OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 14 September 2006 [1]

I — Introduction

1. The issue that arises in this case is once again the inviolability of final judgments. The final judgment on this occasion is that of an Italian civil court, in which the Italian State was held to be required under national law to disburse State aid pledged conditionally, as against the legal force of a previous Commission decision declaring that aid to be incompatible with the common market. In the subsequent procedure for the recovery of the aid granted unlawfully according to Community law, the beneficiary of that aid relied, as against the Italian authorities, on the final and conclusive judgment of the Italian court. The key question is essentially whether the ruling of a national court can frustrate the exercise of the Commission's exclusive competence to examine State aid for its compatibility with the common market and, if necessary, to order the recovery of aid granted unlawfully.

1 — Original language: Dutch.

II — Relevant legislation

A — *Community law*

2. Article 4(c) ECSC prohibits the Member States from granting subsidies or aid, in any form whatsoever, in the coal and steel sectors.

3. From 1980 the serious crisis in the steel sector in Europe led to a number of exceptions being made to this absolute prohibition. The exceptional measures were based on the first and second paragraphs of Article 95 CS.

4. From the latter half of 1981 until the end of 1985 Decision No 2320/81/ECSC, [2] as amended by Decision No 1018/85/ECSC, [3] known as the second aid code, was in force.

2 — Commission decision of 7 August 1981 establishing Community rules for aids to the steel industry (OJ 1981 L 228, p. 14).

3 — Commission decision of 19 April 1985 amending Decision No 2320/81/ECSC establishing Community rules for aids to the steel industry (OJ 1985 L 110, p. 5).

The aim of that code was to permit aid with a view to bringing about the recovery of this sector and reducing production capacity to the level of demand. The aid was to be temporary and required prior approval. To this end, the code provided for an approval procedure.

5. Article 8(1) of the second aid code reads:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aids ... . The Member State concerned shall put its proposed measures into effect only with the approval of and subject to any conditions laid down by the Commission.'

6. From 1 January 1986 that code was replaced by the third aid code, Decision No 3484/85/ECSC, [4] which remained in force from 1 January 1986 to 31 December 1988 inclusive. That aid code was more restrictive in regard to exceptions to the prohibition of aid in that sector. Article 3 of the third aid code permitted aid to be granted to bring plants into line with new statutory environmental standards. The amount granted was not allowed to exceed 15% net grant equivalent of the investment costs directly related to the environmental measures concerned.

7. Article 1(3) of the third aid code stipulated that aid coming within the terms of the code could be granted only after the procedures laid down in Article 6 had been followed and was not to be payable after 31 December 1988.

8. Article 6(1), (2) and (4) reads as follows:

'1. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid ... . It shall likewise be informed of plans to grant aid to the steel industry under schemes on which it has already taken a decision under the EEC Treaty. The notifications of aid plans required by this Article must be lodged with the Commission by 30 June 1988 at the latest.

4 — Commission decision of 27 November 1985 establishing Community rules for aid to the steel industry (OJ 1985 L 340, p. 1).

2. The Commission shall be informed, in sufficient time for it to submit its comments, and by 30 June 1988 at the latest, of any plans for transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing.

The Commission shall determine whether the financial transfers involve aid elements within the meaning of Article 1(2) and, if so, shall examine whether they are compatible with the common market under the provisions of Articles 2 to 5.

...

4. Where, after inviting interested parties to submit their comments, the Commission finds that aid in a given case is incompatible with the provisions of this Decision, it shall inform the Member State concerned of its decision. The Commission shall take such a decision not later than three months after receiving the information needed to assess the proposed aid. Article 88 of the ECSC Treaty shall apply in the event of a Member State's failing to comply with that decision. The planned measures falling within paragraphs 1 or 2 may be put into effect only with the approval of and subject to any conditions laid down by the Commission.'

9. The third aid code was replaced by Decision No 322/89/ECSC, [5] known as the fourth aid code. The fourth aid code remained in force from 1 January 1989 until 31 December 1991. Article 3 of the fourth aid code is identical to Article 3 of the third aid code.

10. Since the ECSC Treaty expired on 23 July 2002, the aid regime laid down in the EC Treaty has also applied to aid granted to the steel industry.

B — *National legislation*

11. Law No 183 of 2 May 1976 ('Law No 183/1976') [6] provides for the possibility of awarding direct financial aid and interest rate subsidies of up to 30% of the investment costs for industrial projects in the Mezzogiorno.

5 — Commission decision of 1 February 1989 establishing Community rules for aid to the steel industry (OJ 1989 L 38, p. 8).

6 — Legge n° 183/1976 sulla disciplina dell'intervento straordinario nel Mezzogiorno (GURI No 121 of 8 May 1976).

12. Article 2909 of the Italian Civil Code contains a provision under which no pleas in law may be invoked where they are already covered by a final judgment, which precludes, in procedural terms, judgments of courts in disputes on which another court has already delivered a final judgment. According to the Consiglio di Stato (Council of State), this applies not only to pleas invoked in the earlier proceedings but also to pleas which might have been invoked.

III — The facts, the proceedings and the questions referred

The facts/chronological sequence

13. The facts, inasmuch as they can be reconstructed from the case-file, are as follows (in chronological order):

— On 6 November 1985 the legal predecessor of Lucchini SpA ('Lucchini') applied for aid under Law No 183/1976. For a total investment of ITL 2 550 million for the modernisation of certain plants, it applied for a loan of ITL 1 021 million at a reduced rate of interest and for a government subsidy of ITL 765 million (corresponding to 30% of the investment costs).

