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

In Case T-442/93,

Association des Amidonneries de Céréales de la CEE (AAC), established in Brussels,

Levantina Agricola Industrial SA (LAISA), a company incorporated according to Spanish law established in Barcelona, Spain,

Società Piemontese Amidi e Derivati SpA (SPAD), a company incorporated according to French law, established in Lestrem, France,

Pfeiffer & Langen, a company incorporated according to German law, established in Cologne, Germany,

Ogilvie Aquitaine SA, a company incorporated according to French law, established in Bordeaux, France,

Cargill BV, a company incorporated according to Netherlands law established in Amsterdam,

Latenstein Zetmeel BV, a company incorporated according to Netherlands law established in Nijmegen, Netherlands,

* Language of the case: French.

all represented by Michel Waelbroeck and Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernst Arendt, 8-10 Rue Mathias Hardt,

applicants,

supported by

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

and

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

interveners,

v

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

defendant,

supported by

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

intervener,

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

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

Facts underlying the dispute

1 The applicants are an association of undertakings and six undertakings engaged in starch production. The Association des Amidonneries de Céréales de la CEE (AAC) is a grouping of all the producers of starch and starch products in the Community, including the other applicants. Levantina Agricola Industrial SA (LAISA) is a producer of maize starch, glucose syrups, high-maltose syrups, isoglucose and dextrose. Società Piemontese Amidi e Derivati SpA (SPAD) is a producer of maize starch, glucose syrups, high-maltose syrups, isoglucose and dextrose. Pfeifer & Langen is a producer of wheat starch and glucose syrups. Ogilvie Aquitaine SA is a producer of wheat starch. Cargill BV is a producer of maize starch, wheat starch, glucose syrups and high-maltose syrups. Latenstein Zetmeel BV is a producer of wheat starch.

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

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

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

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

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

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

6 Since the sectors concerned were the subject of considerable intracommunity trade, the Commission considered that the interventions in question constituted aids

within the meaning of Article 92(1) of the EEC Treaty, and that from the information at its disposal they did not appear to be covered by the derogations contained in Article 92(3) and in particular by the provisions of Law No 64/86 under the terms of Article 9 of Decision 88/318/EEC. Therefore, the Commission initiated the procedure provided for in Article 93(2) in respect of the aid intended for:

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

— the production of seed oils,

— the production of meal and flour,

— investments in the starch sector.

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

7 By letter dated 23 November 1990, the Commission informed the Italian Government of its decision to initiate the procedure provided for in Article 93(2) of the Treaty and gave it formal notice to submit to it its observations in the framework of that procedure. The other Member States and interested third parties were informed by the publication of a communication in the *Official Journal of the European Communities* (OJ 1990 C 315, p. 7, and corrigendum OJ 1991 C 11, p. 32). Eight associations including the Italian association, Assochimica, of which SPAD is a member, and two undertakings including Italgrani, submitted their observations which were notified to the Italian authorities on 8 April 1991.

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

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

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

11 The new programme modified the original programme as follows:

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

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

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

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

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

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

— the aids for research projects are increased.

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

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

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

13 The principal products which Italgrani intended to produce were as follows (in tonnes):

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

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

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

'Article 1

1. The award of aids totalling LIT 461 billion by the Italian Government to Italgrani SpA to implement the programme of investments referred to in the CIPI decision of 12 April 1990 as amended by letters of 23 and 24 July 1991 are hereby deemed compatible with the common market and may benefit from the measures provided for in Law No 64/86 of 1 March 1986 (aid in favour of the Mezzogiorno).

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

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

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

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

Article 2

(omissis)

Article 3

(omissis)

Article 4

(omissis).'

Procedure

6 It was under these circumstances that the applicants brought this action in an application lodged at the Registry of the Court on 27 November 1991. The Commission Decision was also subject to annulment proceedings brought by the Association of Sorbitol Producers within the EEC and a certain number of starch producers and by Casillo Grani (T-435/93 and T-443/93).

7 By order of the President of the Court of 1 October 1992 the French Republic was granted leave to intervene in support of the form of order sought by the applicants. By orders of the President of the Court of 8 February 1993 Casillo Grani and Italgrani were given leave to intervene in support of the forms of order sought by the applicants and the Commission respectively.

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

19 The written procedure was conducted before the Court and culminated in the lodgment on 3 December 1993 of the applicants' observations on the statements on intervention lodged by Casillo Grani and Italgrani.

