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

7 June 2001 *

In Case T-187/99,

Agrana Zucker und Stärke AG, established in Vienna (Austria), represented by W. Barfuß and H. Wollmann, lawyers, with an address for service in Luxembourg,

applicant,

v

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

defendant,

APPLICATION for annulment of Commission Decision 1999/342/EC of 30 September 1998 concerning aid which Austria plans to grant to Agrana Stärke-GmbH to build and convert starch production facilities (OJ 1999 L 131, p. 61),

* Language of the case: German.

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

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

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 16 November 2000,

gives the following

Judgment

Legal background

1 Article 16(5) of Council Regulation (EC) No 951/97 of 20 May 1997 on improving the processing and marketing conditions for agricultural products (OJ 1997 L 142, p. 22), which replaces in identical terms the same provision in Council Regulation (EEC) No 866/90 of 29 March 1990 (OJ 1990 L 91, p. 1), provides:

'[W]ithin 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.'

2 Article 151(1) of the Act concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, 'the Act of Accession') provides:

'The acts listed in Annex XV to this Act shall apply in respect of the new Member States under the conditions laid down in that Annex.'

3 Point VII D 1 of Annex XV to the Act of Accession reads:

'... [Regulation No 866/90]..., as last amended by Council Regulation (EEC) No 3669/93 of 22 December 1993 (OJ No L 338, 31.12.1993, p. 26).

When applying Article 16(5), the Commission:

— ...

— will implement these provisions with respect to Austria and Finland in accordance with the declaration No 31 set out in the Final Act.

— ...'

4 A joint declaration was included in the Final Act of the Act of Accession, which reads as follows:

'31. Declaration on the processing industry in Austria and Finland:

The Contracting Parties agree on the following:

...

(ii) flexibility on transitional national aid schemes designed to facilitate restructuring.'

Background to the dispute

5 Agrana Stärke-GmbH is an undertaking which extracts starch from potatoes and maize and markets its products within Austria and abroad, both in the non-food

sector and in the organic sector. It manufactures and processes maize starch at its plant in Aschach (Austria) and potato starch at its plant in Gmünd (Austria). At the material time Agrana Beteiligungs-AG, whose assets were owned mainly by Zucker BeteiligungsgmbH and Südzuker AG, held 98.75% of the shares in Agrana Stärke-GmbH. On 13 August 1999 Agrana Stärke-GmbH merged with its sister company Agrana Zucker-GesmbH. The application was lodged by that new company, named 'Agrana Zucker-GesmbH', the universal successor to Agrana Stärke-GmbH. On 27 August 1999 Agrana Zucker-GesmbH was converted into a limited company governed by Austrian law (Aktiengesellschaft). The name of that company was changed at the same time to Agrana Zucker und Stärke Aktiengesellschaft (hereinafter referred to, together with all the previous forms the company has taken, as 'Agrana').

6 In 1995 the Austrian Government introduced an aid package for certain activities entitled 'Special ERP programme for investment designed to improve the processing and marketing of agricultural products coming under Article 38 (Annex II) of the EC Treaty' ('Eurofit'). On 19 May 1995 Agrana lodged with the Austrian authority responsible for granting aid under the Eurofit programme an application for aid for a range of investments in the starch sector planned for its sites at Gmünd and Aschach.

7 On 27 May 1995 the Austrian Government notified the Commission of the Eurofit aid package.

8 In September 1995 Agrana took the decision to begin implementing the plan.

9 The Austrian Government later decided to notify separately, and not as part of the aid package, each of the plans coming under the Eurofit programme.

Accordingly, by letter dated 28 June 1996, it notified the Commission of each of the investment aid measures which Agrana had implemented at the Aschach and Gmünd sites. Notification of the Eurofit programme was finally withdrawn on 3 December 1996.

10 In a letter to the Commission dated 20 December 1996 the Austrian Government asked for each of the two aid measures relating to Agrana's sites to be considered separately.

