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

13 June 2000 *

In Joined Cases T-204/97 and T-270/97,

EPAC — Empresa para a Agroalimentação e Cerais, SA, established in Lisbon (Portugal), represented by J. Mota de Campos, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of J. Calvo Basaran, 34, boulevard Ernest Feltgen,

applicant,

v

Commission of the European Communities, represented by D. Triantafyllou and A.M. Alves Vieira, of its Legal Service, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Portuguese.

APPLICATION, in Case T-204/97, for the annulment of Commission Decision 97/433/EC of 30 April 1997 requiring the Portuguese Government to suspend the aid in the form of a State guarantee granted to the undertaking EPAC — Empresa para a Agroalimentação e Cereais, SA (OJ 1997 L 186, p. 25) and, in Case T-270/97, for the annulment of Commission Decision 97/762/EC of 9 July 1997 on measures taken by Portugal to assist EPAC — Empresa para a Agroalimentação e Cereais, SA (OJ 1997 L 311, p. 25),

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

composed of: J.D. Cooke, President, R. Garcia-Valdecasas, P. Lindh, J. Pirrung and M. Vilaras, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 1 July 1999

gives the following

Judgment

1 EPAC — Empresa para a Agroalimentação e Cereais, SA, is a limited company with public capital, created by Portuguese Decree-Law No 29/91 of 11 January 1991, which operates on the cereals market. It was the product of the gradual dismantling of the public undertaking EPAC (at that time Empresa Pùblica de Abastecimento de Cereais), founded in 1977, which, until 1985, as the public intervention agency responsible for ensuring the national supply of cereals and seeds, had a public monopoly in managing that market. In 1986, after the accession of the Portuguese Republic to the European Communities, the port silos, and the plant, facilities and equipment associated with them, were transferred, together with the debt burden on financing relating to them, to a newly-created limited company with public capital, Silopor — Empresa de Silos Portuários.

2 The amount of the debt owed by Silopor to EPAC as a consequence of that transfer was estimated, in 1989, at PTE 7.5 billion, a sum which Silopor was manifestly unable to repay from its own resources. In February 1997, that debt, plus interest, amounted to a total of PTE 31.2 billion.

3 EPAC's asset situation was unbalanced, with an excess of fixed assets and high wage costs coupled with a shortage of equity capital to finance its commercial activities. That situation resulted from maintaining an extensive nationwide infrastructure.

4 From April 1996 onwards, EPAC was no longer able to meet most of its financial commitments.

5 That situation prompted the Portuguese State to draw up a plan for making EPAC economically profitable and financially sound, which was approved jointly, on 26 July 1996, by the State Secretary for the Treasury and Financial Affairs and the State Secretary for Food Production. EPAC was thus authorised to negotiate a loan, on market terms, of up to PTE 50 billion, PTE 30 billion of which could be covered by a State guarantee for a maximum period of seven years.

6 By Ministry of Finance Order No 430/96-XIII of 30 September 1996, that guarantee was granted in respect of part of the loan negotiated between EPAC and a consortium of banks, the amount of which, PTE 48.7 billion, corresponded to EPAC's total debt on 30 June 1996. The purpose of that loan was to restructure EPAC's short-term bank debt into medium-term bank debt. The period set was seven years at an interest rate equal to 'six-month Lisbor' for the guaranteed portion of the loan and 'six-month Lisbor +1.2%' for the remainder.

7 On 15 October 1996, the Commission received a complaint about a possible State aid constituted by that State guarantee in respect of the PTE 30 billion and by the supplementary loan of approximately PTE 20 billion granted on special terms.

8 Having received no notification, as prescribed in Article 93(3) of the EC Treaty (now Article 88(3) EC), from the Portuguese authorities, the Commission sent

them, on 31 October 1996, a letter requesting confirmation of the existence of any such aid. If the reply was in the affirmative, the Commission also requested the Portuguese authorities to notify the aid so that its compatibility with the common market could be examined pursuant to Articles 92 (now, after amendment, Article 87 EC) and 93 of the EC Treaty.

9 By letter of 26 November 1996, the Portuguese Republic confirmed the existence of a State guarantee for EPAC. However, the Commission received no notification, pursuant to Article 93(3) of the Treaty, of that transaction.

10 On 28 January 1997, the complainant submitted a request to the Commission seeking the adoption of interim measures to suspend the guarantee granted to EPAC by the State.

11 By letter of 27 February 1997, the Commission informed the Portuguese authorities that it was initiating the procedure under Article 93(2) of the Treaty in respect of the aid granted to EPAC (OJ 1997 C 140, p. 16). In that letter it stated its view that the grant of the guarantee by the State had not been made subject to specific obligations and that the interest rates on the loans under investigation were considerably lower than the market reference rates, whereas an undertaking in financial difficulties, such as EPAC, could not under normal market conditions obtain loans on more favourable terms than those available to operators in a healthy financial position without infringing the Community rules on State aid.

12 In that letter the Commission also asked the Portuguese Government to take all the measures necessary in order to suspend immediately the effect of the guarantee granted to EPAC. The Portuguese Government was given 15 days from the service of that letter to inform the Commission what measures it had taken to comply with that request. The Commission further reserved the right to adopt a formal decision requiring the Member State to suspend immediately the aid in question for future operations.

13 The Commission concluded that letter by making it clear that the measure in question was, in its view, aid which was not such as to facilitate development of either the sector or the region concerned, and that it therefore constituted operating aid which was contrary to the Commission's consistent practice in applying Articles 92, 93 and 94 of the EC Treaty (now Article 89 EC).

14 As part of that procedure, the Commission gave the Portuguese Government and the other Member States and other interested parties notice to submit their comments.

15 By letter of 21 March 1997, the Portuguese Government informed the Commission that there had been no intervention of any kind by the public authorities in the negotiation of the loan granted to EPAC by the banks to finance its commercial operations, and provided some details concerning that loan.

16 By letter of 8 April 1997, the Portuguese Government formally submitted its comments on the decision to initiate the procedure under Article 93(2) of the Treaty.

17 On 30 April 1997 the Commission adopted Decision 97/433/EC requiring the Portuguese Government to suspend the aid in the form of a State guarantee granted to the undertaking EPAC (OJ 1997 L 186, p. 25). That decision provides:

'*Article 1*

Portugal is hereby required to suspend with immediate effect the State guarantee for the undertaking [EPAC], provided for by Ministry of Finance Order No 430/96-XIII of 30 September 1996, granted in contravention of Article 93(3), and to notify the Commission within 15 days of the measures it has taken to comply with this Decision.

