OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 11 October 1990 *

Mr President,
Members of the Court,

1. In this application, the Italian Republic ('the applicant') seeks the annulment of Commission Decision 89/43/EEC of 26 July 1988 on aids granted by the Italian Government to ENI-Lanerossi [1] ('the contested decision'). The contested decision of the Commission ('the defendant') is based on the first subparagraph of Article 93(2) of the Treaty, and is worded as follows:

'*Article 1*

The aids granted between 1983 and 1987 to ENI/Lanerossi in the form of capital injections in favour of the group's mens outer wear subsidiaries and amounting to LIT 260.4 [thousand million] are illegal as they were provided in violation of the provisions of Article 93(3) of the EEC Treaty. Moreover, they are incompatible with the common market within the meaning of Article 92 of the EEC Treaty.

Article 2

These aids shall be withdrawn by recovery.

Article 3

The Italian Government shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply herewith.'

In other words, this case is concerned with State aid granted in the form of injections of capital into undertakings in difficulty.

Facts and restructuring proposals

2. It appears from the contested decision that in 1962 Lanerossi SpA was taken over by the State holding company Ente Nazionale Indrocarburi (ENI) in order to resolve the economic and financial problems of a number of private textile and clothing companies which had in turn been taken over for that purpose by Lanerossi. [2] It also appears that by means of considerable restructuring efforts it was possible over the years to return some of those subsidiaries to viability but that four subsidiaries in the mens' outer wear sub-sector (Lanerossi Confezioni, Intesa, Confezioni di Filottrano and Confezioni Monti) continued to make losses and to receive financial assistance from the State in the form of loss compensation. [3]

* Original language Dutch
1 — OJ 1989 L 16, p. 52
2 — Contested decision, Part I, first paragraph
3 — Contested decision, Part I, second and third paragraphs

Between 1974 and 1979 the annual losses of those four undertakings grew from LIT 2 thousand million to LIT 39 thousand million, whereupon the defendant informed the applicant by letter of 26 June 1980 that the measures in favour of those undertakings had to be regarded as aid and could be taken only by way of derogation from Article 92(1), on condition that the assistance was granted for a limited period and that the restructuring programme presented to the Commission was carried out in order to reduce the production capacities of the companies concerned and return them to viability and financial self-support in the short term. [4]

In a letter of 20 May 1983 the defendant concluded that past efforts to restructure the four undertakings had not been successful. Losses between 1980 and 1982 had reached well over LIT 150 thousand million and a speedy recovery was not to be expected. [5] The defendant went on to point out that the applicant had informed it of the restructuring programme for the year from 1983 to 1986 and that the undertakings were expected to continue to rely heavily on State intervention and public funds in order to make up their losses. [6] In view of the social and regional importance of those undertakings, the defendant raised no objections to the aid granted until the end of 1982, but expressed doubts as to whether assistance from public funds in order to cover operating deficits could in future be regarded as compatible with the orderly functioning of the common market. [7] Hence it was extremely sceptical in relation to the restructuring programme for 1983 to 1986. In the same letter of 20 May 1983, the defendant also reminded the applicant of its obligation under Article 93(3) to inform the Commission. By telex message of 24 June 1983, the applicant confirmed that it would notify all future measures in favour of those four undertakings. [8]

In a reminder dated 22 July 1983, the defendant reiterated that no further aid in favour of those undertakings could, in view of their history and the state of the market concerned, be regarded as compatible with the common market. [9] By letter of 2 November 1983 the applicant informed the defendant that no further aid was envisaged, and that ENI/Lanerossi's management regarded those factories as unrestructurable, so that the restructuring programme for 1983 to 1986 would not be implemented. [10]

Following press reports that the factories concerned continued to suffer losses and, in order to avoid insolvency, would probably have to solicit aid from the State again, the defendant repeatedly asked the applicant to submit information as to the true state of affairs. By letter of 30 August 1984 the

4 — Contested decision, Part I, third and fourth paragraphs.

5 — Contested decision, Part I, sixth paragraph. It may be noted that in the same letter the defendant informed the applicant that in respect of another of Lanerossi's subsidiaries in the same sub-sector, namely Lebole SpA, the assistance which it had received in the form of compensation for losses was matched by restructuring efforts already implemented and to be implemented shortly afterwards, with the result that the aid granted could benefit from the derogation in Article 92(3)(c) (contested decision, Part I, fifth paragraph).

6 — Contested decision, Part I, sixth paragraph.

7 — Contested decision, Part I, seventh paragraph.

8 — Contested decision, Part I, eighth paragraph.

9 — Contested decision, Part I, ninth paragraph.

10 — Contested decision, Part I, tenth paragraph. The applicant has so far failed to produce, at the Court's request, a copy of that letter, whose contents it does not dispute, with the result that the form in which it is reproduced in the decision may be considered accurate.

applicant acknowledged that in respect of 1983 it had granted compensation for losses and at the same time transmitted to the defendant a summary of a new restructuring programme. It was clear from that summary that losses would have to be made up in the future as well.[11] The credibility of that structuring programme, however, is open to question since it appeared from that letter that ENI/Lanerossi's management still considered the factories to be unrestructurable.

