JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
27 April 1995 *

In Case T-435/93,

Association of Sorbitol Producers within the EC (ASPEC), established in Brussels,

Cerestar Holding BV, a company incorporated according to Netherlands law, established at Sas van Gent, Netherlands,

Roquette Frères SA, a company incorporated according to French law, established in Lestrem, France,

Merck oHG, a company incorporated according to German law, established in Darmstadt, Germany, represented by Nicole Coutrelis, of the Paris Bar, and by J. A. Johnson, of the Bar of England and Wales, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 11 Rue Goethe,

applicants,

supported by

* Language of the case: English.

the **French Republic**, represented by Catherine de Salins, Deputy Director at the Directorate of Legal Affairs at the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

and

Casillo Grani snc, a company incorporated according to Italian law established in San Giuseppe Vesuviano, Italy, represented by Mario Siragusa, Maurizio D'Albora and Giuseppe Scassellati-Sforzolini, respectively of the Rome, Naples and Bologna Bars, with an address for service at the Chambers of E. Arendt, 8-10 Rue Mathias Hardt,

interveners,

v

Commission of the European Communities, represented by Daniel Calleja y Crespo, Michel Nolin and Richard Lyal, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Italgrani SpA, a company incorporated according to Italian law, established in Naples, Italy, represented by Aurelio Pappalardo of the Trapani Bar, L. Sico and F. Casucci, of the Naples Bar, and M. Annesi and M. Merola, of the Rome Bar, with an address for service in Luxembourg at the Chambers of A. Lorang, 51 Rue Albert 1er,

intervener,

APPLICATION for the annulment of Commission Decision 91/474/EEC of 16 August 1991 concerning aids granted by the Italian Government to Italgrani SpA for the setting up of an agri-foodstuffs complex in the Mezzogiorno (OJ 1991 L 254, p. 14),

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

composed of: B. Vesterdorf, President, D. P. M. Barrington, A. Saggio, H. Kirschner and A. Kalogeropoulos, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 9 November 1994,

gives the following

Judgment

Facts underlying the dispute

1 The first applicant is the Association of Sorbitol Producers within the EC (hereinafter 'ASPEC'), whose objects are to defend and represent the interests of its members within the European Communities and with international bodies. The three other applicants, namely Cerestar Holding BV (hereinafter 'Cerestar'), Roquette Frères SA (hereinafter 'Roquette') and Merck oHG (hereinafter 'Merck'), are members of ASPEC. Cerestar and Roquette are also members of the Association of Cereal-starch Producers within the EEC (hereinafter 'AAC') and of the USIPA association, which represents French producers of starch and starch products. Through its Italian subsidiary Cerestar is also a member of the Assochimica association which represents producers of products derived from maize and wheat in Italy.

2 By Decision 88/318/EEC of 2 March 1988 on Law No 64 of 1 March 1986 governing extraordinary intervention in favour of the Mezzogiorno (OJ 1988 L 143, p. 37), the Commission gave general approval to a scheme of aids by the Italian State in favour of the Mezzogiorno, subject, however, to compliance with Community rules and subsequent notification of certain programmes within the competence of the Italian regions. Previously, by a decision dated 30 April 1987, the Commission approved the implementation of Law No 64 of 1 March 1986 (hereinafter 'Law No 64/86') in most regions of the Mezzogiorno.

3 By letter of 3 August 1990 AAC lodged a complaint with the Commission against an aid programme approved on 12 April 1990 by the Italian authorities in favour of the intervener, Italgrani SpA (hereinafter 'Italgrani'). By letter dated 17 July

1990, a cereal-processing company, Casillo Grani, had already called on the Commission under Article 175 of the EEC Treaty to define its position concerning these aids. Upon request by the Commission the Italian authorities communicated certain information on the aid envisaged, in particular the decision by the CIPI (Interministerial Committee for the Co-ordination of Industrial Policy) dated 12 April 1990 on the investment programme in question.

4 According to this information the interventions in question concerned a 'programme contract' between the Minister for measures concerning the Mezzogiorno and the intervener, Italgrani, in accordance with Law No 64 mentioned above. Within the framework of this 'programme contract' Italgrani undertook to execute investments in the Mezzogiorno for a global amount of LIT 964.5 billions in:

(a) Investments in industrial technology	669.5
(b) Research Centres	140
(c) Research Projects	115
(d) Staff training	40

5 The projected aids amounted to LIT 522.1 billion, of which LIT 297 billion were devoted to investments in industrial technology, LIT 97.1 billion to research centres, LIT 92 billion to research projects, and LIT 36 billion to staff training.

6 Since the sectors concerned were the subject of considerable intracommunity trade, the Commission considered that the interventions in question constituted aids within the meaning of Article 92(1) of the EEC Treaty, and that from the infor-

mation at its disposal they did not appear to be covered by the derogations contained in Article 92(3) and in particular by the provisions of Law No 64/86 under the terms of Article 9 of Decision 88/318/EEC. Therefore, the Commission initiated the procedure provided for in Article 93(2) in respect of the aid intended for:

— the setting-up of a starch factory and of a factory to be used directly or indirectly for the production of isoglucose,

— the production of seed oils,

— the production of meal and flour,

— investments in the starch sector.

Also the Commission considered doubts to subsist concerning compliance with levels of intensity in the investment aid.

7 By letter dated 23 November 1990, the Commission informed the Italian Government of its decision to initiate the procedure provided for in Article 93(2) of the Treaty and gave it formal notice to submit to it its observations in the framework of that procedure. The other Member States and interested third parties were informed by the publication of a communication in the Official Journal (OJ 1990 C 315, p. 7, and corrigendum OJ 1991 C11, p. 32). Eight associations and two undertakings including Italgrani, submitted their observations which were notified to the Italian authorities on 8 April 1991.

8 The Italian Government and Italgrani brought annulment proceedings against the decision notified to the Italian Government in the Commission's abovementioned

letter of 23 November 1990 concerning the opening of the procedure under Article 93(2) of the Treaty. Italgrani has since withdrawn its proceedings in Case C-100/91, whereas by a judgment of 5 October 1994 in Case C-47/91 *Italian Republic* v *Commission* (1994) ECR I-4635 the Court annulled points I.3 and I.4 of the Commission Decision, save in so far as they concerned aid for formation of stocks of agricultural products. Those points ordered respectively the suspension of payment of aids and recalled that reimbursement by the recipients of aids paid notwithstanding that order was likely to be requested and that Community expenditure affected thereby could not be charged to the EAGGF.

9 Following the observations submitted by the Italian authorities within the framework of the procedure, the Commission considered that the aids for research, training and seed oils could be regarded as compatible with the common market, since they were in conformity with the conditions laid down in Decision 88/318/EEC.

10 Subsequently, by letters dated 23 and 24 July 1991, the Italian authorities substantially amended the investment programme originally planned and adjusted the relevant aids.

