OPINION OF ADVOCATE GENERAL ALBER

delivered on 21 February 2002 [1]

I — Introduction

1. This action for annulment brought by the Kingdom of Spain is directed against the decision by the Commission of 17 August 2000 to initiate the formal investigation procedure under Article 88(2) EC (formerly Article 93) to examine aid for the benefit of Santana Motor SA (hereinafter 'the contested decision'). [2]

2. At the centre of the litigation is the time-limit of 15 working days provided in Article 4(6) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (hereinafter 'Regulation No 659/1999'), [3] within which the Commission may, if necessary, initiate an investigation procedure after being notified by a Member State of the implementation of aid measures. One of the issues disputed by the parties is whether, since notification was by fax, the prescribed period starts to run at the time of receipt (in this case, Friday 28 July 2000) or registration of the fax (in this case, Monday 31 July 2000). The other is whether the Commission must decide to open the formal procedure within the deadline (which in this case it did on 17 August 2000) or whether it must serve the relevant decision (which in this case it did on 23 August 2000).

3. The Member State concerned must inform the Commission of new aid. After such notification, the Commission may, where doubts arise, initiate a formal examination procedure within two months. Where the Commission fails to take a decision, the aid is deemed to have been authorised and the relevant Member State may implement it, unless, after the requisite further notification by the Member State of implementation of the measures, the Commission decides within 15 days to initiate an investigation. Thus, expiry of the time-limit would result in the notified aid measures being regarded as existing aid.

1 — Original language: German.
2 — OJ 2000 C 328, p. 19.
3 — OJ 1999 L 83, p. 1.

II — Legal background

4. Article 88 EC regulates the procedure for monitoring and authorising State aid by the Commission. The procedure is set out in more detail in Regulation No 659/1999 which was made under Article 89 EC. Article 4 of Regulation No 659/1999 states:

'...

1. The Commission shall examine the notification as soon as it is received. Without prejudice to Article 8 [which relates to withdrawal of notification] the Commission shall take a decision pursuant to paragraphs 2, 3 or 4.

2. Where the Commission ... finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission ... finds that no doubts are raised as to the compatibility with the common market of a notified measure ... it shall decide that the measure is compatible with the common market ...

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article 93(2) of the Treaty (hereinafter referred to as a "decision to initiate the formal investigation procedure").

5. The decisions referred to in paragraphs 2, 3 and 4 shall be taken within two months. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. ...

6. Where the Commission has not taken a decision in accordance with paragraphs 2, 3 or 4 within the period laid down in paragraph 5, the aid shall be deemed to have been authorised by the Commission. The Member State concerned may thereupon implement the measures in question after giving the Commission prior notice thereof, unless the Commission takes a decision pursuant to this Article within a period of 15 working days following receipt of the notice.'

III — Facts

5. The Spanish authorities had been in contact with the Commission since 2 July

1998 because of a bank guarantee granted to the Santana Motor SA company in June 1998. By a letter dated 1 July 1999, the Spanish Government informed the Commission of its intention to award that company additional aid. Notice thereof — an injection of capital and regional aid — was given in accordance with Article 88(3) EC by means of letters dated 30 July 1999 and 17 November 1999. The Commission considered the notification to be incomplete and requested additional information, which it received on 24 May 2000.

6. In a letter of Friday 28 July 2000, which was faxed to the competent Directorate-General on the same day at 17.49, the Spanish authorities informed the Commission, referring to Article 4(6) of Regulation No 659/1999, that the regional government of Andalusia was going to implement the measures which had been notified. The fax was registered by the Commission on Monday 31 July 2000.

7. On 17 August 2000, the Commission decided to initiate the formal investigation procedure in accordance with Article 88(2) EC. The Permanent Representation of the Kingdom of Spain was informed by fax on the same day that the Commission had taken this decision. On 18 August 2000, the Commission sent a further letter to the Permanent Representation, in which it again referred to the decision taken the previous day, and to the fact that implementation was consequently prohibited under Article 88(3) EC. The decision which is the subject of this action was, however, only served on the Kingdom of Spain on 23 August 2000, by letter dated 22 August 2000.

