OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 12 June 1991 *

Mr President,
Members of the Court,

1. In the action before the Court, the Italian Government is asking, in pursuance of Article 173 of the EEC Treaty, for a declaration that Commission Decision 90/224/EEC of 24 May 1989 on aid granted by the Italian Government to Aluminia and Comsal, two State-owned undertakings in the aluminium industry,[1] (hereinafter referred to as 'the contested decision') is void. The contested decision is based on the first subparagraph of Article 93(2) of the EEC Treaty and reads as follows:

'Article 1

The two aids in the form of interest-free loans to be converted into equity capital amounting to LIT 70 000 million and LIT 30 000 million, granted by the Italian Government to the undertakings Aluminia and Comsal, are incompatible with the common market within the meaning of Article 92(1) of the EEC Treaty given that these aids have been granted in breach of the provisions of Article 93(3) of that Treaty and of the conditions laid down in the Commission's decision of 17 December 1986.

The said aids shall therefore be abolished by the Italian Government and recovered from the recipient undertakings.

The Italian Government may not convert the two loans of LIT 70 000 million and LIT 30 000 million into equity capital.

Article 2

The Italian Government shall inform the Commission within two months of the date of notification of this decision of the measures it has taken to comply therewith.'

In support of its action for a declaration that the measure is void, the Italian Government claims, in its application and its reply, first that the financial contributions at issue come within the ceiling of the aid approved in the Commission decision of 17 December 1986, secondly that in the contested decision the Commission wrongly regarded these contributions as State aid within the meaning of Article 92(1), and thirdly that the statement of the grounds on which the contested decision is based is defective because the Commission did not consider whether the conditions for the derogations from the prohibition of State

* Original language: Dutch.
1 — OJ 1990 L 118, p. 42.

aid under Article 92(3)(c) were satisfied. During the hearing the Italian Government withdrew the first-mentioned argument, which I shall therefore not consider further.

In this Opinion, after a brief outline of the facts (paragraphs 2 to 4), I shall first discuss the question of whether the interest-free loans in 1987 to Aluminia and Comsal, to be converted into equity capital, did in fact represent, as the Commission contends, State aid within the meaning of Article 92(1) (paragraphs 5 to 13). Then I shall consider whether the contested statement of grounds is defective because the Commission did not consider whether the conditions for the application of the derogations from the prohibition of State aid in Article 92(3)(c) were satisfied (paragraphs 14 to 16).

The background

2. With a view to the economic recovery of the insolvent State-owned aluminium industry, in the early part of the 1980s the Italian Government worked out a plan for restructuring the industry. This restructuring plan (hereinafter referred to as 'the aluminium plan') envisaged for the period 1983 to 1988 public aid amounting to LIT 1 445 000 million in the form of new capital, subsidies and interest-free loans. On 5 December 1984 and 20 November 1985 the Commission initiated the procedure under Article 93(2) of the EEC Treaty with regard to this aid. The Commission took the view *inter alia* that the amount of the aid proposed considerably exceeded the requirements of the aluminium plan.[2] However, after the Italian Government had made a number of amendments to the aluminium plan, and in particular had agreed to reduce the aid envisaged in the form of new capital by LIT 200 000 million,[3] the Commission, by decision of 17 December 1986 (of which the Italian Government was notified by letter of 13 January 1987) decided to terminate the procedures it had initiated in 1984 and 1985. At the same time it approved aid, amounting to LIT 989 000 million in the form of new capital and LIT 400 000 million in the form of interest-free loans, for the activities of the public holding company EFIM[4] in the aluminium sector. It also gave its approval to grants amounting to LIT 48 100 million and an interest-free loan of LIT 7 900 million to the State-owned aluminium smelter in Bolzano.[5] The Commission, however, approved this aid envisaged in the aluminium plan (1983-88) only on the express condition laid down in the decision of 17 December 1986 that the Italian Government would provide no further aid in whatever form to the State-owned aluminium industry until the end of 1988.

3. On 18 September 1987 (by decision of the CIPE[6]) the Italian Government instructed the public holding company EFIM to grant loans amounting to LIT 100 000 million to two of its subsidiaries, Aluminia and Comsal, both State-owned aluminium undertakings.[7]

2 — Contested decision, Part I, first paragraph.

3 — See Italian Government telex of 21 November 1986, annex II of the statement of defence.

4 — An abbreviation for 'Ente Participazioni e Finanziamenti Industrie Manifatturiere'.

