OPINION OF ADVOCATE GENERAL

BOT

delivered on 6 March 2008 [1]

1. The present cases concern the appeals brought by the Federal Republic of Germany and by Glunz AG and OSB Deutschland GmbH [2] against the judgment of the Court of First Instance of the European Communities of 1 December 2004 in *Kronofrance* v *Commission*. [3] By the contested judgment, the Court annulled the Commission's decision of 25 July 2001 relating to aid which the Federal Republic of Germany proposed to grant to the undertaking Glunz. [4] In the contested decision, the Commission of the European Communities considered, at the close of the preliminary examination established by Article 88(3) EC, that the measure at issue constituted State aid compatible with the common market and that it was therefore not necessary to raise objections to its grant.

2. These appeals raise, essentially, two legal problems.

3. The first problem is connected with the extent of the rights afforded to the 'interested parties' in connection with the procedure for reviewing State aid. The Court of Justice is again requested to examine the conditions for admissibility applicable to actions for annulment brought against a Commission decision adopted on the basis of Article 88(3) EC.

4. The second problem relates to the interpretation by the Court of First Instance of the multisectoral framework on regional aid for large investment projects adopted by the Commission in a communication of 7 April 1998. [5] That framework establishes the rules for calculating the 'maximum allowable intensity' for regional investment aid. In that regard, it lays down various assessment criteria, one of which is a competition factor. It is the way in which the Commission calculated that factor which is at issue in these cases. The Court of Justice is requested to examine inter alia whether the Court of First Instance exceeded its jurisdiction by reviewing the assessment made by the Commission with regard to the method of evaluating that factor, and whether, in any event, it erred in law when interpreting the rules laid down by that framework.

1 — Original language: French.

2 — 'Glunz' and 'OSB' respectively.

3 — Case T-27/02 [2004] ECR II-4177; 'the contested judgment'.

4 — OJ 2001 C 333, p. 7; 'the contested decision'. The text of the decision addressed to the German authorities is available in the authentic language, namely German, on the website http://ec.europa.eu/community_law/state_aids/comp-2000/n517-00.pdf.

5 — OJ 1998 C 107, p. 7; 'the multisectoral framework'.

5. In this Opinion, I am going to propose that the Court dismiss these appeals.

6. I submit, first, that the Court of First Instance did not err in law when examining the admissibility of the action brought by Kronofrance SA.[6] I shall observe, in that regard, that the Court correctly applied the rules established by the Court of Justice in the judgments in *Cook* v *Commission*[7] and *Matra* v *Commission*[8] and subsequently confirmed in the judgment in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*.[9]

7. I shall go on to show why I consider that the Court was allowed to carry out a comprehensive review of the assessment made by the Commission with regard to the method of calculating the maximum admissible intensity of the aid.

8. Finally, I shall state the reasons why, in my view, the Court was right to hold that the calculation of the competition factor had to take account not only of the structural capacities of the market but also of a decline in the market.

I — The relevant Community provisions

9. First of all, I shall set out the relevant articles of the EC Treaty, and then indicate the applicable provisions of Regulation No 659/1999[10] and the guidelines established by the multisectoral framework.

A — *The Treaty*

10. Under Article 87 EC, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort intra-Community competition is, in principle, prohibited, subject to the exceptions listed in Article 87(2) and (3) EC.

11. Article 87(2) EC lists the forms of aid which are *ipso jure* compatible with the common market. These are aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products, aid to make good the damage caused by natural disasters or other exceptional occurrences, and aid granted

6 — 'Kronofrance'.

7 — Case C-198/91 [1993] ECR I-2487.

8 — Case C-225/91 [1993] ECR I-3203.

9 — Case C-78/03 P [2005] ECR I-10737.

10 — 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).

to certain areas of the Federal Republic of Germany affected by the division of Germany to compensate for the economic disadvantages caused by the division of the territory of that Member State.

12. Article 87(3) EC specifies the aid which may be considered to be compatible with the common market. This includes aid to promote the economic development of areas in which there is serious underemployment.

13. In order to implement those provisions, the Treaty, in particular Article 88 thereof, establishes a procedure for reviewing and giving prior approval to State aid, in which the central role is reserved for the Commission.

14. Thus, Article 88(2) EC gives the Commission the task of assessing the compatibility of the aid with Article 87 EC. Under the first paragraph of that provision, '[i]f, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission'.

15. Article 88(3) EC requires Member States to inform the Commission of any plans to grant or alter aid and prohibits them from implementing such plans until the Commission has reached a decision in accordance with the first paragraph of Article 88(2) EC.

16. Accordingly, as I shall point out in my assessment, the examination procedure provided for in Article 88 EC comprises two stages, namely a preliminary examination of the planned measure and, should the case arise, if the Commission doubts whether the aid is compatible with the common market, a more in-depth examination designed to enable it to have more complete information on all the data in the case. [11] For that purpose, Article 88(2) EC provides that the Commission must invite the parties concerned to submit their comments.

17. Finally, Article 89 EC authorises the Council of the European Union to adopt regulations for the application of Articles 87 EC and 88 EC. Pursuant to that authorisation, the Council adopted Regulation No 659/1999.

11 — See inter alia Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraphs 36 and 38.

B — *Regulation No 659/1999*

18. Regulation No 659/1999 codified the practice by the Commission of the powers conferred on it by Article 88 EC. It lays down specific rules which have been formulated in accordance with the case-law of the Court of Justice. [12]

19. Accordingly, Article 1(h) of Regulation No 659/1999 reproduces, in almost identical terms, the definition which the Court has given of the term 'interested parties', a concept which, I would point out, lies at the heart of the present cases. In its judgment of 14 November 1984 in *Intermills* v *Commission*, [13] the Court held that the parties concerned are the persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations. [14] Article 1(h) of the regulation defines the term 'interested party' as 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations'.

20. Article 4 of the regulation relates to the preliminary examination which the Commission must carry out when a Member State notifies it of plans to grant or alter aid.

21. According to that provision, the Commission may adopt three types of decision. It may decide that the notified measure does not constitute aid. It may also find that there is no doubt that the notified measure is compatible with the common market and decide not to raise objections to the grant of the aid in question. Finally, it may decide, where doubts are raised as to the compatibility with the common market of a notified aid project, to initiate the formal investigation procedure pursuant to Article 88(2) EC.

C — *The multisectoral framework*

22. In its assessment of the compatibility of regional aid, the Commission is required to take account not only of the positive effects on the development of the region but also of

12 — Recital 2 in the preamble to the regulation.

13 — Case 323/82 [1984] ECR 3809.

14 — Paragraph 16. This definition was reproduced inter alia by the Court in *Cook* v *Commission*, paragraph 24; *Matra* v *Commission*, paragraph 18; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 36.

the repercussions such aid might have for the economic situation in certain sectors. [15]

23. It is for this purpose that the Commission adopted the multisectoral framework. This framework constitutes guidelines allowing the Commission to calculate, on a case-by-case basis, a maximum allowable intensity for regional investment aid. [16]

24. The maximum aid intensity is calculated in accordance with a methodology set out in point 3 of the aforementioned framework. To make that calculation, it is first necessary to determine the 'regional aid ceiling' (factor R) which corresponds to the maximum aid intensity which a large company could obtain in the area concerned, within the context of the authorised regional aid system valid at the moment of notification. If it is ad hoc aid, the aid ceiling fixed for the region concerned will be applied. It is then necessary to determine three adjustment factors corresponding to (a) competition in the sector under consideration (factor T), (b) the capital/labour ratio (factor I), and (c) the regional impact of the aid on the economy of the area concerned (factor M). The maximum allowable aid intensity is then calculated by applying these three adjustment factors to the regional aid ceiling (factor R).

