OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 28 November 1989 *

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Mr President,
Members of the Court,

A — Facts

1. The case in which I am to give my Opinion today involves an assessment in the light of Community law of the preferential system established in Italy for the benefit of the Mezzogiorno (Southern Italy). This case is only one of the several references for preliminary rulings with similar facts which are at present pending before the Court. [1] The reference was made by the tribunale amministrativo regionale della Toscana, which seeks a ruling on the interpretation of Articles 30, 92 and 93 of the EEC Treaty.

2. The plaintiff in the main proceedings, Du Pont de Nemours SpA, brought two separate actions, which were joined by the national court, against decisions of Unità sanitaria locale No 2 di Carrara ('the defendant').

1 — Case 310/88 *Istituto Behring* v *USSL N.*; Case 311/88 *Hoechst Italia* v *USSL No 56*; Case 351/88 *Laboratori Bruneau* v *USL R.*

* Original language: German.

3. The plaintiff was invited to take part in a restricted tendering procedure organized by the defendant and published in a notice dated 15 February 1986.

4. On 1 March 1986, Law No 64/86 came into force; that law extended the scope *ratione materiae* and *ratione personae* of the existing preferential system designed to assist Southern Italy. Under that law, the defendant, as a local health authority, was required to procure at least 30% of the supplies it needed from undertakings with establishments and fixed plant located within the area covered by the preferential system in which the products must have undergone at least partial processing.

5. The defendant accordingly laid down, by decision of 3 June 1986, the conditions governing the award of contracts for the supply of radiological films and liquids and, according to the terms and conditions set out in the annex, divided the supplies into two lots, one of which — equal to 30% of the total amount — was reserved to undertakings established in Southern Italy. That decision forms the subject of the main proceedings, together with a decision adopted by the defendant on 15 June 1986 awarding a contract for the lot amounting to 70% of the total amount. The plaintiff was prevented from participating in the tendering procedure for the remaining lot of 30% on the ground that it had no establishments in Southern Italy.

6. The national court has raised a number of questions on the interpretation of Community law with a view to the assessment of the compatibility of Law No 64/86 with Community law.

7. The first question seeks to ascertain whether Article 30, which prohibits quantitative restrictions on imports and any measures having equivalent effect, precludes the contested national rules. Next, the national court asks whether the national rules may be regarded as 'aid' within the meaning of Article 92 of the EEC Treaty and, if so, whether the Commission alone is entitled to determine the compatibility of aid with the common market or whether this can also be determined by the national court.

8. Du Pont de Nemours Deutschland GmbH has intervened in the case in support of the plaintiff; 3M Italia SpA has intervened in support of the defendant. The interveners have also submitted observations to the Court.

9. For an account of the facts, the applicable legal provisions and the submissions of the parties, reference is made to the Report for the Hearing.

B — Opinion

1. *The competitive relationship between Article 30 and Article 92 of the EEC Treaty*

10. It is appropriate to consider the competitive relationship between Article 30 and Article 92, because the applicability of one of those provisions may preclude the applicability of the other. The question arises as to whether a measure adopted by a Member State, which is to be regarded as a measure having an effect equivalent to a quantitative restriction on imports, may at the same time constitute an aid within the meaning of Article 92. The question may also be relevant if put the other way round: can a measure which is to be regarded as a

State aid also be assessed in the light of the provisions on the free movement of goods, in particular Article 30.

11. In principle, the starting point must be that both the prohibition of quantitative restrictions on imports and of measures having equivalent effect and the prohibition laid down by Article 92 of aid granted by the State or through State sources pursue a common purpose, which is to ensure the free movement of goods between Member States under normal conditions of competition. [2]

12. It follows from the prohibition in Article 30 of measures having an effect equivalent to quantitative restrictions on imports, and from the prohibition in Article 92(1) of aid which distorts or threatens to distort competition in so far as it affects trade between Member States, that a national measure which falls foul of those prohibitions is unlawful. Concurrent application of those two provisions would thus lead to the same result in terms of substantive law, in so far as the legal consequence of the two prohibitions is that the national measure in question is incompatible with Community law.

