decision in which the procedure culminates would ensure protection against any unlawfulness. 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 holding that it is incompatible. In addition, where the measures categorized by the Commission as new aid have been implemented, the legal effects of that categorization are definitive in the sense that it is not possible to regularize *ex post facto* the measures implementing the aid contravening the prohibition laid down in the final sentence of Article 93(3).

For that reason such a decision is an actionable measure under Article 173 of the Treaty.

REPORT FOR THE HEARING
in Case C-47/91 *

I — Facts

Italian Law No 64 of 1 March 1986 instituted an aid scheme for the Mezzogiorno which was approved by the Commission, subject to compliance with certain conditions, in its Decision 88/318/EEC of 2 March 1988 (OJ 1988 L 143, p. 37).

Following that decision, pursuant to Law No 64/86 the Italian authorities decided to grant aid to Italgrani SpA, a cereal processor based in Naples. The aid formed the subject-matter of a framework contract ratified on 12 April 1990 by the CIPI (Interministerial Committee for the Coordination of Industrial Policy).

On 26 July 1990, following complaints made by Casillo Grani, a competing undertaking, and an association of starch and cereal producers, the Commission asked the Italian authorities for information concerning the aid.

The Italian authorities submitted their reply on 7 September 1990. Supplementary information was provided in the course of a

* Language of the case: Italian.

meeting on 28 September 1990 and by letters dated 4 and 14 October 1990.

By a letter of 23 November 1990 the Commission then informed the Italian Government of its decision to initiate the procedure provided for in Article 93(2) in respect of aid granted to Italgrani. After brief examination of the documents submitted to it, the Commission considered that the aid did not seem to qualify for any of the derogations referred to in Article 92(3)(a) and (c) of the Treaty.

II — Course of the procedure

On 31 January 1991 the Italian Government brought an action claiming that the Court should:

— annul the letter of 23 November 1990 concerning the aid granted to Italgrani SpA;

— order the defendant to pay the costs.

By a document lodged on 28 February 1991, pursuant to Article 91(1) of the Rules of Procedure, the Commission asked the Court to decide the question of admissibility as a preliminary issue, to hold the application inadmissible and to order the applicant to pay the costs.

In its observations lodged on 11 April 1991, the Italian Government requested the Court to dismiss the objection of inadmissibility entered by the Commission.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure on the objection of inadmissibility alone without any preparatory inquiry. It did, however, ask the Commission one question. The reply to that question appears in Point IV of this Report.

III — Arguments put forward by the parties on the admissibility of the application

In reliance on the judgment in Case 60/80 *IBM* [1981] ECR 2639, the *Commission* takes the view, first, that the decision to initiate the procedure provided for in Article 93(2) is not a measure open to challenge under Article 173 of the Treaty. The decision is of a preparatory character and contains no element of a decision liable to affect the applicant's legal position.

As regards the preparatory character of the decision, the Commission makes the preliminary point that the Italian Government's action relates not to the central part of the letter containing the statement of legal and economic grounds on which the contested decision is based, but to its introductory part. In that part the Commission describes the installations, investments and production planned by Italgrani and it interprets Article 9 of Decision 88/318/EEC. The Commission emphasizes that the Italian Government took

that course because, on its own admission, in the central part of the letter 'content and objective [were] preparatory to a decision'.

Contrary to the Italian Government's assertions, the Commission's letter of 23 November 1990 cannot be analyzed as producing the implied revocation of Decision 88/318/EEC of 2 March 1988 by which the Commission approved general Italian Law No 64. According to the Commission the review procedure that it initiated is directed not against aid already authorized but against aid which *prima facie* was granted in breach of the conditions which it laid down in its decision of 2 March 1988. It may therefore be a case where 'aid is being misused' under Article 93(2) of the EEC Treaty.

On that same point, the Commission adds that as a general rule revocations may not be implied but must be expressed in strict compliance with the proper form.

Similarly, the Commission considers that the requirement that payment of the planned aid be suspended does not confer on its letter the character of a decision open to challenge pursuant to Article 173 of the Treaty. That requirement does not result from an act of will on the part of the Commission but is the consequence attached by Article 93(3) of the Treaty to the opening of the procedure provided for in the previous paragraph. Moreover, the Commission is obliged to initiate that procedure every time that it entertains doubt as to the compatibility of aid with the Treaty. In support of the latter assertion, the Commission refers to the judgment in Case 84/82 *Federal Republic of Germany* v *Commission* [1984] ECR 1451.