IV — Applications and procedure

8. The Kingdom of Spain brought an action on 30 October 2000. It claims that the Court should

(1) annul the decision of the Commission of 22 August 2000 in respect of all the measures adopted other than the guarantee of June 1998;

(2) order the Commission to bear the costs of the proceedings.

9. The Commission contends that the Court should

(1) dismiss the application;

(2) order the applicant to bear the costs of the proceedings.

There was no oral hearing.

V — Submissions of the parties

A — *Kingdom of Spain*

10. The Spanish Government begins by arguing that the contested decision is an act that may be challenged by an application for annulment because it has legal consequences, in that it classified the aid concerned as new aid.

11. However, it is actually existing aid, to which Article 88(2) EC does not apply.

12. The measures were duly notified. More than two months passed from receipt of the additional information requested by the Commission on 24 May 2000. Article 4(6) of Regulation No 659/1999 thus applied. The prescribed period of 15 working days had already expired when the Commission's decision was served on the Spanish authorities.

13. The Commission received the letter from the Spanish authorities of 28 July 2000 notifying implementation of the measures by fax on the same day. That started time running. The fact that the letter was only registered by the Commission's staff on 31 July 2000 is immaterial to commencement of the prescribed period. As a matter of principle, it can only be the date of receipt of a letter by the addressee that is decisive, not the date on which it comes to the knowledge of the responsible case officer.

14. This is apparent from the competition rules for State aid published by the Commission.[4] Annex 1 to the *Guide to procedures in State aid cases* states that, as a matter of principle, time-limits run from receipt of the relevant correspondence. This is reinforced in footnote 106 of the guide, which states that, in the case of transmission by fax, time starts to run on dispatch.

15. Hence, time started to run on Monday 31 July 2000 — the first working day

4 — Commission publication: *Competition law in the European Communities*, Volume IIA, 1999.

following receipt of the letter — and ended on 21 August 2000. Thus, service of the decision was only effected after the prescribed period had expired.

16. Compliance with the time-limit can only be determined by reference to the date of service. When the Commission reached the decision internally is not decisive. A decision cannot give rise to legal consequences for the addressee before it is served upon him. That is clear from Article 254(3) EC, according to which decisions only take effect once the addressee has notice of them.

17. If the matter were to turn on the point in time when the decision is taken, this could also lead to considerable legal uncertainty. It is difficult for outsiders to determine when a decision has been taken internally by the Commission. The Commission could, after taking a decision, delay at will notifying that decision to the Member State, with the result that the Member State could even implement aid measures without knowing of the decision. At a later stage, the Commission could then plead non-expiry of the prescribed period.

18. Nor can the fax sent to the Spanish authorities on 17 August 2000 be a substitute for service. This simply informed them that the Commission had taken a decision pursuant to Article 88(2) EC. This communication must, however, be distinguished from the decision itself, which, with the requisite statement of reasons, was only contained in the letter from the Commission of 22 August 2000, which was delivered on 23 August 2000.

19. The decision taken on 17 August 2000 was merely of a preliminary nature, and is not to be regarded as a legal act within the meaning of Article 249 EC. The actual decision was only taken on 22 August 2000, and thus after the prescribed period had expired.

20. Furthermore, the Spanish Government claims that the Commission did not give an adequate statement of reasons for the contested decision. It is not apparent from the decision that the Commission considered the measures to be incompatible with the Treaty. Rather, it must be assumed that the decision was only taken to prevent the period under Article 4(6) of Regulation No 659/1999 from expiring.

B — *The Commission*

21. The Commission, on the other hand, is of the view that the contested decision was taken within the period prescribed by Article 4(6) of Regulation No 659/1999, and that the measures concerned do not, therefore, constitute existing aid.

22. Time only started to run on 1 August 2000, the day after registration. Notification under Article 4(6) of Regulation No 659/1999 is not admissible by fax. To ensure legal certainty, notification must be made in the same form as notification of aid. The extract from the *Guide to procedures in State aid cases* to which the applicant refers only applies to less important communications. For procedural reasons, such notification must also be directed to the Secretariat-General, and not the competent Directorate-General. Futhermore, the fax was received outside office hours on Friday at 17.49, so it was not possible to take cognisance of it that day.