...'

18 By letter of 21 May 1997, the Portuguese Government commented on that decision, stating, in particular, that 'this [was] not an investment or a subsidy but... the grant of a guarantee covering the obligations taken on by EPAC under the loan-restructuring negotiated and concluded by it with the creditor banking consortium'. It added that the financial contribution arose exclusively from that agreement, to which the State was not a party. According to that government, the State itself had deemed the loan in question necessary, since its effect was not to give one undertaking an advantage over others, but rather to mitigate damage caused to the undertaking by the State.

19 The Commission, taking the procedure further, adopted Decision 97/762/EC of 9 July 1997 on measures taken by Portugal to assist EPAC (OJ 1997 L 311, p. 25), which states:

'*Article 1*

The aid granted by the Portuguese Government to EPAC is illegal since it was granted in contravention of the procedural rules referred to in Article 93(3) of the Treaty. Furthermore, it is incompatible with the common market pursuant to Article 92(1) of the Treaty and does not meet the conditions for exemption provided for in Article 92(2) and (3) of the Treaty.

Article 2

1. Portugal must cancel the aid referred to in Article 1 within 15 days of the date of notification of this Decision.

2. Within two months of the date of notification of this Decision, Portugal shall take the measures necessary to recover the aid referred to in Article 1.

3. Recovery of the aid shall be carried out in accordance with the procedures laid down in Portuguese legislation, with interest due from the date on which the aid was paid. The interest rate to be applied must be the reference rate used to calculate subsidy equivalents in the context of regional aid.'

Procedure

20 By applications lodged at the Registry of the Court of First Instance on 7 July and 14 October 1997, the applicant brought actions against Decision 97/433, registered under case number T-204/97, and Decision 97/762, registered under case number T-270/97.

21 In addition, on 23 September 1997, the Portuguese Republic brought an action before the Court of Justice for the annulment of the decisions contested in the present actions, its applications being registered under case numbers C-246/97 and C-330/97. By orders of 15 December 1998, the Court of Justice decided to stay proceedings in both cases until the delivery of judgments by the Court of First Instance.

22 In Case T-204/97, the Commission, by separate document lodged on 13 October 1997, made an application for the case not to proceed to judgment. On 21 November 1997 the applicant lodged its observations on that application. By order of 5 March 1998 of the Fourth Chamber, Extended Composition, the Court reserved its decision on that application for the final judgment and also reserved its decision on costs.

23 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided, first, in Case T-270/97, to adopt measures of organisation of procedure by requesting the parties to reply in writing to certain questions and to produce certain documents and, second, to open the oral procedure in both cases. The Commission and the applicant acceded to those requests by letters of 7 and 9 April 1999 respectively.

24 By order of 16 June 1999, the two cases were joined for the purpose of the oral procedure. The parties presented oral argument and replied to the questions of the Court at the hearing on 1 July 1999.

25 After hearing the parties on this point, the Court considers it appropriate to join the present cases for the purposes of the judgment, in accordance with Article 50 of its Rules of Procedure.

Forms of order sought by the parties

26 The applicant claims that the Court should:

— declare the actions admissible and annul Decisions 97/433 and 97/762;

— order the Commission to pay the costs.

27 The defendant contends that the Court should:

— declare that there is no need to give a decision and, in any event, dismiss the action as unfounded in Case T-204/97;

— dismiss the action as unfounded in Case T-270/97;

— order the applicant to pay the costs.

Merits — Case T-270/97

28 The applicant puts forward four pleas in support of its action, alleging, first, breach of the obligation to state reasons, second, infringement of Article 92(1) and (3) of the Treaty, third, infringement of Articles 90 and 222 of the EC Treaty (now Articles 86 EC and 295 EC) and, fourth, breach of the general principles of proportionality, legal certainty and the protection of legitimate expectations.

1. *The first plea, alleging breach of the obligation to state reasons*

Arguments of the parties

29 The applicant argues, first, that there is a contradiction between the facts and their legal characterisation in the statement of reasons for Decision 97/762 (hereinafter the 'contested decision'). It points out that, in its letter notifying the contested decision and in its interim decision of 30 April 1997, the Commission refers only to the existence of 'aid', whereas, in the contested decision, it uses by turns the singular 'aid' and the plural 'aids'. That contradiction within the statement of reasons and between the statement of reasons and the operative part of the decision stems from a failure to take account of the applicant's legal position and from an erroneous assessment of the facts by the Commission. It follows that there is a failure to state reasons for the contested decision. The applicant states in this connection that, since the bank loan of approximately PTE 20 billion was not covered by any State guarantee or intervention, it cannot constitute aid.

30 Second, the applicant complains that the statement of reasons is inadequate. In the light of the relevant case-law in this field, it submits that the Commission was required to show that the State guarantee constituted aid, that that aid affected

trade between Member States, that it distorted or specifically threatened to distort competition and, finally, that the nature of that aid necessitated its recovery (see Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 31). The seriousness of the consequences that necessarily followed from the Commission's decision called for 'extreme rigour in assessing the matters of law and fact stated as the reasons for the finding of illegality and for the adoption of measures contained in the decision'. The Commission failed to mention the specific factors relating to the market (see Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papiervarenfabriek* v *Commission* [1985] ECR 809, paragraph 24) and to specify the aspects relating to the effect on trade and to distortion of competition.

31 Finally, the applicant states that the Commission failed to take into consideration the observations made by the Portuguese State and, in particular, the fact that the guarantee is one of the means of achieving the financial restructuring necessary for any privatisation measure and is therefore a prerequisite for that envisaged in the case of EPAC. Finally, the Commission did not indicate the reasons which led it, in the light of the circumstances of this case, to require the recovery of the alleged aid (see Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 54).

32 The Commission replies that there is complete consistency between the operative part and the grounds of the contested decision and that the only measure covered by the decision was the guarantee granted by the Portuguese State to EPAC. It claims that the use of the term 'aids' in the plural in the contested decision stems from its intention to ensure the complete abolition of the aid and its effects and to restore the previously existing situation. In the alternative, the Commission argues that the measure in question also constituted aid to Silopor, allowing the latter not to discharge its debt to EPAC. That twofold effect of the aid justified the use of the plural.