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

21 By order of the President of the Second Chamber (extended composition) of 28 September 1994 the case was joined for the purposes of the oral procedure with Cases T-435/93 and T-443/93).

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

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

Forms of order sought by the parties

24 The applicants claim that the Court should:

(i) annul the Decision;

(ii) order the Commission to pay the costs.

25 In their reply the applicants further claim that the Court should declare the contested decision to be non-existent.

26 The Commission contends that the Court should:

(i) dismiss the application as inadmissible or unfounded;

(ii) order the applicants to pay the costs.

27 The French Republic contends that the Court should:

(i) annul the Decision;

(ii) order the Commission to pay the costs of these proceedings.

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

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

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

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

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

(i) dismiss the action as inadmissible or unfounded;

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

The intervention by Casillo Grani

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

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

Admissibility

Summary of the parties' arguments

32 Without formally raising any objection of inadmissibility, the Commission challenges the admissibility of the present application. In that connection, referring to the Court's judgment in Case 169/84 *Cofaz* v *Commission* [1986] ECR 409, the Commission submits that, in the specific sector of state aids, only undertakings which played a certain role in the administrative procedure and whose market position is substantially affected by the aid measures which form the subject matter of the contested decision may be regarded as directly and individually concerned within the meaning of the second paragraph of Article 173 (now the fourth paragraph of Article 173 of the EC Treaty).

33 As regards the first condition, the Commission recognizes that the applicants played, directly or indirectly, a certain role in the procedure. However, AAC intervened only in respect of aids to starch production, which were withdrawn. None of the applicants can therefore rely on AAC's interventions in order to satisfy this condition.

34 As to the second condition, the Commission argues that the companies Pfeifer & Langen and Latenstein Zetmeel produce only wheat starch, which is not subsidized, and that they are not therefore directly and individually concerned by the decision. In the case of the other applicants the Commission finds a part of their

production to be in competition with the subsidized production. However, in its opinion, they have adduced no pertinent reasons why the decision is likely to harm their legitimate interests by substantially affecting their position on the market in question. Indeed no relevant fact has been adduced in this connection.

35 More specifically with regard to AAC, the Commission observes that as early as 1962 the Court held in its judgment in Joined Cases 16/62 and 17/62 *Producteurs de Fruits* v *Council* [1962] ECR 471 that 'one cannot accept the principle that an association, in its capacity as the representative of a category of businessmen, could be individually concerned by a measure affecting the general interests of that category.' In its judgment in Joined Cases 67/86, 68/86 and 70/86 *Van der Kooy and Others* v *Commission* [1988] ECR 219 the Court recognized that a body representing the interests of a group of producers was directly and individually concerned by a Commission decision on compatibility; it based itself on three reasons: (1) the position of the body had been affected in its negotiating capacity, (2) it had taken an active part in the procedure, and (3) it had been obliged to commence fresh tariff negotiations and to enter into a new agreement.

36 The Commission reiterates that the observations submitted by AAC related only to aids in favour of starch production, which were finally withdrawn. Moreover, it adds, AAC has not shown that its position is affected in the same way as that of the association in the *Van der Kooy* v *Commission* judgment cited above. AAC is said therefore not to be individually concerned by the Commission Decision.

37 The intervener, Italgrani, essentially supports the Commission's arguments. It adds that the applicants other than AAC cannot rely on the intervention by the latter

which did not participate in the procedure on behalf of those undertakings or in order to defend their individual interests.

38 The applicants point out that they played a predominant role during the pre-litigious phase inasmuch as AAC lodged a complaint and, following publication of the communication to the interested parties, further observations on the proposed aids. In that connection the applicants maintain that AAC acted as agent on behalf of its members whose interests it has the task of representing in accordance with its articles of association.

39 The applicants go on to allege that Italgrani will be in direct competition with them on a market which shows excessive surpluses. If one has regard to the fact that the production capacity envisaged for starch products (ca. 360 000 tonnes per annum) represents more than the total production of those products in Italy (ca. 338 000 tonnes per annum) and in the knowledge that the two Italian members of AAC, namely Cerestar and SPAD, respectively produce 209 000 and 167 000 tonnes of starch products, it is easy to appreciate the impact which the aid will have in Italy. In fact the modified scheme involves an increase in production of starch products of the order of 7% at Community level. In a market characterized by considerable overcapacity and stagnant demand, the aids in question appreciably distort the Community starch market and, in particular, seriously affect the position of the applicant undertakings.