11 The new programme modified the original programme as follows:

— the aid for the setting-up of a starch, meal and flour factory is withdrawn,

— the aid for the setting-up of large-scale pig farms is withdrawn,

— the aid to fund the establishment of stocks of Annex II products is withdrawn,

— annual production capacity is reduced from 357 000 tonnes to around 150 000 tonnes;

— the investments and aid for the production of sugar-based chemicals are increased and there will be no production of isoglucose,

— the investments and aid for the fermentation and citric acid industries are increased,

— the aids for research projects are increased.

12 Following these amendments planned investments amounted to LIT 815 billion broken down as follows (in billions of LIT):

(a) investments in industrial technology	510
(b) research centres	140
(c) research projects	125
(d) staff training	40

The aids provided for amounted in total to LIT 461 billion of which LIT 228.17 are devoted to investments in industrial technology, LIT 96.83 billion to research centres, LIT 100 billion to research projects and 36 billion to staff training.

13 The principal products which Italgrani intended to produce were as follows:

Maltose	23 400
High-maltose syrups	36 000
Fructose syrups	18 000
Crystalline fructose	16 200
Mannitol	14 400
Sorbitol	27 000
Other hydrogenated glucoses	18 000
Glucoses and dextroses abv	9 000
Glucose for the light chemicals industry	9 000
Yeasts	16 500
Citric acid	18 000
Vegetable proteins	
— texturized protein	112 750
— Lecithin	2 610
— soya oil	49 590

14 Following the amendments made, the Commission considered that the levels of intensity of the aids in question were in line with the limits laid down in Law No 64/86. However, the Commission acknowledged that the link between starch and the products benefiting from the aids in question could not be ignored, inasmuch as those products are derivatives of or processed from starch. The grant of all the aids was therefore made subject to conditions.

15 At the outcome of the procedure the Commission adopted the contested decision whose operative part is as follows:

'Article 1

1. The award of aids totalling LIT 461 billion by the Italian Government to Italgrani SpA to implement the programme of investments referred to in the CIPI

decision of 12 April 1990 as amended by letters of 23 and 24 July 1991 are hereby deemed compatible with the common market and may benefit from the measures provided for in Law No 64/86 of 1 March 1986 (aid in favour of the Mezzogiorno).

2. The abovementioned aids totalling LIT 461 billion may be granted only, however, subject to compliance by Italgrani with the following conditions when implementing the programme of investments:

— the products processed or derived from starch must be produced by Italgrani using exclusively starch of Community origin,

— Italgrani's production of starch under the programme — whose annual capacity is about 150 000 tonnes — shall be strictly limited to the quantities needed to meet the requirements of its own production of products derived and/or processed from starch; the starch production in question must therefore develop in accordance with the demand for derived and/or processed products and not increase beyond the level of that demand,

— starch produced under the programme shall not be placed on the (national, Community or third country) market,

Article 2

(omissis)

Article 3

(omissis)

Article 4

(omissis).'

Procedure

It was under these circumstances that the applicants brought this action in an application lodged at the Registry of the Court on 25 November 1991. The Commission Decision was also subject to annulment proceedings brought by AAC and six producers of starch and other products mentioned in the investment programme and by Casillo Grani (T-442/93 and T-443/93).

By order of the President of the Court of 19 June 1992 the French Republic was granted leave to intervene in support of the form of order sought by the applicants. By orders of the President of the Court of 16 November 1992 Casillo Grani and Italgrani were given leave to intervene in support of the forms of order sought by the applicants and the Commission respectively.

The written procedure was conducted before the Court and culminated in the lodgment on 31 August 1993 of the applicants' observations on the statements on intervention lodged by Casillo Grani and Italgrani.

19 In pursuance of Article 4 of Council Decision 93/350/ECSC, EEC, Euratom of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), the case was transferred to the Court of First Instance, by order of the Court of 27 September 1993. The case was there assigned to the second chamber, extended composition.

20 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, extended composition) decided to open the oral procedure without any preparatory inquiry. However, the Court of First Instance requested the Commission to produce documents relating to the adoption of the decision and requested the parties to give their views on the consequences to be drawn for these proceedings from the judgment of the Court of 15 June 1994 in Case C-137/92 P *BASF and Others* v *Commission* [1994] ECR I-2555, (the 'PVC case').

21 By order of the President of the Second Chamber (extended composition) of 28 September 1994 the case was joined for the purposes of the oral procedure with Cases T-442/93 and T-443/93.

22 After the case had been set down for hearing, one of the lawyers acting for the intervener, Casillo Grani, informed the Court of First Instance in a letter received at the Registry of the Court of First Instance on 3 October 1994 that that company had been declared bankrupt. By a facsimile received at the Registry of the Court of First Instance on 2 November 1994 the same lawyer forwarded a copy of a decision of the court supervising the liquidation enjoining the company's liquidator to choose as its address for service in connection with the proceedings before the Court of First Instance the Chambers of Messrs Siragusa and Scassellati-Sforzolini.

23 The main parties and the intervener, Italgrani, presented oral argument and gave replies to the questions put to them by the Court of First Instance at the hearing on 9 November 1994. After the hearing the Court of First Instance requested the Commission to produce the telex of 14 November 1986 addressed to the Italian Government and mentioned at paragraph 22 of the abovementioned *Italy* v *Commission* judgment. Following production of that telex by the Commission the parties were requested to give their views on its significance to the present proceedings.

Forms of order sought by the parties

4 The applicants claim that the Court should:

(i) declare the application admissible;

(ii) annul Commission Decision 91/474/EEC of 16 August 1991;

(iii) order the Commission to pay the costs.

5 The Commission contends that the Court should:

(i) dismiss the application (and the objection of inadmissibility) as inadmissible or unfounded;

(ii) order the applicants to pay the costs.

6 The French Republic contends that the Court should:

(i) annul Decision 91/474/EEC;

(ii) order the Commission to pay the costs.

7 The intervener, Casillo Grani, contends that the Court should:

(i) declare the contested decision to be non-existent;

(ii) in the alternative, annul the contested decision and declare Decision 88/318 inapplicable to the present case;

(iii) order the Commission to pay the costs incurred by Casillo Grani.

28 The intervener, Italgrani, contends that the Court should:

(i) dismiss the action as inadmissible or unfounded;

(ii) order the applicants to pay the costs including those of the intervener.

The intervention by Casillo Grani

29 It is apparent from the file that Casillo Grani's interest in the resolution of the dispute was constituted solely by the fact that it was in competition with the company in receipt of the aids in question. However, following the declaration that Casillo Grani is in liquidation, of which its lawyer informed the Court of First Instance on 2 November 1994, that interest no longer subsists. Moreover, according to information provided at the hearing by the intervener, Italgrani, the recipient company of the aid in question, that aid has not yet been paid to it. The decision could not therefore have affected the competitive situation of Casillo Grani before it was declared to be in liquidation.