11 The aid for the Gmünd plant was approved by the Commission by letter SG (97) D/461 of 23 January 1997 (State aid N 517/96).

12 The aid for the Aschach plant related to the following measures:

— converting a high-pressure soaking facility for maize starch to standard technology and increasing its capacity, from... to...;

— investing in a saccharification line using maize starch as the raw material and increasing annual capacity to... (and closing down existing obsolete, lower-capacity plant).

13 So far as the measures for the Aschach plant were concerned, the Commission, first by fax of 30 July 1997 and then by letter of 18 August 1997, informed the Austrian Government of its decision to initiate the procedure laid down in Article 93(2) of the EC Treaty (now Article 88(2) EC). The decision to initiate the procedure was published in the *Official Journal of the European Communities* (OJ 1997 C 342, p. 4) on 12 November 1997, and the other Member States and other interested parties were invited to submit observations.

14 The Austrian Government submitted its observations on the Commission decision to initiate the procedure in a letter dated 18 September 1997.

15 The Italian and Spanish Governments submitted their observations to the Commission in letters dated 12 December 1997.

16 The Fachverband der Stärkeindustrie eV, the Association des amidonneries de céréales de l'Union Européenne and the Asociación de Transformadores de Maiz por Via Húmeda submitted their observations to the Commission in letters dated 5, 9 and 12 December 1997.

17 The Austrian authorities commented on those observations in a letter dated 12 February 1998.

18 On 30 September 1998 the Commission adopted Decision 1999/342/EC concerning aid which Austria plans to grant to Agrana Stärke GmbH to build

and convert starch production facilities (OJ 1999 L 131, p. 61), in which it declared that the aid planned for the Aschach plant was incompatible with the common market ('the contested decision').

Contested decision and procedure

19 The contested decision states that, according to the statements made by the Austrian Government, the amount of aid is 57.4 million Austrian schillings (ATS) (ECU 4.13 million), representing 20% of the capital cost.

20 The Commission considered that the aid measure notified to it was a State aid within the meaning of Article 92(1) of the EC Treaty (now Article 87(1) EC). It also considered that neither the derogations contained in Article 92(2) of the EC Treaty (now Article 87(2) EC) nor those contained in Article 92(3)(a), (b) and (d) of the EC Treaty (now Article 87(3)(a), (b) and (d) EC) were applicable.

21 Similarly, the Commission found that the derogation contained in Article 92(3)(c) of the EC Treaty (now, after amendment, Article 87(3)(c) EC) did not apply in the case of the aid in question since it affected trading conditions to an extent contrary to the common interest by helping to increase supply in a market on which there was limited demand and thereby distorted competition (paragraph 54 of the contested decision). The Commission considered that, notwithstanding the flexibility clause in Declaration No 31, the aid could not be considered to be

compatible with the common market pursuant to Article 92(3)(c) of EC Treaty (paragraph 56 of the contested decision).

22 The Commission also stated that Article 92(3)(c) of the Treaty did not apply since Agrana had already carried out the investment in full and the facilities concerned were already in operation (paragraph 57 of the contested decision). The aid did not therefore appear to be needed in order to make the investment concerned. In the Commission's view, there was nothing to support the claim that if the aid had not been granted the company would probably have to be wound up for operational reasons, since the decision to invest had already been put into effect. It therefore considered the aid was an operating aid covered by the prohibition contained in Article 92(1) of the Treaty (paragraph 69 of the contested decision).

23 The contested decision provides as follows:

'*Article 1*

...

The aid plan does not qualify for any of the exemptions from the prohibition on State aid contained in Article 92(2) and (3) of the EC Treaty. It cannot therefore be implemented.

...'

24 By application lodged at the Registry of the Court of First Instance on 20 August 1999 the applicant brought the present action.

25 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of the Court of First Instance, to request the Commission to produce copies of certain decisions in which it had applied Declaration No 31. The Commission complied with that request.

26 The parties presented oral argument and answered the questions put to them by the Court at the hearing in open court on 16 November 2000.