13. However, it is necessary to draw a distinction on procedural grounds, since Article 30 incontestably has direct effect and any Community national may rely, in an appropriate case, upon that provision before the courts of the Member States. In contrast, Article 92(1) does not have direct effect, since the prohibition which it lays down is neither absolute nor unconditional, [3] as is clear both from Article 92(1) and (2) and from Article 93. In addition, pursuant to the review of systems of aid provided for in Article 93, the assessment of whether an aid is prohibited under Article 92(1), permitted under Article 92(2) or to be regarded as compatible with the common market under Article 92(3), comes within the jurisdiction of the Commission.

14. With the exception of the last sentence of Article 93(3), Articles 92 and 93 may be relied upon before the courts of the Member States only 'where they have been put in concrete form by acts having general application provided for by Article 94 or by decisions in particular cases envisaged by Article 93(2)'. [4]

15. Those differing procedural consequences constitute in themselves an indication that the provisions in question have in principle different fields of application. The Court of Justice stated as follows with regard to this question of demarcation in the judgment in *Iannelli & Volpi*: [5]

2 — See the judgment in Case 74/76 *Iannelli & Volpi* v *Paolo Meroni* delivered as long ago as 22 March 1977 ([1977] ECR 557); the judgments of 10 July 1985 in Case 17/84 *Commission* v *Ireland* [1985] ECR 2375, and of 5 June 1986 in Case 103/84 *Commission* v *Italy* [1986] ECR 1759.

3 — See the judgment in *Iannelli & Volpi*, cited above in footnote 2, paragraphs 11 and 12.

4 — See the judgment of 19 June 1973 in Case 77/72 *Capolongo* [1973] ECR 611, paragraph 6.

5 — See the judgment in *Iannelli & Volpi*, cited above in footnote 2, paragraphs 9 and 10.

'however wide the field of application of Article 30 may be, it nevertheless does not include obstacles to trade covered by other provisions of the Treaty'

'similarly the fact that a system of aids provided by the State or by means of State resources may, simply because it benefits certain national undertakings or products, hinder, at least indirectly, the importation of similar or competing products coming from other Member States is not in itself sufficient to put an aid as such on the same footing as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30'.

The Court went on to state that:

'the effect of an interpretation of Article 30 which is so wide as to treat an aid as such within the meaning of Article 92 as being similar to a quantitative restriction referred to in Article 30 would be to alter the scope of Articles 92 and 93 of the Treaty and to interfere with the system adopted . . . for the division of powers . . . '.[3]

16. Although that reasoning provides some support for the proposition that Articles 92 and 93 are in a special position in relation to Article 30, regard should nevertheless be had to the wording used by the Court, which speaks of an aid 'as such'. According to the Court, moreover, it is necessary to distinguish between the respective fields of application of the provisions in question 'except in those cases which may fall simultaneously within the field of application of two or more provisions of Community law'.[5]

17. In the same judgment, the Court acknowledges the possibility, when analysing a system of aid, of separating those factors which are not necessary for the attainment of its object.

'In the latter case there are no reasons based on the division of powers under Articles 92 and 93 which permit the conclusion to be drawn that, if other provisions of the Treaty which have direct effect are infringed, those provisions may not be invoked before national courts simply because the factor in question is an aspect of aid'.[6]

18. The Court has followed that case-law and confirmed that Articles 92 and 93 of the EEC Treaty cannot hinder the application of Article 30, provided that the contested measures constitute an aspect of an aid scheme which is not necessary for the attainment of the object or the proper functioning of the scheme.[7]

19. Accordingly, if the Court considers that it is possible to invoke Article 30 and therefore proceeds on the assumption that Article 30 may be applied even though on the whole the legal categorization of the measure in question as aid is uncontested, there is all the more reason for taking this to be the case where a national system cannot be classified in one or other of those categories clearly and unequivocally.