30 Accordingly, it is not necessary to give a decision on Casillo Grani's conclusions and arguments.

Admissibility

Summary of the parties' arguments

1 Without formally raising any objection of inadmissibility, the Commission challenges the admissibility of the present application. In that connection it maintains that it follows from the Court's judgment in Case 169/84 *Cofaz* v *Commission* [1986] ECR 409 that in the specific sector of state aids Commission decisions terminating the procedure initiated under Article 93(2) of the EC Treaty are of direct and individual concern within the meaning of the second paragraph of Article 173 (now the fourth paragraph of Article 173 of the EC Treaty) to undertakings which fulfil two conditions, namely that they played a decisive role in the procedure referred to in Article 93(2) and, secondly, that they show their market position to be substantially affected by the aid measure in question.

2 Since neither ASPEC nor Merck took part in the procedure there is no doubt, in the Commission's view, that their action is inadmissible since they do not satisfy the first condition laid down in the *Cofaz* judgment.

3 As regards Cerestar and Roquette, the Commission accepts that these undertakings both belong to AAC which did in fact lodge a complaint and submit comments in the course of the procedure. However, there is nothing in those documents to suggest that AAC did in fact intervene on behalf of those two undertakings as producers of sorbitol, mannitol and other hydrogenated products. In fact, the Commission recalls that AAC for its part brought a separate application against the same decision on behalf of its members. It would seem therefore that the right to bring an action has been availed of twice.

As regards the adherence of Roquette and Cerestar to other national associations intervening in the procedure, such as USIPA and ASSOCHIMICA, the Commis-

sion maintains that those associations did not intervene in order to complain specifically of the aid granted to sorbitol, mannitol and other hydrogenated products but were proceeding against the proposal in general. The Commission concludes that none of the applicants satisfies the first condition laid down in the *Cofaz* judgment.

35 As regards the second condition laid down in the *Cofaz* judgment that the applicants must adduce 'pertinent reasons to show that the Commission's decision may adversely affect their legitimate interests by seriously jeopardizing their position on the market in question', the Commission points out that it would not appear to be satisfied in the present case. For the impact of the aid depends to a large extent on events linked to market developments, the realization of the programme and the attainment of the statistical forecasts concerning the products in question.

36 The Commission has no figures available to it concerning the production of mannitol, sorbitol and the other hydrogenated products. According to the *European Chemical Handbook*, it would appear that as at 1 January 1989 there was a surplus of sorbitol in the Community. The same could have been true of mannitol. However, in the absence of objective official statistics the Commission is unable to state with certainty the situation on the Community market concerning the other polyols. As far as sorbitol is concerned, it is even inaccurate to say that there is a market for this product, in view of its very varied applications. The Commission is thus not in agreement with the applicants when they assert that, in the absence of official figures, 'the Court could very well assume that the figure provided by the applicants is correct'. The Commission stresses that, in the exercise of its powers, it is obliged to base itself on official and objective figures and cannot prohibit aids solely on the basis of statistics compiled by the undertakings concerned.

37 Finally, the Commission disputes the applicants' assertion that there are only five sorbitol producers and that the combined shares held by the applicants account for

more than 95% of the market. In fact the table supplied by the applicants themselves shows that there are certainly more than five sorbitol producers in the Community.

38 The Commission concludes that the question whether the applicants have demonstrated beyond a shadow of doubt that they satisfy the second condition laid down in the *Cofaz* judgment remains open.

39 The intervener, *Italgrani,* essentially supports the Commission's arguments.

40 Concerning more particularly the question whether the applicants suffered damage as a result of the contested decision, Italgrani asserts that ASPEC, *qua* association, cannot suffer any loss in itself. It ought at least to have brought out clearly that its members had suffered damage.

41 As regards Merck, Italgrani observes that it is principally a user and purchaser of sorbitol and therefore the entry on to the market of a new producer should be beneficial to it.

42 As regards Roquette and Cerestar, Italgrani observes that they have not proved that the entry on to the market of a new producer of hydrogenated products would be prejudicial to them. The two applicants constitute a duopoly and from 1980 to 1991 considerably increased their production capacities for hydrogenated glucoses, which can be accounted for only by a consistent and significant growth in the market. The additional production programmed by Italgrani would therefore be easily absorbed in a few years by the increase in demand for hydrogenated glucoses, since these products are entirely interchangeable in practically all their applications.

43 Italgrani adds that the damage allegedly suffered by the applicants does not flow directly from the contested decision, any such loss being purely hypothetical at the time when that decision was approved. Only the subsequent national measures gave substance and concrete reality to the damage alleged.

44 The applicants allege that the Commission is giving a restrictive interpretation of the first condition laid down in the *Cofaz* judgment. In their view, the Court is simply saying in that case that the fact that the undertaking was the originator of the complaint and played a decisive role in the procedure was 'accepted as evidence that the measure in question was of concern to the undertaking, within the meaning of the second paragraph of Article 173 of the EEC Treaty.' In other circumstances the Community judicature might accept other evidence.

45 The applicants recall that they participated in the procedure in the manner set out below.

46 AAC, of which Roquette and Cerestar are members, lodged a complaint against the programme contract, as published in the *Official Journal of the Italian Republic* on 14 May 1990, concerning the planned production of starch and a large range of starch-based products.

47 Following the publication in the *Official Journal of the European Communities* of the plan for the production of starch and starch derivatives, AAC reiterated its opposition to the plan. USIPA, of which Roquette is a member, expressed its opposition to the whole project pointing in particular to the envisaged mannitol production. Assochimica submitted observations on behalf of its members, including Cerestar. In its observations it supplied a list of derivatives of maize and wheat produced by its members including sorbitol.

48 As to the second condition contained in the *Cofaz* judgment, the applicants point out that Roquette, Cerestar and Merck produce sorbitol, mannitol and other hydrogenated glucoses. Those are also products for which Italgrani receives subsidies for its investments. With a production capacity set to rise to 59 400 tonnes per annum of hydrogenated glucoses (14 400 tonnes of mannitol, 27 000 tonnes of sorbitol and 18 000 tonnes of 'other hydrogenated glucoses'), Italgrani enters into direct competition with the applicants on a market already suffering from overcapacity.

49 On the basis of a table taken from the *Chemical Economics Handbook 1989* on which the Commission also bases itself in its defence, the applicants maintain that there are only five producers of sorbitol and mannitol in the Community, namely Roquette, Cerestar, Merck, Sisas and CCA Biochem. The applicants maintain that, according to the same table, they account for more than 95% of the sorbitol market, since they produce 291 000 tonnes which corresponds to 98% of the total of 297 000 tonnes.

50 The Commission, the applicants add, itself recognizes that it is not in a position to discuss the applicants' figures. Consequently, the Court of First instance is entitled to presume that the figures supplied by the applicants are correct.

