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

14 April 2005 *

In Case T-88/01,

Sniace SA, established in Madrid (Spain), represented by J. Baró Fuentes, M. Gómez de Liaño y Botella and F. Rodríguez Carretero, lawyers,

applicant,

v

Commission of the European Communities, represented by D. Triantafyllou and J. Buendía Sierra, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

supported by

Republic of Austria, represented by H. Dossi and M. Burgstaller, acting as Agents, with an address for service in Luxembourg,

Lenzing Lyocell GmbH & Co. KG, established in Heiligenkreuz im Lafnitztal (Austria),

and

Land Burgenland (Austria), represented by U. Soltész, lawyer,

interveners,

APPLICATION for annulment of Commission Decision 2001/102/EC of 19 July 2000 on State aid granted by Austria to Lenzing Lyocell GmbH & Co. KG (OJ 2001 L 38, p. 33),

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

composed of P. Lindh, President, R. García-Valdecasas, J.D. Cooke, P. Mengozzi and M.E. Martins Ribeiro, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 June 2004,

gives the following

Judgment

Facts

1 Sniace SA (hereinafter 'the applicant') is a Spanish company whose principal activities are the production and sale of artificial and synthetic fibres, cellulose, cellulose fibres (viscose staple fibres), continuous polyamide thread, unwoven felt and sodium sulphate, forestry and the coproduction of electricity.

2 Lenzing Lyocell GmbH & Co. KG (hereinafter 'LLG') is an Austrian company, a subsidiary of the Austrian company Lenzing AG, which produces, among other things, viscose fibres and modal. LLG's business is the production and sale of lyocell, a new type of fibre made from pure natural cellulose. It is also produced by the British company Courtaulds plc, which markets it under the name 'Tencel'.

3 In 1995, LLG started construction of a factory for the production of lyocell in the business park at Heiligenkreuz-Szentgotthárd, in a cross-border area between Austria and Hungary. The factory is located in the Austrian part of the area, in the Province of Burgenland.

4 In 1995, the Austrian public body Wirtschaftsbeteiligungs AG (hereinafter 'the WiBAG') informed the Commission informally of its intention to grant State aid to LLG for the investment project. By letter of 30 August 1995, the Republic of Austria informed the Commission that the aid would be granted under regional aid scheme N 589/95, approved by the Commission by letter of 3 August 1995. By letter of 5 October 1995, the Commission informed the Republic of Austria that individual notification of the intended aid in the form of grants was unnecessary since they were covered by an approved aid scheme, whilst putting it on notice not to grant aid in the form of guarantees to LLG without previously informing the Commission of them.

5 On 21 April 1997, the Austrian authorities sent the Commission application forms for co-financing under the European Regional Development Fund (ERDF) for two large-scale investment projects in the business park to be carried out by Business Park Heiligenkreuz GmbH (hereinafter 'BPH') and Wirtschaftspark Heiligenkreuz Servicegesellschaft mbH (hereinafter 'WHS').

6 Because of information contained in those forms and in a contract made in 1995 between the Province of Burgenland and LLG, the Commission decided to re-investigate the case concerning the aid granted to LLG. After a meeting and an exchange of letters with the Austrian authorities, it decided to enter that case on the register for non-notified State aid. Subsequently there were other meetings and exchanges of correspondence between the Commission and the Austrian authorities.

7 By letter of 29 October 1998, the Commission informed the Austrian Government of its decision of 14 October 1998 to initiate the procedure laid down in Article 93 (2) of the EC Treaty (now Article 88(2) EC) in respect of various measures adopted by the Austrian authorities in favour of LLG (hereinafter 'the decision to initiate the procedure'). The measures in question consisted of State guarantees for subsidies and loans amounting to EUR 50.3 million, an advantageous price of EUR 4.4 per square metre for 120 hectares of industrial land and guarantees of fixed prices for basic communal services for 30 years. The Commission enjoined the Austrian Government, in accordance with the principles stated by the Court in Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, to furnish it with certain information in order that it might examine the compatibility of those measures with the common market.