33 The Commission points out that, in support of its argument, it provided statistical data permitting the inference that the aid in question made it possible for EPAC to survive as a very significant operator on the market concerned and

that this necessarily resulted in an effect on trade and a distortion of competition. Finally, the Commission asserts that, contrary to the applicant's claims, the reasons justifying its refusal to take into consideration the argument that the aid in question was designed to make EPAC's financial position sound and to bring about its restructuring were stated in its contested decision.

Findings of the Court

34 The Community institutions' obligation under Article 190 of the Treaty (now Article 253 EC) to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the legality of the decision and the person concerned to know the reasons for the measure adopted so that he can defend his rights and ascertain whether or not the decision is well founded (see Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 57).

35 Furthermore, in stating the reasons for the decisions it has to take in order to ensure that the rules of competition are applied, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see *Siemens* v *Commission*, cited above, paragraph 31).

36 With regard to the characterisation of a measure as aid, that principle requires that the reasons which led the Commission to consider that the measure concerned falls within the scope of Article 92(1) of the Treaty should be stated.

37 While it is common ground that the contested decision uses both the singular and the plural of the term 'aid', it must also be pointed out that the Commission drew attention in that decision to the fact, which was indeed taken into consideration in its letter of 27 February 1997, that the mechanism for consolidating EPAC's debts also appeared to constitute aid to Silopor.

38 The Commission also states in recital 13(c) in the preamble to the contested decision:

'The Commission can therefore conclude that the State guarantee for EPAC also constitutes State aid to Silopor, the undertaking created directly from EPAC. The Portuguese State, the only shareholder in both undertakings, by providing a State guarantee for EPAC, is enabling the latter not to demand payment of the debt owed to it, so that in effect the guarantee is indirect aid to Silopor.'

39 In any event, since the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption, the applicant must be held to have been put in a position to comprehend that only the State guarantee which it had been granted by the Portuguese State was covered by the contested decision (see Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21).

40 It follows that the applicant's argument based on a contradiction in the statement of the reasons for the contested decision must be rejected.

41 The applicant further maintains that the Commission has not shown that the State guarantee constituted aid, that it affected trade between Member States, that it distorted or threatened to distort competition and that its nature necessitated its recovery.

42 The Commission takes the view, in the second paragraph of recital 4 of the contested decision, that the guarantee in question constituted State aid within the meaning of Article 92(1) of the Treaty. It states in that regard that the interest rate on the loans included an aid element and that the State guarantee under investigation did not involve any specific obligations which alone could justify possible authorisation of the measure in question.

43 The Commission also mentioned the specific effects of the aid on competition and intra-Community trade. As regards the criterion concerning distortion of competition, the contested decision makes it clear that the measures concerned would lead directly to an improvement in the conditions of production and marketing of products of the undertaking vis-à-vis other operators in the Community not benefiting from comparable aid (see the third paragraph of recital 4 of the contested decision).

44 As regards the criterion relating to the effect on intra-Community trade, the decision states:

'Community cereal production is 173.9 million tonnes. Portuguese cereal production is 1.52 million tonnes. Trade between the rest of the Community and Portugal is considerable, since Portugal is not self-sufficient in cereals and imports more cereals from other Member States every year than it produces itself (1.83 million tonnes) and exports 32 530 tonnes to those Member States. In 1996 the monetary value of Portugal's exports to those Member States was around ECU 5.8 million and that of its imports from them ECU 310 million.

The measures in question are therefore likely to affect trade in cereals between the Member States since trade is affected where one operator active in intra- or extra-Community trade receives aid which gives it an advantage over others. The measures concerned had a direct and immediate effect on the primary costs of the

undertaking which thus enjoyed an economic advantage over other undertakings in the sector which did not have access, either in Portugal or in the other Member States, to comparable aid. This aid therefore distorts or threatens to distort competition.' (See the fourth and fifth paragraphs of recital 11 of the contested decision.)

45 It is clear from that statement of reasons that the Commission examined the question whether the conditions for the application of Article 92(1) of the Treaty were satisfied. The statement of reasons therefore enables the applicant and the Community judicature to know the reasons which led the Commission to consider that Article 92(1) of the Treaty was applicable to the case.

46 In that respect, the applicant's argument that the Commission failed to mention the specific factors relating to the market is unfounded.

47 First, the applicant wrongly relies on the judgment in *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*, cited above, in which the Court of Justice declared, in the light of the obligation laid down by the case-law (cited in paragraph 30 above), that the failure to state reasons for the decision contested in that case was unlawful with respect to the criteria concerning distortion of competition and the effect on intra-Community trade.

48 Although the Commission did not indicate, in the decision contested in the present action, the market share held by EPAC, the applicant cannot accuse it, in the light of the abovementioned relevant extracts (see paragraph 44), of not examining the effects of the aid on competition and on trade between Member States.

49 The applicant further claims that the Commission failed to take account of the observations made by the Portuguese State.

50 It must be observed that all the Portuguese Government's observations contained in its letters of 8 April and 21 May 1997 were subjected to a detailed assessment by the Commission in recital 13 of the contested decision.

51 With regard, in particular, to the applicant's assertion concerning the fact that the guarantee is one of the means designed to bring about the financial restructuring necessary for any privatisation measure, it must be observed that the Commission did not have any information regarding the alternative means. That being the case, although it set out that argument in the contested decision (second paragraph of recital 8), the Commission was entitled to consider that this was not a fact or a legal consideration of crucial importance in the context of the decision.

52 Finally, the applicant claims that the Commission did not state sufficient reasons for the requirement to recover the aid in question.

53 However, it is settled case-law that where, contrary to the provisions of Article 93(3) of the Treaty, the proposed aid has already been granted, the Commission, which has the power to require the national authorities to order its repayment, is not obliged to provide specific reasons in order to justify the exercise of that power (see, for example, Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 82).

54 It is clear from the contested decision that the Commission gave sufficient reasons for the recovery of the aid by stating, in recital 15 of the decision, that the aid

concerned is, intrinsically and for the reasons explained previously, incompatible with the common market under Article 92 of the Treaty. In this regard, it must be noted that the Commission justified the amount of the aid to be recovered by reference to the financial advantage unduly obtained by EPAC, represented by the difference between the market financial cost of bank loans and the financial cost actually borne by EPAC (see the fifth paragraph of recital 15 of the contested decision).

