to initiate the procedure laid down in Article 88(2) EC. The decision to open the procedure ('the opening decision') was published in the *Official Journal of the European Union* (OJ 2007 C 275, p. 18) and the interested parties were invited to submit their comments on the aid at issue. Apart from the observations submitted by FagorBrandt, the Commission received comments from two of its competitors, Electrolux and another undertaking which wished to remain anonymous ('the second complainant') (recitals 1 to 5 in the preamble to the contested decision).

4 In Part 2 of the contested decision, entitled 'Description', the Commission finds inter alia that the aid at issue is restructuring aid, that the amount provided for is EUR 31 million and that it is granted by the French Ministry of Economic Affairs, Finance and Employment. It also points out that FagorBrandt belongs to a cooperative incorporated under Spanish law, Fagor Electrodomésticos S. Coop ('Fagor') which, in turn, forms part of a grouping of cooperatives called Mondragón Corporación Cooperativa ('MCC'). According to the Commission, FagorBrandt achieved a turnover of EUR 903 million in 2007 and is present in the three large product families of the electrical household appliance market, namely, washing appliances, refrigeration appliances and cooking appliances (recitals 6 to 9 of the contested decision).

5 In Part 3 of the contested decision, entitled 'Grounds for opening the procedure', of the contested decision the Commission lists the five reasons which led it to adopt the opening decision. First, it considered that there was a risk of circumvention of the prohibition on restructuring aid to newly created firms laid down by point 12 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2, 'the Guidelines'), in view of the fact that FagorBrandt had been established in January 2002. Second, there was a risk of circumvention of the obligation to reimburse incompatible aid granted to FagorBrandt by reason of the tax exemption on company profits from which it had benefited under Article 44 septies of the French General Tax Code ('the Article 44 septies aid'), the recovery of which the Commission ordered by Decision of

16 December 2003 on the State aid scheme implemented by France for the takeover of firms in difficulty (OJ 2004 L 108, p. 38). Third, the Commission expressed doubts on FagorBrandt's long-term viability. In that regard, it requested details of the forecast growth in FagorBrandt's turnover for 2007, which was 20% up on its 2006 turnover. It also asked FagorBrandt to explain how it was going to repay the incompatible aid received by its Italian subsidiary, FagorBrandt Italia ('the incompatible Italian aid'). Fourth, the Commission also had doubts regarding the adequacy of the compensatory measures taken as part of the restructuring plan. Fifth, the Commission doubted whether FagorBrandt's own share satisfied the requirements of points 43 and 44 of the Guidelines. It states in that regard, that the French authorities had not included the repayment of the Article 44 septies aid in the costs of restructuring. Also, the French authorities had not explained where certain amounts classed as FagorBrandt's own contribution came from (recitals 11 to 16 in the preamble to the contested decision).

6 In Parts 4 and 5 of the contested decision entitled 'Comments from interested parties' and 'Comments from France' respectively, the Commission states, first, the reasons why Electrolux and the second complainant consider that the conditions imposed by the Guidelines are not satisfied in the present case, namely that the aid at issue distorts competition, it is not limited to the minimum and it circumvents the obligation to repay earlier aid which the Commission declared to be unlawful. Second, the Commission states that the French Republic and FagorBrandt claimed that the latter fulfilled all the conditions under the Guidelines for receiving the aid at issue (recitals 17 to 33 in the preamble to the contested decision).

7 In Part 6 of the contested decision, entitled 'Assessment of the aid', first the Commission states that none of the parties disputed that the aid at issue constituted State aid within the meaning of Article 87(1) EC (recital 34 in the preamble to the contested decision).

8 Second, the Commission considers that the aid at issue can only be assessed in the light of the Guidelines, which France and the interested parties have not denied (recitals 35 and 36 in the preamble to the contested decision).

9 Third, the Commission examines whether FagorBrandt qualifies for restructuring aid in the light of the Guidelines. In that connection, it considers that FagorBrandt satisfies the conditions laid down in points 11 and 13 of the Guidelines since its financial difficulties had become too serious to be financed by Fagor. Also, it is apparent from the analysis of the financial situation of FagorBrandt, which was formed in January 2002, that it could not be regarded as being in difficulty during the first three years of its existence (recitals 37 to 43 in the preamble to the contested decision).

