JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
15 March 2001 *

In Case T-73/98,

Société Chimique Prayon-Rupel SA, established in Engis (Belgium), represented by B. van de Walle de Ghelcke, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by D. Triantafyllou, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

supported by

Federal Republic of Germany, represented by B. Muttelsee-Schön, acting as Agent, assisted by C. von Donat, lawyer,

intervener,

APPLICATION for annulment of the Commission's decision of 16 December 1997 to raise no objection to the grant of aid by the Federal Republic of Germany to Chemische Werke Piesteritz GmbH,

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

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

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 July 2000,

gives the following

Judgment

Facts and procedure

1 By letter of 22 January 1998, the Commission notified the German Government of its decision of 16 December 1997 (hereinafter 'the contested decision') concerning financial measures adopted in favour of Chemische Werke Piesteritz GmbH (hereinafter 'CWP'), which concluded by stating that the Commission raised no objection to the grant of aid to CWP.

2 It is apparent from the contested decision that CWP was created in 1994 for the purpose of acquiring, as part of a privatisation, the 'phosphorus-based products' operating division of Stickstoffwerke AG Wittenberg Piesteritz (hereinafter 'Stickstoffwerke'), a manufacturer of chemical products established in the former German Democratic Republic. Before its privatisation, State aid granted to Stickstoffwerke had been covered by the regime operated by the Treuhandanstalt (a public law body responsible for restructuring undertakings of the former German Democratic Republic). The privatisation was coupled with a restructuring plan and the grant of State aid (points 2.1, 2.2 and 3 of the contested decision).

3 It is stated in the contested decision that there are two processes for manufacturing phosphoric acid. In the 'wet' process, 'pure' phosphoric acid is extracted from 'basic' or 'crude' phosphoric acid by means of a chemical reaction. In the 'thermal' process employed by CWP, pure phosphoric acid is obtained by combustion of elemental phosphorus (seventh paragraph under point 2.2).

4 Between 1995 and 1996, CWP's situation worsened when deliveries of elemental phosphorus from Khazakstan, its principal source of supply, were interrupted.

The undertaking's own funds became insufficient and losses in the 1995 and 1996 financial years considerably reduced its liquidity margin. Following those difficulties, the German authorities gave CWP an extension of time in which to pay the purchase price and extended a guarantee until 31 December 1996 in order to enable CWP to develop a new restructuring plan.

5 Since crude phosphoric acid proved to be easier to obtain and cheaper to process than elemental phosphorus, CWP decided, in 1996, under the new restructuring plan, to change the raw material used and, as a consequence, also the method of production. According to the plan, one of the two furnaces that CWP had thus far been using would only be used for environmental purposes, that is, for the combustion of toxic phosphine gasses left as residue from the phosphate production process. The second furnace would be replaced by a new chemical processor, allowing CWP to implement the wet process in 1999. The major disadvantage of this process is the initial investment in infrastructure. However the Commission stated in the eighth and ninth paragraphs under point 2.2 of the contested decision that:

'... it is not a question of an entirely new installation, but simply a chemical processor, and this will mean that much of the old equipment can be used. Almost all of the peripheral equipment will therefore remain unchanged.

At the same time, this will allow the present relatively simple phosphate products to be replaced with high quality products with increased added value.'

6 The Commission points out that CWP thus intends to steer its output toward such high quality products 'so that 75% of its output will be made up of special

products for the farming and food industries, such as livestock feed, products for protecting plants and foods, and water-treatment products' (eighth and ninth paragraphs under point 2.2 of the contested decision).

7 The Commission states in the contested decision that the financial measures in favour of CWP include, in addition to the payment of DEM 5.2 million under various aid schemes previously approved by the Commission, the grant of DEM 25.5 million in new aid. That new aid comprises the State's agreement to defer until 1999 payment of the purchase price of the phosphorus division of Stickstoffwerke (DEM 6.7 million), as well as an investment grant (DEM 10.3 million) and the covering of losses by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben ('the BvS'), the entity which succeeded the Treuhandanstalt, and the *Land* Saxe-Anhalt (DEM 8.5 million) (point 3).

8 It is clear from the contested decision that, by facsimile letter of 15 April 1997, the German Government notified those measures to the Commission as restructuring aid. On 14 May and 22 July 1997 the Commission asked the German Government for additional information. The German Government's replies were received on 10 July and 2 September 1997. On 17 June 1997, the Commission received a first request for information from a direct competitor of CWP. On 28 July 1997 another direct competitor expressed concern about the situation from the point of view of competition.

9 During the procedure, the Commission found that certain aid to CWP had not been notified to it within the proper time (point 1 of the contested decision). The Commission reviewed the compatibility of the aid proposal with the common market in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12, hereinafter 'the guidelines'). It took the view that the conditions set out in the guidelines, namely the undertaking's return to viability with the help of a restructuring plan, the avoidance of undue distortions of competition, the limitation of the aid to the

strict minimum needed and the monitoring by the national authorities of the complete implementation of the restructuring plan, were satisfied (point 5 of the contested decision).

10 Thus, on 16 December 1997, the Commission took the view that the aid in question was compatible with the common market for the purposes of Article 92(3)(c) of the EC Treaty (now, after amendment, Article 87(3)(c) EC) and Article 61(3)(c) of the Agreement on the European Economic Area, and did not initiate the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC).

11 On 19 December 1997, the Commission informed the applicant of the contested decision and, by letter of 10 February 1998, undertook to send it a copy. A summary of the contested decision was published in the *Official Journal of the European Communities* of 18 February 1998 (OJ 1998 C 51, p. 7) and on 5 March 1998 the applicant received from the Commission the full text thereof.

12 It is common ground that the applicant manufactures, by means of the wet process, products that are entirely substitutable for those produced by CWP. Without lodging a formal complaint with the Commission, the applicant sent it certain information while the measures in question were in the process of being examined.

13 By application lodged at the Registry of the Court of First Instance on 5 May 1998, the applicant brought the present action. By separate document, it also asked, by way of measures of organisation of procedure, that the Commission be ordered to produce documents relating to the CWP's restructuring plan and answer several questions regarding the information at its disposal at the time when it adopted the contested decision.

14 On the same day, the applicant applied under Article 185 of the EC Treaty (now Article 242 EC) for interim measures. That application was dismissed by order of the President of the Court of First Instance of 15 July 1998 (Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II-2769).

15 By document received at the Registry of the Court of First Instance on 8 June 1998, the Federal Republic of Germany applied for leave to intervene in the present case in support of the form of order sought by the Commission.

16 By letters of 9 June and 4 December 1998 the applicant asked that certain information be omitted from documents served on the German Government on the ground that it was confidential or amounted to business secrets.

17 By order of 11 March 1999 the President of the Fifth Chamber, Extended Composition, of the Court of First Instance granted the Federal Republic of Germany leave to intervene and upheld in part the applicant's request for confidentiality to be preserved.