8 The Commission also enjoined it, in accordance with the principles stated by the Court in its judgment of 5 October 1994 in Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635,'*Italgrani*', paragraphs 21 to 24, to provide it with a range of information intended to enable it to determine whether certain of the other measures adopted by the Austrian authorities in favour of LLG were covered by approved or existing aid schemes. The other Member States and the parties concerned were given notice of the initiation of that procedure and were requested, by the publication of that letter in the *Official Journal of the European Communities* of 13 January 1999 (OJ 1999 C 9, p. 6), to submit any observations they might have.

9 The Austrian Government replied to that letter from the Commission by letters of 15 March and of 16 and 28 April 1999. The United Kingdom and other third parties concerned, among them (by letter of 12 February 1999) the applicant, also submitted their observations.

10 After examining the information submitted to it by the Austrian authorities, the Commission, by letter of 14 July 1999, informed the Austrian Government of its decision of 23 June 1999 to extend the procedure initiated under Article 88(2) EC (hereinafter 'the decision to extend the procedure') to four other measures in favour of LLG. They are the following: ad hoc investment aid of EUR 0.4 million for the land purchase, the taking of an equity holding of EUR 21.8 million terminable only after 30 years and with a 1% per year return, aid of an unknown amount for the creation of company-specific infrastructure and environmental aid, of EUR 5.4 million, possibly granted otherwise than in accordance with an existing aid scheme. The Commission invited the Austrian Government to submit its observations. The other Member States and interested parties were notified of the extension of the procedure and were requested to submit any observations by the publication of that letter in the *Official Journal of the European Communities* of 4 September 1999 (OJ 1999 C 253, p. 4). The Austrian Government submitted its observations by letter of 4 October 1999. The United Kingdom and other parties concerned, including (by letter of 4 October 1999) the applicant, also submitted their observations. The Austrian Government provided additional information by letters of 25 February and 27 April 2000.

11 On 19 July 2000 the Commission adopted Decision 2001/102/EC of 19 July 2000 on State aid granted by Austria to LLG (OJ 2001 L 38, p. 33, hereinafter 'the contested decision').

12 The operative part of that decision is as follows:

'Article 1

The aid which Austria has granted to ... LLG, Heiligenkreuz, through the provision of guarantees amounting to EUR 35.80 million (a guarantee by a consortium of commercial and public-sector banks amounting to EUR 21.8 million and three guarantees by the ... WHS amounting to EUR 1.4 million, EUR 10.35 million and EUR 2.25 million) and through a land price of EUR 4.4 per m^2 for the acquisition of 120 hectares of industrial land, through fixed-price guarantees by the Province of Burgenland for the provision of process utilities and through the provision of aid of an unknown amount in the form of the creation of company-specific infrastructure does not constitute aid within the meaning of Article 87(1) [EC].

Article 2

The aid which Austria has granted to LLG through the provision of a guarantee amounting to EUR 14.5 million by [the] WiBAG complies with the guarantee guidelines approved by the Commission under [reference] number N 542/95.

The environmental aid amounting to EUR 5.37 million complies with the environmental aid guidelines approved by the Commission under [reference] number N 93/148.

Article 3

The individual aid which Austria has granted in the form of aid amounting to EUR 0.4 million for land acquisition and in the form of equity capital amounting to EUR 21.8 million is compatible with the common market.

Article 4

This Decision is addressed to the Republic of Austria.'

Procedure

13 By application lodged at the Court Registry on 17 April 2001, the applicant brought this action.

14 By documents lodged at the Registry on 6 June, 16 and 26 July 2001 respectively, LLG, the Republic of Austria and the Province of Burgenland applied for leave to intervene in this action in support of the form of order sought by the Commission.

15 By letter of 16 October 2001, the applicant requested measures of organisation of procedure seeking the disclosure by the Commission of a series of documents referred to in its defence and in the contested decision, as well as of certain information, particularly on the market for the products in question. On 14 November 2001, as a measure of organisation of procedure, the Commission was requested to disclose some of those documents. It complied with that request within the period prescribed.

16 By letter of 10 December 2001, the applicant requested that confidential treatment be accorded to certain information contained in Annexes 14 and 15 of its application with regard to LLG, the Republic of Austria and the Province of Burgenland.

17 By order of 18 February 2002, the President of the Fifth Chamber, Extended Composition, granted the applications for leave to intervene and for confidential treatment.

