JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)
5 November 1997 *

In Case T-149/95,

Établissements J. Richard Ducros, a company incorporated under French law, established in Paris, represented by Philippe Genin, of the Lyons Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented initially by Jean-Paul Keppenne, then by Xavier Lewis, both of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

CMF S. p. A., a company incorporated under Italian law, and **CMF Sud S. p. A.**, a company in liquidation incorporated under Italian law, established in Pignatero Maggiore, Italy, represented by Mario Siragusa, of the Rome Bar, and Giuseppe Scassellati-Sforzolini, of the Bologna Bar, with an address for service in Luxembourg at the Chambers of Messrs Elvinger, Hoss & Prussen, 2 Place Winston Churchill,

interveners,

* Language of the case: French.

APPLICATION for annulment of the decision reproduced in Commission Notice 95/C 120/03 pursuant to Article 93(2) of the EC Treaty to other Member States and other parties concerned regarding aid which Italy granted to CMF Sud S. p. A. and CMF S. p. A. [State aid C 6/92 (ex NN 149/91)] (OJ 1995 C 120, p. 4),

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

composed of: A. Saggio, President, C. P. Briët, A. Kalogeropoulos, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 April 1997,

gives the following

Judgment

Facts

1 CMF Sud S. p. A. ('CMF Sud'), which resulted from the merger in 1986 of two wholly-owned subsidiaries of two holding companies in the Italian public sector, was principally engaged in metal construction work.

2 As part of the restructuring of those holding companies, a new company, CMF S. p. A. ('CMF'), was set up in October 1992. CMF bought up the principal business of CMF Sud, which was then placed in liquidation.

3 The applicant is a company incorporated under French law which carries on business in public works and metal construction.

4 In 1990 the applicant and CMF Sud put in tenders for a public-works contract concerning the extension of the terminal at Marseilles Provence airport, France. By decision of 4 September 1990 the contract for those works was awarded to CMF Sud.

5 The applicant took the view that the terms and conditions of CMF Sud's bid for the contract were made possible only as a result of the subsidies received by that company; the applicant therefore lodged a complaint with the Commission.

6 By decision dated 11 March 1992, the Commission initiated the procedure provided for in Article 93(2) of the EC Treaty against the Italian Republic in connection with the public capital contribution in favour of CMF Sud to offset its operating losses in 1989 and 1990 (Notice 92/C 122/04, OJ 1992 C 122, p. 6, hereinafter 'the decision of 11 March 1992'). By decision dated 16 September 1992 the Commission decided to extend the procedure to cover fresh injections of public capital (Notice 92/C 279/11, OJ 1992 C 279, p. 13). On 22 September 1993 it decided to extend the procedure once again in order to cover the grant by the Italian State of a guarantee in respect of the total liabilities of CMF Sud during its voluntary liquidation, the aid components which might be comprised in the sale to CMF of the main business of CMF Sud and the supply of start-up capital to the new company (Notice 93/C 282/04, OJ 1992 C 282, p. 5).

7 In the abovementioned decisions the Commission took the view, essentially, that the successive increases in the capital of CMF Sud, the guarantees granted to it, and the provision of start-up capital to CMF, were State aid, since those investments did not reflect the conduct of a private investor in a market economy. In particular, the Commission found that, on carrying out the increases in capital, the subscribers failed to decide at the same time on the measures necessary to remedy the financial difficulties of the beneficiaries, which should have taken the form of a thorough restructuring programme capable of being regarded as acceptable from the point of view of the public interest. Under those circumstances, it considered the financing to be operating aid in favour of CMF Sud and CMF.

8 On the initiation and subsequent extensions of the procedure, the Commission stressed that the distortion of competition caused by the operating aid in the building and engineering sectors was particularly serious in light of the characteristics of those sectors. None the less, it stated that it was not opposed to the grant of such aid for restructuring companies in difficulty, provided that certain strict conditions were observed.