40 According to the applicants, the effect on the starch industry as a whole is all the more appreciable since the market in such products is characterized by complete supply substitutability. There is weak elasticity in demand so that an increase in production capacity would bring about a sudden fall in prices.

41 As to AAC, the applicants point out that an action for annulment is also available to associations of undertakings; this is all the more so in the present case since

AAC is the umbrella association for all the undertakings in the sector concerned. AAC intervened only concerning the effects of the aids for starch but its initiative related to all starch products, that is to say both starch and products derived therefrom. In its observations on the interventions by Italgrani and Casillo Grani the applicants add that AAC was the Commission's interlocutor when in 1986 the new regime for starch was introduced and continues to act as such with regard to all Community legislation affecting the interests of starch producers. It therefore had a position analogous to that of the associations in the judgments in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125 and *Van der Kooy* v *Commission* cited above.

42 Finally, the applicants add that when the Commission has not afforded competitors the opportunity of submitting comments and of participating in the procedure, such competitors are nevertheless entitled to challenge the Commission decision authorizing aid (see judgments in Case C-198/91 *Cooke* v *Commission* [1993] ECR I-2487 and in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203). Since the Commission did not give the applicants the opportunity of giving their views on the definitive programme, the same should apply, *mutatis mutandis*, in the present case.

43 The French Republic did not submit any observations on admissibility.

Findings of the Court

44 The fourth paragraph of Article 173 of the EC Treaty allows natural or legal persons to challenge decisions addressed to them or those which, though appearing to be adopted by way of a regulation or a decision addressed to another person, are of direct and individual concern to them. Thus, the admissibility of the present

action depends on whether the contested decision addressed to the Italian Government and closing the procedure initiated under Article 93(2) of the EC Treaty is of direct and individual concern to the applicants.

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

46 The contested decision is therefore of direct concern to the applicants (see to the same effect the judgment in *Piraiki-Patraiki* v *Commission* [1985] ECR 207). Moreover, it is apparent from the documents before the Court that CIPI approved the modified programme by decision of 8 October 1991. Moreover, whilst the aid at issue has not yet been paid to Italgrani, the latter stated during the oral procedure that that situation is due to the decision by the Italian authorities to await the outcome of the present proceedings.

47 As to the question whether the contested decision is of individual concern to the applicants, it is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of Article 173 of the Treaty only if that decision affects them by reason of certain attributes

peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (see judgments of the Court in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95; and in Case C-309/89 *Codorniou* v *Council* [1994] ECR I-1853, paragraph 20).

48 With regard to Commission decisions closing a procedure initiated under Article 93(2) of the Treaty the Court has accepted as factors establishing that such a decision is of concern to an undertaking within the meaning of Article 173 the fact that that undertaking was the originator of the complaint which gave rise to the inquiry procedure, the fact that its observations were heard and the course of the procedure was largely determined by its observations, provided its market position is substantially affected by the aid measure in question (see *Cofaz* v *Commission* cited above).

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

50 In this connection it is apparent from the documents before the Court that the applicant company, SPAD, with an annual production of starch products amounting to approximately 160 000 tonnes is one of the two largest Italian producers of those products, annual Italian production running at about 390 000 tonnes. According to the observations submitted in the context of the procedure under Article 93(2) of the Treaty by the Italian association, Assochimica (Gruppo Chim-

ica Agraria), of which SPAD is a member, the other major Italian producers of those products are Cerestar and Seda Manildra Europe SpA which respectively have an annual production of 209 000 tonnes and 12 000 tonnes. The Commission supplied no factual elements capable of casting doubt on that information concerning the situation on the Italian market for starch products.

51 Moreover, it is clear from the contested decision that Italgrani's projected annual production amounts to approximately 190 000 tonnes, thus entailing roughly a 50% increase in annual Italian production. The Court considers that such an increase cannot be achieved without considerable concomitant effects on the competitive situation of producers already present on the Italian market.