3. After the defendant had initiated the procedure under the first subparagraph of Article 93(2), the applicant informed the defendant by letter of 28 May 1985, an initial reply in which it also requested more time in which to submit its comments, that the workforce was being reduced, that restructuring could not succeed in the short term in view of the state of the businesses at the time when they were taken over by ENI/Lanerossi (in 1962), and that it had now been realized that the factories were probably unrestructurable and must therefore be reconverted to other activities. However, this would take time and would require further intervention by the State.[12] At a bilateral meeting held on 21 June 1985 the applicant announced additional information on the new programme 'to restructure certain parts of these factories and to reconvert others' and indicated that this would shortly lead to a definitive solution.[13]

However, it was not until 5 February 1986 that the defendant obtained the information that had been promised, and even then it was incomplete.[14] At a bilateral meeting on 12 June 1986 the applicant confirmed that the factories in question had received aid from the State in the form of loss compensation amounting to LIT 78 thousand million in 1983, LIT 56.8 thousand million in 1984 and LIT 42.2 thousand million in 1985, and that the factories would either be transferred to the private sector, or reconverted to other activities, or both.[15] A definitive solution, the applicant reiterated, would take time. After the Commission had pointed out that certain information necessary for full examination of the case was still missing, the applicant supplied additional but still incomplete information by letter of 8 September 1986; further information was provided at a bilateral meeting on 7 November 1986.[16] It may be inferred from the applicant's statement at that meeting that a definitive solution would soon be found and that it would inform the defendant of the details in good time that the applicant did not yet have a detailed restructuring plan, the existence of which it had announced in 1984/1985 (see final paragraph of section 2 and the first paragraph of section 3 above).

4. At a bilateral meeting on 11 September 1987, it transpired that a transfer of the factories to the private sector and a reconversion to other activities was under way but had not yet been finalized.[17] Finally, the applicant informed the defendant at a meeting held on 26 January 1988 that by March 1988 ENI/Lanerossi would transfer

11 — Contested decision, Part II, first and second paragraphs
12 — Contested decision, Part III, first paragraph
13 — Contested decision, Part III, third paragraph
14 — Contested decision, Part III, fourth and fifth paragraphs
15 — Contested decision, Part III, sixth paragraph
16 — Contested decision, Part III, eighth paragraph.
17 — Contested decision, Part III, ninth paragraph

all the factories to the private sector; that in fact took place and was confirmed by telex message of 5 March 1988 and by letter of 22 July 1988.[18] The applicant accordingly informed the defendant that the losses made up amounted to LIT 45.9 thousand million in 1986 and LIT 37.5 thousand million in 1987. As it had already stated at the meeting on 26 January 1988, the applicant confirmed that as a result of the various transfers, of the original 3 563 employees in 1983 38% would have taken early retirement, 25% would have been transferred to the private mens' outer wear sector (civil), 20% to the private mens' outer wear sector (military) and 17% to other sub-sectors of the textile and clothing industry and other branches of industry, for instance shoes.[19] According to the applicant, production (capacity) had been reduced and transferred in the same manner and to the same extent.[20] According to the Commission, however, it was by no means certain that production capacity had really been reduced by 55%, as the applicant asserted.[21]

5. That lengthy account of the facts, which is not contested by the applicant, reveals, in my view, that during the period from 1983 to 1987 to which the contested decision relates the applicant initially submitted to the Commission a restructuring plan for the years from 1983 to 1986 which, as the applicant itself acknowledged subsequently, could *not* lead to a recovery, and it went on to announce restructuring plans which existed at best only in outline or still had to be worked out *in detail*, even though the factories had been regarded as unrestructurable by the management itself since 1983. Nevertheless, contrary to the undertakings it had given and without properly informing the Commission, the applicant continued to grant substantial compensation for losses which reached or even exceeded the level of the factories' turnover.[22]

In reply to the Court's request that it submit all the relevant restructuring programmes, explain how those programmes eliminated or reduced over-capacity between 1979 and 1987 and furnish proof that production capacity had been reduced, the applicant was unable to refer to any restructuring plans other than those mentioned above. The applicant confined itself to an *a posteriori* description of a complex series of corporate transactions in which the various establishments of the four businesses concerned changed hands (although the reasons for those transactions are not always clear) and to a factual survey of the changes in the workforce (-40% between 1983 and 1990), the volume of production (-38% between 1980 and 1985), production capacity (-30% between 1983 and 1987), the factories' surface area (-20% between 1983 and 1987) and the decommissioning of machinery and equipment (25%). Even if the method of calculating those figures could be established, which the Commission does not accept, they still do not indicate the existence of a credible and pre-existing restructuring programme for the period in question. Similar reductions can also be made in undertakings in a situation of crisis which have not been restructured. In other words, the applicant has failed to establish a clear link between reductions observed subsequently and specific restructuring measures drawn up in advance.

18 — Contested decision, Part III, tenth and twelfth paragraphs.

19 — Contested decision, Part III, tenth and twelfth paragraphs.

20 — Contested decision, Part III, tenth paragraph.

21 — Contested decision, Part IX, fourth paragraph.

22 — Contested decision, Part III, sixth and twelfth paragraphs; and Part VII, seventh, tenth, eleventh and twelfth paragraphs.

On the basis of those figures, I consider that the defendant was right to conclude that the aid granted from 1983 to 1987 to the four undertakings in the form of loss compensation was not part of a cohesive, specific and pre-existing restructuring programme, or succession of such programmes, having a reasonable chance of success. That is an important factual element which must be taken into account in assessing the applicant's legal arguments.

Aid granted by a Member State or through State resources in any form whatsoever

6. According to Article 92(1) of the EEC Treaty, 'any aid granted by a Member State or through State resources in any form whatsoever . . .' is incompatible with the common market where it distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects intra-Community trade. The requirement of an adverse effect on trade will be discussed below (in section 17 et seq.), following consideration of the distortion or threatened distortion of competition (in section 8 et seq.).

The phrase used in the Treaty, 'by a Member State or through State resources in any form whatsoever', has been given a broad interpretation by the Court. In its judgment in *Commission* v *France*[23] the Court stated that 'as is clear from the actual wording of Article 92(1), aid need not necessarily be financed from State resources to be classified as State aid'. Nor is there any need to draw a distinction according to whether the aid 'is granted directly by the State or by public or private bodies established or appointed by it to administer the aid'.

In a recent judgment of 2 February 1988,[24] the Court acknowledged, moreover, that the grant of a financial benefit to energy consumers through the lowering of tariffs (thus forgoing profits) by a company incorporated under private law 50% of whose capital is held by the State, which also appoints half of the members of the supervisory board, must be regarded as State aid since it was also clear that the undertaking did not enjoy 'full autonomy' but acted under the control and on the instructions of the public authorities.