9 The applicant was the sole competing undertaking to intervene during the procedure.

10 On 16 May 1995 the Commission published in the *Official Journal of the European Communities* Notice 95/C 120/03 pursuant to Article 93(2) of the Treaty to the other Member States and other parties concerned regarding aid which Italy granted to CMF Sud S. p. A. and CMF S. p. A. [State aid C 6/92 (ex NN 149/91)] (OJ 1995 C 120, p. 4). In that notice the Commission stated that it had decided to close the procedure initiated under Article 93(2) of the Treaty and to authorize the aid in question under Article 92(3)(c) of the Treaty (hereinafter 'the contested decision').

11 The Commission explained that, following an evaluation of the information supplied by the Italian authorities, by the recipients of the aid and by their shareholders, and in the light of undertakings given by them to the Commission, it had formed the view that the aid to CMF Sud and CMF covered by the procedure under Article 93(2) of the Treaty was in conformity with the principles of compatibility laid down in the Community Guidelines for State aid for Rescuing and Restructuring Firms in Difficulty set out in Commission Notice 94/C 368/05 (OJ 1994 C 368, p. 12, hereinafter 'the guidelines').

12 It stressed in that connection that the aid formed part of a reasonably viable, coherent and large-scale plan designed to restore the long-term viability of the undertakings concerned. Moreover, the aid granted to CMF Sud was to be accompanied by an acceptable industrial counterpart, namely the total withdrawal of existing capacity from the relevant market. Furthermore, they would enable the company's business to be wound up under optimal conditions without entailing other harmful effects on competition in the sector.

13 The Commission stated that, in authorizing the aid, it took special account of the following undertakings by the Italian authorities:

— CMF would be privatized by 30 June 1995 at the latest;

— two of CMF's production lines, with production capacities of 10 000 and 12 000 tonnes a year respectively, would be sold on markets not in competition with the European Community or scrapped by 30 June 1995 at the latest;

— in the process of CMF Sud's liquidation its assets would be sold to companies in sectors other than those in which it carried on its business, no later than 31 December 1996.

Procedure and forms of order sought

14 By application lodged at the Registry of the Court of First Instance on 14 July 1995, the applicant brought these proceedings.

15 By document lodged at the Registry on 27 November 1995, CMF Sud and CMF applied for leave to intervene in support of the form of order sought by the Commission. By order of 31 January 1996 leave to intervene was granted.

16 The written procedure was concluded on 23 May 1996 when the Commission lodged its observations on the statement in intervention.

17 At the hearing on 22 April 1997 the parties were asked to give their views on the existence of competitive relations between the applicant and CMF and on the latter's current situation.

18 The applicant claims that the Court should:

— declare the action admissible and annul the contested decision;

— order the Commission to pay the costs.

19 The Commission contends that the Court should:

— dismiss the action as inadmissible or ill-founded:

— order the applicant to pay the costs.

20 The interveners claim that the Court should:

— declare the action inadmissible or dismiss it as unfounded;

— order the applicant to pay the costs, including those incurred by the interveners.

Admissibility

Arguments of the parties

21 The Commission, supported by the interveners, maintains that even if the applicant was responsible for the initiation of the procedure provided for in Article 93(2) of the Treaty, and participated in it, it does not satisfy the conditions laid down in the case-law for it to be directly and individually concerned by the contested decision. It has not shown that its position was significantly affected by the measure in question (Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391; Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, and Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971).

22 As far as the Commission is concerned, the applicant has not demonstrated the existence of a causal link between the aid paid to CMF Sud and CMF, on the one hand, and its exclusion from the public-works contract concerning Marseilles airport, on the other. Analysis of the bids made in the course of that award procedure reveals, moreover, that two other bidders also made proposals which were deemed to be more attractive than that made by the applicant.

23 In the Commission's view, the applicant has not adduced proof that the aid in question affected its market position. However, it is clear from the case-law that the fact that a measure may influence existing competitive relationships cannot suffice to allow a trader in competition with the addressee of the measure to be regarded as directly and individually concerned by that measure (Joined Cases 10/68 and 18/68 *Eridania and Others* v *Commission* [1969] ECR 459).

24 The Commission, supported by the interveners, contends that the fact that CMF was able to maintain its market position as a competitor of the applicant does not suffice in order to enable its action to be deemed admissible, especially since the contested decision entailed the closure of the CMF production lines which were in direct competition with the applicant's business.

