OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 18 March 1992 *

Mr President,
Members of the Court,

1. Cases C-319/90 and C-47/91, now before the Court, are applications for the annulment of Commission decisions initiating the procedure provided for in Article 93(2) of the EEC Treaty.

2. Case C-319/90, *Spain* v *Commission*, is concerned with aid granted by the Spanish Government to a group of manufacturers of electrical equipment (Cenemesa, Conelec and Cademesa) as part of a winding-up and restructuring agreement. On 3 August 1990 the Commission initiated the procedure provided for in Article 93(2) with regard to that aid. On 11 October 1990 the Spanish Government lodged an application for the annulment of that decision in which it argued *inter alia* that the aid in question was wrongly categorized as new aid which had not been notified. It claims that it notified the Commission in due time of the aid which it granted. Since, however, the Commission did not give its views on the lawfulness of the aid within a two-month period, the aid is to be regarded, according to the Court's case-law, as existing aid. [1]

3. Case C-47/91, *Italy* v *Commission*, is concerned with aid granted by the Italian Government to a cereal-processing undertaking located in Naples (Italgrani SpA). The aid in question was granted pursuant to arrangements governing aid to the Mezzogiorno (southern Italy) which were introduced by Italian Law No 64 of 1 March 1986. The Commission approved those arrangements conditionally by Decision 88/318/EEC of 2 March 1988. Following an initial investigation in which doubt arose as to whether the aid was compatible with the conditions set out in Decision 88/318/EEC, the Commission decided on 23 November 1990 to initiate the procedure provided for in Article 93(2).

On 31 January 1981 the Italian Government lodged an application for the annulment of that decision, in which it claimed that the aid in question fully satisfied the conditions laid down in Decision 88/318/EEC and merely implemented that decision. In its view, the decision to initiate the Article 93(2) procedure with regard to that aid is tantamount to a (partial) infringement of Decision 88/318/33C. The decision must therefore be annulled on the ground that it infringed the rules governing competence and the essential procedural requirements which apply to the withdrawal of an earlier decision. On 27 March 1991 Italgrani SpA, the undertaking to which the aid was granted, also brought an action for the annulment of the Commission decision (Case C-100/91).

* Original language: Dutch.

1 — See Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, paragraph 4.

In the meantime, the Commission closed the Article 93(2) procedure by means of a decision holding that the aid was lawful (Decision 91/474/EEC of 16 August 1991). It takes the view that the Italian Government has now brought the aid granted to Italgrani into line with the conditions laid down in Decision 88/318/EEC. Thereupon Italgrani SpA withdrew its application for the annulment of the contested decision. The Italian Government, however, maintained its application.

In contrast to the aid granted by Spain to Cenemesa, Conelec and Cademesa, Italy did not actually pay over the aid earmarked for Italgrani SpA, pending the definitive Commission decision on its legality.

General background to the question of admissibility

4. The Commission takes the view in both cases that the decision to initiate the procedure provided for in Article 93(2) cannot be the subject of an application for annulment within the meaning of Article 173. It has therefore raised an objection of inadmissibility in accordance with Article 91(1) of the Rules of Procedure, in which it draws attention to the potential consequences of a declaration that the applications for the annulment of the contested decisions are admissible. In the first place it might disrupt the distribution of jurisdiction, as laid down in the Treaty, with regard to the control of State aids. It refers in that connection to the *IBM* case, in which the Court held with regard to a decision initiating a procedure in a cartel case that:

'An application for a declaration that the initiation of a procedure and a statement of objections are void might make it necessary for the Court to arrive at a decision on questions on which the Commission has not yet had an opportunity to state its position and would as a result anticipate the arguments on the substance of the case, confusing different procedural stages both administrative and judicial. It would thus be incompatible with the system of the division of powers between the Commission and the Court and of the remedies laid down by the Treaty, as well as the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed in the Commission.' [2]

Secondly, the Commission warns against the risk of the proliferation of applications for annulment [3] and points out that if the Court should declare the applications admissible and ultimately annul the decisions at issue, this would give rise to a category of aid measures whose compatibility with the Treaty the Commission could no longer investigate.

5. The Court has decided to rule first on the objection of inadmissibility. I shall therefore not be considering those grounds for annulment raised by the applicants which have no bearing on that objection.

2 — Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 20.

