OPINION OF ADVOCATE GENERAL JACOBS
delivered on 23 March 1994 *

My Lords,

1. This Opinion relates to three joined cases in which the Kingdom of Spain contests Commission decisions finding that Spain granted State aid in breach of Articles 92 and 93 of the Treaty. Although some of the issues raised by the three cases are related, there are also important differences. I shall therefore deal with the three cases one by one.

Case C-278/92 (Hytasa)

2. Hilaturas y Tejidos Andaluces SA (or Hytasa) was founded as a private undertaking but was taken over by an organ of the Spanish State (the Patrimonio del Estado) in 1982 as a result of its financial difficulties. It manufactures various textile products at a number of factories in and around Seville. Hytasa's financial difficulties did not cease with nationalization and a restructuring plan was launched which involved the injection of a large sum of capital (PTA 6 600 million), provided by the State, in the years up to 1986.

3. Following a complaint the Commission requested the Spanish authorities on 4 April 1989 to send it all relevant information on alleged capital contributions made by the State after Spain's accession to the Community on 1 January 1986. On 24 November 1989 the Spanish authorities informed the Commission that PTA 7 100 million had been injected into Hytasa out of State funds since 1986.

4. On 30 May 1990 the Spanish authorities informed the Commission that Hytasa was in the process of being privatized. Under the privatization scheme the capital sum of PTA 4 300 million was to be injected into the company by the Patrimonio del Estado, the company was to be sold for PTA 100

* Original language: English.

million and the buyer was to increase the company's capital by a further PTA 3 700 million. A five-year recovery plan was put forward, under which it was assumed that sales would increase by 29% and the workforce would be reduced by 30%.

5. On 3 August 1990 the Commission informed Spain that it intended to initiate the procedure laid down in Article 93(2) of the Treaty in respect of the capital injection of PTA 7 100 million made between 1 January 1986 and 1988 and in respect of the terms of the intended privatization. By this time the privatization had in fact already taken place, Hytasa having been sold on 25 July 1990 to two private companies already engaged in the textile industry: Hilatura Gossypium SA and Industria Textil del Guadiana SA.

6. In the course of the proceedings under Article 93(2) Spain argued that the capital injections of PTA 7 100 million made between 1986 and 1988 did not constitute State aid since the investments carried out by the government were based on sound criteria which would equally have been applied by a private investor. Spain also contended that those capital contributions took place in response to circumstances which developed before Spain's accession to the Community. As regards the privatization scheme, Spain argued that that did not involve State aid, in view of the fact that the undertaking was sold to the highest bidder after being offered on the international market. In valuing the undertaking account must be taken of its operating losses in the recent past and of the cost of making its workers redundant. If the sale did involve State aid, Spain contended that such aid was compatible with the common market since it formed part of a recovery plan designed to make the firm economically viable and since the firm was located in an area classified by the Commission as eligible for regional State aid, namely Seville.

7. In the second half of 1990 and the first half of 1991 protracted negotiations seem to have taken place between Spain and the Commission, in the course of which Spain was requested to produce a revised restructuring plan for Hytasa. Spain submitted such a plan to the Commission on 13 June 1991.

8. Commission Decision 92/317/EEC [1] on State aid in favour of Hilaturas y Tejidos Andaluces SA, now called Mediterráneo Técnica Textil SA, and its buyer was adopted on 25 March 1992. According to Article 1, the aid granted to Hytasa in the form of cap-

1 — OJ 1992 L 171, p. 54.

ital contributions of PTA 7 100 million over the period 1986 to 1988 was granted illegally, since the procedural rules established in Article 93(3) of the Treaty were not complied with. Article 1 went on to state, however, that that aid met the conditions laid down in Article 92(3)(c) of the Treaty and was therefore compatible with the common market.

9. According to Article 2 of the decision, the State aid element of PTA 4 200 million contained in the capital contribution provided by the Patrimonio del Estado to Hytasa before its privatization in July 1990 was illegal, since it was granted in breach of Article 93(3). The sum of PTA 4 200 million was arrived at by deducting the PTA 100 million paid for the purchase of Hytasa from the PTA 4 300 million contributed to the company's capital by the Patrimonio del Estado. The second paragraph of Article 2 declared that that aid did not meet any of the conditions which must be fulfilled in order for one of the exceptions laid down in Article 92(2) and (3) to apply and was therefore incompatible with the common market.

10. Article 3 of the decision required the Patrimonio del Estado to recover the aid (PTA 4 200 million) from Mediterráneo Técnica Textil SA (formerly Hytasa) in accordance with the procedures and provisions of national law, in particular those relating to interest.

11. Article 4 of the decision stated that any agreement providing for an indemnity for the buyers by the State or the Patrimonio del Estado in respect of the obligation to reimburse the aid should not be carried out.

12. Article 5 required Spain to inform the Commission, within two months of the date of notification of the decision, of the measures taken to comply with it.

13. By an application lodged at the Court on 19 June 1992 Spain sought the annulment of Articles 2, 3, 4 and 5 of the decision. Five distinct submissions have been pleaded and I shall examine them one by one.

First submission

14. By its first submission Spain disputes the Commission's finding that the 'financial intervention' effected in connection with the

privatization scheme was illegal inasmuch as the procedural rules laid down in Article 93 of the Treaty were infringed. Spain points out that in part V of the contested decision the Commission stated that:

'Concerning the legal status of the aid to Hytasa under Community law, it has to be concluded that it is illegal, since the Spanish Government failed to notify it in advance to the Commission as provided for by Article 93(3) of the EEC Treaty.'

Spain states that the Commission was informed of the essential features of the financial intervention on 30 May 1990, that the terms of the contract for the sale of Hytasa were notified to the Commission on 25 June 1990 and that the essential terms of the restructuring programme for Hytasa were notified on 6 July 1990. Spain points out that those notifications took place before the contract of sale was concluded on 25 July 1990 and before Spain was informed of the Commission's decision to initiate proceedings under Article 93(2) of the Treaty on 3 August 1990.

15. As the Commission points out, this submission is clearly unfounded, in view of the terms of Article 93(3) of the Treaty, which provides:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

Thus the mere fact that a Member State has notified a plan to grant aid does not entitle it to put the measure into effect forthwith. It must wait until the Commission has taken a final decision. The Commission must of course act with due diligence and cannot keep the Member State waiting indefinitely. It must decide promptly, after a preliminary examination, whether to carry out a full review of the aid under Article 93(2) of the Treaty. The Court held in *Lorenz* v *Germany* [2] that the Commission does not act with due diligence if it fails to decide within two

2 — Case 120/73 [1973] ECR 1471, paragraph 4 of the judgment; see also Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 11, and other cases cited there.

months whether to initiate a full review under Article 93(2). When that period has expired, the Member State may implement the plan, but the requirements of legal certainty mean that prior notice should be given to the Commission.

16. In the present case it is clear from the contested decision and from the account of the facts in Spain's application that the Commission was first informed of the plan to privatize Hytasa on 30 May 1990 and that the terms of the proposed sale were not notified to the Commission until 25 June 1990. Details of the recovery plan were not notified until 9 July 1990. In the circumstances Spain was clearly not justified in proceeding with the sale on 25 July 1990. By doing so it flagrantly infringed the procedural rules laid down in Article 93 of the Treaty.

Second submission

17. Spain argues that the injection of capital into Hytasa prior to its privatization did not constitute State aid for the following reasons.

18. *First*, there was a reasonable balance between the benefits and burdens arising under the contract for the sale of Hytasa. The Commission is oversimplifying matters when it maintains that the payment of the purchase price of PTA 100 million was the only burden accepted by the buyers of Hytasa in return for the acquisition of a company into which capital amounting to PTA 4 300 million had just been injected. The buyers also undertook to carry out a restructuring programme to ensure the viability of the undertaking. Under that programme they were required to invest PTA 2 500 million and to disburse, in addition, PTA 2 040 million on reducing the workforce. The buyers also undertook, in the contract of sale, to forego a claim held by Hytasa against the State for the sum of PTA 822 750 396. The claim had been upheld by the Spanish Supreme Court.

19. Looking at matters from the point of view of the Patrimonio del Estado, Spain argues that far greater benefits accrued to the State as a result of the privatization scheme than receipt of the sale price of PTA 100 million. The alternative to privatization would have been liquidation. The cost of liquidating Hytasa would have been PTA 5 312 600 000. Spain arrives at that figure by taking into account the adjusted value of the company's assets (PTA 8 741 800 000), the adjusted value of its liabilities (PTA 6 388 million) and the cost of redundancies (PTA 7 666 400 000): see the report in Annex VI to the application, at p. 19. Consequently, Spain argues that in purely financial terms — that is to say, disregarding the social cost of allowing Hytasa to go into liquidation — the privatization scheme was beneficial to the Patrimonio del Estado.

20. Spain also argues that regard must be had to the damage which the image of the Patrimonio del Estado would suffer if Hytasa were allowed to go into liquidation.

21. *Secondly*, Hytasa was sold to the highest bidder in accordance with a procedure which was in conformity with Community law. Here, Spain refers to a passage in the contested decision in which the Commission stated that in order to prove that no element of State aid was involved it had to be shown not only that the company was sold to the highest bidder but also that 'the sale took place in an unconditional open bid, that is to say, through a tendering process where any potential buyer is invited to bid for the company and where the State does not impose any condition for settling the sale'. [3] The contested decision went on to note that Spain imposed certain conditions on the buyers, 'limiting temporarily the disposal of the share-holding acquired'.

