JUDGMENT OF THE COURT (Fifth Chamber)

19 September 2002 *

In Case C-114/00,

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by D. Triantafyllou, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision 2000/240/EC of 22 December 1999 concerning an aid scheme implemented by Spain to finance operating capital in the agricultural sector in Extremadura (OJ 2000 L 76, p. 16),

* Language of the case: Spanish.

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, D.A.O. Edward, A. La Pergola, M. Wathelet and C.W.A. Timmermans (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 24 January 2002,

gives the following

Judgment

1 By an application lodged at the Registry of the Court on 27 March 2000 the Kingdom of Spain brought an action under the first paragraph of Article 230 EC for annulment of Commission Decision 2000/240/EC of 22 December 1999 concerning an aid scheme implemented by Spain to finance operating capital in the agricultural sector in Extremadura (OJ 2000 L 76, p. 16, hereinafter 'the contested decision').

Community legislation

The EC Treaty

2 Article 87(1) EC provides:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

3 Article 87(3)(a) and (c) EC provides:

'The following may be considered compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

...

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest...

...'.

4 The first paragraph of Article 88(2) EC provides:

'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.'

5 Finally, Article 88(3) EC provides:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

The Notice on State aids: subsidised short-term loans in agriculture (crédits de gestion)

6 In the context of the implementation of the EC Treaty provisions on State aid, the Commission adopted Notice 96/C 44/02 on State aids: subsidised short-term

loans in agriculture (*crédits de gestion*), published in the *Official Journal of the European Communities* of 16 February 1996 (OJ 1996 C 44, p. 2, hereinafter 'the Notice on short-term loans'). The purpose of the Notice is to set out the conditions pursuant to which such aid may be granted in a sector — namely agriculture — which, the Commission acknowledges at point A of the Notice, may be at a relative disadvantage compared with operators elsewhere in the economy both in terms of their need for, and ability to finance, short-term loans.

7 Thus point B of the Notice on short-term loans makes it clear that aid must be granted to all operators in agriculture on a non-discriminatory basis irrespective of the agricultural activity (or activities) for which the operator needs short-term loans. The Commission states that it will, however, accept national aid for such loans which, at the discretion of the Member State concerned, excludes certain activities and/or certain operators, provided that the Member State is able to demonstrate that all such instances of exclusion are justified on the grounds that the problems of obtaining short-term loans faced by those excluded are inherently less significant than in the rest of the agricultural economy.

8 Next, the first paragraph of point C of the Notice states that the element of aid under any programme must be limited to that which is strictly necessary to compensate for the disadvantages suffered by the agricultural sector and that a Member State wishing to apply subsidised loans must quantify the disadvantages, always remaining within the limits of the gap between the interest rate paid by a typical agricultural operator and the interest rate paid on the open economy of the Member State concerned for short-term loans of a similar amount per operator, not linked with investments.

9 Finally, the second paragraph of point C of the Notice states that the amount of subsidised loans to any beneficiary must not exceed the cash flow shortfall arising from the fact that production costs are incurred before any income from output

sales is received. Whilst the Commission allows the amount to be fixed on a flat-rate basis, in no event may the aid be linked to particular marketing or production operations.

10 The Notice on short-term loans was implemented from 1 January 1996, but was suspended from July 1997 to June 1998 following problems of interpretation encountered by some Member States in applying point C. By a letter of 19 December 1997, the Commission informed the Member States that the rules laid down in the notice would be reapplied from 30 June 1998.

National law

11 With a view to implementing Law 4/92 of 26 November 1992 on the financing of the agricultural sector in Extremadura, the main purpose of which is to support the agricultural sector so as to compensate for the effects of the reform of the common agricultural policy, on 13 April 1993 the Junta de Extremadura adopted Decree 35/1993 on the financing of operating capital in the agricultural sector in Extremadura (*Diario Oficial de Extremadura* No 45 of 15 April 1993, p. 1027).

12 Article 1 of Decree 35/1993 states that the purpose of the decree is to provide financing, both at general and preferential rates, to meet capital requirements for a single marketing year in order to develop agriculture and food processing in Extremadura.

13 Pursuant to Article 2 of Decree 35/1993, the beneficiaries of the financing are farmers with agricultural holdings in Extremadura (Article 2(1)), agricultural cooperatives and other associations of producers (Article 2(2)), and processing undertakings in Extremadura entered on the agricultural trade register which have signed contracts approved by the Ministry of Agriculture with agricultural and livestock holdings in Extremadura for the supply of raw materials for industrial processing (Article 2(3)).

