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

14 October 2004 *

In Case T-137/02,

Pollmeier Malchow GmbH & Co. KG, established in Malchow (Germany), represented by S. Völcker and J. Heithecker, lawyers,

applicant,

v

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

defendant,

ACTION for annulment of Commission Decision 2002/821/EC of 15 January 2002 on the State aid implemented by Germany for Pollmeier GmbH, Malchow (OJ 2002 L 296, p. 20),

* Language of the case: German.

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

composed of: H. Legal, President, V. Tiili, A.W.H. Meij, M. Vilaras and N.J. Forwood, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 4 March 2004,

gives the following

Judgment

Legal background

1 The 18th and 19th recitals in the preamble to Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises (SMEs) (OJ 1996 L 107, p. 4) state as follows:

'... independence is also a basic criterion in that an SME belonging to a large group has access to funds and assistance not available to competitors of equal size; ... there is also a need to rule out legal entities composed of SMEs which form a grouping whose actual economic power is greater than that of an SME;

... in respect of the independence criterion, the Member States, the [European Investment Bank] and the [European Investment Fund] should ensure that the definition is not circumvented by those enterprises which, whilst formally meeting this criterion, are in fact controlled by one large enterprise or jointly by several large enterprises.'

2 The 22nd recital in the preamble to Recommendation 96/280 states '... fairly strict criteria must be laid down for defining SMEs if the measures aimed at them are genuinely to benefit the enterprises for which size represents a handicap'.

3 Article 1 of the annex to that recommendation, headed 'Definition of small and medium-sized enterprises adopted by the Commission', sets out the following criteria ('the definition criteria for SMEs'):

'1. [SMEs] are defined as enterprises which:

— have fewer than 250 employees, and

— have either,

an annual turnover not exceeding [EUR] 40 million, or

an annual balance-sheet total not exceeding [EUR] 27 million,

— conform to the criterion of independence as defined in paragraph 3.

...

3. Independent enterprises are those which are not owned as to 25% or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME ...

4. In calculating the thresholds referred to in [paragraph 1], it is therefore necessary to cumulate the relevant figures for the beneficiary enterprise and for all the enterprises which it directly or indirectly controls through possession of 25% or more of the capital or of the voting rights.

...

6. Where, at the final balance-sheet date, an enterprise exceeds or falls below the employee thresholds or financial ceilings, this is to result in its acquiring or losing the status of "SME" ... only if the phenomenon is repeated over two consecutive financial years.

...

8. The turnover and balance-sheet total thresholds are those of the last approved 12-month accounting period. In the case of newly-established enterprises whose accounts have not yet been approved, the thresholds to apply shall be derived from a reliable estimate made in the course of the financial year.'

4 Point 3.2 of Commission Notice 96/C 213/04 laying down Community guidelines on State aid for SMEs (OJ 1996 C 213, p. 4, 'the SME guidelines'), headed 'Definition of SMEs', states in the first and fourth paragraphs:

'For the purpose of applying the guidelines, an SME is defined in accordance with [Recommendation 96/280] ...

The three tests — workforce, turnover or balance-sheet total, and independence — are cumulative: all three must be satisfied. The independence test, according to which a large enterprise must not hold 25% or more of the SME's capital, is based on practice in a number of Member States where this percentage is the threshold at which supervision becomes possible. In order to ensure that only genuinely independent SMEs are included, there has to be a way of eliminating legal arrangements in which SMEs form an economic group much stronger than an individual SME. In calculating the thresholds referred to above, it is therefore necessary to cumulate the relevant figures for the beneficiary enterprise and for all the enterprises which it directly or indirectly controls through possession of 25% or more of the capital or of the voting rights.'

5 The Law on the joint Federal/*Länder* scheme for improving regional economic structures (Gemeinschaftsaufgabe) establishes the principal scheme for regional aid in Germany. The 27th outline plan adopted in application of that law for the period 1996/99 ('the 27th outline plan') was approved by the Commission on 12 June 1999 (OJ 1999 C 166, p. 9). Pursuant to the 27th outline plan, for investments in the *Land* of Mecklenburg-Western Pomerania, aid may be granted up to a limit of 50% of the gross amount of the investments eligible for the grant of aid ('the eligible investment cost') in the case of SMEs and 35% in the case of large enterprises.