When a contested act has merely a strictly preparatory character, any alleged procedural irregularity should be pointed out by the applicant in an action brought against the final decision. This was stated by the Court in the *IBM* judgment cited above.

Secondly, the Commission draws the Court's attention to the consequences of a decision finding the action brought by the Italian Government to be admissible. Those consequences are of a triple order.

First, it would disregard the division of supervisory powers between the Court and the Commission established in the matter of aid by the Treaty. As the Court itself pointed out in the *IBM* judgment, the Court would have to arrive at a decision on questions which had not yet been the subject of a full and final examination by the Commission. The result would be to 'anticipate the arguments on the substance of the case, confusing different procedural stages both administrative and judicial'.

Secondly there would be a proliferation of actions for the annulment of measures brought before the Court against decisions to initiate the procedure provided for in Article 93(2) of the Treaty. On that point the Commission observes that of 2000 aid cases registered by the Commission between October 1986 and September 1990 202 gave rise to the initiation of the said procedure

and only 48 of them resulted in a final, negative or conditional, decision.

Finally, were the position taken by the Italian Government to be adopted by the Court, the Commission would be deprived of a means of investigating and intervening with Member States when the latter granted individual aid under a general scheme which had previously been the subject of a decision of authorization. Thus there would be created a category of aid which the Commission could not declare either compatible or incompatible with Community law.

Thirdly, the Commission expresses doubt as to the purpose served by an action brought by the Italian Government when the latter has not at the same time requested that application of the contested act be suspended as provided for in Article 185 of the Treaty. It adds that in all probability the Commission's final decision will be given before the Court has delivered its judgment.

The *Italian Government* acknowledges that since it is directed against a measure initiating a procedure its action raises a question of admissibility.

Nevertheless it believes that because of the particular circumstances of the case the contested letter fulfils the conditions specified by the Court in the *IBM* judgment. The letter in question did revoke Decision 88/318/EEC approving the general Italian scheme on two points. First, it introduced an obligation of notification which was not there before; secondly it extended the scope of the review that the Commission may undertake.

It is clear from the Commission's observations that it takes exception to the fact that the Italian Government did not notify the aid in question to it. That obligation of notification was, however, completely absent from general decision 88/318/EEC. In that connexion the Italian Government states that when the Commission examines the compatibility of a general aid scheme with the Treaty and considers the compatibility of the scheme to depend on how it is applied, it may issue a provisional and conditional assessment and reserve the right to proceed to a specific examination of the implementing measures subsequently adopted. Those implementing measures are then made subject to a new and separate obligation of notification. Articles 8, 9 and 10 of Decision 88/318/EEC clearly attest to the fact that the Commission did not avail itself of that possibility in the present case. In Article 8 the Commission states that it will take a decision at a later date on various provisions of Law No 64, amongst which the provisions at issue in the present case are not included. Article 10 confines itself to requiring that the Italian authorities furnish a report each year concerning all measures adopted in application of the authorized scheme. Were that view not taken, general decision 88/318/EEC would be deprived of all practical effect.

The Italian Government considers moreover that in deciding to initiate the procedure provided for in Article 93(2) of the Treaty the Commission has greatly extended the scope of review of the aid. Whilst Article 9 of Decision 88/318/EEC merely requires

the Italian Government to comply with the Community legislation in force, the contested decision reopens the whole issue of the aid granted to Italgrani with regard to Article 93(3)(a) and (c) of the Treaty.

It cannot be contended against that position that revocation of a measure may not be presumed. According to the Italian Government such an argument would be valid only if it was 'legally impossible that the Commission act outside the rules'. In this case that remains to be proved.

Finally the Italian Government maintains that the decision to initiate the procedure provided for in Article 93(2) changes, as far as the Italian Government is concerned, the situation resulting from the general decision of approval 88/318/EEC. Since it is accompanied by a requirement that payment of aid be suspended it is a serious obstruction to the implementation of its policy for the benefit of the Mezzogiorno, with all the consequences that ensue for the traders concerned.

