OPINION OF ADVOCATE GENERAL JACOBS
delivered on 23 March 1994 *

My Lords,

1. In this case the Kingdom of Spain challenges a Commission decision finding that Spain had granted State aid in breach of Articles 92 and 93 of the Treaty. The decision in issue is Commission Decision 93/133/EEC of 4 November 1992 concerning aid granted by the Spanish Government to the Merco company (agricultural processing industry). [1] The issues in this case are in some respects similar to those in three other cases in which Spain challenges Commission decisions on State aid, Joined Cases C-278/92 to C-280/92 ([1994] ECR I-4103), which were heard on the same day as the present case.

The facts

2. The public company Mercorsa (Mercados en Origen de Productos Agrarios) was set up in 1972 by the Spanish Ministry of Agriculture. In 1987 the company changed its name to Merco. At the time of the contested decision, its public shareholders were the Patrimonio del Estado (part of the Ministry of Finance) with 69.3% capital participation and the FORPPA (Fondo para la Ordenación y Regulación de la Producción de los Precios Agrarios, a public body coming under the Ministry of Agriculture) which held a 30.7% share.

3. Merco was engaged in marketing agricultural products. It had a capital of PTA 8 782 million and employed 900 people. It carried on its activities in 55 agricultural purchasing centres established at the points of production, which marketed agricultural products in Spain and abroad.

4. In 1990 the company's turnover was about PTA 71 000 million, which meant that it ranked as one of the largest companies in Spain. The main divisions of the company dealt in fruit and vegetables, in olive oil, in cereals and grains, and in oilseed products and cotton.

* Original language: English.

1 — OJ 1993 L 55, p. 54.

5. According to an auditing report (for the 1990 financial year) carried out by Price Waterhouse in 1991, Merco had a deficit in 1990 of over PTA 8 727 million, to which were to be added the deficits from earlier financial years amounting to nearly PTA 9 800 million. Thus on 31 December 1990 the total deficit amounted to over PTA 18 000 million.

6. Following a complaint, the Commission, by telex messages dated 20 December 1990 and 23 April 1991, asked the Spanish Government for information concerning aid which it had allegedly granted to Merco, in the form of an injection of capital amounting to PTA 5 900 million.

7. By letter dated 27 May 1991 the Spanish Government confirmed that in 1990 the sum of PTA 5 900 million had been paid to Merco, pursuant to a decision by its two public shareholders, the Patrimonio del Estado and the FORPPA, in the form of an injection of capital.

8. On the basis of the information at its disposal the Commission took the view that that injection of capital of PTA 5 900 million was State aid within the meaning of Article 92(1) of the Treaty, and decided to initiate the procedure provided for in Article 93(2) of the Treaty.

9. In the proceedings before the Commission, the Spanish Government took the view, in comments submitted by a letter dated 4 October 1991, that the injection of capital of PTA 5 900 million was not State aid within the meaning of Article 92 of the Treaty; the decision, taken by the company's public shareholders, had been based on economic criteria since the Spanish Government had decided to reorganize the company and to restrict it to profitable activities.

10. That reorganization consisted on the one hand of the closure of the oil division and on the other of an injection of capital amounting to PTA 5 900 million. The oil division was the cause of a major part of the company's profitability problems. In 1990 that division had cost about PTA 2 022 million.

11. Nevertheless, the Spanish authorities considered that even if the injection of capital were to be regarded as State aid it would be compatible with the common market on the ground that financial assistance was necessary to give effect to the plans to cut back the company's activities through the closure of the oil division. In addition, since the activities of that division were principally concentrated in less-favoured regions, the aid should be declared compatible with the common market under Article 92(3)(a) and (c) of the Treaty.

12. However, the Spanish Government admitted that the injection of capital of PTA 5 900 million was not sufficient to ensure that Merco would become profitable and recognized that other reforms would have to be undertaken, in particular with regard to the company's financial structure.

13. By Article 1 of the contested decision the Commission found that the aid granted to Merco in the form of an injection of capital of PTA 5 900 million was illegal because it was granted in violation of the procedural rules laid down in Article 93(3) of the Treaty. Article 1 also found that the aid was incompatible with the common market under the terms of Article 92(1) since it did not fulfil the conditions laid down by Article 92(3).