51 The applicants also claim that market conditions in the Community will be entirely altered if Italgrani produces and markets the quantities of polyols provided for in the contested decision. The production of mannitol provided for amounts to 14 400 tonnes whereas total Community production is currently running at 10 000 tonnes. For the 'other hydrogenated glucoses' planned production is for 18 000 tonnes compared to only 10 000 tonnes before the aid was granted to Italgrani. The consequences of this enormous increase in production are all the more serious since there is already overcapacity in the Community. In that connection the applicants dispute Italgrani's assertion that hydrogenated glucoses are perfectly interchangeable, and they add that it is apparent from information supplied by Italgrani itself

that the projected increase in demand for sorbitol is only 1.5% per annum between 1990 and 1995.

52 As to the Commission's assertion that the effects of the planned aid will come through only in the future, the applicants explain that if an undertaking had to wait until aid is actually paid to a competitor it could not act within the two month period provided for in the third paragraph of Article 173 of the EEC Treaty (now the fifth paragraph of Article 173 of the EC Treaty). In any event that assertion is not in conformity with the solution adopted in the *Cofaz* judgment.

53 Finally, by reference to the judgment of the Court in Case 11/82 *Piraiki-Patraiki* v *Commission* [1982] ECR 207, the applicants challenge Italgrani's assertion that they are not directly concerned by the contested decision. On this point they stress that the decision authorizes the Italian Republic to grant the aid in question to Italgrani.

54 The applicants conclude that the contested decision is of direct and immediate concern to them.

55 The *French Republic* did not submit any observations on admissibility.

56 In its defence the Commission also takes the view that the applicants cannot seek the annulment of the decision in its entirety. At most the applicants are concerned as producers of sorbitol, mannitol and other hydrogenated products. Their application should therefore be limited to seeking the partial annulment of that part of the decision concerning the investment programme planned by Italgrani in respect

of those products. Consequently, the applicants' conclusions should be declared inadmissible for the rest.

57 The intervener Italgrani points out that the possible production of starch is mentioned in the Commission Decision solely because certain of the conditions to which the approval of the aid programme is subject relate to that production. The applicants' arguments whereby aid for starch products is to be regarded as an aid for starch cannot be accepted since the production cycles of starch and starch products differ.

58 The applicants retort that if Italgrani had to produce starch and polyols without aid but if at the same time its production of other starch products (namely fermented products) continued to be subsidized, the whole of its integrated production would in fact be subsidized. Consequently, the applicants believe that their claims are admissible and that they are entitled to ask for the annulment of every part of the decision which relates to starch products, not only as regards investment aids, but also as regards aids to research and training in so far as these general aids apply to starch products.

Findings of the Court

59 The fourth paragraph of Article 173 of the EC Treaty allows natural or legal persons to challenge decisions addressed to them or those which, though appearing to be adopted by way of a regulation or a decision addressed to another person, are of direct and individual concern to them. Thus, the admissibility of the present action depends on whether the contested decision addressed to the Italian Government and closing the procedure initiated under Article 93(2) of the EC Treaty is of direct and individual concern to the applicants.

60 As to the question whether the contested decision is of direct concern to the applicants, it is true, as Italgrani maintained, that the decision was not capable of affecting the applicants' interests without the adoption at national level of implementing measures by CIPI. However, given that CIPI in its decision of 12 April 1990 had already approved the investment programme initially provided for and the relevant aids in that connection, and that the modifications made subsequently were presented by the Italian authorities themselves, the possibility of the Italian authorities deciding not to grant the aid authorized by the Commission decision is purely theoretical since there is no doubt as to the will of the Italian authorities to act.

61 The contested decision is therefore of direct concern to the applicants (see to the same effect the judgment in *Piraiki-Patraiki* v *Commission* cited above). Moreover, it is apparent from the documents before the Court that CIPI approved the modified programme by decision of 8 October 1991. Moreover, whilst the aid at issue has not yet been paid to Italgrani, the latter stated during the oral procedure that that situation is due to the decision by the Italian authorities to await the outcome of the present proceedings.

62 As to the question whether the contested decision is of individual concern to the applicants, it is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of Article 173 of the Treaty only if that decision affects them by reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (see judgments of the Court in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95; and in Case C-309/89 *Codorniou* v *Council* [1994] ECR I-1853, paragraph 20).

63 With regard to Commission decisions closing a procedure initiated under Article 93(2) of the Treaty the Court has accepted as factors establishing that such a

decision is of concern to an undertaking within the meaning of Article 173 the fact that that undertaking was the originator of the complaint which gave rise to the inquiry procedure, the fact that its observations were heard and the course of the procedure was largely determined by its observations, provided its market position is substantially affected by the aid measure in question (see *Cofaz* v *Commission* cited above).

64 However, as the applicants are right to emphasize, the judgment in *Cofaz* may not be interpreted as meaning that undertakings unable to demonstrate the existence of those circumstances can never be deemed to be individually concerned within the meaning of Article 173. In fact the Court merely stated that undertakings in a position to establish the existence of such circumstances are concerned within the meaning of Article 173, which does not preclude the possibility that an undertaking may be in a position to demonstrate by other means, by reference to specific circumstances distinguishing it individually as in the case of the addressee, that it is individually concerned.

65 In that connection, as far as their market position is concerned, the applicants supplied information on the production of sorbitol taken from a specialized publication according to which in 1989 there were only five producers of sorbitol in the Community excluding non-operational units, marketing the product. According to that information, the total production in the Community of sorbitol was at the time 297 000 tonnes per annum of which the applicant undertakings respectively produced 200 000 tonnes (Roquette), 76 000 tonnes (Cerestar) and 15 000 tonnes (Merck). Finally, it is apparent from that source that there was an overcapacity of sorbitol in the Community with the consequence that two producers had ceased sorbitol production.

66 According to the applicants, their share of the market in mannitol and the other hydrogenated glucoses in the Community is greater than 95%. Moreover they

stated that annual production in the Community of mannitol amounts to 10 000 tonnes including overcapacity of 5 000 tonnes, and 15 000 tonnes of other hydrogenated glucoses including overcapacity of 10 000 tonnes.

67 Although the Commission did not adopt as its own the information supplied by the applicants, nor did it provide any information to cast doubt on it. In fact, at the hearing the Commission in reply to a question by the Court expressly admitted that it was not in a position to do so. In that connection it should be stated that if the Court were able only to give judgment on the basis of information or figures of an official nature, that would be tantamount in the present case to preventing the applicants from adducing any evidence as to the structure of the market in question and to making it impossible for them to prove that the contested decision is of individual concern to them. In the Court's view, observance of the applicants' right of action under Article 173 entails that they must be given the possibility of demonstrating that they are individually concerned. That consideration must be all the more applicable in the present case since, by reference to a specialized publication, the applicants furnished evidence from an independent source. Furthermore, the applicants' information as to their position on the market for hydrogenated glucoses are borne out by Italgrani's allegation that Roquette and Cerestar form a strong duopoly on that market.

68 Under those circumstances the impact of the aid in question on their market position must be examined on the basis of the information provided by the applicants.