14 Article 3 of Decree 35/1993 provides that the aid is to take the form of an interest-rate rebate for loans lasting less than one year, with the amount of the rebate ranging from 0.5 to 5 percentage points, depending on the beneficiary.

15 As regards farmers with agricultural holdings in Extremadura, Article 3(1) of Decree 35/1993 provides that the interest-rate rebate is subject to a ceiling of five percentage points for farmers practising farming as their main occupation and four percentage points for other farmers. Where there is Community or State part-financing already available, the beneficiary must pay a minimum interest rate of 4 or 6%, depending on whether he practises farming as his main occupation or not.

16 Next, with regard to agricultural cooperatives and other associations, Article 3(2) of Decree 35/1993 provides that the interest-rate rebate is subject to a ceiling of one percentage point for the purchase of farming materials — with an additional 0.5 percentage points for the purchase of certified plants and seeds and a further 0.5 percentage points for the purchase of straight fertilisers — and five percentage points in the case of loans to provide operating capital for seasonal payments to member farmers.

17 Finally, as regards processing undertakings in Extremadura, Article 3(3) of Decree 35/1993 provides that the interest-rate rebate is limited to five percentage points for loans for the purchase of raw materials under approved contracts with farmers in the sectors selected every year by order of the Consejería de Agricultura y Comercial de la Junta de Extremadura (Article 3(3)(a)), and for loans to provide general operating capital, also in the sectors laid down each year by order of the Consejería (Article 3(3)(b)).

18 In addition Article 4 of Decree 35/1993 places ceilings on the aid provided for thereunder. For farmers with agricultural holdings in Extremadura, these are maximum amounts per hectare, product and animal (Article 4(1)). For agricultural cooperatives and other associations, they are the average value of farming materials purchased in the last three years plus 10% (Article 4(2)). For processing undertakings in Extremadura, they are the value of the loan as determined by the extent to which the approved contracts have been implemented (Article 4(3)).

19 On 29 September 1998, the Consejería de Agricultura y Comercial de la Junta de Extremadura adopted an order laying down, for the 1997/98 marketing year, detailed rules for application of Decree 35/1993 (*Diario Oficial de Extremadura* No 114 of 6 October 1998, p. 7412, hereinafter 'the 1998 Order'). That order lists the products that give rise to entitlement to the interest-rate rebate provided for by Decree 35/1993 when purchased for the purposes of processing by processing undertakings in Extremadura.

20 Thus, under Article 1(1) of the 1998 Order, processing undertakings in Extremadura are eligible for the aid provided for in Article 3(3)(a) of Decree 35/1993 if they purchase the following products for the purposes of processing: dried figs

and fig paste, peppers for the production of ground red pepper, Iberian swine, olives for the production of olive oil and tomatoes for dehydration other than powdered tomatoes.

21 Article 2 of the 1998 Order provides that the aid is to take the form of an interest-rate rebate of up to five percentage points but is only applicable to the value of the loan awarded to processing undertakings in Extremadura as determined by the extent to which approved contracts have been implemented.

22 Finally, Article 3(1) of the 1998 Order provides that the term of a loan giving rise to entitlement to an interest-rate rebate may not exceed one year.

Background to the dispute and the contested decision

23 Following the adoption of the 1998 Order, the Commission, which had not received notification under Article 93(3) of the EC Treaty (now Article 88(3) EC) of the aid scheme established by Decree 35/1993 and by that order, sent the Spanish authorities a letter on 8 February 1999 requesting confirmation of the existence of the aid and its implementation.

24 By a letter dated 26 February 1999, the Spanish Permanent Representation to the European Union sent the Commission the information it had requested. Attached to that letter were, *inter alia*, Decree 35/1993 and the 1998 Order, together with technical documentation describing the essential characteristics of the aid scheme.

That documentation made it clear *inter alia* that the purpose of the scheme was to encourage the economic development of Extremadura by strengthening existing relationships between growers and processors of agricultural products. The scheme, which was established for an indeterminate period, had an annual budget of ESP 107 million.