18 On 21 May 2002, LLG and the Province of Burgenland lodged a joint statement in intervention.

19 On 23 May 2002, the Republic of Austria lodged its statement in intervention.

20 The Commission and the applicant lodged their observations on the statements in intervention on 19 July and 6 September 2002, respectively.

21 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber, Extended Composition) decided to open the oral procedure.

22 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 17 June 2004.

Forms of order sought by the parties

23 The applicant claims that the Court should:

— declare the action admissible and well founded;

— annul Article 1 of the contested decision, inasmuch as the Commission decides therein that the provision of guarantees amounting to EUR 35.8 million does not constitute State aid within the meaning of Article 87(1) EC;

— annul Article 2 of the contested decision, inasmuch as the Commission decides therein that the aid granted by the Republic of Austria to LLG through the provision of a guarantee of EUR 14.5 million by the WiBAG complies with the guarantee guidelines approved by the Commission under reference number N 542/95;

— annul Article 3 of the contested decision;

— alternatively, annul Article 1 of the contested decision inasmuch as the Commission decides therein that the fixed-price guarantees by the Province of Burgenland for the provision of communal services and the provision of aid of an unknown amount in the form of the creation of company-specific infrastructure do not constitute State aid within the meaning of Article 87(1) EC;

— order the Commission to pay the costs.

24 In its reply, the applicant also claims that the Court should annul Article 2 of the contested decision, inasmuch as the Commission decides therein that the environmental aid of EUR 5.37 million complies with the guidelines for the financing of environmental protection approved by the Commission under reference number N 93/148.

25 The Commission contends that the Court should:

— reject the unsubstantiated pleas in law and the new pleas in law put forward by the applicant as inadmissible;

— in any event, dismiss the action as unfounded in its entirety;

— order the applicant to pay the costs.

26 The interveners contend that the Court should:

— dismiss the action as inadmissible and, in any event, as unfounded;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

27 The inteveners object to the admissibility of the action on the ground that the applicant is not individually concerned by the contested decision.

28 The Republic of Austria observes that, in the context of control of State aid, a Commission decision closing a procedure initiated pursuant to Article 88(2) EC is of individual concern to the undertakings who were responsible for the complaint which led to that procedure and whose views were heard and determined the conduct of that procedure, provided, however, that their position on the market is substantially affected by the aid which is the subject of that decision (Case 169/84 *COFAZ and Others* v *Commission* [1986] ECR 391, paragraphs 24 and 25).

29 It submits, first, that the fact that the applicant may be a party concerned for the purposes of Article 88(2) EC cannot confer on it standing to bring proceedings against the contested decision. It notes that, according to the case-law, a natural or legal person may be individually concerned by reason of its status as a party concerned only by a Commission decision refusing to open the examination stage provided for by Article 88(2) EC (Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraphs 88 and 89). In such a case, it can ensure that its procedural guarantees are complied with only if it is entitled to challenge that decision before the Community judicature (*BP Chemicals* v *Commission*, cited above, paragraph 89). However, where, as in the present case, the Commission has adopted its decision at the end of the examination stage, the parties concerned have in fact availed themselves of their procedural guarantees, so that they can no longer be regarded, by virtue of that status alone, as being individually concerned by that decision.

30 The Republic of Austria adds that the applicant's participation in the procedure under Article 88(2) EC does not suffice to distinguish it individually as it would the person to whom the contested decision is addressed (Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* [1999] ECR II-179, paragraph 50). It follows from the case-law that, in State-aid matters, participation in that procedure is only one of the factors capable of establishing that a natural or legal person is individually concerned by the decision which it seeks to have annulled (*COFAZ and Others* v *Commission*, cited above, paragraph 25, and Case T-189/97 *Comité d'entreprise de la Société française de production and Others* v *Commission* [1998] ECR II-335, paragraph 44).

31 Secondly, the Republic of Austria submits that the applicant is not entitled to base an argument on the fact that its interests are affected by the grant of the contested measures, as referred to in paragraph 16 of the Court's judgment in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809. The passage extracted from that judgment does not, in actual fact, concern the question of standing to bring proceedings.