69 In that connection the Court finds first of all that Italgrani's investment programme provides for the creation of a production capacity which would involve more than a doubling of the production of mannitol and 'other hydrogenated glucoses', together with major growth in the production of sorbitol. In view of the overcapacity already existing on the market in question the Court considers, moreover,

that such an increase in capacity is capable of directly and seriously affecting the competitive situation of the few producers already on that market.

70 Certainly, the mere fact that an act is capable of exerting an influence on the competitive conditions on the market in question cannot be sufficient in order that any trader in a competitive relationship with the recipient of the act may be deemed to be directly and individually concerned by the latter (see judgment of the Court in Cases 10/68 and 18/68 *Eridania* v *Commission* [1969] ECR 459). Nevertheless, regard being had in the present case to the limited number of producers of the products concerned and the significant increase in production capacity involved in the investments planned by the company in receipt of the aid in question, the Court considers that the applicant undertakings have established the existence of a set of factors amounting to a situation peculiar to them in regard to the measure in question in relation to any other trader. Therefore, the Court considers that the applicant undertakings may be assimilated to addressees of the decision in accordance with the judgment in *Plaumann* v *Commission*.

71 It follows from all the foregoing considerations that the action is admissible as regards the three applicant undertakings.

72 Since a single action is involved it is not necessary to examine ASPEC's capacity to bring proceedings (see judgment of the Court in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125).

73 As to the Commission's plea that the applicants' conclusions should be declared inadmissible inasmuch as they do not concern investment aid in the sector of hydrogenated glucoses, the Court finds that this aid cannot be disassociated from the subject matter of the contested decision. In fact its operative part concerns aid for Italgrani's investment programme as a whole. Moreover, the decision makes no

precise distinction between the products for whose production the aid is intended, since the characteristics of the investment programme and the aids relating thereto are essentially described according to type of investment and location of installations.

74 This plea of partial inadmissibility cannot therefore be upheld.

Substance

75 In support of their application the applicants rely on three pleas in law based respectively on:

(1) an infringement of essential procedural requirements inasmuch as the procedure provided for in Article 93(2) was not followed, no adequate statement of reasons was provided, and the decision was not adopted lawfully;

(2) an infringement of Article 92 of the Treaty inasmuch as the aid is not in conformity with Law No 64/86 or, in the alternative, that the earlier decisions of 1987 or 1988 authorizing that law are illegal and inasmuch as the aid should have been examined under Article 92(3) of the Treaty;

(3) an infringement of the principle of non-discrimination inasmuch as if aid for a starch derivative is prohibited all aid for other derivatives should also be prohibited.

76 The first plea relied on by the applicants may in fact be broken down into several different pleas. The Court considers that it is necessary first of all to examine the

submissions to the effect that the rules concerning the adoption procedure for Commission decisions were not observed.

Infringement of the rules concerning the adoption procedure for Commission decisions

The circumstances leading to the Court's request to the Commission to produce internal documents concerning the procedure followed

77 In their reply the applicants state that the contested decision, as published in the *Official Journal of the European Communities*, is dated 16 August 1991 and signed by Mr MacSharry, the then Commissioner responsible for questions of agriculture and rural development. However, the last Commission meeting before the Summer holidays took place on 31 July 1991. Consequently, the applicants say, there was a breach of Article 27 of the Commission's Rules of Procedure (63/41/EEC) of 9 January 1963 (JO 1963 L 17, p. 181), provisionally maintained in force by Article 1 of Commission Decision 67/426/EEC of 6 July 1967 (JO 1967 L 147, p. 1), as subsequently amended by Commission Decision 75/461/Euratom, ECSC, EEC of 23 July 1975 (OJ 1975 L 183, p. 63), inasmuch as the decision was adopted under the habilitation procedure, even though it was not a 'measure of management or administration'. If there was no breach, it remained to be explained why the decision adopted by the college of Commissioners on 31 July 1991 is dated 16 August 1991, and whether the decision published is the same as that adopted by the college of Commissioners. According to the applicants, these doubts about the real date of the contested decision and about the author thereof are a serious indication that this decision was adopted illegally or even perhaps that it is non-existent. Under those circumstances the applicants say that it was legitimate for them to raise this point at the reply stage of the procedure. In that connection the applicants requested the Court of First Instance to order the Commission to produce all relevant internal documents capable of establishing the exact course of events between the notification of the amendments to the initial project and the final decision.

78 In its rejoinder the Commission stated that the applicants raised for the first time in their reply a new plea of annulment based on the illegality of the decision which they did not put forward in their application. This plea is inadmissible because it constitutes a new plea in law within the meaning of Article 42(2) of the Rules of Procedure of the Court of Justice.

79 In the alternative, the Commission observed that the principle of the Commission's collegiate responsibility lies at the very heart of that institution's decision-making process. In practice, however, only the most important decisions are adopted at meetings. For other cases the Commission has always had to resort to more flexible decision-making methods in order to avoid institutional paralysis, in particular the habilitation procedure referred to in the first paragraph of Article 27 of the Rules of Procedure according to which, 'subject to the principle of collegiate responsibility being respected in full, the Commission may empower its members to take, in its name and subject to its control, clearly defined measures of management or administration.'

80 Moreover, the Commission asserted that, at its meeting on 31 July 1991, it was decided to:

— close the procedure opened under Article 93(2) of the Treaty with regard to the aid in question;

— empower Mr MacSharry, the then Commissioner for Agriculture and rural questions, in agreement with the President to finalize the approval of the new aid scheme, as communicated by the Italian authorities, in the form of a formal conditional decision;

— request the Italian authorities to furnish annual reports to the Commission.

81 Therefore, the college of Commissioners, it says, clearly approved the decision in all its details after deliberation, and charged one of its members to proceed to the adoption of the text of the decision in full observance of the provisions of the Treaty and of the rules of procedure.

82 Referring to the Court's case-law concerning the theory of non-existence the Commission finally concluded that it was impossible to apply it to the present case.

83 Under those circumstances, in order to reply to the pleas raised by the applicants, the Court of First Instance requested the Commission to produce the draft letter to the Italian Government submitted to the college of Commissioners at its meeting on 31 July 1991, the minutes of that meeting, the contested decision, as notified to the Italian Government and authenticated on the relevant date by the President and Secretary General of the Commission, together with the blue sheet concerning the adoption procedure for that decision.

Summary account of the parties' observations on the internal documents lodged by the Commission and on the PVC judgment

84 In their observations the applicants stress as a preliminary matter that the Commission did not, as requested by the Court of First Instance, produce the decision notified to the Italian Government and authenticated on the relevant date by the President and Secretary General of the Commission. That omission should be regarded as a major indication of the fact that the procedural rules were not adhered to.

85 Moreover, the applicants submit that it is apparent from the documents produced by the Commission that the Commission's rules of procedure, as interpreted by the Court in the PVC judgment, were not complied with.