3 — The Commission states that, of the 2000 cases of State aids which it investigated between October 1986 and September 1990, the procedure provided for in Article 93(2) was initiated in respect of 202 and that only in 48 cases did it conclude that the aid was incompatible with the common market or reach a conditional final decision.

The following passages from the *IBM* case to which I have already referred are pivotal to the discussion of the question of admissibility. According to that judgment: [4]

'any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void' [5] (paragraph 9)

and

'in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the case-law that in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision' (paragraph 10).

'It would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings not only bore all the legal characteristics referred to above but in addition were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case' (paragraph 11).

In view of those considerations the Court declared the application inadmissible.

6. Subsequently, the *IBM* case-law has been applied in various judgments by the Court — even outside the sphere of competition law — and by the Court of First Instance to measures adopted by a procedure involving several stages. [6]

An instructive application is to be found in the Court's judgment of 24 June 1986 in *AZKO*, [7] particularly since in that case, unlike in the *IBM* case, the Court decided that the application for the annulment of the contested decision was (partly) admissible. The measure at issue was a Commission decision in a competition procedure to the effect that certain documents were 'not among those to which confidential treatment was guaranteed by Community law' (paragraph 17). After first reiterating the general rule contained in paragraph 9 of the *IBM* judgment and stating that the decision to refuse confidential treatment had legal effect for the applicant 'inasmuch as it withheld from the latter the protection provided by Community law', the Court considered

4 — Cited in note 2. The paragraph quoted here from that judgment refers to the established case-law of the Court, going back for example as far as the judgment of 15 March 1967 in Joined Cases 8 to 11/66 *Cimenteries* v *Commission* [1967] ECR 75, at pp. 90-93.

5 — It appears from paragraph 17 of the judgment that the Court does not have in mind measures which only affect the applicant's procedural situation.

6 — See, for example, the Court's judgments in Case 53/85 *AKZO* [1986] ECR 1965 and in Case 346/87 *Bossi* [1989] ECR 303, paragraph 23 et seq. and the judgments of the Court of First Instance in Joined Cases T-32/89 and T-39/89 *Marcopoulos* [1990] ECR II-281, paragraph 21, in Case T-64/89 *Automec* [1990] ECR II-367, paragraph 42 et seq., and in Case T-116/89 *Prodifarma* [1990] ECR I-843, paragraph 63.

7 — Cited in note 6.

'whether that decision clearly altered the applicant's legal position or whether it was merely a preparatory step against which, if it was unlawful, the action brought against the decision concluding the procedure would provide sufficient protection' (paragraph 19).

In the course of that examination the Court held that the decision to refuse confidential treatment of documents — which led the Commission to consider that it was entitled to communicate them to the complainant undertaking (ECS), which it did — is 'definitive in nature and is independent of any decision on the question whether Article 86 of the Treaty has been infringed'. The Court then continued as follows:

'The opportunity which the applicant has to bring an action against a final decision establishing that the competition rules have been infringed is not of such a nature as to provide it with an adequate degree of protection of its rights in the matter. On the one hand, it is possible that the administrative procedure will not result in a decision finding that an infringement has been committed. On the other hand, if an action is brought against that decision, it will not in any event provide the applicant with the means of preventing the irreversible consequences which would result from improper disclosure of certain of its documents.' (paragraph 20)

The Court added that

'[The applicant's] interest in contesting the decision in question cannot be denied on the ground that in this case the decision had already been implemented at the time when the action was brought. The annulment of such a decision is itself capable of having legal consequences, in particular by preventing a repetition by the Commission of the practice complained of and by rendering unlawful the use by ESC of any documents improperly communicated to it'. (paragraph 21)

The application was therefore declared admissible with regard to this point in so far as it sought a declaration that the contested decision was void, but not in so far as it sought a order requiring the documents communicated to ECS to be returned the applicant, on the ground that the Court considered that it had no jurisdiction to make such an order in proceedings for a declaration that a measure is void.

7. I infer the following from that case-law. In the first place, it has to be considered whether the contested measure brings about or has binding legal effects.

Secondly, it has to be examined whether the legal effects clearly alter the applicant's legal position. That will not be the case where the contested decision was merely a preparatory step against which an action for the annulment of the decision concluding the procedure on grounds of invalidity (in this case holding the contested aid compatible or incompatible with Article 92 of the EEC Treaty) would provide sufficient protection for the applicant.

