JUDGMENT OF THE COURT (First Chamber)

11 September 2008 *

In Joined Cases C-75/05 P and C-80/05 P,

APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 11 and 16 February 2005 respectively,

Federal Republic of Germany, represented by W.-D. Plessing and C. Schulze-Bahr, acting as Agents, assisted by M. Núñez-Müller, Rechtsanwalt (C-75/05 P),

Glunz AG,

OSB Deutschland GmbH,

established in Meppen (Germany), represented by H.-J. Niemeyer, Rechtsanwalt (C-80/05 P), with an address for service in Luxembourg,

appellants,

* Language of the case: German.

the other parties to the proceedings being:

Kronofrance SA, established in Sully-sur-Loire (France), represented by R. Nierer and L. Gordalla, Rechtsanwälte,

applicant at first instance,

Commission of the European Communities, represented by V. Kreuschitz, acting as Agent, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (First Chamber),

composed of P. Jann, President of Chamber, A. Tizzano (Rapporteur) and M. Ilešič, Judges,

Advocate General: Y. Bot,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 15 February 2007,

after hearing the Opinion of the Advocate General at the sitting on 6 March 2008,

gives the following

Judgment

1 By their appeals, the Federal Republic of Germany, Glunz AG ('Glunz') and OSB Deutschland GmbH ('OSB') seek to have set aside the judgment of the Court of First Instance of the European Communities of 1 December 2004 in Case T-27/02 *Kronofrance* v *Commission* [2004] ECR II-4177 ('the judgment under appeal'), whereby the Court of First Instance annulled Commission Decision SG (2001) D of 25 July 2001 not to raise objections against the State aid granted by the German authorities to Glunz ('the contested decision').

Legal context

2 Article 1 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) provides:

'For the purpose of this Regulation:

…

(h) "interested party" shall mean 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.'

3 Article 4 of that regulation, entitled 'Preliminary examination of the notification and decisions of the Commission', states:

'…

2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article [87(1) EC], it shall decide that the measure is compatible with the common market (hereinafter referred to as a "decision not to raise objections"). The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall

decide to initiate proceedings pursuant to Article [88(2) EC] (hereinafter referred to as a "decision to initiate the formal investigation procedure").

…'

4 The multisectoral framework on regional aid for large investment projects (OJ 1998 C 107, p. 7, 'the multisectoral framework of 1998'), in force at the material time, lays down the rules for assessing aid which falls within its scope, for the purpose of applying Article 87(3) EC.

5 Under the multisectoral framework of 1998, the Commission decides on a case-by-case basis the maximum allowable aid intensity for projects which are subject to the notification requirement provided for in Article 2 of Regulation No 659/1999.

6 Paragraph 3.10 of the multisectoral framework of 1998 describes the calculation formula which the Commission uses to determine the maximum allowable intensity. The formula is based, first, on determination of the maximum allowable intensity for aid to large companies in the area concerned, referred to as the 'regional ceiling' (factor R), which is then adjusted by three coefficients corresponding, in turn, to competition in the sector concerned (factor T), the capital/labour ratio (factor I) and the regional impact of the aid in question (factor M). The formula for the maximum allowable aid intensity is thus R x T x I x M.

7 According to point 3.2 of the multisectoral framework of 1998, factor T (the competition factor) calls for an analysis aimed at determining whether the notified project will be implemented in a sector or subsector affected by structural overcapacity.

8 Thus, in accordance with point 3.3 of the multisectoral framework of 1998, in determining whether or not such overcapacity exists, the Commission considers, at the Community level, the difference between the average capacity utilisation rate for manufacturing industry as a whole and the capacity utilisation rate of the relevant sector or subsector. The analysis covers a reference period corresponding to the last five years for which data are available.

9 Point 3.4 of the multisectoral framework of 1998 reads 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 apparent consumption of the product(s) in question (that is, production plus imports minus exports) with the growth rate of [European Economic Area] manufacturing industry as a whole.'

10 Under point 3.10.1 of the multisectoral framework of 1998, an adjustment factor of 0.25, 0.5, 0.75 or 1 is applied to factor T (the competition factor), on the basis of the following 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) to (iii): 1.00'.