20. In the judgment relating to the 'Buy Irish' promotion campaign, the Court did not follow the Irish Government's argument to the effect that Articles 92 and 93 take precedence over Article 30.[8] Instead, the Court held that the fact that a substantial part of the campaign was financed by the Irish Government and that Articles 92 and 93 of the Treaty might be applicable to

3 — See the judgment in *Iannelli & Volpi*, cited above in footnote 2, paragraphs 11 and 12.

5 — See the judgment in *Iannelli & Volpi*, cited above in footnote 2, paragraphs 9 and 10.

6 — *Iannelli & Volpi*, cited above, paragraph 14

7 — Judgment of 7 May 1985 in Case 18/84 *Commission* v *France* [1985] ECR 1339, paragraph 6

8 — Judgment of 24 November 1982 in Case 249/81 *Commission* v *Ireland* [1982] ECR 4005, paragraph 16

financing of that kind, did not mean that the campaign itself might escape the prohibitions laid down in Article 30.[9]

21. If that reasoning is applied to this case of a system of regional preference, whose nature as aid is complicated in particular by the question of its financing out of State resources and of the calculation of the amount of aid, it follows that the reserved quota system must be assessed in the light of Article 30 and cannot a priori be exempted from such an assessment because it may be in the nature of aid.

22. In the same vein, the Court has stated in another connection that Articles 92 and 94 cannot be used to frustrate the rules of the Treaty on the free movement of goods:[10]

'the mere fact that a national measure may possibly be defined as aid within the meaning of Article 92 is therefore not an adequate reason for exempting it from the prohibition contained in Article 30'.[11]

23. Accordingly, it is necessary to assess the compatibility of the Italian reserved quota system with the principle of the free movement of goods and, in particular, with Article 30 of the Treaty. The order in which that assessment is carried out is justified *inter alia* by the possible far-reaching consequences of the direct applicability of Article 30.[12]

2. *The compatibility of the reserved quota system with Article 30 of the EEC Treaty*

24. Article 30 of the EEC Treaty imposes an unconditional and absolute prohibition on quantitative restrictions on imports between Member States and on all measures having equivalent effect. Since the judgment in *Dassonville*,[13] which the Court has consistently reaffirmed, 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' are to be considered as measures having an effect equivalent to quantitative restrictions on imports.

25. Even provisions applicable to domestic and imported goods without distinction may constitute measures having equivalent effect in so far as they specifically affect the imported goods and make it more difficult, if not impossible, to market them. However, there is no need in the present case to have recourse to that broad definition in order to establish that, in view of its effects, the reserved quota system is in the nature of a

9 — Case 249/81 *Commission* v *Ireland*, cited above in footnote 8, paragraph 18.

10 — Case 18/84 *Commission* v *France*, cited above in footnote 7, paragraph 13, and Case 103/84 *Commission* v *Italy*, cited above in footnote 2, paragraph 19.

11 — *Commission* v *France*, cited above, paragraph 13, and *Commission* v *Italy*, cited above.

12 — The Court has clearly stated that individuals may rely on directly applicable provisions not only before the courts but also before all organs of the administration, including municipalities, which are obliged to apply those provisions. Judgment of 22 June 1989 in Case 103/88 *Costanzo* v *Commune di Milano* [1989] ECR 1839.

13 — Judgment of 11 July 1974 in Case 8/74 *Dassonville* [1974] ECR 837.

measure having equivalent effect within the meaning of Article 30.