23. In addition, the prescribed period was interrupted by the decision of 17 August 2000. Interruption is determined by reference to when the decision is taken not when it is served. This is apparent just from the text of Article 4(6) of Regulation No 659/1999, according to which the Member State may implement the aid measures unless the Commission 'takes a decision ... within a period of 15 working days ...'. Regulation No 659/1999 expressly distinguishes between the adoption of a decision and giving notice of it as the Commission is expressly required in Article 25 to inform the Member State concerned without delay of decisions taken pursuant to this provision.

24. If the decision were required to be notified to the Member State within 15 working days, the rule in Article 25 of Regulation No 659/1999 would be superfluous. There would be no sense in putting the Commission under an obligation to give notice of a decision without delay, if the Member State has to be given notice of the decision within a specific period in any event.

25. The reference to Article 254(3) EC is also misconceived. It cannot be concluded from this provision that a decision of which no notice has been given is ineffective or non-existent as Article 254(3) EC does not relate to the validity of a decision, only its effectiveness with regard to the addressee.

26. Besides, the decision was taken on 17 August and not only on 22 August 2000 as the applicant argues. Under the fourth paragraph of Article 12 of the Commission's Rules of Procedure, [5] a decision by means of written procedure stands adopted when the time-limit set for the procedure has expired without any member of the Commission having made and maintained reservation. This was the case on 17 August 2000.

27. The Commission considers the further objection that the Commission did not

5 — OJ 1999 L 252, p. 41.

provide adequate reasons for the contested decision to be inadmissible. The compatibility of the aid with Community law is not finally determined by initiation of the procedure under Article 88(2) EC, so the applicant is not prejudiced in this respect.

Before Regulation No 659/1999 came into force, the Court had established that the decision by the Commission to initiate the formal investigation procedure under Article 88(2) EC is one which may be challenged; it has independent legal consequences in that the measure is classified as new, rather than existing, aid. [7]

VI — Legal assessment

A — *Admissibility*

28. Although the Commission has not pleaded inadmissibility, under Article 92(2) of the Court's Rules of Procedure, the Court may, at any time, of its own motion consider whether there exists any absolute bar to proceeding with a case, in particular, whether the measure in dispute constitutes a legal act capable of being challenged. [6]

29. According to Article 230 EC, a decision may, as a matter of principle, only be challenged if it has legal consequences.

30. Different procedures are associated with this classification. Whereas existing aid is examined in accordance with Article 88(1) EC by the Commission in cooperation with Member States, new aid is subject to the requirements of Article 88(2) and (3) EC, and may not be implemented until authorised by the Commission.

31. Besides, according to the case-law [8] which pre-dated the entry into force of Regulation No 659/1999, it is not a question of such a decision being a purely preliminary measure, against whose effects only legal action against the final decision would guarantee adequate legal protection. In particular, such an action would not make it possible subsequently to reverse, by means of the later payment of aid, the possible consequences of a delay in implementing the aid measures arising from compliance with the third sentence of Article 88(3) EC.

6 — Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 23, and Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945, paragraph 18.

7 — Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraphs 19 et seq. ('*Cenemesa*'), and Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraphs 27 et seq. ('*Italgrani*').

8 — Cited in footnote 7.

32. Advocate General Stix-Hackl has recently queried whether these authorities still apply, even after the coming into force of Regulation No 659/1999.[9] In her view, the consequences of the decision to initiate the formal procedure are not irreversible.[10] As a preliminary procedural measure, the decision may not, therefore, be challenged.[11] The Court did not, however, endorse this view, but adhered to its case-law hitherto.[12] It follows that the action for annulment of the contested decision was brought in accordance with Article 230 EC.

B — *Reasoning*

33. The application would succeed if the contested decision had not been taken within the period prescribed by Article 4(6) of Regulation No 659/1999. The decision would then be defective in law, as the measures benefiting Santana Motor SA would have to be classified as existing aid once the deadline of 15 working days had expired, and the Commission would no longer have had the power directly to initiate the formal investigation procedure.