10 Fourth, the Commission states that FagorBrandt's financial difficulties do not stem primarily from the reimbursement of the Article 44 septies aid and that that undertaking is therefore eligible for restructuring aid. Moreover, it states that, according to the judgment in Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraphs 25 and 26 ('the judgment in *Deggendorf*'), there is, in the present case, nothing which precludes the grant of the aid at issue being suspended pending recovery of the Article 44 septies aid (recitals 44 to 50 in the preamble to the contested decision).

11 Fifth, the Commission examines the restructuring plan and concludes that it enables the undertaking to return to long-term viability. In that connection, it states, inter alia, that FagorBrandt's turnover rose in 2007, not by the 20% forecast by the latter in its restructuring plan, but by 16%. In addition, the Commission states, with regard to the fact that the restructuring plan did not indicate how FagorBrandt intended to reimburse the incompatible Italian aid, that the French authorities explained that the recovery of that aid should have no impact on the group's financial situation since, in essence, the amount of that reimbursable aid would probably be less than EUR 1 million. The Commission considers, in that regard, while ruling out the arguments put forward during the administrative procedure by the second complainant, that the additional compensatory measures

proposed by the French Republic after the adoption of the opening decision will not prevent a restoration of FagorBrandt's viability even though they will weaken the company (recitals 51 to 71 in the preamble to the contested decision).

12 Sixth, the Commission states in essence that, although the aid at issue causes distortion, three factors limit its negative consequences. Firstly, FagorBrandt has, at the most, only a 5% market share in Europe. The combined market shares of Fagor and FagorBrandt are, at the most, 8% in Europe. Moreover, four of its competitors have market shares of 10% or more. Secondly, the aid at issue represents less than 4% of FagorBrandt's European turnover. Furthermore, in the light of the fact that the aid at issue has adverse effects on trading conditions between Member States, real, non-negligible compensatory measures, the size of which is nevertheless limited, are necessary. In that regard, the Commission considers that the closure of two plants in France cannot be regarded as compensatory measures. However, the sale in March 2004 of FagorBrandt's subsidiary, Brandt Components, may, according to the Commission, be regarded as a compensatory measure. Since that measure alone must be considered inadequate, the Commission states that it is necessary to examine the additional compensatory measures proposed by the French authorities. It takes the view that the measure consisting in the cessation of marketing for five years of refrigeration, cooking and dishwashing appliances under the Vedette brand must be preferred as opposed to the divestment of the brand. It concludes in that regard that the cessation of marketing of those products for five years and the sale of its subsidiary Brandt Components avoided excessive distortions of competition for the purpose of points 38 to 40 of the Guidelines (recitals 72 to 95 in the preamble to the contested decision).

13 Seventh, as regards the obligation in points 43 to 45 of the Guidelines to limit to the strict minimum necessary the amount and intensity of the aid, the Commission points out that it had raised two points of doubt in that regard in paragraph 44 of the opening decision. The French authorities dispelled those doubts in their observations in response to the opening decision. First, the contribution of the recipient of the aid at issue consists of bank loans raised on the market amounting to between EUR 30 and EUR 35 million secured by stocks of finished products. Secondly, the reimbursement of the Article 44 septies aid, which amounts to between EUR 25 and EUR 30 million, including interest, was included in the restructuring plan. Even if reimbursement of the aid plus interest were included as a restructuring cost, that would not have the effect of reducing the recipient's own contribution to below the 50% required by point 44 of the Guidelines. The Commission also takes the view that, after the grant of the aid at issue and the restructuring has been completed, the group will still be significantly indebted (recitals 96 to 104 in the preamble to the contested decision).

14 In Part 7 of the contested decision, entitled 'Conclusion', the Commission takes the view that the aid at issue may be declared compatible with the common market under certain conditions.

15 The enacting terms of the contested decision are worded as follows:

'Article 1

The aid amounting to EUR 31 million which France is planning to implement for FagorBrandt is compatible with the common market, subject to the conditions laid down in Article 2.

Article 2

1. The French authorities shall suspend payment to FagorBrandt of the aid referred to in Article 1 of this Decision until such time as the recovery from FagorBrandt of the incompatible aid referred to in Commission Decision 2004/343/EC of 16 December 2003 has become effective.

2. FagorBrandt's restructuring plan, as communicated to the Commission by France on 6 August 200[7], shall be implemented in full.

3. FagorBrandt shall cease marketing refrigeration, cooking and dishwashing products of the Vedette brand for a period of five years beginning at the latest seven months after the date of notification of this Decision.

4. In order to ensure that the conditions laid down in paragraphs 1 to 3 of this Article are observed, France shall inform the Commission, by means of annual reports, of progress with the restructuring of FagorBrandt, the recovery of the incompatible aid described in paragraph 1, payment of the compatible aid, and implementation of the compensatory measures.