32 Thirdly, the Republic of Austria argues that the applicant has not shown that its position on the market may be substantially affected by the measures at issue. It points out that those measures refer exclusively to the construction of a factory to produce lyocell, a product which the applicant does not manufacture. It adds that there is no particular competitive relationship between that product and those of the applicant. It submits, more particularly, that the Commission correctly found, in the contested decision, that viscose fibres and lyocell were covered by two different markets.

33 On that last point, the Republic of Austria contends, first, that, from purchasers' point of view, lyocell and viscose fibres cannot be substituted for each other. In support of that contention, it explains that lyocell has specific characteristics which distinguish it from viscose, like its high resistance in the dry state and, in dampness, its low shrinkage in water, its high absorbency of dyes, its softness to the touch, its similarity to silk and its miscibility with other textile fibres. Its specific 'surface characteristics' and its tendency to fibrillate permit the introduction of new products with new properties, such as the 'stonewashed' and 'peach skin' effects, which could not be obtained by using viscose fibres. In addition, in certain fields in which lyocell is used, such as denim, the use of viscose fibres is technically impossible. Lyocell's very high resistance permits exceptionally high productivity in spinning and weaving. Since lyocell costs more to produce, it is intended for segments of the market in which products are of higher quality and more expensive. The Republic of Austria refers also to certain findings made by the Commission in its decision of 17 October 2001 in Case COMP/M.2187 — CVC/Lenzing.

34 Secondly, the Republic of Austria asserts that the manufacturing processes of lyocell and viscose fibres are fundamentally different. Viscose manufacture requires a process of chemical conversion, whereas that of lyocell is obtained by a physical process, namely by the use of an aqueous solution of N-methyl-morpholine oxide (NMMO). It points out that lyocell's manufacturing process has required substantial

research and that it is less harmful to the environment than that of viscose fibres, which requires substantial consumption of chemicals. It states that 'the new technology used in the manufacture of lyocell fibres is characterised ... by fewer manufacturing stages, shorter delays in the process, lower consumption of chemicals and closed manufacturing cycles'.

35 The Republic of Austria adds that the losses of market shares and the decrease in turnover relied upon by the applicant are attributable not to the grant of the contested measures to LLG, but to the financial and economic difficulties and to the over-indebtedness with which the applicant had to cope for several years from the early 1990s. It refers, in that regard, to Commission Decision 1999/395/EC of 28 October 1998 on State aid implemented by Spain in favour of Sniace SA, located in Torrelavega, Cantabria (OJ 1999 L 149, p. 40).

36 LLG and the Province of Burgenland maintain that there is no competitive relationship between LLG and the applicant, since the applicant does not operate in the lyocell sector. In that regard, they rely on the same arguments as those presented by the Republic of Austria and reproduced above.

37 In its rejoinder, the Commission requests the Court to examine, of its own motion, the question of the applicant's standing to bring proceedings, since it concerns an absolute bar to proceeding. It expresses serious doubt that the applicant's competitive position is substantially affected by the measures at issue, since they are intended exclusively for the production of lyocell, which forms part of a different market from that of viscose. In that regard, it stresses, more particularly, that the price of lyocell is appreciably higher than that of viscose fibres and that those two types of fibre are not used in the same ways. In addition, it points out that the applicant, in the observations which it submitted in the course of the pre-litigation procedure, confined itself to 'repeating doubts set forth in the decision [initiating the procedure]'.

38 The applicant submits, first, that it has been consistently held that an intervener is not entitled to raise an objection of inadmissibility which was not formulated in the form of order sought by the defendant (Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 76, and Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others* v *Commission* [1999] ECR II-93, paragraph 25). It leaves it to the Court to decide whether it is appropriate to examine of its own motion the plea of inadmissibility alleging lack of standing to bring proceedings.

39 The applicant submits, next, that it is directly and individually concerned by the contested decision.

40 As regards the requirement of being individually concerned, it asserts, first, that it participated actively in the pre-litigation procedure by submitting its written observations.

41 Secondly, it claims that it was disadvantaged by the grant of the measures at issue to LLG 'according to the Court's case-law, particularly in the judgment in ... *Intermills* v *Commission*', cited above.