1. Commencement of the prescribed period

34. First, it must be noted that the Commission's submissions concerning the Spanish Government's notification by fax of implementation of the measures of 28 July 2000 are contradictory. The Commission considers, on the one hand, that notification under Article 4(6) of Regulation No 659/1999 should have been sent to the Secretariat-General by post, with a request for acknowledgement of receipt. It does not consider the Spanish Government's chosen path of sending the letter in question to the competent Directorate-General by fax to be permissible. On the other hand, it does not deny that this same fax started time running once its receipt had been registered on 31 July 2000. But if transmission by fax was not permissible, the notification would have no legal effect, and, in particular, could not have started time running.

35. However, Regulation No 659/1999 does not prescribe a particular form either for the notification or for other communications required, under the aid procedure, to be directed to the Commission. Article 2(2) of Regulation No 659/1999 merely deals with the requirement that the Member State must provide all necessary information in its notice. It is thus not clear from Regulation No 659/1999 itself whether fax is a permissible method of delivery.

9 — Opinion in Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303, I-7306.

10 — Opinion in Case C-400/99, cited in footnote 9, points 43 et seq., particularly point 52.

11 — Opinion in Case C-400/99 *Italy* v *Commission*, cited in footnote 9, point 77 (summarised).

12 — Case C-400/99 *Italy* v *Commission*, cited in footnote 9.

36. By contrast, it appears from Annex 1 to the *Guide to procedures in State aid cases*,[13] that the Commission itself considers fax to be a permissible method of delivery as it contains a provision for calculating time-limits, according to which time-limits generally start to run on receipt of the relevant correspondence, and specifically in the case of fax transmission, on dispatch. Such a provision would be superfluous if correspondence directed to the Commission could not be sent by fax.

37. The Commission's objection, that this provision only applies to less important communications, and specifically does not apply to communications which have legal consequences, is not supported by the guide. Annex 1 to the guide relates to all time-limits in aid review procedures, as is evident from the introductory phrase in the section 'Counting of time-limits' ('Time-limits are laid down for various kinds of action in State aid cases'). This statement about determining when time-limits begin in footnote 106 of the guide applies equally to fax transmission generally. There is no discernible distinction between 'important' and 'less important' actions or time-limits.

38. According to the Commission's submissions in these proceedings, the significance of an action depends on whether it has legal consequences, and, if so, fax transmission must be excluded. Yet any letter which starts time running or interrupts it has legal consequences for that reason alone. If the Commission's assessment is taken to its logical conclusion, letters which affect time-limits should not, as a rule, be sent by fax. The question in that case remains: what is the purpose of the indications in the guide on calculating time-limits for fax transmissions?

39. Transmission of correspondence by fax machine is technologically advanced and very widespread nowadays. Fax is a secure and time-saving method of communication. In so far as no specific procedural regulations exist, requiring written communications to be submitted either in the original, or bearing an original signature, or specific methods of transmission (recorded delivery, request for acknowledgement of receipt, etc.) fax must, in principle, be seen as a permissible means of sending communications to the Commission.

40. It must however be taken into account that sending correspondence by fax is not always problem free. In certain cases, faults in the sending or receiving fax machines can inhibit transmission. Less than perfect transmission can prevent communications from being directed to the recipient, or can render the content unintelligible. Such a fax

13 — Cited in footnote 4, p. 49.

certainly cannot start time running if the fault lies with the sender. The fact that transmission problems can arise in individual cases does not, however, mean that the fax machine is generally unreliable as a means of communication. As the *Guide to procedures in State aid cases* shows, [14] despite these generally known risks, the Commission has in principle acknowledged the possibility of fax transmission.

41. In this case, there is no indication that the communication from the Kingdom of Spain on 28 July 2000 was not transmitted in full. Although, a transmission report does not in all cases constitute proof that the whole of a document has reached the recipient, as it can merely serve as evidence that the fax has left the sender's machine, the Commission did not deny that the letter was transmitted in full in this particular case. The document which the Commission registered on 31 July 2000 is the very letter which was transmitted by fax. It is hardly credible that the Commission would have registered without further enquiry a communication which was incomplete on receipt.