26. The obligation imposed on *all* public authorities, regions, provinces, municipalities, local health authorities, upland communities, companies and bodies in the State holding sector, universities and independent hospitals to procure at least 30% of the material they need from undertakings with establishments and fixed plant within the area covered by the preferential system certainly causes a substantial reduction in demand for imported goods. The impact of the system is aggravated by the fact that the figure of 30% of supplies and services must be attained at the end of the financial year, which means that, in order to compensate for the fact that some products are not manufactured in the areas covered by the preferential system, the reserved quota is liable considerably to exceed the prescribed figure of 30% in the case of other orders. Provision is even made for the unused portion of reserved quotas to be carried forward to the next financial year. [14]

27. The economic dimension of the reserved quota system has become clearer in the course of the proceedings. Referring to the Commission's communication of 24 July 1989, [15] on public procurement, regional and social aspects, the plaintiff estimated at the hearing that the volume of public procurement subject to the regional preference scheme was ECU 16 to 17 000 million a year. In the radiography sector, some LIT 210 000 million was spent every year, 85% of that sum being accounted for by public supply contracts.

28. The French Government pointed out that Southern Italy was 140 000 square kilometres in area, that is to say approximately one half of Italy's national territory, and was inhabited by 40% of Italy's population.

29. It is plain the system at issue is not only an abstract threat to intra-Community trade simply from the facts of the main proceedings: the amount of the contract which was to be awarded was subsequently reduced by 30%, contrary to the initial notice. In the written procedure, the plaintiff stated, unchallenged, that its German sister company, which has intervened in the proceedings, manufactured photographic products for radiographical applications on behalf of the plaintiff. An estimated 12% of its company's production capacity was given over to the manufacture of goods for the Italian market. The Italian market was fairly important, since it accounted for 18% of the European market for radiographical products. All such products, excluding the products manufactured by the 3M company, were imported.

30. It can be inferred from those economic data that the reserved quota system provided for in Article 17 of Law No 64/86 has definitely impeded trade.

31. The fact that approximately 85% of radiographical material is purchased by

14 — See Commission Communication COM(89) 400 final, paragraph 38.

15 — COM(89) 400 final

health authorities, which are bound to comply with the reserved quota system, casts light on the extent of the trade restrictions.

32. The preferential system at issue is also clearly discriminatory. The obligation on the part of the undertakings concerned to procure 30% of their needs from suppliers with an establishment in Southern Italy totally excludes foreign-manufactured goods from possible supply contracts. Because the reserved quota system is binding, its discriminatory effect is more far-reaching than national measures designed to promote the purchase of domestic products through advertising campaigns supported by the State, [16] subsidies, [17] tax relief, [18] more favourable credit terms [19] or the mere requirement that goods from abroad should be stamped with the indication 'foreign'. [20]

33. The preferential system is more than a financial inducement to obtain supplies on the domestic market. The reserved quota system does not leave economic operators any alternative. Such an alternative existed in the examples referred to above, albeit on condition that certain financial sacrifices were accepted. Accordingly the problem lies not in the existence or otherwise of discrimination against foreign goods, but in the fact that even Italian manufacturers without an establishment in the areas covered by the preferential system suffer discrimination, since they are excluded from the supply contracts in the same way as foreign manufacturers. The Court has not had to consider such a situation before.

34. In assessing the national measure in the light of Community law, pride of place should be given to its effect on international trade. The fact that the Italian undertakings which suffered discrimination may possibly be indirectly affected by the consequences of an assessment of the measure in question in the light of Community law is merely a side-effect.

35. The impact of the reserved quota system — albeit restricted to certain regions — is significantly greater in economic terms, in particular on intra-Community trade, than many other measures having equivalent effect within the meaning of Article 30 which apply throughout the territory of a Member State (for instance, the requirement that certain souvenirs manufactured abroad must bear an indication of their foreign origin [21] or the grant of aid to municipal transport undertakings for the purchase of electric vehicles, a case in which two applications for aid were pending at the time of the hearing [22]). Even though not all Italian manufacturers benefit by the reserved quota system, never-

16 — Case 249/81 *Commission* v *Ireland*, cited above in footnote 8.

17 — Judgments of 22 March 1977 in Case 78/76 *Steinike und Weinlig* v *Federal Republic of Germany* [1977] ECR 595, and in *Commission* v *Italy*, cited above in footnote 2.