It is striking in the judgment in *AZKO* that the requirement of effective or adequate legal protection for the applicant, which was mentioned in the judgment in *IBM* (in paragraph

24), now assumes key importance in assessing whether the applicant should be given the possibility of bringing proceedings at an early stage, and I am assuming — having regard to the context of the judgment — that what is meant is an application for the *annulment* of the final decision and not, for example, an action for damages. [8] As result, the criterion mentioned in the judgment in *IBM* (paragraph 11) of whether the contested measures 'were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case' retreats somewhat into the background or rather is clarified by the requirement of adequate legal protection. That is to say, the contested measure is regarded as being the culmination of a special procedure and hence as being definitive in the event that an action for the annulment of the final decision would not afford the applicant adequate protection for its rights in respect of the specific point to which the measure relates.

8. It was therefore decided in *AZKO*, on the basis of the criterion of adequate legal protection, that an application for the annulment of the Commission decision not to regard certain documents in the file as being confidential, with the result that they could be communicated to the complainant undertaking, was admissible because otherwise it would have been impossible to prevent 'irreversible consequences' for the applicant. The Court's conclusion was the same irrespective as to whether or not the administrative procedure would ultimately have led to a final decision holding there to have been an infringement of Article 86.

The Court went on to hold that even the fact that the contested decision had already been implemented and the documents had already been disclosed did not diminish the applicant's interest in bringing an early action for annulment, since if the decision were declared void at an early stage that might prevent a repetition of the practice by the Commission and would make it clear in any event that if the undertaking to which the documents had been disclosed used them that would be unlawful.

9. It appears from the foregoing that the question whether an action for annulment can be brought against a certain measure at an early stage must be examined on a case-by-case basis in the light of the criteria set out to this end by the Court in the case-law. The case-law seeks to strike a balance between adequate protection of the applicant's rights and the division of powers and of the remedies laid down by the Treaty together with the requirements of the sound administration of justice and the proper course of the administrative procedure (see the passage quoted from the judgment in *IBM* in point 4 above).

I shall therefore consider the question of admissibility separately first for Case C-312/90 and then for Case C-47/91.

8 — I shall have no further regard in this case to the possibility of bringing an action for damages since such an action constitutes independent proceedings. Neither in the judgment in *AKZO* did the Court consider that possibility when assessing whether the requirement for adequate legal protection was satisfied.

Case C-312/90 Spain v Commission

10. It is important precisely to identify the Commission measure which the applicant is contesting. A Commission decision to initiate a procedure under Article 93(2) of the EEC Treaty contains two distinct elements: in the first place, the decision contains a provisional evaluation of the compatibility with the Treaty of the relevant aid, an element which neither of the parties maintains can be the subject of an early application for annulment; in the second place, the decision categorizes the aid as new aid within the meaning of Article 93(3), which, according to the Commission, was not notified.

The Spanish Government contests that assertion. Admittedly the aid was new but it was notified to the Commission by letters dated 14 and 28 February 1990. However, the Commission failed to investigate the case expeditiously as it is required to do by the Court's judgment in *Lorenz*, [9] that is to say, within a reasonable period of two months. The Spanish Government therefore considers that when the Commission had not initiated a procedure under Article 93(2) within two months, it was entitled to put the aid into effect notwithstanding the prohibition contained in Article 93(3). It was under a duty to notify the Commission beforehand and this it did. The Spanish Government takes the view that, since the Commission did not set in motion the procedure provided for in Article 93(2) in due time, the aid is to be regarded as being covered by the rules on existing aid set out in Article 93(1).

The Commission contests that view. It maintains that the aid in question was not notified to it. It discovered the aid itself following complaints made by interested undertakings, first in February 1987 and subsequently in December 1989. [10] The letters of 14 and 28 February to which Spain refers are, it maintains, answers to a request from the Commission for information, dated 12 January 1990. However, the Commission considered that the information provided in those letters was incomplete. At meetings held on 10 and 28 May it asked for additional explanations, but they were not forthcoming. Instead, on 15 June 1990 the Spanish Government made it known that it would put the measure into effect, which it did in fact do on 3 July 1990, notwithstanding a protest from the Commission.

11. It is not appropriate to consider that dispute here. With a view to the examination of the admissibility of the action for annulment which has been brought by Spain I must assume that the most disadvantageous situation for the applicant obtains. Whether that situation does in fact obtain will have to be considered — in the event that the application is declared admissible — when the grounds for annulment raised by the applicant are considered. In discussing the question of admissibility I shall therefore assume

9 — Cited in note 1.

