JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
26 February 2002 *

In Case T-323/99,

Industrie Navali Meccaniche Affini SpA (INMA), in liquidation, established in La Spezia (Italy), represented by S. Capparucci,

Italia Investimenti SpA (Itainvest), established in Rome (Italy), represented in these proceedings by G.M. Roberti and F. Sciaudone, lawyers, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by K.-D. Borchardt, acting as Agent, assisted initially by A. Abate and E. Cappelli, subsequently by A. Abate and G. Conte, lawyers, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for annulment of Commission Decision 2000/262/EC of 20 July 1999 on State aid granted by Italy to the INMA shipyard (OJ 2000 L 83, p. 21),

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

composed of: P. Lindh, President, R. García-Valdecasas, J.D. Cooke, M. Vilaras and N.J. Forwood, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 7 June 2001,

gives the following

Judgment

Legal background

1 Article 87(1) EC provides that '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 shall, in so far as it affects trade between Member States, be incompatible with the common market'.

2 Pursuant to Article 87(3)(e) EC, the following may be considered to be compatible with the common market: 'such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission'.

3 On 21 December 1990 the Council adopted Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27). It has been amended on several occasions, but those amendments do not affect the provisions that are relevant in the present case.

4 Article 1(d) of Directive 90/684 provides, in particular, that 'aid' means State aid within the meaning of Articles 87 EC and 88 EC, including 'not only aid granted by the State itself but also that granted by regional or local authorities and any aid elements contained in the financing measures taken by Member States in respect of the shipbuilding or ship repair undertakings which they directly or indirectly control and which do not count as the provision of risk capital according to standard company practice in a market economy.'

5 Article 4(1) of Directive 90/684 provides, in particular, that 'production aid in favour of shipbuilding and ship conversion may be considered compatible with the common market provided that the total amount of aid granted in support of any individual contract does not exceed, in grant equivalent, a common

maximum ceiling expressed as a percentage of the contract value before aid, hereinafter referred to as the ceiling.'

6 Directive 90/684 was extended, most recently, by Council Regulation (EC) No 2600/97 of 19 December 1997 amending Regulation (EC) No 3094/95 on aid to shipbuilding (OJ 1997 L 351, p. 18), which provides that 'pending the entry into force of the [Organisation for Economic Development and Cooperation (OECD)] Agreement, the relevant provisions of Directive 90/684/EEC shall apply until the Agreement enters into force and until 31 December 1998 at the latest.'

7 Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding (OJ 1998 L 202, p. 1) entered into force on 1 January 1999. In the first two recitals of that regulation, the Council states that the OECD Agreement has still not entered into force and that the relevant rules of Directive 90/684 will continue to apply until 31 December 1998 only.

8 Article 1(e) of Regulation No 1540/98 defines 'aid' in essentially the same way as Article 1(d) of Directive 90/684 (see paragraph 4 above).

9 Article 3 of Regulation No 1540/98 provides, *inter alia*, that 'until 31 December 2000, production aid in support of contracts for shipbuilding and ship conversion, but not ship repair, may be considered compatible with the common market provided that the total amount of all forms of aid granted in support of any individual contract (including the grant equivalent of any aid granted to the shipowner or third parties) does not exceed, in grant equivalent, a common

maximum aid ceiling expressed as a percentage of the contract value before aid. For shipbuilding contracts with a contract value before aid of more than ECU 10 million, the ceiling shall be 9%; in all other cases the ceiling shall be 4.5%'.

Facts

10 Industrie Navali Meccaniche Affini SpA (INMA), a shipyard in Spezia, is a public undertaking which has been operating, since 1945, in the ship repair and conversion sector and, since 1989, in the shipbuilding sector. It is a wholly-owned subsidiary of the public undertaking GEPI SpA, which changed its name in 1997 to Italia Investimenti SpA (Itainvest).

11 Between 1987 and 1998 INMA received from the Ministry responsible for the merchant navy, and subsequently from the Ministry of Transport and Navigation, various sums under Italian laws Nos 599/82, 111/85, 234/89, and 132/94.

12 Between 1996 and 1998 Itainvest provided guarantees and sureties in favour of INMA, relating to orders for ships placed by the shipping companies Stolt Nielsen, Tirrenia, Pugliola and Corsica Ferries.

13 At the end of the 1996 financial year INMA's losses amounted to ITL 21.4 billion. The shareholders' meeting held on 13 November 1997 resolved that ITL 4.68 billion of the loss would be covered by INMA's reserves and ITL 16.7 billion by Itainvest.