22. Spain states that Hytasa was offered to 160 potential buyers, not all of which were Spanish. The conditions of the contract were not determined in advance but were the result of negotiations with the buyers. They are balanced, proportionate and directly related to the object of the contract. The contractual term prohibiting disposal of Hytasa for a certain period was designed to prevent speculation.

23. *Thirdly*, the injection of capital into Hytasa by the Patrimonio del Estado was action that a private investor would have taken. Spain cites *Belgium* v *Commission* [4] in which the Court held that an increase in the capital of a State-owned undertaking, provided out of public funds, does not constitute State aid if the undertaking would have been able to obtain the sums in question on the private capital markets, that is to say if 'in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question'. [5]

24. Spain argues that a private investor would willingly have paid PTA 3 377 300 000 (i. e. PTA 4 200 million minus PTA 822 700 000 [6] in respect of the judgment debt referred to in paragraph 18 above)

3 — Decision 92/317, part IV, sixth paragraph.

4 — Case 234/84 [1986] ECR 2263.

5 — Ibid., paragraph 14 of the judgment.

6 — Spain sometimes quotes the precise figure stated in paragraph 18 and sometimes rounds the figure off.

in order to rid himself of a company which was likely to lose PTA 5 000 million in the next three years and which could only have been liquidated at a cost of PTA 5 312 600 000. Spain observes that in its judgment in *Italy* v *Commission* (ENI-Lanerossi) [7] the Court held that a subscription of capital by a parent company was acceptable if the aim was to close down a subsidiary in the best possible conditions and that one of the relevant considerations was the need to maintain the image of the parent company. The image of the Patrimonio del Estado would be severely damaged if it closed down its operations in an area of high unemployment and social deprivation. A private company in the same situation as the Patrimonio del Estado would also be sensitive to trade union pressure or to political pressure.

25. *Fourthly*, the contested decision does not establish that the Community market in finished cotton and wool products was affected by the financial operation carried out by the Patrimonio del Estado. The decision refers exclusively to the market in yarns and woven cloth. After the sale of Hytasa, that undertaking will cease to supply such products and will in fact become a consumer of them. As regards finished products, on which Hytasa will henceforth concentrate its activities, the Commission simply complains — in the contested decision — about the absence of statistics.

26. In my view, none of the above arguments can undermine the Commission's finding that Spain's action, which consisted in injecting PTA 4 300 million of public money into a State-owned company and simultaneously agreeing to sell that company for PTA 100 million, amounted to the granting of State aid.

27. As to the argument that there was a reasonable balance between the burdens and benefits arising under the contract for the sale of Hytasa, that is not in my view the most appropriate way to approach the question whether Spain granted State aid to the buyers of Hytasa or the question how much State aid was granted. Those questions must be answered, not so much by reference to the benefits conferred (or the burdens imposed) on the alleged recipient of aid, but rather by reference to the net cost of the operation to the State. The approach taken by Spain would in the circumstances of the present case make it practically impossible to quantify the financial assistance provided to the buyers of Hytasa, since some of the burdens allegedly assumed by them cannot be measured in pecuniary terms.

28. Although it is sometimes suggested that financial assistance granted by the State

7 — Case C-303/88 [1991] ECR I-1433.

must, in order to qualify as State aid, be gratuitous, [8] the better view is surely that State aid is granted whenever a Member State makes available to an undertaking funds which in the normal course of events would not be provided by a private investor applying ordinary commercial criteria and disregarding other considerations of a social, political or philanthropic nature.

29. Spain recognizes that the 'private investor test' is the essential yardstick, but seeks to establish that its action was consistent with that test because the only alternative course of action — namely, to wind Hytasa up — would have been more costly to the State. The flaw in that argument is that, since Hytasa was constituted as a limited company, the Patrimonio del Estado would not, as the owner of its share capital, have been required to inject further money into the company in the course of its winding-up. If the company's liabilities exceeded its assets, its creditors would not have been able to call upon the Patrimonio del Estado to make good the difference. As the Commission rightly points out, a distinction must be made between the obligations of the Patrimonio del Estado, as owner of the share capital in Hytasa, and the obligations of the Spanish State as provider of social security and unemployment benefits. The latter type of obligation cannot be taken into account for the purpose of applying the private investor test.

30. Once matters are seen in this light many of the issues debated by the parties at considerable length cease to be relevant. Certainly the uncontested fact that Hytasa was sold to the highest bidder as a result of a properly conducted tendering procedure is irrelevant. That other undertakings were unwilling to take Hytasa over unless an even higher amount of public finance was offered as an inducement does not prove that the terms agreed with the successful tenderer did not involve State aid. Also irrelevant in my view is the argument based on the need to safeguard the image of the Patrimonio del Estado. It is difficult to accept that a State-owned holding company would be so concerned about the damage to its collective image ensuing from the failure of one of its enterprises that it would, for that reason alone, offer huge sums of money to a private company as an inducement to take the enterprise over.

31. More difficult is the issue of the judgment debt of PTA 822 750 396 which the Spanish State allegedly owed Hytasa and which the buyers of Hytasa agreed to forego under the terms of the contract of sale. In

8 — Despina Schina, *State Aids under the EEC Treaty — Articles 92 to 94*, Oxford, 1987, p. 15, paragraph 50; the view is refuted by Wenig in Groeben, Thiesing and Ehlermann (eds.), *Kommentar zum EWG Vertrag*, 4th edition, p. 2645, paragraph 5; see also Bellamy and Child, *Common Market Law of Competition*, 3rd edition, paragraph 14-004, and Hancher, Ottervanger and Slot, *EC State Aids*, 1993, p. 21, paragraph 2.6.

principle, if the Spanish State owed a certain sum of money to Hytasa as a result of a normal commercial transaction (and hence not as a result of an undertaking to grant some form of State aid) and if the buyers of Hytasa agreed to forego that claim, it would be logical to take that sum into account when calculating the amount of aid granted to Hytasa. (This point does not of course affect the question whether Hytasa and its buyers were the beneficiaries of State aid; it merely affects the quantification of the aid.) However, as the Commission has pointed out, Spain failed to bring this matter clearly to the Commission's attention in the course of the proceedings under Article 93 of the Treaty. All that the Commission knew was that a clause in the contract of sale provided for a waiver of possible rights against the State pursuant to a judgment of the Supreme Court. Therefore I do not see how the Commission's decision adopted at the conclusion of those proceedings can be annulled, even partially, on this ground.

32. The final issue raised by Spain's second submission is whether the aid granted to Hytasa affected trade between Member States. The relevance of this argument is of course that Article 92(1) of the Treaty prohibits State aid only in so far as it produces such an effect.

33. It is clear from the Court's case-law that the requirement of an effect on trade between Member States is easily satisfied. In *Philip Morris* v *Commission* the Court stated that: [9]

'When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid.'

34. State aid may obviously affect trade between Member States if the beneficiary, whose competitive position is strengthened by the aid, exports an appreciable amount of goods to other Member States. State aid may however also have such an effect where the beneficiary does not export goods to other Member States, since the aid may enable the beneficiary to increase its production and thus reduce the potential market for goods imported from other Member States. [10] Aid may even affect trade between Member States when the beneficiary exports almost all its production outside the Community, in view of 'the interdependence between the markets on which Community undertakings operate'. [11]

9 — Case 730/79 [1980] ECR 2671, paragraph 11 of the judgment.

10 — Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 19 of the judgment.

11 — Case C-142/87 *Belgium* v *Commission* (Tubemeuse) [1990] ECR I-959, paragraph 35 of the judgment.

35. In the present case very substantial sums of money were disbursed by the State in order to save from extinction a textile manufacturer which could not have survived if market forces had been allowed to operate freely. As a result that undertaking will produce large quantities of goods for sale in Spain, in other Member States or outside the Community. The goods in question are cotton and wool fabrics and finished garments. One does not need a battery of statistics or volumes of OECD reports to know that such goods are the subject of international trade both within the Community and outside it: jackets, trousers, skirts and shirts made in Seville may satisfy the needs of consumers in Hamburg, Paris and Athens, just as sheets, towels, table cloths and napkins made in Lancashire may find their way into homes in Andalusia. In the circumstances I do not think that it can seriously be contended that the aid granted to the buyers of Hytasa did not have an appreciable effect on trade between Member States.

Third submission

36. Spain contends that, even if the injection of capital provided by the Patrimonio del Estado and the concomitant sale of Hytasa constituted State aid, it should have been declared compatible with the common market in accordance with Article 92(3)(a) and (c) of the Treaty.

37. Spain observes in the first place that it appears to be common ground that the Seville region is in principle eligible for State aid under Article 92(3)(a), which permits aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.

38. Spain criticizes the Commission for having stated in the contested decision that the amount of aid granted (PTA 4 200 million, according to the Commission) greatly exceeded the sum invested by the buyers of Hytasa (PTA 2 500 million). Spain observes that the buyers were required to carry out a recovery plan for Hytasa and to spend approximately PTA 2 040 million on reducing the workforce by 314.

39. Spain contends that the aid is justified under Article 92(3)(a) because its beneficial effects on the Seville region, where 700 jobs would be preserved, outweighed the negative effects of the minimal distortion of competition.