42 Thirdly, the applicant argues that the said measures cause it economic loss 'in terms of loss of market share, [of] lowering of turnover and [of] incorporeal assets'. To demonstrate the reality and extent of that loss, it refers to a note which is set out in Annex 14 to the application.

43 In that note, the applicant makes the following submissions:

— the world and European viscose markets are characterised by a decrease in production capacity and consumption;

— that situation is 'incompatible with the creation of a new substitute industry benefiting from preferential European financing';

— '... lyocell is used without distinction, with a varying competitive advantage, in place of traditional viscose fibre or as a substitute for it';

— LLG's supply of lyocell is equivalent to 3.5% of the European viscose market;

— 'there is no doubt that a supply equivalent to 3.5% of the market entails an even greater change in the prices, conditions, etc., where, by reason of its investment/writing-down costs, it can compete unfairly to the detriment of other fibres in a position of economic inferiority and liable therefore to result in losses, whereas lyocell fibre, which needs no writing down, may give rise to profits';

— the applicant consequently ceased to produce, and therefore to sell, the following quantities of viscose: ... [1] tonnes in 1997, ... tonnes in 1998, ... tonnes in 1999, ... tonnes in 2000, with a decrease of ... tonnes per year forecast from 2001;

— that is equivalent to a loss of net revenue of: ... Spanish pesetas (ESP) in 1997, ESP ... in 1998, ESP ... in 1999, ESP ... in 2000, ESP ... according to its forecasts for 2001 and ESP ... according to forecasts for the period 2001 to 2007;

— the supply of lyocell by LLG also led to a 'change of at least ...% in the market price', entailing the following losses for the applicant: ESP ... in 1997, ESP ... in 1998, ESP ... in 1999, ESP ... in 2000, ESP ... according to its forecasts for 2001 and ESP ... according to forecasts for the period 2002 to 2007;

— in addition, LLG annually puts on the market, 'through special outlets which then sell at extremely low prices', about 1 000 tonnes of 'by-products' (or 'sub-standard products'), which has forced the applicant to lower its prices for 'products of the same quality';

— that has entailed, for the applicant, a loss of revenue of ESP ... per year.

1 — Confidential data omitted.

44 In its reply, the applicant refers to the fact that LLG manufactures and sells, under the trade mark 'Pro-Viscose', a product made up of a mixture of viscose and lyocell (hereinafter 'proviscose') and asserts that it is in competition with viscose. It submits that it is clear from a note attached to the reply that LLG has offered proviscose to several of the applicant's customers 'at a price comparable to that of traditional viscose'.

45 In its observations on the statements in intervention, the applicant maintains that it is 'incontestably' a company competing with LLG. The viscose fibre which it produces is in direct competition with the products manufactured by LLG, namely lyocell, 'sub-standards of lyocell' and proviscose. In support of the latter assertion, it provides an expert report by an 'independent consultant', Mr F. Marsal Amenós, as well as the evidence of an 'independent trader', the company Manfib Sas. Lyocell is only an 'improved viscose fibre' which can be substituted 'in most applications' for the latter. The applicant recognises that lyocell fibres cost more than viscose fibres and argues that proviscose was created in order to 'avoid that problem'. In that regard, it asserts that, in view of lyocell's higher price, LLG has introduced on the market proviscose and a 'sub-standard of lyocell (of lower quality)' at 'prices close to that of viscose'. It adds that lyocell fibres have attained a significant share, namely between 5 and 10%, of the European market for cut cellulose fibres, a market which was hitherto supplied exclusively by the European viscose producers.

46 At the hearing, the applicant submitted that LLG had put 'sub-standard lyocell' on the market for certain applications (cigarette filters, wet wipes, chiffons, etc.). It also stated that lyocell was a product of higher quality than viscose, particularly in terms of resistance, that it presented a certain number of technical characteristics and that the price of 'pure lyocell' was higher than that of viscose. As regards the latter point, the applicant stated that it is when it is mixed with other products that lyocell can be supplied at competitive prices compared to those of viscose.