25 The interveners consider that, contrary to the requirement laid down in the *Cofaz* judgment, cited above, the applicant did not play a decisive role in the conduct of the administrative procedure, inasmuch as the contested decision states that the only competitor to have participated in that procedure (that is to say, the applicant) did no more than supply publicly available accounting documents.

26 The interveners go on to contend that, contrary to the requirements laid down in the *ASPEC* judgment, the applicant has not shown that it belonged to a restricted circle of competitors, or that the aid in question would bring about an increase in capacity on a market already suffering from overcapacity. The conditions laid

down in the *ASPEC* judgment are therefore not satisfied in the present case and the action is inadmissible. Furthermore, the financial intervention by the Italian State, decided on in May 1991, served merely to cover the losses of the 1990 financial year and not, as stated in the contested decision, also those arising in the 1989 financial year. Since the contract-award procedure took place in 1990, that aid could not have had any effect, it is alleged, on CMF Sud's participation in that procedure.

27 Finally, the interveners raise a supplementary plea of inadmissibility based on a lack of jurisdiction of the Court of First Instance. Whilst accepting that this plea was not put forward by the Commission, they contend that since it is a matter of public policy it may be raised by the Court of First Instance of its own motion. The pleas raised by the applicant are said, essentially, to go to the legality of the award of a public-works contract in Marseilles. However, the French courts, with all the facts before them and having all the necessary powers of investigation, have, it is alleged, already rejected the plea raised in this action. Thus, the action does not seek the annulment under Article 173 of the Treaty of an act of a Community institution and the Court of First Instance therefore lacks jurisdiction to determine the dispute.

28 For its part, the applicant maintains that it fulfils the criteria laid down in *Cofaz*. It points out that it was responsible for the initiation of the administrative procedure and asserts that the fact that the contested decision allows CMF to be privatized without restitution of the aid received affects its market position. Regard being had to the amount of the losses sustained by CMF Sud and CMF since 1989, those undertakings could not have pursued their activities without their 'acquisition by the State'.

29 It also states that the prices offered by CMF Sud in the course of the contract-award procedure for Marseilles airport in reality constitute sales at a loss made possible only by the State aid. The share of CMF Sud and CMF in the Community market is large, as is borne out by the securing of several contracts in France, Denmark and Portugal, and the aid in question, it claims, enabled those undertakings to charge prices which amounted to dumping in relation to their competitors' prices.

Findings of the Court

30 Contrary to the interveners' assertions, the jurisdiction of the Court of First Instance cannot be called in question in this case. Suffice it to be noted in that connection that the form of order sought in the action unequivocally seeks annulment of a Commission decision reviewable by the Court. Accordingly, the fact that the pleas relied on in support of the form of order sought may have already been put forward and rejected in national proceedings cannot call in question the jurisdiction of the Court of First Instance.

31 It follows from the fourth paragraph of Article 173 of the Treaty that persons other than the addressees of a decision may contest that decision only if it concerns them directly and individually. Since the contested decision was addressed to the Italian Government, it is necessary to determine whether those conditions are met in the applicant's case.

32 As regards the question whether the applicant was directly concerned, the Court considers that, since the contested decision declares certain aid already granted to be compatible with the common market, it is of direct concern to the applicant (*AITEC*, paragraph 41).

33 As to the issue of the individual effect on the applicant, it has been consistently held that a decision is of individual concern to the natural or legal persons to whom it applies by reason of certain characteristics peculiar to them or a factual situation which distinguishes them in relation to any other person (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 124 and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1395, paragraph 44).

34 With particular regard to review of State aid, it is clear from the case-law that a decision closing a procedure initiated under Article 93(2) of the Treaty is of individual concern to the undertakings which instigated the complaint giving rise to

the initiation of the procedure, which submitted observations and which determined the course of that procedure, provided, however, that their market position was significantly affected by the aid measure which formed the subject-matter of the contested decision (*Cofaz*, paragraphs 24 and 25). However, it does not follow that an undertaking may not demonstrate in another way, by pointing to specific circumstances differentiating it in the same way as the addressee, that it is individually concerned (*ASPEC*, paragraph 64).