40. Spain also contends that the aid is justifiable under Article 92(3)(c), under which aid

may be declared compatible with the common market if its purpose is to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

41. The central concern throughout the privatization process was, according to the Spanish Government, to bring about the viability of the company by means of substantially modifying its production and by bringing in valuable know-how, design capability, fashion awareness and technological innovation. The recovery plan envisaged a substantial reduction in Hytasa's workforce: the number of employees was to fall from 1 034 to 720. The company was to reduce its production of yarns and woven cloth by amounts varying from 20.8% to 30.2% and was to cease selling those products completely (the production being used internally for the manufacture of finished goods). The company would henceforth concentrate on the manufacture of finished garments.

42. Spain criticizes the Commission for having concluded that the recovery plan was not likely to bring about the viability of the company. Spain cites the judgment in *Intermills* v *Commission*, [12] where the Court held that the Commission had not shown 'why the applicant's activities on the market, following the conversion of its production with the assistance of the aid granted, were likely to have such an adverse effect on trading conditions that the undertaking's disappearance would have been preferable to its rescue'. [13]

43. It is to be noted that Spain has invoked both subparagraphs (a) and (c) of Article 92(3) of the Treaty. Since both those provisions allow aid for the development of certain areas to be declared compatible with the common market, there is an obvious overlap between them. There are however some important differences: in particular, paragraph (a) provides only for regional aids, its application being confined to 'areas where the standard of living is abnormally low or where there is serious underemployment'; paragraph (c), on the other hand, allows the Commission to authorize, in addition to regional aids (which are not however limited under paragraph (c) to particularly disadvantaged regions), sectoral aids, meaning aids for the development of certain activities. Paragraph (c) is thus of potentially unlimited geographical application, which doubtless explains why the authors of the Treaty subjected its application to the further condition — not present in paragraph (a) — that the aid must 'not adversely affect trading conditions to an extent contrary to the common interest'.

12 — Case 323/82 [1984] ECR 3809.

13 — Ibid., paragraph 39 of the judgment.

44. What the two provisions have in common is that they both grant the Commission a wide margin of discretion. In *France* v *Commission* (Boussac) [14] the Court held that:

'It should be borne in mind that the Commission enjoys a wide discretion under Article 92(3) of the Treaty and that the exercise of that discretion involves assessments of an economic and social nature which must be made within a Community context.'

45. In the present case it is not contested that the Seville region is afflicted by serious underemployment, which means that Article 92(3)(a) is capable of application in principle. As I have noted above, that provision does not expressly require the Commission to satisfy itself that the aid would not adversely affect trading conditions to an extent contrary to the common interest. That is not to say of course that the Commission may disregard the common interest entirely when applying Article 92(3)(a); but the difference in the wording of paragraphs (a) and (c) of Article 92(3) clearly implies that the Commission must grant the Member States greater latitude in relation to aid granted to undertakings in areas afflicted by serious underemployment. The contested decision contains little evidence that the Commission made such a distinction, even though the Commission dealt separately with the possible application of paragraphs (a) and (c).

46. The reasons given in the contested decision for refusing to apply Article 92(3)(a) are to be found in the 7th, 8th, 9th and 10th paragraphs of part VI of the decision. I will cite them in full:

'In respect of the State aid element to Hytasa of PTA 4 200 million contained in the capital contribution made just before the company's sale, Article 92(3)(a) lays down an exception for aid that promotes the development of areas where the standard of living is abnormally low or where there is serious underemployment. In this respect, although Hytasa is situated in Seville, which is an assisted area pursuant to Article 92(3)(a) qualifying for regional aid, the aid measure to Hytasa in question was not granted under the corresponding regional aid schemes but on the basis of *ad hoc* decisions of the Spanish government, taking the form of discretionary capital contributions.

14 — Case C-301/87 [1990] ECR I-307, paragraph 49 of the judgment; see also *Philip Morris* (cited above, note 9), paragraphs 17 and 24, and Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18.

Even if the aid in question ... were to be considered as regional, it would not however be eligible for compatibility under Article 92(3)(a), because aid granted pursuant to the provisions of that article must contribute to the long-term development of the region — this notably means in this case that the aid must at least serve for restoring the company's viability, an objective not attained for Hytasa in the light of the information submitted so far to the Commission (this aspect was already discussed in part IV above) — without having unacceptable negative effects on competition conditions within the Community.

On the other hand, even though the PTA 4 200 million aid element was explicitly granted by the State on the condition that part of it be used by Hytasa in investments — a requisite feature for aid to facilitate the development of certain economic areas as established in the 1979 Commission communication [15] on the principles of coordination of regional aid systems — this aid to Hytasa cannot be considered automatically as compatible since, in view that its grant was made outside the scope of aid regimes approved by the Commission, the Commission must assess its compatibility on its own merits verifying, amongst other aspects, both that the aided investment projects are in line with the interest of the Community for the sector concerned and that they contribute to a sound restructuring of the company (both aspects are discussed further below).

In any case, the aid of PTA 4 200 million largely surpasses the level of investments of PTA 2 500 million foreseen by the company, a situation which is in any case unacceptable for investment aid.'

47. The Commission cannot be criticized for taking the view that aid granted pursuant to Article 92(3)(a) must contribute to the long-term development of the region in question, with the result that in the present type of case the aid must serve to restore the company's viability. Any other view would open the door to operating aid, the evils of which are well recognized.

48. The key issue is therefore whether the restructuring plan accepted by Hytasa's buyers was likely to bring about the desired result. Unfortunately the reasoning on this point, in the contested decision, is extremely exiguous.

15 — OJ 1979 C 31, p. 9.

49. The passage cited above makes no attempt to explain why the restructuring plan was not likely to guarantee Hytasa's long-term viability. It is true that the passage cited states on two occasions that that key point is dealt with elsewhere in the decision. Thus in the second paragraph of the passage cited (i. e. the eighth paragraph of part VI) it is stated that the failure to attain the objective of restoring the company's viability is discussed in part IV. And at the end of the penultimate paragraph of the passage cited (i. e. ninth paragraph of part VI) it is stated that the questions whether Hytasa's investment projects are in line with the interest of the Community and whether they contribute to a sound restructuring of the company 'are discussed further below'.

50. In fact part IV deals with completely different issues and was presumably referred to by mistake, part III being the one that deals with the soundness of the restructuring plan. I shall examine part III shortly. As for the statement that the question whether Hytasa's investment projects contribute to a sound restructuring of the company is 'discussed further below', that is not entirely accurate. The remainder of the decision gives no reasons for considering that the investment projects would not achieve the desired result. It is true that part VI of the decision concludes with the observation that the aid granted to Hytasa affects trading conditions within the Community to an extent contrary to the common interest, 'for it does not contribute to a genuine restructuring fully ensuring the viability of the company'; but no reason is given for that finding. In fact, the preceding paragraphs deal with very different aspects of the restructuring plan: they attack the plan on the ground that no provision was made for the disposal of Hytasa's productive assets, which meant that the company could re-expand its activities by having recourse to idle capacity, and they criticize the implementation of the plan on the ground that only 260 workers had been made redundant by 1 August 1991, some by means of temporary dismissals, which again left open the possibility of subsequent re-expansion. Those are perhaps significant points, inasmuch as they concern the question whether Hytasa's buyers were genuinely committed to a long-term reduction in the company's activities; but they have no bearing on the central question whether the restructuring plan would lead to the viability of the company or not.

51. As to part III of the decision, that is almost equally silent on the question why the restructuring plan was not likely to ensure Hytasa's viability. Part III refers to a revised restructuring plan submitted to the Commission by the Spanish authorities on 13 June 1991. The plan foresaw 'radical changes in the productive and commercial policy of Hytasa'. In particular, the company

was to sell only finished goods, production of which would increase by amounts varying between 50% and 320%, according to the product. The company was to decrease its spinning and weaving operations by amounts varying between 13% and 25%. [16] The plan foresaw a revised workforce of 720 and forecast profits of PTA 716 million (a 9% margin on sales) in the final year. After thus summarizing the revised plan the contested decision states:

'A comparison between the two plans puts into evidence several points that could let one doubt the soundness of their assumptions or their results; actually the several contradictions between the two plans do not allow the Commission to agree with the final favourable forecast of the revised plan.

In particular the Spanish authorities did not give any explanation on the means to effect a further increase in the second plan of the overall value of sales by 23% while the company will stop the sale of yarns and raw fabrics still foreseen in the previous plan, and while it will keep the sale of finished goods and clothing at roughly the quantitative level of the first plan. Moreover, no explanation is given to justify a larger direct workforce (720 instead of 700) when a reduction in production is foreseen.'

52. Such a statement of reasons seems wholly inadequate, especially since the viability of Hytasa in the light of the restructuring plan is an issue of crucial importance. Wide though the Commission's margin of appraisal is under Article 92(3), it must at least give a coherent, albeit summary, statement of reasons to support its findings on such an essential point.