47 Finally, the applicant accepts that, according to the case-law, the mere fact that a measure may exercise an influence on the competitive relationships existing on a given market cannot suffice to allow any trader in any competitive relationship whatever with the addressee of the measure to be regarded as directly and individually concerned by that measure (Joined Cases 10/68 and 18/68 *Eridania and Others* v *Commission* [1969] ECR 459, paragraph 7). However, it stresses that, first, there is only a limited number of producers on the market for the products concerned (there are only five manufacturers in the market sector for 'commodity viscose staple fibres' and three in the market sector for 'spundyed viscose staple fibres') and, second, that the investment project will entail a significant increase in production capacity.

48 As regards the requirement of direct concern, the applicant submits that the contested decision has left intact all the effects of the contested measures, although it had sought from the Commission a decision eliminating or amending those measures (*COFAZ and Others* v *Commission*, paragraph 30, and Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 41).

Findings of the Court

49 Under the fourth paragraph of Article 40 of the Statute of the Court of Justice, an application to intervene is to be limited to supporting the form of order sought by one of the parties. In addition, as provided in Article 116(3) of the Rules of Procedure of the Court of First Instance, the intervener must accept the case as he finds it at the time of his intervention.

50 In the form of order sought, the Commission has confined itself to seeking the dismissal of the action on the substance and has not challenged the applicant's standing to bring proceedings.

51 As interveners, the Republic of Austria, LLG and the Province of Burgenland are therefore not entitled to raise a plea of inadmissibility.

52 However, it is settled case-law that, under Article 113 of the Rules of Procedure, the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case, including any raised by interveners (Case T-266/94 *Skibsvaerftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 40; Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839, paragraph 26, and Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraph 79; see also, to that effect, Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945, paragraph 18; Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 23, and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 13).

53 In this case, the plea of inadmissibility invoked by the interveners raises the question whether there is an absolute bar to proceeding, so far as concerns the applicant's standing to bring proceedings (see, to that effect, Case C-341/00 P *Conseil national des professions de l'automobile and Others* v *Commission* [2001] ECR I-5263, paragraph 32, and *EISA* v *Commission*, cited above, paragraph 27). It can therefore be considered by the Court of its own motion.

54 In that regard, it must be noted that, under the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him. Since the contested decision was addressed to the Republic of Austria, it must be considered whether the applicant satisfies those two requirements.

55 As regards the question whether the applicant is individually concerned by the contested decision, it must be observed that, according to a consistent line of

decisions, persons other than those to whom a decision is addressed may claim to be concerned individually 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 (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95; Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* v *Commission* [2000] ECR I-3659, paragraph 39, and Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraph 62).

56 As regards, more particularly, the field of State aid, not only the undertaking in receipt of the aid but also the undertakings competing with it which have played an active role in the procedure initiated pursuant to Article 88(2) EC in respect of an individual aid have been recognised as being individually concerned by the Commission decision closing that procedure, provided that their position on the market is substantially affected by the aid which is the subject of the contested decision (*COFAZ and Others* v *Commission*, paragraph 25).

57 An undertaking cannot therefore rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that, having regard to the extent of any participation by it in the procedure and to the extent of the detriment to its market position, its circumstances distinguish it in a similar way to the undertaking in receipt of the aid (*Comité d'entreprise de la Société française de production and Others* v *Commission*, cited above, paragraph 41).

58 In the present case, the Court must therefore consider to what extent the applicant's participation in the procedure initiated under Article 88(2) EC and the effect of the aid on its market position are capable of distinguishing it, in accordance with Article 230 EC.

59 First, the Court finds that the applicant played but a minor role in the course of the pre-litigation procedure. It lodged no complaint with the Commission. The conduct of the procedure was not largely determined by the observations which it submitted by its letters of 12 February and 4 October 1999 (see, to that effect, *COFAZ and Others* v *Commission*, paragraph 24). Thus, in its observations of 12 February 1999, the applicant confines itself, in essence, to reproducing certain of the Commission's findings in the decision to initiate the procedure, commenting on them briefly, but without providing any specific evidence. Likewise, in its observations of 4 October 1999, it confines itself to asserting, without giving the least detail or any evidence, that the measures referred to in the decision to extend the procedure amount to State aid and that they should be declared incompatible with the common market.