18 By letters received at the Registry of the Court of First Instance on 9 July and 23 August 1999, and thus within the time allowed, the parties submitted their observations on the statement in intervention lodged on 12 May 1999.

19 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure and adopted measures of organisation of procedure whereby it requested the parties

to reply to certain written questions and to produce certain documents, including the documents relating to CWP's restructuring plan which the applicant had requested on 5 May 1998. The parties complied with those requests.

20 The parties presented oral argument at the hearing on 6 July 2000 and answered the oral questions put to them by the Court.

Forms of order sought by the parties

21 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

23 The Federal Republic of Germany contends that the Court should:

— dismiss the action.

Law

24 In reply to a written question put to it by the Court, the applicant withdrew a preliminary plea alleging breach of the principle of collegiality on the adoption of the contested decision. Its action now rests on three pleas in law.

25 By its first plea, alleging infringement of Article 92(3)(c) of the Treaty, the applicant submits that the Commission did not have sufficient grounds to find the aid in question to be compatible with the common market. The plea is divided into two limbs. Under the first limb, the applicant seeks to show that the contested decision is vitiated by factual inaccuracies and manifest errors of assessment that no one with knowledge of the technical and economic characteristics of the phosphoric acid and derivative products industry could fail to notice. Under the second limb, which concerns breach of the guidelines, the applicant essentially develops two arguments. First, it submits that the measures in favour of CWP cannot be called restructuring aid in the sense contemplated by the guidelines. In the alternative, the aid does not fulfil the compatibility criteria laid down in the guidelines.

26 In the context of its first plea, the applicant raises certain technical and economic matters in order to refute the finding that the aid in question is compatible with

the common market. They include the Commission's assessment of the likelihood of CWP's returning to viability, the prevention of undue distortion of competition and the proportionality of the aid to the costs and benefits of restructuring.

27 The applicant relies upon substantially the same matters in support of its second plea, by which it alleges infringement of Article 93(2) of the Treaty. It claims that the Commission was not in possession of sufficient information and ought, therefore, to have opened the formal review procedure provided for in Article 93(2) of the Treaty, there being serious difficulties in assessing the compatibility of the aid in question with the common market.

28 By its third and final plea, the applicant alleges that the contested decision was based on inadequate reasoning.

29 It is appropriate to begin by considering the plea alleging infringement of Article 93(2) of the Treaty in the light of the arguments and evidence put forward to prove the manifest errors of assessment and factual inaccuracies alleged in the first plea.

30 The applicant submits that, given the circumstances of the case, the Commission was under an obligation to open the formal procedure provided for in Article 93(2) of the Treaty. Whilst the parties agree that the Commission must, where it is confronted by serious difficulties, initiate the formal procedure for examining notified aid, they disagree on the legal issue of the nature and extent of that criterion and, indeed, on the question whether the circumstances of the case called for that procedure to be initiated.

The criterion for initiating the formal procedure for examining aid under Article 93(2) of the Treaty

Arguments of the parties

31 The applicant submits that the Commission must initiate the formal procedure provided for in Article 93(2) of the Treaty whenever its preliminary review of the aid in question does not enable it to surmount all the difficulties of determining that aid's compatibility with the common market. It is only exceptionally, when it is presented with an aid proposal that is, on first sight, manifestly compatible with the common market, that the Commission may simply adopt a decision during the preliminary stage of the procedure for reviewing aid. The applicant refers to paragraph 15 of the Opinion of Advocate General Tesauro in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487 and submits that the case-law referred to therein merely amounts to the specific expression of generally applicable principles.

32 The question whether doubts as to the aid's compatibility with the common market are serious must be assessed on the basis of objective factors including, in particular, the duration of the review, the frequency of consultation with the State granting the aid and the information available to the Commission. Whilst the Commission does enjoy a broad discretion in conducting its initial review, it did encounter serious difficulties, according to the applicant, and ought therefore to have initiated the formal review procedure. Whether or not there actually were serious difficulties is a matter for the Court's review and any such review will go beyond ascertaining whether there has been a manifest error of assessment.

33 The Commission contends that the preliminary review procedure enables it to form an initial assessment of the aid in question so that it can establish whether there are any difficulties that call for the initiation of the formal procedure under

Article 93(2) of the Treaty. If notified aid is neither manifestly compatible nor manifestly incompatible with the common market, the Commission will find it necessary to consider whether or not the difficulties encountered are serious. Because of its experience, it will be in a position to surmount certain such difficulties without having recourse to the *inter partes* procedure.

34 It has been implicitly acknowledged in the case-law of the Court of Justice, for example in Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 39, that the Commission enjoys a certain discretion during the preliminary review and, in view of the frequent lacunae in notifications by Member States, may consult third parties in order to obtain more complete information. In this connection, the Commission points out that the Court of Justice has not wholly followed the Opinions of Advocate General Sir Gordon Slynn and Advocate General Tesauro in Case 84/82 *Germany* v *Commission* [1984] ECR 1451, 1492 and *Cook* v *Commission*, cited above (ECR I-2502), respectively. They were more inclined to make the initiation of the procedure under Article 93(2) of the Treaty to some degree automatic. The Court thus sought to preserve a degree of freedom on the part of the Commission in determining whether or not the difficulties it encounters are serious and has accepted that information sent to the Commission may be 'corrected and supplemented' 'on several occasions' (see Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 27 and 28).

35 According to the Commission, the principles of sound administration and economy of procedure require that it should enjoy a degree of latitude in its management of the preliminary procedure. It submits that it is entitled to dispense with the *inter partes* procedure where it appears to be disproportionate to the difficulties encountered or the consequences, for the beneficiary of the aid in question, of suspending the aid's implementation without good cause. The Commission is entitled to a degree of flexibility in its management of the preliminary procedure, in accordance with the law, where there are no difficulties that make the aid prima facie incompatible with the common market. The Court of First Instance confirmed that approach in the particular context of aid granted in tranches (see Case T-140/95 *Ryanair* v *Commission* [1998] ECR II-3327). In the present case, the difficulties encountered during the preliminary procedure, to which the applicant refers, were not sufficiently serious to warrant initiating the formal procedure.

36 As to the remainder, the Commission points out that it is under no obligation to conduct an exchange of views and arguments with a complainant nor to examine objections which a complainant would certainly have raised had it been given the opportunity of taking cognisance of the information obtained by the Commission in the course of its investigation (see *Commission* v *Sytraval and Brink's France*, cited above, paragraphs 58 to 60).

37 According to the Federal Republic of Germany, the aid in question is indisputably compatible with the common market. There was no justification for commencing a formal investigation procedure, because it would necessarily have led to the same conclusions as those stated in the contested decision. The Community's interest in the restructuring of CWP militates against the commencement of a formal procedure on the basis of statements made by a competitor when it is clear from the terms of the notification that the aid does not present a significant threat to competition or trade. The rights of competitors do not extend to allowing them to take cognisance of, or to make submissions on, the technical details of a restructuring proposal. That information amounts to business secrets worthy of protection.