25. In accordance with points 3.2 and 3.3 of the multisectoral framework, the competition factor is designed to determine whether the proposed project will take place in a sector or subsector suffering from structural overcapacity. In determining whether structural overcapacity exists in the sector or subsector concerned, the Commission compares, at the European Community level, the average capacity utilisation rate for manufacturing industry as a whole and the capacity utilisation rate of the relevant sector or subsector. The Commission refers to the last five years for which data are available. [17]

26. Point 3.4 of the multisectoral framework is worded as follows:

'In the absence of sufficient data on capacity utilisation, the Commission will consider whether the investment takes place in a declining market. For this purpose, the Commission will compare the evolution of

15 — See inter alia paragraph 6 of the First Resolution of 20 October 1971 of the Representatives of the Governments of the Member States, meeting within the Council, on general systems of regional aid (OJ English Special Edition, Second Series IX, p. 57); paragraphs 10 to 12 of the Communication of the Commission on regional aid systems (OJ 1979 C 31, p. 9); and paragraph 1.6, second and third indents, of the Commission communication on the method for the application of Article [87(3)(a) and (c) EC] to regional aid (OJ 1988 C 212, p. 2).

16 — Point 1.4 of the multisectoral framework. The projects which are subject to a duty to notify are defined in point. 2.1 of the framework.

17 — According to point 7.7 of the multisectoral framework, the Commission considers structural overcapacity to exist when, on average over the last five years, the capacity utilisation rate of the relevant sector or subsector is more than two percentage points below that of manufacturing as a whole. Structural overcapacity is described as serious when the difference with respect to the average for manufacturing is more than five percentage points.

apparent consumption of the product(s) in question… with the growth rate of [European Economic Area ("EEA") manufacturing industry as a whole. [18]]'

27. Finally, under point 3.10.1 of the framework, four adjustment factors are applicable to the competition factor. The value of those factors depends on the following assessment criteria:

'(i) Project which results in a capacity expansion in a sector facing serious structural overcapacity and/or an absolute decline in demand: 0.25

(ii) Project which results in a capacity expansion in a sector facing structural overcapacity and/or a declining market and which is likely to reinforce high market share: 0.50

(iii) Project which results in a capacity expansion in a sector facing structural overcapacity and/or a declining market: 0.75

(iv) No likely negative effects in terms of (i)-(iii): 1.00'.

28. Within the meaning of the multisectoral framework, the relevant product market for determining market share comprises the products envisaged by the investment project and, where appropriate, the products considered by the consumer or by the producer to be interchangeable with them. The geographic market comprises usually the EEA or, alternatively, any significant part of it if the conditions of competition in that area can be sufficiently distinguished from other areas of the EEA. [19]

II — Facts

29. The facts, as they are stated in the contested judgment, may be summarised as follows:

18 — Under point 7.8 of the multisectoral framework, the market for the products in question will be deemed to be declining if, over the last five years, the average annual growth rate of apparent consumption is significantly (more than 10%) below the annual average of EEA manufacturing industry as a whole, unless there is a strong upward trend in the relative growth rate of demand for the product(s). An absolutely declining market is one in which the average annual growth rate of apparent consumption over the last five years is negative.

19 — Point 7.6 of the multisectoral framework.

30. Glunz, the German company which was the recipient of the aid in question, and Kronofrance, the French company which was the applicant at first instance, both manufacture and market wood panels and boards.

31. By letter of 4 August 2000, the Federal Republic of Germany notified the Commission of a project to grant investment aid of an intensity of 35% (that is, EUR 69 797 988 in total) to the companies Glunz and OSB for the construction of an integrated wood processing centre at Nettgau in the *Land* of Saxony-Anhalt.

32. The Commission considered that the notified measure constituted State aid within the meaning of Article 87(1) EC and that it should be assessed on the basis of the multisectoral framework. In accordance with the rules laid down by that framework, the Commission determined the maximum intensity of aid which companies could receive in that area, by evaluating each of the adjustment factors (factors T, I and M).

33. With regard to the assessment of the competition factor, the Commission stated that, in accordance with points 3.3 and 3.4 of the framework, when there is sufficient data relating to the capacity utilisation rate, it had to limit its analysis to determining whether or not there was structural overcapacity in the relevant sector. Taking the view that the two products manufactured by Glunz represented a very significant share of all wood panel and board production in Europe, and referring to the lowest level of the general classification of economic activities in the European Community, [20] the Commission chose to base its analysis on the data relating to the capacity utilisation rate of class 20.20 of that classification, which includes the manufacture of wood panels and boards, covering the period from 1994 to 1998. The Commission concluded that the investment project in question would entail an increase in capacity in a sector in which there was no overcapacity, which justified the application of the adjustment factor 1 to the competition factor.

34. On the basis of an assessment of the notified aid in the light of the criteria laid down in the multisectoral framework, the Commission set out the reasons why it considered that the investment aid project proposed by the Federal Republic of Germany was in accordance with the maximum authorised aid intensity. [21]

35. On 25 July 2001, the Commission therefore decided, on the basis of Article 4(3) of Regulation No 659/1999, not to raise objections to the grant of that aid.

20 — This classification was established by Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community (OJ 1990 L 293, p. 1), as amended by Commission Regulation (EEC) No 761/93 of 24 March 1993 (OJ 1993 L 83, p. 1).

21 — According to the Commission, the factors applicable to the present cases were to be fixed at:
- 35% as to the maximum authorised intensity in the *Land* of Saxony-Anhalt;
- 1 for factor T relating to competition in the wood panels and boards market;
- 0.8 for factor I (capital/labour ratio);
- 1.5 for factor M in view of the impact of the proposed aid;

which is a maximum allowable intensity of 42% (35% x 1 x 0.8 x 1.5).See pages 8 to 14 of the contested decision and paragraph 14 of the contested judgment.

III — The procedure before the Court of First Instance and the contested judgment

36. By application lodged at the Registry of the Court of First Instance on 4 February 2002, Kronofrance brought an action for annulment of the contested decision. By order of the Court of First Instance of 10 September 2002, Glunz and OSB were granted leave to intervene in support of the form of order sought by the Commission.

37. In the contested judgment, the Court of First Instance annulled the contested decision after declaring that the action brought by Kronofrance was admissible and well founded.

38. It is apparent from that judgment that, at the hearing, the Commission and the interveners raised a plea of inadmissibility on the ground that Kronofrance did not have locus standi. They contended that Kronofrance was not individually concerned by the contested decision since its position on the market was not substantially affected by the aid in question.

39. In paragraphs 29 to 46 of the contested judgment, the Court of First Instance therefore examined the admissibility of the action.

40. Basing its argument on settled case-law, the Court of First Instance pointed out, first, in paragraph 32 of the contested judgment that it was necessary to distinguish between the two stages of the procedure for reviewing State aid, namely the preliminary examination of the measure and the formal investigation procedure. [22] The former stage enables the Commission to form a prima facie opinion on the compatibility of the aid, and the latter stage enables it to be fully informed of all the facts of the case and, in that context, imposes on it an obligation to give the parties concerned notice to submit their comments. The Court therefore stated, in paragraph 33 of the judgment, that, where the Commission finds, on the basis only of the preliminary examination, that aid is compatible with the common market, the persons intended to benefit from the procedural guarantees provided for in Article 88(2) EC may secure compliance therewith only if they are able to challenge that decision before the Community judicature. [23]

41. Consequently, the Court concluded, in paragraph 34 of the contested judgment:

'… [W]here, by an action for annulment of a Commission decision taken at the end of the preliminary stage, an applicant seeks to secure compliance with the procedural

22 — The Court referred to *Cook* v *Commission*, paragraph 22; *Matra* v *Commission*, paragraph 16; *Commission* v *Sytraval and Brink's France*, paragraph 38; and Case T-158/99 *Thermenhotel Stoiser Franz and Others* v *Commission* [2004] ECR II-1, paragraph 57.