55 Consequently, the complaint based on failure to state reasons for the recovery of the aid is unfounded.

56 Accordingly, the first plea must be rejected.

2. *The second plea, alleging infringement of Article 92 of the Treaty*

First part, alleging infringement of Article 92(1) of the Treaty

Arguments of the parties

57 The applicant alleges, first, that the Commission infringed Article 92(1) of the Treaty, inasmuch as it took the view, in the contested decision, that the State guarantee constituted State aid as referred to in that article. In support of that contention it claims, first, that the grant of a guarantee for a mere restructuring of its debts did not involve any transfer of State resources since the guarantee would be implemented only if the applicant did not honour its loan contract. It adds

that, since the guarantee did not enable it to negotiate a loan at a rate of interest below the market rate, the guarantee cannot be classified as aid. In that respect, the interest rate granted to the applicant by the consortium of banks is not the result of any intervention by the public authorities during the negotiations, but of the intention of that same consortium to make possible a financing operation designed to convert short-term debt into long-term debt.

58 The applicant further claims that it was for the State, as the only shareholder, to take responsibility for the performance of its tasks in the general interest, and that, in that respect, the guarantee granted by the State is comparable to that which may be granted by a private investor acting in the context of a market economy. It thus maintains that 'there is State aid where the public authority provides the undertaking with financial resources in circumstances unacceptable to an investor operating under normal market conditions' and points out that the Commission has favoured a pragmatic and flexible understanding of that private-investor test. Thus, 'a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganisation' (see Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 15). Nevertheless, 'the intervention of the public investor pursuing economic policy aims... need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term' (see Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 20).

59 Applying that case-law to its own circumstances, the applicant submits that it was legitimate for the State to intervene in order to guarantee a restructuring of its debts on market terms, in view both of its status as sole shareholder and of its responsibility in regard to the applicant's financial position. In support of its submission, the applicant cites its restructuring and financial reorganisation plan which is designed, first, to prepare it for privatisation and, secondly, to enable it to return to profitability on the market concerned. Thus, while working towards the pursuit of the general interest, inherent in the performance of the applicant's task, the State is helping to 'restore the viability' of a public undertaking and to avoid diminishing its own prestige.

60 The applicant also claims that, in accordance with the position adopted by the Commission in its communication on financial relations between the State and public undertakings, the Portuguese authorities had provided a considerable amount of information as the basis for a plausible explanation for the grant of the guarantee, precluding its characterisation as aid. However, the Commission did not take all those arguments into consideration.

61 Finally, by characterising the guarantee in question as State aid, the Commission misinterpreted the concept of aid, and since no infringement of Article 92(1) of the Treaty could be established, the Portuguese State was not required to notify the Commission of the alleged aid under Article 93(3) of the Treaty.

62 Second, the applicant alleges that the Commission infringed Article 92(1) of the Treaty, in that it did not show that the alleged State aid affected intra-Community trade and distorted or threatened to distort competition. In support of its contention, the applicant asserts that it is not enough to presume that trade has been affected simply because a financial support measure has been adopted, but that, on the contrary, it is incumbent on the Commission to establish, specifically, the existence of an actual or potential impairment of competition (see Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 32). By merely finding that there were disturbances on the market, without identifying those disturbances, and that there was a flow of trade between Portugal and the other Member States, without showing that EPAC has influenced that flow to its advantage, the Commission has not established that intra-Community trade has been affected or that competition has been distorted.

63 The Commission replies that the guarantee at issue constitutes State aid and that a private investor would have chosen to wind up EPAC and not to grant it a guarantee. The allocation of State resources results, in this case, not only from the relinquishment of any premium which a private guarantor would have demanded in return for the risk incurred, but also from the burden resulting from the possible materialisation of such a risk for the State budget. However, the Commission has also stated, in reply to a question from the Court, that, if such a

premium had in fact been paid to the Portuguese State, the rate thereof would not correspond to the market rate. It also objects that it was not required to demonstrate the actual effect of the aid and that it has established, in this case, the existence of an effect on intra-Community trade.

Findings of the Court

— The concept of State aid

64 As a preliminary point, it should be borne in mind that Article 92 of the Treaty prohibits any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States.

65 Furthermore, it is settled case-law that the concept of aid embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (see, in particular, Case C-189/91 *Petra Kirsammer-Hack* v *Nurhan Sidal* [1993] ECR I-6185, paragraph 16, Case C-387/92 *Banco Exterior de España* v *Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 13, and Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 19).

66 In determining whether a State measure constitutes aid, it is necessary, according to settled case-law, to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (see Case C-39/94 *SFEI and Others* v *La Poste and Others* [1996]

ECR I-3547, paragraph 60, Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 41, and the *DM Transport* case, cited above, paragraph 22).

67 In this case, the applicant claims that the guarantee granted by the Portuguese State is comparable to that which may be granted by a private investor operating in the context of a market economy.

68 However, the conduct of the Portuguese State, which granted the guarantee at issue, cannot be compared to that of a private investor (see, with regard to loans, Case C-342/96 *Spain* v *Commission*, cited above, paragraph 46, and *DM Transport*, cited above, paragraph 24) since the Portuguese State did not inject any capital. It must therefore be determined whether, under normal market conditions, the guarantee which the Portuguese State granted to EPAC for the purpose of enabling it to obtain a loan from banking institutions would also have been granted by a private operator in view, in particular, of the risk of that guarantee being enforced in the event of non-repayment of the loan granted.

69 It should be noted, first, that EPAC was in a seriously exposed financial position characterised by its inability to meet its financial commitments and the need to restructure its debts and its logistical and payroll capacities.

70 In addition, the applicant has stated that 'it may be assumed that, without the grant of that State guarantee, the contract between it and the consortium of banks ... would not have been concluded', and that, if the State takes the initiative of revoking the guarantee, the creditor banks may demand the immediate settlement of their claims, thereby making the applicant insolvent.

71 It follows that EPAC enjoyed an advantage which it would not have enjoyed under normal market conditions.

72 In this respect, the applicant cannot claim that a private operator would regard the plan for profitability and financial restructuring, together with the grant of a loan covered in part by a State guarantee, as a prospect so favourable as to make the conferring of such an advantage acceptable.

73 It admits in its pleadings that that plan for profitability and financial restructuring did not constitute a framework designed to solve its problems. Indeed, the Portuguese Government, in its letter of 8 April 1997, states that 'it should be noted that, although the loan contract in question temporarily mitigated certain effects of the past situation, it did not help in any way to meet the needs of the undertaking in terms of the working capital necessary for its current commercial operations or the requirements of the investment needed to restructure the undertaking and fund the compensation to be paid to the workers for terminating their contracts of employment'.