53. There are two other respects in which the reasoning of the contested decision appears defective.

54. *First*, the decision states (in the 10th paragraph of part VI) that 'the aid of PTA 4 200 million largely surpasses the level of investments of 2 500 million foreseen by the company, a situation which is in any case unacceptable for investment aid'. Spain is right, in my view, when it criticizes the Commission on the ground that it ought to have taken into account, not only the PTA 2 500 million spent on investments in the strict sense, but also the PTA 2 040 million that Hytasa's buyers had to spend on redundancy payments. The Commission maintains that it does not, for the purpose of measuring the intensity of aid, take into

16 — On this point the French version of the decision does not concur with the Spanish and English versions. The Spanish text is the only authentic one.

account the cost of reducing an undertaking's workforce. That approach seems wholly illogical in the case of aid which is intended to enable a loss-making company to restructure itself, scale down its operations and become economically viable. If economic viability can only be achieved by reducing the workforce and if that entails redundancy costs as a result of legislation to protect the rights of workers, it is appropriate to regard those costs as an essential part of the restructuring programme; they are as necessary as investment in new machinery to adapt the company's production.

That approach is illogical. If Hytasa was to be restructured and rendered economically viable, it had to manufacture something. The whole point of the operation was to enable the undertaking to discontinue activities which it could not pursue profitably and to commence the manufacture of goods which it could sell at a profit. To criticize the restructuring plan on the ground that the reduction in Hytasa's output of intermediate products would be offset by increases in the manufacture of finished products is to misunderstand the whole concept of restructuring.

55. *Secondly*, the decision states (in the 15th paragraph of part VI) that:

'... after detailed examination of the initial restructuring programme for Hytasa and of its revised version, the Commission noted that even if some reductions in the productions and sale of intermediate goods are foreseen, they are largely offset by the increases in the manufacture and sale of finished products. As a consequence the Commission considers that the restructuring plan of Hytasa does not provide the commitment for reducing its activities that could be regarded as a compensatory justification for aid.'

56. In view of the abovementioned defects in the reasoning of the contested decision I consider that the second paragraph of Article 2 of the decision, which declared the aid granted to Hytasa incompatible with the common market, must be annulled.

Fourth submission

57. In its fourth submission Spain criticizes the inconsistency between the Commission's approach to the aid granted in the period 1986 to 1988 and its approach to the provision of capital made at the time of the privatization of Hytasa in 1990. As regards the earlier period, aid of PTA 7 100 million was considered compatible with the common market because it was designed to create the basis for a definitive, viable restructuring of the company under a scheme that involved

rationalization investments of PTA 5 000 million and redundancies costing PTA 700 million. In the later period PTA 2 040 million were to be spent on redundancies and PTA 2 500 million were to be invested by the buyers of Hytasa, but the Commission gave no explanation as to why that did not represent rationalization and restructuring such as to justify a contribution from the State of PTA 4 200 million (PTA 3 377 300 000 if Hytasa's abandoned claim against the Patrimonio del Estado is taken into account). The only explanation for the difference in treatment was that the earlier aid was a response to circumstances that arose before Spain's accession to the Community. The Spanish Government contends that the action taken in 1990 was the culmination of the process initiated in the earlier period and therefore also constituted a response to pre-accession circumstances. In short, Spain regards the different treatment of the aid granted in 1986-88 and the later contribution as evidence of arbitrariness on the part of the Commission. The failure to give adequate reasons for the different treatment is alleged to be a breach of Article 190 of the Treaty.

59. Deficient though its reasoning is, I do not think that the contested decision should be annulled simply on account of the disparity of treatment as between the earlier aids and the later ones. It might well be contended that the Commission was exceptionally lenient with regard to the aid granted between 1986 and 1988. With the benefit of hindsight one may question the finding that that aid represented a major effort to create the basis for a definitive viable restructuring of the company. However, the fact that the Commission displayed leniency with regard to the earlier aid does not mean that it must be equally benevolent towards the aid granted in July 1990. On the contrary, the Commission was entitled to take the view that a more indulgent attitude was required in the early years of Spain's membership of the Community, so as to allow the Spanish authorities and the undertakings concerned a period of grace in which to become accustomed to the rules of the Treaty. By the same token the Commission was entitled to assume that by July 1990 there was no longer a case for special treatment.

Fifth submission

58. In view of the conclusion that I have reached on the third submission, I shall deal with this submission briefly.

60. The fifth and final submission relates to the obligation to recover the aid declared incompatible with the common market.

Spain contends that that obligation is contrary to the principle of proportionality and that the contested decision does not contain a sufficient statement of reasons for imposing such an obligation. Reference is also made to the legitimate expectations of the recipients of the aid. It is contended that the distortion of competition caused by the aid was not serious enough to justify action that might lead to the demise of a viable firm and thus result in further unemployment in a socially deprived region.

61. Obviously, if the second paragraph of Article 2 of the contested decision is annulled, as I have just proposed, that will automatically entail the nullity of the provisions requiring the Spanish authorities to recover the aid (Article 3) and to refrain from carrying out any agreement by which those authorities are to indemnify the buyers of Hytasa for an obligation imposed by the decision (Article 4). Article 5, which requires Spain to inform the Commission of the measures taken to comply with the decision, will likewise cease to be applicable.

62. If however the Court upholds the Commission's finding that the aid was incompatible with the common market, I do not think that the provisions requiring the Spanish authorities to recover the aid can be annulled on any of the grounds pleaded in the fifth submission.

63. The most important point to bear in mind is that the question of recovery would never arise if Member States complied with their obligation to inform the Commission, in advance, of any plans to grant or alter aid, in accordance with the first sentence of Article 93(3) of the Treaty, and with their obligation to refrain from implementing plans to grant aid until the Commission has given its final decision, as required by the last sentence of Article 93(3). Where Member States flout those obligations, the prohibition of State aids decreed by Article 92(1) would be deprived of its effectiveness if the Commission were not empowered to require the recovery of aid that is held to be incompatible with the common market. Thus it is futile to invoke the principle of proportionality as a ground for not recovering such aid: action that is necessary in order to ensure the effectiveness of one of the fundamental prohibitions of the Treaty cannot be contrary to the principle of proportionality. In *Belgium* v *Commission* (Tubemeuse) [17] the Court expressly recognized that the recovery of unlawfully granted State aid cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aids.

64. Spain's attempt to invoke the legitimate expectations of the recipients of the aid is equally inappropriate. In *Commission* v *Ger-*

17 — Case C-142/87, cited above in note 11, paragraph 66 of the judgment.

many (BUG-Alutechnik) [18] the Court held that a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 93 may not rely on the legitimate expectations of recipients of the aid to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. [19] In the same judgment the Court held that the recipients of aid may not in principle entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 93. The Court noted that a diligent businessman should normally be able to determine whether that procedure has been followed. [20]

65. As to the requirement of reasoning, it may be noted that the contested decision referred (in part VII) to the *Deufil* case [21] and to the Tubemeuse case. The relevant principles are set out clearly in those judgments. The decision also stated that recovery of the aid was necessary in order to restore the status quo by removing all the financial benefit which the recipient of the aid had improperly enjoyed since the date on which it was paid. That statement of reasons is more than adequate, in my view.

18 — Case C-5/89 [1990] ECR I-3437.
19 — Ibid., paragraph 17 of the judgment.
20 — Ibid., paragraph 14 of the judgment.
21 — Cited above in note 14.

Case C-279/92 (Imepiel)

66. Industrias Mediterráneas de la Piel (or Imepiel) is a manufacturer of hides and footwear, with premises located in Vall d'Uxó in the province of Castellón de la Plana. It was taken over by the Spanish State in 1976, when it was on the verge of bankruptcy. Thereafter 99.94% of its capital was owned by the Patrimonio del Estado. Throughout its period of public ownership the company lost money. Over the ten years to 1987 losses amounted to PTA 12 700 million.

67. As a result of press reports in December 1987 the Commission learned that the Spanish authorities had prepared a rescue plan for the company and had granted it PTA 1 400 million to cover trading losses in 1987. At a meeting with the Commission on 9 June 1988 the Spanish authorities stated that a further capital injection of PTA 1 929 million had been made in respect of 1988, with a view to restructuring the company by means of redundancies.

68. In the course of 1988 several meetings took place between the Spanish authorities and the Commission. Correspondence was

also exchanged. The subject of the discussions was a viability plan for Imepiel. By a letter dated 14 December 1988 the Commission informed Spain that it was initiating proceedings under Article 93(2) of the Treaty in relation to the PTA 3 329 million injected into Imepiel by Spain. Spain replied to the Commission's letter on 25 January 1989, stating that the money contributed to Imepiel from 1986 to 1988 had to be viewed in the context of a three-year recovery plan that would lead to the privatization of the company. The plan foresaw *inter alia*:

(1) a return to profitability within three years,

(2) a reduction in capacity (footwear from 3.2 million pairs a year to 1.74 million pairs and hides from 20 million square feet a year to 14.1 million square feet),

(3) a reduction in the workforce from 1 457 to 627.

69. On 17 March 1989 the Commission was informed of an offer to purchase the company by a group of Spanish entrepreneurs. The offer required financial assistance from the State in excess of PTA 23 000 million.

70. After further exchanges of correspondence between the Spanish authorities and the Commission in the course of 1989, the Commission was informed on 24 January 1990 of the latest details of the proposed privatization plan. The purchaser was a company called Círculo de Financiación y Gestión SA, which had a share capital of PTA 2 500 million, of which 25% was paid up. The purchase price was PTA 100 million. The purchaser was to retain ownership of Imepiel for at least three years. The Patrimonio del Estado was to provide a capital injection of PTA 8 500 million. The purchaser intended to increase production of shoes (from 1 250 000 pairs in 1989 to 3 445 000 pairs in 1994) and of hides (from 8 600 000 square feet to 15 500 000 square feet).