Article 3

France shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply with it.

Article 4

This Decision is addressed to the French Republic.'

Procedure and forms of order sought

16 By applications lodged at the Court Registry on 24 March 2009, the applicants brought actions for annulment of the contested decision, in Cases T-115/09 and T-116/09 respectively.

17 By letters lodged at the Court Registry on 30 June 2009, the applicants requested the Court to order the Commission, in connection with measures of organisation of procedure laid down in Article 64 of the Rules of Procedure of the General Court, to produce nine documents or categories of document to which the Commission refers in its defence in Cases T-115/09 and T-116/09.

18 By letters lodged at the Court Registry on 9 July 2009, the French Republic and FagorBrandt requested leave to intervene in support of the Commission in Cases T-115/09 and T-116/09.

19 By letters lodged on 27 July 2009, the Commission lodged its observations on the applicants' requests for disclosure of documents referred to in paragraph 17 above, and raised objections to those requests.

20 By letters lodged at the Court Registry on 24 August 2009, Electrolux, in its observations on the application to intervene referred to in paragraph 18 above, requested the Court to grant confidential treatment, vis-à-vis FagorBrandt and the French Republic, of certain figures in Annex 15 to the application since this is, in essence, information which is not publicly available and is of strategic value to Electrolux.

21 By orders of 22 September 2009, the President of the Second Chamber of the General Court granted the applications to intervene lodged by the French Republic and FagorBrandt in Cases T-115/09 and T-116/09. In those orders, the Court holds that, given that those applications were made after the period of six weeks laid down in Article 115(1) of the Rules of Procedure, the French Republic and FagorBrandt have the rights provided for in Article 116(6) of those rules.

22 By letters lodged at the Court Registry on 30 September 2009, FagorBrandt asked the Court for access to the case file in Cases T-115/09 and T-116/09 and for copies or extracts of procedural documents, subject to the confidential treatment of certain information or documents on the file.

23 By decision of 7 October 2009, the President of the Second Chamber of the General Court decided to refuse the applications mentioned in paragraph 22 above, in accordance with Article 116(6) of the Rules of Procedure.

24 By letters lodged at the Court Registry on 1 June 2010, the applicants provided new evidence consisting in a Commission press release of 5 May 2010, in which the latter stated in particular that it had not received 'the necessary evidence' to definitively conclude that FagorBrandt, had, at that date, reimbursed the Article 44 septies aid. The Commission submitted its observations on that letter on 22 June 2010.

25 Owing to a change in the composition of the chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber to which, in consequence, the present case was assigned.

26 By order of the President of the Fourth Chamber of 5 May 2011, after hearing the parties, Cases T-115/09 and T-116/09 were joined for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure. The application for confidential treatment of certain documents made by Electrolux with respect to Whirlpool was granted.

27 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, to put written questions to the parties and requested the Commission to produce certain documents. The parties complied with those requests within the period prescribed.

28 At the hearing on 29 June 2011, the parties presented oral argument and answered the questions put to them by the General Court.

29 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

30 The Commission, supported by the French Republic and by FagorBrandt, contend that the Court should:

— dismiss the actions as unfounded;

— order the applicants to pay the costs.

Law

31 In support of their action the applicants advance two pleas in law.

32 In their first plea, the applicants state essentially that the conditions laid down in the Guidelines necessary for restructuring aid to be declared compatible with the common market are not met in this case. They divide this plea into eight parts. They submit that the following conditions are not fulfilled: first, the 'one time, last time' condition as laid down in points 5 and 72 to 77 of the Guidelines, according to which, in substance, restructuring aid cannot be granted in the 10 years following the grant of such aid has not be complied with; second, the condition that, in accordance with point 8 of the Guidelines, restructuring aid cannot serve to keep firms artificially alive in a sector with structural overcapacity; third, the condition, laid down in point 23 of the Guidelines, according to which the Commission must take into consideration previous unlawful aid granted and not recovered when examining the grant of restructuring aid; fourth, the condition laid down in point 33 of the Guidelines, according to which the beneficiary of restructuring aid must be 'a firm in difficulty'; fifth, the condition set out in point 12 of the Guidelines that the beneficiary of the aid must not be a newly created firm; sixth, the condition that, in accordance with points 34 and 35 of the Guidelines, the restructuring plan must restore the long-term viability of the beneficiary; seventh, the condition, in

points 38 to 40 of the Guidelines, that the compensatory measures must be proportionate to the distortion of competition caused by the aid at issue; eighth, the condition laid down in point 43 of the Guidelines according to which restructuring aid must be limited to the minimum and a real contribution from the group to which FagorBrandt belongs must be made.