6 It is clear from the decisions of the Commission to initiate the procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC) as regards, respectively, the 27th outline plan (OJ 1999 C 80, p. 3) and the 26th outline plan (OJ 1997 C 341, p. 4), that those two schemes adopt the definition of SMEs laid down by the SME guidelines.

Background to the dispute

7 On 27 May 1998, the applicant, then called Pollmeier GmbH, Malchow, lodged an application for investment aid. By decision of 2 September 1998, amended on 12 May 1999, the Ministry of Economic Affairs of the *Land* of Mecklenburg-Western Pomerania granted the applicant an investment aid under the 27th outline plan for the construction of a sawmill in Malchow. That sawmill had to be located in an assisted area covered by Article 87(3)(a) EC. The aid, limited to DEM 16 384 600 (EUR 8 377 313), corresponded to 30.23% of the gross eligible investment cost of DEM 54.2 million (EUR 27.7 million).

8 A supplementary investment allowance of DEM 9.3 million (EUR 4.75 million) was also granted, corresponding to 17.15% of the gross eligible investment cost. In addition, the applicant received, on 27 January 1999, a loan from the European Reconstruction Programme of DEM 5 million (EUR 2.55 million) at an interest rate of 3.75% per annum. The benefit from that subsidised rate corresponded to 0.8% of the gross eligible investment cost. The total aid resulting from the above measures amounted to 48.18% of the gross eligible investment cost.

9 Following receipt of a number of complaints about the aid granted to the applicant, the defendant, by letter of 17 April 2000, put the Federal Republic of Germany on notice to provide it with all information necessary to enable it to determine whether that aid fell within a previously authorised scheme.

10 By letters received by the defendant on 22 May 2000, 16 June 2000 and 9 August 2000, the Federal Republic of Germany complied with that request.

11 The defendant simultaneously informed the German Government by letter of 13 March 2001 that it had decided to initiate the procedure provided for in Article 88 (2) EC and requested that government to provide information in accordance with Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] EC (OJ 1999 L 83, p. 1). The parties concerned were informed of the initiation of that procedure and requested, by the publication of the abovementioned letter in the *Official Journal of the European Communities* of 9 June 2001 (OJ 2001 C 166, p. 5), to submit any observations they might have.

12 By letter of 15 May 2001, the Federal Republic of Germany submitted observations on the decision to initiate the procedure and replied to the request to provide information referred to in the preceding paragraph.

13 On 15 January 2002, the defendant adopted Commission Decision 2002/821/EC on the State aid implemented by Germany in favour of the applicant (OJ 2002 L 296, p. 20, 'the contested decision').

14 The operative part of the contested decision reads as follows:

'*Article 1*

The State aid which [the Federal Republic of Germany] has implemented for [the applicant] amounting to EUR 3 650 860 is incompatible with the common market.'

15 It is not in dispute that when the aid was granted the entirety of the applicant's capital was held by Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, the capital of which was wholly owned by Mr Pollmeier. Pollmeier GmbH, Holzverarbeitungsbetrieb, also held 60% of the capital of Pollmeier Massivholz GmbH & Co. KG, Creuzburg, with the remaining 40% held by Mr Pollmeier.

16 Until 1 June 1998, Mr Pollmeier also held 74.25% of the capital of an American company, Inland Wood Specialties, LP, Spokane ('IWS'), the remainder of the capital of which was held by his brother. On 1 June 1998, Mr Pollmeier transferred 41% of the capital of IWS to his sister Mrs Tegelkamp, and 10% to Mr Gottwald. Since that date, therefore, Mr Pollmeier has not held more than 23.25% of the capital of IWS.

17 On 17 July 1999, Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, transferred all its assets and liabilities — apart from the shares in the capital of Pollmeier Massivholz GmbH & Co. KG, Creuzburg, and in that of the applicant — to Pollmeier Leimholz GmbH, Rietberg, which had been newly established for that purpose. The registered office of Pollmeier GmbH, Holzverarbeitungsbetrieb, was subsequently transferred from Rietberg to Creuzburg and its name was changed to Pollmeier Massivholz GmbH, Creuzburg. Furthermore, Pollmeier Massivholz GmbH & Co. KG, Creuzburg, became Pollmeier Creuzburg GmbH & Co. KG, Creuzburg, whilst the applicant, until then called Pollmeier GmbH, Malchow, became Pollmeier Malchow GmbH & Co. KG, Malchow.