35 In the present case the Court notes, first, that, as the Commission acknowledged, the applicant was the instigator of the complaint and was the sole undertaking to participate in the procedure other than the recipients of the aid; it submitted observations on 15 July 1992 and, following the first extension of the procedure, on 8 December 1992. Those observations were, moreover, communicated to the Italian authorities, which presented their comments on them (see also the contested decision, pp. 5 and 6, and the decision of 11 March 1992, p. 6).

36 In that connection, the argument of the interveners based on the public nature of the accounting documents supplied during the procedure by the applicant is without foundation since it was on the basis of such information, which, in contrast to the internal documents of the national administration granting aid and the documents of the recipient undertaking, is to be found in the documents to which competing undertakings may have access, that the applicant was able to argue its case during the procedure before the Commission. The fact that the Commission was obliged on two occasions to extend the scope of the procedure, moreover, highlights the difficulty in elucidating the situation of the undertakings in receipt of the aid.

37 As regards, secondly, the effect on the applicant's market position, the Court of First Instance considers that the file contains several indications that the applicant is individually concerned by the contested decision. It should be noted, first, that the Commission described the applicant in the contested decision as a competitor of CMF Sud.

38 Next, it is clear from the file in general that a common feature of the construction and engineering sector is the organization of tender procedures — in which the price offered is the main selection criterion — at European level, which may result in the securing by a company of a public-works contract such as that which gave rise to the complaint, making it difficult to quantify the market shares of the undertakings concerned.

39 The Court of First Instance notes further that, when asked at the hearing to give particulars of a competitive relationship with CMF, the applicant stated that the metal-construction sector in Europe comprises a restricted number of undertakings. Though acknowledging that, since its tender for the public-works contract concerning Marseilles airport, it has not participated in other tender procedures with CMF, the applicant also stated that the public-works contract in question was of considerable importance to it because it represented a considerable part of its annual turnover. In those circumstances, the Court of First Instance considers that this competitive relationship was not of the same degree as that referred to in the *Eridania* judgment (paragraph 23, above).

40 On the other hand, neither the defendant nor the interveners were able to explain further their assertions concerning the fact that, in view of the conditions to which the contested decision is subject, CMF is no longer a competitor of the applicant. Even if production lines have been closed, that undertaking remains active in certain areas of metal construction and it is therefore still possible that, contrary to the assertions of the Commission and the interveners, the applicant remains in competition with CMF.

41 As regards the argument based on the fact that the applicant was classified only in fourth position on the award of the public-works contract concerning Marseilles airport, the Court of First Instance points out that the subject-matter of this action is the Commission's decision to close a procedure under Article 93(2) of the Treaty. Since the participation by the applicant and by one of the undertakings in

receipt of the aid in the same public-works contract is not in question, the classification obtained by the applicant in this context cannot cast doubt on the significant effect of the contested decision on its market position. Indeed, the action does not go to the legality of that contract, and it is only in the framework of a review of that aspect, which does not fall to be made here, that the applicant's classification could possibly be of importance.

42 In the light of all those considerations, the Court of First Instance considers that the applicant is in competition with the undertakings in receipt of the aid, so that it is individually affected by the decision declaring the aid compatible with the common market (see *Skibsværftsforeningen and Others* v *Commission*, cited above, paragraph 47).

43 Accordingly, the action must be declared admissible.

Substance

44 In support of the form of order which it seeks, the applicant raises two pleas in law. The first alleges infringement of the rules of procedure provided for in the Treaty, inasmuch as the Italian State did not notify the Commission of the aid granted, which justifies the annulment of the contested decision. The second plea alleges infringement by that decision of the conditions laid down by the Commission in the matter of aid to undertakings in difficulty.