60 Second, as regards the extent to which the applicant's position on the market was affected, it should be borne in mind, that, as stated in paragraph 28 of the judgment in *COFAZ and Others* v *Commission*, it is not for the Community Court, when it is considering whether the application is admissible, to make a definitive finding on the competitive relationship between the applicant and the undertakings in receipt of the aid. In that context, it is for the applicant alone to adduce pertinent reasons to show that the Commission's decision may adversely affect its legitimate interests by seriously jeopardising its position on the market in question.

61 In addition, in this case, the measures referred to in the contested decision concern exclusively a factory for the production of lyocell and it is common ground that the applicant neither manufactures that type of fibre nor foresees doing so in the future.

62 However, the applicant relies on three arguments in an attempt to establish that its position on the market may be seriously jeopardised by the contested decision.

63 First, in its application, it alleges, in essence, that viscose and lyocell are in direct competition with each other.

64 Without it being necessary, at the stage of considering admissibility, to rule definitively on the exact limits of the market for the products in question, it suffices to hold that that allegation is undermined by various evidence in the case-file.

65 First, lyocell has certain physical characteristics which differentiate it clearly from viscose fibre. The applicant thus observes expressly, in paragraph 23 of its application, that 'lyocell is of natural origin and biodegradable; the solvent used is not toxic, can be recycled, complies with the standards on the absence of toxic substances, has high resistance as much in [cases of] conditioning [as when subject to] humidity and has a low shrinkage percentage'. Likewise, at the hearing, it recognised that lyocell had 'some advantages on the technical level', was of higher quality than viscose fibre and offered very high resistance. Furthermore, it did not dispute that lyocell was characterised by a tendency to fibrillation, which enabled the creation of fabrics which are full bodied and silky to the touch. As regards that last property of lyocell, the applicant confined itself to declaring that 'it [was] out of fashion and [was] ... no longer appreciated today' (paragraph 26 of the application).

66 The applicant's assertion that lyocell can be substituted for viscose 'in most applications' is not convincingly substantiated. In particular, the 'expert report' of the 'independent consultant' which it attached to its observations on the statements in intervention, in order to support that assertion, is hardly convincing. It is, in fact, only a single-page document, which contains only a few paragraphs and a highly superficial analysis of the question. The document contains, also, some obviously incorrect statements, such as the one about the great similarity between the manufacturing processes and between the properties of lyocell and viscose fibres (see paragraph 65 above and paragraph 69 below). As for the evidence of an

'independent trader', which the applicant also attached to its observations on the statements in intervention, it establishes at the very most that, for certain specific applications, certain customers of the applicant have woven into their products lyocell or proviscose in place of viscose.

67 Furthermore, that assertion is contradicted by LLG's statement at a conference, which the applicant invokes in support of its argument (paragraph 30 of and Annex 14 to the application) and according to which lyocell is 'an additional fibre whose applications are different'.

68 Secondly, it is common ground that the price of lyocell is substantially higher than that of viscose fibres. That point was expressly admitted by the applicant, both in its pleadings (paragraph 26 of the application and paragraphs 77 and 78 of the applicant's observations on the statements in intervention) and at the hearing. Thus, it has, for example, recognised on several occasions that lyocell could be marketed at prices competitive to those of viscose fibres only if it was mixed with other products.

69 Finally, according to the applicant's own statements, the manufacturing processes of lyocell, on the one hand, and that of viscose fibres, on the other hand, differ to a great extent. Indeed, at paragraph 23 of its application, it states that, 'for [l]yocell ..., a solvent is used for the cellulose paste (type NMMO), whereas the manufacturing process of traditional viscose involves stages of mercerisation and xanthogenation' and that, 'by comparison with the manufacturing process of traditional viscose, ... [l] yocell [is produced] by using a solvent rather than by following the traditional manufacturing stages of viscose'. Yet further, in paragraph 36 of its reply, it argues that, 'from the point of view of the manufacturing procedure, [it] agrees with the Commission when it states that lyocell is produced by procedures different from the traditional procedures for manufacturing viscose'.