23 — The Court referred to *Cook* v *Commission*, paragraph 23; *Matra* v *Commission*, paragraph 17; *Commission* v *Sytraval and Brink's France*, paragraph 47; and *Thermenhotel Stoiser Franz and Others* v *Commission*, paragraph 69.

guarantees provided for in Article 88(2) EC, the mere fact that it has the status of a "party concerned" within the meaning of that provision is sufficient for it to be regarded as directly and individually concerned for the purposes of the fourth paragraph of Article 230 EC [24]…'

42. The Court then considered whether the applicant could be regarded as an interested party for the purposes of Article 1(h) of Regulation No 659/1999. After analysing the competitive position of Kronofrance on the wood panels and boards market, the Court held, in paragraph 44 of the contested judgment, that the applicant was a competitor of the undertaking which was the recipient of the aid and, as such, was an interested party.

43. The Court therefore declared the action admissible. [25]

44. The Court then analysed the pleas in law put forward by Kronofrance. The applicant relied, essentially, on four pleas in support of its claim for annulment, alleging, first, infringement of Article 87 EC and of the multisectoral framework; second, infringement of Article 88(2) EC; third, misuse of powers; and, fourth, breach of the obligation to state reasons.

45. The Court held that the first plea raised by Kronofrance was well founded and on that ground annulled the contested decision.

46. By that first plea, Kronofrance disputed the Commission's assessment of the maximum allowable aid intensity and more particularly of the adjustment factor applicable to the competition factor (factor T). It criticised the Commission inter alia for failing to examine whether the proposed investments were to take place in a declining market and for merely analysing the structural capacities of the sector.

47. After noting, in paragraph 79 of the contested judgment, the wide discretion enjoyed by the Commission in the exercise of its review of State aid, the Court of First Instance examined whether the Commission had committed an error of law in its interpretation and application of the multisectoral framework.

48. Although the Court acknowledged, in paragraph 89 of the contested judgment, that, on the basis of its wording alone, the multisectoral framework could be understood in the sense claimed by the Commission, it nevertheless considered that the framework must be interpreted in the light of Article 87 EC and of the objective sought by

24 — The Court referred to *Cook* v *Commission*, paragraphs 23 to 26; *Matra* v *Commission*, paragraphs 17 to 20; and Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraphs 89 and 90.

25 — Paragraph 46 of the contested judgment.

that provision, namely undistorted competition in the common market.

49. In paragraphs 90 to 95 of the contested judgment, the Court examined the organisation of points 3.2 to 3.10 of the multisectoral framework. In paragraph 96 of the contested judgment, it concluded that the application of an adjustment factor equal to 1 to the competition factor implied a prior finding that there was no structural overcapacity in the sector concerned and also that the market was a declining market. In that regard, the Court referred to the specificity of those two assessment criteria.

50. It was in those circumstances that, in paragraph 97 of the contested judgment, it held that the first sentence of point 3.4 of the multisectoral framework must be understood as meaning that, 'where the data on capacity utilisation in the sector concerned do not allow the Commission to reach the positive conclusion that there is structural overcapacity, the Commission must consider whether the market in question is a declining market'.

51. Accordingly, the Court held, in paragraph 103 of the contested judgment, that, in applying an adjustment factor equal to 1 to the competition factor without having first ascertained whether the aid project in question would take place in a declining market, the Commission had erred in law, infringing Article 87 EC and the multisectoral framework.

52. The Court held that the forms of order sought by Kronofrance must therefore be granted and the contested decision annulled.

IV — The procedure before the Court of Justice and the forms of order sought by the parties

53. By applications lodged at the Registry of the Court of Justice on 16 and 18 February 2005 respectively, the Federal Republic of Germany and Glunz and OSB brought the present appeals.

54. By order of 13 October 2005 of the President of the Court, Cases C-75/05 P and C-80/05 P were joined for the purposes of the oral procedure and the judgment.

55. The appellants claim that the Court should annul the contested judgment and dismiss the action brought by Kronofrance. Glunz and OSB also request that, if appropriate, their case be referred back to the Court of First Instance for judgment on the merits.

56. The appellants request, finally, that Kronofrance be ordered to pay the costs both of the appeals and of the action brought before the Court of First Instance.

57. In each of these cases, the Commission claims that the contested judgment should be annulled. It requests the Court to dismiss Kronofrance's action as inadmissible and, in the alternative, as unfounded, and to order

Kronofrance to pay the costs of the proceedings at first instance and on appeal.

58. In both cases, Kronofrance contends that the Court should dismiss the appeals and order the appellants to pay the costs both of the appeals brought before the Court of Justice and of the action brought before the Court of First Instance.

V — Legal assessment

59. In my view, the appellants put forward four pleas in law in support of their appeals.

60. By the first plea, the Federal Republic of Germany and Glunz and OSB claim that the contested judgment is marred by an error of law in that the Court of First Instance declared that the action brought by Kronofrance was admissible.

61. By their second plea, which I consider comprises two limbs, the appellants dispute the nature and extent of the judicial review carried out by the Court of First Instance of the Commission's assessment concerning the calculation of the competition factor. They maintain that the Court disregarded the restrictions imposed on its judicial review and misinterpreted the multisectoral framework.

62. By their third plea, the Federal Republic of Germany and Glunz and OSB maintain that the Court of First Instance did not comply with the measures of organisation of procedure, in particular, Article 64 of the Rules of Procedure of the Court of First Instance.

63. Finally, by their fourth plea, Glunz and OSB claim that the contested judgment infringes the second paragraph of Article 230 EC, because it rules on matters outside the scope of the pleas raised in support of the action for annulment brought by Kronofrance.

64. Before giving my views on the validity of these pleas, I should like to make a preliminary point regarding the limits on the judicial review conducted by the Court of Justice in the context of an appeal.

65. Under Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal is limited to points of law. It must be based on grounds of lack of jurisdiction of the Court of First Instance, breach of procedure before it which adversely affects the interests of the applicant

or infringement of Community law by the Court of First Instance. [26]

66. According to settled case-law, the Court of First Instance thus has exclusive jurisdiction, first, to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. Save where the evidence adduced before the Court of First Instance has been distorted, the appraisal of the facts therefore does not constitute a point of law which is subject to review by the Court of Justice in the context of an appeal. [27]

67. On the other hand, it is established that, when the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them. [28]

68. That having been noted, it is therefore necessary to examine the various pleas invoked by the appellants in support of their appeals.

A — *The first plea, alleging an incorrect assessment of the admissibility of the action brought by Kronofrance*

69. By this first plea, the appellants dispute the assessment made by the Court of First Instance as regards the locus standi of Kronofrance.

1. Arguments of the parties

70. The Federal Republic of Germany and also Glunz and OSB maintain that the contested judgment infringed the fourth paragraph of Article 230 EC, since the Court of First Instance considered that Kronofrance was 'directly and individually concerned' by the contested decision and therefore held that the action brought by that company was admissible. That incorrect conclusion stems, they claim, from an unreasonable extension of the scope of the fourth paragraph of Article 230 EC and a misinterpretation of that provision in the light of Regulation No 659/1999.

26 — See inter alia Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 49 and the case-law cited therein.

27 — See inter alia Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 47 to 49, and *Sniace* v *Commission*, paragraph 35 and the case-law cited therein.