Forms of order sought

27 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

29 In its application the applicant puts forward four pleas in support of its claim for annulment, alleging essentially first, that the time-limit for investigation had expired, second, infringement of the provisions of Article 151(1) of the Act of Accession read in conjunction with Declaration No 31 and Article 87(3)(c) EC, third, misappreciation of the criterion of whether the aid was needed and, fourth, failure to provide an adequate statement of reasons.

First plea, alleging that the time-limit for investigation had expired

Arguments of the parties

30 The applicant observes that, according to settled case-law, the Commission is required to act promptly during the first stage of the procedure relating to State

aids and to take into account the interest of Member States to be informed quickly whether the planned measures can be implemented (see Case 120/73 *Lorenz* [1973] ECR 1471). If it fails to adopt a position within a period of two months ('the Lorenz time-limit') the Commission is not acting as promptly as it is required to do. Once that time-limit has expired the Member State concerned can implement the plan. The applicant argues that the Commission did not observe the time-limit in this case.

31 It points out that it was only by a letter of 18 August 1997, delivered to the Republic of Austria's Permanent Representation to the European Communities on 19 August 1997, that is to say, two months and three days after the final information was supplied, that the examination procedure provided for in Article 88(2) EC was initiated. The Lorenz time-limit was therefore not observed. Consequently, the prohibition on implementing the aid plan, contained in Article 88(3) EC, no longer applied and the provision in the contested decision to the effect that the aid plan 'cannot therefore be implemented' was incorrect. The contested decision should therefore be declared void.

32 The applicant agrees that the Austrian Government was informed by fax of 30 July 1997 that the Commission had decided to initiate the procedure under Article 88(2) EC, that is to say, within the two-month time-limit. However, the applicant contends that that communication did not constitute a decision suspending the Lorenz time-limit. The Commission's decision to initiate the procedure concerned should have taken the form of a decision under Article 249 EC, which should therefore have stated the reasons on which it was based. However, according to the applicant, the fax concerned did not contain any reasons and so it did not enable the Austrian Government to assess the scope of the decision and to submit its observations.

33 The applicant also acknowledges that the Republic of Austria did not give any notice that the two-month time-limit had expired, as provided for in *Lorenz*. However, in the applicant's submission, since notice is only required in order to ensure that the aid plan is implemented in the manner described in the

notification, failure to give notice does not preclude the aid from being regarded as existing aid.

34 Lastly it states that it follows from the preceding considerations that the Commission was entitled to consider the contested aid only in accordance with the provisions relating to existing aid.

35 The Commission challenges the contention that it failed to observe the Lorenz time-limit in this case. It argues, in particular, that the applicant is wrong to state that the procedure under Article 88(2) EC must be initiated by a reasoned decision under Article 249 EC. The Commission observed the time-limit by communicating to the Austrian Government its decision to initiate the procedure by fax of 30 July 1997. In any event, since no notice was given when the two-month time-limit had expired, an essential condition for the application of the *Lorenz* case-law was missing and so the aid in question did not in any case constitute existing aid for the purposes of Article 88(1) EC.

Findings of the Court

36 The first point to be noted is that Article 88 EC provides for a procedure for prior examination of new aid which Member States intend to introduce, in the absence of which the aid is regarded as having been introduced unlawfully. Under the first sentence of Article 88(3) EC, as interpreted by the case-law of the Court of Justice, the Commission must be informed of any plans to grant or alter aid before they are put into effect. The Commission is then to carry out an initial examination of the proposed aid. If there are serious doubts following such examination as to whether a plan is compatible with the common market, the Commission must without delay initiate the procedure provided for in the first subparagraph of Article 88(2) EC.