38 In the interests of procedural economy, the formal investigation procedure should be reserved to matters where the Commission justifiably harbours doubts. The Federal Republic of Germany emphasises that it was informed by the Commission that the Community's review of State aid should not stand in the way of the 15 000 privatisations undertaken under the regime operated by the Treuhandanstalt.

Findings of the Court

39 It is appropriate to recall the general rules of the system for monitoring State aid established by the Treaty, as identified by case-law (see *Commission* v *Sytraval and Brink's France*, cited above, paragraphs 33 to 39, Case T-95/96 *Gestevisión*

Telecinco v *Commission* [1998] ECR II-3407, paragraphs 49 to 53, and Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraphs 164 to 166).

40 Article 93 of the Treaty provides for a special procedure of constant review and supervision of State aid by the Commission. In relation to new aid which Member States intend to institute, there is a procedure without which no aid can be considered properly granted and the Commission must be informed of any plans to grant or alter aid prior to their being put into effect. The Commission then conducts an initial review of the planned aid. If at the end of that review it regards an aid proposal as being incompatible with the common market, it must without delay initiate the procedure under the first paragraph of Article 93(2) of the Treaty, which provides that '[i]f, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission'. The Commission has exclusive jurisdiction to find that aid is incompatible with the common market (see Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraphs 9 and 10).

41 A distinction must therefore be drawn between, on the one hand, the preliminary procedure for investigating aid, instituted under Article 93(3) of the Treaty, whose sole aim is to enable the Commission to form an initial view of the compatibility, in part or in whole, of the aid in question and, on the other hand, the formal investigation procedure referred to in Article 93(2) of the Treaty. The latter procedure makes a thoroughgoing investigation of State aid possible and serves a dual purpose: it is intended both to protect the rights of potentially interested third parties and to enable the Commission to be fully informed of all of the facts of the case before adopting its decision (see *Germany* v *Commission*, cited above, paragraph 13). Thus, the formal procedure entails a duty to give notice to interested third parties so that they may submit their comments on the measures under review. It enables third parties and Member States to express their point of view regarding measures that impinge upon their interests and enables the Commission to gather all the points of fact and law that are

indispensable for evaluating such measures. Third parties thus have a right to be informed of the procedure and to participate in it, albeit that that right may be restricted in accordance with the circumstances of the case (see Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraphs 58 to 64).

42 According to settled case-law, the procedure under Article 93(2) of the Treaty is obligatory if the Commission experiences serious difficulties in establishing whether or not aid is compatible with the common market. The Commission cannot therefore limit itself to the preliminary procedure under Article 93(3) of the Treaty and take a favourable decision on a State measure which has been notified unless it is in a position to reach the firm view, following an initial investigation, that the measure cannot be classified as aid within the meaning of Article 92(1) of the Treaty or that the measure, whilst constituting aid, is compatible with the common market. On the other hand, if the initial analysis results in the Commission taking the contrary view of the aid's compatibility with the common market or does not enable all the difficulties raised by the assessment of the measure in question to be overcome, the Commission has a duty to gather all necessary views and to that end to initiate the procedure under Article 93(2) (see the judgments of the Court of Justice in *Germany* v *Commission*, cited above, at paragraph 13, *Cook* v *Commission*, cited above, at paragraph 29, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, at paragraph 33; see also the judgment of the Court of First Instance in Case T-49/93 *SIDE* V *Commission* [1995] ECR II-2501, at paragraph 58).

43 It is for the Commission to decide, on the basis of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the aid require the initiation of that procedure (see *Cook* v *Commission*, cited above, paragraph 30). That decision must satisfy three requirements.

44 Firstly, under Article 93 of the Treaty the Commission's power to find aid to be compatible with the common market upon the conclusion of the preliminary procedure is restricted to aid measures that raise no serious difficulties. That

criterion is thus an exclusive one. The Commission may not, therefore, decline to initiate the formal investigation procedure in reliance upon other circumstances, such as third party interests, considerations of economy of procedure or any other ground of administrative convenience.

45 Secondly, where it encounters serious difficulties, the Commission must initiate the formal procedure, having no discretion in this regard. Whilst its powers are circumscribed as far as initiating the formal procedure is concerned, the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties. In accordance with the objective of Article 93(3) of the Treaty and its duty of good administration, the Commission may, amongst other things, engage in talks with the notifying State or with third parties in an endeavour to overcome, during the preliminary procedure, any difficulties encountered.

46 In this connection, it must be observed that, contrary to the Commission's apparent argument, the discretion in the management of the procedure under Article 93 to which the Court of First Instance referred in *Ryanair* v *Commission* has no bearing on the present case. In that case, the Court of First Instance considered the question of which procedure should be followed by the Commission when, pursuant to Article 92(3)(c) of the Treaty and on the conclusion of the formal procedure, it approves, subject to certain conditions, State aid payable in tranches and it subsequently transpires that one of those conditions has not been fulfilled (see *Ryanair* v *Commission*, cited above, paragraph 85). It was in that specific context that the Court of First Instance held that the Commission enjoyed 'a power to manage and monitor the implementation of such aid in order, in particular, to enable it to deal with developments which could not have been foreseen when the initial decision was adopted'. Whilst the Commission may, pursuant to that power to manage and monitor, vary the conditions governing the implementation of State aid without re-opening the formal procedure, the Court of First Instance took pains to point out that such power may only be exercised subject to the condition that 'such variations do not give rise to doubts as to the compatibility of the aid at issue with the

common market' (see *Ryanair* v *Commission*, cited above, paragraph 89). The Court, applying that principle, examined, at paragraphs 98 to 135 of its judgment in *Ryanair* v *Commission*, whether the considerations upon which the decision at issue rested indicated difficulties such as to warrant re-opening the formal procedure.

47 Thirdly, the notion of serious difficulties is an objective one. Whether or not such difficulties exist requires investigation of both the circumstances under which the contested measure was adopted and its content. That investigation must be conducted 'objectively..., comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aids with the common market' (*SIDE* v *Commission*, cited above, paragraph 60). It follows that judicial review by the Court of First Instance of the existence of serious difficulties will, by nature, go beyond simple consideration of whether or not there has been a manifest error of assessment (see, to that effect, *Cook* v *Commission*, cited above, paragraphs 31 to 38, *Matra* v *Commission*, cited above, paragraphs 34 to 39, *SIDE* v *Commission*, cited above, paragraphs 60 to 75, *BP Chemicals* v *Commission*, cited above, paragraphs 164 to 200 and *Ryanair* v *Commission*, cited above, paragraphs 98 to 135).