33 By their second plea, the applicants submit essentially that, in the contested decision, the Commission has failed to fulfil its duty to state reasons laid down in Article 253 EC in several respects. They divide that plea into three parts. First, Electrolux submits that the Commission failed to deal with the existence of structural overcapacity on the market, even though Electrolux had informed it during the administrative procedure of the existence of such overcapacity. According to Whirlpool, the Commission should have stated the reasons why it did not consider it necessary to reduce the distortion of competition in Member States other than France. Second, the applicants take the view that the Commission failed to state the reasons why it considered that the contribution of the group to which FagorBrandt belonged was of a satisfactory level in that is was the highest possible. Third, they take the view that, in the contested decision, the Commission should have stated the reasons why it was not necessary to assess the impact of the repayment of the Article 44 septies aid on the restoration of FagorBrandt's long-term viability.

34 The Commission, supported by the French Republic and FagorBrandt, challenges those two pleas.

35 First, the Court considers it appropriate to point out that it is common ground that, in paragraph 36 of the contested decision, the Commission considered the compatibility with the common market of restructuring aid must be examined in the light of Article 87(3)(c) EC. In that connection, the General Court will set out as a preliminary point the legal framework relating to the Commission's discretion with respect to the examination of the compatibility of restructuring aid with the common market and the General Court's power of review in that area. Second, it will start its examination of the pleas raised by the applicants by considering the seventh part of the first plea.

The relevant legal framework relating to the review of the grant of restructuring aid

36 First, Article 87(3)(c) EC states that aid to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest may be considered to be compatible with the common market.

37 According to settled case-law, in the application of Article 87(3)(c) EC, the Commission has a wide discretion the exercise of which involves complex economic and social assessments which must be made in a Community context (Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18; Case C-372/97 *Italy* v *Commission* [2004] I-3679, paragraph 83; and Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraph 137).

38 Furthermore, the Commission may lay down for itself guidance for the exercise of its discretion by adopting acts such as the guidelines on undertakings in difficulty inasmuch as those acts contain indications as to the direction to be followed by that institution and do not depart from the Treaty rules (see Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, paragraph 77 and the case-law cited).

39 In that context, it must be observed, as regards the definition of restructuring aid, that it is apparent from points 16 and 17 of the Guidelines that the Commission considers that such aid is intended to restore the long-term viability of a firm, unlike rescue aid which consists of temporary assistance and is intended for the implementation of immediate measures.

40 Second, it is settled case-law that judicial review of the manner in which the Commission's discretion is exercised in the application of Article 87(3)(c) EC is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with, and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error of assessment of the facts or misuse of powers (see, to that effect, Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 93, and *Corsica Ferries France* v *Commission*, paragraph 138 and the case-law cited). However, it is not for the Court to substitute its own economic assessment for that of the author of the decision (Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 79, and *Corsica Ferries France* v *Commission*, paragraph 138).

41 Furthermore, the Court must also verify whether the requirements which the Commission has laid down in the Guidelines have been observed (see, to that effect, *Keller and Keller Meccanica* v *Commission*, paragraph 77 and the case-law cited).

42 However, it is not for the European Union judicature to replace the Commission by carrying out in its stead an examination it never carried out and drawing the conclusions which it would have drawn (Case T-266/02 *Deutsche Post* v *Commission* [2008] ECR II-1233, paragraph 95; see, to that effect, Case T-274/01 *Valmont* v *Commission* [2004] ECR II-3145, paragraph 136).

43 The present action must be examined, in the light of those principles.

The seventh part of the first plea: infringement of points 38 to 40 of the Guidelines relating to the fact that the compensatory measures adopted are not proportional to the distortion of competition caused by the aid at issue

44 It must be observed, as regards the adoption of compensatory measures in the context of the grant of restructuring aid, that points 38 to 40 of the Guidelines relate to the 'avoidance of undue distortions of competition'. Pursuant to those provisions, and as the Commission observes in its pleadings, in the first place, compensatory measures must be adopted in order to limit the negative effects of the grant of restructuring aid on competition and trade (point 38 of the Guidelines). In the second place, those measures must be 'appropriate' in that they must not lead to a deterioration in the structure of the market (point 39 of the Guidelines). In the third place, they must be 'in proportion' to the distortive effects of the aid. In that connection, first, they must take place in particular in the market(s) where the firm will have a significant market position after restructuring. Second, while those measures may take place before or after the grant of the aid, they must in any event be an integral part of the restructuring plan. Third, they must not consist simply of write-offs and the closure of loss-making activities where they would not lead to a reduction of capacity or market presence of the relevant firm (point 40 of the Guidelines).