14 The shareholders' meeting of 24 March 1998 noted that INMA's accounts, drawn up as of 30 November 1997, already showed a loss of ITL 81.89 billion. Itainvest covered those losses.

15 At the shareholders' meeting of 23 June 1998, INMA's accounts revealed, for the 1997 financial year, total losses of ITL 103.7 billion. Itainvest covered the part of that sum not already covered, namely ITL 21.81 billion.

16 Finally, INMA was put into liquidation at the shareholders' meeting of 6 November 1998.

Administrative procedure

17 Pursuant to an obligation on the part of Itainvest to provide information relating to certain types of intervention, the Commission was informed of the transfer by Itainvest to INMA of approximately ITL 100 billion in order to cover the losses registered by INMA during the 1996 and 1997 financial years.

18 By letter of 1 October 1998, the Commission requested the Italian authorities to send additional information in that respect. The Italian authorities responded to that request by sending, by letter of 9 November 1998, INMA's annual accounts for the financial years 1992 to 1997.

19 The Commission decided to initiate the procedure under Article 88(2) EC in respect of the covering of INMA's losses by Itainvest. It informed the Italian authorities of its decision by letter of 19 January 1999 which was published on 5 March 1999 in the *Official Journal of the European Communities* (OJ 1999 C 63, p. 2).

20 In the letter of 19 January 1999 the Commission invited the Italian Republic to submit, first, its observations and any relevant information concerning the action by Itainvest in favour of INMA in the form of loss compensation and recapitalisation and, second, a complete breakdown of the aid paid by the Ministry with responsibility for the merchant navy and subsequently by the Ministry of Transport and Navigation. In that letter the Commission also stated that the majority of bank loans taken out by INMA were covered by guarantees provided by Itainvest.

21 The Italian authorities replied to that letter by letter of 2 March 1999.

22 The observations of interested parties, lodged following the notice of 5 March 1999, were sent to the Italian authorities, which commented on them by letter of 30 June 1999.

The contested decision

23 On 20 July 1999 the Commission adopted Decision 2000/262/EC on State aid granted by Italy to the INMA shipyard (OJ 2000 L 83, p. 21, hereinafter 'the contested decision'), Section V of which, under the heading 'Assessment', may be summarised as follows.

24 By way of introduction, the Commission states that as the aid relates to a shipbuilding and ship repair company it must be examined under Directive 90/684/EEC and Regulation No 1540/98 (recital 19).

25 As regards the production aid and investment aid granted by the Italian Government to INMA for the period 1991 to 1998, the Commission finds that they are in conformity with the aid schemes provided for by Italian laws Nos 599/82, 111/85, 234/89 and 132/94, which it had authorised. It observes, however, that, as regards the shipbuilding contracts concluded with Pugliola, Corsica Ferries and Stolt Nielsen, the rate applicable is the maximum rate in force under Article 4(1) of Directive 90/684 (recital 20).

26 The Commission observes that the Italian authorities attribute the difficulties encountered by INMA from 1996 to management errors relating to the Stolt Nielsen and Tirrenia orders. However, it notes that completion of the orders was guaranteed by Itainvest in the amount of ITL 42 billion from March 1996. It considers, therefore, that no financial institution would have advanced funds without a guarantee from Itainvest and that those guarantees constitute aid within the meaning of Article 87(1) EC (recitals 24 and 25).

27 The Commission considers, therefore, that the Italian authorities cannot justify the loss compensation on the ground that it was less costly than the obligations arising out of the guarantees provided, since those guarantees constitute non-notified aid (recital 26).

28 The Commission states that, as the Stolt Nielsen and Tirrenia orders were to benefit or had benefited from the maximum rate of aid laid down in Article 4(1)

of Directive 90/684 in the form of a grant from the competent ministry, and as the guarantees, by virtue of their nature as aid, had to be taken into account when calculating the aid rate for the contract, the ceiling of 9% of the contract price before aid therefore will be, or has been, exceeded (recitals 26 and 27).

29 The Commission also considers that the Italian authorities' claim that the sudden loss recorded by INMA which appeared in May 1997 is attributable to the poor management of orders received in December 1995 is unfounded, because in the presentation of the annual accounts for the 1996 financial year it is stated that those orders had not contributed significantly to the results of that year. The Commission concludes from this that the poor situation of the undertaking already existed and was caused by other orders (recitals 28 and 29).