45 The Commission, supported by the interveners, challenges the pleas raised by the applicant.

The first plea: infringement of the rules of procedure provided for in the Treaty

Arguments of the parties

46 In its first plea the applicant maintains essentially that the fact that the aid granted to CMF and CMF Sud was not notified renders the contested decision unlawful. It is for the Commission to penalize such infringement of the duty to notify by systematically ordering reimbursement of non-notified aid. Moreover, the applicant recalls, in the notice of 24 November 1983 (OJ 1983 C 318, p. 3) the Commission declared that such aid would be unlawful from the date of its coming into effect. The judgment of the Court of Justice in Case 70/72 *Commission* v *Germany* [1973] ECR 813, furthermore, affords the Commission the possibility of taking a decision to order recovery of such aid. That is also the approach taken most recently by the Commission, as is borne out by the decision which gave rise to the judgment of the Court of Justice in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, and by Commission Decision 88/468/EEC of 29 March 1988 on aids granted by the French Government to a farm machinery manufacturer in St Dizier, Angers and Croix (OJ 1988 L 229, p. 37). By not declaring aid granted in breach of the applicable rules of procedure to be unlawful, on the pretext that it is in conformity with substantive rules, the Commission renders those rules nugatory.

47 The Commission asserts that it strictly observed the relevant rules of procedure. Moreover, it emphasizes that the applicant's assertion as to the consequences of failure to observe the notification rules is in total contradiction with the case-law (Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires et Syndicat National des Négociants et Transformateurs de Saumon* v *French State* [1991] ECR I-5505 and Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501). It does not, it maintains, have the power to seek recovery of State aid, without examining the compatibility thereof with the common market, solely on the ground that the obligation to notify was not observed.

48 The interveners contend that the infringement of the obligation to notify aid does not entail the incompatibility of the aid with the Treaty. Observance of that obligation is ensured by the direct effect attributed by the Court to Article 93(3) of the Treaty, which enables national courts to draw all the consequences of such an infringement. Provided it could show an interest in bringing proceedings, the applicant could therefore have secured from the Italian courts a declaration as to the invalidity of the decisions implementing non-notified aid. Consequently, the plea must be dismissed.

Findings of the Court

49 The Court has consistently held that the infringement by the Member States of the obligation provided for in Article 93(3) of Treaty to notify the Commission of projected aid and not to implement any such aid prior to the Commission's final decision does not have the effect of rendering those measures automatically incompatible with the common market (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 11 et seq., and Case C-39/94 *SFEI and Others* v *La Poste and Others* [1996] ECR I-3547, paragraph 43; *SIDE* v *Commission*, cited above, paragraph 84). The prohibition on the grant of aid provided for in Article 92(1) is neither absolute nor unconditional, since paragraph 3 of that provision grants the Commission a wide margin of discretion, in derogation from the general prohibition, to declare certain aid compatible with the common market (*France* v *Commission*, cited above, paragraph 15, and *SFEI*, cited above, paragraph 36).

50 The possible incompatibility of aid measures with the common market may be established therefore only after completion of the examination procedure provided for in Article 93, which it is for the Commission to implement, and cannot be an automatic consequence of the omission by the Member State concerned to notify the measure in question.

51 Furthermore, the Court of First Instance observes that the infringement of such an obligation is penalized by the direct effect attributed to Article 93(3), *in fine* (Case 120/73 *Lorenz* [1973] ECR 1471 and *Fédération Nationale du Commerce Extérieur des Produits Alimentaires*, cited above, paragraphs 12 and 14), which enabled the applicant, if appropriate, to bring proceedings before the national courts. The Commission may, none the less, for its part, direct the Member State responsible to suspend payment of the aid until the procedure has been completed (*France* v *Commission*, cited above, paragraphs 19 and 20). The Court of First Instance emphasizes that in the present case both in the decision initiating the procedure and in the two subsequent decisions extending it, the Commission directed the Italian Government to suspend payment of the aid in question and reminded it of the consequences of not doing so.

52 In those circumstances the failure by the Italian authorities to notify the aid granted to CMF and CMF Sud could not render it incompatible with the common market. The first plea must therefore be dismissed.

The second plea: failure to observe the requirements relating to aid to undertakings in difficulty

Arguments of the parties

53 The applicant maintains that the contested decision infringes rules established by the Commission in its guidelines on aid to undertakings in difficulty (see paragraph 11, above).