48 The Commission submits that, whilst the present matter did raise difficulties, they were not serious ones. It thus puts in issue the merits of its assessment of the legal characterisation of those difficulties. To approach the criterion of serious difficulties subjectively in that way amounts to imposing upon the applicant a burden of proof equivalent to that required in order to prove that there was a manifest error of assessment as regards the legal characterisation of the difficulties encountered. Such an interpretation runs counter to Article 93(3) of the Treaty and would deprive interested third parties of the procedural guarantees given to them by Article 93(2) of the Treaty.

49 The applicant bears the burden of proving the existence of serious difficulties and may discharge that burden of proof by reference to a body of consistent evidence. In the context of an action for annulment under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the

time when the measure was adopted (see Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, and *British Airways and Others* v *Commission*, cited above, paragraph 81) and cannot depend on retrospective considerations of its efficacy (see Case 40/72 *Schroeder* v *Germany* [1973] ECR 125, paragraph 14).

50 Thus, it is appropriate to take into consideration information in the Commission's possession or available to it at the time when it adopted the contested decision, and in particular information in the public domain that was without doubt available to the Commission at that time, such as information on the physical and chemical properties of phosphoric acid and its derivatives, and on the industrial processes by which they are produced.

51 Those are the principles that must be borne in mind when considering the claims and arguments of the parties and determining whether, in the present case, assessment of the aid in question presented serious difficulties such as to oblige the Commission to initiate the procedure under Article 93(2) of the Treaty.

The existence of serious difficulties

52 In seeking to prove the existence of serious difficulties, the applicant argues, first of all, that the Commission did not possess sufficient information to enable it to reach an informed decision on the compatibility of the aid in question with the common market. Secondly, it alleges that the duration and circumstances of the preliminary procedure indicate the existence of such difficulties.

The adequacy of the Commission's information

Arguments of the parties

53 The applicant alleges that the Commission was not in possession of the necessary information to enable it to appraise the supply difficulties, the feasibility of the technical measures proposed, CWP's production capacity and the size of the relevant market and that, as a result, the Commission erred in its conclusions as to the compatibility of the aid in question with the common market.

54 The applicant begins by recounting the general characteristics of phosphoric acid production and phosphoric acid derivatives production and points out a number of errors or terminological inaccuracies in the contested decision and in Commission memoranda. It then claims, first of all, that, because it was poorly informed about the products in question, their method of production and their respective markets, the Commission wrongly accepted the German authorities' submission that the difficulties of obtaining a supply of raw materials justified the grant of new aid to CWP. The applicant expresses doubt as to the severity of those supply difficulties, elemental phosphorus being a raw material that is abundantly available on the international market. It maintains that the problems encountered by CWP between 1994 and 1996 arose from strategic errors in its choice of principal supplier of elemental phosphorus, namely the company Fosfor, established in Khazakstan. Furthermore, the applicant alleges that the cash-flow difficulties suffered by CWP are in reality due to the fact that, because of its high credit risk rating, its suppliers demanded that it pay for purchases on dispatch.

55 Secondly, the applicant disputes the technical and economic feasibility of the change in production methods intended to ensure the undertaking's return to viability. The change from the 'thermal' process to the 'wet' process could not,

contrary to what the Commission seems to have believed (see the eighth paragraph under point 2.2 of the contested decision), be made by simply installing a chemical processor costing DEM 10 million. According to the applicant's estimate, a plant with an annual capacity of 20 000 tonnes P_2O_5, as described in the contested decision, costs between DEM 24 million and DEM 42 million. With an investment of DEM 10 million it would only be possible to contemplate the construction of a single stage phosphoric acid production unit, which would mean a poor rate of extraction. Such a plant would generate a great quantity of waste matter of which the treatment alone would cost more than the DEM 10 million in investment aid.

56 If CWP really means to abandon its present method of production in favour of the wet process, the investment financed by the aid at issue is, in the applicant's submission, unlikely to improve the quality of its output or to increase its profitability. If CWP equips itself with a rudimentary plant that enables the wet process to be employed and is intended to operate in parallel with its existing thermal plant, the aid at issue would then serve to remedy a commercial problem and enable CWP to diversify its procurement of supplies and its production. If that is the case, the measure at issue constitutes operating aid, which is prohibited by Article 92(1) of the Treaty.

57 Thirdly, the applicant refutes the Commission's argument that CWP's production capacity will be reduced once its restructuring is complete. The Commission accepted that proposition on the basis of a reference value that is questionable, not to say incorrect. The Commission in fact compared CWP's production capacity after restructuring to that of Stickstoffwerke in 1990. As regards the present capacity, estimated at 40 000 tonnes, the applicant states that it noted, in 1996, that only one of CWP's two furnaces was in operation. Moreover, according to the applicant, it cannot be accepted that, after switching to the wet process, CWP will be able to reserve one of its furnaces for environmental uses. The applicant infers from this that CWP will continue to operate the furnace in question to produce acid by means of the thermal process and in fact is seeking to add to its existing thermal plants a structure enabling acid to be produced using the wet process.

58 Fourthly, the applicant refutes the Commission's analysis of the market and states that there is no single 'phosphates market'. Instead there are separate markets for phosphoric acid and for its derivatives. Those markets are characterised by fierce competition and excess capacity. For some years, CWP has been engaging in aggressive practices that have had a substantial effect on competition. In 1997, the applicant's sales fell by 49% in Germany, as compared with the 1995 and 1996 financial years, the price per tonne of purified phosphoric acid (75%) falling from DEM 810 to DEM 765 between the third quarter of 1997 and the first quarter of 1998. The applicant submits that the aid will serve to support loss-making activity, will entail an increase in CWP's production capacity and will enable it to continue to sell its products on the market at low prices.

59 The Commission does not dispute the merits of the applicant's technical observations but argues that such subtleties in no way call into question the substance of the contested decision. Indeed, the aid in question merely constitutes an amendment to the restructuring plan that accompanied the 1994 privatisation aimed at remedying the supply problems of 1995 and 1996, in the context of a programme designed to improve CWP's position in a lasting manner.

60 The Commission submits, first of all, that the arguments made against the feasibility of CWP producing phosphoric acid using the wet process are irrelevant because they concern measures that are an integral part of a restructuring plan that is capable of ensuring the undertaking's return to viability. The Commission thus asserts that it made a global assessment of the restructuring plan in order to verify its coherence as a whole. As regards the merits of those arguments and the advisability of switching to the wet process, the Commission submits that it merely accepted what was obvious: it had become difficult for CWP to obtain a supply of raw materials. In addition to the problem of distance, political risks too are posed by the exporting and transit countries and there are certain well-known technical problems. Confronted with serious difficulties in obtaining supplies from Fosfor, CWP was constrained to find new suppliers, outside China and Khazakstan. That being so, the search for independent, reliable sources of supply

was, according to the Commission, a legitimate objective for CWP. The restructuring plan is responsive to that objective because there is an abundant supply of crude phosphoric acid and the profitability of the new plant has been attested and confirmed by independent experts.