— By decision of 11 June 1986 the credit institution charged with examining the application in so far as it concerned credit financing granted a loan of ITL 1 021 million over 10 years at a reduced rate of interest of 4.25%.

— On 20 April 1988 the competent Italian authorities informed the Commission, pursuant to Article 6(1) of the third aid code, of the intention to grant aid to Lucchini. According to the notification, the aid related to investment in the improvement of the environment amounting to ITL 2 550 million, for which a subsidised loan at a reduced rate of interest was to be agreed (the interest subsidy was to amount to ITL 367 million), and a government subsidy (ITL 765 million).

— By letter of 22 June 1988 the Commission requested further information on this aid measure with regard to the nature of the assisted investment and the precise conditions (percentage, duration) of the requested loans. That letter also contained a request for an indication as to whether the aid was granted under a general scheme for the

protection of the environment aimed at enabling plants to be brought into line with new standards, with a reference to those standards. The competent Italian authorities did not respond to that request.

— On 16 November 1988, since the period for the granting of aid under the third aid code was about to expire, the competent Italian authority (at that time, Agensud) granted Lucchini on a provisional basis, by Decision No 7372, aid amounting to ITL 382.5 million, equivalent to 15% of the investment costs (rather than 30%, as provided for in Law No 183/1976), to be disbursed by 31 December 1988, as required by the third aid code. The interest rate subsidy, however, was refused on the ground that the total aid granted would otherwise exceed the 15% permitted by the third aid code. Pursuant to Article 6 of the third aid code, the granting of the aid was made conditional on the Commission's approval, and Agensud did not proceed to disbursement.

— On 13 January 1989, being unable to assess the compatibility of the aid measure as a whole owing to the lack of information from the Italian authorities, the Commission initiated the procedure laid down in Article 6(4) of the third aid code. The details were published in the Official Journal of 23 March 1990. [7]

— In the meantime, as the aid had not yet been disbursed, Lucchini brought proceedings against Agensud in the Civil and Criminal Court, Rome (Tribunale civile e penale di Roma) on 6 April 1989 to establish its right under Law No 183/1976 to the payment of ITL 765 million (30% of the investment costs) and ITL 367 million (interest rate subsidy).

— By telexed message of 9 August 1989 the Italian authorities forwarded to the Commission, under the procedure initiated by the latter, further information on the aid in question.

— By letter of 18 October 1989 the Commission informed the Italian authorities that their answer was unsatisfactory in that a number of details were still outstanding. In that letter the Commission also indicated that, failing

7 — OJ 1990 C 73, p. 5.

an acceptable answer within 15 working days, it would be entitled to take a final decision on the basis of the information at its disposal. No answer was received to that letter.

— On 20 June 1990 the Commission stated definitively, by Decision 90/555/ECSC, that the aid was incompatible with the common market. It published that statement in a press release.[8] It also notified the Italian authorities thereof by letter of 20 July 1990.[9] The decision was eventually published in the Official Journal of 14 November 1990.[10] Neither Lucchini nor the Italian Government lodged an appeal against the decision.

— On 24 July 1991 the Italian court granted Lucchini's application at first instance. That decision was based on Law No 183/1976.

— On 6 May 1994 the Corte d'appello di Roma (Court of Appeal, Rome) confirmed the judgment of the Tribunale civile e penale di Roma on appeal. As no appeal in cassation was lodged, that judgment became final.

— As the aid had still not been disbursed by 20 November 1995, Lucchini applied for and obtained an order requiring payment. This was served on the competent authority (now the Ministry of Industry) on 29 December 1995. In February 1996 Lucchini secured seizure of the fleet of cars belonging to the ministry responsible, the Ministry of Industry, on the ground that there had still been no compliance with the order.

— Consequently, the ministry adopted Decree No 17975 on 8 March 1996, granting, in implementation of the judgment of the Corte d'appello, a capital injection of ITL 765 million and an interest rate subsidy of ITL 367 million. The decree contained a proviso to the effect that the assistance would be recovered in whole or in part in the event of any adverse Community decisions concerning the validity of the grant and disbursement of that aid. On 16 April 1996 the amounts concerned, plus statutory interest, were disbursed.

— On 15 July 1996 the Commission announced that, in the light of Decision 90/555 and the third aid code, the

8 — IP(90) 498 of 20 June 1990.

9 — Transmission memorandum SG(90) D/24789.

10 — OJ 1990 L 314, p. 17.

judgment of the Corte d'appello and Decree No 17975 were at variance with Community law and invited the Italian Government to comment.

— That letter was answered by letter of 26 July 1996. The Ministry of Industry emphasised that the aid had been granted subject to a right of recovery.

— On 16 September 1996 the Commission instructed the Italian authorities to recover the aid, stating that failure to do so would lead to proceedings being initiated under Article 88 of the ECSC Treaty.

— On 20 September 1996 the Ministry of Industry adopted a new decree, Decree No 20357, withdrawing the aid granted and demanding repayment.

— On 16 November 1996 Lucchini lodged an appeal against the new decree with an administrative court (Tribunale amministrativo regionale del Lazio). It stated inter alia that the right to aid was inviolable in view of the fact that the judgment of the Corte d'appello had become final. On 1 April 1999 Lucchini's appeal was allowed.