45 The applicants point out that, pursuant to points 38 and 40 of the Guidelines, compensatory measures must, in essence, be in proportion to the distortive effects caused by restructuring aid and, second, must take place on the market(s) where the firm will have a significant position after restructuring. They set out three main complaints in that regard. By their first complaint, they submit that the compensatory measures adopted by the Commission are insufficient with regard to the significant position FagorBrandt occupies in the market. By their second complaint, they claim that the sale of Brandt Components is not an appropriate compensatory measure. By their third complaint, they submit that the cessation for five years of the marketing of refrigerators, cookers and dishwashers under the Vedette brand is not a proportionate compensatory measure, taking account of the distortive effects created by the aid at issue.

46 The Commission disputes each of those three complaints.

47 In the present case, it should be observed that, after stating in recitals 80 and 81 of the contested decision that the closure of two of FagorBrandt's factories do not constitute compensatory measures since they consisted in the closure of loss-making activities, the Commission stated, in recitals 82 and 83 of the contested decision, as regards the sale of Brandt Components, as follows:

'(82) By contrast, in March 2004 the company divested its subsidiary Brandt Components (Nevers plant) to the Austrian group ATB for EUR [2-5] million. What was involved here, therefore, was neither a write-off […] nor a closure of an activity. This measure is therefore not excluded by the […] provision in point 40 of the […] [G]uidelines. The business divested in March 2004 […] had in 2003 a turnover of EUR [25-45] million — equivalent to [2-5]% of the company's 2003 turnover — and [250-500] employees — equivalent to [5-10]% of the company's workforce. It was active in the design, development, manufacture and marketing of electric motors for washing machines. The divestment has accordingly led to a reduction in the company's presence in the washing machine component market.

(83) While accepting that this measure constitutes a compensatory measure, the Commission considers that it cannot on its own outweigh the adverse effects of the aid [at issue]. The Commission would observe notably that the measure does not reduce FagorBrandt's presence in the large electrical household appliance market […], the main market in which FagorBrandt will remain present.'

48 Footnote No 32 of the contested decision, to which recital 83 in the preamble to that decision refers, is worded as follows:

'The French authorities state that the activity of Brandt Components enabled the company to benefit from a strongly integrated production of high-end washing machines, which is historically a strength of the FagorBrandt group. According to the French authorities, this type of integration is particularly highly sought after in the case of innovative products or products requiring specific know-how and is practised by the major operators in the sector (e.g. BSH or Miele). The Commission would observe, however, that, beyond the earlier assertions, the French authorities have not furnished any evidence such as might enable it to establish beyond doubt — and even less to quantify the resulting effect — that the divestment of Brandt Components will reduce FagorBrandt's ability to develop competitive washing machines and will consequently reduce the presence of FagorBrandt in the washing machine market. The Commission cannot therefore conclude that the divestment of Brandt Components has a real effect on the large electrical household appliance market.'

49 On one hand, therefore, it is clear from recitals 82 and 83 of the contested decision and footnote No 32 of that decision that the Commission considered that the sale of Brandt Components could be treated as a compensatory measure since it was neither a mere 'write-off' nor a 'closure of an activity' and that it 'led to a reduction in the company's presence in the washing machine component market'. On the other hand, the Commission also considered that that compensatory measure did not reduce FagorBrandt's presence in the main market, that is, the large electrical household appliance market, so that that measure was insufficient on its own to limit the distortion of competition resulting from the grant of the aid at issue.

50 The Court will examine, in the light of the findings set out in paragraphs 47 to 49 above, first of all the applicants' second complaint according to which the Commission wrongly held that the sale of Brandt Components constituted an appropriate compensatory measure.

51 First, it is common ground that the sale of Brandt Components took place in March 2004, and that the French Republic notified the Commission of the aid at issue on 6 August 2007, that is almost three and a half years after the sale. In that connection, it may be stated therefore that even if, as the Commission observes, the French Republic took the view that the sale of Brandt Components was an integral part of the restructuring plan that it notified to the Commission, that measure, when it was adopted in

March 2004, as the applicants point out, was not intended to reduce, and could not have had the effect of reducing, the distortions of competition to which the grant of the planned aid by the French Republic in its notification of 6 August 2007 gave rise.