10 — Where unnotified aid is concerned, it is in principle not the case that the Commission has to complete its investigation within a two-month period. See in that connection Case C-301/87 *France* v *Commission* (Boussac) [1990] ECR I-307, paragraph 27. This does not mean that the Commission is not under duty to act expeditiously in compiling the file and carrying out its preliminary investigation of it.

that the Commission wrongly categorized the relevant aid measures as new, unnotified aid (I shall refer to this hereinafter as 'the categorization decision').

Important legal consequences flow from that categorization decision of the Commission, which was brought to the applicant's notice at the same time as the decision to initiate the procedure provided for in Article 93(2). The fact that the aid is categorized as new aid means that the direct effect conferred by the Court's case-law on the prohibition on putting proposed measures into effect which is contained in Article 93(3) remains in being until the Commission takes its final decision. As a result, the national courts are obliged if interested parties so request — regardless of the Commission's final assessment as to whether or not the aid is compatible with Article 92 of the EEC Treaty — to have the Member State concerned comply with the prohibition on putting measures into effect which is contained in Article 93(3) before the Commission takes its final decision. As the Court held in *Fédération Nationale du Commerce Extérieur des Produits Alimentaires* v *French State*, [11] this means that, as regards an aid measure which has already been implemented, the national courts may assess whether it was put into effect validly under national law, require aid already disbursed to the repaid and/or order interim measures.

I consider it to be irrelevant that, strictly speaking, the categorization decision did not 'bring about' the aforesaid binding legal effects (*IBM*, paragraph 9) and was not the measure which 'had legal effect in relation to the applicant' (*AZKO*, paragraph 18) but that the binding legal effects flowed from the direct effect of the last sentence of Article 93(3) and were maintained in being by the Commission's decision, since in any event it is for the Commission to establish whether or not the conditions for maintaining or bringing about the intentional effects have been satisfied. [12]

12. There remains the question whether the contested categorization decision, owing to its binding legal effects, clearly and definitively altered the applicant's legal position. That will be the case where the applicant cannot be sufficiently protected against the illegality of the decision by an application for the annulment of the final decision.

In that respect, it would be possible to take the view that the Commission's decision to categorize the relevant aid measure as a new or an existing measure is merely a preparatory step in the Commission's decision-making — before it evaluates the compatibility of the aid measure with Article 92 — and that the Commission can revoke that initial categorization later at the end of the administrative procedure. A categorization decision such as the one involved in this case differs from the decision in the *AZKO* case: the Commission's refusal in that case to treat documents as confidential with the result

11 — Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires* v *French State* [1991] ECR I-5505, paragraph 12.

12 — Cf. the judgment in *Cimenteries* cited in note 4, at p. 93.

that they could be disclosed to a competitor and, in so far as that had already been done, they could be lawfully used by that undertaking, is a decision which was no longer capable of being adequately reversed by means of an application for the annulment of the Commission's final decision. As a result, the interests of the applicant undertaking would have been irreversibly affected if an early application for annulment had been inadmissible.

13. In my view, it is likewise possible — depending on the particular circumstances — for the applicant's interests in a case such as the present to be in danger of being irreversibly affected by a categorization decision such as the one at issue — for example, where, as a result of the Commission's categorizing the aid as an unnotified new aid, the Member State concerned complied with the prohibition on putting the aid into effect which is contained in Article 93(3) and the undertaking for which the aid was intended gets into financial difficulties or cannot proceed with restructuring plans as a result of the failure to pay over the promised aid. It is clear that in such a case the continued existence of the undertaking or its creditworthiness is liable to be irreversibly affected and an application for the annulment of the categorization decision must therefore be regarded as being admissible.

Since in this case the aid was in fact paid over, that possibility does not arise. Neither is there any claim before the national courts for the repayment of the aid pursuant to the prohibition on putting new aid measures into effect which is set out in Article 93(3). Moreover, the question arises — and I shall shortly be considering it when I discuss Italy's application (point 17 below) — as to whether such a possibility, were it to arise, could be relied on by the Member State concerned in the absence (as in this case) of an application for the annulment of the contested decision brought by the undertaking concerned. I shall later be concluding that that question must in any case be answered in the negative if no actual adverse effect suffered by a specific undertaking can be proved (see point 17 below).

14. In view of the foregoing I consider therefore that the Spanish Government's application for the annulment of the contested decision is inadmissible.

