JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber, Extended Composition)
15 September 1998 *

In Case T-11/95,

BP Chemicals Limited, a company governed by English law, established in London, represented by James Flynn, Barrister, of the Bar of England and Wales, and Alec Burnside, Solicitor, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe,

applicant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and by Kenneth Parker QC and Rhodri Thompson, Barrister, of the Bar of England and Wales, with an address for service in Luxembourg at the Embassy of the United Kingdom, 14 Boulevard Roosevelt,

intervener,

v

Commission of the European Communities, represented initially by Jean-Paul Keppenne and Paul Nemitz, of its Legal Service, subsequently by Paul Nemitz and

* Language of the case: English.

Nicholas Khan, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Italian Republic, represented by Professor Umberto Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, and Maurizio Fiorilli, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

and by

ENI SpA, a company governed by Italian law, established in Rome,

EniChem SpA, a company governed by Italian law, established in Milan (Italy),

represented by Mario Siragusa, of the Rome Bar, and Giuseppe Scassellati-Sforzolini, of the Bologna Bar, with an address for service in Luxembourg at the Chambers of Elvinger & Hoss, 15 Côte d'Eich,

interveners,

APPLICATION for annulment of the Commission decision of 27 July 1994 regarding aid which Italy has decided to grant to EniChem SpA (OJ 1994 C 330, p. 7),

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

composed of: C. W. Bellamy, President, C. P. Briët, R. García-Valdecasas, A. Kalogeropoulos and A. Potocki, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the oral procedure of 23 September 1997 and 17 March 1998,

gives the following

Judgment

Facts

1 ENI SpA ('ENI') is a holding company created in July 1992 when the Ente Nazionale Idrocarburi, an Italian public entity, was re-formed as a limited company. Until November 1995, the Italian State Treasury was ENI's sole shareholder.

EniChem SpA ('EniChem') is a near 100% ENI subsidiary, producing and marketing a wide range of chemical products. EniChem originated from Enimont SpA ('Enimont'), a joint venture set up in May 1989 by the Ente Nazionale Idrocarburi and Montedison SpA.

2 On 1 October 1992 ENI made a capital contribution of LIT 1 000 billion to EniChem, followed by LIT 794 billion in December 1993 (hereinafter 'the first two capital injections'). In neither case was the Commission given prior notification under Article 93(3) of the EC Treaty.

3 On 16 February 1994 the Commission decided to open the procedure provided for in Article 93(2) of the Treaty in respect of the first two capital injections. By letter of 16 March 1994, it informed the Italian Government of this and called on it to submit comments.

4 In the course of a meeting on 15 April 1994 between Commission Directorate General IV (Competition), ENI and EniChem, the Chairman of EniChem presented a restructuring plan to be implemented during the period from 1994 to 1997. Part of the plan was that ENI should invest a further LIT 3 000 billion in EniChem (hereinafter 'the third capital injection').

5 By letter of 18 May 1994, the Italian Government officially replied to the Commission's letter of 16 March 1994. Annexed to its reply were extracts from the 1994-97 restructuring plan, referring to the third capital injection.

6 On 2 June 1994 the Commission published its letter of 16 March 1994 to the Italian Government in the *Official Journal of the European Communities*, in the form of a notice 'to other Member States and other parties concerned regarding aid which Italy has decided to grant to EniChem SpA' (OJ 1994 C 151, p. 3), calling on them to submit their comments within 30 days. No mention was made of the third capital injection.

7 By letter of 6 June 1994 the Italian Government drew the Commission's attention to the fact that both EniChem's restructuring plan and its own comments of 18 May 1994 referred not only to the capital injections covered by the investigation opened by the Commission's letter of 16 March 1994, but also to the third injection. The Italian Government expressed the hope that the investigation in respect of the third injection would be concluded swiftly.

8 On 1 July 1994, following discussions held by a working party made up of representatives of industry and of the Department of Trade and Industry (hereinafter 'the DTI'), the United Kingdom Government submitted comments to the Commission in response to the notice of 2 June 1994. In those comments, the United Kingdom questioned the justification for the first two capital injections and, drawing the Commission's attention to press reports concerning the third injection, asked that it be subjected to a separate and thorough examination.

9 On 27 July 1994 the Commission published Press Release IP/94/728 (hereinafter 'the Commission's press release') indicating that it had decided that day to close the proceeding opened pursuant to Article 93(2) of the Treaty with regard to the first two capital injections, approving the aid thereby granted, and to declare that the third injection did not constitute State aid.

10 The third capital injection was carried out in instalments between August and October 1994.

11 On 1 August 1994 the American company, Union Carbide Corporation ('UCC'), published a press release announcing that it planned to form a joint venture with EniChem to produce and market polyethylene in Europe.

12 On reading UCC's press release, the applicant learned that the Commission had approved EniChem's recapitalisation. It thereupon contacted the DTI, which obtained a copy of the English-language version of the Commission's press release through the UK Permanent Representation to the European Communities. This was sent to the applicant on 3 August 1994.

13 The decision adopted by the Commission on 27 July 1994 (hereinafter 'the contested decision') was notified to the Italian Government by letter of 9 August 1994.

14 In section 4 of the contested decision, the Commission states that the third capital injection (LIT 3 000 billion) does not constitute State aid within the meaning of Article 92(1) of the Treaty because it would have been undertaken by a private investor operating in a market economy.

15 In section 5 of the contested decision, the Commission states that the first two capital injections — totalling LIT 1 794 billion — 'will receive no return whatsoever' and that 'no comparable private investor would have undertaken to invest such an amount of money without a comprehensive restructuring plan having been drawn [up] beforehand'. The Commission goes on to state that 'therefore, these injections are to be considered aid [to cover EniChem's] losses which stem mainly from closures of installations', and sets out an overview of those closures. In Section 6 of the contested decision, however, the Commission states that, given the significance of those closures and the consequent reduction of production capacity, the first two capital injections are compatible with the common market, pursuant to Article 92(3)(c) of the Treaty.

16 In the course of a meeting on 11 November 1994, the Commission provided both the British authorities and the applicant with a document which it describes in its written pleadings as the full text of the contested decision.

17 The contested decision was published in the *Official Journal of the European Communities* of 26 November 1994 (Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and other parties concerned regarding aid which Italy has decided to grant to EniChem SpA (OJ 1994 C 330, p. 7)).

Procedure

18 By application lodged at the Registry of the Court of First Instance on 20 January 1995, the applicant brought the present proceedings.

19 By orders of 13 October 1995, the Court of First Instance (Second Chamber, Extended Composition) granted the United Kingdom and the Italian Republic leave to intervene in these proceedings in support of the forms of order sought, respectively, by the applicant and by the Commission. By order of 19 October 1995, ENI and EniChem were granted leave to intervene in support of the Commission.

20 By order of 26 June 1996 (T-11/95 *BP Chemicals* v *Commission* [1996] ECR II-599), the Court of First Instance (Second Chamber, Extended Composition) dismissed a request submitted by ENI and EniChem for a derogation under Article 35(2) of the Rules of Procedure as regards translation into the language of the case of the annexes to their statement in intervention.

21 Acting on the report of the Judge Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure. By way of measures of organisation of procedure, the Commission, the Italian Republic, ENI and EniChem were asked to reply in writing to certain questions and to produce certain documents before the hearing. In particular, the Court asked the Commission to produce the calculations in its file concerning the question whether the third capital injection would have been acceptable for a private market economy investor.

22 On 30 June 1997 the Commission, ENI and EniChem replied to those questions and produced certain documents. The Commission submitted, in particular, a calculation dated 1 July 1994 of the return on the third injection (hereinafter 'Table QI/1'). The Italian Republic submitted its observations on 30 July 1997.

23 At the hearing on 23 September 1997, the parties presented oral argument and replied to questions from the Court. However, at the end of the hearing, the Court decided not to close the oral procedure.

24 By letter of 26 September 1997, the applicant sought permission to lodge written observations concerning the calculations given in Table QI/1.

25 By letter of 26 September 1997 the Agents of the Commission advised the Court of First Instance that Table QI/1, dated 1 July 1994, had not been drawn up before adoption of the contested decision on 27 July 1994, but was rather a reconstruction of work done during the preparation of that decision.

26 By letter of 13 October 1997, the Court of First Instance asked the Commission to indicate whether it continued to rely on the calculations set out in Table QI/1 in support of the assertion in the contested decision that the third capital injection

would have been undertaken by a private investor in a market economy. If not, the Commission was asked to specify, on the basis of the reasoning in the contested decision and in its written pleadings, what calculations or other elements were relied on in support of that conclusion.

27 By letter of 16 October 1997 the Commission informed the Court of First Instance that the documents produced in Annexes QI/2 and Q1/4 to its observations of 30 June 1997 (hereinafter 'Tables QI/2 and QI/4') were copies of the original documents which were in its file at the time of the adoption of the contested decision, but that the document in Annex QI/3 (hereinafter 'Table QI/3') had been recreated — to facilitate understanding — after the adoption of the contested decision, on the basis of a table which had existed at the material time.

28 By its observations of 11 November 1997 the Commission replied to the question from the Court of First Instance of 13 October 1997 and submitted calculations (hereinafter 'Table A' and 'Table B') containing certain new elements with respect to Table QI/1.

29 By letter of 24 November 1994 the Court of First Instance invited the applicant and the interveners to comment in writing on the Commission's letters and observations of 30 June 1997, 26 September 1997, 16 October 1997 and 11 November 1997.

30 On 19 January 1998 the applicant, the United Kingdom, ENI and EniChem lodged observations in response to that invitation.

31 The parties presented oral argument and replied to questions from the Court of First Instance at the hearing on 17 March 1998 at the end of which the oral procedure was closed.

Forms of order sought

32 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs;

— order the Italian Republic, ENI and EniChem to pay the costs occasioned by their respective interventions.

33 The United Kingdom claims that the Court should annul the contested decision.

34 The Commission claims that the Court should:

— dismiss the action;

— order the applicant to pay the costs;

— order the United Kingdom to pay the costs.

35 ENI and EniChem claim that the Court should:

— dismiss the action as inadmissible;

— in the alternative, reject the action as unfounded;

— order the applicant to pay the costs incurred by ENI and EniChem.

36 The Italian Republic supports the form of order sought by the Commission.

Admissibility

37 The Commission, the Italian Republic, ENI and EniChem contend that the action is inadmissible, first, because the applicant was time-barred and, second, because it was not individually concerned by the contested decision within the meaning of the fourth paragraph of Article 173 of the Treaty.

Time-limit for bringing proceedings

Arguments of the parties

38 The Commission contends that the application lodged on 20 January 1995 fell outside the time-limit set by the fifth paragraph of Article 173 of the Treaty, since time

for the purposes of bringing proceedings started to run on 3 August 1994, when the contested measure came to the knowledge of the applicant, through its reading of the Commission's press release.