52 In that connection, the Court rejects as unfounded the Commission's argument, supported by FagorBrandt, that it follows from the judgment in *Corsica Ferries France* v *Commission* (paragraph 225) that a compensatory measure may be adopted before the implementation of the restructuring plan. As the applicants rightly observe, while the General Court held in that judgment that a compensatory measure could be adopted before the implementation of the restructuring plan, it took account of the specific circumstances in which the measure concerned had been decided almost one month before the adoption of the restructuring plan and that it had been implemented almost one month after the plan had been notified to the Commission. Since the facts of the case which led to the adoption of that judgment are therefore not comparable to those in the present case, in which the sale of Brandt Components took place almost three and a half years before even the restructuring aid and FagorBrandt's restructuring plan were notified to the Commission.

53 Second, while it is not disputed that, as the Commission pointed out in recital 82 of the contested decision, the sale of Brant Components reduced FagorBrandt's presence in the washing machine component market, it must be observed however that none of the parties has argued or established during the administrative procedure or before the Court that that sale had the effect of reducing, even minimally, the adverse effects resulting from the aid at issue on the competition existing on the main market in which FagorBrandt was present. To the contrary, as is clear from recital 83 and footnote No 32 of the contested decision (see paragraphs 47 and 48 above), the Commission ruled out the claim that the sale of Brandt Components had a 'real effect' on the washing machine market, which is part of the large electrical appliances sector, which is the 'main market' in which FagorBrandt was active according to the Commission.

54 Third, contrary to the Commission's findings in recital 82 of to the contested decision, the fact that the sale of Brandt Components was neither a write-off nor a closure of an activity did not mean that it was a compensatory measure able to reduce the negative effects on competition created by the grant of the aid at issue. Therefore, as stated in paragraphs 52 and 53 above, as that measure was not intended and, in any event, did not have the effect of limiting the negative effects of the grant of the aid at issue on trade and competition, it could not reasonably be regarded as a compensatory measure.

55 In light of the findings set out in paragraphs 51 to 54 above, it must be held that the Commission committed a manifest error of assessment by holding, in recital 83 of the contested decision, that the sale of Brandt Components constituted a compensatory measure within the meaning of points 38 to 40 of the Guidelines. Therefore, it is appropriate to examine the effects of such an error on the substance of the Commission's analysis that the compensatory measures adopted in the present case reduced the negative effects on competition resulting from the grant of the aid at issue.

56 First of all, it must be observed that, in recital 94 of the contested decision, the Commission recalled:

'The compensatory measures are the cessation of the marketing for a period of five years of certain products of the Vedette brand (cooking, refrigeration and dishwashing) […] and the divestment of Brandt Components. The result is a real (i.e. non-negligible) reduction in market presence [of FagorBrandt], the size of which is, however, limited. This reduction is therefore proportionate to the extent of the distortion of competition and trade as analysed above.'

57 The Commission concluded its analysis in that regard, in recital 95 in the preamble to the contested decision, by stating the following:

'Consequently, the Commission considers that these measures can avert the risk of excessive distortions of competition within the meaning of points 38 to 40 of the … [G]uidelines.'

58 In the light of the foregoing, it must be held that, to the extent that, as stated in paragraph 53 above, the sale of Brandt Components had no real effect on the main market in which FagorBrandt operated, the Commission incorrectly concluded that, in essence, the combination of that compensatory measure with that consisting in the cessation of the marketing of certain products for five years under the Vedette brand limited proportionately the negative effects on competition generated by the grant of the aid at issue. First, it must be stated in that regard that the Commission neither considered nor established in the contested decision or before the Court that the adoption of that compensatory measure was sufficient on its own to reduce proportionately, in accordance with the requirements laid down in points 38 to 40 of the Guidelines, the negative effects on competition resulting from the grant of the aid at issue. Second, and in any event, it is not for the Court, according to the case-law set out in paragraph 42 above, to replace the Commission by carrying out in its stead an examination of whether the latter compensatory measure was sufficient on its own to limit the negative effects on competition resulting from the grant of the aid at issue and by drawing conclusions that the Commission should have drawn from that examination.

59 In those circumstances, without it being necessary to give a ruling on the first and third complaints in the seventh part of the first plea, the Court upholds the second complaint of that part raised by the applicants, and finds that the sale of Brandt Components does not constitute an appropriate compensatory measure.