71. At a meeting on 26 January 1990 the Commission informed the Spanish authorities that the restructuring plan was unacceptable in view of the increase in production. Imepiel was none the less privatized on 2 February 1990.

72. The Commission subsequently extended the scope of the procedure under Arti-

cle 93(2) of the Treaty to include *inter alia* the capital contribution of PTA 8 500 million that was to take place in connection with the privatization.

73. In the course of the proceedings under Article 93(2) the Governments of Denmark, Germany, Italy, Portugal and the United Kingdom all objected to the financial assistance provided to Imepiel by the Spanish authorities. The British Footwear Manufacturers Federation also objected, noting that Spanish exports of footwear to the United Kingdom had increased and that Spanish shoes competed at the lower end of the market where competition was based on price rather than quality.

74. On 25 March 1992 the Commission adopted Decision 92/318/EEC on aid granted by Spain to Industrias Mediterráneas de la Piel SA (Imepiel). [22] Article 1 of the decision declared that aid of PTA 6 029 million provided to Imepiel between 1986 and 1988 was granted illegally in breach of the procedural rules laid down in Article 93(3) of the Treaty. That aid was however declared compatible with the common market on the ground that it met the conditions laid down in Article 92(3)(c) of the Treaty.

22 — OJ 1992 L 172, p. 76.

75. According to Article 2 of the decision, the net State aid of PTA 8 400 million (i. e. the capital injection of PTA 8 500 million minus the purchase price of PTA 100 million) contained in the capital contribution provided by the Patrimonio del Estado to Imepiel simultaneously with its privatization on 2 February 1990 was illegal since it was granted in breach of Article 93(3). Furthermore, the aid was found not to meet any of the conditions which must be fulfilled in order for one of the exceptions laid down in Article 92(2) and (3) to apply and was therefore incompatible with the common market.

76. Article 3 of the decision required the Patrimonio del Estado to recover the aid of PTA 8 400 million from the beneficiaries in accordance with the procedures and provisions of national law, in particular those relating to interest, with interest starting to run on the date on which the illegal aid was granted.

77. Article 4 required the Spanish Government to inform the Commission, within two months of the date of notification of the decision, of the measures taken to comply with it.

78. By an application lodged at the Court on 19 June 1992 Spain sought the annulment of Articles 2, 3, 4 and 5 [23] of Decision 92/318.

79. Six submissions have been pleaded. I shall examine them one by one.

First submission

80. Spain argues that the injection of capital into Imepiel at the time of its privatization did not constitute State aid because the Patrimonio del Estado had adopted the normal behaviour of a private investor. In view of the situation in which Imepiel found itself the State had two options: to sell Imepiel or to wind it up. The cost of liquidation greatly exceeded the cost of privatization. In particular, the Patrimonio del Estado would have had to disburse PTA 7 900 million in redundancy payments for a workforce of 1 450. Spain also refers to the 'cost to the State of unemployment insurance' and the expense of financing 'public aids for the regeneration of the industrial fabric'. Spain thus concludes that the 'economic cost of the social consequences of liquidation' would have greatly exceeded the cost of the capital accretion objected to by the Commission and states that the area affected was an 'especially depressed area in which 80% of employment depends on the Imepiel factory'.

81. The arguments pleaded under this submission resemble arguments pleaded under the second submission in Case C-278/92. For reasons analogous to those set out in paragraphs 26 to 30 above, the arguments are clearly unfounded. An ordinary private investor would not contribute PTA 8 500 million to the capital of a company and simultaneously agree to sell the company for PTA 100 million. In the present case it is clear from the terms of Spain's application that the private investor test is being misapplied by Spain, which includes in the cost of winding up Imepiel the cost to the State of unemployment insurance and of public aids for the regeneration of the industrial fabric. Such matters are obviously not relevant to the private investor test.

Second submission

82. Spain observes that Article 92(1) of the Treaty declares aid incompatible with the common market if it 'distorts or threatens to

23 — Article 5 simply states that the decision is addressed to the Kingdom of Spain.

distort competition by favouring certain undertakings or the production of certain goods' and 'in so far as it affects trade between Member States'.

83. Spain considers that the capital contribution made by the Patrimonio del Estado did not impair competition between Member States. Imepiel's share in the European market is minimal and the capital contribution did not entail any discrimination against competitors. Spain gives precise figures to quantify Imepiel's market share: after privatization it had 1.5% of the Spanish market and 0.8% of the Community market; since 1988 its production has not exceeded 0.2% of total Community production.

84. Spain also stresses that the capital provided by the State was to be used to wipe out Imepiel's existing debts. The object was to restore the company to financial health and to allow it to remain in existence.

85. This submission is clearly unfounded. It cannot seriously be pretended, in the light of the facts set out in the contested decision, that the granting of PTA 8 400 million to Imepiel did not threaten to 'distort competition by favouring certain undertakings or the production of certain goods' or that it would not affect trade between Member States. As a result of that grant of aid a loss-making undertaking was able to remain in business and to plan a huge increase in its output: its production of shoes was to rise from 1 250 000 pairs in 1989 to 3 445 000 pairs in 1994 and its production of hides from 8 600 000 square feet to 15 500 000 square feet in the same period. Those are very substantial quantities of goods and they were capable of satisfying the needs of consumers in Spain, in other Member States or in non-member countries. The considerations set out above in paragraphs 33 to 35 apply with equal force to the shoe trade.

86. Although Imepiel's share of a total Community shoe market of 1 290 million pairs may be small in percentage terms, that is a consequence of the fragmentary structure of the shoe-manufacturing sector, which has, according to the contested decision, about 15 000 units with an average workforce of 24. Imepiel is thus a significant producer. Moreover, as the Commission stated in the contested decision, 42% of Community production is the subject of intra-Community trade. In such a situation aid which allowed an ailing manufacturer not just to remain in business but to double its output could not fail to affect trade between Member States.

87. As regards the argument that the capital provided by the State was to be used to wipe out Imepiel's existing debts, that is irrelevant. Without the aid the company would have had to seek an alternative source of finance to wipe out those debts and might not have been able to survive. Whichever way the matter is looked at, the aid clearly helped to strengthen Imepiel's competitive position.

88. As for the argument that the aid did not entail discrimination against competitors, that is simply absurd. The essence of State aid is that it distorts competition by favouring certain undertakings (i. e. those who receive it) to the detriment of others (i. e. those who do not receive it). In order to be non-discriminatory aid would have to be granted at the same rate to every shoe manufacturer in the Community.

Third submission

89. Spain contends that, if the grant of capital made to Imepiel at the time of its privatization constituted State aid, it should none the less be considered to be compatible with the common market in accordance with Article 92(3)(c). According to Spain, the grants made to Imepiel were sectoral aid, that is to say aid designed to facilitate certain adjustments or the discontinuance of certain activities. The aid granted to Imepiel satisfied the requirements of Article 92(3)(c) because (i) it was absolutely necessary in view of the situation of the industry in question, (ii) its ultimate purpose was to restore the long-term viability of the undertaking, (iii) it was bound up with a restructuring programme which involved a viability plan subscribed to by the Patrimonio del Estado and by the buyers and (iv) the aid was proportionate since the distortion of the market was minimal.

90. The main objective of the aid was to enable Imepiel to adjust to a market based on free competition. Imepiel had been nationalized at a time when the Spanish State pursued an industrial policy that was not always based on free-market principles. Spain's accession to the Community necessitated radical changes in that policy. The aid to Imepiel was intended to facilitate that process of adaptation.

91. Spain also states that Imepiel is situated in an area with high unemployment which the Commission has recognized as eligible for 'economic incentives'. Imepiel provides directly or indirectly 80% of the employment in the Vall d'Uxó area.

92. The remarks made in paragraph 44 above, concerning the Commission's margin of appraisal in determining whether aid is compatible with the common market, apply equally in this case.

93. Although Spain refers to the high unemployment in the Vall d'Uxó region, it is not invoking Article 92(3)(a) of the Treaty in the present case and relies solely on Article 92(3)(c). In the contested decision the Commission had in fact stated that Article 92(3)(a) could not apply because Vall d'Uxó did not suffer from an abnormally low standard of living or serious underemployment. I have already remarked that the different wording of paragraphs (a) and (c) of Article 92(3) implies that the Commission should be more stringent when applying paragraph (c). In particular, the Commission must consider whether the aid adversely affects trading conditions to an extent contrary to the common interest.

94. Aid authorized under Article 92(3)(c) may be for the development of certain economic activities (sectoral aid) or for the development of certain economic areas (regional aid). The contested decision (in part VI) dealt first with the possibility of authorizing the aid granted to Imepiel as regional aid. Such a possibility was rejected on several grounds: the intensity of the aid exceeded the ceiling (30% of productive capital investment) which the Commission had established for regional aid in the Vall d'Uxó area; the decision to accept that area as eligible for regional aid had been taken by the Commission to stimulate diversification, in particular as a safety net for redundancies at Imepiel, and not to aid Imepiel itself; the aid in question was granted on the basis of an *ad hoc* decision and was moreover in the nature of operating aid to a firm in difficulties, since it was not conditional on investment or job creation. The Commission concluded that, even if the aid were to be considered as regional aid, it could only be justified if it contributed to the long-term development of the region by bringing about the viability of the undertaking concerned and if that undertaking was required to follow a restructuring plan which enhanced the competitive situation. Although somewhat laconic on this point, the contested decision seems to imply that those conditions were not satisfied.