37 It is clear, moreover, from the last sentence of Article 88(3) EC that the Member State concerned must not put the planned aid into effect at any time during the preliminary period. Where the examination procedure provided for in Article 88(2) EC is initiated, the prohibition continues until the Commission reaches a decision on the compatibility of the aid plan with the common market. However, according to settled case-law, if the Commission has not responded within two months of full notification the Member State concerned may put the proposed aid into effect provided that it has given prior notice to the Commission, and that aid will then come under the scheme for existing aid (see *Lorenz*, paragraph 6, Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraph 18, Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 38 and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 37).

38 In this particular case, it should be pointed out that the applicant does not dispute that the Republic of Austria was informed, within the two-month time-limit, in a fax sent by the Commission on 30 July 1997, of the Commission's decision to initiate the *inter partes* procedure provided for in Article 88(2) EC. Since the Commission duly 'responded' within the appropriate time-limit, that fax was sufficient to stop the Lorenz time-limit from running.

39 In any event, it is undisputed in this case that the Republic of Austria failed to give the Commission notice of its intention to put the planned aid into effect. Contrary to what the applicant contends, the function of such notice is not merely to ensure that the aid plan is implemented in the manner described in the notification; it is designed to meet the 'requirements of legal certainty' (see *Lorenz*, paragraph 4). Compliance with that obligation is designed to establish, in the interest of the parties concerned and of the national courts, the date from which the aid falls under the scheme for existing aid. Since that obligation has not been met the aid concerned cannot be regarded as existing aid.

40 It follows from the foregoing considerations that the plea must be rejected.

Second plea, alleging infringement of the provisions of Article 151(1) of the Act of Accession, read in conjunction with Declaration No 31 and Article 87(3)(c) EC

Arguments of the parties

41 The applicant points out that Article 151(1) of the Act of Accession in conjunction with Point VII D 1 of Annex XV thereto provides that the Commission will apply Article 16(5) of Regulation No 866/90 with respect to the Republic of Austria and the Republic of Finland in accordance with Declaration No 31 set out in the Final Act of the Act of Accession. In that declaration the European Union undertook to be flexible on national transitional aid measures designed to facilitate the restructuring required as a result of accession.

42 It follows that, when those provisions are read in conjunction, Declaration No 31 is not only interpretive in scope but, through Article 151(1) of the Act of Accession, constitutes an obligation on the part of the European Union under primary legislation. The Commission cannot therefore refuse to take Declaration No 31 into account by making reference to Community secondary legislation, or yet to measures constituting unilateral undertakings, such as the Community guidelines for State aid in connection with investments in the processing and marketing of agricultural products (OJ 1996 C 29, p. 4). The applicant adds, moreover, that those guidelines do not apply in this case since they were adopted following notification of the aid plan under the Eurofit programme.

43 It goes on to state that Declaration No 31 originated as a special agreement designed to reconcile the Republic of Austria's interest in not being suddenly exposed to the single market, without any protection for its particularly sensitive industrial sectors, with the Community's interest in not granting a transitional

period. Declaration No 31 is in essence a transitional scheme and requires special account to be taken of the 'accession scenario'.

44 The applicant considers that the concept of 'flexibility' referred to in Declaration No 31 implies that aid for restructuring can also be designed to increase the production capacity of the industries concerned. This stems from the wish of those who drafted the declaration, who were aware that there would inevitably be an increase in capacity among starch producers, to enable the undertakings concerned to survive in the single market. That wish can be inferred in particular from the fact that any increases in capacity were initially ruled out in a proposal put forward by the Commission during the accession negotiations with the Republic of Austria, which was a restriction which would have been rejected by the Austrian negotiators. The Commission would be acting contrary to Declaration No 31 if it made the approval of aid subject to an undertaking not to increase capacity.

45 It refers in that regard to the position adopted by the Commission itself in its decision concerning a range of investments by Agrana in the potato starch sector (State aid N 517/96). The applicant quotes in particular a passage from that decision which reads as follows:

'[I]n order for Declaration No 31 to have any meaning it must be taken to concern the long-term viability of the sector. Wherever this can be achieved only by maintaining or increasing capacity, a condition seeking to reduce capacity would run counter to the very meaning of the concept of restructuring.'