39 According to the Commission it is evident, both from the wording of the fifth paragraph of Article 173 of the Treaty and from the the case-law of the Court of Justice that, of the three events envisaged by the aforementioned provision — publication of the contested measure, its notification to the applicant or its coming to the latter's knowledge — the first to occur causes time to run for the purposes of bringing proceedings (see, in particular, Case 59/84 *Tezi Textiel* v *Commission* [1986] ECR 887, paragraphs 9 to 12, and Case 378/87 *Top Hit Holzvertrieb* v *Commission* [1989] ECR 1359, paragraphs 12 to 15).

40 In the present case, the Commission's press release gave the applicant precise knowledge of the content and grounds of the measure in question, on the basis of which it would have been able to exercise its right of action. Even supposing that on 3 August 1994 the applicant did not have sufficient knowledge of the content and grounds of the contested decision for the purposes of the fifth paragraph of Article 173 of the Treaty, time for the purposes of bringing proceedings would not have started to run on the decision's notification — 11 November 1994 — unless the applicant had asked the Commission for the full text within a reasonable period. In the present case, however, that condition was not satisfied.

41 Lastly, the Commission disputes the applicant's statement that it was given the text of the contested Decison at the meeting on 11 November 1994 on the strict understanding that no use would be made of it until its publication in the Official Journal, but acknowledges that the meeting was confidential and that the Commission officials placed the document under embargo until the date of publication, mistakenly believing that they were under a duty to avoid its being circulated beforehand.

42 The Italian Republic, ENI and EniChem concur with the Commission's arguments.

43 ENI and EniChem emphasise that, pursuant to Article 191(3) of the Treaty, publication of the contested decision was not a condition of its taking effect. As Advocates General Reischl and Mancini affirmed, respectively, in Case 76/79 *Könecke* v *Commission* [1980] ECR 665 and Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, in such circumstances the applicant was not entitled, therefore, to await publication before instituting proceedings. That is *a fortiori* the position with respect to the third capital injection, since Commission decisions pursuant to Article 93(3) of the Treaty, finding that there is no State aid, are never published.

44 The applicant, supported by the United Kingdom, argues that, in accordance with the fifth paragraph of Article 173 of the Treaty, time for the purposes of bringing proceedings started to run on 26 November 1994, the date of the contested decision's publication in the Official Journal. Knowledge of the contested measure is a residual criterion which is only applicable in the absence of publication or notification (see *Könecke*, cited above, and Case 236/86 *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761, paragraph 14).

45 Neither the Commission's press release, nor the handing over of a confidential copy of the contested decision in the course of the meeting on 11 November 1994, constitutes notification. Furthermore, the contested decision was given to the applicant at that meeting on the strict understanding that no use would be made of it before publication, and consequently time should not be taken to run from the date of the meeting. In any event, the Commission's press release did not give the applicant sufficient knowledge of the contested decision. Moreover, the applicant endeavoured with all appropriate diligence to obtain a copy of that measure.

Findings of the Court

46 Pursuant to the fifth paragraph of Article 173 of the Treaty, the proceedings provided for in Article 173 must be instituted within two months of the publication of the measure, or of its notification to the applicant, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

47 It is clear simply from the wording of that provision that the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point of the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure (Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 35; see also, as regards State aid, the Opinion of Advocate General Capotorti in Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, p. 2695).

48 In the present case, the contested decision was published on 26 November 1994. Taking the hypothesis that it was not previously notified to the applicant, it would follow that the present proceedings, initiated on 20 January 1995, were brought within the period prescribed in the fifth paragraph of Article 173 of the Treaty.

49 That conclusion is all the more inevitable in the present case given that it is consistent practice for Commission decisions closing a State aid investigation procedure under Article 93(2) of the Treaty to be published in the Official Journal (see, *inter alia*, the letter of 27 June 1989 from the Commission to the Member States, published by the Commission in *Competition Law in the European Communities*, Volume IIA, 'Rules applicable to State aid', 1995, p. 107, and the *XXth Report on Competition Policy*, 1990, paragraph 170).

50 In the present case, the contested decision closed not only the investigation procedure opened, pursuant to Article 93(2) of the Treaty, with respect to the first two injections, but also the preliminary examination of the third injection under Article 93(3) of the Treaty. However, the Commission has not denied that it always meant to publish the contested decision on the three injections in its entirety. Nor does it deny informing the United Kingdom that the contested decision would be published, which is evident in any case from its fax of 29 September 1994 to the UK Permanent Representation, confirming that the contested decision would be published in the course of the next few weeks.

51 In those circumstances the applicant could reasonably expect the contested decision to be published in the Official Journal.

52 Alternatively, taking the hypothesis that the handing-over to the applicant, at the meeting on 11 November 1994, of the document described by the Commission as the full text of the contested decision may be regarded as 'notification' within the meaning of the fifth paragraph of Article 173 of the Treaty, it would still follow that the proceedings had been initiated in due time. In that case, time for the purposes of bringing proceedings would not have expired until Monday 23 January 1995, having regard to the two-month period prescribed by the fifth paragraph of Article 173 of the Treaty, extended on account of distance by a period of 10 days in the case of the United Kingdom, pursuant to Article 102(2) of the Rules of Procedure, and with regard also to the first subparagraph of Article 101(2) of those Rules, which applies where the period ends on a Saturday, Sunday or official holiday.

53 The pleas that the proceedings were initiated out of time must therefore be rejected.

The question whether the contested decision is of direct and individual concern to the applicant

Arguments of the parties

54 The Commission, supported by the Italian Republic, ENI and EniChem, contends that the application is inadmissible so far as concerns the first two capital injections, since in that respect the decision was not of individual concern to the applicant within the meaning of the fourth paragraph of Article 173 of the Treaty.

55 The applicant does not satisfy any of the three cumulative conditions laid down in this connection by the case-law: it did not participate in the administrative procedure, either as the complainant or as a third party submitting comments pursuant to a notice on the opening of a procedure pursuant to Article 93(2) of the Treaty; nor was the conduct of that procedure largely determined by its observations; lastly, its position on the market was not significantly affected by the aid in question (Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849; Case 169/84 *Cofaz* v *Commission* [1986] ECR 391, paragraph 25, and the Opinion in that case of Advocate General VerLoren Van Themaat, p. 405).

56 On the other hand, the Commission does not contest the action's admissibility so far as concerns the third capital injection, in accordance with the judgments in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487 and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203.

57 Diverging from the Commission in this respect, ENI and EniChem contend that the action is inadmissible with respect to the third capital injection. They maintain that *Cook* is not applicable to a decision pursuant to Article 93(3) of the Treaty finding that no aid is involved. The annulment of such a decision, in contrast to the

annulment of a decision finding that aid is compatible with the common market, does not automatically entail the opening of a formal investigation procedure under Article 93(2) of the Treaty. Rather, the Commission would undertake a second examination under Article 93(3) of the Treaty, in order to determine whether the third capital injection, now presumed to involve aid, was nevertheless compatible with the common market. No provision is made for the participation of third parties such as the applicant at that stage in the procedure. Only if the Commission were subsequently to open the investigation procedure under Article 93(2) of the Treaty would the applicant be able to submit comments regarding the third capital injection. Accordingly, the decision was not of direct concern to the applicant.

58 ENI and EniChem also contend that the action is inadmissible so far as concerns the third capital injection because it does not contest a decision adopted pursuant to Articles 92(1) and 93(3) of the Treaty. Since the contested decision was adopted solely on the basis of Articles 92(3)(c) and 93(2) of the Treaty and the Commission never extended its investigation under those provisions to cover the third injection, the action is inadmissible because the applicant does not claim, in its conclusions setting out the form of order sought, that the 'separate' decision concerning the third injection should be annulled.

59 The Italian Republic contends that the action is inadmissible with respect to the third injection because the applicant has failed to show that ENI, a public undertaking, acted in the exercise of public authority, in furtherance of the public interest or social priorities, rather than self-serving or commercial objectives.

60 The applicant, supported by the United Kingdom, submits that it is directly and individually concerned by the contested decision in its entirety.

61 The applicant considers itself entitled to challenge the finding concerning the third injection, since it is a competitor of EniChem which, in the absence of a notice on the opening of a procedure under Article 93(2) of the Treaty in respect of the third injection, had no opportunity to submit its observations (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809; *Cook*, cited above, paragraphs 23 to 25; and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125). Contrary to the contention raised by ENI and EniChem, *Cook* is applicable where a decision has been adopted not to open the Article 93(2) procedure on the ground that the measure in question does not constitute State aid.

62 According to the applicant, the application is also admissible, in the light of *Cook*, with respect to the first two capital injections, since they are inextricably linked to the third. By failing to extend the procedure by means of a further Article 93(2) notice, the Commission denied parties concerned the opportunity to comment on EniChem's overall restructuring and the related financing. The rationale underlying *Cook* applies to such circumstances since, if interested parties are not allowed to contest the Commission's decision before the Court, the procedural guarantees contained in Article 93(2) of the Treaty cannot be secured.

63 In the alternative, should the Court hold that, in respect of the first two injections, the question of admissibility is to be determined separately, the applicant maintains that an undertaking may be individually concerned solely by virtue of the aid's effect on its market position (see Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraph 64, and Case T-442/93 *AAC and Others* v *Commission* [1995] ECR II-1329, paragraph 49).

64 In Europe competition between the applicant and EniChem is considerable, especially on the ethylene and polyethylene markets, but also with regard to other products. EniChem is the largest ethylene producer in Europe, accounting for

11% of total capacity, compared with the applicant's 7%. Furthermore, the Commission indicated in the communication of 2 June 1994 that EniChem is a market leader on the Western European market in olefins, the category of products to which polyethylene belongs.

65 In 1993 the applicant suffered a total operating loss, in respect of all of its products sold in Europe, of UKL 95 million, primarily in connection with sales of ethylene and polyethylene. In the same year, its parent company made an exceptional charge of UKL 200 million in its accounts to cover the fundamental restructuring of its European petrochemicals operations and, in particular, the permanent closure of its ethylene cracker at Baglan Bay. That closure of 360 Kt/a capacity coincided with the introduction, announced in 1988, of 330 Kt/a capacity at a more efficient plant at Grangemouth.

66 The applicant therefore maintains that its market position was seriously affected by the grant of the first two capital injections to EniChem.

67 Furthermore, the applicant actively participated in the administrative procedure, playing a role analogous to that of a complainant, within the meaning used in *Cofaz*, cited above. On 24 May 1994 it tabled a paper on aid to EniChem for the working party made up of representatives of industry and the DTI. At a meeting of the working party on 13 June 1994, it supplemented that paper with additional figures and arguments, and later wrote giving the DTI further information. The applicant contributed to the working party's discussions on the outline of the United Kingdom's observations, for which it provided most of the factual information; also, it submitted comments on the draft observations circulated by the DTI.