52 As regards the applicant SPAD it is also apparent from the file that, prior to the initiation of the procedure under Article 93(2) of the Treaty, it brought proceedings before the regional administrative court for Lazio against the decision by CIPI of 12 April 1990 approving the investments proposed by Italgrani and the aids in connection therewith. Cerestar also brought proceedings on the same subject. Besides, the observations submitted by Assochimica appeared to be based on documents collected during those proceedings. It is also apparent from those observations that the members of Assochimica were particularly worried, as direct competitors, about aid provided for starch products.

53 Certainly, the mere fact that an act is capable of exerting an influence on the competitive conditions on the market in question cannot be sufficient in order that any trader in a competitive relationship with the recipient of the act may be deemed to be directly and individually concerned by the latter (see judgment of the Court in Cases 10/68 and 18/68 *Eridania* v *Commission* [1969] ECR 459). Nevertheless, regard being had in the present case to the information made available concerning

the Italian market in starch products, the role played by SPAD in the involvement of Assochimica in the administrative procedure, and the significant increase in production capacity involved in the investments planned by the company in receipt of the aid in question, the Court considers that SPAD has established the existence of a set of factors amounting to a situation peculiar to it in regard to the measure in question in relation to any other trader. Therefore, the Court considers that SPAD may be assimilated to an addressee of the decision in accordance with the judgment in *Plaumann* v *Commission* cited above.

54 It follows from the foregoing that the action is admissible as regards the applicant SPAD.

55 Since a single action is involved it is not necessary to examine the capacity of the other applicants to bring proceedings (see judgment in *CIRFS and Others* v *Commission*, cited above).

Substance

56 In support of their application the applicants rely on five pleas in law based respectively on:

(1) an infringement of the rules on the procedure for adopting Commission decisions;

(2) a manifestly erroneous assessment and an infringement of Article 92 of the EEC Treaty owing to the lack of any economic basis and viability of the projected investments and the inconsistency of the programme contemplated in relation to the earlier programme;

(3) incompatibility of the contested decision with the rules applicable in the agricultural sector;

(4) infringement of Article 190 of the EEC Treaty, inasmuch as the contested decision is supported by an inadequate and contradictory statement of reasons;

(5) infringement of the complainant's rights inasmuch as they were never given access to the file or the opportunity to submit observations on the draft decision.

Infringement of the rules concerning the adoption procedure for Commission decisions

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

57 In their reply the applicants submitted that the decision should be declared non-existent — or at least null and void — owing to the particularly serious and flagrant infringements of essential formal requirements committed on its adoption. In that respect the applicants referred to the judgment in Case 131/86 *United Kingdom* v *Council* [1988] ECR 905 and to the judgment of the Court of First Instance in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF* v *Commission* [1992] ECR II-315, subsequently annulled by the PVC judgment. They observed that since this plea is a matter of public policy it could be raised irrespective of time-limits during the course of the procedure.

58 In support of that plea the applicants submitted that it was clear from the Commission's defence in Case T-443/93 Cassillo Grani v Commission that on 31 July

1991, in other words barely a week after the notification by the Italian authorities of Italgrani's new investment programme and of the aids in connection therewith, and moreover on the eve of the Commission's holidays, the college of Commissioners decided to:

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

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

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

59 It is thus common ground that, in breach of the principle of collegiality, the Commission never adopted the formal text of the decision. In that connection the applicants recall that the contested decision, as published in the *Official Journal of the European Communities*, is stated as having been adopted on 16 August 1991 'by the Commission'. The applicants accepted that, under the first paragraph of Article 27 of the Commission's Rules of Procedure (63/41/EEC) of 9 January 1963 (JO 1963 L 17, p. 181), provisionally maintained in force by Article 1 of Commission Decision 67/426/EEC of 6 July 1967 (JO 1967 L 147, p. 1) in the version in force contained in Commission Decision 75/461/Euratom, ECSC, EEC of 23 July 1975 (OJ 1975 L 199, p. 43), the Commission is authorized, provided that the principle of collegiate responsibility is fully observed, to permit its members under the habilitation procedure to adopt clearly defined 'measures of management or administration'. However, they said that the decision could not be so classified.

60 Moreover, the applicants submitted that, under Article 12 of the Commission's rules of procedure, 'acts adopted by the Commission, at a meeting ... shall be

authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary.' Under Article 10 of the rules of procedure the minutes of the meeting must be approved by the college of Commissioners at its next meeting. However, those obligations were evidently not observed. Consequently, the decision should be declared non-existent or in any event should be annulled for infringement of essential formal requirements. In the alternative, the applicants requested the Court of First Instance to order the Commission to produce documents permitting it to be ascertained that all these formalities were observed.