14. Article 2 of the decision required the Kingdom of Spain to withdraw the aid referred to in Article 1 and to order Merco to repay the sum in question within two months of receipt of notification of the decision. Repayment was to be made in accordance with the procedures and provisions laid down by national legislation.

15. Article 3 of the decision required the Spanish Government to inform the Commission, within two months from the date of notification of the decision, of the measures taken to comply with it.

16. Spain advances four submissions in support of its action. I shall examine them in turn.

First submission — the existence of an aid

17. In its first submission Spain contends that the injection of capital was not an aid within the meaning of Article 92(1) of the Treaty if the criteria applied in the Court's case-law are applied. The Court has held that an appropriate way of establishing whether a subscription of capital is a State aid is to apply the criterion of determining to what extent the undertaking would be able to obtain the sums in question on the private capital markets and to consider whether a private shareholder would have subscribed the capital in question. [2] In another case the Court applied the test whether a private investor operating under normal market economy conditions would have entered into the financial transactions in question. [3] According to the Spanish Government the Commission, in applying those criteria, omitted to take account of a fundamental element, namely the purpose of the interven-

2 — See Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 13 of the judgment.

3 — See Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 29 of the judgment.

tion. That intervention, far from seeking to maintain artificially the undertaking's activity, was on the contrary limited to facilitating the liquidation in the least burdensome manner of one division of the undertaking, that of oils, which represented about 50% of the undertaking's total activities. Consequently, it was not appropriate to assess the increase in capital in relation to the maintenance of the undertaking's activities in its entirety.

18. The Spanish Government also contends that, as appears from the analysis of the accounts annexed to its application, the increase in capital which is the subject of the contested decision has made possible both the 'recovery of the company's assets' [4] and the payment of a substantial amount of debts to small farmers whose very existence would have been endangered if the debts had not been paid.

19. For the reasons given in the Commission's defence, it is difficult to accept the suggestion that the purpose of the intervention was to close down the oil division. The intervention was made in 1990, while the decision to abandon the oil division was not taken until 1991, according to the Spanish Government's own statements. Moreover in a letter dated 20 March 1992, the Spanish authorities informed the Commission that Merco wanted to cease its activities in the oil sector by 30 March 1992. The Commission also points out that none of the objectives now attributed by the Spanish Government to the intervention was mentioned in the course of the proceedings before the Commission. The inference must I think be that the purpose of the intervention was not, as the Spanish Government now claims, to facilitate the liquidation of part of Merco's activities but on the contrary to maintain Merco in operation for a further period and to put off the evil day of liquidation.

20. As regards the reliance by the Spanish Government on the recovery of assets and the payment of debts to small farmers, it is again significant that those considerations were not mentioned by the Spanish authorities in the course of the proceedings before the Commission. The Commission also points out that the Spanish Government has not established any link between the increase in capital and the recovery of assets. Moreover, the accounts annexed to the application do not support the existence of any such connection. As regards the payment of debts, the Commission submits that such factors are not relevant in considering the attitude of a private investor. Moreover, the Commission states that Merco's balance sheet for the year ended 31 December 1990, supplied to the Commission by a third party, shows that most of Merco's creditors were not small farmers: the debts were not essentially commercial (PTA 5 220 million) but debts to

4 — The meaning of this expression is not entirely clear; nor does it emerge from the documents annexed to Spain's application.

financial establishments (PTA 21 511 million).

21. In its reply, Spain makes very little attempt to meet the convincing refutation of its contentions. The reply confines itself to two assertions: first, that the recovery of assets and the payment of debts to small farmers had been effected, and secondly, that the process of winding up Merco's activities, embarked upon, according to the Government, in 1990, was now (May 1993) practically completed. Those assertions, even if well founded, do not meet the Commission's case. Spain's first submission must therefore be rejected.

Second submission — effect on trade between Member States

22. By its second submission Spain challenges the Commission's finding that the aid was such as to affect trade between Member States. Article 92(1) prohibits only such aid as 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods ... in so far as it affects trade between Member States'.