68 The applicant was reluctant to submit comments in its own name for fear of damaging its commercial relations with EniChem within joint ventures, or of prejudicing ongoing negotiations for technology licenses and cooperation in the context of trade associations to which both companies belonged. Although a Member State does not act 'on behalf of' an undertaking in the same way as a trade association, the United Kingdom authorities wished to make sure that the Commission took the applicant's interests fully into account. It would be excessively formalistic to require that the applicant submit the same observations in its own name.

Findings of the Court

— Admissibility of the action with regard to the first two capital injections

69 Under the fourth paragraph of Article 173 of the Treaty, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to it. Since the contested decision was addressed to the Italian Republic, it must be determined whether the applicant satisfies those requirements in the case of the first two capital injections.

70 It is common ground that the applicant is directly concerned by the contested decision inasmuch as that measure declares compatible with the common market aid that has already been granted (see, most recently, Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraph 32).

71 Furthermore, it is settled law that persons other than the addressees of a decision cannot claim to be individually concerned unless they are affected by that decision by reason of certain attributes which are peculiar to them or by reason of circum-

stances in which they are differentiated from all other persons and, by virtue of these factors, distinguished individually just as in the case of the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107, and *Ducros*, cited above, paragraph 33).

72 It is also clear from the case-law that, in the field of State aid control, a decision closing a proceeding pursuant to Article 93(2) of the Treaty is of individual concern to any undertaking which was at the origin of the complaint which led to the opening of the investigation procedure, and whose views were heard during that procedure and largely determined the conduct of that procedure, provided, however, that its position on the market was significantly affected by the aid which is the subject of the decision (*Cofaz*, cited above, paragraphs 24 and 25). However, that 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 person addressed — that it is individually concerned (*ASPEC and Others*, cited above, paragraph 64, and *Ducros*, cited above, paragraph 34).

73 In the present case, the applicant did not complain to the Commission. Nor, following publication of the notice of 2 June 1994, did it approach the Commission under its own name with a view to submitting comments as a party concerned within the meaning of Article 93(2) of the Treaty. Furthermore, the fact that the applicant is a party concerned within the meaning of that provision is not sufficient in itself to distinguish it as in the case of the addressee of the decision.

74 Nor, in the view of the Court, does the applicant satisfy that test by virtue of its participation, as a member of a working party made up of representatives of industry and the DTI, in the preparation of the observations submitted to the Commission by the United Kingdom on 1 July 1994. Those observations were submitted in the name of the United Kingdom and in its capacity as a Member State. Furthermore, they convey solely the views of the United Kingdom Government with

regard to proposed aid, considered in the general context of the European petrochemical industry at that time, and do not in any way address the particular situation of the applicant.

75 Moreover, the mere participation by the applicant in a working party set up by the United Kingdom authorities cannot be equated with the exercise, by a party concerned within the meaning of Article 93(2) of the Treaty, of the right to submit comments in the course of the procedure foreseen by that provision. In the latter case, the interests of legal certainty and sound administration require the Commission to be aware, so far as is possible, of the particular circumstances of every trader who considers himself injured by the grant of aid proposed. In the present case, the Commission had no knowledge, at the time of the administrative procedure, of either the applicant's specific objections or of any role which it had played in the preparation of the United Kingdom's comments.

76 As regards the question whether the applicant has been able to demonstrate by other means the existence of specific circumstances distinguishing it individually as in the case of the addressee, it should be recalled that the mere fact that a measure is capable of influencing competitive relationships within the relevant market does not in itself suffice to deem any trader in any competitive relationship with the measure's beneficiary to be directly and individually concerned by it (Joined Cases 10/68 and 18/68 *Eridania* v *Commission* [1969] ECR 459, paragraph 7, and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 47).

77 The Court takes the view that where, as in this case, the applicant has not exercised its right to submit comments in the course of the procedure foreseen by Article 93(2) of the Treaty, it must prove that it is in a distinct competitive position which differentiates it, as regards the State aid in question, from any other trader (*ASPEC and Others*, cited above, paragraph 70, and *Skibsværftsforeningen and Others*, cited above, paragraph 47).

78 The applicant relies on the fact that it is a competitor of EniChem on the ethylene and polyethylene markets, and that EniChem accounts for 11% of Europe's entire ethylene production capacity, compared with the applicant's 7%. It also refers to the Commission's statement in the notice of 2 June 1994 that EniChem is a market leader on the Western European market in olefins. Lastly, it refers to the operating loss which it suffered in 1993, primarily in connection with its sales of ethylene and polyethylene, and to the restructuring on which it embarked, involving the closure of its ethylene cracker at Baglan Bay.

79 It is the Court's view that those factors do not constitute special circumstances which are sufficient to distinguish the applicant as in the case of the person addressed by the contested decision.

80 The documents before the Court show that, at the material time, some 20 operators, including EniChem and the applicant, were active in the ethylene sector, with a total of approximately 50 plants (see, for example, the table on page 14 of 'Petrochemical Market Outlook', May 1994, lodged at the Registry of the Court of First Instance by the applicant, and the '1994 Olefins Report Product Review' produced by EniChem in Annex 4 to its statement in intervention). Although, admittedly, EniChem had the largest production capacity in Europe at that time, it is clear from the table on page 16 of the application that five other producers had a larger capacity than the applicant, which only occupied seventh position. As for its operating loss in 1993, the documents before the Court reveal that, at that time, the petrochemical industry was in recession and, as a result, most of the operators concerned either made a loss or very low profits. Nor does the applicant's closure of its ethylene cracker at Baglan Bay appear to be related to the first two capital injections, but rather to its own decision, announced in 1988, to build a more efficient plant at Grangemouth.

81 The applicant's situation is thus quite different from that of the three applicants in the case which gave rise to the judgment in *ASPEC and Others*, cited above, whose market shares accounted for nearly all the relevant markets (see paragraphs 65 to 71). Similarly, whereas in that case the aid in question was specifically designed to increase the beneficiary's production capacity in markets already characterised by excess capacity, in the present case, the first two capital injections were granted in the context of the plant closures referred to in section 5 of the contested decision.

82 Lastly, it is not possible to accept the applicant's argument that by analogy with *Cook*, cited above, its application is admissible because the absence of any reference to the third capital injection in the notice of 2 June 1994 denied it an opportunity to make its views known regarding EniChem's restructuring as a whole. In *Cook*, the Court held that the failure to open the procedure provided for in Article 93(2) of the Treaty deprived the parties concerned, within the meaning of that provision, of the procedural guarantees to which they were entitled. It must be pointed out that, in the present case, the Commission opened the procedure provided for in Article 93(2) in respect of the first two capital injections. Consequently, even supposing that, in the context of EniChem's restructuring, the three injections were related and that the notice of 2 June 1994 was incomplete, the mere fact that it did not mention the third capital injection did not preclude the applicant from submitting comments on the first two injections in the course of the procedure opened by the Commission for their investigation.

83 The action must therefore be dismissed as inadmissible with regard to the first two capital injections.

— Admissibility of the action with regard to the third capital injection

84 The Commission, relying on *Cook* and *Matra*, cited above, has raised no objection as to the admissibility of the action with regard to the third capital injection.

85 Pursuant to the fourth paragraph of Article 37 of the EC Statute of the Court of Justice which, pursuant to the first paragraph of Article 46 thereof, applies to the procedure before the Court of First Instance, an application to intervene is limited to supporting the form of order sought by one of the parties. Also, pursuant to Article 116(3) of the Rules of Procedure of the Court of First Instance, the intervener must accept the case as he finds it at the time of his intervention.

86 It follows that the intervener has no standing to challenge the admissibility of the action with regard to the third capital injection and that, accordingly, the Court of First Instance is not required to consider the pleas of inadmissibility on which it relies (Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 76).

87 It is none the less appropriate, pursuant to Article 113 of its Rules of Procedure, for the Court of First Instance to examine the admissibility of the action with regard to the third capital injection of its own motion (see *CIRFS and Others*, cited above, paragraph 23, and Case T-19/92 *Leclerc* v *Commission* [1996] ECR II-1851, paragraph 51).

88 The Commission found in the contested decision that the third capital injection would have been made by a private investor operating in a market economy and that it did not therefore involve State aid. In making that finding, at the end of its preliminary examination of the third injection pursuant to Article 93(3) of the Treaty, the Commission impliedly refused to open the procedure provided for in Article 93(2) of the Treaty (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 47).

89 In such circumstances, those entitled to the procedural guarantees provided for in Article 93(2) of the Treaty may secure compliance therewith only if they are able to challenge that decision before the Community judicature (*Cook*, cited above, paragraph 23, and *Matra*, cited above, paragraph 17). This principle is of equal application, whether the ground on which the decision is taken is that the Com-

mission regards the aid as compatible with the common market or that, in its view, the very existence of aid must be discounted (*Commission* v *Sytraval and Brink's France*, cited above, paragraph 47). It follows that the applicant, being a party concerned within the meaning of Article 93(2) of the Treaty, is individually concerned by the contested decision in so far as that measure concerns the third capital injection.

90 To that extent, the applicant is also directly concerned by the contested decision, since the third capital injection was carried out before the present proceedings were initiated (*Ducros*, cited above, paragraph 32).

91 As regards the argument of ENI and EniChem that the action is inadmissible because the applicant did not seek, in its conclusions setting out the form of order sought, annulment of a 'separate' decision concerning the third capital injection taken on the basis of Articles 92(1) and 93(3) of the Treaty — the contested decision having been adopted solely on the basis of Articles 92(3)(c) and 93(2) of the Treaty — suffice it to note that the form of order sought by the applicant concerns annulment of the contested decision as a whole, including the Commission's statements to the effect that the third injection did not constitute State aid.

92 Nor can the Court accept the argument put forward by the Italian Republic that the applicant must show that ENI acted in the exercise of public authority rather than on the basis of commercial interest, if its action is to be admissible with regard to the third capital injection. A consideration of that kind has no bearing on the action's admissibility.

93 The action must therefore be declared admissible with regard to the third capital injection.

Substance

Summary of the parties' arguments

94 So far as regards the third capital injection, the applicant submits that (a) the Commission infringed Article 92(1) of the Treaty by disregarding the links between the three injections, in view of which the third injection could not be assessed in isolation; (b) in any event, the Commission infringed Article 92(1) of the Treaty inasmuch as a private investor operating in a market economy would not have undertaken the third injection; and (c) accordingly, the Commission infringed the applicant's rights as a party concerned by failing to open the procedure provided for in Article 93(2) of the Treaty with regard to the third capital injection.