7. In this case the aid was implemented and financed by ENI through its wholly owned subsidiary Lanerossi SpA.

ENI is a State holding company which was set up and provided with capital by the applicant, and is managed by individuals appointed by the government.[25] ENI displays many characteristics which distinguish it in fundamental respects from companies incorporated under private law:

23 — Case 290/83 [1985] ECR 439, at paragraph 14. See also the judgment in Case 57/86 *Greece* v *Commission* [1988] ECR 2855, at paragraph 12

24 — Judgment in Joined Cases 67, 68 and 70/85 *Van der Kooy* v *Commission* [1988] ECR 219, at paragraphs 36 and 37.

25 — Article 12 of Law No 136 of 10 February 1953 setting up the ENI (Official Gazette of the Italian Republic No 72 of 27 March 1953), as frequently amended, *inter alia* by Law No 1153 of 14 November 1967 (Official Gazette of the Italian Republic No 310 of 13 December 1967).

creation by law and organization as a company incorporated under public law (Article 1), strict State supervision over all of its organs (Articles 11 to 17) and over the adoption of important decisions (Articles 4, 8, 10, 21 and 23), the possibility of obtaining expropriation orders for its benefit (Article 23), monopoly rights (Article 2) and so on. In my view, it is clear from that scheme and from the structure of its powers that ENI and its wholly-owned subsidiaries are State bodies for the purposes of Article 92(1) through which State aid is channelled. [26]

ENI's capital is held entirely by the State, that is to say the applicant. That capital is known as the 'endowment fund' [27] and enables ENI to borrow on the capital market. It plays a role similar to that of equity capital in private undertakings. [28] For the sake of completeness, it is worth noting that the funds raised by ENI on the capital market in order to augment its resources over and above its capital are not obtained without the assistance of the State. In 1985 ENI borrowed, with the applicant's consent in accordance with Article 21 of the Law on the ENI and, it would seem, at an interest rate subsidized by the applicant, LIT 51.7 thousand million on the capital market in order to cover losses in the textile sector. [29]

In those circumstances it cannot, in my view, be disputed that the funds provided by ENI through its subsidiary Lanerossi SpA constitute indirect State aid, and were also granted through State resources in the broad sense applied by the Court in its case-law. It makes no sense, therefore, as the applicant still advocated at the hearing, to demand proof that State resources were specifically earmarked or that there was an official, published and specific instruction from the government to ENI to rescue Lanerossi's four subsidiaries. That would deprive the provisions of the EEC Treaty on aid of their effectiveness and greatly facilitate their circumvention.

Aid which distorts or threatens to distort competition

8. I now turn to the question whether the defendant was right in the contested decision to start from the premise that the aid in question is incompatible with the common market because it 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods'. In support of that argument the defendant relies on the finding that the losses were made up by injections of capital in circumstances which a private investor would have found unacceptable in a market economy. [30]

On 17 September 1984 the defendant sent a document to the Member States explaining its general standpoint with regard to public holdings in company capital in the light of Article 92. [31] In that communication the Commission takes the private investor

26 — In the *Meura* case (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263) the role of the public investment company SRIW as a channel for State aid in the form of the acquisition of capital holdings was not even called in question.

27 — Article 7 of Law No 136, cited above.

28 — Report of the Italian parliamentary experts' committee on State holdings (known as the 'Chiarelli Committee'), No 19, second paragraph, published in *Foro Amministrativo II* (1975) p. 653, at p. 666.

29 — During the written procedure and at the hearing the defendant referred to the publication in Official Gazette of the Italian Republic No 6 of 9 January 1986, at p. 40, of a decision of the Comitato Interministeriale per la Programmazione Economica of 28 November 1985. The applicant objected to the examination of that measure because it is not mentioned in the contested decision and was referred to only in the written procedure. However, its existence cannot be disputed.

30 — Part IV of the contested decision.

31 — Bulletin EC 9-1984, pp. 98 to 100; reference in the *Fourteenth Report on Competition Policy*, 1984, point 198.

criterion as the relevant criterion for its assessment:

'3.3 . . . *there is State aid* where fresh capital is contributed in circumstances that would not be acceptable to a private investor operating under normal market economy conditions.

This is the case:

(i) where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return (in dividends or capital gains) cannot be expected within a reasonable time from the capital invested; . . .'

9. After the Court had acknowledged in its judgment in Intermills that 'no distinction can be drawn between aid granted in the form of loans and aid granted in the form of a holding acquired in the capital of an undertaking',[32] it gave full recognition to the prudent private investor criterion in the *Leeuwarder Papierwarenfabriek* judgment,[33] the relevant passages of which are as follows:

'With regard to State aid within the meaning of Article 92(1) of the EEC Treaty, it is clear from the preamble to the decision that the Commission takes the view that the prohibition of such aid may also apply to injections of capital effected by public agencies under the State's authority (eighth recital). In this case it was the absence of the possibility of raising finance on the private capital market which indicated that the contribution in question amounted to aid in the light of three factors, namely the financial structure of the undertaking, its urgent need for replacement investments and the over-capacity in the paperboard-processing sector. In the Commission's opinion those factors made it unlikely that the undertaking would be able to raise on the private capital markets the funds essential to its survival (ninth recital) [paragraph 20].

That statement of reasons satisfies the requirements of Article 190 of the EEC Treaty since it is sufficient to permit a review by the Court and gives those concerned an appropriate opportunity to express their views on the accuracy and relevance of the alleged facts and circumstances [paragraph 21].'

10. In its more recent judgments, the Court has consistently adhered to that principle, in particular in the *Meura* case, in which the criterion was applied to circumstances such as the size of the losses, the existence of over-capacity in the sector and, in particular, the absence of a credible restructuring plan.[34] In view of the similarity with this case, I shall set out the following passages *in extenso*:

'An appropriate way of establishing whether such a measure is a State aid is to apply the criterion which was mentioned in the Commission's decision and, moreover, was not contested by the Belgian Government, of determining to what extent the under-

32 — Judgment in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, at paragraph 31

33 — Judgment in Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809.