Background to the dispute

11 By letter of 4 August 2000, the Federal Republic of Germany notified the Commission of a project to grant investment aid to Glunz for the construction of an integrated wood processing centre at Nettgau in the Land of Saxony-Anhalt (Germany), which fell within the multisectoral framework of 1998.

12 On 25 July 2001 the Commission decided, in accordance with Article 4(3) of Regulation No 659/1999, not to raise objections to the grant of that aid and specified the maximum allowable intensity on the basis of an assessment of the aid under the criteria laid down in the multisectoral framework of 1998. In that context, given that an examination of the data relating to the capacity utilisation rate of the economic sector to which the manufacture of wood panels and boards belongs had not revealed any structural overcapacity, the Commission applied the maximum adjustment factor of 1 in respect of factor T (competition factor), without proceeding to examine the possibility that the investment in question was carried out in a declining market.

The proceedings at first instance and the judgment under appeal

13 By application lodged at the Registry of the Court of First Instance on 4 February 2002, Kronofrance SA ('Kronofrance') brought an action for the annulment of the

contested decision, in which it relied on four pleas in law: first, infringement of Article 87 EC and of the multisectoral framework of 1998; second, infringement of Article 88(2) EC; third, misuse of powers; and fourth, breach of the obligation to state reasons.

14 The Commission for its part raised a plea of inadmissibility, on the ground that the applicant did not have *locus standi*. According to the Commission, Kronofrance could not be considered to be a competitor of the beneficiary of the aid and consequently could not claim the status of 'interested party' within the meaning of Regulation No 659/1999. For that reason, it did not have standing to challenge the contested decision.

15 As to the substance, Kronofrance claimed inter alia that, by authorising the aid in question after only a preliminary examination, the Commission had infringed Article 88(2) EC and Article 4(4) of Regulation No 659/1999, which require the formal investigation procedure to be initiated once 'doubts are raised' as to the compatibility with the common market of a notified measure.

16 According to Kronofrance, a specific investigation of the situation in the relevant market should have given rise to such doubts. Indeed, during the administrative procedure, Kronofrance had sent the Commission data on the apparent consumption of wood panels and boards, which showed that the investment at issue related to a declining market. Nevertheless, the Commission limited itself to investigating only the possible existence of structural overcapacity and considered that it was not required to verify whether the investments in question were carried out in a declining market.

17 In paragraphs 38 to 44 of the judgment under appeal, the Court of First Instance found that Glunz and Kronofrance were in competition with one another, which accorded the latter the status of an interested party which could be regarded as directly and individually concerned by the contested decision within the meaning

of the fourth paragraph of Article 230 EC. On that basis, the Court of First Instance rejected the plea of inadmissibility raised by the Commission.

18 As to the substance, in paragraphs 79 to 111 of the judgment under appeal the Court of First Instance found that, by examining the competitive situation in the market in question on the sole basis of the data relating to structural overcapacity, without having at the same time ascertained whether the proposed aid was intended for a declining market, the Commission had infringed Article 87 EC and the multisectoral framework of 1998.

19 The Court of First Instance reached that conclusion after having held in particular, on one hand, that a different interpretation would amount to denying the specificity of the two criteria for the assessment of factor T (competition factor) and, on the other hand, that investments undertaken in a declining market carry serious risks of distorting competition, which is plainly contrary to the objective of undistorted competition pursued by Article 87 EC. Such a conclusion was, moreover, consistent with the aim that the Commission itself had laid down when it had adopted the multisectoral framework of 1998, which according to point 1.2 was to limit aid for large-scale projects to a level which avoids as much as possible adverse effects on competition but which at the same time maintains the attraction of the assisted area.

20 The Court of First Instance accordingly annulled the contested decision.

Procedure before the Court and the forms of order sought

21 The Federal Republic of Germany, and Glunz and OSB, brought two appeals against that judgment, which were registered respectively on 11 February 2005 under the number C-75/05 P and on 16 February 2005 under the number C-80/05 P.

22 By order of the President of the Court of 13 October 2005, the two cases were joined for the purposes of the oral procedure and the judgment.

23 The Federal Republic of Germany and the Commission claim that the Court should:

— set aside the judgment under appeal;

— declare Kronofrance's action inadmissible or dismiss it as unfounded, and

— order Kronofrance to pay the costs relating to the proceedings at first instance and on appeal.

