JUDGMENT OF THE COURT
30 June 1992 *

In Case C-47/91,

Italian Republic, represented by Professor Luigi Ferrari Bravo, head of the Department for Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, assisted by P. G. Ferri, Avvocato dello Stato, acting as Agent, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adelaïde,

applicant,

v

Commission of the European Communities, represented by A. Abate, Principal Legal Adviser, acting as Agent, with an address for service at the office of Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg, Luxembourg,

defendant,

APPLICATION for the annulment of the letter of 23 November 1990 in which the Commission of the European Communities notified the Italian Government of its decision to initiate the procedure provided for in Article 93(2) of the Treaty in respect of the decision of the Italian authorities of 12 April 1990 to grant aid to Italgrani SpA,

THE COURT,

composed of: O. Due, President, R. Joliet, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Diez de Velasco, M. Zuleeg and J. L. Murray, Judges,

* Language of the case: Italian.

Advocate General: W. Van Gerven,
Registrar: J. A. Pompe, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 4 February 1992,

after hearing the Opinion of the Advocate General at the sitting on 18 March 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 31 January 1991, the Italian Republic sought under Article 173 of the EEC Treaty the annulment of the Commission's decision to initiate the procedure provided for in Article 93(2) of the Treaty, which was notified to it by a letter of 23 November 1990.

2 It is clear from the documents before the Court that Italian Law No 64/86 of 1 March 1986 on aid to the Mezzogiorno established an aid scheme for the Mezzogiorno for a nine-year period. In accordance with Article 93(3) of the Treaty, that scheme was submitted to the Commission which — at least in so far as concerns the provisions under which the aid was subsequently granted to Italgrani — approved it in Decision 88/318/EEC of 2 March 1988 on Law No 64 of 1 March 1986 on aid to the Mezzogiorno (OJ 1988 L 143, p. 37) (hereinafter 'decision approving the general Italian scheme'). Article 9 of that decision however required Italy to comply with the Community legislation and codes then in force or to be introduced in the future to control aid to particular sectors of industry or agriculture and fisheries.

3 Following that decision, the Italian authorities granted specific aid to Italgrani, a cereal processor based in Naples. That aid formed the subject-matter of a 'programme contract' within the meaning of Law No 64/86 of 1 March 1986 made between the Minister responsible for aid in the Mezzogiorno and Italgrani and ratified on 12 April 1990 by the Interministerial Committee for the Coordination of Industrial Policy (hereinafter 'CIPI').

4 That contract, which consisted in an integrated production programme based on cereals, fruits, soya and beet, had various facets: the construction of industrial installations, the construction of research centres, the implementation of research projects and industrial staff training. The structure of the aid which it set up varied depending on the sector concerned: capital subsidies, subsidized interest rates or reduced rate financing. The aid envisaged for Italgrani came to a total of LIT 522 300 000 000 and was intended to finance investments totalling LIT 964 500 000 000.

5 On 26 July 1990, following a complaint lodged by Casillo Grani, a competitor of Italgrani, the Commission requested the Italian authorities to let it have some information about the aid.

6 On 7 September 1990 the Italian authorities notified the CIPI's decision of 12 April 1990. Additional information was provided at a meeting on 28 September 1990 and by letters of 4 and 14 October 1990.

7 By letter of 23 November 1990, the Commission indicated to the Italian Government its decision to initiate the procedure provided for in Article 93(2) of the Treaty with respect to all the aid granted to Italgrani except that concerning agricultural alcohol and pig-breeding and gave that Government notice to submit its comments. The Commission considered that on the basis of an initial review of the documents submitted the aid did not appear to qualify for any of the derogations

in Article 92(3)(a) and (c) of the Treaty. In the grounds given for the decision, it stated moreover that it had doubts as to the Italian Government's compliance with the two reservations which it had imposed in the decision approving the general Italian scheme. The first concerned the 'intensity levels' of the aid, the second the exclusions and limits which are the subject-matter of Article 9 of that decision and are to be applied when the aid concerns the products referred to in Annex II to the Treaty. The letter of 23 November 1990 also 'brought to the attention of' the Italian Government that 'under Article 93(3) of the EEC Treaty, proposed measures may not be put into effect until the procedure provided for in Article 93(2) has resulted in a final decision.'

8 The Member States and other interested parties were informed of the initiation of the procedure provided for in Article 93(2) of the Treaty by publication of the decision in the *Official Journal of the European Communities* (OJ 1990 C 315, p. 7, and OJ 1991 C 11, p. 32). They were invited to submit their comments within four months.