The arguments adduced in the written procedure

95 As regards, first, the links between the first two capital injections and the third, the applicant submits that the third capital injection must be regarded as forming part of a single process for the restructuring of EniChem, in which it is inextricably linked to the first two capital injections. In those circumstances, it is artificial for the Commission to argue that the first two capital injections constitute State aid, but that the third does not. In reality, there is a single State aid of LIT 4 794 billion.

96 The applicant primarily relies on the fact that the Commission was unable to approve the first two capital injections pursuant to Article 92(3)(c) of the Treaty without a restructuring plan enabling the undertaking to recover long-term viability within a reasonable period having been drawn up (see Paragraph 3.2.2.(i) of the Community guidelines on State aid for rescuing and restructuring firms in difficulty, adopted on 27 July 1994 (OJ 1994 C 368, p. 12, hereinafter 'the Guidelines';

and Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* (*'Hytasa'*) [1994] ECR I-4103). In the present case, there was only one restructuring plan — that submitted to the Commission in response to the letter of formal notice of 16 March 1994 — the key element of which was the third capital injection. The fact that the first two capital injections are related to the third is also evident from the Italian Government's letter of 6 June 1994 to the Commission.

97 Secondly, even assuming that the third injection could be evaluated in isolation, the applicant argues that, in its assessment of that injection, the Commission misapplied the very strict criterion of the private investor operating in a market economy (Case C-303/88 *Italy* v *Commission* (*'ENI-Lanerossi'*) [1991] ECR I-1433, Case C-305/89 *Italy* v *Commission* (*'Alfa Romeo'*) [1991] ECR I-1603 and *Hytasa*, cited above).

98 According to the applicant, no such investor would have contributed LIT 3 000 billion to the restructuring of EniChem. In particular, no private investor would have financed EniChem's restructuring plan without first insisting on precise objectives being met within strict deadlines. He would not have proceeded with the third injection without first considering the possibility of putting EniChem into liquidation; he would never have contemplated an investment where the present value of future cash flows just equalled the amount invested, as stated in the contested decision; and, in any case, he would not have taken his decision on the basis of the less pessimistic of the two sets of financial forecasts, which, according to the Commission's defence, was the approach adopted in the present case.

99 Thirdly, the applicant argues that, by not opening the procedure provided for in Article 93(2) of the Treaty, in respect of the third capital injection, the Commission is in default of its procedural obligations in that it deprived the applicant of its rights under that provision (*Cook*, cited above, paragraph 23). The Commission should either have extended the procedure already initiated to cover the third capital injection, or it should have opened a new procedure, so as to be wholly con-

versant with all the facts of the case before taking its decision (see Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13, and *Cook*, cited above, paragraph 29).

100 The United Kingdom adds to this that the Commission should have followed the views of the Italian authorities, according to whom there was a necessary and indissoluble link between the three injections. Furthermore, the Italian authorities were constrained to present the three injections as a whole because the necessary condition in law for approval of restructuring aid is that it must restore viability to the recipient, as the Commission itself emphasised in Paragraph 3.2.2.(i) of the Guidelines.

101 The Commission emphasises, first of all, the limits applying to review by the Community judicature of decisions adopted by the Commission in the exercise of its preventive review of State aid, and the necessarily broad discretion enjoyed by the Commission when making economic and social appraisals in a Community context (see, *inter alia*, *Philip Morris Holland*, cited above, paragraph 24, *Matra*, cited above, paragraph 24, and *Hytasa*, cited above, paragraph 51).

102 In the Commission's view, there is no link between the first two injections and the third such that all three should have been considered together. The first two injections were evaluated quite separately from the third, since their purpose was to cover losses incurred from past closures and their effect was in no way dependent on that injection.

103 In particular, the Commission points out that in applying the private market economy investor test to the first two injections, account had to be taken of the circumstances at the time when they were carried out (1992 and 1993), whereas the third injection had to be appraised in terms of the situation at the time of the contested decision (1994). The Commission contends that no return was to be received on the first two injections, since they were intended to compensate past

losses, including those arising from certain restructuring measures which were not undertaken within the framework of a detailed restructuring plan. On the other hand, the proposal for an injection of LIT 3 000 billion was based on a detailed and realistic restructuring plan for 1994 to 1997, with a view to restoring the undertaking to a viable profit level as from 1997. It does not follow from the fact that the restructuring plan advocated measures similar to those previously adopted that the first two injections are so closely associated with the third that they could not be evaluated without extending the procedure to that injection.

104 The Commission took the view that the first two capital injections and the concomitant restructuring measures had restored the viability of EniChem up to a level where private capital could be attracted on the capital market without, however, raising the company to such a level of profitability that long-term returns would be provided on those injections. For a restructuring aid to be compatible with the common market, it is sufficient that it restores the viability of the recipient to a level where the latter can obtain from the capital market the private capital necessary for a return to profitability, if need be on the basis of a more detailed restructuring plan. This was precisely what the first two capital injections achieved, given that on the third injection of LIT 3 000 billion a normal market rate of return was to be expected.

105 According to the Commission, although no detailed plan for the restructuring of EniChem existed at the time of the first two capital injections, it was aware that an overall plan for restructuring the group was being formulated in the context of a large-scale operation to restructure Italian public undertakings, discussed with the Commission in the context of the EFIM case (OJ 1993 C 349, p. 2), which led to the Andreatta-Van Miert Agreement. A general explanation of EniChem's restructuring and privatisation plan was given in two official documents published by the Italian Treasury in November 1992 and April 1993. It became clear in the course of the Article 93(2) procedure that the injections were used to finance restructuring measures aimed at restoring profitability along the general lines described by the Italian Government in those documents. Given that those measures were following a coherent direction, which was finally expressed in detail in the restructuring plan

submitted to the Commission in 1994, and that formulation of a restructuring plan is not a static exercise, the Commission reached the conclusion that the measures were 'bound to a restructuring programme designed to reduce or redirect EniChem's activities', within the meaning of the *Hytasa* judgment, cited above.

106 In the Commission's view, the return to 'viability' following a restructuring aid must be understood in the sense explained in paragraph 3.2.2.(i) of its Guidelines, that is to say, the undertaking must be capable 'of covering all its costs, including depreciation and financial charges, and generating a minimum return on capital'. That was EniChem's position after the first two injections: it could survive on the market with no need for any further aid.

107 Secondly, regarding the private investor test, the Commission makes the preliminary point that, at paragraph 21 of the *ENI-Lanerossi* judgment, cited above, the Court of Justice acknowledged that in applying that test, account may be taken of the special situation of a holding company. However, the Commission states in its pleadings (for example, in its rejoinder, paragraph D.8) that it did not need to rely on *ENI-Lanerossi*, because it was entirely satisfied as to the profitability of the third capital injection.

108 The restructuring plan submitted under cover of the Italian Government's letter of 18 May 1994 contained exhaustive information on all points, including financial forecasts presented in the form of income statements, balance sheets and cash-flow statements for the years 1993-98. A second, less pessimistic set of financial forecasts was also projected, based on a higher level of plastic materials prices and a slightly increased level of polyethylene production.

109 The Commission maintains that it checked the coherence, reasonableness and feasibility of the restructuring plan. It concluded that the two financial forecasts put forward in the plan were realistic and prudent. The Commission then evaluated

the figures given in the financial forecasts in order to ascertain whether the return on the capital injection of LIT 3 000 billion was sufficient to make such an investment attractive to a private investor operating in market economy conditions.

110 At the time of the third capital injection, ENI was faced with the choice of either recapitalising and restructuring, or taking no action and thereby automatically allowing EniChem to go bankrupt. Although there was no immediate risk then that, without an injection of LIT 3 000 billion and the consequent restructuring, EniChem would be declared bankrupt, the losses normally recorded by EniChem at that time would have absorbed its equity capital in the space of one or two years, giving rise to the need for further capital, failing which the company would have had to be put into liquidation.

111 The evaluation of the additional cash flows due to the choice of restructuring therefore had to start from the comparison between EniChem's financial evolution under the liquidation alternative and the financial forecasts under the restructuring alternative. The Commission undertook just such a comparison.

112 At the time when ENI decided to invest more capital in its subsidiary, rather than put it into liquidation, EniChem's equity capital stood at LIT 1 950 billion. That figure was arrived at by deducting from LIT 2 952 billion — the estimated equity at the end of 1993 — LIT 1 001 billion, the January-July proportion (i. e. 7/12) of the total losses forecast for 1994. The resulting figure of LIT 1 950 billion therefore represented ENI's existing investment in EniChem. Although it is difficult to arrive at a reliable estimate, it is not unreasonable to assume that the final cost of liquidating EniChem would have been higher than this amount.

113 In evaluating the financial effects of the restructuring option, it therefore seemed prudent to assume that ENI's existing investment in EniChem (LIT 1 950 billion) was already nil, because liquidation would certainly have caused the total loss of

the existing level of equity as well as additional losses arising from the cost of liquidation.

114 The Commission therefore decided that the liquidation option would have completely erased ENI's existing investment in its subsidiary, EniChem. Thus the analysis of the return on the investment of LIT 3 000 billion was made on the totality of the figures of the financial plan provided by EniChem. In this way, the evaluation took into account all positive and negative flows arising from the implementation of the restructuring plan, because they were additional to the alternative solution of liquidation.

115 For the purposes of the private investor test, the capital injection of LIT 3 000 billion therefore represented the initial investment. Since the investor was EniChem's 100% shareholder, the return on the third capital injection was expressed by the flow of net profits which EniChem would provide to ENI.

116 Taking the less pessimistic financial forecast of EniChem's financial situation, the flow of net profits that EniChem would provide to ENI over a period of 10 years was discounted at an annual rate of 12%. On that basis, the present value of future cash flows just equalled the investment of LIT 3 000 billion, as stated in the decision. The investment would therefore have been acceptable to a prudent investor operating in normal market conditions and accordingly did not constitute State aid.

117 Lastly, as regards the question whether the Commission should have opened the procedure provided for in Article 93(2) of the Treaty, the Commission acknowledges that if, after a preliminary examination of the third injection, it had entertained any doubts as to whether State aid was involved, it would have been under a duty to open a formal investigation or to ask the Italian Government for further information (see Case 84/82 *Germany* v *Commission*, cited above, and Case

C-301/87 *France* v *Commission* (*'Boussac'*) [1990] ECR I-307, and Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173). Since the Commission had no such doubts, it was neither obliged nor entitled to open that procedure.