95. As to the question whether the aid could be justified as sectoral aid, the Commission stated in the contested decision that it took a strict approach to aid granted to companies in difficulties, since it carried the greatest risk of transferring unemployment and industrial problems from one Member State to another; such aid preserved the status quo by preventing market forces from achieving their normal consequences in terms of the disappearance of uncompetitive firms. The deci-

sion went on to state that the Commission required that aid to firms in difficulties must be strictly conditional on the implementation of a sound restructuring or conversion programme capable of restoring the long-term viability of the beneficiary. There must also be 'a compensatory justification for the aid in the form of a contribution by the beneficiary to the development of the sector as a whole on a Community level by a reduction of its presence on the market'. The contested decision did not pronounce on the viability of Imepiel in the light of the restructuring plan put forward at the time of its privatization, but rejected that plan on the ground that it did not contain any compensatory justification for the grant of aid. The Commission's fundamental objection seems to have been that Imepiel, far from scaling down and redirecting its activities, was simply going to increase the output of its existing products.

96. I do not think that the Commission can be said to have exceeded its wide margin of appraisal under Article 92(3)(c) of the Treaty by deciding that the aid granted to Imepiel could not be declared compatible with the common market either as regional or sectoral aid. In my view, the Commission was right to stress that rescue aid, designed to save an undertaking from the normal consequences of its failure to remain competitive, must be judged by particularly stringent criteria.

97. When a formerly profitable undertaking consistently makes a trading loss over a period of several years, that indicates that it has failed to adapt to a changing market, meaning that it has not responded either to changes in demand or to more intense competition from other undertakings. If Member States made a practice of rescuing undertakings which find themselves in such a situation, the consequences for the Community as a whole would be disastrous: competition would be distorted; efficient firms would be deprived of the competitive advantage, as against inefficient ones, which would normally be their reward for sound management and commercial foresight; unemployment would be transferred from one Member State to another; and in the long term there would be little hope of an efficient Community industry able to compete with undertakings in non-member countries.

98. The Commission is therefore right to take the view that rescue aid should be conditional on the acceptance by the beneficiary of a sound restructuring programme. If all that the aid does is to enable the beneficiary

to continue its existing activities, but on a much greater scale, there is little prospect of the beneficiary's achieving long-term viability, for it is unlikely that, once rescued from the brink of insolvency, the firm will do profitably that which it has done unprofitably in the recent past. If on the other hand the aid is conditional on the beneficiary streamlining its operations, or reallocating its resources so that loss-making activities are abandoned in favour of more profitable ones, then *prima facie* there is a case for authorizing the aid.

99. In this respect there is an important difference between the present case and that of Hytasa, where the beneficiaries of the aid put forward a restructuring plan that, on the face of things, represented a genuine attempt to alter the focus of the company's activities. In the case of Imepiel, there is little evidence that the purchaser of the company intended to carry out any major restructuring. Certainly the information contained in Annex II to the application, which was supplied to the Commission by Spain on 30 January 1990, contains very few details about how the purchasers of Imepiel intended to achieve their objective of restoring the company to profitability within four years, other than by producing more and more shoes. If every loss-making shoe manufacturer in the Community attempted to overcome its difficulties by doubling its output with the benefit of State aid, that would result in market saturation and financial ruin for all. In the circumstances the Commission was in my view entitled to consider that the aid was not compatible with the common market.

Fourth submission

100. This submission corresponds closely to the fourth submission in Case C-278/92. Spain contends that the contested decision infringed Article 190 of the Treaty because the statement of reasons on which it was based was contradictory. The essence of the argument is that there was no justification for treating the aid granted between 1986 and 1988 differently from the aid granted in connection with the privatization of Imepiel. If any difference in treatment was justified, it was the latter aid which should have been treated more generously.

101. In my view, this submission must be dismissed for the reasons set out in paragraph 59 above.

Fifth submission

102. Spain contends by its fifth submission that the obligation to repay the aid is contrary to the principles of legal certainty and

legitimate expectation. According to this argument, the Commission does not have to require repayment of aid in every case but may do so where it is appropriate, in which case it must state reasons for doing so. The contested decision failed to state any reasons for requiring repayment of the aid.

103. As regards legal certainty and legitimate expectations, Spain observes that Imepiel drew up its restructuring plan on the basis that it would obtain the agreed sum of aid from the Patrimonio del Estado. Imepiel had a legitimate expectation that the aid was lawful.

104. In my view, this submission must be dismissed for the reasons set out in paragraphs 63 to 65 above. Although the reasoning of the contested decision is particularly exiguous on this point, I note that the judgment in *Deufil* [24] was cited. Since the obligation of recovery is the obvious consequence of granting aid without awaiting the Commission's authorization, I do not consider that the Commission is required to state specific reasons for exercising the power which the Court held it to have in *Deufil*.

Sixth submission

105. In its sixth submission Spain argues that the present situation of Imepiel, which is now the subject of insolvency proceedings, makes it impossible for Spain to comply with its obligation to recover the aid.

106. This submission must in my view be dismissed, since the validity of the contested decision must be assessed in the light of the circumstances obtaining at the time of its adoption. The validity of the decision cannot be affected simply because the subsequent course of events makes it difficult, or even impossible, to carry out the decision. [25]

107. The comments that I have made in paragraph 38 of my Opinion, also delivered today, in Case C-42/93 regarding a general difficulty in the enforcement of the Treaty provisions on State aid apply equally to this case.

24 — Cited above in note 14.

25 — See Case C-142/87, cited above in note 11, paragraphs 58 to 63 of the judgment.

Case C-280/92 (Intelhorce)

108. Industrias Textiles de Guadalhorce SA was established in 1957 by the Instituto Nacional de Industria, a holding company owned by the Spanish State. The company produces and markets cotton products. Its factory is located near the city of Malaga in the region of Andalusia. Its production activities are vertically integrated: they include spinning, weaving and the manufacture of finished garments. In the late 1960s the company operated at a loss for several years. It was privatized in 1972. It changed its name to Intelhorce in 1975. In the second half of the 1970s the company's trading position worsened and it was again nationalized, apparently as a means of keeping it in business and thus safeguarding employment, in 1980. The renationalization took place through the agency of the Patrimonio del Estado, which launched a restructuring plan designed to secure the company's viability. Between 1980 and 1985 the company carried out investments totalling PTA 6 000 million and the workforce was reduced from 2 785 to 2 094. During that period the State made capital contributions to the company of PTA 17 000 million. Despite these investments Intelhorce lost PTA 1 300 million in 1985 on a turnover of PTA 9 400 million.

109. Following a complaint the Commission requested the Spanish authorities, by a letter dated 4 April 1989, to supply information on alleged capital contributions that the State had made to cover operating losses of Intelhorce after Spain's accession to the Community. In a series of letters sent between August 1989 and May 1990 Spain supplied the information requested. According to that information, the State contributed a total of PTA 7 820 million to Intelhorce in a series of five grants between June 1986 and May 1989. The grants were used mainly to finance the replacement of equipment and reductions in the workforce. Between 1986 and 1989 Intelhorce spent PTA 5 000 million on investments and over PTA 1 100 million on redundancy payments. Its workforce was reduced from 1 883 at the end of 1986 to 1 617 by June 1989. Intelhorce recorded losses in 1986 and 1988 of PTA 2 093 million and PTA 2 413 million respectively.

110. The Spanish authorities also informed the Commission that they had decided to privatize Intelhorce. In January 1988 a promotional brochure was sent to 106 companies thought likely to be interested in taking over Intelhorce. After negotiations with potential bidders, three final bids were received. The Spanish authorities accepted

the bid made by Benorbe SA and Benservice SA, companies belonging to the Benetton group. The terms agreed for the sale of Intelhorce were as follows:

Before concluding the sale, the State would provide PTA 5 869 million to Intelhorce in the form of additional capital subscribed by the Patrimonio del Estado.

The bidders were to buy Intelhorce's capital for PTA 2 000 million, of which 70% would be paid by Benorbe and 30% by Benservice. The price was to be paid in three instalments of PTA 700 million, PTA 700 million and PTA 600 million due on 1 June of the years 1991, 1992 and 1993.

The new owners were to subscribe an increase in Intelhorce's capital of PTA 2 000 million, of which 25% was to be paid up at the moment of sale.

It was also agreed that the new owners would not apply to the State for authorization of temporary redundancies in Intelhorce during a period of three years after the purchase or sell the shareholding acquired during a period of four years after the purchase.

111. The Spanish authorities informed the Commission that the other two bids were costlier to the State: both the bidders required higher contributions from the State, while offering a symbolic price for the purchase of Intelhorce. The Spanish authorities also claimed that the selected bid offered the greatest probability of success in terms of industrial viability in the light of a five-year restructuring programme presented by the buyers.