24 Glunz and OSB claim that the Court should:

— set aside the judgment under appeal;

— dismiss the action or, in the alternative, refer the case back to the Court of First Instance, and

— order Kronofrance to pay the costs.

25 Kronofrance contends that the Court should:

— dismiss the appeals, and

— order the appellants to pay the costs relating to the proceedings at first instance and on appeal.

The appeals

26 The Federal Republic of Germany advances three grounds of appeal, whilst Glunz and OSB put forward four grounds of appeal, which partly coincide with Germany's grounds.

Infringement of the fourth paragraph of Article 230 EC

Arguments of the parties

27 The Federal Republic of Germany, by its first ground of appeal, and Glunz and OSB, by their second ground of appeal, supported by the Commission, maintain that the judgment under appeal infringes the fourth paragraph of Article 230 EC, in that the Court of First Instance considered the contested decision to be 'of direct and individual concern' to Kronofrance and consequently held the action brought by that undertaking to be admissible. That incorrect assessment stems from an unreason-

able extension of the scope of the fourth paragraph of Article 230 EC and from a misinterpretation of that provision in the light of Regulation No 659/1999.

28 The Court of First Instance wrongly concluded that any person potentially 'interested' by the formal procedure for investigating aid within the meaning of 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 the competitive position of Kronofrance was 'substantially' affected by that decision.

29 By contrast, according to the Federal Republic of Germany, Glunz and OSB, the status of 'interested party' within the meaning of Regulation No 659/1999 does not automatically imply the right to bring legal proceedings. Only a specific examination, based on the competitive relationship existing between the recipient of the aid and the applicant at first instance, would meet the requirements laid down in settled case-law and, in particular, by Case 25/62 *Plaumann* v *Commission* [1963] ECR 95. Accordingly, in order to find that Kronofrance had *locus standi*, the Court of First Instance should have ascertained whether its position on the relevant market was substantially affected.

30 Contrary to the findings of that court, Glunz and Kronofrance are not actually in competition on the market in question and therefore Kronofrance's position on that market cannot have been substantially affected.

31 In that regard, Glunz and OSB allege that the finding of the Court of First Instance that the marketing areas of Kronofrance and Glunz overlap is inaccurate. The Court incorrectly assessed the data relating to the markets of the two undertakings.

32 Moreover, according to the Federal Republic of Germany, the Court of First Instance merely stated that Glunz belonged to a group which included other companies active in the field of wood panels and boards in France. That criterion is, however, irrelevant because it is based on considerations relating to such a group rather than on specific competition between the two undertakings in question.

33 In the light of those considerations, the Federal Republic of Germany, Glunz and OSB, as well as the Commission, are of the opinion that the action for annulment brought by Kronofrance should have been declared inadmissible.

34 Kronofrance, on the other hand, maintains that, if the formal investigation procedure is not opened, a competitor of the recipient of aid need prove only its status as an 'interested party' within the meaning of Article 88(2) EC, where its action seeks to protect its procedural rights. In that situation, it is not necessary to show that the applicant's competitive position is substantially affected. It is sufficient that its interests might be affected by the grant of the aid. In the present case, the direct competitive relationship between Glunz and Kronofrance is enough to reach such a conclusion.

Findings of the Court

35 It should first of all be stated that under the fourth paragraph of Article 230 EC a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to the former.

36 According to settled case-law, 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 by such a decision (see, among others, *Plaumann* v *Commission*, at 107; Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 20; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 14; and Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 33).

37 Since the present action concerns a Commission decision on State aid, it must be borne in mind that, in the context of the procedure for reviewing State aid provided for in Article 88 EC, the preliminary stage of the procedure for reviewing aid under Article 88(3) EC, which is intended merely to allow the Commission to form a *prima facie* opinion on the partial or complete conformity of the aid in question, must be distinguished from the examination under Article 88(2) EC. It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (*Cook* v *Commission*, paragraph 22; *Matra* v *Commission*, paragraph 16; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 38; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 34.

38 It follows that, where, without initiating the formal investigation procedure under Article 88(2) EC, the Commission finds, on the basis of Article 88(3) EC, that 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. For those reasons, an action for the annulment of such a decision brought by a person who is concerned within the meaning of Article 88(2) EC is declared to be admissible where that person seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision (*Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 35 and the case-law cited there).