9 This action is brought against the letter of 23 November 1990. The Italian Government considers that the 'programme contract' concluded with Italgrani and ratified on 12 April 1990 by the CIPI merely constituted the implementation of the aid scheme established by Italian Law No 64/86 and approved by the Commission in its abovementioned Decision 88/318. Accordingly, the Commission should have confined itself to ascertaining that the conditions imposed in the decision approving the general Italian scheme had been complied with, and was not entitled to conduct a complete new review of the aid in the light of the Treaty rules. The contested decision, in so far as it purports to revoke Decision 88/318, should accordingly be annulled. The Italian Government stresses that the application does not impugn the Commission's assessments of the compatibility of the aid with the Treaty. It considers that the content and purpose of those assessments are only preparatory aspects of the final decision.

10 In support of its application, the Italian Government puts forward various pleas including infringement of essential formalities, infringement of the principles of

the protection of legitimate expectations and legal certainty, and misuse of powers, the latter to be assessed by reference both to Article 175 of the Treaty and to Article 93.

11 With regard to the first plea, the Italian Government considers that a revocatory measure must contain an express statement of its reasons and be signed by the same authority as adopted it. Those requirements are not satisfied in this case. On the second plea, the Italian Government considers that after the decision approving the general scheme it was entitled to consider itself authorized to take the measures called in question by the Commission. By initiating a new procedure involving the re-examination of authorized aid and thus the revocation of the authorization, the Commission has for no valid reason infringed the principles of the protection of legitimate expectations and legal certainty. As for the misuse of powers, the Italian Government submits first that Article 175 did not require the Commission to react to Casillo Grani's complaint. In reality the Commission availed itself of the request to take action sent to it by that company in order to initiate a procedure which it had neither the power nor the duty to undertake. The grounds relied on by the Commission cannot justify initiating a new procedure under Article 93 of the Treaty. In order to take such action, it was not sufficient that the Commission had doubts as to the Italian Government's compliance with the first reservation imposed by the Commission in the decision approving the general scheme. As for the second reservation, there is no basis for it in that decision.

12 By a document dated 9 April 1991, the Commission raised an objection of inadmissibility under Article 91(1) of the Rules of Procedure of the Court of Justice. The Court decided to rule on that preliminary objection without considering the merits of the case.

13 With respect to the admissibility of the action, the Commission submits that the contested decision is a preparatory measure and as such is not actionable under Article 173 of the Treaty. In reply to the Italian Government, which asserts that the contested measure has a revocatory effect and therefore amounts to a decision, the Commission states that the procedure initiated by that measure concerns unauthorized aid, or more specifically aid which is being incorrectly applied within the meaning of Article 93(2).

14 Secondly, the Commission maintains that the obligation to suspend payment of the proposed aid may not be taken into account in deciding on the admissibility of the action, since it is an inescapable consequence which the Treaty attaches to initiating the procedure provided for in Article 93(2) of the Treaty.

15 Finally, the Commission states that if the action were held admissible the system of supervision established by Article 93 of the Treaty would be altered. First, the Commission would be deprived of the means of investigating and intervening in the case of Member States which grant specific aid within the framework of a general scheme previously authorized by a Commission decision. The Court would then be required to decide whether aid which had not been thoroughly and definitively reviewed by the Commission was compatible with the Treaty. The Commission finally is concerned that a favourable ruling on admissibility may precipitate a proliferation of actions for annulment of decisions initiating the procedure under Article 93(2).

16 In support of admissibility of the action, the Italian Government argues that the contested measure is on the contrary actionable under Article 173 of the Treaty. Apart from the fact that it revoked Decision 88/318, it prevented the payment of aid to Italgrani, the effect of which was seriously to impede implementation of the Italian Government's economic and social policy for the Mezzogiorno. Contrary to the Commission's argument that suspensory effect is not an inescapable consequence of the Treaty since the Commission deliberately reconsidered its Decision 88/318, which had approved the general aid scheme set up by the Italian Government.

17 Reference is made to the Report for the Hearing for a fuller account of the relevant legislation, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

18 It is clear from the arguments put forward by the Italian Government that the action for annulment concerns only the Commission's decision to initiate the procedure provided for in Article 93(2) of the Treaty with respect to the aid granted to Italgrani, in so far as it revokes the earlier decision approving the general Italian scheme, but not in so far as it contains assessments of the compatibility of the aid with the Treaty. The review by the Court will accordingly be limited to the former aspect of the decision.

19 In order to rule on the admissibility of the action, it should first be noted that a measure may be contested under Article 173 of the Treaty only if has legal effects (see the judgment in Case 22/70 *Commission* v *Council* [1971] ECR 263, (the '*ERTA* case').