25 In the light of that information, the Commission had doubts as to the compatibility of the aid scheme with the rules in the Treaty, in particular Articles 28 EC, 29 EC and 87 EC, and informed the Kingdom of Spain by a letter of 4 June 1999 that it had decided to initiate the procedure provided for in Article 88(2) EC. It accordingly invited the Kingdom of Spain and other interested parties to submit any comments on the scheme within one month of, respectively, receipt of the letter of 4 June 1999 or its publication in the *Official Journal of the European Communities*.

26 Only the Kingdom of Spain submitted any comments on the aid scheme in question, by a letter of 19 July 1999.

27 It argued first of all that the aid scheme established by Decree 35/1993 was a non-discriminatory general scheme, providing reduced-rate seasonal loans to the whole agricultural sector in Extremadura. The scheme is applied annually by means of an order identifying the disadvantaged sectors and making payment of the aid conditional on the conclusion between the buyer and the seller of a contract approved by the Ministry of Agriculture. It thus guarantees growers a minimum price above the market price and ensures that processing undertakings obtain supplies of raw materials meeting minimum quality requirements.

28 The Spanish Government also argued that the sectors to which priority was given in this case were those producing products with a local or regional identity, or with particular characteristics conferred by their particular production or processing, and that the aid could not therefore affect free competition in Community trade in other products, as the measure was of purely regional scope.

29 The Spanish Government none the less pointed out that application of Decree 35/1993 had been suspended pending its repeal and replaced by a decree more in accord with the Commission's Notice on short-term loans.

30 The Commission was not convinced by the explanations proffered by the Spanish Government. It took the view in the contested decision that, since the aid provided for by Decree 35/1993 and the 1998 Order had not been notified in accordance with Article 88(3) EC, it had been granted illegally and was furthermore incompatible with the common market. That did not apply, however, to aid awarded before 30 June 1998 to farmers with agricultural holdings in Extremadura and agricultural cooperatives and other associations and to aid for potatoes other than for starch, horsemeat, honey, coffee, vinous alcohol, spirit vinegar and cork, as it related to products listed in Annex I to the Treaty not covered by a common organisation of the market.

31 In that regard, the Commission first of all held, at points 21 to 27 of the contested decision, that, in view of the considerable volume and value of trade between Spain and the other Member States, the aid in question could affect trade in agricultural products between the Member States because such trade is affected by aid which favours operators active in one Member State over those in others. The Commission pointed out, *inter alia*, that the measures in question had an immediate effect on the production costs of undertakings producing and

processing agricultural products in Spain, and that they therefore conferred on them an economic advantage over undertakings which did not have access to comparable aid in other Member States. It accordingly concluded that the aid scheme in question fell within the scope of Article 87(1) EC.

32 Secondly, the Commission found, at points 30 to 54 of the contested decision, that the aid scheme in question was not covered by any of the exemptions provided for in Article 87(3) EC. In that regard it advanced three separate arguments.

33 At paragraphs 31 to 50 of the contested decision, the Commission first of all took the view that the aid in question had not been granted as regional aid for new investment or to create employment, nor to provide horizontal compensation for shortcomings in infrastructures suffered by all the region's undertakings, but as operating aid for the agricultural sector. Such aid was incompatible with the common market because, firstly, it had no lasting effects on the development of the sector concerned, since its immediate effect disappeared with the measure itself, and, secondly, because a direct consequence of such aid was an improvement in the production and marketing opportunities of the operators concerned compared with other operators not receiving comparable aid both within the country and in the other Member States.

34 At points 40 and 41 of the contested decision the Commission none the less observed that the aid granted to farmers with agricultural holdings in Extremadura and to agricultural cooperatives and other associations before 30 June 1998 was undoubtedly covered by the exemption provided for in Article 87(3)(c) EC because it met the criteria laid down by the Commission for this type of aid.

35 That was not, however, the case for the period after 30 June 1998, because the aid concerned did not meet the requirements laid down in the Notice on short-term loans (points 43 to 49 of the contested decision).

36 The Commission found, firstly, that the aid was not granted to all operators in agriculture on a non-discriminatory basis since the aid scheme was implemented each year by means of an order stipulating the disadvantaged sectors which were eligible for aid.

37 Secondly, the Commission observed that the aid was not limited to that which was strictly necessary to offset the disadvantages suffered by the agricultural sector in Extremadura, since Decree 35/1993 fixes the interest-rate rebate on seasonal loans of between 0.5 and 5 percentage points on a discretionary basis according to the type of beneficiary.