28 — See inter alia Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 23; Case C-470/00 P *Parliament* v *Ripa di Meana and Others* [2004] ECR I-4167, paragraph 41; and Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51.

71. They claim that Court wrongly concluded, in paragraphs 34 and 35 of the contested judgment, that any person potentially 'concerned' by the formal procedure for examining aid under Article 1(h) of Regulation No 659/1999 was to be regarded as directly and individually concerned, within the meaning of the fourth paragraph of Article 230 EC, by an approval decision taken at the end of the preliminary examination stage, and that it was therefore unnecessary to show that Kronofrance's competitive position was 'substantially' affected by that decision.

72. However, according to the Federal Republic of Germany and Glunz and OSB, the status of 'interested party' within the meaning of Regulation No 659/1999 does not automatically imply a right to bring legal proceedings. Only a specific examination based on the competitive relationship between the recipient of the aid and Kronofrance would be consistent with the case-law established by the Court of Justice in *Plaumann* v *Commission*.[29] Therefore, in order to find that Kronofrance had locus standi, the Court of First Instance should have ascertained whether its position on the market was substantially affected.

73. Contrary to the findings of the Court of First Instance, Kronofrance and Glunz are not actually in competition on the market in question and therefore Kronofrance's market position cannot have been substantially affected.

74. In that regard, the Federal Republic of Germany points out that the Court merely stated, in paragraph 43 et seq. of the contested judgment, that Glunz belonged to a group which included other companies active in wood production in France. However, that criterion is irrelevant because it is based on considerations relating to the group, not on the specific competition between the two undertakings.

75. Moreover, Glunz and OSB maintain that the Court's finding that the marketing areas of Kronofrance and Glunz overlap is inaccurate. The Court incorrectly assessed the information relating to the markets of the two undertakings.

76. In the light of these considerations, the appellants submit that the action brought by Kronofrance should have been declared inadmissible.

29 — Case 25/62 [1963] ECR 95.

77. The Commission shares, in essence, the appellants' views regarding infringement of the fourth paragraph of Article 230 EC and cites in that regard the case-law of the Court of Justice concerning the locus standi of competitors of a recipient of aid. It refers, in particular, to the judgment in *Cofaz and Others* v *Commission* [30] and to the aforementioned judgments in *Cook* v *Commission* and *Matra* v *Commission*.

78. Kronofrance maintains, on the other hand, that the Court was fully entitled to hold that it was an interested party within the meaning of Regulation No 659/1999 and that its action against the contested decision was admissible, since it had sought to secure compliance with the procedural guarantees provided for in Article 88(2) EC. Kronofrance points out inter alia that, if the formal investigation procedure is not opened, a competitor of a recipient of aid need only prove its status as a 'party concerned' within the meaning of Article 88(2) EC, where its action seeks to protect its procedural rights. In that case, as is apparent from the settled case-law of the Court of Justice, in particular from the judgment in *ARAP and Others* v *Commission*, [31] it is not necessary to show that the applicant's competitive position is substantially affected. It is sufficient if the applicant's interest might be affected by the grant of the aid, a condition which is satisfied in the present cases, since there is a direct competitive relationship between Kronofrance and Glunz.

2. Assessment

79. In connection with the first plea, the Court is, in essence, asked to give a ruling on the rights afforded to interested parties in the procedure for reviewing State aid, in particular where they bring an action for annulment of a Commission decision refusing to open the formal investigation stage provided for in Article 88(2) EC.

80. Consideration of this plea requires, first, a summary of the case-law on the matter.

(a) The case-law relating to the rights of interested parties in the procedure for reviewing State aid

81. In the procedure for reviewing State aid, decisions adopted by the Commission are addressed only to the Member States concerned. That is also so where a decision is given following a complaint in which objection is taken to the measure in question on the ground that it constitutes State aid contrary to the Treaty. [32]

30 — Case 169/84 [1986] ECR 391.

31 — Case C-321/99 P [2002] ECR I-4287, paragraph 61.

32 — See inter alia *Commission* v *Sytraval and Brink's France*, paragraph 45.

82. Natural or legal persons wishing to bring an action for annulment against such decisions must therefore satisfy the conditions laid down in the fourth paragraph of Article 230 EC. I would point out that that provision makes an action for annulment brought by any natural or legal person against a decision of which it is not the addressee subject to the dual condition that the decision must concern it directly and individually. If the measure in question does not fulfil those conditions, the action brought against it is inadmissible.

83. The scope of the concept 'individually' concerned was defined by the Court of Justice in the judgment in *Plaumann* v *Commission*, [33] which has since been confirmed by established case-law. [34] The Court held that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually 'just as in the case of the person addressed'.

84. In connection with the procedure for reviewing State aid, the Court has acknowledged that the concept of individual interest is applied in a particular way, having regard to the aim and specific features of the procedures provided for in Article 88(2) and (3) EC respectively. [35]

85. As the Court of First Instance pointed out, in paragraph 32 of the contested judgment, that review procedure comprises two stages, between which the Community judicature has always drawn a clear distinction. [36]

86. The first of those stages is established by Article 88(3) EC. [37] I note that it enables the Commission to carry out a preliminary, simplified examination of the project in order to form a prima facie opinion as to the compatibility of the project with the common market. [38] No provision is made for the participation of third parties in the procedure. At the end of that examination, the Commission may decide that the measure in question does not constitute State aid within the meaning of Article 87 EC. It may also decide, if it is sure, that that measure constitutes State aid compatible with the Treaty. On the other hand, if the Commission has serious difficulty in assessing the compatibility of the aid with the common

33 — P. 223.

34 — See inter alia *Cofaz and Others* v *Commission*, paragraph 22; *Cook* v *Commission*, paragraph 20; Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 33 and the case-law cited therein; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 33.

35 — See inter alia *Cook* v *Commission*, paragraph 21, and *Matra* v *Commission*, paragraph 15.

36 — In the contested judgment, the Court of First Instance refers inter alia to *Cook* v *Commission*, paragraph 22; *Matra* v *Commission*, paragraph 16; and *Commission* v *Sytraval and Brink's France*, paragraphs 38 and 39. That case-law has since been confirmed by the Court of Justice in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 34, and by the Court of First Instance in Case T-359/04 *Air One* v *Commission* [2006] ECR II-1343, paragraph 33.

37 — The detailed rules for applying that procedure are contained in Article 4 of Regulation No 659/1999.

38 — Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 3.

market, it must decide to initiate the formal investigation procedure.

87. This is the second stage of the procedure provided for in Article 88(2) EC. It must allow the Commission to gather all the opinions necessary in order to assess, on the basis of full information as to the details of the case, the compatibility of the measure notified with the common market. [39] It is for that purpose that the Commission is required to obtain the observations of the interested parties on the aid project notified. [40]

88. As I have already pointed out, the concept of 'party concerned' within the meaning of Article 88(2) EC has been defined broadly by the Court as referring to any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, that is to say, inter alia, competing undertakings and trade associations. That definition, we should remember, was later enshrined in Article 1(h) of Regulation No 659/1999.

89. It follows that any undertaking which invokes a competitive relationship, even a potential one, may be accorded the status of 'party concerned' within the meaning of Article 88(2) EC and, in that capacity, may enjoy procedural guarantees which allow it to lodge its observations.

90. The right of 'parties concerned' to bring proceedings has been inferred by the case-law from Article 88(2) EC and is based on the procedural rights which that provision confers on them. [41]

91. That rule was formulated for the first time in the judgments in *Cook* v *Commission* and *Matra* v *Commission*. The Court of Justice held that, where, without initiating the formal investigation procedure, the Commission adopts a decision declaring that an aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the Community judicature. [42]

92. Accordingly, in the former case, the Court held that the undertaking William Cook plc was a 'party concerned' within the meaning of Article 88(2) EC, since it produced equipment identical to that produced by the recipient of the aid. In that capacity, it must be considered to be directly and individually concerned by the decision in

39 — The detailed rules for applying that procedure are contained in Articles 6 and 7 of Regulation No 659/1999.