34 — Judgment in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, at paragraphs 14 to 17

taking would be able to obtain the sums in question on the private capital markets. In the case of an undertaking whose capital is held by the public authorities, the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question [paragraph 14].

As the Belgian Government has observed, a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganization. However, in this case, at the time when the capital was subscribed the undertaking in question had for several years been making very substantial losses relative to its turnover, its survival had already necessitated the reconstitution of its capital by the public authorities on several occasions after it had been completely exhausted, and its products had to be sold on a market in which there was excess capacity [paragraph 15].

In so far as the Belgian government contends that the subscription of capital in question was linked to the implementation of a plan for reorganizing the undertaking, it must be emphasized that the legality of the contested decision is to be assessed in the light of the information available to the Commission when the decision was adopted. Although the existence of a reorganization plan was in fact briefly mentioned by the Belgian authorities in their correspondence with the Commission, the content of that plan was never notified to it in the course of the procedure under Article 93 of the Treaty [paragraph 16].

It follows from the foregoing considerations that, in the light of the information available to it at the time, the Commission was right to consider that the undertaking would very probably be unable to raise the sums essential for its survival on the private capital markets and that the additional subscription of capital by SRIW therefore constituted a State aid [paragraph 17].'

In more recent cases, too, the absence of a credible and realistic restructuring plan has been a crucial factor in classifying the acquisition of a capital holding as State aid. [35]

11. It is clear from the foregoing that the prudent private investor criterion has been accepted by the Court and correlated to the existence of a credible restructuring plan. The Commission was therefore entitled to apply that criterion in the contested decision [36] as a factor in its assessment.

12. In the light of that case-law, the applicant claimed that the four subsidiaries concerned were in fact the object of a restructuring operation which, however, lasted longer than anticipated, and that the capital injected in connection with that operation was necessary for the undertakings' survival. Those injections of capital must therefore be considered permissible since it would have been reasonable for a private investor to have acted in the same way.

35 — See the judgment in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, at paragraphs 26 to 30, and the judgment in Case C-301/87 *France* v *Commission* [1990] ECR I-307, at paragraphs 38 to 41 and 54.

36 — Contested decision, Part II.

That assertion, in my view, goes too far. The subsidiaries concerned had already been the object of restructuring, accompanied by financial assistance, when Lanerossi SpA was taken over by ENI (in 1962). It is difficult to treat a period of 20 to 25 years as reasonable for restructuring purposes. Furthermore, it is apparent from the above account of the facts (paragraph 2 et seq.) that there was no credible restructuring programme for the period from 1983 to 1987, in issue here, and that ENI/Lanerossi's management had taken the view since 1983 that the factories in question were unrestructurable. In my view, therefore, the Commission's assessment of the facts can be upheld.

Unequal treatment of public and private undertakings

13. Carrying on from the foregoing, it is necessary to consider the principle of equal treatment of public and private undertakings. The parties are agreed that both Article 90 and Article 222 of the EEC Treaty call for equal treatment. According to the applicant, however, the defendant is wrong to lose sight of the fact that a State holding company such as ENI must be able to transfer funds from one subsidiary to another as part of a long-term strategy.

14. It seems to me that in that regard public and private undertakings do not operate in fundamentally different ways. The phrase in the *Meura* judgment to the effect that the public authorities must be compared with a private shareholder in similar circumstances who takes a decision to subscribe capital 'having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations'[37] is in my view perfectly reconcilable with the principle of equal treatment. The passage 'leaving aside all social or regional policy considerations' cannot be taken literally in the sense that a private investor would be wholly uninfluenced by considerations of a social nature or of regional or sectoral policy. In a mixed economy in which the interests of the private and public sector are closely interwoven and the interests of workers are strongly represented, even a large private holding company cannot remain totally insensitive to employment and economic development in the area in which it operates. *Partly* in view of such considerations it will be prepared to transfer funds from one subsidiary to another in order to help cover temporary losses. However, it would be in breach of its obligations towards its shareholders, creditors and employees if it covered the losses of undertakings operating in a sector characterized by over-capacity and accumulated losses amounting to a substantial share or even the whole of its turnover without drawing up a serious restructuring plan and attempting to implement it to the best of its ability.

In the circumstances of this case, the defendant was right, in my view, to conclude that, even taking into account social and regional policy considerations, a prudent private investor would not have continued (without overt or covert aid from the State which itself would have to be assessed in the light of Article 92) to grant aid over a number of years, not to say decades, if it transpired on the expiry of a reasonable period that restructuring was

37 — Judgment in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, at paragraph 14.

impossible and that this was acknowledged by the management as well. It seems to me that the behaviour of a public holding company should not be assessed in a fundamentally different manner. Admittedly, a holding company of that kind must pay special attention to social and policy considerations but it cannot and may not ignore the laws of the market place, precisely on account of the principle of equality between public and private undertakings. The applicant's argument regarding Articles 90 and 222 must therefore be rejected in the light of the facts of this case.

For that reason, I do not consider the observations of the Spanish Government to be compatible with the facts of the case. The argument that it must be possible for a holding company to tolerate a subsidiary's temporary operating losses with a view to implementing a long-term strategy of generating maximum profits is inconsistent with the facts of the present case. The argument that a private holding company would not allow the group's reputation to be tarnished by an insolvency cuts both ways. In a specific case it may be equally damaging to the credibility of a holding company, whether public or private, for it to keep in operation subsidiaries which continue to sustain losses equal to their turnover.

Regional development

15. Allow me also to devote some attention to the argument concerning regional development put forward by the applicant to justify the compatibility of the aid with the common market. According to the applicant, at least one of the factories of the four subsidiaries concerned is located in a province which is regarded as eligible for Community aid under Council Regulation No 219/84;[38] on that ground, it says, compensation for losses is exempt under Article 92(3)(a) of the Treaty.