Case C-47/91 *Italy* v *Commission*

15. In this case, too, the dispute between the parties is based on whether the Commission rightly categorized an aid granted by Italy as new aid which had to be notified, with all the consequences that that entails (see point 11 above).

Italy argues that the aid did not have to be notified as a new aid because it falls within,

and satisfies all the conditions of the aid legislation approved by Decision 88/318/EEC, which the Commission had previously adopted in favour of the Mezzogiorno. The Commission's decision to initiate the procedure provided for in Article 93(2) in respect of the aid granted to Italgrani and to treat that aid as aid which had not yet been approved and hence was subject to a duty of notification is tantamount, according to the Italian Government, to a (partial) revocation of the earlier general decision granting approval. I do not have to go into this second argument now because it has no bearing on the aid's categorization as new aid which had to be notified and therefore is not germane to the examination of the question of admissibility.

As has already been observed (in point 3) Italgrani also brought an action for the annulment of the Commission's categorization decision, but it withdrew its application when the Commission reached a final decision to the effect that the aid was lawful.

16. What differentiates this case from C-312/90 is that although the Italian Government granted the aid it did not actually pay it because of the Commission's view that the aid should be categorized as new aid and therefore had to be notified. [13] As has already been pointed out, that circumstance may be such as to justify the interest which an undertaking to which aid has been granted, such as Italgrani, may have in an early application for annulment, if it can prove that the Commission's categorization decision caused it to suffer adverse effects which can no longer be adequately made good by bringing an application for the annulment of the Commission's final decision. That will be the case in particular where the non-payment of the aid caused the undertaking concerned to suffer serious financial problems or problems relating to its creditworthiness which may jeopardize its continued existence. As has already been mentioned, the question also arises as to whether the Member State concerned may take legal action to protect this interest which primarily affects the undertaking. In this case Italgrani withdrew its application for the annulment of the contested decision after the Commission adopted its final decision holding the aid to be lawful.

17. As far as the application brought by the Italian Government is concerned, I would not deny that a Member State may also have an interest in the survival of an undertaking established in its territory and that an early application by the Member State for a declaration that the Commission's categorization decision is void may possibly be admissible where the decision might jeopardize the continuing existence of an undertaking to which aid has been granted (but where the aid has

13 — In the contested decision the Commission complains that the Italian Government *granted* the aid and reminds the Government that under Article 93(3) it may not put that aid measure into effect until such time as the Commission has taken a positive final decision (see Annex I to the application). It can be inferred from this that the aid has indeed not yet been *paid*. It also appears from Italgrani's letter to the Court of 22 January 1992 in which it withdraws its application in Case C-100/91 that no aid was paid before the Commission's final decision (page 3).

not yet been paid).[14] However, as has already been observed, such circumstances have not been shown to exist in this case and the Member State cannot therefore invoke them.

Admittedly, the Member State does also have a general interest in the implementation of its policy on the granting of aid. However, that general interest, which is distinct from the interest which an undertaking or a Member State or both may have in an particular grant of aid, can be protected by the Member State's bringing an action for the annulment of the Commission's final decision holding that there has been an infringement of Article 92, and even protected more effectively since at that time all the Commission's arguments will be on the table.

18. In view of the specific circumstances of the case, I therefore consider that the application brought by the Italian Government is also inadmissible.

Conclusion

19. In view of the foregoing I propose that the Court should declare inadmissible the actions brought in Case C-312/90 and C-47/91 by the Spanish and Italian Governments respectively against Commission decisions initiating a procedure under Article 93(2) of the EEC Treaty and against the decisions contained therein categorizing the aid in question as new aid, and order the applicant Governments to pay the costs.

14 — The questions raised here exhibit a clear similarity to the question whether a Member State may (as Italy might in fact have done in this case but did not do so) show in an application for interim measures that it suffered serious and irreparable damage as a result of damage sustained by an undertaking or sector in that Member State. See in that connection the order of 17 March 1989 in Case 303/88R *Italy* v *Commission* [1989] ECR 801 (summary publication only) in which it was held that the applicant Member State could not successfully invoke such damage. In that order the President of the Court did not discuss the question of possible damage to the sector concerned and hence to the national economy as a whole, as it had not been proved that such damage had occurred. See also the order of 8 May 1991 in Case C-356/90R *Belgium* v *Commission* [1991] ECR I-2423.