74 It follows that the Commission was justified in taking the view that, in the circumstances of this case, a private operator would not have granted EPAC the guarantee at issue.

75 That conclusion cannot be invalidated by the applicant's argument that the reason for the State intervention lay in the pursuit of the general interest, the taking into consideration of concerns relating to wages and salaries or the desire to maintain the prestige and credibility of the State.

76 Any responsibility which the Portuguese State may bear for the deterioration of EPAC's financial position does not affect the characterisation of the guarantee in

question as aid, since Article 92 of the Treaty does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (see, most recently, Case C-75/97 *Belgium* v *Commission*, cited above, paragraph 25).

77 Nor can that conclusion be invalidated by the applicant's claim that the Portuguese authorities provided the Commission with information intended to demonstrate the existence of a plausible explanation for the grant of the guarantee, precluding its characterisation as State aid.

78 In support of its claim, the applicant relies on the Commission Communication (OJ 1993 C 307, p. 3) to the Member States concerning the application to public undertakings in the manufacturing sector of Articles 92 and 93 of the Treaty and of Article 5 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35). Point 29 of that communication states:

'This communication, by making clearer how the Commission applies the market economy investor principle and the criteria used to determine when aid is involved, will reduce uncertainty in this field. It is not the Commission's intention to apply the principles in this communication (in what is necessarily a complex field) in a dogmatic or doctrinaire fashion. It understands that a wide margin of judgment must come into entrepreneurial investment decisions. The principles have however to be applied when it is beyond reasonable doubt that there is no other plausible explanation for the provision of public funds other than considering them as State aid.'

79 However, it has already been found, first, that the conduct of the Portuguese State cannot be compared to that of a private investor and, second, that the advantage conferred on EPAC would not have been conferred by a private operator under normal market conditions.

80 With regard to the absence of a transfer of State resources, the advantage conferred on EPAC will entail an additional burden for the State budget in the event of implementation of the guarantee (see Case C-200/97 *Ecotrade* v *AFS* [1998] ECR I-7907, paragraph 43).

81 Accordingly, the grant of a guarantee by the State cannot avoid the prohibition in Article 92 of the Treaty merely because that advantage was not conferred on the beneficiary undertaking by way of a direct and clear mobilisation of State resources.

82 Furthermore, it is clear from the contested decision that the payment of a 0.2% premium to the Portuguese State was envisaged. Since the applicant has not claimed that that rate corresponded to those charged on the market, the Court finds that it was reasonable for the Commission to consider that it did not constitute fair compensation for the risk incurred by the State. Consequently, the State is already sustaining a loss of revenue.

83 It is clear from the foregoing that the Commission did not infringe Article 92(1) of the Treaty by finding that the guarantee at issue constitutes State aid for the purposes of that provision.

— Effect on intra-Community trade and distortion of competition

84 The applicant claims that the Commission has not demonstrated that the alleged aid affected intra-Community trade and distorted or threatened to distort

competition and that it was for the Commission to establish, specifically, the existence of an actual or potential impairment of competition.

85 However, the Commission is not required to carry out an extremely detailed economic analysis supported by statistics. Moreover, in the case of aid which has not been notified to the Commission, the decision finding that such aid is incompatible with the common market does not have to be based on a demonstration of the real effect of that aid on competition or on trade between Member States. To decide otherwise would ultimately be to favour those Member States which grant aid in breach of the duty to notify laid down in Article 93(3) of the Treaty, to the detriment of those which do notify aid at the planning stage (see Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 33, and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 67).

86 The contested decision sets out, as far as is necessary, the factors from which the existence of an effect on intra-Community trade and a distortion of competition may be inferred.

87 The Commission considered, in the contested decision, that the financial measures in question would lead directly to an improvement in the conditions of production and marketing of products of the undertaking vis-à-vis other operators in the Community not benefiting from comparable aid. The decision also states that, during the administrative procedure, the complainant asked the Commission to have the State guarantee suspended following the opening of an invitation to tender for the reduction in the duty on maize imported into Portugal. When questioned on this point at the hearing, the Commission stated that, like EPAC, the complainant had tendered for a reduction in import duty. The position of EPAC which, in that context, offered extremely competitive terms which could not be matched by the other undertakings, was thus characteristic of a distortion of competition.

88 Moreover, in the contested decision the Commission cites the volume of trade between Portugal and the rest of the Community, pointing out that it is considerable since Portugal is not self-sufficient in cereals (the relevant extract is reproduced at paragraph 44 above).

89 The Commission concludes that the trade in question is affected where one operator which is active in intra- or extra-Community trade in cereals receives aid which gives it an advantage over others and where the measure concerned has had a direct and immediate effect on the primary costs of the undertaking which thus enjoys an economic advantage over other undertakings in the sector (the relevant extract is reproduced at paragraph 44 above).

90 The Commission was therefore fully entitled to find that intra-Community trade was affected in this case. Moreover, the applicant does not adduce any evidence to invalidate that conclusion.

91 It follows from all those considerations that the argument based on infringement of Article 92(1) of the Treaty is unfounded.

The second part, alleging infringement of Article 92(3) of the Treaty

Arguments of the parties

92 The applicant pleads infringement of Article 92(3)(c) of the Treaty on the ground that the Commission has not sufficiently justified precluding the application of

the exemptions provided for in that article. The Commission should not only have found that the information provided by the Portuguese authorities was relevant, but should have taken it more into consideration in its assessments. Thus, having known, from the outset of the procedure, that the plan for making EPAC economically viable and financially sound was no longer intended to constitute a framework for solving the problems of the undertaking, the Commission should have analysed the guarantee at issue in the light of the criteria applicable to rescue aid and not in the light of those relating to restructuring aid.

93 Apart from that error of legal characterisation, the Commission also erred in law in applying to this case the four conditions which it identified in its Communication 94/C 368/05 ('Community guidelines on State aid for rescuing and restructuring firms in difficulty', OJ 1994 C 368, p. 12), even though it acknowledged that EPAC was an undertaking in difficulty which was unable to secure its recovery on its own.