5 — Contested decision, Part I, second and third paragraphs.

6 — An abbreviation for 'Comitato Interministeriale per la Programmazione Economica'.

7 — Contested decision, Part I, eighth paragraph; see also Annex I to the application.

The Commission was not notified in advance by the Italian Government of these loans in accordance with Article 93(3) of the EEC Treaty. Only in answer to an express request from the Commission did the Italian Government inform it by letter dated 28 March 1988 of the loans and attendant circumstances. In that letter the Italian authorities stressed above all that the two loans were intended for financing investments: the loan to Aluminia amounting to LIT 70 000 million was intended to finance investments for modernization, whilst in addition the loan to Comsal amounting to LIT 30 000 million was intended to finance investments for the extension and diversification of production. The Italian Government further informed the Commission that the loans included a four-year period of grace and were to be reimbursed between 1991 and 1994.[8] The interest on both loans and the repayments of the principal sum were to be paid by the public authorities, in such a way that each repayment of the loans would be converted into equity capital for EFIM.[9]

4. On the basis of the information from this and public sources, the Commission decided in September 1988 to initiate the procedure under Article 93(2) in respect of the loans. The Commission took the view that the payment of all interest by the State constituted a clear case of State aid,[10] and that the conversion of the two loans into equity capital constituted the provision of new capital which, in the light of the circumstances, might involve elements of State aid.[11] On 24 May 1989 the procedure under Article 93(2) was concluded with the adoption of the decision contested in this action. As emerges from the portion of the contested decision already referred to, the Commission took the view that the loans in question did indeed constitute State aid incompatible with the common market because the Commission had not been informed of them in advance and because they constituted an infringement of the conditions laid down in the decision of 17 December 1986 and particularly of the condition that no further aid in whatever form was to be provided for the State-owned aluminium industry until the end of 1988.[12] The Commission required the Italian Government to recover the aid granted to the recipient undertakings, Aluminia and Comsal,[13] and expressly prohibited the conversion of the loans into equity capital.[14]

Are the loans in question State aid within the meaning of Article 92(1) of the EEC Treaty?

5. In support of its application for a declaration that the contested decision is void, the Italian Government claims that the Commission's statement of the reasons on which its decision was based was incomplete and erroneous in contending that the interest-free loans to be converted into equity capital constituted State aid within the meaning of Article 92(1) of the EEC Treaty. The Italian Government points out in particular that in considering the loans in question the Commission took account only of the very critical financial and economic situation of the beneficiary undertakings in the period 1985 to 1987 and did not take into account the results recorded in 1988.[15] The Italian Government also claims that in

8 — Contested decision, Part II, second paragraph.

9 — Contested decision, Part II, third paragraph.

10 — Contested decision, Part IV, second paragraph.

11 — Contested decision, Part IV, third, fourth and fifth paragraphs.

12 — First paragraph of Article 1 of the contested decision.

13 — Second paragraph of Article 1 of the contested decision.

14 — Third paragraph of Article 1 of the contested decision.

15 — In 1988 Aluminia recorded a profit, whilst Comsal halved its losses as compared with those suffered in 1987. See also footnote 21 *infra*.

considering the loans in question the Commission took no account of the fact that they were not intended to cover losses suffered but to finance investments, as already stated. In the case of Aluminia those investments were meant for modernizing production and fell within the aluminium plan approved by the Commission. In the case of Comsal the investments were intended for modernization, extension and diversification of production and formed part of a restructuring plan specifically prepared for that undertaking. [16]

By failing to take these facts into account, the Italian Government states, the Commission wrongly came to the conclusion in the contested decision that a 'private shareholder' would not have granted the loans in question and that these loans therefore constituted State aid.

6. In addition the Italian Government suggests that the criterion used by the Commission of determining 'to what extent the undertaking would be able to obtain the sums in question on the private capital markets' is incompatible with the principle derived from Article 222 of the Treaty of equal treatment of private and public undertakings. The Italian Government points out that private undertakings belonging to a large group do not necessarily have to seek new resources on the capital market but 'may' resort to the financial resources of the group. By the application of the abovementioned criterion public undertakings belonging to an important group are, according to the Italian Government, being subjected to a 'test' to which private undertakings forming part of a large group are not subject, and the principle of equal treatment is not being observed.

16 — Application, pages 7 and 8.