118 The Italian Republic, ENI and EniChem support the Commission's arguments. Moreover, the Italian Republic emphasises that the re-formation of the Ente Nazionale Idrocarburi as a limited company took place in 1992 as part of a large-scale privatisation programme, under which the use of public undertakings as an instrument of general policy was permanently abandoned. Accordingly, since 11 July 1992, ENI had been subject to the provisions of the Italian Civil Code applicable to limited companies, and all State powers to issue directives to ENI had been abolished. The company's operations were to be governed by the criteria of economic efficiency and profitability. No capital injection was made by the State to the Ente Nazionale Idrocarburi before it was re-formed as a limited company or, thereafter, to ENI. The management decisions taken by ENI were attributable to the company alone and not to the State, which bears the risks of a shareholder and does not act in the exercise of public authority.

119 According to the Italian Government, the third capital injection was part of a wide-ranging restructuring plan approved by ENI's Board of Directors on 27 January 1994, providing in particular for a reduction of overcapacity, to complete the policy of rationalising production and reducing fixed costs, for the re-focusing of activities on the sectors most closely linked to the shareholder's core business, for a considerable reduction of indebtedness and financial recovery, and for arrival at break-even point in 1997, and then profits permitting a proper return to the shareholders. That plan was partially financed by EniChem's own funds accruing from its reduction of non-strategic activities and was capable of restoring EniChem to a high level of competitiveness in a relatively short space of time with positive effects both direct (profits) and indirect (synergies) for shareholders.

120 ENI and EniChem contend that the Commission could have concluded that none of the capital injections were granted 'through State resources', since ENI used its own funds without causing a loss of return on, or loss of value of, the Treasury's investment in it. But for those three injections, ENI risked losing its substantial investment in EniChem, as well as synergies between EniChem and ENI's activities in the energy sector, and the Italian Government's privatisation scheme for ENI would have been jeopardised. Besides, by that time ENI was no longer a public entity, nor was it subject to the directives of the Italian Government. Furthermore, the first two capital injections were no more than the implementation of a joint decision taken by the Ente Nazionale Idrocarburi and Montedison SpA in May 1989 to increase Enimont's capital by LIT 2 000 billion to the extent that the company's profits did not reach that level during the period from 1989 to 1991.

121 So far as concerns the evaluation of the third injection from the point of view of a market economy investor, ENI and EniChem emphasise that the Commission's policy — in accordance with the judgments in *ENI-Lanerossi* and *Alfa Romeo*, cited above, and with Article 222 of the Treaty — is to take account of the wide margin of appreciation enjoyed by investors and the long-term policy considerations of undertakings controlling a large group (see points 27 to 31 of the Commission's Communication to the Member States of 28 July 1993 on the application of Articles 92 and 93 of the EEC Treaty; see also Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ 1993 C 307, p. 3, hereinafter 'the Communication on public undertakings'). In the present case, the Commission was able to establish that, independently of those considerations, an adequate return was to be expected. Considering the normal life of the investment to be 10 years, the Commission discounted the expected future results at a rate of 12%. However, that rate is considerably higher than both ENI's cost of capital (the weighted average interest rate payable on its long-term debt was 8.5% in 1994) and the chemical industry's average return on investment (9.3% in 1992). If a lower discount rate had been used — which, according to the interveners, would have been justifiable — the present value of future cash flows would have exceeded the initial investment.

122 ENI and EniChem state that it was reasonable to estimate the value of ENI's investment in EniChem before the third injection at LIT 1 950 billion. However,

under the liquidation alternative, ENI would have had to reimburse EniChem's debt (LIT 8 676 billion), because of the repercussions that default by EniChem would have had on the ENI Group as a whole. ENI also took into account — in accordance with point 36 of the Communication on public undertakings, cited above — the impact that EniChem's liquidation would have on the ENI Group, including the loss of synergies, damage to the Group's reputation and credit rating, and the derailing of ENI's privatisation. The interveners add that the activities actually disposed of by EniChem were sold at more favourable prices than if the sale had taken place under threat of liquidation (see point 20 of the Communication on public undertakings, cited above). Lastly, ENI and EniChem contend that the 1994-97 restructuring plan was manifestly successful, and set out EniChem's financial statistics in detail so as to demonstrate that the results expected for 1997 had already been achieved in 1995.

The arguments adduced after the end of the written procedure

123 By way of measures of organisation of procedure, the Court of First Instance asked the Commission, by letter of 21 May 1997, to produce the calculations in its file concerning the question whether the third capital injection of LIT 3 000 billion would have been acceptable for a private market economy investor and, in particular, those relating to the 'net present value of future cash flows' from EniChem, according to the two sets of forecasts (one less pessimistic than the other) referred to in its defence and rejoinder. The arguments put forward by the parties after the end of the written procedure concern solely the calculations produced by the Commission.

— The Commission's observations of 30 June 1997

124 Annexed to its observations of 30 June 1997, the Commission produced Tables QI/1, QI/2, QI/3 and QI/4, stating that these were the documents requested by the Court.

125 According to those observations, Table QI/1 — dated 1 July 1994 — is the calculation made by the Commission of the return on the capital injection of LIT 3 000 billion. 'The net present value of future cash flows' from EniChem is given in line 5 of that table (entitled 'Cumulated equity value') according to which, in the year 2005, EniChem's cumulated equity value was to be LIT 2 966 billion.

126 Again according to those observations, Table QI/2 sets out the calculation made by the Commission of ENI's cost of capital. Table QI/3 contains its calculation of the average return on equity of the major chemical companies, used as a basis for comparison. Table QI/4 contains the forecasts of developments in the business and financial situation, which served as a basis for the calculation of the return on the capital injection. This is a document entitled 'Analisi di Sensitivitá (Ipotesi Migliorative di Scenario)', prepared on 13 April 1994 and provided by the Italian Government during the administrative procedure.

— The hearing on 23 September 1997

127 At the hearing on 23 September 1997 the applicant and the United Kingdom made a number of criticisms of the calculations set out in Table QI/1. In particular, they maintained that the Commission should have based its calculations on future cash flows in the strict sense, not on the flow of net profits. The initial investment of LIT 3 000 billion should have been entered in line 4 ('Cumulated discounted flow') as a negative value: the net present value of future cash flows would then have been, not minus LIT 34 billion, but minus LIT 3 034 billion. Line 5, in which the cumulated discounted profits are added to the initial investment of LIT 3 000 billion, is vitiated by a fundamental error in that, as all the parties agree, the sum of LIT 3 000 billion was in fact paid to EniChem's creditors for the purpose of reducing its debts and improving its net results; consequently, that sum would not have been available at the end of the investment's lifetime, in 2005. Furthermore, line 5 is no more than a self-fulfilling prophecy: if the Commission's methodology is adopted, EniChem's residual value will always equal the initial injection, whether the amount contributed is LIT 2 000 billion or LIT 10 000 billion.

128 The Commission replies, in particular, that line 4 of Table QI/1 shows how great the flow of results would have to be for the investor to recover his initial outlay at the end of the investment's normal lifetime, when a discount rate of 12% is applied to the flow. Line 5 then shows that the level of results is such that the investor recovers his initial investment at the end of that period (LIT 2 966 billion), having meanwhile enjoyed a 12% return.

129 In reply to questions put by the Court of First Instance at the hearing, Mr Spagnolli — the DG IV official in charge of the file — confirmed that he had made a substantial contribution to the preparation of Table QI/1. He explained that, because EniChem's equity stood at LIT 1 950 billion at the time of the third injection, the results given in Table QI/1 derived from the LIT 4 950 billion of equity available after that injection was made. However, before deciding whether or not to contribute LIT 3 000 billion to EniChem, a shareholder would have needed to know how much he would obtain by way of a return on that particular injection. It was therefore necessary to determine what the third injection would add to the situation of the undertaking. The answer is that the third injection made it possible for EniChem to avoid bankruptcy, which would have wiped out its existing equity of LIT 1 950 billion. That is why the calculations set out in Table QI/1 were made without taking the pre-existing equity into account.

130 Mr Spagnolli added that if the applicant's approach is adopted — that is to say, if the third injection is entered in line 4 of Table QI/1 as minus LIT 3 000 billion in July 1994 — that minus figure would have to be counterbalanced by adding the undertaking's residual value as a positive figure in 2005. In fact, line 5 of Table QI/1 shows that, during the period between July 1994 and 2005, EniChem's equity rose and fell according to its results. Nevertheless, initially the equity stood at LIT 3 000 billion and in 2005 it was still LIT 3 000 billion, a discount rate of 12% having been applied to the flow of results.

131 ENI and Enichem contend, in particular, that the rigorous nature of the Commission's approach is evident from the fact that, in Table QI/1, it takes into account Enichem's estimated losses for the years 1994 to 1996, after quoting the same losses as a reason for leaving EniChem's equity in July 1994 out of the calculation. According to ENI and EniChem, this is a case of double counting, in that EniChem's losses have been counted twice.

132 ENI and EniChem add that, in order to show that there are several methods of making these calculations, they have themselves computed the cash flows to be expected from the third capital injection. According to their calculations, the present value of the future cash flows is LIT 7 195 billion.

— The Commission's letters of 26 September and 16 October 1997

133 By letter of 26 September 1997 the Commission informed the Court of First Instance that Table QI/1, albeit presented as being part of its file, had not actually existed at the time when the contested decision was adopted. In that letter the Commission states that, although Table QI/1 bears the date of 1 July 1994, it is a reconstruction prepared by Mr Spagnolli, the official responsible for the file, of calculations which he had made at the material time. The Commission admits that it cannot be certain that the calculations set out in Table QI/1 are precisely those carried out prior to the adoption of the contested decision, but maintains that calculations of the same type were used as a basis for the measure at issue. The original calculations had been carried out on a computer which had meanwhile been replaced, owing to the State Aid Directorate changing its computer system, and no paper copy had been found. Those facts can be attested to by Mr Spagnolli and Mr Feltkamp, his head of division at the time, both of whom were present at the hearing on 23 September 1997.

134 By letter of 16 October 1997 the Commission confirmed to the Court of First Instance that Tables QI/2 and QI/4 were copies of the original documents in its file at the time when the contested decision was adopted. According to the Com-

mission, Table QI/3 is not the original version which was in the case file at the material time. However, the Commission provided the Court of First Instance with a document which, it maintains, was the original version of Table QI/3, although Table QI/3 (provided to the Court on 30 June 1997) had been recreated on computer — for better comprehension — after the adoption of the contested decision.

135 In the same letter, the Commission adds that those facts can be attested by Mr Spagnolli. Mr Feltkamp, his head of division, could confirm that tables of the same type as Tables QI/2, QI/3 and QI/4 were used during the preparation of the contested decision, although he does not recall the exact content of the tables used. Another official in DG IV, Mr Owen, could attest to being in Mr Spagnolli's office in July 1994 when he had prepared a spreadsheet to ascertain the present value of the cash flows relating to the third capital injection. The results indicated that State aid was not involved, but Mr Owen does not remember the figures in detail.