20 In this case, it should be pointed out at the outset that the decision to initiate the review procedure provided for in Article 93(2) of the Treaty, which was notified to the Italian Government by the letter of 23 November 1990, prohibited the Government from paying the proposed aid to Italgrani before the procedure had resulted in a final decision.

21 Notwithstanding the Commission's argument to the contrary, that prohibition is the result of a deliberate decision by it. That becomes clear if the contested measure is placed in the context of the whole system of supervision of aid established by Article 93.

22 The rules of procedure which the Treaty lays down vary according to whether the aid constitutes existing or new aid. While the former is subject to Article 93(1) and (2), the latter is governed by Article 93(2) and (3).

23 With respect to existing aid, Article 93(1) empowers the Commission to keep it under constant review in cooperation with the Member States. In the context of that review, the Commission is to propose to those States any appropriate measures required by the progressive development or by the functioning of the common market. Article 93(2) then provides that if after giving notice to the parties concerned to submit their comments the Commission finds that aid is not compatible with the common market having regard to Article 92, or that such aid is being misused, it is to decide that the State concerned shall abolish or alter such aid within such period as may be determined by the Commission.

24 As for new aid, Article 93(3) provides that the Commission is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The Commission then conducts an initial review of the aid proposed. If at the end of that review it considers a proposal to be incompatible with the common market having regard to Article 92, it must without delay initiate the contentious procedure provided for in Article 93(2). In such a case, the final sentence of Article 93(3) prohibits the Member State concerned from implementing the proposed measures until that procedure has resulted in a final decision. New aid is accordingly subject to the Commission's preventive control and in principle may not be granted until that institution has declared it to be compatible with the Treaty.

25 It follows from the foregoing that the effects of the decision giving notice to the parties concerned and initiating the procedure under Article 93(2) differ depending on whether the aid in question is new aid or existing aid. In the former case the State is prevented from implementing the aid proposal submitted to the Commission; that prohibition does not, however, apply where the aid is existing aid.

26 In this case, the Commission decided to treat aid as new aid which, the Government regarded as existing aid because it had been granted under Italian law No 64/86 which had been approved by a Commission decision. It cannot therefore

be considered that in this case suspension of payment of the aid follows automatically from the Treaty. Since it involves a choice by the Commission of the applicable rules of procedure, the contested decision to initiate the Article 93(2) procedure has legal effects.

27 Secondly, it must be established that the contested decision is not simply a preparatory step, in which case an action against the decision in which the procedure culminates would ensure sufficient protection against any unlawfulness (see the judgment in Case 53/85 *Akzo Chemie* v *Commission* [1986] ECR 1965).

28 It should be noted that the irreversible consequences of a delay in paying aid due to the prohibition in the final sentence of Article 93(3) could not be eradicated by a decision that the aid is compatible with the Treaty or by proceedings brought against a Commission decision that it is incompatible.

29 In addition, where the measures categorized by the Commission as new aid have been implemented, the legal effects of that categorization are definitive. It is clear from the judgment in Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires* v *French State* [1991] ECR I-5505 that even a final decision by the Commission declaring the aid compatible with the common market could not regularize *ex post facto* the implementing measures which would have to be deemed to be adopted in breach of the prohibition laid down in the final sentence of Article 93(3).

30 It must accordingly be concluded that the decision at issue, involving the choice by the competent institution of a review procedure a feature of which is the suspension of payment of the aid contemplated, is an actionable decision under Article 173 of the Treaty.

31 In reply to the Commission's objection that there is a risk of prejudging arguments on the compatibility of the aid with the Treaty, it must also be stated that in the course of the review of the merits of these proceedings it will be for the Court alone to decide whether aid granted pursuant to a general scheme already approved by the Commission constitutes new aid subject to the prohibition in Article 93(3) of the Treaty, where the Commission considers that such aid was granted in contravention of the conditions imposed by the decision approving the scheme.

32 In the light of the foregoing, the objection of inadmissibility raised under Article 91(1) of the Rules of Procedure of the Court of Justice must be dismissed and the action must be declared admissible.

Costs

33 The costs should be reserved.

On those grounds,

THE COURT

hereby:

1. Dismisses the objection of inadmissibility raised by the Commission of the European Communities;

2. Orders that the action on the merits shall proceed;

3. Orders that the costs be reserved.

Due Joliet Schockweiler Grévisse

Kapteyn Mancini Moitinho de Almeida

Rodríguez Iglesias Díez de Velasco Zuleeg Murray

Delivered in open court in Luxembourg on 30 June 1992.

J.-G. Giraud
Registrar

O. Due
President