The Commission's answer, couched in general terms, is that in its decision it took account of regional and social considerations by not raising any objection to the grant of aid before the end of 1982.[39] In its view, however, recourse to Regulation No 219/84 is unjustified inasmuch as that regulation is concerned with special programmes designed to assist the reconversion of certain areas, and not with rescue aid for individual undertakings.

16. In my view, the Commission's position is correct. Since the Court's judgment in *Philip Morris* it has been clear that the Commission has a broad discretion with regard to the grant of exemption under Article 92(3) of the EEC Treaty;[40] in other words, there is no enforceable, let alone directly applicable, right to exemption for national measures based on considerations of regional policy. In the contested decision (Parts VII and VIII) the Commission explained convincingly that the applicant had failed to comply with the guidelines

38 — Council Regulation (EEC) No 219/84 of 18 January 1984 instituting a specific Community regional development measure contributing to overcoming constraints on the development of new economic activities in certain zones adversely affected by restructuring of the textile and clothing industry (OJ 1984 L 27, p. 22).

39 — See the contested decision, Part I, seventh paragraph.

40 — Judgment in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, at paragraphs 16, 17 and 24, and judgment in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, at paragraph 56.

which the Commission had previously communicated to the Member States as regards aid to the textile sector and rescue aid. The possibility of granting aid within the framework of a Community programme of the European Regional Development Fund does not authorize the Member States to grant aid outside the scope of that programme on their own initiative and without prior notification.

Furthermore, it is apparent from Articles 1, 3, 4 and 5 of Regulation No 219/84 that in areas affected by the restructuring of the textile and clothing industry the Commission may approve a specific measure under which, alongside other measures for the redevelopment of the areas concerned, supplementary aid may be granted for investment in small and medium-sized firms. The purpose of that aid must be the establishment of new undertakings or the adaptation of the production of existing undertakings. The supplementary nature of that aid is apparent from the fact that it may take the form of a capital grant or an interest rebate, and that the Community aid, amounting to 50% of the expected investment aid, may not exceed 10% of the cost of the investment or last longer than four years. Finally, it is clear from Article 6(2) that at the end of each year the Member State concerned must submit to the Commission a report on the progress made in carrying out the special programme, which, as stated earlier, is to include measures other than aid. In this case, at no stage of the procedure has the applicant argued that the formal and substantive requirements were fulfilled in order to bring the aid within a special programme of the European Regional Development Fund approved by the Commission under Regulation No 219/84.

Effect on trade between Member States

17. According to the applicant, the defendant has not given sufficient reasons in its decision for the statement that the requirement laid down in Article 92(1) of the Treaty of an effect on trade between Member States has been fulfilled. In the applicant's view, there was no such effect, in view of the small market share held by the four undertakings in the mens' outer wear sector in Italy and the relatively small proportion of their output that is exported to other Member States of the Community.

In reply to the allegation concerning an inadequate statement of reasons, the defendant points out first of all that Parts VI to X of the contested decision are largely devoted to the requirement in question. In that connection ample use is made of statistical material. It seems to me, therefore, that the requirement of a statement of reasons is fulfilled if the information provided in the contested decision is clearly relevant and supports the Commission's assessment regarding the applicability of this requirement laid down in Article 92, a matter to which I now turn.

18. In the contested decision, the defendant points repeatedly to the existence of overcapacity in the sector in question,[41] a factor which the Court in the *Meura* case, amongst

41 — Fourth paragraph of Part VI, third indent of Part VIII, penultimate paragraph of Part VIII, also the second paragraph of Part X and the eighth paragraph of Part IX, in relation to the economic pressure on undertakings to reduce their capacity.

others, has acknowledged is relevant as evidence of an effect on intra-Community trade,[42] just as it regularly points to the existence of keen competition in this sector.[43] It goes on to state that the four undertakings concerned are large undertakings, in relation to the average size of undertakings in the sector in which they operate.[44] In its view, that must be taken into account in assessing their exports. Furthermore, the contested decision lays emphasis on the fact that although the four undertakings in receipt of aid themselves exported only a relatively small proportion of their output (14%), they nevertheless took an active part in intra-Community trade in the sector in question, which is intensive and of increasing importance.[45] Finally, the decision refers to the fact that Italian products and exports account for a substantial share of intra-Community trade in textiles and clothing, especially in the mens' outer wear sector,[46] and that the industry derived from the aid complained of an advantage which may adversely affect trade between Member States.[47]

19. In my view, the applicant has failed to establish that the Commission was not entitled to come to the conclusion that the aid at issue was capable of affecting trade between Member States. It bases its argument primarily on the small individual share of the four undertakings in intra-Community trade in the products concerned. That is insufficient, however, in the light of the case-law of the Court, to refute the abovementioned details of the contested decision.

Thus, in its defence, the defendant rightly refers to the Court's judgment in Case 259/85,[48] in which the narrow profit margins in a given sector (coupled with over-capacity) meant that a relatively small amount of State aid fell within the prohibition in Article 92, and in particular to the Court's judgment in the *SEB* case, in which the Court accepted the argument that an undertaking which does not itself export goods to other Member States can nevertheless contribute, as a result of State aid in respect of its production, to a situation in which other undertakings from other Member States are able to export less than would be the case in the absence of State aid. Even where there is no over-capacity in the sector in question, competition in the common market can thus be distorted in favour of domestic producers.[49] That argument closely reflects the reasons set out in the contested decision, which emphasize the role of the sector in question within a common market characterized by a high level of trade and vigorous competition.

Preventing the distortion of competition in favour of an entire sector of domestic industry is an aim of Article 92 which is of

42 — Judgment in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, at paragraph 22. Reference in the penultimate paragraph of Part VIII of the contested decision.

43 — Part VIII, first paragraph; and Part VI, second paragraph.

44 — Part VI, third paragraph, and Part VII, eleventh paragraph.