61 In its rejoinder the Commission stated that the applicants raised for the first time in their reply a plea of annulment based on the illegality of the decision which they did not put forward in their application. This plea, it is said, is inadmissible because it constitutes a new plea in law within the meaning of the Rules of Procedure.

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

63 Moreover, the Commission argued that, at its meeting on 31 July 1991, it took the decisions mentioned by the applicants on the basis of the documents which resulted from the meeting of the heads of cabinets on 29 July 1991 and on the basis of a complete and detailed draft decision drawn up in the form of a letter addressed to the Italian authorities. After deliberation it thus approved the decision in all its elements and assigned to one of its members the task of carrying through the adaptation of the text of the decision. The provisions of the Treaty and of the rules of procedure were thus fully observed.

64 As regards the alleged infringement of Articles 10 and 12 of the rules of procedure, the Commission argues that those provisions do not have the scope that the applicants attribute to them. Their purpose is to keep a record of the Commission's proceedings. Authentication is simply an internal Commission procedure; the provisions of Articles 10 and 12 of the Commission's rules of procedure do not concern third parties and do not affect their rights and guarantees. Infringements of those articles cannot therefore be relied on in court proceedings.

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

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

66 In their observations the applicants reiterate their position that the pleas in issue must be considered to be admissible.

67 As to the substance of those pleas the applicants add as a preliminary matter concerning the observations already submitted in their reply that it is clear from the PVC judgment that the arguments invoked by the Commission in its rejoinder must be rejected, since those arguments, as the Commission itself pointed out, were reproduced from the appeal lodged against the judgment of the Court of First Instance in that case.

8 The applicants go on to submit that the differences between the document adopted by the college and that notified to the parties and published in the *Official Journal of the European Communities* are much more significant than in the PVC case. In that connection they emphasize that the draft letter to the Italian Government submitted to the college was not drafted in the form of a proposal for a decision, in particular because it contained no operative part. Yet it is clear from the PVC judgment that that factor alone is sufficient for the act to be regarded as non-existent.

9 Moreover, there are manifest differences between the draft letter submitted to the college and the final decision inasmuch as essential information was added, figures were changed and whole paragraphs were added or removed. The applicants refute the Commission's assertion that the college directed its mind to a complete and detailed draft decision, and list the main differences between the two documents and conclude that the modifications made to the text approved by the college go beyond changes purely of spelling or grammar which under the terms of the PVC-judgment may be made to a text after it has been adopted by the college.

10 As regards the alleged infringement of Article 27 of the Commission's rules of procedure the applicants add to the observations already submitted in their reply that the documents lodged by the Commission show that the task delegated to Mr MacSharry in fact entailed the power to take by himself, without any proposal for a decision, a decision on behalf of the Commission, since the authority conferred under the habilitation procedure did not even require the member of the Commission to take account of the letter. Such a task may not be regarded as an act either of administration or of management, or as a clearly defined task and therefore ought not to have been delegated under that article to a single member of the Commission.

Finally, according to the applicants, it is clear from the documents lodged by the Commission that the authentication procedure provided for in Article 12 of the Commission's rules of procedure was not followed; nor were the rules on lan-

guages observed, since the draft letter to the Italian Government was for the most part drafted in French, although Italian in this case was the sole authentic language.

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

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

74 In the alternative, on the question whether the pleas are well founded, the Commission recalls that the aid programme at issue was granted pursuant to a general aid scheme which had already been approved, and that it therefore was able only to verify that the individual aid scheme was in conformity with the general scheme. In fact the reason for the initiation of the procedure provided for in Article 93(2) of the Treaty was that the investments originally provided for did not appear to observe the conditions of the general scheme. If the aid programme had been originally submitted in the current version, as amended by the Italian authorities, the Commission's services would merely have informed the complainant that the project was in conformity with the general scheme already approved. Therefore the examination of the amended aid programme would no longer have involved the exercise of any discretionary power but would have been no more than a management measure.

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

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

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

The findings of the Court

78 Under the first subparagraph of Article 48(2) of the Rules of Procedure of the Court of First Instance 'no new plea in law may be introduced in the course of

proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.'