— On 2 November 1999 the Avvocatura Generale dello Stato (State Legal Advisory Service), acting on behalf of the Ministry of Industry, lodged an appeal against that judgment with the Consiglio di Stato.

— By decision of 22 October 2004 the Consiglio di Stato requested a preliminary ruling on the resolution of the incompatibility between the final judgment of the Corte d'appello and Commission Decision 90/555.

The questions referred for a preliminary ruling

14. The Consiglio di Stato, Judicial Division (Sixth Chamber), has referred the following questions to the Court:

'(1) *In the light of the principle of the primacy of immediately applicable Community law*, in the form in this case of general ECSC Decision No 3484

of 1985, the Commission decision of 20 June 1990, notified on 20 July 1990, and Commission Decision No 5259 of 16 September 1996, requiring the recovery of aid — which all formed the basis for the recovery measure challenged in the present proceedings (namely Decree No 20357 of 20 September 1996 overturning Decrees Nos 17975 of 8 March 1996 and 18337 of 3 April 1996) — *is it legally possible and compulsory for the national administrative authority to recover aid from a private recipient even though a final civil judgment has been delivered confirming the unconditional obligation to pay the aid in question*?

(2) Or, in view of the generally accepted principle that decisions on the recovery of aid are governed by Community law but the implementation thereof and the associated recovery procedure, in the absence of Community provisions on the matter, is governed by national law (regarding which principle, see the judgment of the Court of Justice in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* [*and Others*] v *Germany* [1983] ECR 2633), is the recovery procedure rendered legally impossible by virtue of a specific judicial decision that has become res judicata (Article 2909 of the [Italian] Civil Code), thereby being conclusive as between the private individual and the administration, and requires the administration to comply with it?'

Proceedings before the Court

15. Written observations have been submitted by Lucchini, the Italian Government, the Czech Government, the Netherlands Government and the Commission. They all explained their respective positions orally at the hearing held on 6 June 2006.

IV — Appraisal

A — *Positions of the parties*

16. In this highly exceptional case, in which the relationship between one of the key provisions of Community law, namely Article 88 EC, and the principle of res judicata are to be examined and assessed, it will be useful to give a more detailed account than usual of the positions adopted by the parties in the main action, by the Member States which have intervened and by the Commission.

17. In essence, Lucchini and the Czech Government defend the position that a final judgment of a court takes precedence over the Community's interest in recovering aid granted in contravention of Community law.

They base their view on the judgments in *Eco Swiss*,[11] *Köbler*,[12] *Kühne & Heitz*[13] and *Kapferer*.[14] The Italian Government, the Netherlands Government and the Commission similarly recognise the importance of the principle of res judicata, as reflected in the aforementioned case-law, but take the view that that principle is not applicable in the present case or that an exception should be made to it.

18. Above all, Lucchini questions whether the order for reference is admissible. The arguments which it presents concern the absence of a Community rule of law to be interpreted, the absence of a dispute to be settled and the contention that the questions referred are hypothetical in nature. In addition and alternatively, Lucchini questions the validity of Decision 90/555 because of a number of alleged procedural irregularities.

19. In substance, Lucchini refers to settled case-law according to which the only defence that a Member State may offer against an appeal lodged by the Commission under Article 88(2) EC for failure to comply is that it is utterly impossible to implement the Commission decision correctly. It claims that that impossibility stems from the irrevocable and unconditional judgment of the Corte d'appello.

20. Lucchini recognises the existence of the principle that State aid may not be granted where a Commission decision declares that aid to be incompatible with the common market. According to Lucchini, however, there is a superior rule of law which states that all market participants may consider themselves to be protected by res judicata on the basis of the fundamental principle of legal certainty.

21. In addition to the aforementioned judgments, the Czech Government refers, like Lucchini, to Article 14(1) of Regulation (EC) No 659/1999,[15] which stipulates that the Commission may not require recovery of the aid if this would be contrary to a general principle of Community law. According to the Czech Government, that is so in the case of res judicata.

11 — Case C-126/97 [1999] ECR I-3055.
12 — Case C-224/01 [2003] ECR I-10239.
13 — Case C-453/00 [2004] ECR I-837.
14 — Case C-234/04 [2006] ECR I-2585.

15 — Council regulation of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

22. According to the Italian Government, the principle of res judicata is not applicable since it presupposes a judgment which has acquired binding force between the same parties, concerns the same subject-matter and has the same legal basis. [16]

23. It claims that the third of those conditions was not satisfied in view, on the one hand, of the differences between the proceedings in a civil court resulting in the judgment of the Corte d'appello and the administrative court proceedings currently before the referring court and, on the other hand, of the fact that the judgment of the Corte d'appello is neither based on the third aid code nor takes account of Commission Decision 90/555.

24. The Italian Government also points out that Lucchini cannot rely on the protection of legitimate expectations. An undertaking knows that there can be a right to payment of aid only if it has been approved at both national and European level. Even a final judgment delivered at national level does not in itself signify that an undertaking may receive the aid. It must first await the Commission decision. The Commission is not, after all, bound by the judgment of the national court. There can therefore be no question of a legitimate expectation worthy of protection which opposes the repayment of the aid. The Italian Government further points out that Lucchini could have appealed against the Commission's decision. Finally, the Italian Government states that the authority of a national court is limited in the context of the Community aid regime. As it cannot rule on the compatibility of the aid, the force of a final judgment in the present context is limited.