40 — With regard to the role of the interested parties in the administrative procedure pursuant to Article 88(2) EC, see Article 20 of Regulation No 659/1999 and Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19; Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13; *Commission* v *Sytraval and Brink's* France, paragraph 59; and Case C-276/03 P *Scott* v *Commission* [2005] ECR I-8437, paragraph 34.

41 — I should point out that those rights do not exist in the preliminary examination stage provided for in Article 88(3) EC.

42 — See *Cook* v *Commission*, paragraph 23, and *Matra* v *Commission*, paragraph 17.

question and was therefore entitled to seek the annulment of that decision on the basis of the fourth paragraph of Article 230 EC. [43]

93. Similarly, the Court held, in the latter case, that the status of 'party concerned' could be accorded to the undertaking Matra SA since its interests were affected by the grant of the aid at issue 'as it was the leading Community producer of multi-purpose vehicles and a future competitor of [the recipient of the aid]'. The Court held that the action for annulment brought against the Commission's decision was therefore admissible. [44]

94. However, the sole purpose of such action must be to safeguard the procedural rights available to 'parties concerned' under Article 88(2) EC. They must therefore put in issue the failure to initiate the formal investigation procedure. [45]

95. To sum up, it is apparent from the case-law as it now stands that, where a natural or legal person brings an action for annulment against a Commission decision not to raise objections, it must show that it has the status of a party concerned within the meaning of Article 88(2) EC and must base its action on the Commission's refusal to initiate the formal investigation procedure in which it would have enjoyed procedural rights.

96. On the other hand, if the applicant directly calls in question the validity of the Commission's assessment, adopted at the end of the preliminary examination, it is in the same position as any person seeking to challenge a decision of which it is not the addressee, such as a person who brings an action against a decision adopted at the end of the formal investigation procedure.

97. Thus, in the judgment in *Skibsværftsforeningen and Others* v *Commission*, the Court of First Instance clearly stated that, where the applicant does not seek annulment of the decision on the ground that the Commission infringed the obligation to initiate the formal investigation procedure or that, as a result, it failed to comply with the procedural safeguards afforded to the applicant under that procedure, the strict criteria laid down by the Court of Justice in the judgment in *Plaumann* v *Commission* apply. [46]

98. Therefore, the mere fact that the applicant may be regarded as a party concerned

43 — *Cook* v *Commission*, paragraphs 25 and 26.

44 — *Matra* v *Commission*, paragraphs 19 and 20.

45 — See inter alia *Cook* v *Commission*, paragraph 23; *Matra* v *Commission*, paragraph 17; *Commission* v *Sytraval and Brink's France*, paragraph 47; *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 35; and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 45.

46 — See paragraph 45.

within the meaning of Article 88(2) EC cannot suffice to render the action admissible. The admissibility of the action will depend on the applicant showing that the decision at issue affects it by reason of attributes peculiar to it or by reason of factual circumstances differentiating it from all other persons. [47] The Court has accepted that that applies where the applicant shows that its competitive market position is substantially affected by the aid to which the decision at issue relates. [48]

99. It is therefore apparent from the case-law that if an applicant challenges the Commission's refusal to initiate the formal investigation procedure, on the ground that that decision infringes its procedural rights, it must show that it is a party concerned within the meaning of Article 88(2) EC inasmuch as *its interests might be affected* by the grant of the aid in question.

100. On the other hand, if the applicant calls in question the merits of the decision appraising the aid as such, it must then demonstrate that *its competitive market position is substantially affected*. Its access to the Community judicature is therefore less straightforward than in the first situation.

101. In recent years, that case-law has been severely criticised.

102. Advocate General Jacobs, in his Opinion in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, considered the aforementioned case-law to be complex, illogical and inconsistent, since, in his view, it introduced artificial distinctions in terms of access to the Community judicature. [49] Expressing many reservations regarding the aforementioned judgments in *Cook* v *Commission* and *Matra* v *Commission*, Advocate General Jacobs finally requested the Court to re-examine and clarify its case-law, suggesting that it apply, in every case in which the applicant challenges a decision taken pursuant to Article 88(3) EC, the criterion of direct and individual interest, irrespective of the pleas on which the action

47 — See also *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 37 and the case-law cited therein.

48 — See, to this effect, *Cofaz and Others* v *Commission*, paragraphs 22 to 25, and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 37.

49 — See, in particular, points 101, 102, and 138 to 141 of that Opinion. As Advocate General Jacobs notes, those difficulties were also pointed out by commentators, inter alia, Winter, J., 'The rights of complainants in State aid cases: judicial review of Commission decisions adopted under Article 88 (ex 93) EC', *Common Market Law Review*, 1999, No 36, p. 521; Soltész, U. and Bielesz, H., 'Judicial review of State aid decisions', *European Competition Law Review*, 2004, p. 133; Flynn, L., 'Remedies in the European Courts', in A. Biondi and Others (eds), *The Law of State Aid in the EU*, Oxford, 2004, p. 283.See also Azizi, J., 'Droits de la défense dans la procédure en matière d'aides d'État: le point de vue judiciaire', in *Un rôle pour la défense dans les procédures communautaires de concurrence*, Bruylant, Brussels, 1997, p. 87, especially pp. 112 to 120; Vandersanden, G., 'Pour un élargissement du droit des particuliers d'agir en annulation contre des actes autres que les décisions qui leur sont adressées', *Cahiers de droit européen*, 1995, Nos 5 and 6; Lenaerts, K., 'The legal protection of private parties under the EC Treaty: a coherent and complete system of judicial review?', *Scritti in onore di Giuseppe Federico Mancini*, Vol. II, Diritto dell'Unione europea, Milan, 1998; Jankovec, B. and Kronenberger, V., 'Third parties in State aid litigation: Locus standi and procedural guarantees', in Sánchez Rydelski, M., *The EC State aid regime: distortive effects of State aid on competition and trade*, May, London, 2006, p. 848; Sinnaeve, A., 'State aid procedures: developments since the entry into force of the procedural regulation', *Common Market Law Review*, 2007, No 44, p. 965, and also Coulon, E. and Cras, S., 'Contentieux de la légalité dans le domaine des aides d'État: les récentes évolutions dans l'application des articles 173 et 175 du traité CE', *Cahiers de droit européen*, 1999, Vol. 35, Nos 1 and 2, p. 61, particularly pp. 91 to 110.

is founded since, in his view, the requirement of individual interest is different from the concept of interested party.

103. Although the present cases do not constitute the most appropriate context in which to suggest a new approach to this matter, I nevertheless wish to make a few observations.

104. It is true that the distinction made by the Community judicature with regard to the conditions for the admissibility of actions brought against a decision adopted on the basis of Article 88(3) EC is open to criticism. The ultimate consequence of that case-law is to limit the right of interested parties in the procedure for reviewing State aid. Although the Court affords rights to those parties where, in support of their action, they allege infringement of their procedural guarantees, at the same time it denies them those rights where they seek to call in question the merits of the decision appraising the aid. Such case-law gives rise to questions and makes Article 88(3) EC not readily comprehensible.

105. Yet access to the Community judicature is, I believe, an area in which, more than in any other, the law must be clear and consistent. The restrictions on the right of persons to obtain judicial review of the rules and measures applied by the institutions to their activity or situation must be easy to understand.