23. In the contested decision the Commission based its finding about the effect on trade between Member States simply on the fact that all the agricultural products marketed by Merco were traded between Member States. The Commission produced in its decision a statistical table showing the extent of trade between Spain and the other Member States in the various product categories. The Commission stated that, if financial aid granted by public authorities strengthens the position of certain undertakings as against their competitors in the Community, it must be considered to affect the latter; and that that was all the more true when — as in the case in point — the aid served to prop up the financial position of an undertaking which, as the Commission expresses it, ought in the normal course of events to have disappeared.

24. Spain's challenge to the contested decision on this issue is essentially a corollary of its first submission. Spain considers that the capital injection in question cannot be regarded as liable to affect trade between Member States since its effect was not, as the Commission had affirmed, to support the activities of Merco, but rather the liquidation of the activities which were the origin of Merco's problems. In Spain's view, it is difficult to argue that the liquidation of an undertaking or of one of its branches distorts competition by affecting trade between Member States when the effect of the disappearance of an undertaking from one of the sectors of its activity is precisely to allow the remaining undertakings to occupy that sector of the market.

25. In its defence, the Commission again denies that the increase in capital formed part of a plan to close down the oil division. In its reply, Spain merely repeats that the purpose of the capital injection was to pay off outstanding debts, with a view to winding up activities in the oil sector.

26. The answer to the second submission therefore follows, in my view, from the answer to the first. In any event, the Commission's reasoning on this point, although not directly challenged as inadequate by the Spanish Government, seems to me to be adequate in the circumstances. The effect, if not the intention, of the injection of capital was to allow Merco to continue trading, and it could reasonably be inferred, given the scale of Merco's activities, that there would be an effect on trade between Member States.

27. The Spanish Government cites in this connection the *Intermills* case, where the Court held that 'the settlement of an undertaking's existing debts in order to ensure its survival does not necessarily adversely affect trading conditions to an extent contrary to the common interest ... where such an operation is, for example, accompanied by a restructuring plan'. [5] However, there the Court was considering, not the effect on trade or the distortion of competition under Article 92(1) but whether an aid was contrary to the common interest under Article 92(3)(c). Moreover, in the present case the Commission had found that Spain had not produced any adequate restructuring plan, as was required before such aid could be approved under Article 92(3). This point can therefore be considered in the context of Spain's third submission, which raises the issue whether the aid fell within the scope of Article 92(3).

28. For the reasons given above, I conclude that Spain's second submission must be rejected.

Third submission — applicability of Article 92(3)

29. Spain contends that the capital injection in issue fell within the scope of Article

5 — Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 39 of the judgment.

92(3)(a) and (c) of the Treaty. Article 92(3) provides:

'The following may be considered to be compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious unemployment;

(b) ...;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest ... .'

30. Spain states that many of Merco's activities were carried out in the least developed parts of Spain which are eligible for regional aid within the scope of Article 92(3)(a) and (c). The capital injection facilitated a reduction in the company's activities and avoided all serious consequences. Non-payment of the sums due to small farmers in the sector would have unleashed a crisis leading to the ruin of many of them and excluding for the future any possibility of encouraging regional and sectoral development. The measure therefore fell within the provisions of Article 92(3)(a) and (c).

31. The reply to these arguments can be found, in my view, in the Commission's decision itself. That decision stated *inter alia* as follows:

'The exemptions provided for at points (a) and (c) of Article 92(3) in regard to aid to promote or facilitate the development of particular areas are not applicable.

... Although Merco has been able to expand some of its activities in areas qualifying for regional aid under points (a) and (c) [of Article 92(3)] the aid measure in question was not authorized as part of a regional aid programme but by an *ad hoc* decision of the Spanish Government, and it took the form of

arbitrary capital increases granted at the Government's discretion.

Even if the aid in question were to be considered regional aid, it would still not be eligible for the exemptions under Article 92(3)(a) and (c) since aid granted pursuant to those provisions must contribute to the region's long-term development which, in this case, means that the aid would have been used, at the very least, to reestablish the profitability of the company (an aim which Merco has not achieved, according to the information supplied to the Commission) without producing any unacceptable negative effects on the conditions of competition within the Community.

... .'