46 The applicant also maintains that the aid plan notified would enable the Austrian starch industry to adapt to competition within the single European market. It

therefore meets the first condition laid down in Article 87(3)(c) EC, which is not disputed by the Commission in the contested decision (paragraph 50).

47 In order to take the 'accession scenario' into account, it is necessary, when the aid plan in question is considered, and in particular when the criteria with regard to the effects on trade and the Community interest are assessed, for the Commission not to take account exclusively of the circumstances particular to the aid plan concerned. On the contrary, the Commission should weigh the advantages gained by the Community from the Republic of Austria's accession to the European Union without a transition period against the disadvantages of the aid concerned being paid. The Commission failed to take this into account in paragraphs 23 and 52 to 56 of the contested decision.

48 The applicant states in its reply that the Commission merely raised the question whether the market conditions after accession would deteriorate further as a result of the aid. The Commission should have taken into consideration market conditions in relations between the Community and the Republic of Austria prior to accession, whether those market conditions had improved as a result of accession without a transition period and whether that improvement was jeopardised by the aid measure under consideration. Failure to take those circumstances into consideration makes the decision unlawful.

49 The Commission rejects that line of argument.

50 It points out that it follows from Article 174 of the Act of Accession that Declaration No 31 is not an integral part of the Act of Accession. However, the Commission does not dispute the fact that it is required to take that declaration into consideration when considering individual cases. Declaration No 31 is one other factor among many which the Commission must take into account in its overall assessment of a specific aid plan.

51 The Commission goes on to say that its position should not be interpreted as meaning that Declaration No 31 can never be relied on for the purpose of approving aid for increasing capacity in the starch sector. However, as a rule, such aid cannot be granted even if Declaration No 31 is relied on. It stresses that in this particular case of aid approval of an increase in capacity is not justified following consideration of the situation concerned.

52 The Commission disputes in this regard the applicant's reference to the decision concerning investment in the potato starch sector (State aid N 517/96), which has little relevance since what was concerned in that case was maintenance of existing capacity and not increases in capacity. Moreover, in the quotation relied on by the applicant, the Commission merely stated that the clear intention to bring about a reduction of capacity might be contrary to the concept of restructuring according to Declaration No 31. It did not accept that increases in capacity should be approved.

53 Similarly, the Commission argues that paragraph 53 of the contested decision does not state anywhere that increases in capacity would not be approved under any circumstances. The Commission states that paragraph 53 cannot be read in isolation and mentions various factors which it took into account in its assessment (listed in paragraphs 52 to 56 of the contested decision). In its rejoinder the Commission points out that the whole of the second part of paragraph 53 of the contested decision describes the Commission's approach when applying the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12). It would therefore be wrong to see those observations as a statement regarding the interpretation of the concept of flexibility referred to in Declaration No 31, as the applicant does.

54 The Commission concludes by saying that, as regards the aid in question, it came to the conclusion, in the context of its overall examination, that the aid could not

be approved, even on the basis of Declaration No 31. It adds that it has approved other aid, which the applicant among others had received, by applying in respect of it the flexibility advocated by Declaration No 31. It mentions the decisions relating to cases N 445/B/95 (concerning Austria), N 14/96 (concerning Finland) and N 517/96 (concerning Austria).

Findings of the Court

55 Article 16(5) of Regulation No 866/90 (now Article 16(5) of Regulation No 951/97) provides that Member States may adopt national aid measures, subject to certain conditions, provided that such measures comply with Articles 92 to 94 of the EC Treaty (now Articles 87 EC to 89 EC) (see paragraph 1 above).