42. Fax could, of course, be an unsuitable method of transmission if the authenticity of a letter is intended to be evidenced by the sender's signature on the original. Thus, Article 37(6) of the Court's Rules of Procedure, for example, permits transmission of written statements by fax in order to comply with time-limits in proceedings. However, this applies only if the signed original is received no more than 10 days later. This special provision in the Court's Rules of Procedure is necessary because it is a derogation from the general rule in Article 37(1) of the Rules of Procedure, by which statements are required to be lodged in original form and signed by the party's attorney or lawyer.

43. It is not apparent from the files, nor is it significant in this case, whether and, if so, when, the Spanish Government's notification of 28 July 2000 was sent by post. In the absence of appropriate procedural rules, such as those in the Court's Rules of Procedure, notification under Article 4(6) of Regulation No 659/1999 should not be subject to similarly stringent requirements as to proof of authorship.

44. According to the provision contained in Rule 1.2.2 of the competition rules applicable to State aid, [15] notification of new aid

14 — Cited in footnote 4.

15 — Cited in footnote 4, p. 28; see specifically for motor vehicles: Community framework for State aid to the motor vehicle industry (OJ 1997 C 279, p. 1).

must generally be sent to the Secretariat-General of the Commission. As the text indicates, however, this rule only applies directly to the notification itself, and not to other communications required to be directed to the Commission.

45. There is no reason to extend the application of this rule to other communications. The scheme and purpose of the rule is to concentrate the receipt of notifications in one central area — in this case the Secretariat-General. This is because new aid must first be registered in the central register of all pending State aid cases, and be allocated to the competent Directorate-General. [16] Once this has happened, there is no further need for correspondence to be directed to one central place. On the contrary, it is in the interest of the competent Directorate-General to receive communications from Member States as quickly as possible, i.e. without being diverted via the Secretariat-General. This applies particularly where the communication has legal consequences, as, for example, in this case, the commencement of a short time-limit.

46. The Commission itself has determined in 1.2.2 of the *Guide to procedures in State aid cases* [17] that it saves time in dealing with the notification if it is sent direct to the competent Directorate-General. It goes without saying that similar time savings could be achieved by direct transmission of all communications to the competent Directorate-General, and not just the notification.

47. The fact that the fax reached the Commission outside office hours has no effect on the commencement of the time-limit. It is fundamentally irrelevant when the responsible case officer becomes aware of a communication. That is clear from Annex 1 to the *Guide to procedures in State aid cases* [18] according to which a time-limit commences on receipt of correspondence or, in the case of fax transmission, on dispatch. In other words, it is not dependent on when the particular recipient takes cognisance of it. It must also be taken into account that when that occurs is often a matter of chance and not at all capable of being calculated by the sender. If the point when the recipient becomes aware of the communication were decisive, that would lead to considerable legal uncertainty.

48. Article 3 of Council Regulation (EEC/Euratom) No 1182/71 of 3 June 1971 on determining the rules applicable to periods, dates and time-limits [19] (hereinafter 'Regulation No 1182/71') determines the point in time which is relevant for the commencement of a time-limit measured in

16 — See Annex 1 to the *Guide to procedures in State aid cases*, rules on the organisation of the Commission, cited in footnote 4.

17 — Cited in footnote 4, p. 30.

18 — Cited in footnote 4.

19 — OJ, English Special Edition 1971 (II), p. 35.

days. Under that provision, the day on which a particular event occurs, or action takes place, is not counted. The time of dispatch of the fax is what causes the time-limit to start to run.

2. On the interruption of the prescribed period

(a) Time of adoption of the decision

49. This provision ensures that the duration of the prescribed period does not depend on the hour when the event which started time running occurred. [20] Thus, the fact that the communication from the Spanish Government arrived at the Commission after close of business did not cause the prescribed period of 15 working days to be curtailed.

51. The decision taken by the Commission on 17 August 2000 is — contrary to the view taken by Spain — not merely preliminary in nature, but represents a legal act with its own legal consequences, to which Articles 249 and 254 EC apply. The process of taking the decision is governed in more detail by the Commission's Rules of Procedure.