18 — Judgment of 10 July 1985 in Case 17/84 *Commission* v *Ireland* [1985] ECR 2375.

19 — Judgment of 11 December 1985 in Case 192/84 *Commission* v *Hellenic Republic* [1985] ECR 3973.

20 — Judgment of 17 June 1981 in Case 113/80 *Commission* v *Ireland* [1981] ECR 1627.

21 — Judgment in Case 113/80 *Commission* v *Ireland*, cited above in footnote 20.

22 — Judgment in Case 103/84 *Commission* v *Italy*, cited above in footnote 2.

theless the fact remains that the undertakings which do benefit are almost invariably domestic undertakings.

36. The extent of the impediments to trade arising from the reserved quota system therefore suggests that it should be regarded as a measure having equivalent effect within the meaning of Article 30. The decisive criteria for the purposes of that assessment are, on the one hand, the size of the area covered by the preferential system and, on the other, the large number of institutions bound by the system.[23] Finally, the share of the potential volume of procurement contracts of economic operators subject to the system is considerable.

3. *The compatibility of the reserved quota system with Directive 70/50/EEC*[24]

37. In the written procedure it was argued that the contested statutory system should be regarded as a measure having an effect equivalent to a quantitative restriction on imports, and consequently prohibited, also on the ground that it falls within Article 2(3)(k) of Directive 70/50.

38. The first point in that regard is that recourse to the directive is unnecessary if the contested system must be regarded as a measure having equivalent effect within the meaning of Article 30 on the basis of the criteria set out in the case-law. The directive, which is based on Article 33(7) of the EEC Treaty, contains merely a series of particularly noteworthy examples of measures covered by Article 30 and does not seek to provide a complete list.[25]

39. Whether it is possible in this case to derive from the provisions of the directive an autonomous prohibition distinct from that laid down in Article 30 is questionable for two reasons. In the first place, the directive, in view of its legal nature, is addressed to the Member States and hence direct effect cannot be attributed to it as a matter of course. Furthermore, the general prohibition of measures having an effect equivalent to quantitative restrictions on imports follows directly from the Treaty. Secondly, it is expressly stated in the preamble to the directive that it does not apply to the aids mentioned in Article 92,[26] with the result that there would be a barrier to its application if the contested provision were in the nature of aid, even if only to some extent.

40. Nevertheless, some provisions of the directive may serve as an aid for interpretation for the purpose of assessing whether a national measure is a measure having equivalent effect. According to Article 2(2) of the directive, the latter covers, in particular, measures which favour domestic products or grant them a preference. Article 2(3) lists examples of the kind of measures covered by this provision. According to Article 2(3)(k), those measures must be taken to include measures which 'hinder the purchase by private individuals of imported products only, *or* encourage, require *or* give preference to the purchase of domestic

23 — See paragraph 26 above.

24 — Of 22 December 1969, OJ, English Special Edition 1970 (I), p. 17.

25 — See the Opinion of Mr Advocate General Lenz in Case 103/84 *Commission* v *Italy* [1986] ECR 1761, at p. 1764.

26 — See the penultimate (15th) recital in the preamble to the directive (OJ L 13, 19.1.1979, p. 30).

products only'.[27] There are therefore four possibilities, of which the last two are relevant here, since the preferential system gives preference to a substantial number of domestic products and at the same time requires such products to be purchased.

41. Consideration of the provisions of the directive therefore lends weight to the view that the disputed national system is a measure having equivalent effect to a quantitative restriction. Moreover, for the reasons referred to earlier, the fact that not all domestic goods of a specified kind are accorded preferential treatment does not preclude that classification. The preferential system applies only to goods which are at least in part domestically produced.