25. The Netherlands Government describes the present situation as unusual, it being permissible, by way of exception, to set aside the principles of res judicata and of national procedural autonomy. Referring to the judgment in *Kapferer*, the Netherlands Government maintains that the basic premiss should be that an infringement of the principle of res judicata is unacceptable. Calling into question a court's final judgment would be a serious breach of the principle of legal certainty and the stability of legal relations, and would also seriously harm the authority of the judiciary as such. Secondly, the Netherlands Government cites the principle of national procedural autonomy. In principle, a court decision which has become irrevocable may be challenged only on the ground of incompatibility with Community law if national procedural rules so permit.

16 — To illustrate this, the Italian Government refers to Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 9.

26. The Netherlands Government none the less takes the view, given the particularly serious circumstances in the present case, that this is an exceptional situation. The case, according to the Netherlands position, (1) concerns a court decision on State aid, an area in which the Commission has exclusive competence; (2) the Commission took a clear prior decision, which shows that the court decision subsequently taken was inconsistent with Community law, in which context it is pointed out that all organs of a Member State, including the national courts, are bound by a decision of the Commission in the matter concerned; and (3) the national court and the parties involved in the national proceedings knew, or should have known, that the aid had already been declared incompatible with the common market. According to the Netherlands Government, the rules on State aid contained in the Treaty would be deprived of their *effet utile* if it was accepted in an exceptional situation such as the present that in no circumstances was recovery possible.

27. According to the Commission, a distinction must be made between the force accorded to judgments in which the freely disposable rights of parties are decided in proceedings in which both sides are heard and the force of judgments of national courts relating to State aid, in which the interests of the national authorities and those of the beneficiaries often run parallel and in which for both parties the fundamental question of the lawfulness of the aid is governed by mandatory Community provisions.

28. The Commission begins by referring to the obligation under Community law that it be informed of planned aid. That obligation to give prior notification applies to the Member State as such, irrespective of the organ which allocates the aid. Thus, such organs include the courts. The fact that the aid is awarded on the basis of a judgment to that effect delivered by a national court does not relieve the Member State of the obligation to give prior notification of the aid and to refrain from disbursing it before the Commission has given its approval. The relationship between the organ granting the aid and the organ responsible for notifying that aid is a matter of internal order which cannot obstruct the application of Community law.

29. To assume that a judgment of a civil court might obstruct the recovery of aid is, according to the Commission, to confuse two different levels: the national procedure (especially the consequences of a judgment of a civil court concerning the powers of the national administration) and the procedure during which provision is made for the allocation of aid, which presupposes not only the completion of the national procedure but also, until such time as the Commission has given its approval for the notified aid, the obligations ensuing from Community law.

30. In the present case, the Italian authority concerned notified the Commission, in compliance with the third aid code, of the intention to grant aid. The decision taken by that national authority on Lucchini's application for aid included a proviso, namely the Commission's consent. However, the Commission judged the aid to be incompatible with the common market. The national decision therefore had no effect at all.

31. It was at a much later stage that the Italian courts (initially, the Tribunale civile e penale di Roma and, subsequently, the Corte d'appello) recognised Lucchini's subjective right to the payment of the aid in question. This formed the basis for the Italian authority to grant the aid by way of decree, although that decree, too, contained a proviso.

32. The Commission elaborates two hypotheses, one in which the aid allocated matches the aid appraised by the Commission, thus aid already prohibited, and one in which the aid granted is different from that notified and appraised. In both cases, however, it is abundantly clear from the case-law what the court has to do. In the first case, it is bound by the decision in which the aid is declared incompatible with the common market; it should draw conclusions from this. In the second case, the immediately effective standstill provision laid down in Article 88(3) EC applies as it has been interpreted by the Court.

33. It is, in fact, a decision at Community level which has become inviolable. The requirement of legal certainty is also reflected in the inviolability of such a decision; it is therefore binding on all organs of the Italian State. In addition, according to the Commission, the finality of the Italian court's judgment applies only to the national phase: it has no impact at Community level.

34. The Commission also refers to case-law [17] which stipulates that national provisions must be applied in such a way that the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration and to case-law [18] from which it is clear that the primacy of Community law sometimes involves the qualification of legal certainty.

35. Finally, the Commission points out that the primacy of Community law may mean that any national act of an administrative or even legislative nature must yield if it is inconsistent with Community law. It cannot

17 — The Commission is referring here to the judgments in Case C-5/89 *Commission* v *Germany ('BUG-Alutechnik')* [1990] ECR I-3437 and in Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591.

18 — The Commission refers in this context inter alia to Case C-201/02 *Wells* [2004] ECR I-723, paragraph 64 et seq.; Case C-118/00 *Larsy* [2001] ECR I-5063, paragraphs 51 to 55; and *Kühne & Heitz* (cited in footnote 13), paragraphs 23 to 28.

see why that should not be the case where the judgment of a court which has been declared final is inconsistent with Community law.

B — *Analysis*

36. The national legal systems of all the Member States include the principle of *res judicata*. It is in the interests of legal certainty that court decisions which can no longer be appealed should be inviolable in societal relations, in other words, become a legal fact. That legal fact should be respected. This means that the lodging of a fresh appeal with the same subject-matter, the same parties and the same arguments is ruled out.