18 The grounds of the contested decision state as follows:

'56. The aid granted to [the applicant] in 1998/99 to construct a sawmill in Malchow, which corresponded to a total aid intensity of 48.18% gross, was allegedly granted under regional schemes previously approved by the Commission [27th outline plan, Law on tax investment premiums, European Reconstruction Fund].

...

59. The [defendant] notes that the measures were granted in disadvantaged regions covered by Article 87(3)(a) of the EC Treaty. The Commission further notes that the maximum permissible gross aid intensity under the programmes applicable in these regions was 35% and 50% for large enterprises and SMEs respectively. These percentages are ceilings to be applied to the total aid granted if aid is granted concurrently under several regional schemes or from local, regional, national or Community resources.

60. In view of the gross intensity of the measures (48.18%), the aid granted to [the applicant] presupposes that the recipient firm met the SME criteria defined in the applicable Community guidelines and [Recommendation 96/280] when the programme was approved.

...

70. [The defendant] is of the opinion that 1998 is to be viewed as the year of the grant. Accordingly, the reference data for the beneficiary should be the number of employees and the financial data from 1997 and 1996. ...

71. [The defendant] is of the opinion that, contrary to the comments of [the Federal Republic of Germany], IWS, the United States-based company, must be considered when defining the beneficiary. In 1996 and 1997 the beneficiary enterprise consisted of Pollmeier GmbH Holzverarbeitungsbetrieb, Rietberg, Pollmeier Massivholz GmbH & Co. KG, Creuzburg, and IWS. All of these companies are directly or indirectly controlled by [Mr] Pollmeier and are engaged in the same or parallel economic activities. One can therefore conclude that they are economically integrated. None of these companies can be said to form an independent economic unit. The degree of economic integration is sufficiently high to conclude that IWS forms an economic unit together with the two European Pollmeier sawmills.

72. If one considers 1996 and 1997, it is evident that the beneficiary was not an SME in 1998. In 1996 the cumulated number of employees was 416 and the cumulated annual turnover EUR 44.8 million, thus exceeding the SME thresholds. In 1997 the

beneficiary had 465 employees, annual turnover of EUR 66.73 million and a balance-sheet total of EUR 29.19 million. The data of the beneficiary exceeded the SME thresholds in 1997. Accordingly, the beneficiary exceeded the SME thresholds in two consecutive financial years.

...

80. Recommendation [96/280] stipulates that a company acquires or loses the status of an SME only if the thresholds are exceeded or fallen below over two consecutive years. It is clear that the beneficiary was above the SME thresholds prior to 1 June 1998. This fact is to be taken into account when reviewing the SME status of the beneficiary as required in accordance with Article 1(6) of the annex to the recommendation. At the time the aid was granted (i.e. 1999), the data of the beneficiary enterprise had fallen below the SME thresholds for less than one year. The [defendant] therefore concludes that the aid beneficiary does not formally comply with the SME definition and that it cannot be seen as suffering from the handicaps to SMEs.

...

82. [The defendant] doubts whether [the] change of ownership [of IWS] is motivated by any purposes other than the circumvention of the SME definition. ...

83. Neither [the Federal Republic of Germany] nor the beneficiary itself has presented any justification for the change in the ownership structure of the Pollmeier group. Apparently, the only purpose of this restructuring was to [ensure] that [the applicant] would enjoy the advantages granted to SMEs to offset specific handicaps linked to their size. A look at the structure of the Pollmeier group, the links between the shareholders of the various Pollmeier companies and the economic links of the various entities of the group gives the impression that the group does not suffer from the typical handicaps of SMEs referred to by the Community guidelines. For example, [the applicant] benefits in particular from the market presence of the other companies of the Pollmeier group and from the technology of the existing sawmills and will not therefore have to overcome the (technological and distributive) obstacles otherwise associated with entry into the relevant market.

...

86. Given that the aid beneficiary is a large company, only 35% of the aid granted complies with the conditions of the scheme; therefore only aid up to this amount can be seen as existing aid. The remaining 13.18% must be viewed as new aid. Since this new aid was granted without the Commission's approval, it is illegal.

...'

Procedure and forms of order sought

19 By application lodged at the Court Registry on 29 April 2002, the applicant brought the present action.

20 By letter of 26 November 2002, the applicant abandoned its claims in the alternative seeking annulment of the contested decision in so far as the amount of the recovery sought in Article 1 exceeds EUR 2 808 319.95.