50. Thus, the period began on the first working day following 28 July 2000, that is — since working days, according to Article 2(2) of Regulation No 1182/71, are any days except public holidays, Saturdays and Sundays — on Monday 31 July 2000. In accordance with Article 3(2)(b) of Regulation No 1182/71, the deadline expired at the end of 21 August 2000. In the calculation, 5/6, 12/13 and 19/20 August 2000, being Saturdays and Sundays were not to be counted, nor was 15 August, as a public holiday for the Commission, [21] as these were not working days.

52. In principle, under Article 4 of its Rules of Procedure, [22] the Commission is to take decisions at meetings, by written procedure or by delegation. The written procedure used in relation to the contested decision in this case is set out in Article 12 of the Rules of Procedure. According to paragraph 4 of Article 12, a proposal by the Commission stands adopted if no member of the Commission has made a reservation and maintained it up to the time-limit set for a written procedure. The decision-making process within the Commission is completed when the time-limit expires. At this point, a resolution is made to adopt the

20 — On the corresponding provision in the Court's Rules of Procedure, see Case 152/85 *Misset* v *Council* [1987] ECR 223, paragraph 7.

21 — See OJ 1999 C 379, p. 26.

22 — OJ 1999 L 252, p. 41.

decision. This is not precluded by the fact that the letter served on the Spanish authorities bears a later date — 22 August 2000 — as the letter simply served to give details of, and to communicate, the decision adopted on 17 August 2000. Furthermore, since, as will be explained, service alone is decisive, neither date is material.

53. As the decision taken on 17 August 2000 was only communicated to the Kingdom of Spain on 23 August 2000, and thus after the deadline had expired, it is necessary to clarify, by construction of Article 4(6) of Regulation No 659/1999, the event that causes the prescribed period to be interrupted.

(b) Construction of Article 4(6) of Regulation No 659/1999

54. According to the wording of Article 4(6) of Regulation No 659/1999, it is the taking of the decision which is decisive, as the 'Member State concerned may ... implement the measures in question after giving the Commission prior notice thereof, unless the Commission *takes* a decision pursuant to this Article within a period of 15 working days following receipt of the notice' (emphasis added).

55. The conclusion may be drawn from the context of Regulation No 659/1999 as a whole that the legislature drew a distinction in principle between taking, and giving notice of, a decision because Article 25 of Regulation No 659/1999, which requires the Commission to notify the Member State concerned of its decision without delay, contains an express provision on notification.

56. However, contrary to the Commission's view, it cannot be concluded from this that the provision in Article 25 of Regulation No 659/1999 would be superfluous if the Commission was already fulfilling the obligation to notify the addressee concerned within a particular period. First, this general rule applies to all decisions to be taken under Regulation No 659/1999, including those which are not subject to a deadline. And secondly Article 25 requires the Commission to act 'without delay' and thus more quickly than is generally required in order to comply with a time-limit.

57. Article 4(6) of Regulation No 659/1999 must, however, be construed in the light of the Treaty. According to settled case-law, provisions of Community law derived from the EC Treaty are, as far as possible, to be construed in such a way as to be compatible with it. [23]

23 — Joined Cases 201/85 and 202/85 *Klensch* [1986] ECR 3477, paragraph 21, and Case C-314/89 *Rauh* [1991] ECR I-1647, paragraph 17.

58. The EC Treaty provides in Article 254(3) EC for decisions to be effective (only) on notice being given. Unlike regulations, Article 254(2) EC does not require the publication of decisions in the Official Journal. Notification is thus essential in order for a decision to take effect. [24]

59. According to case-law of the Court, a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it. [25] This must also apply if those affected by that act are not individuals but Member States.

60. In the light of Article 254(3) EC, Article 4(6) of Regulation No 659/1999 is to be interpreted as meaning that it is not the date of the Commission's decision that is significant for the purposes of interruption of the time-limit, but rather notice of the decision.