32. The Commission in the contested decision further stated that 'given that ... the aid ... was used to offset losses and reduce debts, that it was not linked to a satisfactory restructuring programme and that it could have had a negative impact on the company's Community competitors by maintaining the company's competitiveness through artificially improving its financial position, the aid in question is incompatible with the common market'. And the Commission also stated that it could approve restructuring aid only in special circumstances: such aid must be linked to a true restructuring plan and may be granted only where it can be proved that the continued existence of a company and the reestablishment of its profitability are in the best interests of the Community.

33. In my view the Commission's decision cannot be faulted on these points.

34. In its defence the Commission refers to its decision and adds only that the closure of the company's activities in the oil sector does not contribute to the development of the regions in question. Spain adds nothing in its reply and it is clear in my view that there is no basis for challenging the Commission's decision on this ground.

Fourth submission — obligation to recover the aid

35. Spain submits that it is impossible to carry out the contested decision in so far as it required the recovery of the aid, since the company is in liquidation, as was known to the Commission from the letters of the Spanish authorities dated 1 and 31 July 1992, and has no remaining activities, being managed by an administrator responsible solely for the last rites of winding up the company.

The Commission contends that Spain could nevertheless seek, as a creditor in the winding up, the recovery of the sums paid, in whole or in part.

36. In my view the validity of the Commission's decision must be assessed in the light of the circumstances in which it was taken. It makes no difference to its validity, in my view, if the subsequent course of events makes it difficult or even impossible to carry out the decision. [6] In the present case I have no doubt that the aid in question was granted illegally, both by Spain's failure to observe the procedural requirements of the Treaty and in breach of the substantive provisions of the Treaty. Equally clearly, the Commission acted correctly in requiring the recovery of the aid.

37. I would add that the present case highlights a general difficulty in the enforcement of the Treaty provisions on State aid. In the Boussac case [7] the Court held that where a Member State fails to comply with the procedural requirements of the Treaty, the Commission may issue an interim decision requiring suspension of payment of the aid and requiring the Member State to provide all necessary information. If a Member State then complies with the Commission's order, the Commission is required to examine the compatibility of the aid with the common market: it cannot, as the Commission had suggested, order recovery of the aid simply on the basis of the Member State's failure to comply with the procedural requirements of the Treaty.

38. In reaching that view the Court sought to reconcile two conflicting considerations, in the light of the repeated failure by certain Member States to comply with their Treaty obligations in respect of notification of proposed State aid. On the one hand, if the Commission's view were accepted, then aid might be declared unlawful because of procedural irregularities even though it might be compatible with the common market. On the other hand, it could not be held that the Commission, when faced with aid which has been granted in breach of the procedural requirements, had the same rights and obligations as when aid is duly notified; such an interpretation would encourage the Member States concerned not to comply with Article 93(3) and would deprive that paragraph of its effectiveness. [8]

39. The solution reached by the Court, in recognizing the Commission's power to order suspension of the aid but requiring the Commission to proceed to examine the compatibility of the aid with the common mar-

6 — See Case C-142/87, cited above in note 3, paragraphs 58 to 63 of the judgment.

7 — Case C-301/87 *France* v *Commission* [1990] ECR I-307.

8 — Ibid., paragraph 11 of the judgment.

ket, may prove useful in cases where the aid has been only partly paid. Where the whole of the aid has already been paid, the power to order suspension is of course of no avail; and the fact that the Commission must go on to examine the compatibility of the aid, and that the Member State may then challenge the Commission's decision — on however flimsy grounds — in Court proceedings, before the obligation to recover the aid can be definitively established is likely to render that obligation, in some cases, illusory. Recovery may by then be in practice impossible. It would be preferable, I think, to take the view that, when a Member State breaches the requirement of notification, the Commission has the power immediately to order recovery of the aid. I see little force in the argument that that might lead to orders for the recovery of aid which might prove compatible with the common market: Member States can avoid that problem precisely by complying with their obligation to notify. [9]

40. Both in the present case and in Joined Cases C-278/92 to C-280/92 many of the difficulties which have been occasioned could have been avoided if Spain had complied with its obligations under Article 93(3) of the Treaty.

Conclusion

41. For the above reasons, I am of the opinion that:

(1) the action should be dismissed;

(2) the Kingdom of Spain should be ordered to pay the costs.

9 — See my Opinion in Boussac (cited above in note 7), paragraph 42.