45 — Contested decision, Part VI, third paragraph.

46 — Contested decision, Part VI, first paragraph.

47 — Contested decision, Part VI, tenth paragraph.

48 — Case 259/85 *France* v *Commission* [1987] ECR 4393, at paragraph 24.

49 — Judgment in Case 102/87 *France* v *Commission* [1988] ECR 4067, at paragraph 19.

growing importance as the Member States become progressively less able to use other measures of economic policy to benefit their own producers, with the result that they are more strongly tempted to grant State aid. At the same time, the distortion of competition is felt all the more keenly as progress is made towards market integration. [50]

The more flexible approach taken by the Court in the *SEB* judgment to the requirement that reasons be stated with regard to the effect on inter-State trade must, in my view, be viewed in that context. In view of its importance in the development of the Court's case-law, [51] I shall set out the relevant passages in full:

'In that regard, the French Government claims that the loan at issue cannot be regarded as affecting trade between Member States and competition. It also alleges that there is nothing in the decision to elucidate the Commission's reasoning on that point [paragraph 17].

It must be observed that the contested decision examines the beer market in France. After noting that between 1975 and 1985 the annual consumption of beer per head stagnated in most of the Member States and fell slightly in France, the decision points out that France traditionally imports just over 10% of its requirements from the other Member States. French exports to other Member States declined slightly over the same period and represent only about 1.5% of French production. The undertaking in receipt of the loan at issue is wholly owned by a French group whose beer production accounts for over 50% of total French production and which participates in intra-Community trade in beer. The undertaking itself controls about 20% of the French market [paragraph 18].

Those facts were not contested by the French Government. However, it pointed out that the Commission neither found over-capacity in the brewing sector nor indicated the borrowing undertaking's share of exports to other Member States. However, aid to an undertaking may be such as to affect trade between the Member States and distort competition where that undertaking competes with products coming from other Member States, even if it does not itself export its products. Such a situation may exist even if there is no over-capacity in the sector at issue. When a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that, in circumstances such as those found to exist by the Commission, undertakings established in other Member States have less chance of exporting their products to the market in that Member State. Such aid is therefore likely to affect trade between

50 — In that connection, see the Eighteenth Report on Competition Policy — 1988, 1989, point 164, third paragraph.

51 — In its judgments in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, at paragraph 11, and in Case 259/85 *France* v *Commission* [1987] ECR 4393, at paragraph 16, adopted by the Court in its judgment of 21 March 1990 in Case C-142/87 *Belgium* v *Commission* (*Tubemeuse*) [1990] ECR I-959, at paragraph 43, the Court pointed out that the small size of the undertaking in receipt of aid or the small amount of aid does not as such exclude the possibility that trade between Member States may be affected. The judgment in *SEB*, however, goes even further.

Member States and distort competition [paragraph 19].'

It is implicitly but unmistakably apparent from those considerations that once an undertaking in receipt of aid operates in a market in which producers from different Member States are actually in competition with one another, the Commission can reasonably conclude that the requirement of an adverse 'effect on trade between Member States' is satisfied. According to the Court, a situation of that kind can arise even when there is no over-capacity in the sector concerned, unlike the position in this case. It follows, in my view, that it is only in respect of products in which there is no cross-frontier trade on account of very high transport costs or other particular circumstances that it is still possible in the present state of market integration to conceive of aid which does not satisfy the requirement of an effect on trade.

In the light of that case-law, it seems to me that the applicant's plea cannot succeed. The figures produced at the Court's request in no way detract from that conclusion: the Italian producers' share of the market in the textile and clothing sector as a whole rose from 27.1% to 29.1% between 1983 and 1987; for the four categories of mens' outer wear at issue in this case, their average market share between 1983 and 1987 remained fairly stable at a high level, namely between 35% and 40%. I therefore conclude that the Commission remained within the limits of its power of assessment in the statement of reasons for the contested decision also as regards the requirement of an effect on intra-Community trade.

Article 93(3) and the failure to notify the aid

21. The applicant claims to have complied with Article 93(3) in substance. In its view, the defendant was given an opportunity to submit its comments in good time. The aid was paid only when the defendant refrained from stating its position for four years. Since the survival of an undertaking is a matter of some importance, the Commission should have reacted sooner if it intended to do so at all.

The applicant's plea to the effect that it complied with Article 93(3) has no basis in fact, because the aid granted from 1 January 1983 onwards was not properly notified even though the applicant had undertaken by telex message of 24 June 1983 to notify all future measures (see section 2 above).[52] It was only some considerable time after the material events — and after repeated insistence on its part, its suspicions having been aroused by press reports — that the defendant was officially informed of the fact that aid *had* nevertheless been granted in 1983 and subsequent years. It is self-evident that the requirement of notification applied in respect of every measure making up losses which took place after 1 January 1983. Since the defendant had made it clear

52 — Contested decision, Part I, eight paragraph, referred to in section 2 above. The applicant has still not succeeded in producing a copy of that telex at the Court's request, and has not contested its contents, so that the form in which it is reproduced in the Commission's decision may be regarded as accurate.

that no further operating aid could be allowed after the end of 1982 and the applicant had already notified the Commission in November 1983 that the management regarded the undertakings concerned as unrestructurable, the applicant should have assumed that it would not obtain authorization to grant such aid. However, that is no excuse for infringing the duty of notification, quite the contrary.

22. In addition, the applicant and the defendant have also expressed their views on a matter which is not relevant to the solution of the present dispute, namely whether the absence of notification is in itself sufficient to bring the aid into conflict with the Treaty. A significant indication in that regard emerged from the Court's judgment in the *Boussac* case.[53] In that judgment, the Court considered that the absence of notification did not necessarily render any examination of the fundamental requirements superfluous: it is only where the Member State has disregarded a specific order from the Commission to provide information concerning aid which has not been notified that the Commission can call for the recovery of the aid without a (thorough) examination of the conditions for exemption in Article 92(2) and (3) (see paragraph 22).