106. To draw distinctions between the conditions for the admissibility of one and the same action brought against one and the same decision in an application seeking the same relief is indeed artificial. The aim pursued by the applicant is, in my view, the same whether it invokes the protection of its procedural rights or challenges the merits of the decision appraising the aid. In both situations, the applicant seeks, by its action, the initiation of the formal procedure to investigate the aid.

107. Furthermore, such a distinction complicates the task of the Community judicature, since it is not necessarily easy, when reading an application for annulment, to distinguish between the two situations.

108. I consider, therefore, that the Court should, in due course, make that case-law more straightforward and consistent, by defining the conditions for the admissibility of actions brought against State aid decisions only in relation to the purpose of the action, not to the pleas in law invoked in support of it.

109. Accordingly, the Court should acknowledge that, where a person contests the merits of the Commission's assessment, adopted at the end of the preliminary examination,

it necessarily calls in question the failure to initiate the formal investigation procedure and therefore seeks to obtain protection of its procedural rights. The purpose of that action is the initiation of the formal investigation procedure, in which the applicant may submit its observations, and that is its sole purpose, whatever plea in law it invokes.

110. In those circumstances, I propose that the Court apply the case-law laid down in the aforementioned judgments in *Cook* v *Commission* and *Matra* v *Commission* to all actions brought against decisions adopted on the basis of Article 88(3) EC.

111. This solution would give individuals greater access to the Community judicature. The case-law in the aforementioned judgments in *Cook* v *Commission* and *Matra* v *Commission* is clearly a reflection of the Court's intention to extend the scope of judicial protection to persons who are unable to show, at that stage of the procedure, that they fulfil the very strict criteria laid down in the judgment in *Plaumann* v *Commission*. It should be pointed out, in that regard, that there is no form of publication that informs third parties of aid projects which have been notified. In the judgment in *Heineken Brouwerijen*, [50] the Court of Justice had stated, accordingly, that Article 88(3) EC 'does not require that the notification to the Commission by a Member State of plans to grant or alter aid should be immediately made known to all the interested parties; such an obligation falls upon the Commission alone when it initiates the procedure provided for in Article [88(2) EC]'. [51] On the other hand, the decision *closing* the preliminary examination stage is published in the *Official Journal of the European Union*, but just a summary version. As for the text of the decision addressed to the Member State concerned, it is only available in the authentic language. So far as concerns the information contained in that decision, a person wishing to bring an action for annulment of the decision may not have sufficient information to establish, in its application, that it is individually concerned in accordance with the criteria laid down in *Plaumann* v *Commission*. [52]

112. This solution would also strengthen judicial review of the decisions adopted by the Commission. It should not be forgotten that the Commission has exclusive jurisdiction to review State aid. Affording competitors, as any other person whose interests may be affected by the measure in question, the right to contest a decision by which the Commission, without initiating the formal investigation procedure, decides that a notified measure does not constitute aid or constitutes aid compatible with the common market strengthens judicial review of the decisions adopted by the Commission and a fortiori the application of the State aid rules contained in the Treaty.

50 — Joined Cases 91/83 and 127/83 [1984] ECR 3435.

51 — Paragraph 15.

52 — In that regard, Advocate General Tesauro stated, in his Opinion delivered in *Cook* v *Commission*, that undertakings therefore cannot be required to formulate in the document instituting the proceedings precise submissions regarding the size and the effect of the aid, such as its impact on the recipient's production costs, shifts in market shares or the effect on trading patterns (point 41).

113. Moreover, once the formal investigation procedure has been initiated and the interested parties have been able to lodge their observations in that regard, the action brought against the Commission's decision undeniably seeks to call in question the validity of its assessment. It is therefore apparent that any person wishing to bring an action against that decision will have to show an individual interest and establish, in accordance with the criteria laid down by the Court of Justice in the judgment in *Cofaz and Others* v *Commission*, that its competitive market position is substantially affected.

(b) Assessment in the light of the present cases

114. In spite of the reservations which had been expressed in respect of the aforementioned decisions in *Cook* v *Commission* and *Matra* v *Commission*, the Court, sitting in plenary session, nevertheless confirmed that case-law in the judgment in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*.[53] That judgment was delivered one year after the contested judgment.

115. As is apparent inter alia from paragraphs 33 and 34 of the contested judgment, the Court of First Instance examined the admissibility of the action for annulment brought by Kronofrance in the light of the case-law laid down by the Court of Justice in the aforementioned judgments in *Cook* v *Commission* and *Matra* v *Commission*. I would remind the Court that Kronofrance complained that the Commission had infringed its procedural rights by refusing to initiate the formal investigation stage which would have enabled it, as an interested party, to submit its observations with regard to the grant of the planned aid. Accordingly, the Court of First Instance considered that, 'where, by an action for annulment of a Commission decision taken at the end of the preliminary stage, an applicant seeks to secure compliance with the procedural guarantees provided for in Article 88(2) EC, *the mere fact that it has the status of a "party concerned" within the meaning of that provision is sufficient for it to be regarded as directly and individually concerned for the purposes of the fourth paragraph of Article 230 EC*".[54] In my view, that conclusion is wholly consistent with the case-law laid down by the Court of Justice in the aforementioned judgments in *Cook* v *Commission* and *Matra* v *Commission*, and subsequently confirmed in the judgment in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*.

116. The Court then examined, in paragraphs 36 to 44 of the contested judgment, whether the applicant could be regarded as an 'interested party' within the meaning of Article 1(h) of Regulation No 659/1999. For that purpose, the Court analysed the competitive position of Kronofrance in the wood panels and boards market.

53 — See inter alia paragraphs 31 to 37.

54 — Emphasis added.

117. In accordance with the aforementioned case-law, the Court was not required to examine whether the applicant's interests were *substantially* affected. It had only to establish that Kronofrance's position on the market in question *might be affected* by the grant of the planned aid.

118. Accordingly, in its unappealable assessment of the facts, the Court, in paragraphs 38 to 44 of the contested judgment, analysed the competitive position of Kronofrance on the market concerned. The Court found, first, that the applicant and the recipient undertaking are present on the same product market, namely the manufacture of wood panels and boards. It then pointed out that the relevant geographic market was indeed the EEA, in which the supply areas of each of those two undertakings are situated and overlap. The Court therefore concluded, in paragraph 44 of the contested judgment, that the applicant is indeed a competitor of the undertaking for which the aid is intended and that it may therefore be classified as an 'interested party' for the purposes of Article 1(h) of Regulation No 659/1999.

119. I consider this finding to be appropriate in the light of the assessment of competition which the Court of Justice had carried out in *Cook* v *Commission* and *Matra* v *Commission*.

120. In those circumstances and in the light of the foregoing considerations, I consider that the Court was right to hold that Kronofrance was an interested party within the meaning of Regulation No 659/1999 and therefore had locus standi to bring an action for annulment against the contested decision.

121. I consider that this plea must therefore be rejected as unfounded.

B — *The second plea, alleging misinterpretation of the multisectoral framework and infringement of Article 87 EC*

122. In my view, this second plea comprises two limbs. In support of the first limb, the appellants claim that the Court of First Instance, when assessing the examination conducted by the Commission in respect of the competition factor, failed to observe the limits of its jurisdiction. In support of the second limb, the appellants consider that, in any event, the Court erred in law in its interpretation of the multisectoral framework, by holding that, in order to assess that factor, it was necessary not only to take account of the structural capacities of the sector under consideration, but also to examine whether

the investment in question would be made in a declining market.

1. Arguments of the parties

123. The Federal Republic of Germany and also Glunz and OSB, supported by the Commission, claim that the Court of First Instance misapplied Article 87(3) EC and also the multisectoral framework.