61. The Commission, on the other hand, takes the view that a distinction must be drawn between the validity of the decision as such (validité intrinsèque), which takes effect when the Commission takes the decision, and its effectiveness vis-à-vis third parties. The latter is governed by Article 254(3) EC. Article 4(6) of Regulation No 659/1999, however, relates to its validity as such.

62. This argument cannot be accepted. A legal act which is concluded but not yet notified may well have latent or delayed validity which is conditional upon notice. In particular, it may not be amended during this stage. [26]

63. However, in order to produce legal consequences vis-à-vis the addressee — and that is what is in issue here — the addressee must have had notice of the legal act. The decision to initiate the formal procedure is also intended to interrupt the period prescribed in Article 4(6) of Regulation No 659/1999 and thus prevent the Member State from implementing the aid. The decision cannot have this effect unless the Member State has notice of it.

24 — See Opinion of Advocate General Van Gerven in Case C-137/92 P *Commission* v *BASF AG and Others* [1994] ECR I-2555, I-2559, point 62.

25 — Case 98/78 *Racke* [1979] ECR 69, paragraph 15.

26 — Case 131/86 *United Kingdom* v *Council* [1988] ECR 905, paragraphs 34 et seq. ('*Legehennen*').

64. This analysis is also consistent with the scheme and purpose of the provisions relating to time-limits in Article 4 of Regulation No 659/1999. As with all time-limits, the time-limits laid down in that article also serve to ensure legal certainty and security. Article 4 enshrines in statutory form the principles first developed by the Court in *Lorenz*.[27] The Court gave further grounds for these principles in the *Siemens* case.[28]

65. It is true that the findings of the Court in that case, which are set out below, relate to the Commission's two-month time-limit for initiating the formal procedure. But they can also be transposed to the time-limit of 15 working days following notice by the Member State that it is implementing the aid. The Court held:[29]

'By drawing guidance from Articles 173 and 175 of the Treaty, and by thus [in the *Lorenz* case] assessing the maximum duration of the period at two months, the Court intended to remove a legal uncertainty manifestly contrary to the objective of the preliminary stage of the procedure for State aid under Article 93(3) of the Treaty. That objective, which is to offer Member States the legal certainty they require by informing them quickly as to the compatibility with the Treaty of a particular aid, which may be a matter of urgency, would be jeopardised if the period were to be regarded as merely indicative. Moreover, the legal uncertainty that would result could be aggravated if the preliminary examination phase were artificially prolonged.'

66. The Commission has not, it is true, cast any doubt on the binding nature of the 15-working-day deadline. But if interruption of the deadline was effected by the Commission's decision, and not notice of the decision to the Member State, the deadline would be extended so far as the Member State was concerned.

67. Whether and when the Commission has taken a decision internally is not, as a rule, something the Member State concerned can ascertain. In principle, aid measures may be implemented once the deadlines provided for in Article 4 of Regulation No 659/1999 have expired. If the interruption of the deadline depended on when the decision was taken (internally), this would mean that the Member State, despite having already waited for at least two months for a decision by the Commission and the 15-working-day period having expired, could still not rely upon approval being deemed to have been granted under Article 4(6) of Regulation No 659/1999. The Member State would

27 — Case 120/73 *Lorenz* [1973] ECR 1471.

28 — Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraph 73 ('*Siemens*').

29 — *Siemens* case, cited in footnote 28, paragraph 73.

have to wait even longer to implement the measures so as not to risk having to recover the aid later. Nor would it be clear how much longer the Member State would have to wait to be certain that it would not, at some stage, be notified of a decision taken by the Commission within the 15-working-day period. It would be contrary to the purpose of Article 4(6) of Regulation No 659/1999, which is to create legal certainty, if the significant event was the taking of the decision rather than notification thereof.

68. Account must also be taken of the fact that it is not only the interests of Member States which are affected by a decision of the Commission, but also those of the recipients of the aid. The grant or refusal of aid is usually of enormous economic or even existential significance to them. They may not be the immediate addressees of the decision, but the reliance they place on the fiction of approval being granted after expiry of the 15-working-day period must be protected.