94 With regard to the first condition, relating to the interest rate attaching to the guarantee, the applicant claims that the loans were negotiated without the direct intervention of the Portuguese authorities and on market terms. Even if an interest-rate subsidy had been granted, the first criterion, on a literal construction, would not require the rate granted to have been granted on market terms, since only repayable loans were required to bear normal commercial interest rates. As to the second condition, relating to the restriction of the amount of aid to that needed to keep the undertaking in business, the applicant maintains that the guarantee is not operating aid but an 'exceptional and transitional measure which would enable this problem to be overcome pending a definitive solution'. According to the applicant, the solution chosen by the Portuguese authorities was designed to keep the undertaking in business without infringing the rules of Community law by, to that end, consolidating short-term bank debt into long-term debt. With regard to the third condition, relating to the duration of the aid granted, the applicant claims that the period of six months normally prescribed is extendable and that it is necessary in order to allow the undertaking benefiting from the aid time to draw up a viable recovery plan. Finally, as to the fourth condition, relating to the social justification for the measure in question, the applicant claims that, by enabling it to stay in business, the guarantee which was

granted made it possible to avoid redundancies and disturbances on the country's market in the supply of cereals, and to ensure the long-term continuation of EPAC's commercial and technical support for Portuguese farmers.

95 The applicant also points out that, if the guarantee which was granted is characterised as aid under Article 92(3)(c) of the Treaty, it does not adversely affect trading conditions to an extent contrary to the common interest. It notes that the Court of Justice has held, in circumstances similar to those of this case, that the settlement of an undertaking's existing debts in order to ensure its survival does not necessarily adversely affect trading conditions to an extent contrary to the common interest where such an operation is, for example, accompanied by a restructuring plan (see Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 39).

96 The Commission states that it took account of the information submitted by the Portuguese Government. Furthermore, as regards the application of Commission Communication 94/C 368/05, cited above, the Commission finds that it was normal to examine both the hypothesis of rescue aid and that of restructuring aid since those were the two parts of a single operation aimed firstly at ensuring the survival of the undertaking in the short term and secondly at restoring its viability in the long term. Finally, it was entitled to consider that the guarantee in question did not satisfy the criteria laid down in the abovementioned communication.

Findings of the Court

97 It should be observed at the outset that, according to case-law, under Article 92(3) of the Treaty the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context and that the Court must therefore limit its review of such an assessment to ascertaining that the rules of procedure have been

complied with, that the reasoning is sufficient, the facts are correct, and that there is no manifest error of assessment or misuse of power (see Case C-303/88 *Italy* v *Commission*, cited above, paragraph 34, and Joined Cases T-244/93 and T-486/93 *TWD* v *Commission* [1995] ECR II-2265, paragraph 82).

98 The applicant claims that the Commission infringed Communication 94/C 368/05.

99 In that connection, it submits first, that the Commission should have analysed the guarantee in question in the light of the criteria applicable to rescue aid and not in the light of those relating to restructuring aid.

100 However, it is clear from the contested decision (see recital 13(b)) that although, when it initiated the procedure, the Commission considered that the criteria relating to aid for rescuing undertakings did not apply to the State guarantee in question, it eventually concluded, in the contested decision, on the basis of the information submitted by the Portuguese Government, that the guarantee did in fact constitute rescue aid.

101 However, the Commission points out that the State guarantee granted to EPAC does not meet the criteria laid down in the abovementioned communication for consideration as rescue aid compatible with the common market and, in that context, analyses the aid in the light of the four criteria laid down in that communication (see recital 13(b)).

102 It is clear from the foregoing that the Commission carried out a comprehensive analysis of the derogations provided for by that communication, in particular in the perspective of rescue aid.

103 It must therefore be concluded that the applicant's argument based on an error in the legal characterisation of the measure in question in the light of the guidelines cited above is unfounded.

104 Secondly, the applicant claims that the Commission committed an error in its application of the criteria relating to rescue aid.

105 The communication cited above provides, in paragraph 3.1 relating to the general conditions for the authorisation of rescue aid:

'In order to be approved by the Commission rescue aid must:

— consist of liquidity help in the form of loan guarantees or loans bearing normal commercial interest rates,

— be restricted to the amount needed to keep a firm in business (for example, covering wage and salary costs and routine supplies),

— be paid only for the time needed (generally not exceeding six months) to devise the necessary and feasible recovery plan,

— be warranted on the grounds of serious social difficulties and have no undue adverse effects on the industrial situation in other Member States.'

106 In the contested decision, the Commission considered that those conditions were not fulfilled in this case since the interest rates on the loans obtained by EPAC were subsidised, the duration of the operation greatly exceeded the general rule of six months, the amount of the guarantee could not be regarded as the amount strictly needed to keep the firm in business and, finally, no serious social situation had been cited as justification (see recital 13(b)).

107 With regard to the first condition, concerning the interest rate, it should be borne in mind that the objective pursued by the Commission in authorising such rescue aid is to contribute to economic development without affecting trade to an extent contrary to the Community interest. From that point of view, charging interest at a rate more favourable than that available on the market is no more acceptable in the case of a loan obtained by virtue of a State guarantee than it is where aid consists of the loan itself.

108 The interest rate on the loan granted to the applicant is 6.75% (Lisbor rate) for the guaranteed part of the loan and 6.75% + 1.2% (Lisbor rate + 1.2%) for the remainder. In that regard, the applicant's claims, supported by a letter from the Banco Chemical Finance, SA, a member of the creditor banking consortium, to the effect that the interest rates granted reflect market conditions on the date of signature of the contract in question, cannot be accepted.

109 First, it is clear from the contested decision that the Community reference rate on the date the loan was granted was 12.51%, which in this case must be regarded as a minimum rate since EPAC's financial difficulties would have prevented it from obtaining a loan on terms more favourable than those available to operators in a balanced financial situation (see recital 13(d)). In that connection, the Commission produced, in response to a question from the Court, a note sent by it to the

Portuguese Government, mentioning the same rate as the reference rate for Portugal, from which it is possible to calculate, without further analysis, the aid element resulting from interest-rate subsidy schemes applicable to investment loans.

110 Second, the documents submitted by the Portuguese Ministry of Finance relating to the implementation of the plan for making EPAC profitable show that the rate applicable to the guaranteed part of the loan is lower than the Portuguese reference rate of 12.98% for 1995.

111 It must therefore be found that Portuguese State knew the reference rate, which was supposed to reflect the average level of interest rates in force for medium- and long-term loans, which the Commission would apply in order to calculate the aid element. It must also be found that an interest rate lower than that reference rate was knowingly applied in the present case.

112 It follows that the Commission was entitled, without committing any manifest error of assessment, to consider that the rates granted to EPAC had been subsidised.