124. The Court exceeded the limits of its power of judicial review in interpreting the multisectoral framework and in making its own economic evaluations. It thereby failed to have regard for the wide discretion enjoyed by the Commission in the application of Article 87(3) EC, pursuant to which it adopted and applied that framework. The Court interpreted the framework, and in particular points 3.2, 3.4 and 3.10, in a manner inconsistent with the wording, meaning and purpose thereof, by holding that the repercussions for the market of the regional aid planned should be evaluated not only in the light of the capacity utilisation in the sector concerned, but also taking into account the existence of a declining market. It is apparent from those provisions that the examination of whether the market is declining is only an alternative review criterion which must be taken into account only where the data relating to the capacity utilisation are insufficient. However, that is not the position in the present cases, for all the data concerning capacity utilisation were available.

125. Furthermore, the Court stated, in paragraphs 104 to 107 of the contested judgment, that its interpretation of the multisectoral framework is not inconsistent with the Commission's variable practice in taking decisions. However, the appellants and the Commission contend that a more in-depth analysis of that practice would reveal that, on the contrary, the Commission has always applied, with only one exception (namely, the decision of 16 May 2000 not to raise objections to the aid granted to Pirna AG [55]), the review criteria in the aforementioned order.

126. Finally, in paragraph 108 of the contested judgment, the Court also justified the application of the declining market criterion by holding that point 32 of the version of the multisectoral framework adopted in 2002 [56] takes an examination of the economic decline in a market as a basis for identifying sectors with problems. However, irrespective of the irrelevance of the 2002 multisectoral

55 — OJ 2000 C 278, p. 26. The text of the decision addressed to the German authorities is available in the authentic language, namely German, on the website http://ec.europa.eu/community_law/state_aids/comp-2000/n035-00pdf.

56 — OJ 2002 C 70, p. 8.

framework to an interpretation of an earlier version of that text, that statement is incorrect. Any reference to the economic decline criterion was, in fact, eliminated from the 2002 multisectoral framework, even before the contested judgment was delivered. Indeed, by its communication of 1 November 2003 on the modification of the multisectoral framework on regional aid for large investment projects (2002) with regard to the establishment of a list of sectors facing structural problems and on a proposal of appropriate measures pursuant to Article 88(1) of the EC Treaty, concerning the motor vehicle sector and the synthetic fibres sector,[57] the Commission amended point 32 of the 2002 multisectoral framework, with effect from 1 January 2004.

127. Kronofrance contends that the wording of point 3.10 of the multisectoral framework makes it expressly clear that, in its appraisal of the competitive situation of a market affected by an aid project, the Commission should always ascertain whether the project involves a capacity expansion in a sector with structural overcapacity, and if it is intended for a declining market. As the Court pointed out in the contested judgment, this latter aspect should always be examined because aid in a declining market is bound to create severe distortion of competition.

57 — OJ 2003 C 263, p. 3.

2. Assessment

(a) The first limb of the plea, alleging that the Court failed to have regard to the limits of its jurisdiction

128. Contrary to what the appellants maintain, I consider that the Court was right to carry out a comprehensive review of the Commission's appraisal of the method of evaluating the adjustment factor relating to market competition.

129. It is true that the Commission, for the purposes of applying Article 87(3) EC, enjoys a wide discretion, particularly where it adopts a measure involving a complex economic or social assessment.[58] In my view, this is the case where it has to examine whether the market in which the investment is planned suffers structural overcapacity or is declining.

58 — See paragraph 79 of the contested judgment. See also Case C-91/01 *Italy* v *Commission* [2004] ECR I-4355, paragraph 43 and the case-law cited therein, and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 282 and the case-law cited therein.

130. In that situation, the Court of Justice considers that judicial review of that assessment is limited. The Community judicature therefore cannot substitute its appraisal of the facts for that of the Commission and cannot make its own economic evaluations. Its review, in that case, 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 in regard to the facts or misuse of powers. [59]

131. However, I do not consider that such is the situation here. In these appeals, the Court of Justice is not required to consider whether the market in which the recipient of the aid is active suffers structural overcapacity or is declining. The question is whether the Court of First Instance was allowed to interpret the methodology laid down for itself by the Commission for reviewing the compatibility with Article 87 EC of regional aid projects for investment.

132. It is apparent from settled case-law that, in principle, the Community judicature carries out a comprehensive review where the question is whether or not a measure falls within the scope of Article 87(1) EC. [60]

133. Such is the situation in these appeals. The multisectoral framework establishes a method for calculating the maximum allowable intensity of regional investment aid. As the Court pointed out in paragraph 102 of the contested judgment, the implementation by the Commission of that methodology creates binding legal effects in that it determines the amount of aid which may be declared compatible with the common market. That method of calculation is therefore certainly legal in nature and must be implemented on the basis of objective criteria. The question whether the competition factor must be calculated taking account not only of the existence of structural overcapacity in the sector but also of the existence of a declining market does not fall within the scope of a complex economic appraisal carried out by the Commission, but must be interpreted in the light of the rules laid down by the Treaty. [61]

134. The case-law provides many examples of situations in which the Community judicature has carried out such a review. I refer to the judgment in *Italy* v *Commission* concerning an action for annulment brought by the Italian Republic against a Commission decision declaring aid granted by that State incompatible with the common market. In that case, the Italian Republic claimed, in particular, that the Commission, by refusing to approve the increase in aid intensity for small and medium-sized enterprises, had infringed Articles 87 EC and 88 EC and the Community guidelines on State aid for small

59 — See *Italy* v *Commission*, paragraph 43 and the case-law cited therein, and Case T-68/03 *Olympiaki Aeroporia Ypiresies* v *Commission* [2007] ECR II-2911, paragraph 150.

60 — Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25. See also *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen*, paragraph 282, and Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 64.

61 — See, in that regard, *France* v *Ladbroke Racing and Commission*, paragraph 25; Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 159; and *Olympiaki Aeroporia Ypiresies* v *Commission*, paragraph 150.

and medium-sized enterprises.[62] In that judgment, the Court interpreted those guidelines in the light of Article 87 EC and of the objectives it pursues.[63]

135. In the light of these considerations, I take the view that the Court of First Instance was allowed to carry out a comprehensive review of the Commission's appraisal of the method of calculating the adjustment factor relating to market competition.

136. I therefore consider that the Court did not commit an error of law as regards the scope of the judicial review of the Commission's assessments.

(b) The second limb of the plea, alleging that the Court committed an error of law in its interpretation of the multisectoral framework

137. It is now necessary to examine whether it was reasonable for the Court to take the view that the Commission infringed Article 87 EC and the multisectoral framework, thus vitiating the procedure to review the aid in question, by failing to ascertain, when calculating the competition factor, whether the aid project which had been notified was going to be carried out in a declining market.

138. As the Court states in paragraph 89 of the contested judgment, the multisectoral framework could be understood in the sense claimed by the Commission. Indeed, it is clear from the wording of point 3.4 of the framework that the Commission will consider whether the investment takes place in a declining market '[i]n the absence of sufficient data on capacity utilisation'. In the present cases, it is apparent from the papers before the Court that the Commission considered that the data relating to the structural capacity utilisation rate in the sector concerned were sufficient for calculating the competition factor. Therefore, the Commission does not appear to have departed from the methodology established in the multisectoral framework.

139. However, the Court held that, in spite of the wording of point 3.4 of the framework, that provision was to be interpreted in the light of Article 87 EC. In so doing, it held, in paragraphs 96 and 97 of the contested judgment, that the data relating to the structural capacity utilisation rate in the sector and those relating to the existence of a declining market were two specific assessment criteria which the Commission had to examine concurrently.

62 — OJ 1996 C 213, p. 4.