79 In the present case the applicants made no mention in their application of any alleged infringement of the rules on the procedure for adopting Commission decisions. In their reply the applicants raised the aforementioned pleas on the basis of the Commission's defence in Case T-443/93 *Casillo Grani* v *Commission* from which it appears that the college of Commissioners, at its meeting on 31 July 1991, formed a view on a draft letter to the Italian Government and decided to authorize Mr MacSharry to finalize approval of the new aid scheme by way of a formal decision. Although the Commission claims that the pleas raised are not based on new matters of fact, it has adduced no evidence of the fact that those matters relating to the procedure for the adoption of the contested decision were known to the applicants prior to the filing of the application. The Court finds, also, that the documents previously available to the applicants contained nothing to show that they could or ought to have known prior to the receipt by them of the defence in Case T-443/93 that the decision had been adopted by way of the habilitation procedure and that the college of Commissioners had formed a view solely on the basis of a draft letter to the Italian Government.

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

81 As to whether those pleas are well founded, the Court recalls that Article 12 of the Commission's rules of procedure, in the version in force at the time of the adop-

tion of the contested decision, provides that 'acts adopted by the Commission, at a meeting or by written procedure shall be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary.' Therefore, authentification is not required in the case of acts adopted under the habilitation procedure. Since the contested decision was not authenticated and the Commission claimed that it was adopted under the habilitation procedure, the Court considers it necessary to examine, first, whether it was legitimate for the decision to be adopted under the habilitation procedure.

82 In that connection it should be mentioned first that, as the Court observed in the *AKZO Chemie* v *Commission* and *PVC* judgments cited above, the Commission's functioning is governed by the principle of collegiality resulting from Article 17 of the Treaty of 8 April 1965 establishing a single Council and a single Commission of the European Communities (JO 1967 L 152, p. 2), now replaced by Article 163 of the EC Treaty which provides that 'the Commission shall act by a majority of the number of members provided for in Article 157. A meeting of the Commission shall be valid only if the number of members laid down in its rules of procedure is present.'

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

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

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

86 In that connection, as far as the examination of the Commission's implementation in specific cases of the general aid scheme is concerned, the Court has already held that the Commission must confine itself, prior to the initiation of any procedure, to an examination of whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving that scheme (see judgment of the Court of 5 October 1994 in *Italy* v *Commission*, cited above). Similarly, after initiation of the procedure provided for in Article 93(2) of the Treaty, observance of the principles of the protection of legitimate expectations and of legal certainty could not be ensured if the Commission were able to go back on its decision approving the general scheme. Therefore, if the Member State in question proposes modifications to an aid proposal submitted for the examination provided for under Article 93(2) of the Treaty, the Commission must first assess whether those modifications result in the proposal being covered by the decision approving the general scheme. If that is the case, the Commission is not entitled to assess the compatibility of the modified proposal with Article 92 of the Treaty since such assessment was already carried out in the framework of the procedure culminating in the decision approving the general scheme.

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

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

39 On this point the Commission submitted at the hearing that such a condition is contained in all its decisions approving a general aid scheme, and that it merely gives expression to a very obvious requirement whose observance is monitored by its services as a matter of routine in all its decisions on State aids.

40 However, as regards aid intended for starch production the Court of First Instance finds that, according to the Commission itself, that aid had to be withdrawn in order to satisfy the condition contained in Article 9 of Decision 88/318 since starch is a sector in which investments are excluded from Community financing (see, in the version in force at the material time, Council Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products (OJ 1990 L 91, p. 1, hereinafter 'Regulation No 866/90') and the annex to Commission Decision 90/342/EEC of 7 June 1990 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products (OJ 1990 L 163, p. 71). Moreover, the Commission stated that the sectoral exclusions from Community financing for certain agricultural products, in accordance with settled practice, apply by analogy to State aids. Nevertheless, it is clear from the contested decision that the subsidized investment programme as finally approved seeks to create an annual starch production capacity of approximately 150 000 tonnes. In that connection the Court notes particularly that the Commission made its approval of the aid subject to the condition that Italgrani's starch production under the programme should be strictly limited to the needs of its own production of derivatives. However, that condition

presupposes that the effect of the proposal in its definitive version is for Italgrani's starch production to be directly, or in the case of an integrated project, indirectly subsidized since, if that was not the case, the Commission would not have been entitled to make its approval subject to a condition as to the utilization of that production. The Court considers that that contradiction between the Commission's assertions at the hearing and the actual wording of the contested decision is capable of giving rise to doubts as to its conformity with the rules of the Common Agricultural Policy.