61 Next, the Commission denies the existence of any causal link between CWP's changeover to the wet process and the reorientation of its output. Distinct but complementary, those two key measures enable CWP to remain active in the phosphoric acid market whilst at the same time increasing the share of its turnover derived from phosphatic salts. Given that the choice of a new raw material and the reorientation of its output are both necessary to ensure CWP's return to viability, it matters little whether the reorientation of its output is dependent on the new procedure or independent of it.

62 Lastly, the Commission states that the purpose of analysing the market and production capacities is to establish whether there is any structural excess capacity in the relevant market. If there is, aid for restructuring must then normally be linked to a contribution from the beneficiary to the restructuring of the sector, consisting in a reduction in production capacity. The Commission reached the conclusion that there was excess capacity in the market and consequently proceeded on the basis most favourable to CWP's competitors. Nevertheless, according to the guidelines, the Commission may be less strict in assessing reductions in capacity where the beneficiary of aid is a small or medium-sized undertaking or where it is established in an area referred to in Article 92(3)(a) of the Treaty, or where such reduction in capacity would entail a risk of altering the structure of the market concerned. All three of those circumstances obtain in the present case.

63 The Federal Republic of Germany states that, under the 1994 restructuring plan, Fosfor had undertaken to supply CWP with elemental phosphorus at a very

advantageous price and to invest capital of DEM 1.6 million in CWP. Fosfor failed to honour those undertakings and, after discovering that no supplier could offer terms comparable to those promised by Fosfor, CWP found itself constrained to obtain supplies from the market at substantially higher prices than those envisaged at the time of its privatisation. In addition, due to an anti-dumping action, CWP's supply of elemental phosphorus from China also appeared to be under threat.

64 Those were the circumstances in which CWP decided, in 1996, to adopt the wet manufacturing process. The 1996 restructuring plan guarantees CWP a reliable supply of raw materials, at an advantageous price, and a profitable production of phosphoric acid, the cost price of which is reduced from DEM 1 460 to DEM 900 per tonne of P_2O_5.

65 The contested decision rests upon verified facts which were, in all essential respects, correctly summarised in it. In so far as the applicant criticises certain inaccuracies in the description of the technical aspects of the restructuring plan, the Federal Republic of Germany submits that the contested decision does not rest on such details and that they have no bearing on its validity. The Commission cannot be required to incorporate into a decision in a State aid matter technical details that amount to business secrets.

66 The German Government submits that the interests of the applicant must be weighed not only against those of CWP, but also against the interest of the Federal Republic of Germany and of the whole Community in completing the integration of the new *Länder*, something which requires the financial intervention of the public authorities. The long-term market prospects for phosphorus derivatives are so favourable, in particular in the food sector, that CWP can be,

and deserves to be, restored to health. In order to complete its restructuring, CWP needs sufficient own funds and a reliable supply of raw materials.

67 The German Government submits that, taking into account the increase in supply and demand in the new *Länder*, the increase in the production capacity of Community producers and competition with producers from non-member countries, CWP's restructuring would not appear to have any adverse effect upon Community industry. Indeed, the applicant has not succeeded in proving any causal link between the aid granted to CWP and the loss of market share that it claims to have suffered. Such a link is impossible: with a 5% share of the market in Germany, CWP could not be the cause of the fall in prices after 1990. Given that the restructuring plan did not provide for any increase in capacity, neither CWP's conduct nor its privatisation in 1994 pose any risk for the phosphoric acid and derivative products markets.

68 The German Government adds that it sent to the Commission information that demonstrated the feasibility of the restructuring project. DLM, a firm of consultants, estimated the cost of the investment required for the changeover to the wet process at DEM 6.2 million, which figure has been confirmed by the tenders received by CWP from constructors. The profitability of the plant using the wet process was subsequently confirmed by DLM whose two reports were sent, in the form of extracts, by the German Government to the Commission. Furthermore, the applicant cannot be affected by changes made to CWP's production methods.

69 The market for the products in question has long been dominated by a small circle of producers comprising seven major European producers, including the applicant. Very recently, certain producers, including the applicant, have increased their production capacity by building new production units. That phenomenon, coupled with the arrival on the market of new operators established in central Europe, has led to an intensification of competition and at times spectacular price increases.

Findings of the Court

70 In order to be declared compatible with Article 92(3)(c) of the Treaty, aid to undertakings in difficulty must be linked to a restructuring programme designed to reduce or redirect their activities (see Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 67). Thus the guidelines state, at point 2.1, that 'restructuring... is part of a feasible, coherent and far-reaching plan to restore a firm's long-term viability'.

71 In order for the Commission to be able to adopt a decision to raise no objection to a proposed grant of aid without initiating the formal investigation procedure, it must be in a position to assess, in accordance with point 3.2.2 of the guidelines, the ability of the restructuring plan to restore the long-term viability of the undertaking concerned within a reasonable period of time and on the basis of realistic assumptions as to its future operating conditions. Admittedly, in the case of small and medium-sized undertakings, or undertakings established in assisted areas, the possibility of relaxing certain criteria is expressly envisaged (points 3.2.3 and 3.2.4 of the guidelines), in particular, the requirement for reducing capacity where the market concerned shows structural excess capacity. Nevertheless, contrary to the Commission's apparent argument, that possibility, which amounts to an exception, does not call into question the primary requirement that there be a coherent and realistic restructuring plan enabling the undertaking to be restored to viability.

72 According to the contested decision, CWP's problems in obtaining a supply of elemental phosphorus led to a deterioration in its financial position. That is why the cornerstone of the restructuring plan financed by the German authorities is the acquisition of a piece of equipment — the 'chemical processor' — designed to enable CWP to switch irreversibly from the so-called 'thermal' method of producing phosphoric acid to the so-called 'wet' process. That changeover must, according to the contested decision, enable CWP, upstream, to cease to be

dependent on its supply of elemental phosphorus and, downstream, to broaden the range of phosphorus derived products it offers.

73 Thus, according to the contested decision, the restructuring plan rests essentially on measures of a technical nature. Consequently, the allegations relating to the difficulty of assessing the contribution of those measures to restoring the undertaking to viability are relevant because they seek to show that the Commission was not in possession of sufficient information to enable it to reach a decision on the compatibility of the aid in question with the common market without initiating the formal procedure for examining the aid.

74 It must be observed that the description of the restructuring measures envisaged by CWP that is given in the contested decision is not consistent with the terms of the restructuring plan itself. On being questioned about this by the Court of First Instance, the Commission produced to the Court two documents drafted by directors of CWP which, according to the Commission, constitute the undertaking's restructuring plan.

75 The first document, dated 29 May 1996 and headed 'A new concept for continuing the business of CWP, the company that acquired the "phosphorus derivatives" division of Stickstoffwerke AG Wittenberg', gives an account of CWP's restructuring strategy. There are essentially two goals: firstly, to broaden the raw materials base and, secondly, to extend the undertaking's sphere of activity (page 1 of the 29 May 1996 document). Thus, in that document, the production of table quality phosphatic salts and the addition of a new production plant that makes use of the wet production method are contemplated as the end result of a programme of investment.