38 Thirdly, the Commission stated that the aid scheme contained no measures to ensure that the subsidised loans granted to a beneficiary did not exceed the cash-flow shortfall arising from the fact that production costs are incurred before any income from output sales is received.

39 The Commission went on, at point 51 of the contested decision, to note that the aid provided for in Decree 35/1993 and the 1998 Order — with the exception of aid for the products set out at paragraph 30 of this judgment — related to products subject to a common organisation of the market, and that there were

clear limits on the powers of the Member States to intervene in the operation of such an organisation since common organisations of the markets have to be considered to be comprehensive and exhaustive systems which preclude Member States from adopting derogations or measures that conflict with them.

40 Finally, at paragraphs 42, 48 and 52 of the grounds of the contested decision, the Commission held that the aid granted to the processing undertakings in Extremadura effectively constituted a restriction on the free movement of goods between Member States in so far as, in order to receive the aid, the processors were obliged to enter into approved contracts for the supply of raw materials with agricultural and livestock holdings in Extremadura. In the Commission's view that requirement constituted a restriction on the import of those raw materials from other Member States, contrary to Article 28 EC.

41 In those circumstances, the Commission decided that the Kingdom of Spain should abolish the aid scheme in question, with the exception of the aid granted to farmers with agricultural holdings in Extremadura and agricultural cooperatives and other associations before 30 June 1998, and adopt all measures necessary to recover the aid granted illegally from the beneficiaries.

The application

42 The Kingdom of Spain advances four pleas in support of its application for annulment of the contested decision. By those pleas it alleges, first of all, a manifest error of assessment on the part of the Commission based on the fact that

some of the aid declared incompatible by it was not paid; secondly, infringement of Articles 87(1) EC and 253 EC; thirdly, infringement of Articles 87(3)(a) EC and 253 EC; and, fourthly, infringement of Article 87(3)(c) EC.

Second plea

43 By its second plea, which is best considered first, the Spanish Government claims that the contested decision infringes Articles 87(1) EC and 253 EC because trade between Member States is not affected by the aid in question and the Commission did not provide an adequate statement of reasons in regard to the alleged effect on trade.

First limb of the second plea: no effect on inter-State trade

44 By the first limb of its second plea, the Spanish Government argues that trade between Member States is not affected by the aid scheme in question. First of all, the total amount of aid is small and furthermore is divided among a large number of beneficiaries. Secondly, the aid in question only indirectly constitutes aid for agricultural production and processing, because the purpose of Decree 35/1993 and the 1998 Order was not so much to encourage such production and processing as to ensure stability in relations between producers and processors. Thirdly, with the exception of the Kingdom of Spain itself, no State, undertaking or trade association submitted observations on the aid covered by the contested decision in the course of the procedure initiated by the Commission in respect of that aid.

45 The Spanish Government argues more particularly in that connection that the total amount of expenditure in aid was ESP 83 million and that the number of beneficiaries was fewer than 50. It concludes from those figures that the aid in question did not have a direct effect on production costs in the sector to which it was addressed and compares them to the sums of aid that are exempted from prior notification pursuant to Community *de minimis* provisions, particularly that laid down in Commission Notice 94/C 368/05 entitled 'Community guidelines on State aid for rescuing and restructuring firms in difficulty' published in the *Official Journal of the European Communities* of 23 December 1994 (OJ 1994 C 368, p. 12, hereinafter 'the Guidelines on firms in difficulty').

46 As regards the Spanish Government's first argument that the overall amount of aid in question is small, and that it is divided among a large number of beneficiaries, each of whom received a negligible sum in national or Community terms, it is settled case-law of the Court that the relatively small amount of aid, or the relatively small size of the undertaking which receives it, does not as such exclude the possibility that intra-Community trade may be affected (see, *inter alia*, Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 43 ('*Tubemeuse*'); Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 42; and Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 86). Other factors may be decisive when assessing the effect of aid on trade, such as whether the aid is cumulative and whether the undertakings that receive it are operating in a sector that is particularly exposed to competition.

47 It is clear that the agricultural sector falls within the latter category, and that there is intense competition in the sector between growers in the Member States whose produce is traded within the Community. Spanish growers play a major part in that competition because they export substantial quantities of agricultural produce to other Member States.