— The written question from the Court of First Instance of 13 October 1997 and the Commission's observations of 11 November 1997

136 By letter of 13 October 1997 the Court of First Instance asked the Commission to state whether it continued to rely on the calculations set out in Table QI/1 in support of the assertion in the contested decision that the third injection of LIT 3 000 billion would have been undertaken by a private market economy investor, notably because 'the net present value of future cash flows just equals this investment of LIT 3 000 billion'. If not, the Commission was asked to specify, on the basis of the reasoning in the contested decision and in its written pleadings, what calculations or other elements were relied on in support of that conclusion.

137 Annexed to its observations of 11 November 1997 the Commission produced two tables (Table A and Table B), explaining that it continued to rely on the calculations set out in Table QI/1, but as amended in Table A. Mr Spagnolli, Mr Feltkamp

and Mr Owen could testify to the fact that Mr Spagnolli had created on a computer a spreadsheet of the type of Table QI/1, which had been used to ascertain the present value of the results of the third capital injection, and which showed that no State aid was involved.

138 Table A is an attempt, based on the recollections of those involved, to recreate more fully the calculations made at the time of the contested decision. Essentially, the new Table A introduces two factors which, according to the Commission, featured in the calculations made at the material time and reconstructed on the basis of the recollections of the persons involved.

139 First, Enichem's equity, which stood at LIT 1 950 billion on 31 July 1994, was used to offset EniChem's losses during the first three years of the plan. The sum of LIT 1 950 billion remained in EniChem's accounts and, once the option of making the third capital injection had been chosen, had to be taken into account in the calculation.

140 Secondly, EniChem's residual value in 2005 was included in the calculation at a discounted value of LIT 1 531 billion. That value is based on the fact that EniChem would continue to operate beyond the forecast period. According to the Commission, while it is certain that, in accordance with the Commission's consistent practice in matters concerning State aid, a residual value was calculated at the time, Mr Feltkamp and Mr Spagnolli can no longer recall the precise calculation made at the time of the contested decision. However, there is a simple but well-established method which it would have been usual to employ, which involves multiplying the gross operating margin (operating revenues minus operating costs) by a factor which varies according to the specific situation of the undertaking concerned and the industrial sector. In the chemical sector, the normal range is between four and six, and in Table A a factor of three is used.

141 The elements added in Table A were not expressly set out in Table QI/1 but could easily be inferred from the figures contained in that table and in the restructuring plan (Table QI/4). The double counting of the losses and the disappearance of the equity may be ascribed to the negligence of the official responsible for preparing Table QI/1 and were not discovered until after the hearing. The three witnesses confirm that this mistake was not made at the time of drafting the contested decision. Nor is there any double counting in the defence.

142 More generally, the Commission points out that its calculation was based on EniChem's net results (after tax). Table B provides the Court of First Instance with a calculation made in accordance with the DCF (discounted cash flow) method suggested by the applicant, which shows future cash flows to be LIT 2 000 billion in excess of the initial outlay of LIT 3 000 billion.

143 However, the finding that the injection of LIT 3 000 billion would have been made by a private market economy investor was not based solely on the Commission's calculation of the expected return but also, as stated in its written pleadings, on the value and importance to ENI of EniChem continuing to operate in the context of the ENI holding, and on the other factors indicated in section 4 of the contested decision.

— The parties' written observations following the Commission's letter of 11 November 1997

144 In its written observations of 19 January 1998, the applicant points out that the Commission has not explained why Table QI/1 was dated, incorrectly, 1 July 1994. However, since Table QI/1, albeit erroneous, is more consistent than Table A with the reasoning in section 4 of the contested decision, it is likely that Table QI/1 represents the work done at the time, and that Table A was drawn up *ex post facto*

in an attempt to make good the mistakes made at that time. Furthermore, Table QI/3 differs in several respects from the document submitted by the Commission with its observations of 16 October 1997.

145 Accordingly, the applicant asked the Court of First Instance to adopt measures of inquiry to establish how and when Tables QI/1, QI/3 and A were created, and to examine Mr Feltkamp, Mr Spagnolli and Mr Owen as witnesses.

146 As regards the substance, the applicant submits that the Commission no longer relies on Table QI/1. Table A reflects a fundamentally different approach which, moreover, cannot be discerned either in the contested decision or in the Commission's written pleadings. Given the Commission's inability to produce calculations from its file to sustain the finding in the contested decision that the present value of future cash flows just equalled LIT 3 000 billion, that measure must be annulled.

147 The Commission has implicitly accepted the force of the criticisms made by the applicant at the hearing on 23 September 1997 to the effect, first, that EniChem's future cash flows (as given in Table QI/1, line 4) would not be minus LIT 34 billion but minus LIT 3 034 billion and, second, that Enichem's cumulated equity value (as given in Table QI/1, line 5) had no bearing on the calculation of the present value of EniChem's future cash flows. In Table A, line 4 shows the correct figure — minus LIT 3 034 billion — and even though the old line 5 is still included, it plays absolutely no part in the calculation of the return to the investor.

148 In those circumstances, in order to find, by other means, over LIT 3 034 billion in present value terms, the Commission has introduced two new elements in Table A.

First, it has used 'the existing level of equity' in its calculations and, secondly, it has assigned a residual value to EniChem at the end of the lifetime of the investment. However, that approach is inconsistent with both the contested decision and the Commission's written pleadings.

149 In any event, Table A's use of EniChem's existing equity to offset its losses until 1996 is a financial nonsense which confuses investment appraisal and corporate accounting, two entirely separate disciplines. No independent expert would be prepared to certify that this method is a generally accepted component of a present value calculation. As for the method used in Table A to calculate EniChem's residual value, it is neither normal nor well-established.

150 The applicant also submits that the details of the calculation of net results in Table A are vitiated by a number of errors. It also criticises Table B, while pointing out that the Commission has conceded that no analysis along those lines was carried out at the time of the contested decision.

151 In its observations of 19 January 1998 the United Kingdom primarily submits that the contested decision should be annulled on the ground that it is wholly uncertain what calculations the Commission actually made to justify its conclusion that the investment would have been made by a market investor.

152 In their observations of 19 January 1998, ENI and EniChem contend that the legality of an act of an institution must be assessed on the basis of the factual and legal situation existing at the time of its adoption, and the information then avail-

able (Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, paragraph 87). Consequently, a measure cannot be annulled on the ground that a Community institution has fallen short of its duty to keep a full copy of the file on record after the measure was adopted or is unable to submit original supporting documents to the Court upon request. In any event, the Commission has remedied the situation in its observations of 11 November 1997 by offering a clear, first-hand and convincing reconstruction of the analysis made and the reasoning followed at the time of the contested decision. Consequently, its inability to submit to the Court certain original documents relied upon in preparing the contested decision cannot have any effect on the legality of that measure.

153 In particular, the new Table A avoids the risk of double counting identified by ENI at the hearing on 23 September 1997. Because the losses over the first three years are offset by the existing equity of LIT 1 950 billion, they are no longer deducted again from the injection of LIT 3 000 billion. Moreover, Table A completes Table QI/1 by adding an extremely conservative residual value. Given the complexity of the issues raised, the Commission must enjoy a broad discretion as to the choice of method and assumptions made in the calculation.

154 Even if it were assumed that the method used in Table A was inappropriate, that would not vitiate the contested decision because the second method, used in Table B, shows that the capital injection cannot be equated with State aid. Other methods confirm that the Commission adopted the contested decision on sound grounds, since they also establish that the injection did not amount to aid. ENI and EniChem submit calculations to the Court of First Instance, in which the same discounted cash flow method has been used as in Table B, but which are based on slightly different assumptions. These calculations show that the third capital injection would produce a significant return.

— The hearing on 17 March 1998

155 At the hearing on 17 March 1998 the Commission informed the Court of First Instance that there was a possibility that the document submitted in annex to its letter of 16 October 1997 was not, as then indicated, the original version of Table QI/3 which existed at the time when the contested decision was adopted. Nevertheless, that did not affect the fact that 12% was a reasonable rate for the Commission to apply in its calculations.

156 As to the merits, the Commission emphasised in particular that the reference to future cash flows made in section 4 of the contested decision must be read in the light of paragraph 35 of the Communication on public undertakings, cited above, where it is stated that cash flows may comprise 'expected future cash flows from the intended project (accruing to the investor by way of dividend payments and/or capital gains ...)'. Given that, under the liquidation alternative, EniChem's existing assets would have been lost on account of the liquidation costs, the LIT 1 950 billion at issue represented 'capital gains' within the meaning of that Communication. The private market economy investor principle also requires the LIT 1 950 billion value to be taken into account, since the capital injection enables that value to be conserved for the future, whereas under the liquidation option, it would be lost. Even though that particular component of the calculation was not expressly reproduced in the contested decision, it is settled law that there is no need to set out all the details of the reasoning adopted.

157 Also, even though no express reference was made in the contested decision to the residual value, it is normally calculated in such an analysis, as the various works cited by the parties make clear. Given that there are at least four methods of calculating residual value, the fact that the Commission has opted for one method, whereas the applicant favours another, does not mean that the Commission has committed a manifest error of assessment.

158 The Commission added that section 4 of the contested decision states that, as from 1998, the annual profits predicted in the restructuring plan should level out at an amount somewhat higher than the minimum return acceptable to a private investor. Following *ENI-Lanerossi*, cited above, the contested decision is justified on the basis of that statement alone. Other factors to be taken into account are ENI's long-term strategy, its future privatisation and group synergies. Furthermore, developments subsequent to the contested decision may be taken into account, at least in order to show that the Commission did not commit a manifest error of assessment (Case 234/84 *Belgium* v *Commission* ('*Meura*') [1986] ECR 2263, paragraph 12, and Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* ('*Bremer Vulkan*') [1996] ECR I-5151, paragraph 34).

159 Lastly, the Commission asks the Court to base its deliberations on Table A, not on Table QI/1. It states that the calculation made at the time of the contested decision is that given in Table A — where both the existing equity and the residual value are taken into account — not the calculation given in line 5 of Table QI/1.

Findings of the Court

160 In section 4 of the contested decision, the Commission stated that the third capital injection of LIT 3 000 billion did not constitute State aid within the meaning of Article 92(1) of the Treaty on the ground that it would have been undertaken by a private investor operating in a market economy.

161 The principle that a capital contribution cannot be regarded as State aid for the purposes of Article 92(1) of the Treaty if, in similar circumstances, it would have been undertaken by a private investor in a market economy constitutes, according to the case-law, an appropriate test which ensures, *inter alia*, that a capital contribution is not regarded as aid solely because it was made by the public authorities

(*Meura*, cited above, paragraphs 9 to 18; *Boussac*, cited above, paragraphs 38 and 39; Case C-142/87 *Belgium* v *Commission* ('*Tubemeuse*') [1990] ECR I-959, paragraphs 23 to 29; *Alfa Romeo*, cited above, paragraphs 17 to 24; *ENI-Lanerossi*, cited above, paragraphs 16 to 24; *Hytasa*, cited above, paragraphs 20 to 26; and *Bremer Vulkan*, cited above, paragraphs 23 to 26).