37. It is evident from comparative research, however, that, despite the major importance to be attached to *res judicata*, its effect is not absolute. The various national legal systems permit exceptions to *res judicata*, albeit subject to strict conditions. [19] This may be the case, for example, in the event of fraud or if a flagrant breach of fundamental rights is committed in the judgment which has become inviolable. The case-law of the European Court of Human Rights shows that *res judicata* cannot cover over any obvious violations of fundamental (Community) rights. [20]

38. The Community legal system similarly respects *res judicata* . [21] The considerations in this regard are the same as those which apply in the national legal systems. Moreover, the importance of that principle is recognised in the relationship between Community law and national law. This is confirmed in the judgments in *Eco Swiss*, *Köbler*, *Kühne & Heitz* and *Kapferer*.

39. It must be pointed out, however, that in none of those judgments was the exercise of a Community power as such in dispute.

40. In *Köbler* Community law was incorrectly applied by the national court of last

19 — For an extensive comparative study, see the 'Note de recherche' on the function and importance of *res judicata* in the Member States (an internal document), which was drawn up in connection with this case by the Direction Bibliothèque, Recherche et Documentation at the Court's request.

20 — See, for example, the judgment of 16 April 2002 in *S.A. Dangeville v. France*, No. 36677/97, ECHR 2002-III.

21 — See, for example, the order in Case C-397/95 P *Coussios* v *Commission* [1996] ECR I-3873, and the judgment in Joined Cases C-442/03 P and C-471/03 P *P & O European Ferries (Vizcaya)* v *Commission* [2006] ECR I-4845, and the case-law referred to therein.

instance. This might enable an action for damages to be brought under certain conditions. The judgment concerned did not, however, have any direct consequences for the exercise of Community competence.

41. In *Kühne & Heitz* Community law was similarly applied incorrectly by the national court. Again there was no encroachment on the exercise of Community competence.

42. The same is true in *Eco Swiss* and *Kapferer*. In those cases, moreover, appeals could have been lodged, but the parties allowed their time-limits to pass.

43. In *Eco Swiss* a challenge to an interim arbitration award in the nature of a final award was lodged too late. The time-limits in themselves did not render excessively difficult or virtually impossible the exercise of rights conferred by Community law. In those circumstances, Community law does not require a national court to refrain from applying the relevant domestic rules of procedure, even if it would have enabled a possible infringement of Community law to be examined. [22]

44. In *Kapferer* an objection was initially raised under Regulation (EC) No 44/2001 [23] that that court seised lacked jurisdiction. That objection was rejected, but the court found for the party opposing Ms Kapferer, a mail order company, on the merits. The mail order company therefore saw no reason to plead lack of jurisdiction again in the appeal lodged by Ms Kapferer. Consequently, that part of the judgment became final. In this situation, too, the Court ruled that Community law does not require a national court to refrain from applying the relevant domestic rules of procedure which make a decision final.

45. The aforementioned judgments in *Köbler* and *Kühne & Heitz* have in common the fact that they concerned individuals who had exhausted all means of appeal. In both cases, the court adjudicating at last instance omitted to refer a question for a preliminary ruling, which resulted in an incorrect interpretation of Community law. In *Köbler* a court adjudicating at last instance was able to provide reparation for the infringement of

22 — This infringement — the case concerned an agreement possibly inconsistent with Article 81 EC — could always have been 'made good' if the Commission or a national competition authority had intervened. Disadvantaged competitors who were not affected by *res judicata* might also have taken legal steps.

23 — Council regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

Community law. In *Kühne & Heitz* breaching *res judicata* made reparation possible (as a result of the court's judgment the decision of the administrative body concerned had become final) through the conversion of the power of that administrative body to reopen previous decisions into an obligation in this instance to reopen that previous decision.

46. From this case-law it can be deduced that the parties themselves have a responsibility to assert rights of which they may freely dispose (*Kapferer*) or the rights which they may derive from Community law (*Köbler*, *Kühne & Heitz*). If they allow time-limits to pass,[24] or if they do not consider it opportune to appeal, of if they do not institute proceedings at all, they must accept the consequences in that they cannot subsequently assert the rights which they derive from Community law. If, however, they take legal action to defend their legal interests and, in so doing, take full advantage of the options provided by the national procedural system, they are entitled to the options which national law offers for claiming reparation for an unlawful official act, that is to say, an act inconsistent with Community law committed by the national administrative and/or judicial authorities concerned (*Köbler*) or, if national law permits, demanding the revision of the official decision in question (*Kühne & Heitz*). Although this case-law, in which respect for *res judicata* between the parties is assumed as a legal principle, does not appear to rule out every breach of *res judicata*, such an exception is permitted only in very special cases, in which the adage '*res judicata* pro veritate habetur' applicable to both parties must give way to a more important legal interest.

47. In the present case, however, the final judgment of the Corte d'appello not only has consequences for legal relations under Italian law between the subsidised party and the Italian State: it also sets aside the Commission's exclusive power, which is governed by Community law, to examine the aid measure in question for its compatibility with the common market and impinges on the obligations to which Italy is subject under Community law when granting State aid.

48. This case does not concern a dispute between a national administrative authority and a private party which can be resolved only within the framework of the national legal system, but a dispute which must be resolved in the first instance in the sphere of Community law and in which the distinction

24 — They must, of course, be reasonable time-limits.

between the Community legal system and the national legal system — and thus between the obligations of the national court as a consequence of both legal systems — is of great import.

Obligations of national courts

49. In these circumstances, I will begin by considering the obligations of the national court in the context of applying and upholding the Community law of relevance here.

First of all, I would point out that there is a clear division of tasks and jurisdiction between the Commission and the national courts in the application of the Community aid rules.