56 The criteria applied by the Commission in assessing aid referred to in Article 16(5) of that regulation are the same as those it applies when considering national aid plans under the EC Treaty, and are also contained *inter alia* in various guidelines which it has adopted. In this case, the Commission refers in the contested decision to its abovementioned 1996 guidelines concerning investment in the processing and marketing of agricultural products. In that regard it is important to note that those guidelines do not affect the scope of either primary or secondary legislation. Such measures reflect the Commission's desire to publish directions on the approach it intends to follow, in the light of its individual decisions in the field concerned (see, to this effect, Case T-214/95 *Vlaamse Gewest* v *Commission* [1998] ECR II-717, paragraph 79). The applicant is not therefore entitled to assert that the Commission could not rely on the 1996 guidelines in this case, even if it were considered that the contested aid was notified before those guidelines were adopted.

57 The Commission stated in those guidelines that it was necessary, as regards considering the compatibility of national aid in the field concerned, to comply with the view expressed in the first indent of paragraph 2.1 of the annex to Commission Decision 94/173/EC of 22 March 1994 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products and repealing Decision 90/342/EEC (OJ 1994 L 79, p. 29). That paragraph excludes any Community funding in the starch sector. Consequently, since the aid in question concerned the production of starch from cereals it cannot be considered to be compatible with the common market by the Commission under its policy in that sector (see paragraph 40 of the contested decision).

58 This is the background to Point VII D 1 of Annex XV to the Act of Accession, which provides that the Commission will apply Article 16(5) of Regulation No 866/90 in respect of Austria and Finland, in accordance with Declaration No 31. That declaration states that the Commission must show 'flexibility on transitional national aid schemes designed to facilitate restructuring'. There is therefore an express reference in the Act of Accession to a declaration appearing in the final act concerning the application of Article 16(5) of Regulation No 866/90 (now Article 16(5) of Regulation No 951/97).

59 In this case it is common ground between the parties that the contested aid relates to the processing of an agricultural product and therefore falls under Article 16(5) of Regulation No 951/97. It is also common ground between the parties that the aid is a 'transitional scheme' within the meaning of Declaration No 31 since, on the one hand, the financial measure in question, which is intended to facilitate the restructuring of Agrana, concerns in reality virtually the entire starch sector in Austria and must therefore be regarded as a 'scheme' and since, on the other hand, the measure is designed to facilitate transition to the new economic environment in Austria due to its accession to the European Union and must therefore be regarded as 'transitional'.

60 The applicant claims that the Commission applied Declaration No 31 in a manifestly erroneous manner since, on the one hand, it laid down the prior

condition that aid cannot be allowed if the investment in question is intended to increase production capacity and, on the other hand, it did not weigh the advantages gained by the Community from the Republic of Austria's accession to the European Union without a transitional period against the disadvantages of the aid concerned being paid.

61 In that regard, it should be pointed out at once that the wording of Declaration No 31 does not contain any restrictions relating to production capacity (see paragraph 4 above). As a result, the Commission cannot exclude in advance from the scope of that declaration all cases in which investment by a potential recipient of aid is designed to increase production capacity. The Commission is not entitled to add a general restriction to the scope of Declaration No 31 which is not derived from the text of the declaration itself.

62 However, even if it is true that the Commission, at least as regards paragraph 53 of the contested decision, may have given the impression that it would under no circumstances approve aid to an investor which was intended to increase capacity, in accordance with its approach as set out in the guidelines on aid for rescuing and restructuring, the fact remains that a more exhaustive reading of the contested decision shows that the Commission did consider whether it was possible to grant the aid in question on the basis of Declaration No 31 in the light of the particular circumstances of this case.

63 Thus, the Commission considered first of all the conditions existing in the maize starch sector, and found that that sector was experiencing a 20% structural production surplus on the Community market. There are therefore, according to the Commission, no free market segments, and starch producers in the Member States are in a state of very keen competition. That state of affairs, the Commission finds, exists not only on the Community market but also on markets in third countries to which the surpluses are exported with the aid of export refunds (paragraph 25 of the contested decision). In the Commission's view the contested aid plan would contribute to a significant increase in those production capacities within the Community (paragraph 37 of the contested decision). In the

light of this the Commission stated that, under the rules that would normally apply, such aid would be 'expressly excluded from any State aid and considered to be incompatible with the common market' (paragraph 40 of the contested decision).