30 In that regard, the Commission states that Itainvest agreed to provide for INMA a 'claim mobilisation guarantee' linked to the order for the vessels 'Corsica Ferries I' and 'Corsica Ferries II' for a period of 10 years, amounting to ITL 32.44 billion. However, the Commission observes that the guaranteed loans were used for the general management of the yard, as the two vessels had been delivered in 1996 and their price had in principle been paid. It contends that, as the guarantees were given through public resources, they are State aid in the form of operating aid covered by Article 3(1) of Regulation No 1540/98 and must be included in the maximum ceiling of aid for contracts. The Commission states that the competent ministry has already granted 9% of the contract price before aid to all vessels already delivered, that is to say, the maximum amount of aid possible under Article 4(1) of Directive 90/684/EEC (recital 29).

31 The Commission contends that the number and dates of the transactions guaranteed by Itainvest show that, as the parent company, Itainvest was closely linked with the risky day-to-day management of the INMA yard and that consequently it did not act like a private investor. It observes that, in view of the already extensive losses appearing on the balance sheet on 31 December 1996, of

which Itainvest must have been aware well before May 1997, INMA was already insolvent by that date and should have petitioned for bankruptcy (recital 30).

32 The Commission concludes that the loss compensation cannot be regarded as rescue aid under the relevant Community guidelines for State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12) (recital 31).

33 It also considers that the contributions of ITL 21.4 billion in 1997 and ITL 103.7 billion in 1998 in order to cover the recorded losses constitute aid because they were made in circumstances which would be unacceptable to an investor operating under normal market conditions. That loss compensation was therefore intended solely to enhance the value of INMA artificially by injecting non-repayable funds, since there is no evidence that even if Itainvest had sold INMA it would have covered the 'investment' of ITL 120 billion, given the difficulties affecting the shipbuilding industry (recitals 32 and 33).

34 The Commission considers, in that regard, that Itainvest did not choose the most profitable solution in deciding to cover INMA's losses instead of petitioning for bankruptcy. The latter solution would have entailed the cancellation of contractual commitments and hence reduced the cost of its obligations towards the shipping companies. The Commission observes that, should that not be the case, it would further confirm its view that Itainvest had committed itself more deeply than a private investor would have done. The Commission notes, moreover, that Itainvest agreed to a surety of ITL 22.7 billion for the Tirrenia order in March 1998 and a surety of ITL 9 billion for the Stolt Nielsen order in March and May 1998, that is to say, after having taken the decision to cover the INMA losses on the basis of the accounts adopted at 30 November 1997 (recital 34).

35 The Commission concludes that the loss compensation constitutes State aid that is incompatible with the common market (recital 25).

36 In its 'Conclusions' in the contested decision, the Commission states that the Italian authorities unlawfully granted guarantees for the construction of vessels ordered by Corsica Ferries, Pugliola, Tirrenia and Stolt Nielsen and covered losses incurred by INMA in 1997 and 1998, contrary to Article 88(3) EC. The guarantees provided for the construction of the ships and the loss compensation should have been included in the maximum ceiling of aid for the contracts provided for in Article 4(1) of Directive 90/684. That aid must therefore be recovered (recital 36).

37 Article 1 of the contested decision provides as follows:

'The State aid in the form of guarantees for the Corsica Ferries, Pugliola, Stolt Nielsen and Tirrenia orders and the loss compensation totalling ITL 120.4 billion (EUR 62.2 million) granted by Italy through the public holding company Itainvest to the shipyard INMA SpA is incompatible with the common market.'

38 According to Article 2(1) of the contested decision:

'Italy shall take all the necessary measures to recover from the recipient the aid referred to in Article 1 and unlawfully made available to the recipient.'

Procedure and forms of order sought

39 By application lodged at the Registry of the Court of First Instance on 15 November 1999 the applicants brought the present action.

40 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber, Extended Composition) decided to open the oral procedure and, as a measure of organisation of procedure under Article 64 of the Rules of Procedure, asked the parties to answer certain questions in writing, which they did within the time allowed to them for that purpose.

41 The parties presented oral argument at the hearing which took place on 7 June 2001.

42 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

43 The defendant contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

Law

44 In support of their application the applicants rely on two pleas in law. The first plea alleges infringement of Article 87 EC, Article 1(d) of Directive 90/684 and Article 2(1) and (2) of Regulation No 1540/98. The second plea alleges infringement of essential procedural requirements and failure to state reasons.