As I have said, this matter is not relevant here since in this case the aid was in fact examined in relation to the fundamental requirements of Article 92.

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

Recovery of the aid — legitimate expectations

23. The applicant puts forward various arguments in support of the view that the recovery of the aid complained of, required by the Commission, is unlawful. In the first place, it adduces an argument based on the principle of the protection of legitimate expectations. Secondly, it states that it is impossible to recover the sums paid to make up losses because no account was taken of the possibility of recovery when the conditions for the sale of the four subsidiaries to the private sector were laid down. Thirdly, the applicant claims that recovery presupposes the exercise of discretion, for which reasons must be stated, which was not done in this case, and that the identity of the persons who are to enforce the order for recovery is not made clear.

Taking the last argument first, the Commission states in reply that it is immediately apparent from Article 93(2) of the Treaty — which provides for the abolition (or alteration) of aid — that the order for recovery does not need to be based on specific reasons. It can be inferred from the Court's judgment in Case 70/72 that the reasons which the Commission must state in its decision relate to the incompatibility of the aid with the Treaty;[54] if reasons are stated in that regard, the Commission can require the aid to be recovered at once. That is correct, in my view. The abolition or alteration of aid and, consequently, its recovery if it has already been granted is the 'logical consequence'[55]

54 — Judgment in Case 70/72 *Commission* v *Germany* [1973] ECR 813, at paragraph 20.

55 — Judgment in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, at paragraph 66, with reference to the judgment in Case 310/85 *Deufil* v *Commission* [1987] ECR 901.

which the Treaty attaches to a finding that the measure is incompatible; its reasons are to be found in the arguments concerning the incompatibility of the aid. Once it has been established that the grant of aid has interfered with competition and adversely affected international trade, the aid, if it has in fact been paid, has given rise to effects incompatible with the Treaty and its recovery may be required regardless of subsequent developments.

It is quite proper for the Commission to state as accurately as possible from whom the aid is to be recovered. Usually, it is the recipient of the aid, that is to say in this case, according to Article 1 of the contested decision, 'ENI/Lanerossi', which means the subsidiaries in receipt of the aid, the 'parent' (Lanerossi SpA) and the 'grandparent' (ENI). In a situation such as this, in which there was a failure to notify the grant of aid in advance and which is far from transparent, that information is sufficient. As I shall point out (in section 27), moreover, it is for the Member State concerned to submit proposals to the Commission, where appropriate, concerning the procedure for recovery and, consequently, the persons from whom recovery is to be claimed. The applicant's first argument must therefore be rejected.

24. I now turn to the argument concerning the protection of legitimate expectations. According to the applicant, the Court's judgment in the *RSV* case must be applied in this case.[56] In that judgment, the Court stated that by allowing *26 months* to elapse before terminating the procedure under Article 92, the Commission had failed to comply with the rules of good administration; since the sector in question had previously been in receipt of authorized aid, the Commission's delay was capable of arousing a legitimate expectation which made the recovery of the aid unlawful. According to the applicant, that judgment is applicable in view of the fact that no formal procedure was initiated in this case before December 1984.

25. As the defendant rightly contends, this plea cannot be upheld. It is quite clear from the chronological order of events, as set out in the contested decision and not disputed in any way by the applicant, that any delay on the defendant's part in initiating proceedings was attributable primarily to the applicant's delay in providing information and to the applicant's breach of the duty of notification which it had undertaken to comply with.

The latter point is apparent from the fact that in a telex message of 24 June 1983 the applicant undertook to notify all future measures in favour of the four subsidiaries.[57] The Court requested the applicant to produce a copy of that telex message, but the applicant has not yet done so. Having received information that the four undertakings were continuing to suffer considerable losses, the defendant sent the applicant a reminder on 22 July 1983.[58] In a letter of 2 November 1983 the applicant replied that no further aid was envisaged in favour of the four subsidiaries.[59] The applicant has not produced that letter either.

56 — Judgment in Case 223/85 *RSV* v *Commission* [1987] ECR 4617.

57 — Contested decision, Part I, eighth paragraph.

58 — Contested decision, Part I, ninth paragraph.

59 — Contested decision, Part I, tenth paragraph.

In a letter of 7 December 1983, the Commission took formal note of the undertaking given by the applicant. [60]

On 14 December 1984, *thirteen months* after the applicant had confirmed for the second time that no further aid would be granted in 1983 or in subsequent years without prior notification and authorization, the defendant officially requested the applicant to submit its observations in accordance with the procedure under the first subparagraph of Article 93(2). [61] Is that period of thirteen months so long as to arouse in the applicant a legitimate expectation that the State aid was compatible with the Treaty? I think not, in view of the specific circumstances of the case. Unlike the situation in the *RSV* case, in this case the defendant clearly and repeatedly gave the applicant to understand that any aid granted after 1982 would in all likelihood be considered unlawful. The applicant, for its part, failed to abide by its formal undertaking to notify any fresh aid, which it had announced it would discontinue. When questioned on that point by the defendant following the publication of articles in the press, in August 1984 the applicant submitted a summary of a new restructuring programme which the defendant must reasonably have examined in order to make a full appraisal. Apart from that, it is questionable in the first place whether a Member State which is in breach of its duty of notification can still rely on the principle of the protection of legitimate expectations. [62] Furthermore, it must be borne in mind that it was only from a letter dated 30 August 1984 that the defendant learned of the (enormous) size of the losses made up in 1983, [63] even though the defendant had asked for the results to be communicated to it at the end of each year.

26. It is also difficult to maintain that the length of the official procedure itself, from its initiation in December 1984 until the notification of the contested decision in August 1988, can in any way assist the applicant in its arguments. A chronological survey of that period in the contested decision reveals an impressive series of delaying factors: applications for an extension of time, missing or incomplete answers, constantly renewed and purportedly definitive restructuring proposals for the near future, and an ever-changing policy: from restructuring to reconversion and then privatization. In the end it was not until the end of 1987 or the beginning of 1988 that the defendant received all the information which it had sought for so long, [64] and on the basis of which it adopted the contested decision on 26 July 1988. That is sufficient to preclude any attempt to rely on the principle of the protection of legitimate expectations in respect of that period also. It may be pointed out for the sake of completeness that the applicant granted unauthorized aid even after the initiation of the procedure in December 1984.