39 The Court has had occasion to observe that such parties concerned are any persons, undertakings or associations whose interests might be affected by the granting of aid, that is, in particular competing undertakings and trade associations (*Commission* v *Sytraval and Brink's France*, paragraph 41, and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 36).

40 On the other hand, if the applicant calls in question the merits of the decision appraising the aid as such, the mere fact that it may be regarded as 'concerned' within the meaning of Article 88(2) EC cannot suffice for the action to be considered admissible. It must then demonstrate that it enjoys a particular status within the meaning of *Plaumann* v *Commission*. That would in particular apply where the applicant's market position would be substantially affected by the aid to which the decision at issue relates (see, to that effect, Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraphs 22 to 25, and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 37).

41 It is in the light of those principles, which have been identified by the case-law referred to in the preceding paragraphs, that the arguments advanced by the appellants to challenge the Court of First Instance's appraisal of the admissibility of the action for annulment fall to be examined.

42 It should first be observed that, at paragraph 35 of the judgment under appeal, the Court of First Instance found, without being contradicted on this point by the appellants, that Kronofrance had sought annulment of the contested decision on the ground that the Commission had wrongly refused to initiate the formal investigation procedure provided for in Article 88(2) EC.

43 As the Advocate General observed in points 116 to 118 of his Opinion, the Court of First Instance was therefore right, in checking compliance with the condition that the undertaking in question must be individually concerned for the purposes of the fourth paragraph of Article 230 EC, to ascertain whether Kronofrance could be considered an 'interested party' in terms of Article 88(2) EC and Article 1(h) of

Regulation No 659/1999 and to examine, to that end, Kronofrance's position on the relevant market, concluding that a competitive relationship with Glunz existed.

44 In those circumstances, contrary to what the appellants claim, there was no necessity for the Court of First Instance, particularly in view of the judgments in *Cook* v *Commission* and *Matra* v *Commission*, to require in addition proof that the position of Kronofrance on the market concerned was substantially affected by the adoption of the contested decision.

45 As regards, next, the analysis forming the basis of the Court of First Instance's finding that there was a competitive relationship between Glunz and Kronofrance, the appellants dispute the existence of such a relationship and rely on two arguments.

46 First, they maintain that the Court of First Instance reached such a conclusion after making an incorrect assessment of certain data relating to the geographical extent of the respective marketing areas of the two undertakings in question, whose degree of overlap is altogether marginal, so that no competitive relationship exists between Glunz and Kronofrance.

47 It is however clear that, even if that argument is developed in the context of a plea alleging an error in law, the appellants are in reality seeking to challenge the assessment of the facts by the Court of First Instance.

48 In the context of an appeal, such an assessment is subject to review by the Court of Justice only where the facts and evidence put before the Court of First Instance have been distorted (see for example, to that effect, Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42, and Case C-206/04 P *Mühlens* v *OHIM* [2006] ECR I-2717, paragraph 28).

49 It follows that, since no distortion has been substantiated or even alleged by the appellants in the present case, that argument must be considered manifestly inadmissible.

50 Second, the appellants contend that the Court of First Instance relied not on analysis of the competition specifically existing between Kronofrance and Glunz but on general considerations connected with the presence on the French wood panel and board market of companies belonging to the group of which Glunz is a member.

51 In that regard it is sufficient to point out that, after having stated that both the undertakings in question manufactured wood panels and boards and that their marketing areas overlapped, the Court of First Instance added, at paragraph 43 of the judgment under appeal:

'It is also apparent from the [contested decision] that Glunz is a subsidiary of Tableros de Fibras SA, which has factories in France active in the wood industry which were transferred to it by Glunz in 1999.'

52 It is clear from reading that paragraph of the judgment under appeal that the Court referred to considerations relating to the group to which Glunz belongs only for the sake of completeness, after already having concluded that a competitive relationship existed between the two undertakings in question. Thus the Court did not in any way base the conclusion it reached in paragraph 44 on that ground alone.

53 It follows that that argument must be rejected as inoperative.

54 In view of the above, the first ground of appeal of the Federal Republic of Germany and the second ground of appeal of Glunz and OSB must be dismissed.

Infringement of Article 87(3) EC and of the multisectoral framework of 1998

Arguments of the parties

55 The Federal Republic of Germany, by its second ground of appeal, and Glunz and OSB, by their first ground of appeal, supported by the Commission, maintain that the Court of First Instance misapplied Article 87(3) EC and the multisectoral framework of 1998.