113 With regard to the other conditions laid down by the communication, it must be observed, first, that the State guarantee was granted for a period of seven years, whereas the period generally allowed is six months. Although the Commission accepts that that period may be extended in order to enable the investigation relating to the restructuring plan to be completed, a period of seven years cannot be regarded as reasonable for that purpose.

114 Second, it is clear from the guidelines cited above that rescue aid temporarily maintains the position of an undertaking for whatever period of time may be necessary in order to devise an appropriate plan to remedy the financial difficulties encountered. In those circumstances, the Commission was entitled to consider that a seven-year guarantee could not constitute rescue aid, particularly since the restructuring plan announced for 1997 was never sent to the Commission.

115 Third, the documents before the Court do not show that grounds of serious social difficulties were relied on by the applicant or by its government during the administrative procedure.

116 Accordingly, the Commission did not err in law in considering that the criteria relating to rescue aid were not satisfied.

117 It follows from that the second plea must be rejected in its entirety.

3. *The third plea, alleging infringement of Articles 90 and 222 of the Treaty*

Arguments of the parties

118 The applicant states, first, that it is clear from Article 222 of the Treaty that the Commission is required, in the exercise of the powers conferred on it by Articles 92 and 93 of the Treaty, to treat public and private undertakings equally and, second, that, according to its statutes, it must be regarded as a public

undertaking for the purpose of applying the Community rules on competition. Thus it is the duty of the Commission, in the context of State aid, not to discriminate between public and private investors. Having regard to the applicant's financial viability and to the relevant case-law in this field, the Commission has infringed the principle of equal treatment. According to the case-law, '[i]t follows from that principle of equal treatment that capital placed by the State, directly or indirectly, at the disposal of an undertaking in circumstances which correspond to normal market conditions cannot be regarded as State aid' (see Case C-303/88 *Italy* v *Commission* [1991] cited above, paragraph 20).

119 The applicant also pleads infringement of Article 90(2) of the Treaty in that the Commission failed to take account of the fact that the tasks which the applicant performs serve a social purpose and correspond to the operation of a service of general economic interest. Since the grant of the guarantee constituted a measure essential to the survival of EPAC, Article 90(2) of the Treaty is applicable in this case, and a derogation from the principle of the prohibition, cancellation and recovery of the alleged aid is therefore justified.

120 With regard to the alleged infringement of Article 222 of the Treaty, the Commission states that its decision is intended to restore equal treatment as between the public undertaking benefiting from the aid and its competitors.

121 As far as an alleged infringement of Article 90(2) of the Treaty is concerned, it contends that the applicant has not demonstrated that it was entrusted by the State with the operation of services of general economic interest within the meaning of that article.

Findings of the Court

122 With regard to the alleged infringement by the Commission of the principle of equal treatment as between private and public undertakings, it must be pointed out, first, that, under Article 90(1) of the Treaty, the competition rules apply without distinction to both those types of undertaking, and, second, that Article 222 of the Treaty does not contravene that principle.

123 By regarding the guarantee at issue as aid incompatible with the common market, the Commission has in no way encroached on the rules governing property ownership and has merely given identical treatment to the public and the private owner of an undertaking (see Case C-305/89 *Italy* v *Commission*, cited above, paragraph 24).

124 The argument based on infringement of Article 222 of the Treaty must therefore be held to be unfounded.

125 With regard to the alleged infringement of Article 90(2) of the Treaty, it is clear from that article that, for the derogation to apply, the undertaking in question must have been entrusted by the public authorities with the operation of a service of general economic interest, the application of the rules of the Treaty must obstruct the performance of the particular tasks assigned to the undertaking and, finally, the interests of the Community must not be affected (see, in particular, Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 173).

126 In that connection, undertakings entrusted with the operation of services of general economic interest must have been assigned that task by an act of a public authority (see Case 127/73 *BRT and Société Belge des Auteurs, Compositeurs et*

Éditeurs v *SABAM and Fonior* [1974] ECR 313, paragraph 20, and Case C-266/96 *Corsica Ferries France* v *Gruppo Antichi Ormeggiatori del Porto di Genova and Others* [1998] ECR I-3949, paragraph 47).

127 However, the applicant has not adduced any evidence to show that it was entrusted with a task of that nature.

128 The argument based on infringement of Article 90(2) of the Treaty must therefore be rejected.

129 It follows that the third plea must be rejected in its entirety.

4. *The fourth plea, alleging breach of the general principles of proportionality, legal certainty and the protection of legitimate expectations*

Arguments of the parties

130 The applicant claims, first, that, by requiring the cancellation and recovery of the aid granted, the Commission failed to observe the 'minimum criterion of proportionate and balanced treatment of the interests at stake'. It submits that, faced with the choice of winding up the undertaking, granting direct aid or granting the guarantee, the State, as shareholder and custodian of the general interest, chose the solution which was least detrimental to the interests involved.

131 The applicant further claims that it was legally impossible for the Portuguese State to take the measures required by the Commission since they were contrary both to Portuguese law and to Community law on compliance with contractual obligations. The State could not unilaterally free itself from the obligations which it had contracted vis-à-vis the banking institutions since only the national courts had the power to declare the guarantee void.

132 Finally, the applicant and the banking institutions had acquired a legitimate expectation as to the lawfulness of the guarantee granted to those institutions and, on that basis, deserved appropriate legal protection, which was incompatible with a Commission decision requiring the cancellation of the guarantee and the repayment of the alleged aid resulting from it.

133 With regard to the allegedly disproportionate nature of the measures required, the Commission contends that it is evident from the Treaty and the case-law that cancellation of the aid is necessary to enable restoration of the previously existing situation (see Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, Case C-305/89 *Italy* v *Commission,* cited above, and Case C-348/93 *Commission* v *Italy* [1995] ECR I-673. In that connection, it has been held that the winding up of an undertaking benefiting from aid cannot free a State from its obligation to withdraw the aid (see Case 52/84 *Commission* v *Belgium* [1986] ECR 89).

134 The Commission also maintains that, since neither the State nor the recipient itself nor the banks satisfied themselves that the notification procedure had been complied with and that the aid was therefore lawful, they are not entitled to plead breach of the principle of the protection of legitimate expectations (see Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, the Opinion of Advocate General Darmon in that case, ECR I-3445, and Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151).

135 Finally, it contends that the Portuguese Government is under an obligation to implement the measures laid down in the contested decision.