21 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure provided for by Article 64 of the Rules of Procedure of the Court of First Instance, the Court requested the applicant to lodge certain documents with the Court. That request was complied with within the prescribed period.

22 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 4 March 2004.

23 The applicant claims that the Court should:

— annul the contested decision;

— order the defendant to pay the costs.

24 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

25 The applicant puts forward three pleas in law in support of its action for annulment. The first alleges an error of law in the application of Recommendation 96/280, the second an error of assessment as regards circumvention of the definition criteria for SMEs and the third an error of law and of assessment in relation to economic integration and the presence of the typical handicaps of SMEs.

26 Since the first and third pleas essentially concern the same question, whether the defendant was able to analyse the economic integration and the presence of the economic handicaps by going beyond the criteria defined in Recommendation 96/280, they should be examined together.

The first and third pleas, alleging an error of law and of assessment in the application of Recommendation 96/280

Arguments of the parties

27 The applicant considers that in adopting Recommendation 96/280 the Commission committed itself to a particular interpretation of the meaning of SME. Consequently, a separate analysis of economic integration or the typical handicaps of SMEs,

without regard to the criteria for the definition of SMEs, is unlawful since those criteria are to be used precisely in order to determine whether there is economic integration or whether there are typical handicaps of SMEs. According to the applicant, the purpose of Recommendation 96/280 is precisely to standardise that analysis and thus to ensure equality and legal certainty. It follows that the Commission was not able to consider the real economic strength of the beneficiary of the aid beyond its formal status.

28 The applicant submits that in the contested decision the defendant wrongly considered that the applicant did not satisfy all the criteria for the definition of an SME at the relevant time. It does not challenge the facts constituting the basis of the contested decision, but it considers that the defendant could not take account of the figures for IWS during the period in question in assessing whether the applicant could be regarded as an SME.

29 It submits in that connection, first, that all its capital is held directly or indirectly by Mr Pollmeier. The applicant considers that since Mr Pollmeier is a natural person he cannot be an enterprise within the meaning of Article 1(3) of the annex to Recommendation 96/280. It follows that the applicant satisfies the test of independence.

30 Second, the applicant submits that even if Mr Pollmeier were considered to be an enterprise within the meaning of Article 1(3) of the annex to Recommendation 96/280, that in itself would not satisfy the criteria for the definition of an SME.

31 According to the applicant, if Mr Pollmeier were to be regarded as an enterprise for the application of Article 1(3) of the annex to Recommendation 96/280, the data in respect of that 'enterprise' should be determined by the addition of the figures for all companies of which Mr Pollmeier directly or indirectly held 25% or more of the capital or voting rights at the time when the aid was granted.

32 The applicant points out that the aid in question was granted to it by decision of 2 September 1998, which was the subject of a significant amendment on 12 May 1999.

33 During that period, Mr Pollmeier directly or indirectly held 25% or more of the capital of Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, and Pollmeier Massivholz GmbH & Co. KG, Creuzburg, as well as that of the applicant. However, during that period, Mr Pollmeier did not hold 25% or more of the capital of IWS or of the voting rights of the board of directors of that company.

34 The applicant considers that Article 1(8) of the annex to Recommendation 96/280 refers to the last full accounting period solely in the context of calculating the data for the application of the definition criteria for SMEs to the enterprise to which the aid was granted, and not for determining the enterprises whose data must be cumulated within the meaning of Article 1(4) of the annex to that recommendation. It follows that the figures relating to the 'enterprise' constituted by Mr Pollmeier are identical to those of the 'Total' figure which appears in the table at paragraph 70 of the grounds of the contested decision, after deducting the figures for IWS, and to those of the 'Total (without IWS)' figure in the table at paragraph 73 of the grounds of the contested decision, given that at the time of the grant of the aid, Mr Pollmeier held less than 25% of the capital of IWS. The figures for the 'enterprise' constituted by Mr Pollmeier are therefore below the thresholds referred to in Article 1(1) of the annex to Recommendation 96/280, such that the 'enterprise' constituted by Mr Pollmeier satisfied all the definition criteria for SMEs. Therefore, the applicant itself satisfies the criterion of independence referred to in Article 1(3) of the annex to Recommendation 96/280.