112. On 25 July 1990 the Commission decided to initiate proceedings under Article 93(2) of the Treaty in respect of capital contributions of PTA 13 689 million made by the State to Intelhorce between Spain's accession to the Community on 1 January 1986 and the privatization of Intelhorce in August 1989. (That represented the 7 820 million contributed between June 1986 and May 1989, plus the additional capital of 5 869 million subscribed on privatization.) The procedure also covered the potential additional aid the State might have granted in connection with the privatization by accepting a purchase price below its net value. The Commission's decision to initiate proceedings under Article 93(2) was notified to Spain on 18 September 1990.

113. In the course of the proceedings under Article 93(2) Spain argued, in relation to the capital contributions made from June 1986 to May 1989, that these formed part of a restructuring plan designed to secure the firm's viability and that the investments made by the government were based on sound criteria which would have been applied by a private investor; that the contributions had not adversely affected competition in the common market, since the market presence of the firm declined during the period in question; and that those contributions, particularly those made in 1986 and 1987, took place in response to circumstances that developed before Spain's accession to the Community.

114. As regards the terms of the sale of Intelhorce, the Spanish authorities stated that they did not involve State aid either, since the company had been sold to the highest bidder after being offered on the international market. Moreover, in valuing Intelhorce account must be taken of its trading position, in particular the heavy losses incurred in 1988 and 1989. Account must also be taken of the cost of reducing Intelhorce's workforce: the elimination of 650 jobs under the restructuring programme would cost PTA 3 600 million.

115. Spain also argued that, if the terms of the sale did involve aid, that aid was justified under Article 92(3)(a) of the Treaty as regional economic aid, since the firm was located in Malaga, an area classified by the Commission as eligible for aid, and since the operation was designed to ensure the company's full recovery.

116. In attempting to justify its provision of financial assistance for the privatization of Intelhorce, Spain placed great emphasis on the restructuring programme agreed with the purchasers. The programme involved the creation of a double network of shops selling finished articles, manufactured by Intelhorce, in the range of household linen and clothing, with innovative design and a new promotional registered mark. It appears that the restructuring programme had to be revised subsequently, partly as a result of floods in the province of Malaga which affected Intelhorce's production capacity.

117. On 25 March 1992 the Commission adopted Decision 92/321/EEC concerning aid awarded by Spain to Intelhorce SA (ex Industrias Textiles de Guadalhorce SA), now called GTE General Textil España SA, a State-owned producer of cotton textiles. [26] Article 1 of the decision declared that the aid

26 — OJ 1992 L 176, p. 57.

granted to Intelhorce in the form of capital contributions of PTA 7 820 million over the period 1986 to May 1989 was granted illegally, since it was granted in breach of the procedural rules established in Article 93(3) of the Treaty. That aid was however declared to be compatible with the common market in accordance with Article 92(3)(c) of the Treaty.

118. According to Article 2 of the decision, the State aid element of PTA 4 405 million contained in the capital contribution provided by the Patrimonio del Estado to Intelhorce before its privatization in August 1989 was illegal, since it was granted in breach of Article 93(3) of the Treaty. That aid was, moreover, declared incompatible with the common market on the ground that it did not satisfy any of the conditions that must be fulfilled in order for one of the exceptions laid down in Article 92(2) and (3) of the Treaty to apply. The figure of PTA 4 405 million was arrived at in the following way. The Commission deducted from the capital contribution of PTA 5 869 million the price paid by Benorbe and Benservice for the shareholding in Intelhorce. However, instead of simply deducting PTA 2 000 million the Commission took into account the fact that the price was to be paid in three instalments in 1991, 1992 and 1993. Applying an 'actualization rate' of 12.1%, the Commission calculated that the value, at the time of the sale, of the sum paid by Benorbe and Benservice for the purchase of Intelhorce was PTA 1 464 million. Thus the State aid element amounted to PTA 4 405 million (5 869 -1 464 = 4 405).

119. Article 3 of the decision required the Patrimonio del Estado to recover PTA 4 405 million from Intelhorce (or GTE General Textil España SA, as it had now been renamed). The aid was to be recovered in accordance with the provisions of national law, with interest from the date on which the aid was granted.

120. Article 4 required Spain to inform the Commission of the measures taken to comply with the decision within two months of its notification.

121. By an application lodged at the Court on 19 June 1992 Spain asked the Court to annul Decision 92/321.

122. Spain's application, which is articulated somewhat differently from those in Cases C-278/92 and C-279/92, advances three submissions. I shall examine them successively.

First submission

123. Spain argues that the capital contributed to Intelhorce did not constitute State aid, within the meaning of Article 92 of the Treaty, for two reasons.

124. *First*, the capital contribution did not affect trade between Member States. Spain contends that in the contested decision the Commission simply analysed the general situation of the textile sector in the Community and gave no information about the Spanish market or about Intelhorce's specific situation. The contested decision thus gave no reasons for the finding that trade between Member States was affected by the financial assistance provided to Intelhorce.

125. *Secondly*, the action taken by the State corresponded to the normal conduct of a private investor. Intelhorce was sold to the highest bidder and the solution adopted was economically the most advantageous. The sale took place in conditions of transparency by means of an international offer which was not subject to prior conditions and which was open to all potential buyers. The bid accepted was the most attractive to the State, from a purely financial point of view, because the other bids required a much higher contribution of capital from the State. The only alternative to privatization would have been to liquidate the company. The cost of that would have been far higher because it would have been necessary to make redundancy payments to 1 671 workers (PTA 11 362.8 million) and to pay unemployment benefit (costing the State PTA 3 000 million). Spain also refers to the cost of aids to regenerate the industrial fabric of the region affected and states that liquidation would not have been politically and socially feasible since Intelhorce was a public undertaking in an area with high unemployment, a considerable industrial deficit and 'strong social opposition' to such a step. The province of Malaga is economically underdeveloped and has a high rate of unemployment (28.8% compared with a national average of 18.5%). Intelhorce is the largest employer in the province, its workforce representing 1% of total employment. Finally Spain invokes, as in Case C-278/92, the need to avoid damage to the image of the Patrimonio del Estado.

126. In my view, this submission must be dismissed. As regards first of all the effect on trade between Member States, the comments that I made in paragraphs 33 to 35 in relation to Case C-278/92 apply *mutatis mutandis* to the present case. Moreover, the contested decision contained detailed information

about the scale of intra-Community trade in cotton goods. The decision noted (in part IV) that total Community production of textiles in 1988 amounted to ECU 86 691 million, of which 20% corresponded to the cotton industry; the Spanish production represented 11% of the Community output of spun yarns and 13% of fabrics; intra-Community trade in cotton textiles was substantial, amounting to 22, 34 and 63% of the respective Community production of spun, woven and finished goods; Intelhorce participated in that trade and held 'an important position in the Spanish market, as recognized by the Spanish authorities'. The decision also noted that the market for cotton textiles was 'one of those occupying the highest positions in the scale of sensitivity because of stagnation on the demand side and an increasing pressure of imports from third countries that provoke depressed prices and large proportions of idle capacity'. Even though the decision did not indicate the precise market-share held by Intelhorce or the percentage of its goods exported to other Member States, that statement of reasons is adequate in the light of the case-law cited in paragraphs 33 and 34 above.

Second submission

127. As regards the application of the private investor test, the considerations set out in paragraphs 28 to 30 above in relation to Case C-278/92 are equally relevant to this case. In the present case the Spanish authorities contributed PTA 5 869 million to the capital of Intelhorce and simultaneously agreed to sell the company for PTA 2 000 million. That is not the action of a rational private investor applying ordinary standards of commercial prudence. Moreover, as in Case C-279/92, it is clear from the terms of Spain's application that its understanding of the private investor test is flawed: in attempting to prove that the cost of winding up Intelhorce would have exceeded the cost of its privatization on the terms agreed with Benservice and Benorbe, Spain refers to the cost of unemployment benefit and of aids to regenerate the industrial fabric of the region affected, as well as emphasizing the political and social dimensions of the problem. Such considerations are not relevant to the private investor test.

128. Finally, the argument based on the need to safeguard the image of the Patrimonio del Estado must be rejected for the reasons given in paragraph 30 above.

129. Spain argues that, if the capital contribution made to Intelhorce in connection

with its privatization was aid, it should have been declared compatible with the common market under Article 92(3)(a) and (c) of the Treaty.

130. As regards Article 92(3)(a), Spain observes that the buyers of Intelhorce undertook a considerable effort, financially and organizationally, with a view to bringing about the viability of the company, the decisive element being their know-how. The sale was not designed to keep the firm in business artificially but to guarantee its full economic recovery. The recovery plan foresaw a reduction in the workforce of 40% and a cut in the output of Intelhorce's traditional products. By the end of 1993 its production of yarns was to fall by 21% and its production of woven cloth was to fall by 50%.

131. As regards Article 92(3)(c), Spain challenges the Commission's view that that provision could not be applied in the absence of a solid restructuring or conversion programme. Spain insists that the entire privatization operation was centred on the viability plan presented by the purchasers. Moreover, there had been a genuine reduction in Intelhorce's production capacity. In addition to the figures given above, Spain states that Intelhorce's annual turnover in 1990, 1991 and 1992 was PTA 7 000 million, 6 300 million and 5 670 million respectively.

132. Spain accuses the Commission of contradicting itself by holding that the aid granted between 1986 and May 1989 satisfied the requirements of Article 92(3)(c) but that the aid granted in order to privatize Intelhorce did not. According to Spain, the contested decision does not give any reason to justify such a difference in treatment.