86 In that connection the applicants maintain, first, that the draft letter to the Italian Government submitted to the college of Commissioners at its meeting on 31 July 1991 cannot in any event be regarded as a draft decision. Therefore, the Commission did not, as it maintained, approve the decision in all its details. In fact the draft letter was drafted almost entirely in French, although Italian was the sole authentic language. Furthermore, in the final decision, numerous changes were made to the draft letter in which figures or even descriptions had been left blank. Those missing figures and descriptions were in some cases of fundamental importance, such as the figures on production capacities to be created for different products in the context of the aid programme, certain information on the relevant market and the total amount of aid considered by the Commission to be compatible with the common market. The applicants infer therefrom that the college of Commissioners did not have available to it the information necessary in order to decide whether Article 92(3) of the Treaty was applicable, and that the changes to the final decision were in breach of the principle of collegiality, as interpreted by the Court in the PVC judgment.

87 Secondly, the applicants maintain that there was an infringement of Article 27 of the Commission's rules of procedure, inasmuch as the authorization given to Mr MacSharry under the habilitation procedure did not observe the principle of collegiality, as required by that provision. Moreover, the tasks performed by Mr MacSharry went well beyond those of management and administration, and the college of Commissioners did not state the tasks he was to perform. In fact, he was not even bound, in drafting the final decision, by the draft letter submitted to the college of Commissioners.

88 Thirdly, the applicants submit that the copy of the contested decision provided by the Commission was not authenticated by the President of the Commission in breach of Article 12 of the Commission's rules of procedure.

89 Finally, the applicants assert that it is apparent from the details appearing on the blue cover sheet concerning the adoption procedure that the President of the Commission did not join in the final decision, in breach of the habilitation decision adopted by the college on 31 July 1991. It is clear, moreover, from those details that the college adopted that decision without having before it the opinion of the Legal Service.

90 In its observations the Commission reiterates its assertion that the pleas raised are out of time and therefore inadmissible under Article 48(2) of the Rules of Procedure of the Court of First Instance. In fact the applicants communicated them only in their reply, and they were based on no new matter of law or of fact coming to light in the course of the procedure, since all the facts mentioned were already known at the time when the application was lodged. In that connection the Commission also submits that the judgment of the Court of First Instance in Joined Cases T-79, 84 to 86, 89, 91, 92, 94, 96, 98, 102 and 104/89 *BASF* v *Commission* [1992] ECR II-315 may in no way be regarded as a new matter within the meaning of Article 48 of the Rules of Procedure of the Court of First Instance.

91 Referring to the judgment of the Court in Case 108/81 *Amylum* v *Commission* [1982] ECR 3107, the Commission stresses that those new pleas raised out of time cannot be deemed to be matters of public policy. Moreover, it is clear from the PVC judgment that the alleged procedural defects relied on by the applicants could not in any event result in a declaration that the contested decision is non-existent.

92 In the alternative, as to whether the pleas are well founded, the Commission recalls that the aid programme at issue was granted pursuant to a general aid scheme which had already been approved, and that it therefore was able only to verify that the individual aid scheme was in conformity with the general scheme. In fact the reason for the initiation of the procedure provided for in Article 93(2) of the Treaty was that the investments originally provided for did not appear to observe the conditions of the general scheme. If the aid programme had been originally submitted in the current version, as amended by the Italian authorities, the Commission's

services would merely have informed the complainant that the project was in conformity with the general scheme already approved. Therefore the examination of the amended aid programme would no longer have involved the exercise of any discretionary power but would have been no more than a management measure.

93 By reference to the judgment of the Court in Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585, the Commission concludes that it was legitimate to adopt the decision by way of the habilitation procedure. The adoption of that solution is all the more imperative since the cases in which specific aid is granted under general aid schemes may be numbered in thousands, and it is therefore necessary to follow the habilitation procedure in order to avoid a paralysis in the Commission's functioning in this sector. In that connection the Commission goes on to submit that the PVC judgment excluded from the habilitation procedure only decisions finding an infringement of Article 85 of the EC Treaty and imposing penalties. In fact, in that judgment the Court, it is said, did not give a definition of the management measures which under Article 27 of the Commission's Rules of Procedure, could legitimately be adopted under the habilitation procedure; measures of inquiry, as referred to in that judgment, are cited only as examples of management measures.

94 In the further alternative, the Commission submits that the decision was adopted on the basis of a detailed and exhaustive draft letter and, therefore, even supposing that the decision could not have been adopted under the habilitation procedure, there was no infringement of the principle of collegiality. Regard being had to the fact that the contested decision does not adversely affect specifically the applicants, the lack of authentification and the alterations made to the text after deliberation by the college of Commissioners cannot, moreover, be regarded as affecting the legality of the decision.

95 Finally, the Commission asserts that it is clear from the PVC judgment that formal defects may not in any event result in a finding that the contested decision is non-existent.

The findings of the Court

96 Under the first subparagraph of Article 48(2) of the Rules of Procedure of the Court of First Instance 'no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.'

97 In the present case the applicants made no mention in their application of any alleged infringement of the rules on the procedure for adopting Commission decisions. Moreover, in their reply the applicants merely asserted, without providing any evidence, that there had probably been an infringement of those rules. Thus, though they indicated that the fact that the decision, as published in the *Official Journal of the European Communities*, dated 16 August 1991 and signed by Mr MacSharry, was capable of giving rise to doubts as to the conformity of the procedure followed with Articles 12 and 27 of the Commission's rules of procedure, the applicants did not give particulars of the information on which these assertions are based or of the specific pleas which they sought to raise.

98 In its rejoinder the Commission contested the admissibility of the pleas raised on the ground that they were out of time, and stated that the college of Commissioners adopted a position at its meeting on 31 July 1991 on the basis of a draft letter to the Italian Government and decided to authorize Mr MacSharry to finalize approval of the new aid scheme by way of a formal decision. Although the Commission claims that the pleas raised are not based on new matters of fact, it has adduced no evidence of the fact that those matters relating to the procedure for the adoption of the contested decision were known to the applicants prior to the filing of the rejoinder. The Court finds, also, that the documents previously available to the applicants contained nothing to show that they could or ought to have known prior to the receipt of the rejoinder that the decision had been adopted by way of

the habilitation procedure and that the college of Commissioners had formed a view solely on the basis of a draft letter to the Italian Government.

99 The information thus disclosed in fact raised serious doubts as to the legality of the procedure for the adoption of the contested decision. It was in those circumstances that the Court requested the Commission to produce the relevant internal documents which enabled the applicants to develop the pleas in question in their definitive form. The Court finds, therefore, that those pleas are based on matters of fact which came to light in the course of the procedure and that they are not therefore out of time (see to the same effect paragraphs 57 to 60 of the PVC judgment).

100 As to whether those pleas are well founded, the Court recalls that Article 12 of the Commission's rules of procedure, in the version in force at the time of the adoption of the contested decision, provides that 'acts adopted by the Commission, at a meeting or by written procedure shall be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary.' Therefore, authentification is not required in the case of acts adopted under the habilitation procedure. Since the contested decision was not authenticated and the Commission claimed that it was adopted under the habilitation procedure, the Court considers it necessary to examine, first, whether it was legitimate for the decision to be adopted under the habilitation procedure.