64 Later in the decision the Commission did however accept that Declaration No 31 should undoubtedly be taken into account. It stated that it had approved aid on the basis of that declaration in three previous cases [Austria N 445/B/95, Finland N 14/96, Austria N 517/96] in which no aid could have been approved under the 'usual' legal provisions. It states that in the decision in Case N 517/96 it agreed to three aid plans relating to Agrana which involved investment in the potato starch sector. That decision, according to the Commission, was based on Declaration No 31, but also on the fact that there would be no increase in capacity, especially since the potato starch sector in Austria was governed by a quota system in accordance with Council Regulation (EC) No 1868/94 of 27 July 1994 establishing a quota system in relation to the production of potato starch (OJ 1994 L 197, p. 4) (paragraph 45 of the contested decision).

65 The Commission went on to stress that the contested aid 'promotes increased production capacity in a sector which is not regulated by a quota system and is experiencing structural over-capacity' (paragraph 46 of the contested decision). According to the Commission, starch producers in other Member States which export to Austria might find their competitive position on the Austrian market affected by Agrana's increased capacity and might be exposed to greater competition on other markets (paragraph 52 of the contested decision). In conclusion, it considered that the contested aid 'affects trading conditions to an extent contrary to the common interest by helping to increase supply in a market where there is limited demand and thereby distorts competition' (paragraph 54 of the contested decision).

66 Therefore, notwithstanding the flexibility clause in Declaration No 31, the Commission considered the aid could not be regarded as compatible with the

common market pursuant to Article 92(3)(c) of the EC Treaty (paragraph 56 of the contested decision).

67 In the light of the reasons given by the Commission in the contested decision, that institution cannot be regarded as having committed a manifest error of assessment in considering that the contested aid plan could not be justified solely on the basis of Declaration No 31.

68 The Commission cannot be criticised for considering that the grant of that aid might seriously affect its policy in the sector concerned. The fact that it bases itself to a large extent on the structural situation in that sector within a Community context does not mean that it failed to assess this case individually.

69 As regards the failure to weigh the advantages the Community gained from the Republic of Austria's accession to the European Union without a transitional period against the disadvantages involved in the aid in question being paid, it must be observed that the Commission was not required to take that aspect into account. When making its assessment of the compatibility of the contested aid, in which it had to take Declaration No 31 into account, the Commission was, admittedly, required to consider, as it pointed out in paragraph 49 of the contested decision, whether the aid was likely to promote the development of an economic sector or area without affecting trading conditions to an extent contrary to the common interest. However, the advantages which the Community was able to gain as a result of the Republic of Austria's accession to the European Union do not constitute a relevant factor in the context of a specific assessment of aid.

70 It is clear from all the foregoing considerations that the Commission did not commit a manifest error in its assessment of the question whether the contested

aid was compatible with the common market. It is also clear that it did not infringe the provisions of Article 151(1) of the Act of Accession, read in conjunction with Declaration No 31 and Article 87(3)(c) EC.

71 The second plea must therefore be rejected.

The third plea, alleging misappreciation of the criterion of the need for the aid

72 The applicant contends that in the contested decision the Commission based itself on a purely theoretical and incorrect definition of the concept of the need for aid (see paragraph 22 above).

73 It argues that, although it is true that the decision to make the investment was taken before the Commission had decided on the compatibility of the aid, it is not true that Agrana acted at its own risk (paragraph 62 of the contested decision) and that the plan would therefore have paid for itself without the aid.

74 In that regard, it should be observed that in order for aid to benefit from one of the derogations contained in Article 87(3) EC, it must not only comply with one of the objectives set out in Article 87(3)(a), (b), (c) or (d) EC, but it must also be necessary for the attainment of those objectives (see Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 17).

75 It has already been found that the applicant has not demonstrated that the Commission committed a manifest error in its assessment of the other conditions to be met in order for the contested aid to be considered to be compatible with the common market as regards the only derogation which is relevant in the present case, namely Article 87(3)(c) EC.