Findings of the Court

136 First, with regard to the applicant's first argument, alleging breach of the principle of proportionality as a result of the condition requiring the cancellation and recovery of the aid, it is settled case-law that 'the recovery of State aid unlawfully granted, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aids'. In this context, the purpose of recovering the unlawful aid is to restore the situation which existed prior to the grant of the aid (see the judgments in Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 47, and Case C-75/97 *Belgium* v *Commission*, cited above, paragraph 68).

137 Since the Commission has lawfully declared the aid at issue to be incompatible with the common market, the cancellation and recovery of the aid wrongly received are proportionate to the illegality established.

138 Second, with regard to the claim that it was impossible for the Portuguese State to implement the Commission's decision, any procedural or other difficulties in regard to the implementation of that decision cannot have any influence on the lawfulness of the decision (see Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, cited above, paragraph 80, and Case C-75/97 *Belgium* v *Commission*, cited above, paragraph 86).

139 Finally, the applicant claims that it had acquired a legitimate expectation as to the lawfulness of the guarantee granted by the State to the consortium of banks.

140 It should first be observed that, under Article 93(3) of the Treaty, any proposed new grant of aid must be notified to the Commission before it is implemented, failing which it will not be regarded as lawfully granted (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 35).

141 However, the Portuguese State did not send that notification even though the Commission had invited it to do so in its letter of 31 October 1996.

142 Consequently, in view of the mandatory nature of the review of State aid by the Commission, EPAC cannot, in principle, entertain a legitimate expectation that aid granted to it in breach of Article 93(3) of the Treaty is lawful (see Case C-24/95 *Land Rheinland-Pfalz* v *Alcan Deutschland* [1997] ECR I-1591, paragraph 43).

143 In that connection, it must be pointed out that, even if the applicant had pleaded exceptional circumstances which formed the basis of legitimate expectations on its part in order to oppose recovery of the aid, it would be for a national court before which such a case was brought to assess the material circumstances (see *Commission* v *Germany*, cited above, paragraph 16).

144 Moreover, since this question does not appear in a different light depending on whether it concerns the legitimate expectations of the beneficiary of the aid or those of its creditor, the creditor banks, too, were under a duty to display the

required prudence and diligence and to make the necessary checks as to the lawfulness of the aid.

145 It follows that the fourth plea must be rejected.

146 Accordingly, the application in Case T-270/97 must be dismissed in its entirety.

The need for a decision on the application in Case T-204/97

Arguments of the parties

147 The Commission submits that the decision of 30 April 1997 provisionally requiring the Portuguese Government to suspend the aid in the form of a State guarantee is a suspension order as defined in *France* v *Commission*, cited above, and in that respect constitutes an interim measure adopted pending the result of the examination of the aid. Such a decision ceases to have any *raison d'être* once a final decision has been adopted on the substance of the case. The final decision thus supersedes the interim decision.

148 The Commission points out that, on 9 July 1997, it adopted a final decision finding that the aid was incompatible with the Treaty and requiring its cancellation and recovery. That being the case, the obligations of the Member State concerned and the consequences for the undertaking benefiting from the aid no longer flow from the interim decision suspending the aid, but from the final decision. The interim decision is thus 'absorbed' by the final decision.

149 The Commission submits, in conclusion, that the present proceedings have become devoid of purpose.

150 The applicant contends in response that the present action has not lost its purpose merely because a final decision has been adopted on the State measure at issue. It claims that the interim decision has had profound repercussions on its 'internal life'.

151 It is important that the argument based on the unlawfulness of the interim decision should be the subject of judicial review in order to determine whether the Portuguese State and EPAC were kept in a state of being in breach of the law between the adoption of the interim decision and that of the final decision.

152 In the alternative, the applicant maintains that, if the present action is declared devoid of purpose, it would be so on account of the Commission's action in adopting the final decision, and that it would therefore be unreasonable to make it bear the costs arising from Case T-204/97.

Findings of the Court

153 It should be noted at the outset that the decision of 30 April 1997 ordered the suspension of the State guarantee for EPAC. By the decision of 9 July 1997, the Commission found that the State measure in question was unlawful and, at the

same time, ordered the cancellation of the aid within 15 days from the date of notification of that decision and its recovery within two months from the date of notification of that same decision, with interest running from the date on which the aid was paid. The decision of 9 July 1997 was notified to the Portuguese State on 18 July 1997.

154 Accordingly, it must be considered whether the applicant still has an interest in contesting the interim decision. In that respect, it must be borne in mind that an action for annulment becomes devoid of purpose if, irrespective of whether or not it succeeds, in the sense of securing the annulment of the contested act, the applicant's position will remain the same. In such a case, it is appropriate to rule that there is no need to give a decision.

155 As regards the applicant's interest in obtaining a declaration that the interim decision produced effects of its own until the adoption of the final decision, it must be observed that EPAC's replies to the Court's written questions show that the suspension of the guarantee at issue was not given effect by the Portuguese State. Consequently, the applicant cannot claim to have suffered separate harm, of whatever nature, as a result of the interim decision.

156 It is also clear that, by reason of the nature of the measures ordered by it, the decision of 9 July 1997 has, since its entry into force, deprived the interim decision of any separate legal effect. The consequences of the cancellation and recovery of the aid supersede those of mere suspension.

157 Indeed, at the hearing, EPAC admitted, in reply to a question from the Court, that, if the Court were to declare the aid unlawful, 'interest in proceeding further with the case would obviously be diminished to that extent'.

158 Accordingly, since the Court has confirmed the Commission's decision, now final, requiring the cancellation and recovery of the aid and not merely its suspension, the applicant retains no interest in securing the annulment of the interim decision.

159 The action in Case T-204/97 has therefore become devoid of purpose and there is accordingly no longer any need to give a decision on it.

Costs

In Case T-270/97

160 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, it must be ordered to pay the costs, as applied for by the Commission.

In Case T-204/97

161 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court. In view of the circumstances of this case, the Court considers that the applicant must bear all the costs.

On those grounds,

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

hereby:

1. Joins Cases T-204/97 and T-270/97 for the purposes of the judgment;

2. Dismisses the application in Case T-270/97;

3. Declares that there is no need to give a decision on the application in Case T-204/97;

4. Orders the applicant to bear its own costs and to pay those of the Commission in Case T-270/97;

5. Orders the applicant to bear its own costs and to pay those of the Commission in Case T-204/97.

Cooke García-Valdecasas Lindh

Pirrung Vilaras

Delivered in open court in Luxembourg on 13 June 2000.

H. Jung — Registrar

J.D. Cooke — President