48 It must also be observed that the Council has adopted, for most of the products referred to in Annex I to the Treaty, regulations on the common organisation of the markets. Those regulations are intended specifically to provide a reference framework in the agricultural sector by encouraging fair trading and market transparency in intra-Community trade.

49 In those circumstances, the grant of even a small amount of aid will affect trade between Member States.

50 It is true, as the Commission itself has acknowledged, *inter alia*, in the Guidelines on firms in difficulty, and in its Notice 96/C 68/06 on the *de minimis* rule for State aid, published in the *Official Journal of the European Communities* of 6 March 1996 (OJ 1996 C 68, p. 9, hereinafter 'the Notice on the *de minimis* rule for State aid'), which applied at the material time, that where the amount of aid is very small it may not have an appreciable effect on trade and competition between Member States, and is therefore exempt from the requirement of prior notification to the Commission.

51 Nevertheless, it is clear both from paragraph 2.3 of the Guidelines on firms in difficulty and from the fourth paragraph of the Notice on the *de minimis* rule for State aid that the *de minimis* rule does not apply to sectors which are subject to special Community rules on State aid, and in particular the agriculture and fisheries sectors. The Spanish Government's reliance on that rule is therefore unfounded in this case.

52 In the light of all of the foregoing considerations, the Spanish Government's second argument that the aid in question is negligible must therefore be rejected as unfounded.

53 Nor, secondly, can the Spanish Government's argument that the aid in question only constitutes indirect aid towards agricultural production or the processing thereof be upheld, since the aid still takes the form of a reduction in production costs for both farmers with agricultural holdings in Extremadura and processing undertakings in Extremadura which conclude approved contracts for the purchase of raw materials with those farmers, and is therefore likely to affect trade in agricultural products.

54 Finally, with regard to the Spanish Government's argument that no third parties commented on the aid held incompatible with the common market, that fact is not such as to affect the validity of the contested decision.

55 Whilst Article 88(2) EC requires the Commission to seek comments from interested parties before it reaches a decision, it does not prevent the Commission from determining aid to be incompatible with the common market in the absence of any such comments. That circumstance alone does not preclude the possibility that trade between Member States might be affected by the aid.

56 In view of the foregoing considerations, the first limb of the second plea must therefore be rejected in its entirety.

Second limb of the second plea: defective statement of reasons regarding the finding that there was an effect on inter-State trade

57 By the second limb of its second plea, the Spanish Government essentially argues that, even if the aid in question did affect trade between Member States, the contested decision does not in any event satisfy the requirement to provide a minimum statement of reasons on this point. According to the Spanish Government, the only argument used by the Commission to attempt to show that trade is affected is that appearing at point 25 of the contested decision, where the Commission gives the figures for the volume and monetary value of trade between Spain and the other Member States. It submits that that statement of reasons is plainly inadequate, because the Commission does not identify either the nature of the products being traded or the market allegedly affected by the aid in question.

58 The Spanish Government contends, firstly, that if the Commission's figures relate to agricultural products in general, the Commission does not correctly identify the market allegedly affected by the aid in question, because the aid to Extremadura processors only relates to certain agricultural products determined annually by a ministerial order, such as, for the marketing year 1997/1998, the 1998 Order.

59 Secondly, it argues that the Commission does not, in the contested decision, state the share that Extremadura produce represents in terms of the national market as a whole or the Community market, and that the Commission is wrong to take the view that the relevant geographical market is the whole of Spain.

60 According to the Spanish Government, there can be no doubt that it was the Commission's intention to disguise the insignificance of the aid system as regards the Community, by choosing a larger relevant market than that corresponding to the products in question, purely so as to justify the applicability of Article 87(1) EC to this case.

61 The Spanish Government submits that a mere reference to the fact that a Member State imports and exports products which are not even identified is certainly not sufficient to show that trade between Member States is affected. The statement of reasons is all the more inadequate given that the aid to farmers and processors in Extremadura is merely indirect: Decree 35/1993 and the 1998 Order encourage not so much agricultural production and processing as the stability of relations between growers and processors, by ensuring continuity of supply for processors.

62 It should first of all be observed that the obligation to provide a statement of reasons laid down in Article 253 EC is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. Accordingly, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (see, *inter alia*, Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35 and *Italy* v *Commission*, cited above, paragraph 48).

63 Furthermore, that requirement must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in

obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see *France* v *Commission*, cited above, paragraph 36, and *Italy* v *Commission*, cited above, paragraph 48).