162 It follows from the Commission's conclusion concerning the third capital injection that the State aid control regime provided for in Articles 92 to 94 of the Treaty does not apply to that injection. Consequently, its compatibility with the common market was not appraised in accordance with Article 92(2) and (3) of the Treaty. In fact, such an appraisal was carried out solely in the case of the first two capital injections, which account for only LIT 1 794 billion of the total sum of LIT 4 794 billion invested.

163 In the circumstances of the present case, the Court considers it appropriate first to consider the applicant's third plea in law, which alleges that Article 93(2) of the Treaty was infringed in that the procedure provided for therein was not opened with regard to the third capital injection.

The plea in law alleging infringement of Article 93(2) of the Treaty in that the procedure provided for therein was not opened with regard to the third capital injection

164 According to established case-law, the procedure under Article 93(2) is essential whenever the Commission has serious difficulties in determining whether an aid is compatible with the common market. It follows that the Commission, when taking a decision in favour of an aid, may restrict itself to the preliminary examination under Article 93(3) only if it is able to satisfy itself after an initial examination that the aid is compatible with the Treaty. If, on the other hand, the initial review leads the Commission to the opposite conclusion or if it does not enable the Commis-

sion to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 93(2) (see, in particular, Case 84/82 *Germany* v *Commission*, cited above, paragraph 13; *Cook*, cited above, paragraph 29; *Matra*, cited above, paragraph 33; and *Sytraval and Brink's France*, cited above, paragraph 39).

165 The principle that the persons intended to benefit from the procedural guarantees afforded by Article 93(2) of the Treaty may secure compliance therewith only if they are able to challenge, in proceedings before the Community judicature, a decision not to open the procedure also applies where the Commission takes the view that the very existence of aid must be discounted (*Sytraval and Brink's France*, cited above, paragraph 47).

166 In the view of the Court, it follows from that case-law and particularly from *Sytraval and Brink's France*, cited above, that the Commission may be required to open the procedure provided for in Article 93(2) of the Treaty if an initial examination does not enable it to overcome all the difficulties raised by the question whether the measure at issue constitutes aid for the purposes of Article 92(1) of the Treaty, unless, in the course of that initial examination, the Commission is able to satisfy itself that the measure at issue would in any event be compatible with the common market, even if it were aid.

167 The situation before the Court in the present case concerns a series of three capital injections — worth, respectively, LIT 1 000 billion, LIT 794 billion and LIT 3 000 billion — made over a period of two years by the same public undertaking (ENI) to one of its subsidiaries (EniChem). According to the contested decision, the first two capital injections constitute State aid, whereas the third is classed as an investment which would have been made by a private investor.

168 It is common ground that the Commission's conclusion that a private investor would have undertaken the third capital injection is based essentially on the finding made in section 4 of the contested decision that:

'Taken from the payment of the last injection of LIT 3 000 billion over a period long enough to take the normal lifetime of this investment into account, the net present value of future cash flows just equals this investment of LIT 3 000 billion'.

169 It must be ascertained whether, in the present case, the assessments made by the Commission involved serious difficulties justifying the opening of the procedure provided for in Article 93(2) of the Treaty (*Matra*, cited above, paragraph 34). The applicant submits that the Commission encountered two such serious difficulties: (i) whether the return expected on the third capital injection should be analysed in isolation from the return on the first two, and (ii) whether the present value of future cash flows was such that a private investor would have made that injection.

170 As regards the first point, the mere fact that a public undertaking has already made capital injections into a subsidiary which are classed as 'aid' does not automatically mean that a further capital injection cannot be classed as an investment which satisfies the private market economy investor test. Nevertheless, it is the Court's view that in a case such as this, which concerns three capital injections made by the same investor over a period of two years, the first two of which brought no return, the Commission must determine whether the third injection could reasonably be severed from the first two and classed, for the purposes of the private investor test, as an independent investment.

171 The Court considers the following considerations to be relevant in making such a determination: the chronology of the capital injections in question, their purpose, and the subsidiary's situation at the time when each decision to make an injection was made.

172 As regards the chronology of the three injections, the documents before the Court disclose that:

(a) the first injection of LIT 1 000 billion was made on 1 October 1992;

(b) the second injection of LIT 794 billion was approved by ENI at a meeting on 2 December 1993 (see ENI's letter to the Italian Government of 23 December 1993 in Annex 21 to the statement in intervention lodged by ENI and EniChem) and made in December 1993;

(c) at the same meeting on 2 December 1993, ENI's Board of Directors studied a draft plan for the restructuring of EniChem, the main points of which had already been settled on 20 October 1993. That plan provided *inter alia* for 'the rebalancing of the financial structure' through 'interventions by the shareholder' (see ENI's letter to the Italian Government of 23 December 1993 in Annex 21 to the statement in intervention lodged by ENI and EniChem). It was noted that 'the details of the Plan are currently being finalised and will be available for presentation to the Commission at the beginning of 1994';

(d) the 1994-1997 restructuring plan was approved by ENI's Board of Directors on 27 January 1994. Paragraph 2.2 of that plan contains the following statement:

'the shareholders' intervention in capital account can be quantified as LIT 3 000 billion, which is an amount adequate to restore almost completely

the capital of EniChem to the amount set when the company was created (LIT 4 250 billion) but which has been reduced due to losses not covered. The implementation of the capital increase should take place in June 1994';

(e) according to the Italian Government, the Commission was informed of its intention to make the third injection in February 1994 under the terms of the Andreatta-Van Miert Agreement on the restructuring of certain Italian undertakings;

(f) the restructuring plan was submitted to DG IV of the Commission at a meeting on 15 April 1994 and formally notified by letter from the Italian Government of 18 May 1994;

(g) by letter of 6 June 1994 the Italian Government confirmed to the Commission that EniChem's restructuring plan referred not only to the injections covered by the investigation opened by letter of the Commission of 16 March 1994 but also to the third capital injection. The Italian Government also stated that its observations of 18 May 1994 referred to all the transactions concerning EniChem's capital, including the third injection;

(h) according to ENI the third injection was formally approved at a general meeting of EniChem's shareholders on 29 June 1994 and paid during the three months following the contested decision of 27 July 1994.

173 As regards the purpose of the three capital injections in question, the contested decision states that the first two injections were intended to compensate losses incurred as a result of the restructuring measures described in the decision, in particular the closure of plants and entire sites. According to ENI and EniChem, they were also designed to bring EniChem's capital up to the level initially planned in the agreement between the Ente Nazionale Idrocarburi and Montedison SpA in 1989 (paragraph 120 above). As for the third injection, it is clear from the restruc-

turing plan that it was also designed to increase EniChem's capital, eroded by losses, to the level existing at the time of its creation and to finance restructuring measures (paragraph 172(d) above).

174 According to the written pleadings of the Commission and the Italian Government, each of the three capital injections was made as part of a wide-ranging programme for the restructuring of Italian public undertakings, discussed with the Commission during the EFIM case, cited above, which culminated in the Andreatta-Van Miert Agreement. The Italian Government's general approach to EniChem's restructuring and privatisation was set out in two documents published by the Italian authorities in November 1992 and April 1993. In that context, the Commission explained to the Court that the restructuring measures financed by the first two capital injections followed a coherent direction, finally expressed in detail in the restructuring plan submitted to the Commission in 1994 which set out the restructuring measures still necessary to reduce or redirect EniChem's activities. The third injection was foreseen precisely as part of that restructuring plan.

175 The Commission's appraisal is endorsed by the Italian Government's letter of 6 June 1994, according to which EniChem's restructuring plan and the Italian Government's observations of 18 May 1994 referred not only to the first two capital injections but also to the third.

176 Lastly, as regards EniChem's situation at the time of the three capital injections, it is clear from its annual reports that its total losses amounted to LIT 1 542 billion for the year ending 31 December 1992 and to LIT 2 677 billion for the year ending 31 December 1993. Also, according to ENI's most optimistic forecasts, the cumulated losses predicted for the four years between 1994 and 1997 amounted to LIT 2 452 billion, even after the third injection of LIT 3 000 billion and the accompanying restructuring measures (see the 'Analisi di Sensitivitá (Ipotesi Migliorative di Scenario)', prepared on 13 April 1994). It follows that EniChem's actual losses, and those predicted at the time, for the six years between 1992 and 1997 amounted to LIT 6 671 billion, even after the three injections totalling LIT 4 794 billion.

177 According to the Commission's written pleadings, the only other option open to EniChem after the first two injections was bankruptcy. The Commission states that 'at the time of the injection of LIT 3 000 billion, EniChem's shareholder, ENI, had just two choices: either to recapitalise and restructure or to leave the situation unchanged and thereby automatically let EniChem go bankrupt' (Defence, paragraph A. I.14) and that '... without the third injection and the consequent restructuring, the level of losses normally produced by the company at that time would have erased its equity capital within one or two years, and would therefore have required new injections to be made or, in the alternative, the company to go into liquidation' (Rejoinder, paragraph D.15).

178 It follows that:

— ENI's Board of Directors decided to make each of the three capital injections during a relatively short period between October 1992 and July 1994. In particular, it should be noted that its decision in December 1993 to make the second injection and its decision on 27 January 1994 to authorise the third injection in the course of approving the restructuring plan were closely related in time;

— each of the three capital injections was part of an ongoing programme for EniChem's restructuring and primarily for the closure or redirection of certain of its activities and for restoring its capital base after erosion by losses. As the Commission contended before the Court, the third injection was no more than the next logical step after the measures already financed by the first two injections and the restructuring plan approved on 27 January 1994 merely finalised the outstanding requirements in relation to a restructuring programme begun in 1992. Similarly, according to the letter of 6 June 1994 from the Italian Government, ENI's shareholder, the restructuring plan and its observations of 18 May 1994 concerned not only the first two injections but also the third;

— after the first two capital injections, EniChem was still making significant losses. According to the Commission, it was not even capable of surviving on the market on the basis of the first two injections alone and, without the third injection, its liquidation was inevitable (paragraph 177 above).

179 The Court concludes from this that at the time there were serious grounds for believing that the three injections in question, albeit made on different dates in the course of a relatively short space of time (between October 1992 and October 1994), had to be considered as, in reality, a series of related capital contributions, granted as part of a continuing restructuring process begun in 1992, the common purpose of which was to finance the restructuring measures necessary and to restore EniChem's capital base which had been eroded by losses. Similarly, the circumstances referred to above should have raised doubts as to whether it was only by means of that series of injections, viewed as a whole, that the restructuring plan had a chance of restoring EniChem's viability.