76 Consequently, it is not necessary to consider the plea regarding the need for the aid, since even if that plea were successful it could not in any case lead to annulment of the contested decision.

Fourth plea, alleging failure to provide a statement of reasons

Arguments of the parties

77 The applicant states that the obligation on the Commission to provide a statement of reasons is particularly significant where it enjoys a power of assessment in applying the Treaty. This is so in the case of decisions concerning application of the derogation contained in Article 87(3)(c) EC.

78 In that regard, the Commission should have taken particular care to ensure that the Community judicature was in a position to review and decide whether the Commission had complied with the rules of procedure, had correctly stated the facts, had not committed a manifest error of assessment in adopting its decision and had not exercised its discretion in a way which was contrary to the purpose and intent of the legislation concerned (see Case C-269/90 *Technische Universität*

München [1991] ECR I-5469, paragraph 26 and the Opinion of Advocate General Sir Gordon Slynn in Case 84/82 *Germany* v *Commission* [1984] ECR 1451, 1492, 1500).

79 In the present case, the Commission did not deal with the Austrian Government's decisive argument based on Declaration No 31 and the 'accession scenario', or at least did so most inadequately. The contested decision should therefore also be declared void on the ground that it infringes Article 253 EC.

80 Thus, the Commission did not make any findings of its own on the state and progress of trade relations between the Republic of Austria and the rest of the Community in the starch sector before or after accession. Moreover, the Commission did not consider the advantages and disadvantages for the Community as regards the starch sector of accession without a transitional period. Nor did it explain whether and, if so, why it considered the statements by the Austrian Government in this regard to be irrelevant. The failure to provide an adequate statement of reasons is aggravated by the fact that the Commission adopted a totally different opinion in its decision in Case N 517/96.

81 The applicant states in its reply that although the Commission quoted Declaration No 31 several times in the contested decision it failed to take any account of that declaration when assessing the Community interest for the purpose of Article 87(3)(c) EC. Furthermore, it challenges the Commission's argument in its defence that the advantages and disadvantages can be seen from the state of the market at the time the contested decision was adopted. That appraisal of the market conditions on 30 July 1997 does not make it possible to determine whether those conditions had improved since 31 December 1994.

82 The Commission disputes the applicant's contention that the contested decision contains inadequate reasons.

Findings of the Court

83 The Community institutions' obligation under Article 253 EC to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the legality of the decision and the person concerned to know the reasons for the measure adopted so that he can defend his rights and ascertain whether or not the decision is well founded (see Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 57).

84 Furthermore, in stating the reasons for the decisions it has to take in order to ensure that the rules of competition are applied, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 31).

85 As is clear from the findings of the Court regarding the second plea, the Commission has explained why it considered that Declaration No 31 did not permit a result which was favourable to Agrana in this case.

86 Moreover, as is also clear from those findings, the Commission is not required to consider what the advantages and disadvantages are of the accession of a Member State when making an assessment of particular aid measures (see paragraph 69 above).

87 Lastly, the Commission has pointed out clearly the differences between this case and Case N 517/96 (see paragraph 64 above).

88 It follows that the contested decision enables the party concerned to know the reasons for it and the Community judicature to review its legality.

89 That plea must therefore be rejected.

90 It follows from the foregoing that, since the measures of organisation of procedure proposed by the applicant, seeking from the Commission production of the decision approving aid AT/24 (Decision N 708/95) and also of the 'information and documents communicated by the Republic of Austria for the approval of State aid N 517/96', serve no purpose as regards the decision in this case, there is no ground for adopting them.

91 It follows from all the above considerations that the application should be dismissed in its entirety.

Costs

92 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, the applicant must be ordered to pay the costs as applied for by the Commission.

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and pay those of the Commission.**

Lindh García-Valdecasas Cooke

Vilaras Forwood

Delivered in open court in Luxembourg on 7 June 2001.

H. Jung — Registrar

P. Lindh — President