56 According to those parties, the Court of First Instance failed to have regard to the wide discretion enjoyed by the Commission when applying Article 87(3) EC, pursuant to which it adopted and applied the multisectoral framework of 1998. It thus interpreted the relevant points of the multisectoral framework of 1998 in a manner contrary to their wording, meaning and object, by holding that the repercussions of the regional aid at issue on competition had to be assessed in the light of both the capacity utilisation of the sector concerned and the existence of a declining market.

57 More precisely, it ignored the order in which those assessment criteria have to be taken into account, as laid down in points 3.2 to 3.4 of that framework. It is apparent from those provisions that the question whether the relevant market is declining is merely an alternative review criterion which must be taken into account only where the data relating to the capacity utilisation are insufficient. That is, however, not the position in the present cases, since all the capacity utilisation data were available.

58 Kronofrance contends that the wording of point 3.10 of the multisectoral framework of 1998 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 whether it is intended for a declining market. As the Court of First Instance pointed out in the judgment under appeal, the latter aspect should always be examined because aid granted in a declining market carries serious risks of distorting competition.

Findings of the Court

59 It is true, as the appellants submit, that, in the application of Article 87(3) EC, the Commission enjoys wide discretion, the exercise of which involves complex economic and social assessments which must be made in a Community context (see for example, to that effect, Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18). In that context, judicial review of the manner in which that discretion is exercised 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 in the assessment of the facts or misuse of powers (Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 74; Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 93; and Case C-91/01 *Italy* v *Commission* [2004] ECR I-4355, paragraph 43).

60 However, it should be pointed out that, in adopting rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its aforementioned discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 211).

61 Thus, in the specific area of State aid, the Court has already had occasion to stress that the Commission is bound by the guidelines and notices that it issues, inasmuch as they do not depart from the rules in the Treaty and are accepted by the Member States (see, for example, Case C-409/00 *Spain* v *Commission*, paragraphs 69 and 95, and *Italy* v *Commission*, paragraph 45, both cited above).

62 In the judgment under appeal, the Court of First Instance reviewed precisely whether the Commission, in adopting the contested decision, complied with its multisectoral framework of 1998. As is clear in particular from paragraph 86 of the judgment under appeal, the analysis undertaken by the Court involved ascertaining whether the Commission was entitled, on the basis of the text of that framework, to apply to the aid measure in question an adjustment factor of 1 in respect of factor T (the competition factor) and not to examine whether that aid was intended for a declining market.

63 In those circumstances it does not appear that, by embarking upon such an analysis of the contested decision, the Court of First Instance exceeded the limits of its power of review established by case-law in an area giving rise to complex economic and social assessments on the part of the Commission.

64 Nor can a failure to respect the wide discretion enjoyed by the Commission when applying Article 87(3) EC be inferred from the interpretation of the multisectoral framework of 1998 given by the Court of First Instance.

65 In that respect, although the Commission is bound by the guidelines and notices that it issues in the field of State aid, that is so only to the extent that those texts do not depart from the proper application of the rules in the Treaty, since the texts cannot be interpreted in a way which reduces the scope of Articles 87 EC and 88 EC or which contravenes the aims of those articles (see, to that effect, *Deufil* v *Commission*, paragraph 22; Case C-351/98 *Spain* v *Commission*, paragraph 53; *Italy* v *Commission*, point 45, all cited above; and, by analogy, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 72).

66 The Court of First Instance was therefore justified in holding, in paragraph 89 of the judgment under appeal, that the multisectoral framework of 1998 should be interpreted in the light of Article 87 EC and of the principle of incompatibility of public aid set out therein, in order to attain the objective sought by that provision, namely undistorted competition in the common market.

67 The need to appraise the legality of the contested decision with regard to the multisectoral framework of 1998, as interpreted in the light of Articles 87 EC and 88 EC, was all the more justified in the present case in view of a certain ambiguity in the wording of that framework, which the Court of First Instance drew attention to in paragraph 89 of the judgment under appeal. That ambiguity arises in particular from the use of the conjunctions 'and/or' in point 3.10.1 of the framework in relation to the very criteria which the Commission is bound to take into consideration for the purposes of allocating an adjustment factor of 1 in respect of factor T (the competition factor).