76 However, there is no mention in that document of the thermal production process being abandoned. On the contrary, there is the expectation that CWP will profit

from its privileged position in the elemental phosphorus market, it being the only undertaking in the Community, other than Thermphos in the Netherlands, to possess an elemental phosphorus treatment plant. The plan provides for the parallel installation of two production systems, one based on elemental phosphorus and the thermal process, the other based on crude phosphorus and the wet process. Seven measures are defined in the plan in order to 'take advantage of the opportunities offered by the markets using existing technical equipment'. The measures are the following:

'1. The production of high quality phosphoric acid from elemental phosphorus.

2. The production of phosphorus derivatives that can only be manufactured from elemental phosphorus, those being products such as phosphorus pentoxide, phosphoric acid, hypophosphorous acid and hypophosphites.

3. The production of purified phosphorus for use in applications with stringent requirements in terms of chemicals, and trade in elemental phosphorus imported from Khazakstan and China in competition with the only European producers.

4. The production of phosphates from phosphoric acid using the thermal process to the strictest quality standards. Broadening the range by introducing products with significant added value (special food industry products).

5. The production of technical quality phosphates from purchased phosphoric acid using the wet process.

6. The manufacture of products other than phosphorus and phosphoric acid, using the existing technical equipment.

7. The treatment of residual acids, the recovery of chemical raw materials from the production residues using resources available within the undertaking.' (Page 4 of the 29 May 1996 document.)

77 It is apparent from the second document, headed 'Proposal for the long-term survival of CWP and financing and investment plan', that CWP's financial backers refused to underwrite the whole of the investment programme initially proposed to support those measures. That is why, in that second document, CWP defined its priority investments and the manner in which they would be financed, albeit without calling into question the strategy previously developed. Among the priority investments is the alteration of the existing plant and equipment to enable phosphoric acid to be transformed into phosphatic salts. As regards the acquisition of a production plant employing the wet process, the document states that 'the other calculations relating to the proposed extraction plant have not met with a positive result'. It is apparent from the second document, dated 16 October 1996, that abandoning the thermal process is not envisaged.

78 Thus, there is a clear contradiction between the content of those documents and the contested decision, according to which CWP meant to abandon the use of elemental phosphorus and the thermal process as a result of the acquisition of a 'chemical processor' which would enable it both to resolve its supply difficulties and to increase its product range. A contradiction of that kind at least leads to the

conclusion that, at the time when it adopted the contested decision, the Commission did not have sufficient information to enable it to form the view that the issue of whether or not the restructuring plant could return CWP to viability was one that did not raise serious difficulties.

79 That conclusion is borne out, moreover, by other evidence put forward by the applicant in support of its criticisms of the Commission's evaluation of the technical measures designed to make CWP's restructuring possible. Amongst other things, the applicant in fact produced an experts' report, dated 21 September 1998, by Mr Leenaerts, professor of the faculty of applied science of the Catholic University of Louvain. On reading that report, it is clear that the change in the production process, as described by the Commission, is regarded by a specialist in the phosphoric acid industry as manifestly unfeasible.

80 Indeed, paragraph 3.2 of that report states that '[t]he process for producing purified phosphoric acid that is based on the combustion of phosphorus is fundamentally different from the wet process that employs crude phosphoric acid and involves liquid-to-liquid extraction. The differences, in conceptual terms and as regards construction, between the two types of unit of production mean that simply substituting a "chemical processor" will not enable a changeover from one process to the other.... Clearly, there is no intermediate solution or one which combines a thermal plant and a phosphoric purification plant employing the wet process'. The first paragraph of the report states that 'inasmuch as the project described by the Commission in paragraph 42 of its memorandum makes no mention of pre- and post-treatment stages, it is obvious that the proposed plant is not suited to producing purified phosphoric acid of table quality'. As far as the profitability of the plant is concerned, Mr Leenaerts expresses the opinion, in the second paragraph of the report, that 'in the CWP project, the stated capacity of 20 000 tonnes P_2O_5 per annum clearly falls short of the threshold of competitiveness and profitability'. Lastly, in the fourth paragraph Mr Leenaerts categorically dismisses the possibility of CWP using one of its furnaces for the combustion of waste matter from a plant producing phosphoric acid by means of the wet process. It must be admitted that that report substantiates, most convincingly, the applicant's arguments.

81 The Commission submits, essentially, that it acted with all due diligence. In this connection, it takes refuge behind two documents sent by the Federal Republic of Germany which, it alleges, enabled it to dispel any doubts it might have entertained about the aid proposal. One is an opinion dated 21 October 1997 from the firm of management consultants Roland Berger. The extract of that document placed before the Court is a mere diagnosis of the undertaking and a statement of potential restructuring measures. The author recommends changing the method of production and gives an outline of how CWP's activities might be restructured. However, he does no more than sketch out the strategic options and fails to examine the technical feasibility or the cost of the measures considered. Given the document's lack of specificity, the Commission cannot pretend that it enabled it to draw the conclusion that the restructuring plan would enable CWP to be restored to viability.

82 Next, the Commission refers to a report from the firm DLM which, whilst not mentioned in the contested decision, contains, according to the Commission, all the information relating to the feasibility and cost of changing the method of production. The extract of that report placed before the Court consists in a summary table of the costs of producing phosphoric acid by means of the wet process. It does not, however, contain any information regarding the feasibility of the change in the production process evaluated in the contested decision, and as a result it does not counter the evidence put forward by the applicant of serious difficulties in determining the ability of the restructuring plan to restore CWP to viability.

83 Lastly, during the hearing, the Commission stated that the chemical processor referred to in the contested decision had been perfected and was to be patented by the company Vopelius Chemie, and that its technical specification was protected by industrial secrecy. Thus, according to the Commission, the applicant is not in a position to dispute the credibility of the CWP project because it is ignorant of the technology on which it is based. Furthermore, both the Commission and the intervener take the view that the applicant cannot, by means of technical arguments, compel CWP to reveal industrial secrets.

84 That reasoning cannot prevail. The Commission has merely made a general and abstract reference to the confidential nature of the information that is helpful to its defence without, however, supporting its allegations with any concrete evidence of a kind likely to call into question the probative value of the evidence put forward by the applicant. Admittedly, the Commission is required, under Article 214 of the EC Treaty (now Article 287 EC), not to disclose to third parties information of the kind covered by the duty of professional secrecy, in particular information relating to the internal operations or technology of an undertaking receiving State aid. Nevertheless, in the present case, the Commission cannot rely on the fact that it has a duty to preserve professional secrecy to such an extent as to deprive of their substance the rules relating to the burden of proof, to the detriment of the rights of defence of interested parties. In so far as the Commission wished to argue the confidentiality of the technological information used in connection with restructuring CWP, it was incumbent upon it to state the reasons for such confidentiality so that the Court might review them.