70 In any event, even assuming that there is a direct competitive relationship between lyocell and viscose fibre, the applicant's statements in its pleadings and, more particularly, in the note in Annex 14 to its application, do not establish sufficiently that the contested decision is capable of significantly affecting its position on the market. The statements contained in that note are based, in fact, on completely unsupported assumptions, such as the fact that LLG's production of lyocell has, since 1997, completely replaced that of viscose and that it is intended exclusively for the European market. In addition, in that note, the applicant asserts that, because '[LLG's] supply is equivalent to 3.5% of the market', the applicant ceased, from 1997, to produce, and therefore to sell, certain quantities of viscose without substantiating its statement with any evidence and without even providing any explanation whatever on the method by which it calculated those quantities. Similarly, it must be observed that it adduces no evidence in support of its allegation that the 'supply led to a change of at least ...% in the market price'.

71 Secondly, the applicant invokes the existence of, besides 'pure lyocell' and proviscose, 'sub-standards of lyocell' which it also describes as lyocell of 'lower quality'. In the note in Annex 14 to its application, it states, in that regard, that LLG sells, through 'special outlets' and 'at extremely low prices', 1 000 tonnes of those 'by-products' per year, which has forced it to lower its prices by ESP ... per kg for 'products of the same quality'.

72 In that regard, it must be stated that the evidence in the file does not establish the existence of different qualities of lyocell. It must be pointed out, more particularly, that, in its pleadings, the applicant gives no detail as to what the expression 'sub-standards of lyocell' covers. It did not, moreover, seriously challenge the statement made on several occasions by LLG and the Province of Burgenland at the hearing that inferior quality lyocell does not exist. As regards the evidence of an 'independent trader' annexed to the applicant's observations on the statements in intervention, it sheds no light on that point, the trader confining itself to noting that 'sub-standards' are part of 'LLG's modified fibres', like lyocell and proviscose.

73 Even assuming that LLG produces inferior quality lyocell which it sells at extremely low prices, the applicant has not at all substantiated its argument that, as a result, it had to lower its prices for 'products of the same quality'. Nor, moreover, does it substantiate in any way the quantities and price reduction upon which it relies.

74 Thirdly, in its reply and in its observations on the statements in intervention, the applicant places greater reliance on the competition which, it submits, exists between proviscose and viscose. It claims that its situation on the market is affected by the fact that LLG markets proviscose at prices competitive to those of viscose and that, having regard to the higher quality of the former, customers prefer it to the latter.

75 In that regard, it must be stated that the applicant again merely makes allegations which are insufficiently substantiated.

76 First, the note which it attaches to its reply in support of those allegations is not at all convincing, being merely a document drawn up by its internal services limited to setting out very general information obtained from conversations with some of its customers.

77 Second, even assuming that proviscose and viscose are used in the same applications and sold at comparable prices, it must be observed that the applicant gives no indication, not even a brief one, of the losses or other negative consequences which it has suffered as a result of LLG's supply of proviscose. Details are even more necessary in that regard since it is common ground that proviscose is a new product, which was not manufactured and put on the market until the year following that of the contested decision's adoption.

78 It follows from the foregoing considerations that the applicant has not adduced pertinent reasons to show the contested decision may adversely affect its legitimate interests by seriously jeopardising its position on the market.

79 In the light of that fact and of the limited role played by the applicant in the course of the pre-litigation procedure (see paragraph 59 above), it must be held that the applicant is not individually concerned by the contested decision.

80 It follows that the application must be declared inadmissible without the need to consider whether the applicant is directly concerned by the contested decision.

81 As regards the request for measures of organisation of procedure submitted by the applicant on 16 October 2001, to the extent that it covers documents and information not covered by the measure of organisation of procedure ordered on 14 November 2001, there is no need to act on it, since the documents contained in the case-file and the explanations given at the hearing are sufficient to enable the Court to give judgment in these proceedings.

Costs

82 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 applicant has been unsuccessful, and the Commission has applied for costs, the applicant must pay the costs incurred by the Commission in addition to its own costs.

83 The Republic of Austria must bear its own costs in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure. Under the third subparagraph of Article 87(4) of the Rules of Procedure, LLG and Province of Burgenland must bear their own costs.

On those grounds,

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

hereby:

1. Dismisses the action as inadmissible.

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

3. Orders the interveners to bear their own costs.

Lindh García-Valdecasas Cooke

Mengozzi Martins Ribeiro

Delivered in open court in Luxembourg on 14 April 2005.

H. Jung P. Lindh

Registrar President