4. *Possible exceptions to the prohibition of measures having equivalent effect within the meaning of Article 30 of the EEC Treaty*

42. (a) The interests protected by Article 36 of the EEC Treaty in respect of which derogations may be made from the prohibitions of quantitative restrictions on imports and exports and of measures having equivalent effect laid down by Articles 30 and 34 of the EEC Treaty are expressly enumerated in Article 36. Since that is a derogating provision, it must be interpreted restrictively, as regards both the scope of each exception and the applicability of Article 36 to any 'unnamed exceptions'. The grounds on which derogations may be made which are listed in Article 36 cannot be applied either to the substance or to the aims of the reserved quota system. Moreover, the Court has decided in a consistent line of cases that measures with an economic aim cannot be justified by Article 36.[28]

43. (b) Nevertheless, the preferential system might be justified by 'mandatory requirements'.[29] Mandatory requirements may relate, for instance, to the effectiveness of fiscal supervision, the fairness of commercial transactions and consumer or environmental protection.

44. The reserved quota system does not fall within any of those categories. Whether the measure in question may be justified on the ground of some other mandatory requirement depends on its aim and purpose. In so far as it cannot be assumed that the preferential system pursues exclusively protectionistic aims, it must be regarded as a regional support measure. Regional support is an objective recognized by the Treaty, as may be inferred from Article 92(3)(a) and Article 130(a) of the EEC Treaty.

45. However, the legal basis for the implementation of an objective authorized or even laid down by the Treaty must be derived from the provisions of the Treaty in so far as express provisions are to be found there. Recourse to an unwritten legal basis is, therefore, precluded in so far as the machinery provided for in the Treaty

27 — Emphasis added.

28 — See, for instance, the judgment of 7 February 1984 in Case 238/82 *Duphar BV and Others* v *Netherlands* [1984] ECR 523.

29 — Judgment of 20 February 1979 in Case 120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon') [1979] ECR 649.

affords a sufficient guarantee of the achievement of the objective pursued. Accordingly, regional support measures cannot be regarded as mandatory requirements. Furthermore, it is a well-established principle that a Member State may not rely on mandatory requirements in order to protect its domestic economy.

5. *Assessment of the reserved quota system in the context of Directives 77/62/EEC*[30] *and 70/32/EEC*[31]

46. According to the plaintiff, the reserved quota system is contrary to Community law also because it infringes Council Directive 77/62 coordinating procedures for the award of public supply contracts. In its view, that directive applies the principles laid down in the EEC Treaty and therefore prohibits all discrimination, irrespective as to whether it is based on the origin of the products to be supplied or on the place at which the supplier is established.

47. It is true that restrictions on the free movement of goods within the meaning of Article 30 are also prohibited in the case of supplies of goods to the State and to bodies governed by public law and in the case of the award of public supply contracts. The legislative authorities of the Community have therefore adopted coordination directives with a view to ensuring the free movement of goods also in the case of supply contracts awarded in the public sector. The preamble to Commission Directive 70/32 on provision of goods to the State, to local authorities and other official bodies states as follows:

'. . . such provisions, by reserving outlets for domestic products . . . hinder imports which might take place in the absence of such provisions and therefore have an effect equivalent to quantitative restrictions on imports'.

The scope of the directive is defined in Article 3(1)(b) as applying to provisions 'which restrict supplies, either wholly or in part, to domestic products or give them preference other than by way of aid within the meaning of Article 92 of the Treaty, whether conditionally or otherwise'.

48. Directive 77/62 pursues comparable objectives with regard to procedures for the award of public supply contracts. As is clear from the preamble to the directive, it is also designed to ensure a degree of transparency in the award of public contracts in order to permit supervision to take place of the prohibition of restrictions on the free movement of goods.

49. The question arises, however, whether Article 26, which is included amongst the final provisions, provides for an exception for the contested preferential system. It reads as follows:

'This directive shall not prevent the implementation of provisions contained in Italian Law No 835 of 6 October 1950

30 — OJ L 13, 15.1.1976, p. 1.
31 — JO L 13, 19.1 1970, p. 1.