60 Without prejudice to the foregoing conclusion, the Court also considers it appropriate to examine, for the sake of completeness, the third part of the first plea raised by the applicants.

The third part of the first plea: failure to take into consideration the earlier aid granted and not recovered

61 In the third part of the first plea, the applicants raise two main complaints, relating to an infringement of point 23 of the Guidelines, as implemented by the Commission by reference to the judgment in *Deggendorf*. They claim that the Commission failed to examine the cumulative effect of the aid at issue, first, with the Article 44 septies aid and, second, with the incompatible Italian aid, the latter not yet having been recovered.

62 The Commission contests those two complaints.

63 The Court will examine, as a preliminary point, the applicants' second complaint that the Commission failed to take into consideration the cumulative effect of the aid at issue with the incompatible Italian aid.

64 First of all, it must be recalled that in the judgment in *Deggendorf* the Court held that the Commission does not exceed the limits of its discretion where it adopts a decision declaring compatible with the common market aid which a Member State is proposing to grant to an undertaking, subject to the repayment by the undertaking of previous unlawful aid, on account of the cumulative effect of the aids in question (see judgment of 8 September 2009 in Case T-303/05 *AceaElectrabel* v *Commission*, not published in the ECR, paragraph 166 and the case-law cited).

65 Next, it must be recalled that point 23 of the Guidelines, in which the Commission refers to the judgment in *Deggendorf* in footnote No 14 is worded as follows:

'Where unlawful aid has previously been granted to the firm in difficulty, in respect of which the Commission has adopted a negative decision with a recovery order, and where no such recovery has taken place in compliance with Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999

laying down detailed rules for the application of Article [88] EC, the assessment of any rescue and restructuring aid to be granted to the same undertaking shall take into account, first, the cumulative effect of the old aid and of the new aid and, secondly, the fact that the old aid has not been repaid […]'

66 Therefore, it follows from the judgment in *Deggendorf*, and point 23 of the Guidelines, that, in its examination of the compatibility with the common market of restructuring aid, the Commission must in principle examine the cumulative effect of that aid with any earlier aid which has not yet been recovered. Such an examination is justified on account of the fact that the advantages conferred by the grant of earlier incompatible aid which has not yet been recovered continue to produce effects on competition.

67 Moreover, if the Commission makes the grant of the planned aid subject to the prior recovery of earlier aid, it is not obliged to examine the cumulative effect of the aid on competition. The imposition of such a condition prevents the advantage conferred by the planned aid from combining with that conferred by the earlier aid, the negative effects on competition resulting from the grant of the earlier aid having been eliminated by recovery of the amount of that aid plus interest. According to case-law, the recovery of aid with interest removes the undue advantage consisting in the non-payment of the interest which the recipient would have paid on the amount in question of compatible aid, had it had to borrow that amount on the market pending the Commission's decision, and in the improvement of its competitive position as against the other operators in the market while the unlawfulness lasts (Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 51).

68 In the present case, it must be observed that, having found in recital 48 of the contested decision that 'nothing seem[ed] to stand in the way of applying the *Deggendorf* approach, i.e. finding the […] aid [at issue] compatible provided its payment is suspended pending recovery of the Article 44 septies aid', the Commission took the view, in recital 50 of that decision that:

'[…] Point 23 of the … [G]uidelines requires the Commission, when assessing restructuring aid, to "take into account, first, the cumulative effect of the old aid and of the new aid and, secondly, the fact that the old aid has not been repaid." As indicated in footnote No 14 of the […] [G]uidelines, this provision is based on the […] *Deggendorf* judgment. In the present case, France has undertaken to recover the Article 44 septies aid before paying the new aid. In this Decision, the Commission is required, on the basis of the findings in [the] *Deggendorf* [judgment], to transform this commitment into a condition precedent to the compatibility of the notified aid. [The Commission] will thus ensure that there is no combination of the old aid with the new aid and that the old aid is reimbursed. Hence it will no longer be necessary, in the remainder of the assessment of the new aid, to take into account the cumulative effect of the aid or the absence of reimbursement.'

69 In that context, as regards the incompatible Italian aid in particular, first, it should be noted that it is common ground, as is clear in essence from recital 61 of the contested decision, that, when the contested decision was adopted, the Italian subsidiary of FagorBrandt remained liable for part of that aid in an amount of less than EUR 1 million.