133. It is to be noted that, as in Case C-278/92, Spain is invoking both paragraphs (a) and (c) of Article 92(3) of the Treaty. It is not contested that the Malaga region, like the Seville region, is afflicted by serious underemployment, which means that Article 92(3)(a) is capable of application in principle. The remarks made above in paragraphs 43 to 45 about the relationship between paragraphs (a) and (c) of Article 92(3) are also valid in this case.

134. It is clear from the contested decision in this case and in Case C-278/92 that the Commission considers that the benefit of Article 92(3)(a) should so far as possible be reserved to aid granted under a general scheme of regional aid. The Commission is reluctant to extend the benefit of Article 92(3)(a) to *ad hoc* grants of aid taking the form of discretionary capital grants: see the sixth and seventh paragraphs in part VII of Decision 92/321. The Commission is however willing to authorize such grants of aid exceptionally, provided that the aid contributes to 'the long-term development of the region', meaning that it 'must at least serve for restoring the company's viability ... without having unacceptable negative effects on competition conditions within the Community': see the seventh paragraph in part VII of the decision. The Commission also talks — though more in relation to the application of Article 92(3)(c) — of the need for 'a compensatory justification for the aid in the form of a contribution by the beneficiary over and above the normal play of market forces altered by the aid to the achievement of Community objectives as established in Article 92(3) of the EEC Treaty': see the 12th paragraph of part VII of the decision.

135. The notion of compensatory justification, which is a recurring theme of Commission decisions in this field, seems to imply that the undertaking concerned must, in order to justify the granting of State aid, make some positive contribution to the competitive situation in the Community as a whole, for example by reducing its production capacity, by cutting its output of sensitive goods the market for which is saturated and by channelling its productive energies towards sectors of the economy that are less troubled by the phenomenon of excessive supply and insufficient demand.

136. In other words, the Commission is hostile to *ad hoc* aids that would simply induce the beneficiary to produce more and more goods for which there is no real demand, since that would do nothing to ensure the long-term viability of the beneficiary and would aggravate the competitive situation in the Community as a whole. On the other hand, the Commission is willing to look favourably on *ad hoc* aids that enable the beneficiary to adapt itself to changes in demand and thus achieve long-term viability without excessive detriment to the common interest. If that is indeed the Commission's approach, it is in my view the correct one.

137. In the contested decision the Commission refused to authorize the aid to Intelhorce on the ground that the two restructuring programmes put forward by Intelhorce and the Spanish authorities did not provide for sufficient compensatory justification, as defined above, and were not likely to ensure the company's long-term viability. As to compensatory justification, the Commission

noted (in the 15th paragraph of part VII of the decision) that neither restructuring programme envisaged a commitment for reducing production capacities. The initial programme foresaw a 'relaunching of the company's activities by a substantial increase in its global sales, both in traditional products and in the shops network, by 91% from PTA 7 754 million in 1990 to PTA 14 787 million in 1994'. Although the revised programme foresaw a slight sales reduction (by 6.5% between 1990 and 1992), nothing prevented Intelhorce from expanding its activities after 1992 by taking advantage of its idle capacity.

138. As to the long-term viability of Intelhorce, the Commission noted that the key objective in the initial programme was to strengthen Intelhorce's position by means of the creation of two networks of shops selling own-produced household linen and clothing. For household linen Intelhorce planned 15 of its own shops and 22 franchised shops, while for clothing the figures were 14 and 50 shops respectively: see the 3rd and 4th paragraphs in part IV. It was anticipated that the shops would generate a profit of PTA 1 741 million in 1994 and that Intelhorce's global profit in that year would be PTA 1 044: see the 4th paragraph in part IV. The initial programme had to be revised, partly as a result of floods in the province of Malaga in November and December 1989 and partly — according to the contested decision — as a result of 'the proved lack of capabilities in the company to undertake the launching of the strategy for clothing products': see the eighth paragraph in part IV. The revised programme provided for the indefinite postponement of the clothing line and its corresponding shops network, cuts in production and a reduction in the workforce to 1 000: see the eighth and ninth paragraphs in part IV. The revised programme anticipated total losses of PTA 1 894 million in 1990, decreasing to PTA 1 712 million in 1992: see the 10th paragraph in part IV.

139. Although the Commission's reasoning on the issue of long-term viability is not as fully developed as it might have been, there are in my view sufficient elements in the above account of the relevant parts of the contested decision to support the Commission's finding that neither the initial nor the revised programme was likely to transform Intelhorce from a chronically unprofitable company into an economically viable enterprise. The Commission sums up the dismal situation well when it states (in the 16th paragraph of part VII) that in both the initial and revised versions of the programme 'the company recorded persistent negative finan-

cial results'. There was also little evidence of any 'compensatory justification' as defined above in paragraph 135.

140. What is perhaps most significant is that the Spanish authorities seem to have accepted that the revised programme was inadequate, as is clear from the last five paragraphs of part VII of the decision. There it is stated that the Commission requested the Spanish authorities, at a meeting on 18 March 1991, to present a newly revised restructuring plan by 10 May 1991. In spite of two reminders the Spanish authorities had still not complied with that request at the time of the contested decision's adoption. They did not however attempt to defend the existing revised programme. On the contrary, by letters of 12 June and 18 July 1991, they asked the Commission to postpone any decision on the case until they could submit an alternative restructuring plan that was currently being negotiated with the new owners. Thus it is clear that the Spanish authorities recognized the inadequacy of the restructuring programme but that they and the new owners of Intelhorce were unable to agree on an improved programme.

141. In the light of the above considerations I conclude that the second submission should be dismissed.

Third submission

142. Spain challenges the obligation to recover the aid imposed on the Patrimonio del Estado by Article 3 of the contested decision. It argues that the recovery of the aid would impose a disproportionate burden on the undertaking concerned and on its employees, as well as prejudicing the economic situation in the region, that insufficient reasons were given in the contested decision to justify the requirement to recover the aid and that the sum to be recovered was in any event wrongly calculated.

143. On the last point, Spain states that, if the Commission was correct, when computing the value of the aid, to deduct a certain amount from the value of the PTA 2 000 million which Benorbe and Benservice paid for Intelhorce in order to take account of the fact that the full amount was not paid immediately, a similar adjustment should have been applied to the value of the capital contributions made by the Patrimonio del Estado, since they were also to be paid in a number of instalments.

144. Apart from the argument concerning the quantification of the aid granted to Intelhorce, all the arguments adduced under this

submission correspond closely to those pleaded under the fifth submission in Cases C-278/92 and C-279/92. They must be dismissed for the reasons given above in paragraphs 63 to 65 and 104.

145. As regards the argument about quantification, the Commission makes two points in its defence. In the first place, it argues that, irrespective of when Intelhorce and its buyers were able to use the capital contribution, the money was disbursed by the State at the time when the ownership of the shares was transferred to the buyers; the funds became part of Intelhorce's assets at the time of the sale of the company, even though the moment when they could be used was postponed. The Commission observes that funds deposited in a bank account generally produce interest and states that it has no knowledge that that did not occur in the present case. The Commission then observes, very much as a secondary point, that it learnt through press reports that the Spanish authorities allowed Intelhorce to use the funds in question earlier than originally stipulated.

146. In its reply Spain makes no attempt whatsoever to deal with the Commission's primary argument — namely, that the funds granted to Intelhorce bore interest, for the benefit of Intelhorce and its buyers, from the date of the transfer of the undertaking — and concentrates entirely on the secondary argument. In this regard, it states that the dates on which Intelhorce had access to the successive slices of the capital contribution were advanced by a few months as provided for in the contract.

147. The question whether and for whose benefit interest accrued on the capital contribution after the date on which Intelhorce was sold to Benorbe and Benservice is decisive. If that money became Intelhorce's property on the date of the privatization operation and bore interest from that date for the benefit of Intelhorce, the fact that the company was not able to use the money until later is not relevant for the purpose of calculating the value of the capital contribution provided to Intelhorce by the State. The interest would compensate for the delay in Intelhorce's having access to the money. Spain's silence on that question in its reply points inevitably to the conclusion that the version of the facts put forward by the Commission in its defence is correct. There are therefore no grounds for questioning the method by which the amount of the aid was calculated in the contested decision. It follows that the third submission must be dismissed in its entirety.

Conclusion

148. I thus reach the conclusion that in Case C-278/92 (Hytasa), the second paragraph of Article 2 and Articles 3 and 4 of Decision 92/317/EEC should be annulled; in Cases C-279/92 and C-280/92 Spain's actions should be dismissed. There remains the question of costs. If the actions had not been joined, I would have taken the view that in Case C-278/92 each party should bear its own costs under Article 69(3) of the Rules of Procedure since each party has succeeded on some and failed on other heads; and that in Cases C-279/92 and C-280/92 Spain should be ordered to pay the Commission's costs under Article 69(2) of the Rules of Procedure. Since however the cases were joined with effect from the Commission's defence, it seems more appropriate to treat the costs collectively and to order each party to bear its own costs in relation to the entirety of the proceedings.

149. Accordingly, I am of the opinion that:

(1) in Case C-278/92, the second paragraph of Article 2 and Articles 3 and 4 of Commission Decision 92/317/EEC should be annulled;

(2) in Cases C-279/92 and C-280/92 the actions should be dismissed;

(3) the parties should be ordered to bear their own costs.