63 — See paragraphs 50 to 54.

140. In my view, the Court did not commit an error of law.

141. It is apparent from established case-law that the adoption of frameworks or communications setting out, for information and simplification purposes, the adoption of the criteria the Commission intends to apply when considering whether an aid project is compatible with the common market cannot under any circumstances derogate from Article 87 EC and does not release the Commission from its obligation to assess each case in the light of the criteria laid down in that provision. [64] It should be pointed out that the guidelines are only for guidance. They have no legislative force. [65] Like any other measure of secondary legislation adopted for the purposes of the application of Articles 87 EC and 88 EC, they cannot be interpreted in such a way as to restrict the scope of the rules laid down by the Treaty or to contravene the objectives it pursues. [66] It is particularly important to note, as the Court held in the judgment in *Belgium and Forum 187* v *Commission*, that Articles 87 EC and 88 EC provide the basis for an appraisal of the scope of the Commission's powers and duties in relation to State aid. [67] Accordingly, although the Commission is bound by the guidelines and notices that it adopts in this area, that applies only in so far as those provisions do not depart from the proper application of the rules in the Treaty. [68]

142. By adopting the multisectoral framework and establishing inter alia a maximum allowable aid intensity, the Commission sought to limit the adverse effects on competition which could result from regional aid for large investment projects, which has a higher ceiling than regional handicaps. [69] The determination of the competition factor should reveal a 'photograph' of the situation on the market concerned.

143. As the Court states in paragraph 102 of the contested judgment, the determination of the adjustment factor must therefore be derived from an analysis of both the structural and economic situation on the market. As I have already pointed out, this examination is particularly important because the Commission's assessment with regard to that coefficient produces binding legal effects since it determines the amount of aid which may be declared compatible with the common market.

144. Accordingly, and in spite of the wording of point 3.4 of the multisectoral framework, I consider that the assessment of the competition factor must be carried out not only

64 — See Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 22; Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 53; and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 79 and the case-law cited therein.

65 — Senden, L., *Soft Law in European Community Law*, Hart Publishing, Oxford and Portland, 2004.

66 — See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 72.

67 — Idem.

68 — See *Italy* v *Commission*, paragraph 45.

69 — See points 1.1 to 1.4 of the multisectoral framework.

by examining the structural capacity of the sector concerned, but also by analysing whether there is a chance that the planned investments will take place in a declining market.

145. I agree with the Court of First Instance that these data are different and reflect different situations on the market. The first criterion is based on the production capacities of an undertaking or sector, whereas the second is more concerned with the demand for an apparent consumption of the products on the market in question.[70] It is not impossible to observe that there is no structural overcapacity in the sector but nevertheless to find a gradual decline in demand. In due course, that decline may lead to a lower utilisation rate of the capacities of the undertaking or sector and, consequently, to a situation of structural overcapacity. Thus, as the Court correctly pointed out in paragraph 99 of the contested judgment, an interpretation which permits the Commission to approve the grant of a State aid to an undertaking marketing products belonging to a declining market, without taking that circumstance into account when it examines the aid, cannot be accepted. It is clear, as the Court quite rightly pointed out, that investments in such a market entail serious risks of distorting competition, which is plainly contrary to the objective of undistorted competition pursued by Article 87 EC.

70 — See points 7.7 and 7.8 of the multisectoral framework (cited in footnotes 17 and 18).

146. I therefore consider that it was reasonable for the Court to hold that the existence of structural overcapacity in a sector and the existence of a declining market are two distinct assessment criteria which the Commission should have examined concurrently in its determination of the competition factor.

147. In my view, therefore, the Court did not commit an error of law in its review of the Commission's appraisal.

148. Having regard to all of these considerations, I consider that the second plea should therefore be rejected as unfounded.

C — *The third plea, alleging infringement by the Court of First Instance of Article 64 of its Rules of Procedure*

149. In support of this third plea, the appellants claim that the Court of First Instance gave judgment in breach of Article 64 of its Rules of Procedure, which provide for measures of organisation of procedure.

150. The appellants consider that, since the plea alleging that Kronofrance lacked locus standi was raised for the first time during the hearing, the Court should have obtained, on its own initiative, certain information concerning the marketing areas and production sites of the undertakings concerned in order to rule on the admissibility of the action brought by Kronofrance. They submit that, if the Court had obtained that information, it would have held that Kronofrance was not 'individually concerned' within the meaning of the fourth paragraph of Article 230 EC. In omitting to gather that information, the Court therefore committed a breach of procedure.

151. I agree with Kronofrance that this ground of appeal is unfounded.

152. Indeed, the Court of Justice has held that it is for the Court of First Instance alone to decide whether it is necessary to supplement the information available to it in the cases brought before it. It has exclusive jurisdiction to find the facts and to assess the evidential value of that information. It is settled case-law that that assessment is not subject to review by the Court of Justice in the context of an appeal, unless the parties allege a distortion of the clear sense of the evidence presented to the Court of First Instance or a substantial inaccuracy in the Court's findings is apparent from the documents submitted to it. [71]

71 — See inter alia the order of 12 December 2006 in Case C-129/06 P *Autosalone Ispra* v *Commission*, paragraph 22 and the case-law cited therein.

153. No information supplied in connection with these appeals leads to that conclusion in the cases with which we are concerned. In those circumstances, I consider that the Court of First Instance cannot be criticised for not obtaining further data or information regarding the competitive position of Glunz and Kronofrance in the wood panels and boards market.

154. I therefore consider that the third plea is unfounded and should be rejected.

D — *The fourth plea, alleging infringement of the second paragraph of Article 230 EC*

155. In support of the fourth plea, Glunz and OSB maintain that the contested judgment infringes the second paragraph of Article 230 EC, since it goes beyond the pleas raised in support of the action for annulment brought by Kronofrance.

156. The Court annulled the contested decision on the ground that it infringed the Treaty, in so far as the Commission did not

take into account the existence of a declining market, even though that ground had not been invoked by Kronofrance in connection with its first plea alleging infringement of the Treaty, but only in support of its second plea, alleging misuse of powers.

157. Therefore, by failing to distinguish between manifestly different grounds and pleas, the Court erred in law, a fortiori because, according to the case-law, a plea relating to infringement of the Treaty cannot be raised by the Community judicature of its own motion. [72]

158. I agree with Kronofrance that this plea should be rejected.

159. As I pointed out in my analysis of the second plea, the Court of First Instance examined the assessment made by the Commission with regard to the calculation of the competition factor in the context of a comprehensive judicial review. Since, as I have pointed out, the rules established by the multisectoral framework were adopted to implement Article 87 EC, they must be interpreted in accordance with the provisions of the Treaty. [73] The Court was therefore right to examine the contested decision in the light of Article 87 EC.

160. I therefore consider that this plea should be rejected as unfounded.

161. Having regard to all of these considerations, I consider that the appeals brought by the Federal Republic of Germany and by Glunz and OSB should be dismissed in their entirety.

VI — Costs

162. Under Article 69(2) of the Rules of Procedure, which applies to appeals pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In these appeals, Kronofrance has requested that the appellants be ordered to pay the costs. Since the Federal Republic of Germany, Glunz and OSB have been unsuccessful in all their pleas, I consider that they must be ordered to pay the costs of these appeal proceedings.

72 — In their pleadings, Glunz and OSB refer to *Commission* v *Sytraval and Brink's France*, paragraph 67.

73 — I refer to point 141 of this Opinion.

VII — Conclusion

163. In the light of the foregoing considerations, I propose that the Court give the following ruling:

(1) The appeals are dismissed.

(2) The Federal Republic of Germany and also Glunz AG and OSB Deutschland GmbH shall pay the costs.