101 In that connection it should be mentioned first that, as the Court observed in the *AKZO Chemie* v *Commission* and *PVC* judgments, the Commission's functioning is governed by the principle of collegiality resulting from Article 17 of the Treaty of 8 April 1965 establishing a single Council and a single Commission of the European Communities (JO 1967 L 152, p. 2), now replaced by Article 163 of the EC Treaty which provides that 'the Commission shall act by a majority of the number

of members provided for in Article 157. A meeting of the Commission shall be valid only if the number of members laid down in its rules of procedure is present.'

102 In those judgments the Court also stated that the principle of collegiality thus established is based on equality as between the members of the Commission in the decision-making process and signifies that decisions must be deliberated on jointly and that all the members of the college bear collective responsibility at political level for all decisions adopted.

103 Secondly, it is settled case law that recourse to the habilitation procedure for the adoption of measures of management or administration is compatible with the principle of collegiality. In AKZO Chemie v Commission, mentioned above, the Court recalled that 'limited to specific categories of measures of management or administration, and thus excluding by definition decisions of principle, such a system of delegations of authority appears necessary, having regard to the considerable increase in the number of decisions which the Commission is required to adopt, to enable it to perform its duties' (paragraph 37).

104 It remains therefore to examine whether the contested decision may be regarded as a measure of management or administration.

105 In that connection, as far as the examination of the Commission's implementation in specific cases of the general aid scheme is concerned, the Court has already held that the Commission must confine itself, prior to the initiation of any procedure, to an examination of whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving that scheme (see judgment of the Court of 5 October 1994 in *Italy* v *Commission*, cited above). Similarly, after initiation of the procedure provided for in Article 93(2) of the Treaty, observance

of the principles of the protection of legitimate expectations and of legal certainty could not be ensured if the Commission were able to go back on its decision approving the general scheme. Therefore, if the Member State in question proposes modifications to an aid proposal submitted for the examination provided for under Article 93(2) of the Treaty, the Commission must first assess whether the effect of those modifications is that the proposal is covered by the decision approving the general scheme. If that is the case, the Commission is not entitled to assess the compatibility of the modified proposal with Article 92 of the Treaty since such assessment was already carried out in the framework of the procedure culminating in the decision approving the general scheme.

106 However, the Court considers that the fact that in the present case the contested decision was rightly adopted on the sole basis of an examination limited to ensuring observance of the conditions laid down in the decision approving the general scheme is not in itself sufficient for it to be described as a measure of management or administration. In that connection the Court points out that even if the contested decision was adopted without its being necessary to examine the compatibility of the amended proposal with Article 92 of the Treaty, the Commission could not confine itself to examining whether the proposal complied with the very specific conditions of the decision approving the general scheme, in particular as regards the intensity of aid and the regions benefiting from the aid. In fact Article 9 of Decision 88/318 provides that 'this Decision shall be without prejudice to compliance with the Community legislation and codes now in force or to be introduced in the future to control aid to particular sectors of industry or agriculture and fisheries.'

107 The Court considers that a decision approving a measure of state aid involving supervision such as that concerning observance of the condition contained in Article 9 of Decision 88/318 cannot, at least in the present case, be described as a 'measure of management or administration.'

108 On this point the Commission submitted at the hearing that such a condition is contained in all its decisions approving a general aid scheme, and that it merely

gives expression to a very obvious requirement whose observance is monitored by its services as a matter of routine in all its decisions on State aids.

109 However, as regards aid intended for starch production the Court of First Instance finds that, according to the Commission itself, that aid had to be withdrawn in order to satisfy the condition contained in Article 9 of Decision 88/318 since starch is a sector in which investments are excluded from Community financing (see, in the version in force at the material time, Council Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products (OJ 1990 L 91, p. 1, hereinafter 'Regulation No 866/90') and the annex to Commission Decision 90/342/EEC of 7 June 1990 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products (OJ 1990 L 163, p. 71). Moreover, the Commission stated that the sectoral exclusions from Community financing for certain agricultural products, in accordance with settled practice, apply by analogy to State aids. Nevertheless, it is clear from the contested decision that the subsidized investment programme as finally approved seeks to create an annual starch production capacity of approximately 150 000 tonnes. In that connection the Court notes particularly that the Commission made its approval of the aid subject to the condition that the starch production of the company in receipt of the aid under the programme should be strictly limited to the needs of its own production of derivatives. However, that condition presupposes that the effect of the final proposal is for Italgrani's starch production to be directly, or in the case of an integrated project, indirectly subsidized since, if that was not the case, the Commission would not have been entitled to make its approval subject to a condition as to the utilization of that production. The Court considers that that contradiction between the Commission's assertions at the hearing and the actual wording of the contested decision is capable of giving rise to doubts as to its conformity with the Common Agricultural Policy.

110 Moreover, as regards aid intended for the production of starch derivatives, the Court finds that, in its communication to those concerned on the initiation of the

procedure provided for in Article 93(2) of the Treaty, the Commission stated that 'if the production balance of starch products is not to be upset, the new outlets must involve new uses.' In that connection the Court finds that, as regards the rules in force at the time, it is clear from the annex to Decision 90/342 that investments concerning starch derivatives are excluded from Community financing if the existence of realistic potential outlets is not demonstrated. Accordingly, it must be stated that the Commission, in the communication to the parties concerned, referred to the selection criteria to be adopted for investments capable of benefiting from Community financing as far as starch derivatives were concerned. However, the Court finds that the contested decision contains no provision reproducing the condition whereby new production of starch derivatives is required to result in new applications; nor, moreover, does it contain any indication that the procedure provided for in Article 93(2) was initiated against the production of starch derivatives.

111 During the procedure before the Court of First Instance the Commission maintained, contrary to the contents of the abovementioned communication, that the rules on Community financing did not apply by analogy to State aid intended for the production of starch derivatives. In support of that argument, the Commission referred to Article 16(5) of Regulation 866/90 which provides 'within the field of application of this Regulation, Member States may take aid measures which are subject to conditions or rules concerning granting which differ from those provided for in this Regulation, or, where the amounts of aid exceed the ceilings specified herein, on condition that such measures comply with Articles 92 to 94 of the Treaty.' However the Court finds that this provision does not support the distinction made by the Commission between on the one hand sectoral exclusions from Community financing applying by analogy to State aid and other exclusions from Community financing which do not apply by analogy. Moreover, the Commission gave no explanation for its apparent change of mind during the pre-litigious phase of the procedure.

112 In the circumstances and without its being necessary for the Court of First Instance, in order to resolve the question whether the contested decision may be classified as a measure of management or administration, to give a definitive interpretation of the abovementioned rules, the Court finds that the application of Article 9 of Decision 88/318 in the present case raises questions of principle as to whether the starch production of the company in receipt of the aid will be directly or indirectly subsidized and whether the rules on Community financing must apply by analogy to State aid intended for the production of starch derivatives.