180 In the particular circumstances of this case, the Court holds that the Commission should have had doubts as to the question whether the third injection was sufficiently distinct from the first two injections that it could be analysed in isolation from them. Accordingly, the Commission was not in a position to assess whether ENI's decision to make the third injection could be regarded as a decision which would have been taken by a private investor operating in a market economy.

181 Next, as regards the question whether, even supposing that the third injection could be separately assessed, the present value of future cash flows was such that a private investor would have made that injection, the Court points out first of all that the Commission annexed to its observations of 30 June 1997 a calculation of the present value of EniChem's future cash flows. That calculation is presented in Table QI/1, dated 1 July 1994. EniChem's cumulated profits (or losses) for the period between August 1994 and 2005, discounted at a rate of 12%, are shown in line 4 of Table QI/1 as minus LIT 34 billion. According to the Commission's observations, the net present value of EniChem's cash flows is shown in line 5 of Table QI/1 ('Cumulated equity value') as LIT 2 966 billion. This interpretation of Table QI/1 was confirmed at the hearing on 23 September 1997 by Mr Spagnolli, the official responsible for its preparation.

182 In the Commission's letter of 26 September 1997 informing the Court that, despite the fact that Table QI/1 was dated 1 July 1994, it had not been prepared before the contested decision, but was Mr Spagnolli's reconstruction of the calculations which he had made at the time, the Commission stated that Table QI/1 reproduced the type of calculations which had in fact served as a basis for the contested decision. In its letter to the Court of 16 October 1997, the Commission stated *inter alia* that it 'maintain[ed] in full its submission that the methods as described to the Court in order to calculate the return on investment and the net present value of future cash flow were applied in order to arrive at the Commission decision, and that [those] methods produced the results stated in the decision and explained to the Court, including the results contained in Table QI/1 the original of which [could] no longer be found on the file. Both Mr Spagnolli and Mr Feltkamp, who were present at the oral hearing on 23 September 1997, [could] testify to [those] facts'.

183 Subsequently, in response to a fresh question from the Court of 13 October 1997, the Commission produced, in a letter of 11 November 1997, new calculations of the net present value of EniChem's future cash flows. Those calculations were in particular set out in Table A, which differs from Table QI/1 in four relevant respects.

184 First, EniChem's cumulated discounted profits (or losses) for the period between 1994 and 2005 are given in line 4 of Table A as minus LIT 3 034 billion, instead of minus LIT 34 billion as stated in line 4 of Table QI/1.

185 Secondly, in Table A that loss of LIT 3 034 billion is partially offset by calculating a residual value of LIT 1 531 billion attributable to EniChem in 2005 (see the new column 'residual value'). That calculation does not appear in Table QI/1.

186 Thirdly, EniChem's cumulated loss of minus LIT 3 034 billion during the period until 2005 is also partially offset by taking into account the value of EniChem's equity as at July 1994. The new line 6 in Table A ('Existing equity at 31/7/94') shows that that equity (LIT 1 950 billion) was taken into account in order to cancel out EniChem's losses for the years 1994 to 1996, set out in line 3 of Table QI/1 and Table A, which amount to LIT 1 514 billion. That calculation does not appear in Table QI/1, which did not assign any value to that equity (see note 5 to Table QI/1).

187 Fourthly, the calculation of the cumulated equity in line 5 of Table QI/1 which, according to the Commission's observations of 30 June 1997, represents the net present value of EniChem's future cash flows, to which section 4 of the contested decision refers, plays no role in the calculations set out in Table A.

188 Also, it is clear from the Commission's letter of 11 November 1997 and from its statements at the hearing on 17 March 1998 that it viewed the calculations set out in Table QI/1 as incorrect and that it therefore abandoned them. However, according to the explanations given in its observations of 30 June 1997, at the hearing on 23 September 1997 and in its letters of 26 September and 16 October 1997, it was those calculations that it had made at the time in order to support the conclusion reached in the contested decision regarding the attitude of a private investor.

189 As for the Commission's statement in its observations of 11 November 1997 that the contested decision was not based on the calculations set out in Table QI/1, but on those set out in Table A, the Court cannot discern in the Commission's written pleadings any trace of the approach adopted in Table A. The Court notes, in particular, that, according to Table A, the profitability of the investment depends *inter alia* on taking into account — in order to offset EniChem's losses during the period from 1994 to 1996 — the sum of LIT 1 950 billion which, according to

Table A, represents the value, at the time, of EniChem's equity. However, contrary to the approach adopted in Table A, the Commission stated in paragraphs 17 to 19 of its defence that it seemed prudent to assume for the purposes of its calculations 'that ENI's existing investment in Enichem at July 1994 was already nil'. Table QI/1 is also based on that assumption, as note 5 thereto demonstrates. Furthermore, the approach in Table A was not relied on either in the Commission's observations of 30 June 1997 or, at the hearing on 23 September 1997, by the official who had been responsible at the material time for the calculations in question.

190 It should also be noted that, according to the Commission, Table A is based solely on the 'recollections' of the officials concerned, Mr Spagnolli, Mr Feltkamp and Mr Owen. However, Table A is not consistent with Mr Spagnolli's explanations to the Court at the hearing on 23 September 1997. Moreover, the Commission had stated, in its letter of 16 October 1997, that neither Mr Feltkamp nor Mr Owen could recall the precise content of the tables used at the time of preparing the contested decision. Furthermore, at paragraph 8 of its observations of 11 November 1997, the Commission confirmed that nobody could remember the exact calculation of EniChem's residual value.

191 It follows that the Commission has not succeeded in establishing that the calculations reproduced in Table A were in fact made prior to the adoption of the contested decision, in order to support the finding that the net present value of future cash flows was such that the third capital injection would have been made by a private investor operating in a market economy. Furthermore, it is common ground that the Commission no longer relies on the figures given in Table QI/1, and that neither the calculations reproduced in Table B, nor those relied on by ENI and EniChem in the course of the proceedings, were used at the time of the adoption of the contested decision.

192 The Court is therefore unable to ascertain what calculations the Commission made at the material time in order to support its finding that a private investor would have made the third capital injection.

193 In these circumstances, the Court holds that the Commission's production, in the course of the present proceedings, of contradictory calculations, and its inability to produce the calculations which it made at the material time with a view to concluding during the preliminary examination of the third capital injection that 'the net present value of future cash flows just equals the investment of LIT 3 000 billion' and that, accordingly, the injection was one 'which would have been undertaken by a private investor in a market economy' shows that, in the present case, there were serious difficulties as to whether, like the first two capital injections, that injection constituted State aid within the meaning of Article 92(1) of the Treaty.

194 That conclusion is not invalidated by the argument put forward by ENI and EniChem that, in accordance with the case-law (*ENI-Lanerossi*, cited above, paragraph 21), the finding in the contested decision that the last injection of LIT 3 000 billion would have been undertaken by a private investor operating in a market economy may be justified, independently of its financial profitability, by special considerations peculiar to parent companies of a group investing in one of their subsidiaries. On that point suffice it to note that, as the Commission has conceded (see paragraph 107 above), it did not use those considerations as a basis for concluding in its decision that the third injection did not involve aid, bearing in mind that it had no doubts as to the profitability of that injection.

195 The same holds true of the Commission's argument at the hearing on 17 March 1998 that a private investor would have made the third injection solely on the basis of the second sentence of the third paragraph of section 4 according to which 'from 1998 profits would reach at their full level, somewhat higher than the minimum return acceptable to a private shareholder'. It should again be noted that that statement plays only a secondary role in the contested decision by comparison with the calculation to which the third sentence of the third paragraph of section 4 refers. Furthermore, that argument disregards EniChem's losses for the years 1994 to 1997, which exceed LIT 2 400 billion (see paragraph 176 above).

196 As regards the argument put forward by the Italian Republic, ENI and EniChem that, in any case, the three injections were not made by the State or through State

resources within the meaning of Article 92(1) of the Treaty, suffice it to note that the Commission did not use that argument in the contested decision. It cannot therefore be relied on in the context of a review of legality undertaken by the Court.

197 It follows from all the above observations that the Commission was not in a position at the end of an initial examination pursuant to Article 93(3) of the Treaty to overcome all the difficulties raised by the question whether the third injection constituted aid within the meaning of Article 92(1) of the Treaty.

198 The Court emphasises also that the procedure provided for in Article 93(2) of the Treaty was already under way in respect of the first two capital injections which had been classed as State aid. The serious doubts which the Commission should have had regarding the third injection bear specifically on the question whether that injection should have been assessed together with the first two for the purposes of ascertaining whether it constituted State aid or an investment which satisfies the private market economy investor test. Furthermore, the third injection (LIT 3 000 billion) involved a considerably higher amount that the first two taken together (LIT 1 794 billion), which were already under investigation.

199 It is common ground that, in the present case, the Commission never examined whether the third capital injection was compatible with the common market.

200 In view of those particular circumstances, it follows that the Commission, in closing its initial examination of the third capital injection pursuant to Article 93(3) of the Treaty, despite its inability to surmount the difficulties regarding the question whether that injection constituted State aid, and without examining whether the injection was compatible with the common market, infringed the rights of the applicant as a party concerned within the meaning of Article 93(2) of the Treaty.

201 The contested Decsion must therefore be annulled on that ground, there being no need to reach a decision on the other pleas in law and arguments adduced by the applicant.

Costs

202 Under Article 87(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(3) of those Rules, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared. In the present case, the Commission has been unsuccessful so far as concerns the third capital injection, whereas the applicant has been unsuccessful so far as concerns the first two injections. In those circumstances, it is appropriate to order the Commission to bear, in addition to its own costs, two-thirds of the applicant's costs.

203 Pursuant to Article 87(4) of the Rules of Procedure, the United Kingdom, the Italian Republic, ENI and EniChem must bear their own costs.

On those grounds,

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

hereby:

1. Annuls the Commission's decision of 27 July 1994 regarding aid which Italy has decided to grant to EniChem SpA in so far as it closes the examination under Article 93(3) of the Treaty of the capital injection of LIT 3 000 billion to which it refers;

2. **Dismisses the remainder of the application as inadmissible;**

3. **Orders the Commission to bear its own costs and to pay two-thirds of the applicant's costs, and orders the applicant to bear one-third of its own costs;**

4. **Orders the United Kingdom, the Italian Republic, ENI SpA and EniChem SpA to bear their own costs.**

Kalogeropoulos Briët García-Valdecasas

Bellamy Potocki

Delivered in open court in Luxembourg on 15 September 1998.

H. Jung A. Kalogeropoulos

Registrar President