68 It was in the light of the principles set out in Articles 87 EC and 88 EC as well as the objective of preventing the effects of distortion caused by aid, as expressed for example in point 1.2 of the multisectoral framework of 1998, that the Court of First Instance held that point 3.10.1(iv) of that framework had to be interpreted as meaning that the application of the top adjustment factor of 1, which provides the maximum amount of aid capable of being declared compatible with the common market, implies a prior finding that there is no structural overcapacity in the sector concerned and also that the market is not declining.

69 In that respect, it is clear that a different interpretation, whereby the presence of only one of those two factors would be sufficient to justify applying the maximum adjustment factor, would be liable to go against the principles and the objective referred to in the previous paragraph of this judgment. First, such an interpretation would allow the Commission to apply the top adjustment factor to projects that were likely to result in an increase in capacity in a sector which might be characterised by an abso-

lute decline in demand, without the Commission having taken that circumstance into account.

70 Second, that interpretation would have the consequence, for the purposes of applying the adjustment factor of 1, of making the situation of a sector in which the Commission found that there was no structural overcapacity equivalent to a situation in which it lacked the data to come to such a finding, without however being able to rule out the existence of such overcapacity.

71 Furthermore, contrary to what the appellants allege, it is clear from reading paragraph 97 of the judgment under appeal that the Court of First Instance did not propose interpreting the multisectoral framework of 1998 as meaning that the Commission is obliged to assess in every case whether the market concerned is declining. Such an assessment is required according to the Court only if the Commission does not have sufficient data to come to the conclusion that there is structural overcapacity, or when, as in the present case, it intends to apply the maximum adjustment factor of 1 in respect of factor T (the competition factor).

72 Finally, it should be pointed out that in paragraph 99 of the judgment under appeal the Court of First Instance draws an inference of general application, namely that the Commission could not authorise an aid measure without having previously assessed whether the market concerned is declining.

73 It is however clear that such an inference is not only unjustified in view of the findings which precede it but is in contradiction to paragraph 97 of the same judgment.

74 Nevertheless, that contradiction has no effect upon the conclusion that the Court reaches at paragraph 103 of the judgment under appeal as far as the outcome to the presence case is concerned, given that in that paragraph it finds merely that the Commission is precluded from refraining from an assessment of whether the market is declining when it intends to apply an adjustment factor of 1 in respect of factor T (the competition factor).

75 In view of all the above, the second ground of appeal raised by the Federal Republic of Germany and the first ground of appeal raised by Glunz and OSB must also be rejected.

Infringement of Article 64 of the Rules of Procedure of the Court of First Instance

Arguments of the parties

76 By their respective third grounds of appeal, the Federal Republic of Germany as well as Glunz and OSB allege infringement of Article 64 of the Rules of Procedure of the Court of First Instance. Since the plea alleging that the action was inadmissible had been raised for the first time by the Commission at the hearing, the Court of First Instance, in order to rule on whether Kronofrance had *locus standi*, should on its own initiative have obtained certain information necessary for ascertaining whether Glunz and Kronofrance were in competition, such as data relating to their marketing areas or the distances between their productions sites. Had that information been obtained, the Court would have held that Kronofrance was not 'individually concerned' within the meaning of the fourth paragraph of Article 230 EC.

77 According to Kronofrance, on the other hand, the Court of First Instance did not infringe Article 64 of its rules of procedure. It is a matter solely for that court to decide whether the evidence before it in a case needs to be supplemented. Furthermore, the probative value of that evidence does not constitute a question that is subject to review by the Court of Justice, except in the case of distortion or where it is apparent from the documents in the case-file that the findings of the Court of First Instance are inaccurate. Finally, it is clear from paragraphs 38 to 41 of the judgment under appeal that the Court had sufficient evidence to give judgment. There was thus no reason to collect other information.

Findings of the Court

78 As regards the assessment by the Court of First Instance of applications made by a party for measures of organisation of the procedure or enquiry, it must be pointed out that the Court of First Instance is the sole judge of any need to supplement the information available to it in respect of the cases before it (see, for example, Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, paragraph 19; Case C-136/02 P *Mag Instrument* v *OHIM* [2004] ECR I-9165, paragraph 76; and Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 77). Whether or not the evidence before it is sufficient is a matter to be appraised by it alone and is not subject to review by the Court of Justice on appeal, except where that evidence has been distorted or the inaccuracy of the findings of the Court of First Instance is apparent from the documents in the case-file (*Ismeri Europa* v *Court of Auditors*, paragraph 19, and Joined Cases C-24/01 P and C-25/01 P *Glencore and Compagnie Continentale* v *Commission* [2002] ECR I-10119, paragraphs 77 and 78).