54 In fact, according to the applicant, CMF Sud and CMF received aid on six occasions, between the establishment of CMF Sud in 1986 and the drawing up of a

restructuring plan approved by the Commission in 1994. In the notices 92/C 122/04 and 92/C 279/11 of 14 May and 28 October 1992 referred to above, the Commission acknowledged that the aid in question was operating aid, since there was no restructuring plan and the action proposed by the Italian authorities for CMF Sud was very vague. It follows, the applicant states, that the aid is unlawful in character, and the subsequent adoption of a restructuring plan under pressure from the Commission could not have the effect of validating it. It is therefore appropriate to apply the case-law laid down by the Court of Justice in Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603.

55 The total amount of the aid is about ECU 51 million, that is to say the equivalent of the annual turnover of CMF, and it bears no relation to the benefits anticipated at Community level. Under those conditions, the only adequate penalty, according to the applicant, would be the liquidation of CMF, as the Commission required in the case of CMF Sud. Mere privatization would not permit the Italian State to recover the amounts granted. On the contrary, it would leave to the acquirer of the undertaking the benefit of the situation already created and permit it immediately to become a serious competitor. It is thus necessary to demand reimbursement of the aid, the only way to bring an end to the distortion of competition which it has occasioned.

56 The Commission first recalls the wide powers available to it for assessing the compatibility of aid with the common market, in particular in cases of aid for rescue or restructuring, powers confirmed in the case-law, particularly in the judgments of the Court of Justice in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671 and in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203.

57 It contends that CMF and CMF Sud received three injections of capital and not six as alleged by the applicant. The fact that the aid was paid in several instalments does not prevent it from being compatible with the common market. It points out, moreover, that in its second decision extending the procedure it declared that the aid had to be considered as a whole. Since the applicant did not challenge this

approach in the observations which it sent to the Commission on this decision, for it to do so at this stage is inadmissible (Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 27). In any event, it is clear from the judgment of the Court of Justice in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 35, that for aid to rescue an undertaking, accompanied by a restructuring plan, to be incompatible with the common market, it must be shown to be of such a nature as to alter trading conditions. However, the applicant has not demonstrated that to be the case.

58 In any event, the fact that a restructuring plan acceptable to the Commission was finalized only in 1994 did not in the present case prevent restructuring measures from being implemented as early as 1991, in the form of a capital injection, and continued in 1992, with the voluntary liquidation of CMF Sud. The absence of a restructuring plan at the time of the capital injection prompted the Commission to deem that measure to constitute aid, thus justifying the initiation of a procedure under Article 93(2) of the Treaty. On the other hand, once the restructuring plan has been approved that time-lag cannot preclude a finding that the aid is compatible with the common market.

59 Finally, the applicant's argument that the amount of the aid is not proportionate to the restructuring effort undertaken is unsupported by evidence. On the contrary, on this point the contested decision follows the guidelines on aid of this kind.

60 The interveners submit that, contrary to the applicant's assertions, the guidelines on aid to undertakings in difficulty indicate that, in principle, only a restructuring plan may be approved but that the aid may be paid in several instalments. Moreover, even in the absence of a prior plan, aid may be declared compatible with the common market if it satisfies certain conditions, including the drawing up of a plan ensuring the viability of the undertaking within a reasonable period and the adoption of measures to reduce the negative effects on competition. Finally, the

amount of the aid must be proportionate, in the sense that it must not exceed the costs of restructuring. According to the Commission, the applicant has adduced no evidence to cast doubt on the observance of those conditions in this case.

Findings of the Court

61 As a preliminary matter, the Court of First Instance recalls that the Commission may lay down for itself guidelines for the exercise of its discretionary powers by way of documents such as the guidelines in question, provided that they contain directions on the approach to be followed by that institution and do not depart from the Treaty rules (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 34 and 36; and Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57). It is in the light of those rules, therefore, that the contested decision falls to be reviewed.