85 Given the foregoing, it must be held that, on completion of its preliminary examination, the Commission was not in a position to surmount the difficulties of assessing the feasibility of the restructuring measures at issue, as it was not in possession of coherent and sufficiently detailed information.

The evidence of serious difficulty that may be inferred from the length of time taken by, and the particular circumstances of, the preliminary procedure

Arguments of the parties

86 The applicant submits that, in determining whether or not there has been serious difficulty, the Community judicature must have special regard to the period of

time intervening between the notification of an aid proposal and the adoption by the Commission of its decision. That period should be no longer than the time normally required for a preliminary examination to be carried out pursuant to Article 93(3) of the Treaty (see *Germany* v *Commission*, cited above). The applicant submits that, since the judgment of the Court of Justice in Case 120/73 *Lorenz* [1973] ECR 1471, the obligation to suspend the operation of proposed aid measures cannot, in principle, exceed two months, which means that the Commission must complete the preliminary examination procedure within that period of time. In the present case, eight months elapsed between the notification and the contested decision. This demonstrates that it was not clear, at first sight, that the aid in question was compatible with the common market.

87 Furthermore, the consultations between the Commission and the German authorities indicate that there were difficulties which needed to be examined in the context of the formal procedure. Indeed, any step taken by the Commission other than a simple request for clarification of a notified aid proposal must, according to the applicant, entail the commencement of the procedure under Article 93(2) of the Treaty (see *Matra* v *Commission*, cited above, paragraph 38). In the present case, the Commission and the German Government were repeatedly in contact, and the exchanges with the German Government subsequent to the meeting between the applicant and the Commission amount to more than a simple request for clarification. Those exchanges were occasioned in part by the concerns expressed by competitors, including the applicant. Given that the Commission needed to seek assurances and guarantees from the German Government during the weeks immediately preceding adoption of the contested decision, it cannot be said that it was clear, at first sight, that the aid proposal was compatible with the common market. To allow the Commission repeatedly to consult the national authorities concerned without commencing the procedure under Article 93(2) of the Treaty would amount to letting it take advantage of the lack of transparency during the preliminary procedure in order to resolve significant difficulties that warrant an exchange of views and arguments with third parties.

88 The Commission emphasises that the time allowed for reflection mentioned in *Lorenz* begins to run once all the information necessary for adopting a decision has been gathered. In the present case, the Commission submits that it adopted

the contested decision a matter of weeks after receiving from the German authorities the last of the information it needed, and that the applicant's arguments are therefore groundless.

89 The applicant's position, which is that the procedure under Article 93(2) of the Treaty must automatically be commenced at the end of the two-month period mentioned in *Lorenz*, fails to take account of the shortcomings of notification in practice and would needlessly increase the burden of the decision-making process by giving rise to unjustified suspension of aid measures.

90 The Commission points out that the contested decision was adopted on 16 December 1997, shortly before the end-of-year holidays. For Commission staff, the dates of summer and end-of-year holidays can constitute deadlines for the disposal of current matters, and they may need to deal with matters more expeditiously prior to periods of leave. There is no basis in law for complaints founded on the duration of the preliminary procedure.

91 The Federal Republic of Germany takes the view that the time that elapsed between notification and the adoption of the contested decision cannot be interpreted as an indication of doubt as to the compatibility of the aid in question with the common market. On the contrary, the constraints imposed on the recipient undertaking during the preliminary procedure, which is invariably lengthy, do not warrant the opening of the procedure under Article 93(2) of the Treaty where, as in the present case, the Commission is able to assess the circumstances and the likely consequences of granting the aid and where it does not appear that the legitimate interests of third parties will be adversely affected.

Findings of the Court

92 It is necessary to establish whether, in the present case, the procedure conducted by the Commission lasted appreciably longer than the time normally required for a preliminary examination to be carried out pursuant to Article 93(3) of the Treaty.

93 As regards, first of all, the length of time that elapsed between notification of the aid proposal and adoption of a decision, the Court of First Instance held, at paragraph 102 of its judgment in Case T-46/97 *SIC* v *Commission* [2000] ECR I-2125, that the fact that the time spent considerably exceeds the time usually required for a preliminary examination under Article 93(3) of the Treaty may, with other factors, justify the conclusion that the Commission encountered serious difficulties of assessment necessitating initiation of the procedure under Article 93(2) of the Treaty (see *Germany* v *Commission*, cited above, paragraphs 15 and 17).

94 In order to determine whether the time taken amounts to evidence of serious difficulties, it is appropriate to refer to the Commission's internal rules.

95 The Commission specified the periods within which it is to examine aid proposals notified to it by the Member States pursuant to Article 93(3) of the Treaty in a letter to the Member States dated 2 October 1981 (published under the heading 'Rules applicable to State aid — Situation at 30 June 1998' in *Competition Law in the European Communities*, Volume II A, page 89). In paragraph 2 of that letter, the Commission states that '[t]o carry out an initial assessment of the plan notified, the Commission must complete its investigation and consideration of the case within a period set at two months by the Court of Justice of the European Communities.' Furthermore, it states, at paragraph 3(b), that '[a] notification is

incomplete when it does not contain all the information which the Commission departments need in order to form an initial view of the compatibility of the measure with the Treaty; the Commission then has 15 working days from the notification to request further information. Time then begins to run only from the date on which such further information is received. An acknowledgment of receipt is sent showing the relevant date.'

96 The Commission and the German Government have acknowledged that notification of the plan to grant aid to CWP, which the Commission received in full on 15 April 1997, had been the subject of an earlier letter dated 7 March 1997; but they are unable to give the precise date of the notification.

97 By way of measures of organisation of procedure, the Court of First Instance called upon the Commission to produce the acknowledgment of receipt bearing the relevant date for calculating the duration of the preliminary examination, mentioned in the letter to the Member States of 2 October 1981. The Commission responded by producing three letters, dated 14 May, 22 July and 4 November 1997, the first of which alone contains an acknowledgment of receipt. Regardless of the actual date on which the Commission was first apprised of the proposal of aid to CWP, seven months elapsed between the acknowledgment of 14 May 1997 and the contested decision. A delay such as that clearly exceeds the period of time within which the Commission is, in principle, required to complete its preliminary examination.

98 Secondly, as regards the particular circumstances of the preliminary procedure, it must be pointed out that, in accordance with the purpose of Article 93(3) of the Treaty and the Commission's duty of good administration, that institution may, in the context of the preliminary procedure, find it necessary to request supplementary information from a notifying Member State (see, by way of example, *Matra* v *Commission*, cited above, paragraph 38). Whilst such requests are not proof of the existence of serious difficulties, they may, in conjunction with the duration of the preliminary examination, be evidence thereof.