50. The Commission, the administrative authority responsible for implementing and developing competition policy in the public interest of the Community, is exclusively authorised to examine all aid measures which are governed by Article 87(1) EC and the relevant ECSC aid code at issue for compatibility with the common market. [25]

51. The Member States are therefore required to notify the Commission of planned aid measures (notification obligation) and to delay the implementation of an aid measure until the Commission has formed its opinion (standstill obligation). In the event of a 'positive' decision, the planned measure may be implemented; in the event of a 'negative' decision, the standstill obligation becomes final, as it were. [26]

52. Aid which is disbursed before being notified or aid which, pending the examination procedure, is none the less disbursed should be recovered. The main rule can be summarised as follows: Member States may not grant aid before the Commission has explicitly expressed an opinion on whether that aid is compatible with the common market.

25 — See inter alia the judgment in Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* ('*FNCE* judgment') [1991] ECR I-5505.

26 — For the aim and scope of these obligations see inter alia Case 120/73 *Lorenz* [1973] ECR 1471, paragraphs 3 and 4; Joined Cases 31/77 R and 53/77 R *Commission* v *United Kingdom* [1977] ECR 921, paragraphs 16 to 29; Joined Cases 91/83 and 127/83 *Heineken* [1984] ECR 3435, paragraph 20; and Case C-301/87 *France* v *Commission ('Boussac')* [1990] ECR I-307, paragraphs 16 and 17. See also, for example, Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 49, and Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraphs 67 to 69.

53. National courts are therefore not authorised to rule on the compatibility of aid.[27] On the other hand, they perform an essential task within the Community legal system in the enforcement of Community aid provisions, namely in upholding the aforementioned principle that aid may not be granted without the Commission's explicit prior approval, and also in the application and enforcement of provisions which the Commission adopts in connection with the exercise of its powers.

54. Article 88(3) EC is a binding, directly effective Treaty provision, which prohibits the actual granting of aid, in whatever form, without the Commission's prior intervention and approval. The same holds true of Article 6 of the aid code relevant in this case. National courts should therefore proceed consistently when asked for their view on a national decision granting aid or on whether the provisions of Article 88(3) EC or the equivalent provision in the ECSC aid code have been observed.

55. These main rules have been elaborated in a number of judgments in which the Court has stipulated that the national courts must protect the rights of individuals in cases where national authorities breach the aforementioned principle and that they must take all the consequential measures under national law as regards both the validity of the decision giving effect to the aid measure and the recovery of aid granted in the meantime.[28]

56. Secondly, the action of the national court is based on the directly effective Commission decisions taken under Article 88(2) EC. In *Capolongo*[29] the Court has already ruled that decisions taken by the Commission within the framework of the review procedure provided for in the first subparagraph of Article 88(2) EC have direct effect. Consequently, the national courts should also draw conclusions from a negative decision, that is to say, a decision in which the prohibition laid down in Article 87(1) EC is specified.[30]

57. Thirdly, the national court may have a role to play when the Commission takes a decision calling for the recovery of aid. Pursuant to Article 249 EC, in conjunction

27 — See *FNCE* judgment (cited in footnote 25), paragraph 12. See also Case C-39/94 *Syndicat français de l'Express international and Others* ('*SFEI* judgment') [1996] ECR I-3547, paragraph 42, and Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 30.

28 — See inter alia *Lorenz* (cited in footnote 26), paragraph 8; *FNCE* judgment (cited in footnote 25), paragraph 12; *SFEI* judgment (cited in footnote 27), paragraph 40; Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, paragraph 30; Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 17; and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 42.

29 — Case 77/72 [1973] ECR 611, paragraph 6. See also the judgment in Case 78/76 *Steinike & Weinlig* [1977] ECR 595.

30 — See the judgment in *Steinike & Weinlig* (cited in footnote 29).

with Article 10 EC, such decisions are binding on all organs of the Member States, including the national courts. The national court should thus draw the necessary conclusions from this.

58. In addition, those decisions impose explicit and unconditional obligations on the Member State concerned, obligations which Member States cannot evade. Those obligations also have an impact on interested private parties. Firstly, those to whom aid has wrongly been granted must repay it. Secondly, if the Member State does not comply with the obligation to recover aid by the set time-limit, interested third parties can demand compliance before the national courts. [31]32 — The Commission can also exercise the right conferred on it by Articles 88 EC and 228 EC to demand compliance with a decision concerning the recovery of aid.

59. The reason for this strict obligation of compliance is that it ensures that the main rule laid down in Article 87(1) EC, namely that competition in the common market must not be distorted by national aid measures, has the effect intended by the parties to the Treaty.

31 — See inter alia the judgment in *Streekgewest* (cited in footnote 28).

60. Finally, I would point out that aid must be recovered in accordance with the rules of national procedural law, provided that the recovery required by Community law is not rendered practically impossible (principle of effectiveness). [32]

61. It follows from the foregoing that, where the national court is required to rule on the granting of aid in accordance with national law, it must always determine whether the obligations arising from Article 88(3) EC or, as in the present case, the equivalent thereof in the corresponding ECSC aid code concerned have been fulfilled and whether there are any Commission decisions which either obstruct the aid disbursement in question or impose restrictions or special conditions on that disbursement.