Contrary to what the Commission claims, the suspensory effect of the decision is not the inevitable consequence of applying the Treaty. The Commission deliberately reconsidered Decision 88/318/EEC, in which it had approved the general Italian scheme.

IV — The Commission's reply to the question posed by the Court

The Court asked the Commission to indicate the reasoning and the part of the decision which concerned the aid granted by the Italian Government to Italgrani at issue in this case.

It appears from the Commission's reply that the reason for its decision to initiate the procedure provided for in Article 93(2) of the Treaty is that after a preliminary examination of the documents furnished by the Italian Government it had doubts regarding the compatibility of the aid with Decision 88/318/EEC on two points:

1. The sectoral limits referred to in Article 9 of Decision 88/318/EEC of 2 March 1988

The Commission explains that the scope of that provision 'varies *ratione materiae*, that is to say in relation to the sectors whose products are intended to benefit from aid. That is why, when sectors are involved that are not the subject of a common policy (industrial sectors, for instance), the sectoral limits in question ensue from the scope of the derogations referred to in Article 92 of the Treaty and are fixed by the Commission, after consultation with the Member States, in acts commonly called "guidelines" or "codes" (see, for example, the aid guidelines in the synthetic fibres sector which are the subject of the action in Case C-313/90 *AKZO*). On the other hand, when the products concerned are listed in Annex II, the sectoral

limits are those which result from the rules on the common agricultural policy in the various sectors.'

The Commission continues in the following terms:

'Certainly in this context the term "rules" takes on a large and expanding dimension so as to include all measures (normative and non-normative), guidelines and possible interpretations in case-law such as will ensure the attainment of the economic objectives pursued by the Community legislature, and the Member States should *first and foremost* help to attain those objectives by promoting convergent action and at the same time abstaining from acts dictated by exclusively national interests: that is a requirement justified by the principle of the "*co-responsibility*" of the Member States in the implementation of the common agricultural policy and the obligations resulting from Article 5 of the Treaty.'

'Against that perspective there is no cause for surprise that the Commission has *doubts* regarding the compatibility of the programme initially planned by Italgrani which included *inter alia* significant aid for the production of 357 000 tonnes per annum of starch (or approximately 25% of present wheat starch production, at EEC level, or approximately 7% of total starch production in the European Community), on a market well-known to be characterized by significant excess of structural capacity. Analogous considerations may be applied to other products included in the initial investment programme such as glucose, isoglucose, meal, flour, etc., the EAGGF not having granted Community financing for those investments.'

'The Italian authorities, who take part in all the work of the STAR Committee (Committee for Agricultural Structures and Rural Development, set up by Regulation No 355/75) were and are perfectly aware of the rules governing investments in the various agricultural sectors: It was certainly for that reason that they did not submit to the EAGGF a request for assistance for Italgrani's initial programme.'

2. The maximum rates of the aid mentioned in the statement of the grounds of Commission Decision 88/318/EEC (Part I to end)

Those maximum rates are not given expressly in the body of the decision because they are details of the scheme accepted by the Italian authorities without dispute and consequently form part of the authorization of the scheme of Law No 64/86 as a whole.

Those doubts were expressed in points D, E, F, G and H of the letter of 23 November 1990.

Moreover, the Commission considered that the Italian authorities ought, in accordance

with Article 93(3), to have notified the aid programme for Italgrani.

On this point the Commission states:

'The telex sent by the Commission on 14 November 1986 (...) to the Italian authorities mentions in that connection a general obligation of prior notification relating not only to the case in point but to all investments in the agricultural and agri-foodstuffs sector eligible for the measures provided for under Law No 64/86. It should be noted that in 1986, when the procedure for examining the said law was under way, the Italian authorities were not able to provide appropriate information concerning the means whereby the aid to products in the agricultural and agri-foodstuffs sectors was to be applied in view of the fact that those means were linked to economic directives that the various regions of the Mezzogiorno had to adopt under their powers. The Italian authorities promised to transmit those directives to the Commission as soon as possible.'

The telex referred to in the preceding paragraph was annexed to the Commission's reply.

In respect of all these grounds the Commission refers to its letter of 23 November 1990 and to Commission Decision 91/474/EEC of 16 August 1991 (OJ 1991 L 254, p. 14) in which it approved aid granted to Italgrani after the Italian Government had modified it.

R. Joliet
Judge-Rapporteur