70 Second, as is clear from recital 50 of the contested decision set out in paragraph 68 above, unlike in the case of the Article 44 septies aid, the Commission, in the contested decision, did not make the grant of the aid at issue subject to the prior repayment of the incompatible Italian aid. Moreover, it is clear from the contested decision that the Commission did not take into consideration the cumulative effect on competition of that advantage with that resulting from the grant of the aid at issue. Under heading '6.6 Avoidance of undue distortions of competition' in the contested decision and, in particular, in recital 76, the Commission examined only the factors tending 'to limit the negative consequences of [the] distortion of competition' generated by the grant of the aid at issue alone. Furthermore, as is clear from recital 94 of the contested decision, the compensatory measures, on

which the compatibility with the common market of the aid at issue was conditional, relate to the distortion of competition generated by the grant of just that aid, and its cumulative effect with the incompatible Italian aid was not taken into account.

71 Since the Commission did not make the grant of the aid at issue conditional on the recovery of the incompatible Italian aid, it should therefore have examined the cumulative effect of the two types of aid, which it failed to do in the present case. That finding is valid even if, as the Commission essentially considers in recital 31 of the opening decision and submitted at the hearing, together with the French Republic and FagorBrandt, that it should be held that it was not possible for it, pursuant to the judgement in *Deggendorf*, to make the grant of the aid at issue by the French Republic conditional on the prior recovery of the incompatible Italian aid by the Italian Republic.

72 In the light of the foregoing, it must be held that the Commission committed a manifest error of assessment in its examination of the distortion of competition in the present case.

73 The arguments put forward by the Commission, FagorBrandt and the French Republic in that regard do not call that finding into question.

74 In the first place, as regards the argument put forward by the Commission in its pleadings and in response to the questions from the Court at the hearing, according to which it examined the effect of the repayment of the amount in question on the viability of the restructuring, such an argument must be dismissed as ineffective. The fact that the Commission found, in recital 61 of the contested decision that, according to the French authorities, the repayment of that aid should 'have no impact on the group's financial situation', is separate from and without influence on the examination which the Commission should have carried out concerning the cumulative effect of the aid in question on competition and the compensatory measures which should have been adopted in consequence.

75 In the second place, in so far as the Commission argues in its pleadings that the 'true economic effect of [the incompatible Italian aid] was minimal', such an argument cannot justify the failure to take into consideration the cumulative effect of the aid at issue with the incompatible Italian aid.

76 Although, as is clear from the case-law set out in paragraph 37 above, the Commission has a wide discretion in the examination of the compatibility of restructuring aid with the common market, the fact that the amount of earlier aid outstanding is proportionally insignificant as compared with the planned aid does not exempt it from the duty to analyse the cumulative effect of the two items of aid, in accordance with the judgment in *Deggendorf*. In that regard, it must be recalled that, according to the case-law set out in paragraph 42 above, it is not for the Court to carry out such an examination and to draw the conclusions that the Commission should have drawn.

77 Therefore, the second complaint of the third part of the first plea must be upheld, without any need to examine the first complaint of that part.

78 Consequently, the contested decision must be annulled and there is no need to give a ruling on the six other parts of the first plea, or on the second plea, and, in particular, the first part thereof, alleging a failure to state reasons in the contested decision concerning the existence of structural overcapacity on the market (see paragraph 33 above).

The applications for measures of organisation of procedure

79 As noted in paragraphs 17 and 19 above, the applicants requested the Court to order the Commission to provide, in measures of organisation of procedure, certain documents or categories of documents, which the Commission opposed.

80 Since, as held in paragraph 78 above, the contested decision must be annulled without there being any need to examine the merits of the applications for measures of organisation of procedure made by the applicants, there is no need to give a ruling on those applications, which have become nugatory.

Costs

81 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Moreover under the first and third subparagraphs of Article 87(4) of those rules, Member States which intervened in the proceedings are to bear their own costs and the Court may order an intervener other than a Member State, States which are parties to the Agreement on the European Economic Area and the EFTA Surveillance Authority to bear their own costs.

82 Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those of the applicants in accordance with the form of order they have sought.

83 The French Republic and FragorBrandt, who have not lodged any pleadings, shall bear their own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls Commission Decision 2009/485/EC of 21 October 2008 on State aid No C 44/07 (ex N 460/07) which France is planning to implement for FagorBrandt;**

2. **Orders the European Commission to bear its own costs and to pay those of Electrolux AB and Whirlpool Europe BV;**

3. **Orders the French Republic and Fagor France SA to bear their own costs.**

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 14 February 2012.

[Signatures]