64 In the light of that case-law, it does not appear that the Commission failed in this case to fulfil its obligation to provide an adequate statement of reasons in the contested decision for the finding that the aid in question affects trade between Member States.

65 First of all, at point 25 of the contested decision, the Commission provides figures on the total volume and monetary value of trade between Spain and the other Member States. It is clear from this information that a sizeable portion of Spanish agricultural products is exported to other Member States. Whilst the Commission did not provide detailed figures on exports of the products to which the aid scheme in question applies — and in particular figures on exports of goods referred to in Article 1 of the 1998 Order — it none the less noted that the overall context in which the scheme operates is one of a high level of trade between Member States of products in the agricultural sector.

66 Next, at point 26 of the contested decision, the Commission refers to the direct and immediate effect of the aid measures on the production costs of undertakings producing and processing agricultural products in Spain and the economic advantage that they confer on such undertakings over those that do not have access to comparable aid in other Member States.

67 At points 21 to 23 of the contested decision, the Commission also refers explicitly to Article 36 EC, and to the fact that there is a common organisation of the market for the majority of the agricultural products listed in Annex I to the Treaty. The Spanish Government could therefore not be unaware that the Commission's assessment of the aid scheme in question necessarily had to be viewed in the context of rules that benefit both trade in products covered by such common organisations of the markets and the development and maintenance of effective competition at Community level.

68 Finally, whilst it is common ground that in the statement of reasons for its decision the Commission is bound to refer at least to the circumstances in which aid has been granted, where those circumstances show that the aid is such as to affect trade between Member States (Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18), it is not bound to demonstrate the real effect of aid already granted. If it were, that requirement would ultimately favour Member States which grant aid in breach of the duty to notify, laid down in Article 88(3) EC, to the detriment of those which do notify aid at the planning stage (see, *inter alia*, to that effect, Case C-301/87 *France* v *Commission* ('*Boussac*') [1990] ECR I-307, paragraph 33).

69 In those circumstances the second limb of the second plea must also be rejected.

70 It follows that the Spanish Government's second plea in law cannot be upheld.

Third and fourth pleas

71 By its third plea, which it is best to consider next, the Spanish Government alleges that the contested decision infringes Articles 87(3)(a) EC and 253 EC.

72 It argues, first of all, that the Commission failed to take account of the fact that the aid in question might fall within the exemption provided for in Article 87(3)(a) EC because it was specifically intended to promote the economic development of an area — Extremadura — where the standard of living is abnormally low and where there is serious under-employment. According to the Spanish Government, those factors were sufficient for the Commission to declare the aid compatible with the Treaty because — unlike the exemption provided for in Article 87(3)(c) EC — in this case it is not necessary to show that the aid does not adversely affect trading conditions to an extent that is contrary to the common interest. In that context, the Spanish Government claims more particularly that the Commission refused to apply the exemption provided for in Article 87(3)(a) EC on the ground that the aid in question constituted operating aid to the agricultural sector, even though the aid, in particular the aid for marketing, was explicitly authorised under the Commission's Communication 88/C 212/02 on the method for the application of Article [87] (3) (a) and (c) to regional aid, published in the *Official Journal of the European Communities* of 12 August 1988 (OJ 1988 C 212, p. 2, hereinafter 'the Communication on regional aid').

73 Secondly, the Spanish Government claims that, by not basing its refusal to authorise the aid in question on Article 87(3)(a) EC, despite the fact that the aid — especially the aid to Extremadura processing undertakings — had an obvious social purpose that was apparent from both Decree 35/1993 and the 1998 Order, the Commission failed to fulfil its obligation to provide a statement of reasons as required by Article 253 EC.

74 By its fourth plea, which was raised in the alternative, the Spanish Government claims infringement of Article 87(3)(c) EC, in that the Commission failed to take account of the fact that, even if Article 87(3)(a) EC is not applicable, the aid in question could still fall within the exemption provided for in Article 87(3)(c). In that connection it points out that, contrary to what the Commission says in the contested decision, the requirements laid down in the Notice on short-term loans were met in this case.

75 Since the Commission's refusal to apply the exemptions provided for by Article 87(3)(a) and (c) EC was based on broadly similar grounds, the Spanish Government's third and fourth pleas should be considered together.