99 In accordance with their duty of genuine cooperation, which underlies in particular Article 5 of the EC Treaty (now Article 10 EC), the notifying Member State and the Commission must work together in good faith in order to enable the Commission to surmount any difficulties it may encounter on examining, in the course of the procedure under Article 93(3) of the Treaty, a notified plan to grant aid (see, by way of analogy, the judgment of the Court of Justice in Case C-349/93 *Commission* v *Italy* [1995] ECR I-343, paragraph 13). Thus, a Member State that plans to grant aid to an undertaking in difficulty must send the Commission the restructuring plan for that undertaking and answer any requests for supplementary information that the Commission might make where it does not have at its disposal all the facts it needs in order to reach a decision.

100 A Member State that gives the Commission incomplete notification, under Article 93(3) of the Treaty, of a plan to grant aid and is then reluctant to provide information which would assist the Commission, despite repeated requests on the latter's part, is responsible for prolonging the examination procedure. Such an extension of the examination procedure can, by its very nature, indicate the existence of serious difficulties and the Commission is not entitled to rely on the fact that the notifying State itself is responsible for that situation. To permit it to do so would deprive interested third parties of the procedural guarantees conferred upon them by Article 93(2) of the Treaty: the Commission would be allowed to rely on the conduct or negligence of the notifying Member State in order to thwart the purpose of Article 93(3) of the Treaty, which requires it to initiate the formal examination procedure, and the Member State would be allowed to evade its duty of genuine cooperation.

101 In the present case, the Commission stated, in its letter of 14 May 1997 formally acknowledging the notification of the plan to grant aid to CWP, that it did not have at its disposal all the information it needed in order to decide whether or not the aid was compatible with the common market. It requested the German Government to provide it with supplementary information on the feasibility and financing of the change in production methods envisaged by CWP and on the market analyses, the prospects for a return to viability and the development of the undertaking's capacity.

102 Despite the answers provided by the German Government in a letter of 10 July 1997, the Commission found that it was still not in a position to adopt a decision, for want of all the necessary information. By letter of 22 July 1997, it therefore reverted to the German Government, asking, amongst other things, for information on the prospects of CWP's long-term survival and on the proportionality of the proposed aid. Furthermore, by facsimile letter of 30 July 1997, the Commission put to the BvS an unofficial request for supplementary information in essentially the same terms as those of its letter of 14 May 1997. The implication to be drawn from those letters is that, by 30 July 1997, the German Government had still not provided the Commission with the information it asked for on 14 May 1997.

103 The German Government answered the second request for supplementary information by letter of 2 September 1997. The Commission placed on the file a copy of that letter and of certain annexes to the letter, which it received by facsimile the same day. Those documents are identical to the documents attached to the letter of 10 July 1997 in reply to the Commission's first request for supplementary information. In the absence of any evidence to the contrary submitted by the Commission, the necessary inference is that the German Government did not provide the supplementary information sought and thus, even after receiving the letter of 2 September 1997, the Commission still did not have satisfactory answers to its questions of 14 May 1997 concerning the feasibility of the change in production methods, the analyses of the market, the return to viability, the development of CWP's production capacity and the proportionality of the aid at issue.

104 Moreover, during the course of the procedure, two competitors of CWP came forward, albeit without lodging a formal complaint. On 17 June 1997, Budenheim, a German undertaking, informed the Commission of its concerns in relation to the possible grant of aid to its competitor CWP. On 24 July 1997, the applicant did likewise. On 4 November 1997, on the basis of information gathered on 30 September and 8 October 1997 during separate discussions with those undertakings, the Commission put a third request for information to the German Government. More than two months after receiving the German

Government's response to its second request for supplementary information, the Commission thus informed that government that its examination of the proposal of aid to CWP had 'raised other questions' to which it was imperative that answers should be provided. The Commission asked several questions relating to the feasibility and profitability of the change in production methods and asked for further information on the development of production capacities, on supply difficulties and on the possible grant of other aid to CWP.

105 Following that third official request for supplementary information, the Commission and representatives of the German Government met on 24 November 1997. During the oral procedure it emerged that it was only on the occasion of that meeting that the Commission was able to take cognisance of the two documents drafted by directors of CWP and dated 26 May and 16 October 1996 which, according to the Commission, constitute CWP's restructuring plan (see paragraphs 74 to 77 of the present judgment). Furthermore, during that meeting, the German Government handed to the Commission the report of 21 October 1997 prepared by the firm Roland Berger.

106 Lastly, it is apparent from the Commission's written answers to questions put to it by the Court of First Instance that, on 11 December 1997, at the request of the Commission, the BvS had sent it a letter from CWP affirming that its production capacity for phosphoric acid would not increase on completion of the restructuring, but would remain at 40 000 tonnes per annum.

107 It is clear from that chronology of events that the assessment of the proposal of aid to CWP was fraught with difficulty from notification onwards. During the course of the eight months between notification and the contested decision, the

Commission made three separate official requests for information of the German Government and two competitors made their concerns known. The German Government refrained from sending the Commission information that would assist it in its assessment in spite of repeated demands on the latter's part. In particular, it was not until seven months after notification of the aid plan that the German Government sent the Commission the restructuring plan which the aid was intended to finance. The Commission therefore departed from the recommended timetable it had set itself for examining notified aid proposals. For its part, the German Government replied to the Commission out of time. In view of those factors, it must be acknowledged that the procedure conducted by the Commission appreciably exceeded, in the present case, what is normally required for an initial examination under Article 93(3) of the Treaty. That circumstance is cogent evidence of the existence of serious difficulties.

108 There is, therefore, objective and consistent evidence that the Commission adopted its decision to raise no objection to the proposal to grant aid to CWP when it had insufficient knowledge of the facts. Despite the fact that assessment of the compatibility of the aid in question with the common market raised serious difficulties, the Commission failed to commence the procedure referred to in Article 93(2) of the Treaty and to gather more ample information by consultation of the parties concerned. The contested decision must, therefore, be annulled, without it being necessary to rule on the other pleas, complaints and arguments put forward by the applicant.

Costs

109 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

110 Since the Commission has been unsuccessful, it must be ordered to pay the costs, including those of the application for interim relief, as applied for by the applicant.

111 The first subparagraph of Article 87(4) of those Rules of Procedure of the Court of First Instance provides that Member States and institutions which intervened in the proceedings are to bear their own costs. The Federal Republic of Germany must therefore bear its own costs.

On those grounds,

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

hereby:

1. **Annuls the decision of the Commission of 16 December 1997 to raise no objection to the grant of aid by the Federal Republic of Germany to Chemische Werke Piesteritz GmbH;**

2. Orders the Commission to bear its own costs and to pay those incurred by the applicant in the main proceedings and in the application for interim relief;

3. Orders the Federal Republic of Germany to bear its own costs.

García-Valdecasas Lindh Cooke

Vilaras Forwood

Delivered in open court in Luxembourg on 15 March 2001.

H. Jung P. Lindh

Registrar President