Finally, the applicant cannot rely on the principle of the protection of legitimate expectations to justify its failure to implement the decision (through recovery). In its judgment in Case 94/87 the Court

60 — See Annex III to the Commission's defence

61 — See the contested decision, Part II, eighth paragraph, in which the date is *19* December instead of *14* December.

62 — For the same view, see the Opinion of Advocate General Jacobs in Case C-301/87 *France* v *Commission*, cited above, at paragraphs 21 and 22.

63 — Contested decision, Part II, first paragraph.

64 — Part III of the contested decision.

made it clear that the principle cannot be relied upon by a Member State in order to avoid the implementation of a decision on aid; the only defence is that implementation is absolutely impossible, and the Member State must then approach the Commission in order to find a solution to the problem. [65]

'Impossibility' of recovering the aid after transfer of the undertakings

27. The question remains whether the authorities' obligation to recover aid must be fulfilled unconditionally even when the undertakings in receipt of the aid have been sold, possibly as separate establishments or in smaller units, and the consequences of any recovery were not provided for in the conditions of sale. This question raised by the Italian Government must be set in its proper context.

The Court has consistently held that in principle the recovery of unlawfully granted aid must, in the absence of specific rules of Community law, be carried out in accordance with the relevant procedural provisions of national law, subject, however, to the proviso that those provisions may not be applied in such a way as to make recovery as required by Community law practically impossible. [66] In order to effect recovery, the Commission and the Member State concerned must cooperate in good faith on the basis of Article 5 of the EEC Treaty with a view to overcoming the difficulties raised by recovery whilst fully observing the Treaty provisions, in particular those on aid, and the Member State must, if necessary, make 'proposals for suitable amendments' to the contested decision. [67]

It clearly follows from those judgments that it is for the Member State concerned, which in any event has the most detailed knowledge of national procedural rules, to inform the Commission of the manner in which recovery is to be effected. It is understandable, therefore, that in Article 3 of the contested decision the Commission required the applicant to inform it, within two months of the date of notification, of the measures taken by the applicant to comply with the duty to recover the aid. The question which arises in these proceedings for annulment is whether the Commission has made a proper exercise of its powers in imposing on the applicant a duty to recover aid which is couched in general terms and is not accompanied by a separate statement of reasons, while leaving it to the Member State to decide how to comply. Conversely, it is unnecessary at this stage to establish whether the steps which have or have not been taken by the Member State to effect recovery are sufficient for the purpose of fulfilling its obligation under Community law. That is a matter, where appropriate, for proceedings under Article 169. In such a case the Member State will be held to be in default, unless it was absolutely impossible for it to enforce the recovery order correctly, where it has failed to give notice of the measures taken by it within the period prescribed by the Commission [68] or it is apparent that it has taken no steps what-

65 — Judgment in Case 94/87 *Commission* v *Germany* [1989] ECR 175, at paragraph 9. See also the judgment in Case 52/84 *Commission* v *Belgium* [1986] ECR 89, at paragraph 16. The rule that a Member State cannot usually rely on the principle of the protection of legitimate expectations has once again been strongly reaffirmed by the Court in the recent judgment in Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, at paragraphs 17 and 18.

66 — Judgment in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, at paragraph 61, and the judgment in Case C-5/89 *Commission* v *Germany*, cited in the previous footnote, at paragraph 12. See also the judgment in Joined Cases 205 to 215/82 *Deutsche Milchkontor* v *Germany* [1983] ECR 2633.

67 — See the judgments cited in footnote 65, in particular the judgment in Case 52/84, at paragraph 16.

68 — Judgment in Case 52/84, cited in footnote 65 above, at paragraph 15.

soever to recover the aid and has not made any proposals to the Commission for overcoming the difficulties which have arisen.[69]

In these proceedings, as I have said, we have not reached that stage yet. In proceedings for annulment the only issue is whether the imposition on the applicant by the defendant, in the contested decision, of a duty to recover the aid constitutes a proper exercise of its powers. For the reasons already stated (section 23 above) that question must, in my view, be answered in the affirmative: once the Commission had established the incompatibility of the aid with Article 92, it was entitled to demand its recovery without providing a separate statement of reasons. According to the abovementioned judgments of the Court, it is for the Member State to determine the manner in which the aid can best be recovered in accordance with the provisions of national law, and from whom,[70] to inform the Commission thereof and, if necessary, make any proposals for amending the decision. In proceedings for annulment, as the Court stated in its judgment in Case C-142/87,[71] any procedural or other difficulties in regard to implementation cannot have any influence on the validity of the contested decision. Accordingly, this submission must also be rejected.

Conclusion

28. In the light of the foregoing, I propose that the Court dismiss the application in its entirety and order the applicant to pay the costs, making it quite clear that the applicant was and is under an obligation, in accordance with Article 5 of the Treaty, to initiate proceedings for recovery under national law and to consult the Commission on the manner in which any difficulties in the path of recovery can be overcome.

69 — Judgment in Case 94/87, cited in footnote 65 above, at paragraph 10, and the other two judgments cited in that footnote.

70 — As pointed out above (in section 23), this is normally the ultimate recipient, that is to say the undertaking in receipt of the aid. In some cases, others may be required to repay the aid, for instance a parent company which has taken over the undertaking's assets and liabilities as part of a settlement, or has otherwise obtained the undertaking's 'added value' resulting from the grant of aid. That question arises in another case pending before the Court, namely Case C-305/89 *Italy* v *Commission (Alfa Romeo)*.

71 — Judgment in Case C-142/87, cited in footnotes 55 and 66 above, at paragraph 63.