79 Consequently, no distortion or inaccuracy having been alleged in the present case, it must be held that the Court of First Instance was fully entitled to consider that the evidence in the case-file and the explanations given during the hearing, as summarised in paragraphs 38 to 41 of the judgment under appeal, were sufficient to enable

it to decide the question of the admissibility of the action, without any need for measures of organisation of the procedure.

80 Since the present plea is therefore manifestly unfounded, it must be rejected.

Infringement of the second paragraph of Article 230 EC

Arguments of the parties

81 Finally, by their fourth ground of appeal, Glunz and OSB maintain that the judgment under appeal is contrary to the second paragraph of Article 230 EC, in so far as it rules on matters outside the scope of the pleas raised in support of the action for annulment.

82 The Court of First Instance annulled the contested decision on the basis that it infringed the Treaty, in that the Commission had failed to take into account the fact that the sector in question was declining, whereas that argument had been raised by Kronofrance not in the context of its plea relating to infringement of the Treaty, but solely in support of the plea by which it alleged misuse of powers.

83 Thus, by failing to distinguish between manifestly different arguments and pleas, the Court of First Instance erred in law, *a fortiori* because, according to the case-law, a plea relating to infringement of the Treaty, within the meaning of the second paragraph of Article 230 EC, cannot be raised by the Community judicature of its own initiative.

84 Kronofrance contends that it based its application on all the grounds mentioned in Article 230 EC and included all the necessary reasoning in its written pleadings. In any event, it is not bound to devote a plea to a specific defect in the contested decision, since such a flaw is apparent from the summary of the facts and law contained in its written and oral observations.

Findings of the Court

85 By this ground of appeal, Glunz and OSB essentially seek a declaration that the Court of First Instance erred in giving judgment on an infringement of Article 87 EC when examining an argument raised by Kronofrance in support of its plea alleging misuse of powers. By so doing, the Court gave a decision on an argument which it did not have the power to raise of its own initiative and which Kronofrance had not put forward.

86 It should be pointed out at the outset that this ground of appeal is based on a false premise, namely that the Court of First Instance gave judgment on the plea alleging an infringement of Article 87 EC.

87 It should be stated, in that regard, that the Court of First Instance did not give any judgment on that plea. As is apparent from paragraph 35 of the judgment under appeal, the Court limited its analysis to the second plea in the action before it, which alleged that the Commission wrongly refused to open the formal investigation procedure provided for in Article 88(2) EC. In the context of that plea, as is evident from paragraph 48 of the judgment, Kronofrance had maintained that, by approving the aid granted by the German authorities to Glunz after only a preliminary examination, the Commission had infringed inter alia Article 4(4) of Regulation No 659/1999,

which obliges it to open the formal investigation procedure once 'doubts are raised' as to the compatibility with the common market of the notified measure.

88 It was only in order to come to a decision as to whether such doubts existed that the Court of First Instance examined the question of the interpretation of Article 87 EC, thereby considering that question a prerequisite for being able to decide upon the legality of the contested decision with regard to Article 88(2) EC.

89 In those circumstances, the fact that Kronofrance raised a separate plea alleging infringement of Article 87 EC, without relying on the argument relating to the misapplication of the multisectoral framework of 1998, is irrelevant.

90 It follows that the final ground of appeal must also be dismissed.

91 In the light of all the above, the two appeals must be rejected in their entirety.

Costs

92 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of 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. Since the appellants

have been unsuccessful in their grounds for appeal, they must be ordered to pay the costs, in accordance with the form of order sought by Kronofrance.

93 In accordance with the same article of the Rules of Procedure, the Commission must be ordered to bear its own costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeals;

2. Orders the Federal Republic of Germany to pay the costs relating to Case C-75/05 P;

3. Orders Glunz AG and OSB Deutschland GmbH to pay the costs relating to Case C-80/05 P;

4. Orders the Commission of the European Communities to bear its own costs.

[Signatures]