7. That objection, in my opinion, is based on an erroneous interpretation of that criterion. As the Court has already stated in clear terms in its judgments in *'Meura'* and *'Boch II'*, and has confirmed in subsequent judgments, the criterion of the extent to which 'the undertaking would be able to obtain the sums in question on the private capital markets' means that 'the test is, in particular, whether in similar circumstances [to those in which the authority has provided new capital] a private shareholder . . . would have subscribed the capital in question'. [17] The criterion mentioned above therefore coincides with the criterion of the 'private shareholder'. In its recent judgment in Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603 *('Alfa Romeo')*, the Court elucidated this criterion of the private shareholder. The conduct of the private shareholder with which the authority's conduct is to be compared is actually that of a private holding company or group of undertakings similar in scale to the relevant public holding company, pursuing a structural, global or sectoral policy and guided by longer-term prospects of profitability (paragraphs 19 and 20). [18] The Court states expressly that in applying that criterion the Commission is not infringing Article 222 of the EEC Treaty (paragraph 24).

8. Contrary to the Italian Government's argument and as the Commission rightly observes, for a decision as to whether the loans in question constitute State aid it is not in itself important whether these loans are intended to finance investments or form part of a restructuring plan. What counts is

17 — Judgment in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263 *('Meura')*, paragraph 14; see also the recent judgment in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959 *('Tubemeuse')*, paragraph 29.

18 — See also my Opinion of 10 January 1991 in that case, paragraphs 11 and 12 [(1991] ECR I-1616).

whether a private investor would have been ready to subscribe new capital — in this case in the form of interest-free loans to be converted into equity capital — account being taken of *all* information allowing him to assess the economic and financial situation of the undertaking (including possibly the existence of a credible restructuring plan).[19] It is obvious that the answer to that question must be given in the light of the economic and financial situation of the beneficiary undertakings *at the time* the aid is granted. Let us try to reconstitute the position at that time.

9. When, in September 1987, EFIM granted the loans to aluminium and Comsal, the economic and financial situation of both undertakings was critical. It appears from the contested decision that *Aluminia* suffered losses of LIT 77 800 million in 1985, LIT 57 500 million in 1986 and LIT 98 300 million in 1987. Over the same years total indebtedness was LIT 943 300 million, or 155% of turnover, in 1985; LIT 989 300 million, amounting to 153% of turnover, in 1986; and LIT 1 189 800 million or 133% of turnover, in 1987. *Comsal* had losses of LIT 14 200 million in 1985, LIT 10 200 million in 1986 and LIT 9 400 million in 1987. Total indebtedness amounted to LIT 53 100 million, or 125% of turnover, in 1985, LIT 68 200 million, or 156% of turnover, in 1986 and LIT 72 800 million, or 142% of turnover, in 1987.[20]

19 — See for example the judgments already cited in *'Meura'*, paragraphs 15 and 16, *'Tubemeuse'*, paragraphs 26 (and 29), and *'Alfa Romeo'*, paragraphs 19 and 20, and the judgments in Case C-301/87 *France* v *Commission* [1990] ECR I-307 *('Boussac')*, paragraphs 39 and 40, and Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433 *(ENI-Lanerossi)*, I-1433 paragraphs 20 and 24.

20 — Contested decision, Part IV, fourth paragraph.

The Italian Government does not dispute these figures given in the contested decision but, as already stated, raises the point that in considering whether the loans in question constitute aid, account must also be taken of the results recorded in 1988.[21] The Commission does not agree: it states that in assessing an aid account may be taken only of economic and financial facts known at the time the aid was granted, namely in September 1987.

In my view the Commission is right. Since the Commission ought normally to have been notified of the aid in advance (but in this case was not) and the Commission's investigation would then have related to the facts known at that time, I think it is clear that in investigating aid which has not been notified the Commission must proceed on the basis of the situation at the time the aid was granted. If it were to take account of information which has meanwhile come to light, it would be favouring Member States which did not notify the aid in advance.[22]

10. However, the Italian Government claims that the better (or less unfavourable)

21 — It appears from the contested decision that at the time of the procedure under Article 93(2), that is, at the beginning of 1989 (see *infra* paragraph 12), the Italian Government had informed the Commission that it was expected that in 1988 the State aluminium industry, with the exception of Comsal, would show a profit of LIT 3 000 million, whereas the result expected for Comsal for that year would be a loss of LIT 4 600 million (contested decision, Part III, second paragraph).
In its application and reply the Italian Government confined itself to mentioning that in 1988 the State aluminium industry as a whole, including Aluminia, made a profit and that Comsal more than halved its loss (application p. 16 and reply p. 14). Other or more precise information about the recovery of the two undertakings is lacking.
The Italian Government stated at the hearing that in 1988 Aluminia had made a profit of 7 to 8 000 million.