35 According to the applicant, the conditions laid down by Article 1(6) of the annex to Recommendation 96/280 ('the two consecutive financial years rule') apply to the criteria laid down by the first two indents of Article 1(1) (thresholds relating to the number of employees and turnover), and not to the criterion of independence referred to in Article 1(3) or the threshold of 25% referred to in Article 1(4).

36 The applicant concludes that it became independent again within the meaning of Article 1(3) of the annex to Recommendation 96/280 from 1 June 1998 and consequently satisfied all the criteria for the definition of SMEs, the two consecutive financial years rule being irrelevant.

37 The applicant considers that, in any event, the defendant committed an error of assessment in considering that there was a Pollmeier group. It stresses that in fact there is no single Pollmeier group but, at the very most, a 'group' made up of the companies in which Mr Pollmeier holds shares, to which is juxtaposed a 'Pollmeier-Rietberg group'. It considers that the mere fact of belonging to the same family as the holders of shares in companies does not suffice to demonstrate the economic integration of those companies. According to the applicant, the 23.25% stake held by Mr Pollmeier in IWS since 1 June 1998 does not confer on him any right of management or control. In the case of IWS, the applicant stresses in particular that Mr Gottwald, who after 1 June 1998 was the sole manager in charge, already occupied that position before that date. The applicant adds that Mr Pollmeier never spent more than one or two days a year in the United States.

38 According to the applicant, the enterprises held by Mr Pollmeier had nothing in common, in terms of either customers or suppliers, with those in which the other members of the Pollmeier family held the majority of the capital. Those enterprises operated on different markets. They also had no joint accounts or joint management of personnel.

39 As for the website www.pollmeier.com, which is referred to at paragraph 16 of the grounds of the contested decision, the applicant notes that it had not been updated for a long time. The applicant adds that text uploaded to a website cannot in itself constitute legally conclusive proof of economic integration.

40 The defendant submits, first, that the applicant was not an SME when the aid was granted because it did not satisfy the criterion of independence in either 1998 or 1999. The defendant points out that as a matter of competition law the concept of an undertaking also includes natural persons.

41 It stresses in this connection that it is not in dispute that Mr Pollmeier controlled IWS until 1 June 1998 and that he then reduced his shareholding in that company only to the extent that he transferred 41% of the shares to his sister, Mrs Tegelkamp, and 10% of the shares to Mr Gottwald, so that, even after 1 June 1998, the Pollmeier brothers and their sister together still held 89% of the shares of IWS. According to the defendant, Mr Pollmeier, his brother, Mr E. Pollmeier and his sister Mrs Tegelkamp, who held 89% of the capital of IWS, formed a 'single associated entity'.

42 The defendant states that, in its view, the aid beneficiary in question is the Pollmeier group and not merely the applicant.

43 Second, the defendant submits that the same calculation rules set out in Article 1(6) to (8) of the annex to Recommendation 96/280 apply to the aid beneficiary and to its parent companies.

44 Consequently, the aid beneficiary is only an SME if at least 75.01% of its shareholders are SMEs.

45 The defendant considers that the definition of SMEs should not be applied in a mechanical or formal way. It considers that not all enterprises which formally satisfy the definition of an SME are in fact SMEs. On the contrary, the recommendation expressly permits a certain flexibility and therefore the option to consider the aid beneficiary's real economic strength regardless of its formal status.

46 The defendant notes that the need of SMEs for legal certainty and 'planning certainty' does not preclude its interpretation. It contends that it is precisely the legal certainty and 'planning certainty' of genuine SMEs which requires that they not be disadvantaged in comparison with competitors whose overall situation is not that of an SME.

47 As regards the alleged error of assessment, the defendant stresses that the applicant cannot show that it has suffered the typical handicaps of SMEs during the relevant period. The defendant refers to the website of IWS, now called Hardwood, which, in its view, shows the worldwide integrated approach of the Pollmeier group.

Findings of the Court

48 It is appropriate first to examine the argument of the applicant alleging that the defendant based its decision on a definition of the term SME which differs from that in Recommendation 96/280 by considering that 'the enterprise in receipt of the aid incorporated Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, Pollmeier Massivholz GmbH & Co. KG, Creuzburg, and IWS'.