(GURI No 245 of 24.10.1950 of the Italian Republic) and in modifications thereto in force on the date on which this directive is adopted; this is without prejudice to the compatibility of these provisions with the Treaty.'

50. In support of the view that that provision may constitute a derogation from the principles of the free movement of goods, it is argued that the predecessors of the reserved quota system are stated to be unaffected by the directive. Although, on account of its publication date, the amendment of that provision by Directive 88/295/EEC of 22 March 1988 [32] cannot be decisive for the purposes of the dispute in the main proceedings, it also supports the view that the provision in question is still a derogating provision. The amended version of Article 26(1) reads as follows:

'This directive shall not prevent, until 31 December 1992, the application of existing national provisions on the award of public supply contracts which have as their objective the reduction of regional disparities and promotion of job creation in the most disadvantaged regions and in declining industrial regions, on condition that the provisions concerned are compatible with the Treaty and with the Community's international obligations.'

51. The Italian preferential system is no longer expressly mentioned in that provision. It could at most be regarded, for the purposes of the new version, as a national provision whose aim is to reduce regional disparities.

32 — OJ L 127, 20.5.1988, p. 1.

52. The decisive factor, in my view, is that the phrase 'without prejudice to the compatibility of these provisions with the Treaty' was already to be found in the original version, and has now been incorporated in an equivalent formula in the new version. Those forms of words make it clear that, notwithstanding possible derogations from the *directive*, the fundamental principles of the *Treaty*, particularly those relating to the free movement of goods, remain valid without any limitation. The incompatibility of the reserved quota system established by Article 17 of Law No 64/86 with Article 30 cannot therefore be cured by the derogating provision in the directive.

53. In Cases 216/84 [33] and 76/86 [34] a number of similar legal issues had to be resolved. The defendant Member States relied on a derogating provision in a directive in order to justify national legislation which had the effect of hindering intra-Community trade. The Court rejected that argument put forward in those cases. It pointed out that the derogating provision justified the maintenance of national provisions only on condition that the general provisions of the EEC Treaty were complied with.

54. If, therefore, the preferential system cannot find justification for the purposes of Community law in the derogating provisions of Directive 77/62 either, it still remains to be considered what bearing it might have on the validity of the system if it could be regarded as aid.

33 — Judgment of 23 February 1988 in Case 216/84 *Commission* v *France* [1988] ECR 793, paragraph 22.

34 — Judgment of 11 May 1989 in Case 76/87 *Commission* v *Germany* [1989] ECR 1021, paragraph 23.

55. As is already apparent from the discussion of the competitive relationship between Articles 30 and 92, it is not possible for an infringement of Community law by a national measure on account of its incompatibility with the provisions of Article 30 to be cured by the fact that it exhibits aid-like features.

6. *Whether the reserved quota system may be regarded as aid and the consequences resulting therefrom*

56. The following considerations militate against the proposition that the contested system is in the nature of aid.

The essential feature of aid is that it is State assistance or assistance given through State resources. Admittedly, the Italian Government stated that in the case of supply contracts concluded under the reserved quota system the prices paid are higher than the prices which would be paid under an unrestricted tendering procedure. The additional amount is borne by the State, since the contracting authorities are public bodies or at least entities in which the State has a shareholding.

57. The plaintiff stated, however, at the hearing that the local health authorities are autonomous bodies which, as far as their expenditure is concerned, are not dependent on the State. Nor can it be assumed that costs incurred by companies operating in accordance with the market economy which are only partly in public ownership are borne by the State.