62. The coexistence of the Community and national legal systems therefore implies that national courts must always consider, when applying their national law, whether the requirements laid down by the Community legal system have been satisfied and whether the application of national law does not impinge on the Commission's powers in the enforcement of the provisions governing the

33 — See inter alia Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 12; Case C-142/87 *Belgium* v *Commission ('Tubemeuse')* [1990] ECR I-959, paragraph 61; *BUG-Alutechnik* (cited in footnote 17), paragraph 12; *Alcan Deutschland* (cited in footnote 17), paragraph 24; and Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 34.

granting of aid as one of the pillars of the Community legal system. I refer in this context to the judgment in *Eco Swiss*, [33] in which the Court expressly ruled that the provisions of the Community Treaties concerning competition are a matter of public policy. This is also true of the provisions on competition which are applicable in the relationship between the Community and the Member States, thus in this case Articles 87 EC, 88 EC and 4 CS.

63. I would further point out that in the main proceedings in the present case the Italian State complied, or endeavoured to comply, with the obligations arising from Article 6 of the aid code. It notified the Commission of its initial decision, in which it announced its intention to grant aid to Lucchini. Furthermore, it did not wish to disburse the aid until the Commission had taken its decision, and even when it was ordered to do so by the ruling of the Corte d'appello, it eventually disbursed the aid with an explicit proviso.

64. For its part, the Commission assessed the intention to grant aid of which it had been informed. In that assessment, it complied with all the applicable procedural rules, specifically publishing the notification so as to enable the interested parties themselves and interested third parties to express their views on the matter. In addition, the decision in which the Commission arrived at its ultimate negative opinion was duly forwarded to the Italian Government and then published.

65. In those circumstances, it must be stated that, either through ignorance or through carelessness on the part of the Italian civil courts concerned, both at first instance and on appeal, serious errors were made.

66. The first-instance court failed to comply with the obligations described above to establish consistently whether Article 88(3) EC and/or Article 6 of the aid code had been complied with and whether there was a decision by which the Commission explicitly approved the aid. Even worse, at the appeal stage the Corte d'appello also took no notice of a negative decision which had been adopted by the Commission in the meantime. I will add nothing to that statement. I will not consider the grounds which led the latter court to feel that it had to refrain from applying Community law. Where so flagrant a breach has occurred, it does not seem appropriate to me to yield to the pedagogical temptation to explain why that reasoning is legally untenable.

67. I would add at this juncture that the Italian authorities also erred. Although they drew the attention of the appeal court to the

34 — Cited above in footnote 11, paragraphs 36 and 39. In my Opinion relating to the judgment in Case C-321/99 P *ARAP and Others* v *Commission* [2002] ECR I-4287, I have already explained that Articles 87 EC and 88 EC are a matter of public policy (see point 189 of that Opinion).

fact that the aid at issue could not be disbursed before the Commission had explicitly declared it to be compatible with the common market, they evidently forgot that the Commission had in the meantime adopted a decision in which the aid requested was expressly declared to be incompatible with the common market.

68. Finally, Lucchini, the applicant in the case before the Italian civil courts, knew or should have known — it is one of the largest Italian steel producers and was very familiar with Article 4 CS and with the aid codes — that the Italian Government could actually provide the aid which it had pledged only after the Commission had given its consent. Furthermore, when the Commission presented its negative decision, Lucchini did not seek to take advantage of the avenues of appeal against that decision which were available to it under Community law. I cannot escape the impression that Lucchini was looking for the weakest link in the chain of courts which can be called upon to adjudge the lawfulness of the granting of State aid.

69. The result of all this was that State aid was granted and the conditions of competition in the sector of the common market concerned were distorted. Perhaps more important than this substantive result, which is in itself a serious incidental breach of the Community legal system, is that that judgment led to the powers exercised by the Commission for the benefit of the Community being rendered ineffective. The final judgment of the Corte d'appello thus resulted in the setting-aside of the division of powers between the Community and the Member States with respect to the granting of State aid.

70. In short, the key question is whether a final judgment which came about in the circumstances referred to above, which, as is evident from the previous point, may have serious implications for the division of powers between the Community and the Member States, as this results from the Treaty itself, and which would also make it impossible for the powers assigned to the Commission to be exercised, must be considered inviolable.

71. To my mind, that is not the case.

72. The following considerations play a part in this context: the key factor is that, in their interpretation of national law, national courts may not deliver any rulings which set aside the fundamental division of powers between the Community and the Member

States, as those powers emerge from the Treaties. This is true even of decisions which have been declared final.

73. This is particularly true of the application of Treaty provisions which give expression to fundamental principles of substantive Community law, examples in this case being Articles 87 EC and [88] EC. It is even truer especially in cases where the legal duty of the national court is unambiguously laid down in the Treaty itself and in case-law applicable to it, in other words, as is the case in Article 88(3) EC and the aforementioned settled case-law of the Court.

74. In those cases, the finality of a judgment based solely on the interpretation of national law, with relevant Community law blatantly ignored, cannot obstruct the exercise of the powers conferred on the Commission by the provisions of Community law concerned.

75. The fact that, in this case, Lucchini cannot in any way rely on the principle of legitimate expectations is, to my mind, at best a subordinate argument.

76. For this approach I find unambiguous points of contact in the Court's case-law. I refer once again in this context to the judgment in *Eco Swiss*, which states that Article 81 EC constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the common market. It is also clear from that judgment that a national court called upon to determine the validity of an arbitration award should, of its own motion, review the application of Article 81 EC.

77. Another point of contact is, by analogy, the judgment in *Masterfoods*.[34] In that judgment the Court ruled that, in order to fulfil the role assigned to it by the Treaty, the Commission cannot be bound by a decision given by a national court in application of Articles 85(1) and 86 of the EC Treaty. The Court inferred from this that the Commission is entitled to adopt at any time individual decisions under Articles 85 and 86 of the EC Treaty, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision.