69. Finally, account must be taken of the fact that a decision to initiate the formal procedure is an act that may be challenged by an action for annulment. [30] The period for bringing a claim generally begins, according to Article 230(5) EC, with notice, or rather, communication of the action in question. If the period under Article 4(6) of Regulation No 659/1999 were interrupted by the taking of the decision, the decision would have legal consequences for the addressee even before the period for bringing an action had begun and thus before the legal act was able to be challenged. It is essential for the cohesiveness of the Community legal order and the principle of comprehensive legal protection that the legal consequences of a decision do not take effect at a different time from when the period for bringing an action starts to run.

(c) Application to the present case

70. Consideration must therefore be given to whether the Kingdom of Spain was notified of the contested decision before the prescribed period expired on 21 August 2000.

71. A decision is properly notified if it reaches the addressee and puts him in a position to take cognisance of it. [31] The decision is served as soon as it arrives in

30 — See above, point 29 et seq.

31 — Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 10, and Case 58/88 *Olbrechts* v *Commission* [1989] ECR 2643, paragraph 10.

due course within the control of the addressee. [32]

72. Notification was not effected by the faxes of 17 and 18 August 2000. These merely contained a brief announcement that the Commission had taken a decision under Article 88(2) EC, but not the 14-page decision itself. Firstly, a decision within the meaning of Article 249 EC must, according to Article 253 EC, give reasons which the communications of 17 and 18 August 2000 did not. Secondly, the Commission did not at any time state that these communications were to be treated as the decision under Article 88(2) EC. Awareness that a relevant decision has been taken cannot be a substitute for notice of the decision itself. [33]

73. Rather, notification was not effected until the contested decision was served on 23 August 2000, and so after the deadline had expired. The contested decision could not, therefore, interrupt the prescribed period in this case. The measures must, therefore, be seen as existing aid, so that the formal procedure under Article 88(2) EC would only apply once the Commission and the Kingdom of Spain had failed to agree on appropriate measures under Article 88(1) EC. The decision to initiate the formal procedure is, therefore, defective in law.

3. Plea of inadequate statement of reasons

74. In the event that the Court does not endorse that reasoning, the Spanish Government's alternative plea must also be considered.

75. The applicant has argued that it is not apparent from the contested decision that the Commission considered the aid incompatible with Community law. The decision is therefore formally defective in that it fails to give grounds.

76. As stated above, the decision, according to Article 88(2) EC, is only capable of being challenged in so far as the aid measures concerned are classified as new or existing aid. So far as the compatibility of the aid with Community law is concerned, however, it constitutes only a preliminary measure. In so far as it may be unlawful — including in terms of procedural formalities — the person concerned has sufficient protection in that it is open to him to challenge the final decision. The objection that the statement of reasons is inadequate cannot, therefore, be raised.

32 — As the Court held in relation to declarations of intent, Case 8/56 *ALMA* v *Hohe Behörde* [1957] ECR 95, 99.

33 — See Case C-143/95 P *Commission* v *Socurte and Others* [1997] ECR I-1, paragraph 31.

77. In this case, however, that objection could be understood as claiming that there was an abuse of discretion, since the Spanish Government is essentially arguing that the Commission only adopted the contested decision to prevent the 15-day period in Article 4(6) of Regulation No 659/1999 from expiry and not — as provided in Article 4(4) of Regulation No 659/1999 — because a preliminary examination of the measure gave rise to doubts about its compatibility with the common market.

78. But even if it is understood in that way this claim cannot succeed. Firstly, the decision cannot be challenged in the light of this objection either, because once again an action against the final decision offers the recipient adequate protection on this point. Secondly, the Spanish Government has not presented any specific evidence to support the allegation of abuse of discretion.

VII — Costs

79. The decision on costs is based on Article 69(2) of the Rules of Procedure, which provides that the unsuccessful party is to pay the costs if they are applied for.

VIII — Conclusion

80. I therefore propose that the Court:

(1) annul the decision of the Commission of 17 August 2000 (served by letter dated 22 August 2000 on 23 August 2000) in regard to all measures therein contained except the guarantee awarded in June 1998;

(2) order the Commission to bear the costs of the proceedings.