49 In this respect, paragraph 71 of the contested decision reads as follows:

'... In 1996 and 1997 the beneficiary enterprise consisted of Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, Pollmeier Massivholz GmbH & Co. KG, Creuzburg, and IWS. All of these companies are directly or indirectly controlled by [Mr] Pollmeier and are engaged in the same or parallel economic activities. One can therefore conclude that they are economically integrated. None of these companies can be said to form an independent economic unit. The degree of economic integration is sufficiently high to conclude that IWS forms an economic unit together with the two European Pollmeier sawmills'.

50 It should be noted that, according to settled case-law, where legally distinct natural or legal persons constitute an economic unit, they should be treated as a single undertaking for the purposes of Community competition law (see, to that effect, Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11, and, by analogy, Case T-234/95 *DSG* v *Commission* [2000] ECR II-2603, paragraph 124).

51 In the field of State aid, the question whether there is an economic unit arises primarily in relation to the question whether there is an aid beneficiary (see, to that effect, Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraphs 11 and 12). It has been held in that regard that the Commission has a broad discretion in determining whether companies which form part of a group should be regarded as an economic unit or rather as legally and financially independent for the purpose of applying the rules governing State aid (see, to that effect, Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraphs 313 and 314, and, by analogy, *DSG* v *Commission*, paragraph 124).

52 That discretion on the part of the Commission involves the consideration and appraisal of complex facts and circumstance. Since it is not for the Court to substitute its own assessment of the facts, particularly the economic circumstances, for that of the author of the decision, the Court must, in such a context, confine its review to determining whether the Commission complied with the rules governing procedure and the provision of the statement of reasons, whether the facts are accurately stated and whether there has been any manifest error of assessment or misuse of powers (Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraph 32).

53 Moreover, it is clear from the express wording of Article 87(3) EC and Article 88 EC that the Commission 'may' consider aid covered by the first of those two provisions to be compatible with the common market. Accordingly, whilst the Commission must always determine whether State aid subject to review by it is compatible with the common market, even if that aid has not been notified to it (see, to that effect, Case C-301/87 *France* v *Commission* ('Boussac') [1990] ECR I-307, paragraphs 15 to 24), it is not bound to declare such aid compatible with the common market (see, by analogy, Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 94).

54 However, the Commission is bound by the guidelines and notices that it issues in the area of supervision of State aid where they do not depart from the rules in the Treaty and are accepted by the Member States (*Spain* v *Commission*, paragraph 95, and Case C-91/01 *Italy* v *Commission* [2004] ECR I-4355, paragraph 45).

55 In the present case, the applicant considers essentially that Recommendation 96/280 is drafted in such a way as to leave the Commission no discretion in the definition of the term SME outside the limits fixed by that recommendation.

56 It should be noted in this connection that it is clear from point 1.2 of the SME guidelines that the Commission's favourable approach towards State aid for SMEs is justified by the imperfections in the market which mean that those enterprises face a number of handicaps and which thus limit the socially and economically desirable development of them.

57 Point 3.2 of the SME guidelines states that, in order to qualify as an SME under those guidelines, an enterprise must satisfy three tests: the number of persons employed, the financial test and the independence test (*Italy* v *Commission*, paragraphs 46 and 47).

58 In relation to that last test, Article 1(3) of the annex to Recommendation 96/280 provides that independent enterprises are those which are not owned as to 25% or more of the capital or the voting rights by one enterprise, or jointly by several enterprises falling outside the definition of an SME.

59 Article 1(4) of the annex to Recommendation 96/280 further provides that in calculating the thresholds referred to in paragraph 1 it is necessary to cumulate the relevant figures for the beneficiary enterprise and for all the enterprises which it directly or indirectly controls through possession of 25% or more of the capital or of the voting rights.

60 In that regard, it should be stated that the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (Case C-355/95 P

TWD v *Commission* [1997] ECR I-2549, paragraph 21, and *Italy* v *Commission*, paragraph 49).

61 In the present case, it is clear in particular from the 18th, 19th and 22nd recitals in the preamble to Recommendation 96/280 and from point 3.2 of the SME guidelines that the purpose of the independence test is to ensure that the measures intended for SMEs genuinely benefit enterprises for which size represents a handicap and not those which belong to a large group and which therefore have access to funds and assistance not available to competitors of equal size but which do not belong to a large group. It is also apparent from those provisions that, in order to apply only to enterprises which in fact constitute independent SMEs, it is necessary to eliminate legal arrangements in which SMEs form an economic group stronger than such an undertaking and it is necessary to ensure that the definition of SMEs is not circumvented for purely formal reasons.