45 In the present case, it is appropriate to examine the second plea first. It is only if the statement of reasons for the measure is adequate that the Court will be able to review the validity of the Commission's reasoning.

Arguments of the parties

46 In their second plea, the applicants claim that, when making its assessment, the Commission failed to take into consideration the figures and arguments relating to INMA's financial and economic situation which had been adduced by the Italian authorities during the administrative procedure, failed to ask for explanations from them and from the Italian authorities, and failed to examine whether there were economic and financial reasons which might justify the intervention by Itainvest in favour of INMA. Moreover, the contested decision is, according to the applicants, based on mere presumptions. The various omissions by the Commission mean that the contested decision is vitiated by a grave defect

in reasoning, which prevented them from understanding the decision and from exercising their rights of defence.

47 The Commission submits that this plea is inadequately developed by the applicants, that it fails to give specific references and that it does not identify the alleged procedural defects. Furthermore, although they were both implicated from the first phase of the procedure initiated by the Commission under Article 88(2) EC, neither applicant deemed it appropriate to intervene and submit appropriate observations in good time. Moreover, the applicants rely on peculiar considerations in order to justify their failure to take part in the administrative procedure.

48 In any event, a reading of the contested decision, which contains a part describing INMA, a part comprising the detailed observations of the Italian authorities in their letter of 2 March 1999 and a part dealing with the assessment of the aid, refutes the applicants' arguments.

49 The Commission states that the arguments submitted by it in these proceedings are in no way intended to supplement the reasoning of the contested decision, which is, in itself, exhaustive, but merely to respond to the complaints raised in the application and to refute them.

50 The Commission also rejects the applicants' assertion that its analysis is based on an *ex post facto* assessment of the material facts.

Findings of the Court

Preliminary observations

51 The Commission alleges that this plea has not been adequately developed by the applicants.

52 It is true that as part of their arguments as to the breach of the duty to state reasons the applicants do particularly complain that the Commission committed a manifest error of assessment which originated in the inadequacy of the investigation during the administrative procedure. That line of argument, which calls in question the substantive legality of the contested decision, must therefore be distinguished from the plea alleging a failure to state reasons, which is an infringement of an essential procedural requirement and which must, if necessary, be raised by the Community judicature of its own motion (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67, and Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraphs 35 and 38).

53 Nevertheless the applicants have also claimed that the contested decision is vitiated by a serious defect in reasoning in that they are unable to understand the grounds of that decision.

54 The Commission's argument cannot therefore succeed.

The statement of the reasons for the contested decision

55 It is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review. The requirement to state reasons must be assessed according to the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees may have in receiving explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86).

56 With regard to a Commission decision finding that there is State aid which is incompatible with the common market, it must be observed that the Commission's exercise of its powers under Article 87(3) EC assumes the existence of a measure amounting to State aid within the meaning of Article 87(1) EC. The Commission must therefore ascertain first of all whether the measure constitutes State aid within the meaning of that article (Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 73).

57 As regards the classification of a measure as aid, it follows from Article 253 EC that the Commission must indicate the reasons for its view that the measure in question falls within the scope of Article 87(1) EC (Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 66, Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 36, and Case T-55/99 *CETM* v *Commission* [2000] II-3207, paragraph 59). In that context, the statement of reasons cannot be limited to a finding that the measure

constitutes aid but must refer to the specific facts in such a way as to enable the parties concerned to express their views on the accuracy and relevance of the alleged facts and circumstances and to permit the Court to exercise its power of review (see, to that effect, Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraphs 19 to 30, and Joined Cases C-329/93, C-62/95 and C-63/95 *Germany* v *Commission* [1996] ECR I-5151, paragraph 52).

58 Second, the Commission must ensure that the statement of the reasons for the measure at issue makes it possible to identify with precision the aid which is considered to be incompatible with the Treaty and which must be cancelled (see, to that effect, Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraph 47).

59 In the present case, it is necessary to bear in mind the context in which the contested decision was taken and, more specifically, the circumstances surrounding the administrative procedure at the end of which the Commission found that the measures at issue constituted State aid which was incompatible with the common market.

60 In that connection, it should be noted that in its letter of 19 January 1999 the Commission requested the Italian authorities to send information concerning, in particular, the intervention by Itainvest in favour of INMA in the form of loss compensation. With regard to the guarantees which Itainvest agreed to provide in favour of INMA, the Commission merely found that the majority of INMA's bank loans had been covered by Itainvest's guarantees, but did not ask for information concerning those measures.