78. In the same judgment the Court also declared that, when national courts rule on agreements or practices which are already

35 — Case C-344/98 [2000] ECR I-11369.

the subject of a Commission decision, they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance. That case-law has since been codified in Regulation (EC) No 1/2003. [35]

79. That case-law is also applicable to Community aid provisions. The ruling that the judgment of a national court cannot restrict the Commission in the exercise of its powers with respect to rules of competition applicable to private parties also applies to rules of competition applicable to the Member States and so to State aid. In addition, it follows from the fact that the Commission's decision, by which the court, being an organ of a Member State, is bound, is addressed to that Member State that a national court may not deliver a judgment to the contrary. [36]

80. There is, however, an important difference between decisions taken under Articles 81 EC and 82 EC and those taken under Article 88 EC or the ECSC aid codes: the parties to whom those decisions are addressed. The judgment of a national court in a horizontal private-law legal relationship, even if declared final, cannot affect the Commission's power to take decisions, and the same is true of the vertical relationship between a Member State and an individual in respect of the granting of aid. Judgments delivered in that connection by a national court cannot affect the Commission's exclusive powers either.

81. It should also be noted in this context that, although Community law on State aid is addressed primarily to the Member States, interested private parties have the power, when aid is granted, to defend their interests in the procedure or procedures involved. This applies even at the administrative phase, which precedes the Commission's decision, in which both potential aid recipients and interested third parties may present their views. [37] It also applies after the Commission has given its decision. The potential aid recipients affected by that decision may in principle appeal for annulment pursuant to

36 — Council regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1). See Article 16.

37 — I would point out, on the side, that, at the same time as procedures are being implemented at Community level (relating to the examination of aid for compatibility with the common market) and at national level (relating, for example, to an infringement of the standstill obligation), the obligation of loyalty may require the national court to apply to the Commission or, by way of the preliminary ruling procedure, the Court of Justice with a view, for example, to discovering whether a given measure should be regarded as aid. See also in this content *Masterfoods* (cited in footnote 35), paragraphs 57 and 58. See also *SFEI* judgment (cited in footnote 27), paragraphs 49 to 51, and *Piaggio* (cited in footnote 27), paragraph 32.

38 — See inter alia Regulation No 659/1999 (cited in footnote 15).

Article 230 EC, a course which can usually be taken by interested third parties owing to the Court's broad interpretation of the restrictive criterion of 'direct' concern in matters relating to the granting of aid. [38]

82. From this it again follows that, in the absence of appropriate legal protection rules in the Community legal system, those potentially addressed by a national aid measure need not, out of sheer desperation, apply to the national courts. On the contrary, from the very existence of appropriate legal protection for individuals against Commission decisions on State aid the Court has drawn the conclusion that individuals may no longer challenge the validity of those decisions before a national court unless they have availed themselves of the power to appeal to the Community Courts. [39]

83. By analogy, an interested party does not deserve protection if he consistently ignores the possibility of appeal given to him by Community law and applies to a national court, which is not authorised to rule on the admissibility under Community law of an aid measure the implementation of which he is demanding. This is not altered by the fact that the judgment thus elicited from the national court, which, as has been shown above, is flagrantly inconsistent with the Community legal system, has become final and definitive under national law.

84. Consequently, the fact that, in the context of the Community provisions on State aid, the implementation of the Commission's decision requiring recovery of aid granted has an impact on the relationship between the Member State and the beneficiary is no reason to state any less categorically that this must not detract from the Commission's powers.

85. Although not decisive in the present context, I would refer to case-law which rules that the principle of legal certainty cannot impede the recovery of aid. This is the case, for example, where the national legal system sets limitation periods for the revocability of a national decision granting aid. [40] As the role of the national authorities is merely to give effect to the Commission's decision where aid measures have been declared incompatible — there is no judicial

39 — See inter alia the judgments in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809; Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203; and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* ('*Danish Shipping*') [1996] ECR II-1399. See also Regulation No 659/1999 (cited in footnote 15).

40 — Judgment in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833.

41 — See *Alcan Deutschland* (cited in footnote 17), paragraphs 34 to 37; see also *BUG-Alutechnik* (cited in footnote 17), paragraphs 18 and 19.

discretion to decide otherwise — once the Commission takes its decision, market participants no longer act in uncertainty with regard to the recoverability of aid wrongly granted. Limitation periods set in the interests of legal certainty cannot therefore be raised as an objection.

86. It follows from the above that the final judgment of the Corte d'appello cannot obstruct the recovery of aid granted in contravention of the Community law applicable in this context. The breach of Community law effected by that judgment should be terminated.

V — Conclusion

87. In view of the foregoing, I propose that the Court should answer the questions referred by the Consiglio di Stato as follows:

— A final judgment of a national civil court ordering a national authority to disburse State aid pledged by it cannot affect the exercise of the powers conferred on the Commission by Articles 87 EC and 88 EC.

— A national court ruling on the lawfulness of a decision by a national authority to implement a Commission decision ordering recovery of aid which has been wrongly granted is therefore bound to set aside national provisions governing the legal consequences of a civil judgment which has been declared final if that judgment is inconsistent with the obligations arising from Articles 87 EC and 88 EC in order fully to ensure that the Community rules of law on State aid are observed.