58. In addition, in order for aid within the meaning of Article 92 to be involved, the amount of aid must at least be capable of being determined in each case. That is also untrue in this instance, since in many cases the extra amount paid can be calculated only by making a hypothetical comparison between a contract awarded under conditions in which there is freedom of competition and supply contracts awarded under the reserved quota system. Furthermore, there is no conclusive evidence that any extra amount is actually payable. Nor is the payment of a price supplement the sole object of the reserved quota system, which is also aimed at the maintenance of production plant and, consequently, of employment, solely by means of the obligation to purchase goods which have been, at least partially, processed in areas covered by the preferential system. Moreover, a preferential system which has been in force for a decade may also have had, as its purpose and effect, the setting-up of new industries, which in no way implies that they operate uneconomically; as a result, it is possible that goods manufactured in the areas in question come onto the market at wholly competitive prices.

59. Let me add a final remark concerning the nature of the reserved quota system as aid and its relationship with Article 30. According to the case-law, some elements of aid may — as stated earlier — be impermissible on account of their incompatibility with Article 30 where the aim pursued by the aid is attainable by less radical means. It would certainly be possible to promote regional development through measures less restrictive of the movement of goods within

the Community,[35] since the promotion of regional development as such is permissible in accordance with the criteria and within the limits laid down by the EEC Treaty. Thus, aid within the meaning of Article 92(3)(a) of the EEC Treaty may be regarded as being compatible with the common market. However, development measures based on those provisions must be situated in a Community-law context and may not conflict with the aims and objectives of the Community. In order to permit coordination between regional aid schemes, the Commission has worked out principles in the light of which the permissibility of regional aid is to be assessed. Those principles have been published in a Commission communication.[36]

60. Furthermore, regional development measures may also be adopted on the basis of Article 130a of the EEC Treaty. However, that provision is expressly concerned with the achievement of a Community objective, with the result that only Community development programmes, or development programmes authorized by the Community, may be taken into account.

61. It is irrelevant to the outcome of the assessment of the legality under Community law of the reserved quota system and especially to the consequences to be drawn therefrom by the national court whether or not the measure in question is in the nature of aid. The contested system could at most constitute an unauthorized aid. In view of the content and aim of the system, it could only be aid capable of being approved under Article 92(3)(a) of the EEC Treaty.

62. Assessment of the compatibility of a national aid measure with the common market does not fall within the jurisdiction of the national courts. Nor has the Commission, in its capacity as the authority responsible for supervising aid, authorized the system as aid.[37] Although the Italian Government notified it in due time of the draft law which was enacted as Law No 64/86, the Commission, according to the assurances which it gave in the course of the proceedings, never initiated the aid-review procedure in relation to the preferential system. Accordingly, on those facts the last sentence of Article 93(3) of the EEC Treaty, which prohibits the Member State concerned from putting its proposed measure into effect until the Commission has taken a final decision, does not apply in this case. Considered from this angle only, the reserved quota system is not invalid as a measure adopted contrary to Article 93(3); if it had been invalid for that reason that invalidity would have had to be taken into account by the national courts and authorities.

Costs

63. The costs incurred by the Italian Government and the Commission are not recoverable. These proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court. The decision on costs is a matter for that court.

35 — See, for example, the aid measures provided for in Law No 64/86, which the Commission declared to be compatible with Community law by decision of 2 March 1988, OJ L 143, 10.6.1988, p. 37.

36 — Communication of the Commission on regional aid systems, OJ C 31, 3.2.1979, p. 9.

37 — See the Commission decision of 2 March 1988, OJ L 143, 10.6.1988, p. 37, point II.3, and the Commission's earlier reservation in its notice on Law No 64/86, OJ C 259, 29.9.1987, p. 2.

C — Conclusion

64. In the light of the foregoing considerations, I suggest that the questions submitted by the national court should be answered as follows:

'(1) The reserved quota system established by Law No 64/86 must be regarded as a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the EEC Treaty. The resultant illegality of that system under Community law must be taken into account by the national courts and authorities.

(2) The exception provided for in Article 26 of Directive 77/62/EEC does not have the effect of making the reserved quota system compatible with Community law.

(3) The reserved quota system is not in the nature of aid. Even if it were regarded as aid, that would not have any direct repercussions on the dispute in the main proceedings.'