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

92 During the procedure before the Court of First Instance the Commission maintained, contrary to the assertion appearing in the abovementioned communication, that the rules on Community financing did not apply by analogy to State aid intended for the production of starch derivatives. In support of that argument, the Commission referred to Article 16(5) of Regulation 866/90 which provides 'within the field of application of this Regulation, Member States may take aid measures

which are subject to conditions or rules concerning granting which differ from those provided for in this Regulation, or, where the amounts of aid exceed the ceilings specified herein, on condition that such measures comply with Articles 92 to 94 of the Treaty.' However the Court finds that this provision does not support the distinction made by the Commission between sectoral exclusions from Community financing applying by analogy to State aid and other exclusions from Community financing which do not apply by analogy. Moreover, the Commission gave no explanation for its apparent change of mind during the pre-litigious phase of the procedure.

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

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

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

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

97 As regards the principle of collegiality the Court in the PVC judgment held that observance of this principle and especially the need for decisions to be deliberated on collectively by the members of the Commission is necessarily of interest to persons concerned by the legal effects which they produce in the sense that they must be assured that those decisions were in fact adopted by the college and precisely correspond to the latter's wishes.

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

99 It is expressly made clear in that judgment that decisions implementing competition rules, such as the one forming the subject matter of that case, are mentioned only as an example of cases in which the principle of collegiality must be strictly applied. In the present case the contested decision was adopted following a procedure

initiated under Article 93(2) of the Treaty. Such decisions which give expression to the Commission's final assessment of the compatibility of aid with the Treaty or, as in the present case, with a general aid scheme affect not only the Member State which is the addressee of the decision but also the recipient of the planned aid and its competitors.

100 In the present case only a draft letter to the Italian Government concerning the final aid proposal and without any operative provision was submitted to the college of Commissioners at its meeting on 31 July 1991. Far from constituting, as the Commission maintained, a detailed and exhaustive draft decision, several paragraphs and tables of that draft had to be completed in the final version, for example as regards data concerning imports and exports of the products in question, the planned production of the company in receipt of aid and the global amount of aid provided for.

101 Furthermore, some of the data in the draft letter were altered in the final decision, such as for example the data on levels of intensity of the aids. In that connection the Court notes the following statement in the draft letter which is not in the contested decision: 'The intensities of the planned aid correspond respectively to the levels of aids authorized by the Commission on 1 March 1986 (yeast, proteins, biodegradable plastic) and to the levels of aid permitted under Regulation (EEC) No 866/90 applied by analogy to State aids (refrigeration of fruits and vegetables, except tomatoes, pears and peaches) and glucose: Those intensities are also in conformity with the conditions laid down in the Commission decision of 2 March 1988 authorizing the scheme of Law No 64/86.' The Court considers that this paragraph gives the impression that the provisions concerning Community financing are as a general rule applied by analogy to State aid and that those provisions were complied with in the present case. Nevertheless, as pointed out above (paragraph 91), it is clear from the annex to Decision 90/342 that investments concerning starch derivatives are excluded from Community financing if the existence of realistic potential outlets is not demonstrated.

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

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

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

105 It should be added that, even if the contested decision could be regarded as having been adopted by the college of Commissioners, the Commission in any event infringed the first paragraph of Article 12 of its rules of procedure by omitting to

authenticate that decision under the terms of that article (see paragraphs 74 to 77 of the PVC judgment cited above).

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

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

Costs

108 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful and the applicants asked for an order on costs, it must be ordered to bear, in addition to its own costs, those incurred by the applicants.

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

110 Under the second subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener other than Member States and institutions to bear its own costs. The intervener, Italgrani, which intervened in the proceedings in support of the form of order sought by the Commission, must be ordered to bear its own costs. Since the intervener, Casillo Grani, no longer has an interest in the outcome of the proceedings, the Court deems it equitable for it also to bear its own costs.

On those grounds,

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

hereby:

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

2. Dismisses the remainder of the application.

3. Orders the Commission to bear its own costs together with the costs incurred by the applicants.

4. Orders the interveners to bear their own costs.

Vesterdorf Barrington Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 27 April 1995.

H. Jung B. Vesterdorf

Registrar President