61 When questioned on that point at the hearing, the Commission stated that it had not seemed to it to be appropriate to request information from the Italian authorities regarding the terms on which the guarantees in question had been

provided. It was therefore in the absence of that information that the Commission assessed those measures and classified them as State aid.

62 In their reply to the letter of 19 January 1999 the Italian authorities observed, first of all, that that letter concerned financial intervention by Itainvest since 1997 in favour of INMA and aid granted to INMA by the Ministry responsible for the merchant navy and subsequently by the Ministry of Transport and Navigation. They also stated that their letter contained the information needed in order to assess that financial intervention.

63 After they had submitted the financial data relating to the loss compensation and to the guarantees which Itainvest had agreed to issue in favour of INMA, the Italian authorities stated as follows:

'In the circumstances, it may be concluded without hesitation that the above financial intervention corresponds fully to standard practice in a market economy (Article 1(d) of the directive). Having regard to the loss which became apparent in May 1997, Itainvest made a full and careful assessment, with the assistance of leading consultants, of the company's overall situation and the possibilities which it had for selling it.

In that context and in accordance with the abovementioned Community principles, Itainvest rightly concluded that the grant of additional limited financial resources was, at that time, an approach which was objectively preferable from an economic and financial point of view because it was such as (a) to avoid a situation in which the shipyard ceased to make payments which would have led to the immediate [calling in] of the guarantees issued in the amount of more than ITL 223 billion and other costs which may be estimated at approximately ITL 100 billion; and (b) to bring about the sale of the shipyard under the best conditions.'

64 Having regard to the requirements of Article 253 EC and taking into account the context in which the contested decision was adopted, it is necessary to examine whether the Commission gave sufficient reasons in law for classifying as State aid, first, the guarantees in question provided by Itainvest in favour of INMA and, second, the compensation by Itainvest for the losses recorded by INMA.

— The reasons stated for the classification of the guarantees provided by Itainvest as State aid

65 As a preliminary point, it must be observed that according to Article 1 of the contested decision the guarantees for the Corsica Ferries, Pugliola, Stolt Nielsen and Tirrenia orders are considered to be State aid which is incompatible with the common market.

66 According to Section V of the contested decision, entitled 'Assessment', the guarantees referred to are, first, those agreed in 1996 in respect of the Stolt Nielsen and Tirrenia orders in the amount of ITL 42 billion (see recital 24 of the contested decision) and in respect of the Corsica Ferries orders in the amount of ITL 32.44 billion (see recital 29 of the contested decision) and, second, two sureties relating to the Stolt Nielsen and Tirrenia orders issued in 1998 in the amount of ITL 22.7 and 9 billion respectively (see recital 34 of the contested decision).

67 In their pleadings and oral submissions the applicants argue that Article 1 of the contested decision refers to the whole of the abovementioned guarantees, including the sureties.

68 However, in reply to a question put by the Court at the hearing, the Commission stated that only the guarantees referred to in recitals 24 and 29 of the contested decision were covered by Article 1. Those guarantees are the guarantees issued in 1996 in respect of the Stolt Nielsen and Tirrenia orders in the amount of ITL 42 billion and in respect of the Corsica Ferries orders in the amount of ITL 32.44 billion, but not the sureties referred to in recital 34 of the contested decision.

69 As regards the guarantee concerning the Pugliola order, which is not specifically addressed in Section V ('Assessment') of the contested decision, the Commission accepted at the hearing that it should not have been referred to in Article 1 of that decision.

70 It follows that Article 1 of the contested decision must be annulled in so far as it refers to the guarantee in respect of the Pugliola order.

71 As regards the sureties relating to the Stolt Nielsen and Tirrenia orders issued in 1998, it must be observed that they are not covered by Article 1 of the contested decision. In recital 34 of the contested decision, the Commission, after concluding that Itainvest had committed itself more deeply than a private investor would under normal market conditions, merely 'notes' also that the breakdown of Itainvest's commitments shows those sureties. As it observed at the hearing in reply to a question from the Court, it did not, however, express a view on their classification as State aid incompatible with the common market. The applicants' arguments are, therefore, devoid of purpose in so far as they relate to those sureties.