113 The Court concludes that, even if the condition laid down in Article 9 of Decision 88/318 is a standard clause inserted by the Commission's services in all decisions on State aid, the monitoring of observance of that condition required in the present case a thorough examination of complex factual and legal questions such that the contested decision cannot be described as a measure of management or administration.

114 It follows from the foregoing that the contested decision should not have been adopted under the habilitation procedure.

115 It is therefore necessary to examine the Commission's argument that, even if the contested decision should not have been adopted under the habilitation procedure, it was not adopted in breach of the rules concerning the procedure for adopting its decisions. Thus, the Commission maintained that the college of Commissioners adopted its decision on the basis of a detailed and exhaustive draft letter to the Italian Government, and that Mr MacSharry did nothing more than transform that draft letter into a formal decision.

116 As regards the principle of collegiality the Court in the PVC judgment held that observance of this principle and especially the need for decisions to be deliberated

on collectively by the members of the Commission is necessarily of interest to persons concerned by the legal effects which they produce in the sense that they must be assured that those decisions were in fact adopted by the college and precisely correspond to the latter's wishes.

117 In the same judgment the Court added that 'this is particularly so, as here, in the case of acts, expressly described as decisions, which the Commission finds it necessary to adopt under Articles 3(1) and 15(2)(a) of Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) with regard to undertakings or associations of undertakings for the purpose of ensuring observance of the competition rules and by which it finds an infringement of those rules, issues directions to those undertakings and imposes pecuniary sanctions upon them' (paragraph 65). The court inferred therefrom that only simple corrections of spelling and grammar may be made to the text of an act after its adoption by the college (paragraph 68).

118 It is expressly made clear in that judgment that decisions implementing competition rules, such as the one forming the subject matter of that case, are mentioned only as an example of cases in which the principle of collegiality must be strictly applied. In the present case the contested decision was adopted following a procedure initiated under Article 93(2) of the Treaty. Such decisions which give expression to the Commission's final assessment of the compatibility of aid with the Treaty or, as in the present case, with a general aid scheme, affect not only the Member State which is the addressee of the decision but also the recipient of the planned aid and its competitors.

119 In the present case only a draft letter to the Italian Government concerning the final aid proposal and without any operative provision was submitted to the college of Commissioners at its meeting on 31 July 1991. Far from constituting, as the Commission maintained, a detailed and exhaustive draft decision, several para-

graphs and tables of that draft had to be completed in the final version, for example as regards data concerning imports and exports of the products in question, the planned production of the company in receipt of aid and the global amount of aid provided for.

20 Furthermore, some of the data in the draft letter were altered in the final decision, such as for example the data on levels of intensity of the aids. In that connection the Court notes the following statement in the draft letter which is not in the contested decision: 'The intensities of the planned aid correspond respectively to the levels of aids authorized by the Commission on 1 March 1986 (yeast, proteins, biodegradable plastic) and to the levels of aid permitted under Regulation (EEC) No 866/90 applied by analogy to State aids (refrigeration of fruits and vegetables, except tomatoes, pears and peaches) and glucose: Those intensities are also in conformity with the conditions laid down in the Commission decision of 2 March 1988 authorizing the scheme of Law No 64/86.' The Court considers that this paragraph gives the impression that the provisions concerning Community financing are as a general rule applied by analogy to State aid and that those provisions were complied with in the present case. Nevertheless, as pointed out above (paragraph 110), it is clear from the annex to Decision 90/342 that investments concerning starch derivatives are excluded from Community financing if the existence of realistic potential outlets is not demonstrated.

21 Therefore, the Court finds no indication in the draft letter to the Italian Government of the fact that the contested decision in fact represents a change of mind by the Commission from the stance it took in the communication to those concerned as regards the application by analogy to State aid of the rules on Community financing.

22 Under these circumstances, and even on the assumption that the college of Commissioners was entitled, in regard to decisions such as the one in the present case,

to leave to one Commissioner the task of finalizing a decision which it had adopted in principle, the Court finds that in the present case the college cannot be regarded as having adopted all the factual and legal elements of the contested decision. The Court infers therefrom that the changes made to the draft letter to the Italian Government go well beyond the changes which it was permissible, under the principle of collegiality, to make to the decision of the college.

123 At its meeting the college did not in fact approve any text relating to the final decision since it is clear from the minutes of the meeting of 31 July 1991 that the college decided to 'empower Mr MacSharry in agreement with the President to finalize the approval of the new aid scheme, as communicated by the Italian authorities, in the form of a formal conditional decision'; and those minutes contain nothing to show that the commissioner appointed was bound by the wording of the draft letter submitted to the college. A comparison between the wording of the draft letter submitted to the college and of the contested decision reveals that, even if the two documents broadly mention the same factual and legal questions the contested decision was almost entirely redrafted in relation to the draft letter, only a small number of paragraphs remaining unchanged. In the circumstances, the Court cannot but hold that the contested decision must be regarded as a decision adopted, in breach of Article 27 of the Commission's rules of procedure, under the habilitation procedure.

124 It should be added that, even if the contested decision could be regarded as having been adopted by the college of Commissioners, the Commission in any event infringed the first paragraph of Article 12 of its rules of procedure by omitting to authenticate that decision under the terms of that article (see paragraphs 74 to 77 of the PVC judgment).

125 Finally, on the question whether the decision is vitiated by formal defects of such a nature that it must be regarded as non-existent, the Court finds that it is clear

from the minutes of the meeting of the college on 31 July 1991 that the college expressly decided to adopt the contested decision under the habilitation procedure. Although the decision ought to have been adopted by the college itself, the Court considers that this formal defect appears not to be of such manifest seriousness that the decision must be regarded as non-existent (see to the same effect paragraphs 49 to 52 of the PVC judgment).

126 It is clear from all the foregoing that the contested decision must be annulled, and that there is no need to examine the other submissions raised by the applicants.

Costs

127 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 Commission has been unsuccessful and the applicants asked for an order on costs, it must be ordered to bear, in addition to its own costs, those incurred by the applicants.

128 Under the second subparagraph of Article 87(4) of the Rules of Procedure, the Member States intervening in the proceedings are to bear their own costs. The French Republic must therefore bear its own costs.

129 Under the second subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener other than Member States and institutions to bear its own costs. The intervener, Italgrani, which intervened in the proceedings in support of the form of order sought by the Commission, must be ordered to bear its

own costs. Since the intervener, Casillo Grani, no longer has an interest in the outcome of the proceedings, the Court deems it equitable for it also to bear its own costs.

On those grounds,

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

hereby:

1. **Annuls Commission Decision 91/474/EEC of 16 August 1991 concerning aids granted by the Italian Government to Italgrani SpA for the setting up of an agri-foodstuffs complex in the Mezzogiorno;**

2. **Orders the Commission to bear its own costs together with the costs incurred by the applicants;**

3. **Orders the interveners to bear their own costs.**

Vesterdorf Barrington Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 27 April 1995.

H. Jung B. Vesterdorf

Registrar President