22 — In the *Alfa Romeo* case too, in assessing aid granted in 1985 and 1986, the Court did not take into account the remarkable recovery of the motor-vehicle industry in subsequent years.

results for 1988 could already be *foreseen* in September 1987, that is, at the time the loan was granted, and that, as has been recognized by both the Commission [23] and the Court [24] on several occasions, in decisions about the subscription of capital a private investor will be guided above all by the undertaking's future prospects and the expected profitability of the funds subscribed.

This observation of the Italian Government seems to me correct in principle. In the application of the criterion of the 'private shareholder' account must indeed be taken of the future prospects of the undertaking concerned. However, the question is whether the improvement in the performance of Aluminia and Comsal shown in 1988 could already be foreseen in 1987 *and*, if so, whether the improvement which could then be foreseen was of such a kind as to encourage a reasonable investor to subscribe new capital despite the critical financial situation of the undertakings.

11. In assessing the legality of aid which has already been granted, it is naturally difficult to prove subsequently what could and what could not be foreseen at the time the aid was granted. That difficulty would not have arisen if the Italian Government had given notice of the aid at the right time and had provided the Commission with all information which would have allowed it to appraise at the appropriate time the future prospects of Aluminia and Comsal. In a case of this kind where the Member State has not given notice of the aid, and although the Commission is not thereby absolved from a basic investigation of the aid — which it did indeed effect in this case — the burden of proof as regards the foreseeability, at the time the aid was granted, of any favourable future prospects rests upon the Member State itself.

So in this case it was for the Italian Government to put forward, in the course of the administrative procedure under Article 93(2), facts which the Commission could then have taken into account in adopting the decision now at issue and from which it would have appeared convincingly that the improvement which appeared in 1988 in the performance of Aluminia and Comsal could have been foreseen in September 1987 *and* that the improvement then to be expected was such that a private investor would have subscribed new capital for these loss-making undertakings.

12. From the documents before the Court it cannot be seen that at the time of the procedure under Article 93(2) the Italian Government gave the Commission information about the foreseeability of favourable future prospects which might have justified the provision of aid from the point of view of a private investor. From the contested decision it appears only that the applicant informed the Commission in letters of 31 January and 17 March 1989 that the State aluminium industry, with the exception of Comsal, was expected — for the first time for many years — to record a profit of 3 000 million for 1988, whilst the expected result for Comsal for that year would show a loss of LIT 4 600 million. [25]

23 — See *inter alia* the contested decision, Part IV, third paragraph, and the Commission Communication to the Member States of 17 September 1984, *Bulletin of the EC*, No 9-1984, point 2.5.1.

24 — See for example the *Meura* judgment, paragraph 14, already cited in footnote 17.

25 — Contested decision, Part III, second paragraph.

However, it is not stated whether these results could already be foreseen in September 1987. Neither in its application nor in its reply does the Italian Government claim that it did actually make available to the Commission at the time of the procedure under Article 93(2) specific information with regard to the improved prospects for the future. It is true that at the hearing the Italian Government stated that in 1987 clear signs of a coming recovery in the aluminium sector could be seen. However, that was denied by the Commission and the Italian Government has provided no information showing the accuracy of its statement.

But even if it had done so, that still does not mean that that expected recovery would have been sufficient in magnitude or duration to induce a private investor to contribute new capital to undertakings which had been making a loss for so long. The prospect of a merely cyclical recovery of the sector is not enough for that.[26]

13. On the basis of the foregoing considerations I come to the conclusion that the Italian Government has not shown that the Commission wrongly failed to take account of the improvement in the performance of Aluminia and Comsal which, according to the Italian Government, could already be foreseen in 1987, and that the Commission therefore rightly concluded that the loans to be converted into equity capital constituted state aid within the meaning of Article 92(1) of the EEC Treaty.

26 — Nor did it appear subsequently that the recovery announced by the Italian Government did in fact lead in subsequent years to a lasting recovery of Aluminia and Comsal. As already stated in footnote 21, the Italian Government stated at the hearing that in 1988 Aluminia made LIT 8 000 million profit, which is not impressive when it is realized that in the period 1982-87 that undertaking made a loss of almost 1 000 000 million and a loss of 98 300 million for 1987 alone.