72 Having regard to the foregoing, it is necessary to examine whether the Commission gave sufficient reasons in law for classifying, as State aid, the

guarantees actually covered by recitals 24 and 29 of the contested decision. In that regard it is necessary to ascertain whether the decision shows, clearly and unequivocally, the line of reasoning which led the Commission to the view that a private investor would not have provided those guarantees and, accordingly, that they constitute State aid within the meaning of Article 87(1) EC.

73 It should be observed in that regard that in its letter of 19 January 1999 the Commission had not requested information concerning the guarantees relating to the Stolt Nielsen, Tirrenia and Corsica Ferries orders and that it had not set out, even summarily, its reasons for concluding that their issue had to be regarded as State aid. In those circumstances and having regard to the fact that Itainvest was closely linked to INMA on account of its 100 per cent shareholding in that company, it was all the more necessary that the statement of the reasons for the contested decision should contain sufficient details in that regard.

74 As regards the guarantees concerning the Stolt Nielsen and Tirrenia orders, the Commission asserts in recital 24 of the contested decision that 'in view of the various financial operations that were needed in order to complete the orders in hand, it is clear that no financial institutions would have granted advances without a guarantee from Itainvest, and hence without recourse to public resources.'

75 That assertion cannot constitute a clear and adequate statement of reasons for the classification as State aid of the guarantees in question, enabling the parties concerned to comprehend the Commission's reasoning regarding the application of the private investor test in this case and the Community judicature to exercise its power of review. In support of its assertion, the Commission has not even produced details of the financial operations in question and explanations of the link between the provision of the guarantees and the intervention of the relevant financial institutions.

76 Admittedly, during the proceedings before the Court, the Commission put forward certain explanations of recital 24 of the contested decision. It thus claimed that its reason for taking the view that financial institutions would not have agreed to advance funds without a guarantee from Itainvest was 'the fact that Itainvest deliberately provided those guarantees despite the serious difficulties which INMA was experiencing, above all in respect of highly onerous orders which had been accepted at predatory prices and which were therefore doomed to financial disaster'. However, none of those considerations appears in the contested decision (see, to that effect, Case T-16/91 *Rendo and Others* v *Commission* [1996] ECR II-1827, paragraph 45, and Case T-77/95 *Ufex and Others* v *Commission* [2000] ECR II-2167, paragraph 54).

77 Furthermore, in recital 25 of the contested decision, the Commission merely asserts that the guarantees relating to the Stolt Nielsen and Tirrenia orders are State aid and cites in that regard its communication to the Member States on the application of Articles [87] and [88] of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ 1993 C 307, p. 3). In relying, in support of that assertion, merely on an extract from that communication and in omitting to indicate the relevant legal and factual considerations in the case, the Commission has failed to provide sufficient reasons in law to support the conclusion which it reached.

78 The assertion that those guarantees constitute State aid is repeated in the first sentence of recital 26 of the contested decision, but no further explanation is given for such a classification.

79 It follows that there is a lack of reasons for classifying as State aid the guarantees relating to the Stolt Nielsen and Tirrenia orders provided by Itainvest in favour of INMA in 1996.

80 With regard to the guarantees provided for the Corsica Ferries orders and declared to be incompatible with the common market in Article 1 of the contested decision, the Commission asserts, in recitals 28 and 29 of the contested decision, that the first losses incurred by INMA did not emerge, as alleged by the Italian authorities, in May 1997 but on the closure of accounts on 31 December 1996, and that the poor situation of INMA was caused by orders other than the Stolt Nielsen and Tirrenia orders. In that regard, it states that the two Corsica Ferries orders, which were also the subject of guarantees provided by Itainvest to the builders, were in fact completed in 1996. The information supplied by the Italian authorities indicates, according to the Commission, that Itainvest issued, for INMA, a claim mobilisation guarantee linked to those two orders. However, the Commission claims that since the two vessels had been delivered and the price had, in principle, been paid, the guaranteed loans were used for the general management of the yard.

81 The Commission goes on to state that 'as the guarantees were given through public resources, they constitute State aid in the form of operating aid covered by Article 3(1) of Regulation (EC) No 1540/98; they should therefore be included in the maximum aid for contracts and hence reduce the level of aid granted by the Italian Government'.

82 It follows from those findings that the statement of reasons for the contested decision is particularly ambiguous with regard to the Corsica Ferries orders. In recital 29 of the contested decision references are made to 'guarantees to the builders' and a 'claim mobilisation guarantee linked to the order'. Only the claim mobilisation guarantee linked to the order seems, however, to have been regarded as State aid. Nevertheless, the Commission concludes, in the same recital, that 'as the guarantees [in the plural] were given through public resources, they constitute State aid'.