62 The guidelines require restructuring aid to be accompanied by a plan. Point 3.2.2. makes approval of such a plan subject to three substantive conditions: the plan must enable the viability of the undertaking to be restored, avoid undue distortion of competition and ensure that aid is in proportion to the costs and benefits of restructuring. It is for the Court of First Instance to verify whether those requirements have been observed in the individual case.

63 It has been consistently held that Article 92(3) of the Treaty confers on the Commission a wide discretion to allow aid by way of derogation from the general prohibition laid down in paragraph (1) of that article, inasmuch as the determination in such cases of whether State aid is compatible with the common market raises problems which make it necessary to examine and appraise complex economic facts and conditions (*SFEI*, cited above, paragraph 36). Judicial review must therefore be limited to checking that the rules on procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there

has been no manifest error of assessment and no misuse of powers (*Skibsværfts-foreningen and Others* v *Commission*, cited above, paragraph 170). It is not for the Court, therefore, to substitute its economic assessment for that of the Commission (*AIUFFASS and AKT* v *Commission*, cited above, paragraph 56).

64 With regard, first of all, to restoration of viability, the contested decision gives a detailed account of several elements of a restructuring plan which seeks to attain that objective. Moreover, as the Commission had already observed in the course of the procedure which led to the adoption of the contested act (see in particular the decision of 22 September 1993, p. 6), the Italian authorities had as early as 1992 taken steps to restructure the undertakings in question, including the voluntary liquidation of CMF Sud in 1992 and the transfer of its business to CMF.

65 In fact, the decision clearly shows (see table at page 7) that, following the restructuring of CMF and the liquidation of CMF Sud, the total installed capacity of the two undertakings will fall by 50%. As regards the installed capacity of CMF's main branch of business, taken in isolation, it will go down by 8.5%, the other branches of business having been shut down. These factors, viewed in the context of the measures which will be adopted in order to increase productivity, comprising in particular a reduction in staffing levels, the replacement of obsolete equipment and subcontracting of finishing, corroborate the Commission's conclusion, which, moreover, is not contested by the applicant, as to the viability of CMF.

66 As regards the argument derived by the applicant from the fact that the aid was paid in instalments, the Court finds, without its being necessary to rule on the objection of inadmissibility raised by the Commission, that an infringement of the guidelines cannot be inferred merely from the fact that payment was repeated. Point 3.2.2.(i) of the guidelines merely states that aid should 'normally' only need to be granted once. It is thus non-mandatory. The contested act therefore satisfies the first condition laid down in the guidelines.

67 With regard, next, to the need to avoid undue distortion of competition, the Court considers that, as provided for in the contested decision, the reduction in installed capacity constitutes an acceptable counterpart for the distortion of competition created by the aid received, inasmuch as the reduction imposed will be total because the installations shut down will be scrapped or sold to non-competing undertakings (see p. 10 of the contested decision).

68 With regard, finally, to the requirement that the aid be proportionate to the benefits anticipated, the Court finds, first of all, that the applicant has not referred to any evidence in support of its allegation that that requirement has not been met. The Court notes that among the advantages which, from the point of view of competition, flow from the contested decision are the reduction in installed capacity mentioned above, and the privatization of CMF. On that point, the contested decision (see p. 10) takes note of the undertaking by the Italian State concerning privatization by means of an unconditional call for tenders which will enable the market to fix the price of CMF, thus removing any disproportionate aspect of the aid.

69 It should also be recalled that the other undertaking in receipt of aid, CMF Sud, has been placed in liquidation which, as affirmed in the contested decision (p. 9) and found above by the Court, constitutes an acceptable return by the industry for the aid received, inasmuch as it allows for the total withdrawal of existing capacity.

70 It follows from all of the foregoing that, since the conditions laid down in the guidelines are satisfied, the second plea is unfounded, and that consequently the action must be dismissed.

Costs

71 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission and interveners asked for an order as to costs against the applicant, it must be ordered to pay the costs, including the costs of the interveners.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs, including those of the interveners.

Saggio Briët Kalogeropoulos

Tiili Moura Ramos

Delivered in open court in Luxembourg on 5 November 1997.

H. Jung A. Saggio

Registrar President