Ought the Commission to have considered whether Article 92(3)(c) of the EEC Treaty is applicable in this case?

14. In support of its application for a declaration that the contested decision is void, the Italian Government further claims that the statement of the reasons on which the decision is based is defective because the Commission did not consider whether the aid granted was justified on the basis of Article 92(3)(c) of the EEC Treaty. The Italian Government points out that the aid envisaged under the aluminium plan had been justified by the Commission on the basis of Article 92(3)(c) of the EEC Treaty and in that regard the Commission had stated in its decision of 17 December 1986 that the aluminium plan contributed to the general restructuring of the aluminium sector.[27] But the Italian Government observes that the aid to Comsal and Aluminia was part of that restructuring effort. Yet the Commission, after coming to the conclusion that the aid in question exceeded the maximum of the aid already approved, did not consider whether the loan to Comsal and Aluminia, just like the aid envisaged under the aluminium plan, might still be justified on the basis of Article 92(3)(c) of the EEC Treaty. The Italian Government admits that the decision of 17 December 1986 contained by implication an unfavourable assessment of the permissibility of further aid, but takes the view that the Commission should nevertheless have examined the aid in question in the light of Article 92(3)(c) of the EEC Treaty. It puts forward three arguments on this point.

First the Italian Government claims that it is not the purpose of decisions taken on the basis of the first subparagraph of Article

27 — Eleventh paragraph of the decision of 17 December 1986, Annex II to the defence.

93(2), like the contested decision, to find that obligations flowing from a prior decision, in this case the decision of 17 December 1986, have not been fulfilled. For such a finding the Commission must, under the second subparagraph of Article 93(2), refer the matter to the Court direct. Secondly, according to the Italian Government, the decision of 17 December 1986 does not prohibit it from providing further aid but simply requests it not to do so. Thirdly, it adds, the said decision could not possibly involve an absolute prohibition of future aid. Any new aid must be investigated in the light of its purpose and of the economic and market situation at the time it is granted.

15. Before this argument is considered it must be stated here that at no time during the administrative procedure under Article 93(2) of the EEC Treaty did the Italian Government claim that the aid to Aluminia and Comsal should be examined in the light of Article 92(3)(c) of the EEC Treaty. Nor did it then advance any facts which might be relevant or helpful for that purpose. According to the Court's consistent case-law the legality of a contested decision is to be assessed in the light of the information available to the Commission when the decision was adopted. [28] That is in itself sufficient to conclude that this argument cannot lead to a declaration that the contested decision is void.

16. Nevertheless, I shall still discuss the Italian Government's arguments briefly and associate myself with a number of observations made by the Commission.

As far as the first argument is concerned it must be observed that under the first subparagraph of Article 93(2) the Commission is empowered and required to decide whether an aid is or is not compatible with the common market having regard to Article 92 and that in doing so the Commission must consider all the legal and factual circumstances surrounding that aid (such as the decision of 17 December 1986). [29]

As regards the second argument, we must bear in mind the fact that the Commission decision of 17 December 1986 is not a negative decision but a conditionally positive decision which for that reason took the form of a letter to the Italian Minister for Foreign Affairs. Such letters are naturally couched in diplomatic terms, which does not mean that the request must not be regarded as prohibiting the granting of aid.

And as regards the third argument, the position is that it was only if new facts had arisen since the decision of 17 December 1986 that the Commission was required to consider the aid to Aluminia and Comsal in the light of Article 92(3)(c) of the EEC Treaty rather than in the light of the conditions laid down in that decision. The Italian Government correctly states that the decision of 17 December 1986 could not involve an absolute prohibition of *all* future

28 — See for example the *Meura* judgment, paragraph 16, already cited in footnote 17.

29 — See the judgment in Case 47/69 *France* v *Commission* [1970] ECR 487, paragraph 7.

aid. Indeed, new facts may arise, in which case the legality of the aid will have to be assessed in the light of those facts. In the present case, however, the Italian Government in no way suggests that any new facts have arisen. Moreover, even if it had done so, the Italian Government could not simply have ignored a prohibition of further aid. In that case too it would have had to notify the Commission of the aid to Aluminia and Comsal and inform it of the new facts and could not provide the aid before the Commission had given its decision on the legality of the aid.

Conclusion

17. I propose that the Court should dismiss the application for a declaration that the contested decision is void and order the Italian Government to pay the costs.