83 This ambiguity is increased by the fact that in recital 36 of the contested decision the Commission states that Italy unlawfully granted guarantees 'for the construction of vessels ordered by Corsica Ferries'.

84 It follows that the contested decision does not make it possible to identify clearly what is the aid 'in the form of guarantees for the Corsica Ferries orders' referred to in Article 1 of the contested decision. Moreover, the Commission has not explained why the claim mobilisation guarantee linked to the order for the two vessels 'Corsica Ferries I and II', which had already been delivered, could be classified, in recital 36 of the contested decision, as a guarantee for the construction of those vessels.

85 In any event, the reasons stated for the contested decision do not enable it to be ascertained why the Commission considered that those guarantees constituted State aid. Neither the assertions relating to INMA's financial situation at the end of the 1996 financial year nor those relating to the guaranteed loans permit the conclusion that, when those guarantees were issued, INMA's financial situation was compromised and that Itainvest did not act like a private investor.

86 It follows that there is a lack of reasons for classifying the guarantees in respect of the Corsica Ferries orders as State aid.

87 At the hearing the Commission claimed that the reasons for classifying the guarantees at issue as State aid were also contained in recital 30 of the contested decision, which states that the findings concerning the number and dates of the transactions guaranteed by Itainvest indicate that Itainvest, as the parent company, was closely linked with the risky day-to-day management of INMA and that, consequently, Itainvest did not act like a private investor.

88 However, it must again be observed that the Commission did not provide any explanation in support of that assertion, nor can such an explanation be found in the preceding grounds of the contested decision. The Commission is relying on assumptions in failing to indicate the specific facts on which it relies in reaching its conclusion that INMA's financial situation was compromised when the guarantees in question were issued and that Itainvest did not act like a private investor.

89 It follows that, as regards the classification of the guarantees in question as State aid, the Commission did not set out the facts and legal considerations that were of fundamental importance in the scheme of the decision.

90 That conclusion cannot be invalidated by the Commission's argument to the effect that it did not have the information relating to the terms on which all the guarantees in question were provided because that information was not sent to it during the administrative procedure.

91 The Commission is not entitled to rely on the fragmentary nature of the information sent to it on that point during the administrative procedure in order to justify the lack of reasoning in the contested decision, since it did not use all the powers available to it to require the Italian authorities to provide it with the relevant information concerning the financial terms for the provision of those guarantees (see, to that effect, Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, paragraph 29). As has already been observed, in its letter of 19 January 1999 the Commission did not request information concerning the guarantees at issue (see paragraph 60 above). When questioned on that point at the hearing, it stated, moreover, that it

had not seemed to it to be necessary to call for that information during the administrative procedure (see paragraph 61 above).

92 Lastly, although the Commission puts forward in its pleadings a number of matters relating to the social nature of Itainvest's tasks, to INMA's financial situation and to the situation in the shipbuilding sector, in order to show that the guarantees in question fell to be classified as State aid, those reasons do not appear in the contested decision and are not of such a nature as to cure the lack of reasoning which has been found to exist.

93 Having regard to all the foregoing considerations, the Court finds that, in so far as it relates to the classification of the guarantees as State aid, the statement of reasons for the contested decision does not satisfy the requirements of Article 253 EC.

— The reasons stated for classifying the loss compensation as State aid

94 In the contested decision the Commission found that, from May 1997 onwards, INMA was insolvent (see recital 30 of the contested decision), that a private investor would not have covered the losses as Itainvest agreed to do in 1997 and 1998 (see recital 32 of the contested decision) and that it had not been shown, having regard to the situation in the shipbuilding sector, that the price which Itainvest could have obtained from the sale of INMA would have covered the

'investment' of ITL 120 billion in the form of loss compensation (see recital 33 of the contested decision).

95 However, in their observations of 2 March 1999 the Italian authorities stated, in reply to the letter of 19 January 1999, that the compensation by Itainvest for the losses recorded by INMA in 1996 and 1997 corresponded fully to standard practice in a market economy.

96 In that respect, the Italian authorities stated, as has been observed earlier, that 'Itainvest rightly concluded that the grant of additional limited financial resources was, at that time, an approach which was objectively preferable from an economic and financial point of view because it was such as: (a) to avoid a situation in which the shipyard ceased to make payments which would have led to the immediate [calling in] of the guarantees issued in the amount of more than ITL 223 billion and other costs which may be estimated at approximately ITL 100 billion; and (b) to bring about the sale of the shipyard under the best conditions' (see paragraph 63 above).