62 Accordingly, Article 1(3) and (4) of the annex to Recommendation 96/280 must be interpreted in the light of that purpose, so that the data for an enterprise, even one which is owned as to less than 25% by another enterprise, must be taken into consideration in calculating the thresholds mentioned in paragraph 1 of the same article where those enterprises, even though formally distinct, constitute an economic unit (see, to that effect, *Italy* v *Commission*, paragraph 51).

63 It follows that the Commission's discretion in determining whether companies which are members of a group must be regarded as an economic unit or rather as legally and financially independent for the purposes of applying the rules on State aid was not altered by the existence of the notices adopted on the subject. In particular, the Commission may find that an enterprise is part of an economic unit which does not satisfy the definition criteria for SMEs, even if that enterprise is owned as to less than 25% by another enterprise belonging to the same economic unit.

64 Therefore, the defendant was entitled to determine, first, whether the applicant was part of a group which should be regarded as an economic unit and only then ascertain whether that group satisfied the tests in Article 1(1) of the annex to Recommendation 96/280.

65 In those circumstances, the applicant's complaint that the defendant erred in law in using in the contested decision a definition of the term SME which differs from that in the recommendation and in the SME guidelines cannot succeed.

66 It also follows that the applicant's argument challenging the application of Article 1 (8) of the annex to Recommendation 96/280 in determining the enterprises the figures for which must be taken into account within the meaning of paragraph 4 of that article is immaterial. The question whether or not Mr Pollmeier's shareholding in the capital of IWS exceeds 25% is not decisive in assessing whether that company belonged to the economic unit which received the aid. Consequently, the fact that Mr Pollmeier transferred those shares on 1 June 1998 is in itself irrelevant for the purposes of deciding the present dispute.

67 It is also necessary to examine whether the Commission committed a manifest error of assessment in finding that the various companies held by Mr Pollmeier and his family constituted an economic unit on the ground that the relation between the applicant and the other companies held by the members of the Pollmeier family was different from that which normally prevails between separate and independent enterprises.

68 In the present case, it is not in dispute that the applicant is part of a group of companies created by Mr Pollmeier, starting in 1987. All the applicant's capital was

held, following the grant of the aid, by Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, all of the capital of which was itself held by Mr Pollmeier. Furthermore, Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, held 60% of the capital of Pollmeier Massivholz GmbH & Co. KG, Creuzburg, with Mr Pollmeier directly holding the remainder of the capital of that company.

69 Furthermore, until 1 June 1998, Mr Pollmeier held 74.25% of the shares of IWS and his brother held the remaining shares. It is further not in dispute that that change in the structure of the capital of IWS occurred on 1 June 1998, that is three days after 27 May 1998, when the applicant lodged its application for investment aid. Furthermore, 41% of the shares in IWS held by Mr Pollmeier were transferred to his sister and 10% to Mr Gottwald, who is not a member of the Pollmeier family, according to the applicant's assertions, which were not contradicted on that point. Since then, 89% of the shares in IWS have been held by Mr Pollmeier and by members of his family (his brother and his sister).

70 The Court also finds that the applicant and IWS, Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, and Pollmeier Massivholz GmbH & Co. KG, Creuzburg, pursue identical or parallel economic activities, from which it may be concluded that they are economically integrated. At paragraphs 16 and 17 of the grounds of the contested decision, the defendant made the following points:

'On the website of the Pollmeier group, the various group companies, including [IWS], are described as "production sites" [of the Pollmeier group]. ... IWS products were distributed in Europe until 17 July 1999 by Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, on the basis of a commercial agency agreement ... Prior to 1 June 1998, all companies of the Pollmeier group were controlled directly or indirectly by [Mr] Pollmeier via Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg. Active on the same market and controlled by the same person, the

companies did not enjoy any economic autonomy and are therefore to be viewed as forming a single economic unit.'

71 In order to challenge those findings, the applicant merely submitted that the Creuzburg and Malchow sawmills and IWS did not carry out the same business, that they did not work together and that they were not managed jointly. There were no joint accounts or joint management of staff. The applicant adds that it was not present in the same market as IWS and submits in that regard that the Creuzburg and Malchow sawmills concentrated on the business of sawmills whilst IWS manufactures glued wood panels.