97 The arguments submitted by the Italian authorities in their observations of 2 March 1999 were summarised by the Commission in recitals 10 to 18 of the contested decision.

98 According to the case-law cited in paragraph 55 above, the requirement for a statement of reasons does not demand that the Commission discuss all the points of law and of fact raised by the parties concerned. The Commission is, however, required to provide a reasoned response to each of the essential arguments put forward by those parties.

99 The abovementioned factual considerations do not in any sense amount to an irrelevant, insignificant or clearly secondary argument on the part of the Italian authorities, but are rather an essential argument intended to show that the compensation by Itainvest for the losses recorded by INMA during the 1996 and 1997 financial years is not State aid within the meaning of Article 87(1) EC.

100 In that context, the Commission was required to set out clearly and unequivocally for the Italian authorities the reasons for which their contention that Itainvest had acted like a private investor in a market economy in preferring to cover INMA's losses in order to minimise the costs which it might incur as guarantor and sole shareholder was invalid.

101 Admittedly, in recital 26 of the contested decision the Commission did say that: '[I]f the Italian authorities intended to justify the contribution from Itainvest in the form of loss compensation on the ground that it was less costly than the obligations arising out of guarantees, it must be pointed out that such obligations constitute non-notified aid under Article 87(1) [EC] and conform to the concept of aid in Article 2(1) and (2) of Regulation... No 1540/98'.

102 In that regard, it must be pointed out that the Commission's response to the argument of the Italian authorities is based on the finding that the guarantees issued by Itainvest in favour of INMA constitute State aid. However, as has already been found, the reasons given in the contested decision with respect to the classification of the guarantees in question as State aid do not satisfy the requirements of Article 253 EC. In those circumstances, the Court is not in a

position to exercise its power of review in respect of the explanation supplied by the Commission in recital 26 of the contested decision.

103 The Commission also states, in recital 34 of the contested decision, that it 'doubts that, in preferring to cover the losses, Itainvest opted for the lowest expenditure since, in principle, bankruptcy would automatically have entailed the cancellation of contractual commitments, in particular those relating to the Tirrenia order and hence reduced the cost of its obligations towards the shipping companies, one of the effects of bankruptcy being to place all creditors on the same footing and then give priority to those that have actually advanced funds rather than those entitled to compensation for the failure to fulfil a contractual clause'. It adds that 'should this not be the case, it would further confirm [its] view that Itainvest had committed itself more deeply than a private investor would under normal market conditions.'

104 However, that recital does not make it clear that the Commission is expressing its views on the consequences which a petition by INMA for bankruptcy would have had on the guarantees issued in its favour by Itainvest and, in particular, on the question whether, in such circumstances, those guarantees could have been enforced.

105 The Commission's explanation relating to the nature of the contractual commitments to which it refers in that recital is therefore so imprecise and equivocal that it does not enable the Court to review the question whether, in the light of the fact that Itainvest had issued guarantees in favour of INMA, it was preferable, as the Italian authorities claimed, to cover the losses recorded in the 1996 and 1997 financial years.

106 It follows from the foregoing that the reasons given for classifying the loss compensation as State aid do not disclose the justification for rejecting the Italian authorities' essential argument and do not enable the Community judicature to exercise its power of review.

107 It follows that the reasons in the contested decision relating to the classification of the loss compensation as State aid do not satisfy the requirements of Article 253 EC.

108 In the light of all the considerations set out above, the Court holds that the contested decision does not comply with the obligation to state reasons laid down in Article 253 EC, so far as concerns the classification as State aid of the measures in fact covered by Article 1 of that decision.

109 Consequently, the contested decision must be annulled for infringement of essential procedural requirements and it is not necessary to examine the other plea.

Costs

110 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 defendant has been unsuccessful, and as the applicants have applied for costs, it must be ordered to pay the costs.

On those grounds,

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

hereby:

1. **Annuls Commission Decision 2000/262/EC of 20 July 1999 on State aid granted by Italy to the INMA shipyard;**

2. **Orders the Commission to bear its own costs and to pay those incurred by the applicants.**

Lindh García-Valdecasas Cooke

Vilaras Forwood

Delivered in open court in Luxembourg on 26 February 2002.

H. Jung

Registrar

P. Lindh

President