72 However, the applicant has put forward no evidence to undermine the defendant's findings.

73 As for the lack of joint control between the various enterprises held by the Pollmeier family, the applicant does not challenge the figures relating to the shares held by the family, but states, without providing any evidence in support, that that shareholding does not demonstrate the exercise of real control.

74 Furthermore, the applicant does not submit any evidence to show that, because of the links between it and the other companies in the Pollmeier group and the similarity of the businesses carried on by those companies, it could not profit from

the presence on the market of the other companies in the Pollmeier group or from the technology of the existing sawmills. It must be regarded therefore as being free of the handicaps normally facing SMEs, concerning the difficulties of access to the technologies and the distribution networks necessary for entering the relevant market.

75 Therefore, the applicant has failed to demonstrate that the defendant committed a manifest error of assessment in finding that the various companies held by Mr Pollmeier and his family constituted an economic unit.

76 As for the applicant's criticism of the defendant for failing sufficiently to set out the facts on that point during the administrative procedure, it suffices to state that the invitation to submit comments pursuant to Article 88(2) EC concerning the aid in question, published in the *Official Journal of the European Communities* of 9 June 2001, indicates that the defendant found, in the part headed 'Assessment' in the summary of that notice, that 'there are certain indications that the different legal entities may operate under the same management and that their production is coordinated like that of a single company'. The defendant added that it doubted 'whether the sole legal person Pollmeier Malchow GmbH can be considered as the beneficiary of the aid'. Moreover, it is apparent from the letter of 13 March 2001 by which the defendant notified the Federal Republic of Germany of its decision to initiate the procedure laid down by Article 88(2) EC, and in particular from question 8 therein, that the defendant requested the Federal Republic of Germany to provide it with information in respect of the relations between Mr Pollmeier, Mr Ekkerhard Pollmeier and Mrs Doris Tegelkamp, the latter appearing to be partners and/or managers of companies which belong to the Pollmeier group. The argument of the applicant must therefore fail on the facts.

77 The defendant could therefore find, without committing a manifest error of assessment, that because of their economic links, the integration of some of their structures and the composition of their capital, the applicant and IWS, Pollmeier GmbH, Holzverarbeitungsbetrieb, Rietberg, and Pollmeier Massivholz GmbH & Co.

KG, Creuzburg, formed one and the same economic unit and that IWS should therefore be taken into consideration in defining the beneficiary of the aid.

78 Since the applicant has not challenged the finding that, with the figures for IWS, the group did not satisfy the definition criteria for SMEs, the defendant was entitled to find that the aid beneficiary was a large company.

79 It follows that the defendant was entitled to find, at paragraph 86 of the grounds of the contested decision, that 'given that the aid beneficiary [was] a large company, only 35% of the aid granted complies with the conditions of the scheme; therefore only aid up to this amount [could] be seen as existing aid. The remaining 13.18% must be viewed as new aid', and that, 'since this new aid [had been] granted without the Commission's approval, it [was] illegal'.

80 Lastly, since the defendant was able to find, without committing a manifest error of assessment, that the various companies held by Mr Pollmeier and his family constituted an economic unit, it follows that, independently of the application of the two consecutive financial years rule, the beneficiary of the aid exceeded the thresholds laid down by the definition criteria for SMEs, since IWS's figures should have been taken into account. Therefore, the applicant's arguments alleging infringement of Article 1(6) of the annex to Recommendation 96/280 are irrelevant.

81 It follows that the first and third pleas in law must be rejected.

The second plea in law, alleging an error of assessment as regards circumvention of the definition criteria for SMEs

82 It follows from the Court's examination of the first and third pleas in law that the question of any misapplication of the criteria for defining SMEs is irrelevant. As the defendant was entitled to find, without committing an error of law or a manifest error of assessment, that the various companies held by Mr Pollmeier and his family constituted an economic unit which could not be regarded as an SME, it follows that it is not necessary to consider whether there was any such misapplication.

83 In the light of the foregoing, the second plea in law should also be rejected and therefore the action as a whole should be dismissed.

Costs

84 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 other party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the defendant.

On those grounds,

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

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Legal Tiili Meij

Vilaras Forwood

Delivered in open court in Luxembourg on 14 October 2004.

H. Jung H. Legal

Registrar President