76 As regards, first of all, the Spanish Government's argument that the Commission did not take account of the social purpose for the aid scheme and failed to give reasons for its refusal to apply the exemption provided for in Article 87(3)(a) EC, it is sufficient to note that the Commission set out in detail at points 30 to 54 of the contested decision the reasons why the scheme could not benefit either from the exemption provided for in Article 87(3)(a) EC or from that provided for in Article 87(3)(c) EC.

77 This limb of the third plea must therefore be rejected as unfounded.

78 As regards, secondly, the Spanish Government's arguments that it is possible to apply the exemption provided for at Article 87(3)(a) EC to the aid scheme in question, or at least that laid down in Article 87(3)(c) EC, it must first of all be

noted that the Court has repeatedly held that a programme of regional aid may fall within one of the exemptions in Article 87(3)(a) and (c) EC in certain circumstances.

79 In that connection it has stated that the use of the words 'abnormally' and 'serious' in Article 87(3)(a) shows that the exemption concerns only areas where the economic situation is extremely unfavourable in relation to the Community as a whole. The exemption in Article 87(3)(c), on the other hand, is wider in scope inasmuch as it permits the development of certain areas in a Member State which are disadvantaged in relation to the national average without being restricted by the economic conditions laid down in Article 87(3)(a), provided such aid 'does not adversely affect trading conditions to an extent contrary to the common interest' (see, *inter alia*, *Germany* v *Commission*, cited above, paragraph 19; Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 15; and *Italy* v *Commission*, cited above, paragraph 77).

80 Conversely, the fact that that condition is not mentioned in the exemption under Article 87(3)(a) implies greater latitude in granting aid to undertakings in regions which do not meet the criteria laid down in that exemption (see *Spain* v *Commission*, cited above, paragraph 16).

81 Nevertheless, the difference in wording between Article 87(3)(a) EC and Article 87(3)(c) EC cannot lead to the conclusion that the Commission should take no account of the Community interest when applying Article 87(3)(a), and that it must confine itself to verifying the specifically regional impact of the measures involved, without assessing their impact on the relevant market or markets in the Community as a whole. In such cases the Commission is bound not only to verify that the measures are such as to contribute effectively to the economic development of the regions concerned, but also to evaluate the impact

of the aid on trade between Member States, and in particular to assess the sectorial repercussions they may have at Community level. As the Court has already held, Article 87(3) EC gives the Commission a discretion the exercise of which involves economic and social assessments which must be made in a Community context (see, *inter alia*, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 24; Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18; and *Spain* v *Commission*, cited above, paragraph 18).

82 It does not appear in this case that the Commission exceeded the limits of that discretion in finding that the aid scheme in question could not benefit from any of the exemptions referred to in Article 87(2) and (3) EC.

83 Accordingly, in taking the view, first of all, that the aid in question was not conceived as regional aid for new investment or to create employment nor to provide horizontal compensation for infrastructural deficiencies suffered by all the region's undertakings, but as operating aid for the agricultural sector, the Commission did not misclassify the aid. The aid granted according to the quantities of agricultural products bought from Extremadura growers by processing undertakings in the region for local processing reduces the production costs of both growers and processors in the region and thus enables them to avoid expenses which they would normally have had to incur as part of their day-to-day running costs.

84 As the Spanish Government has provided no evidence that the aid in question was by its nature likely to make an effective and lasting contribution to the economic development of Extremadura, the Commission did not exceed the limits of its discretion in finding, on that basis, that the aid in question was incompatible with

the common market. It must in particular be pointed out that, in a case where the Court was asked to rule on an aid scheme in the wine sector in Italy, it held that the Commission had shown that the aid in question, which was granted without any specific conditions and solely according to the quantities used, had to be regarded as operating aid to the undertakings concerned and that, as such, it affected trading conditions to an extent contrary to the common interest (Case C-86/89 *Italy* v *Commission* [1990] ECR I-3891, paragraph 18).

85 As the Spanish Government rightly pointed out in its application, it is true that operating aid may be authorised in certain very well defined circumstances including in particular, in accordance with the Communication on regional aid, to support very small undertakings in the poorest parts of the Community operating in traditional sectors that are failing to prosper without outside help.

86 However it must be observed that that Communication was no longer in force when the 1998 Order was adopted, as it was replaced on 10 March 1998 by a notice 98/C 74/06 from the Commission entitled 'Guidelines on national regional aid' published in the Official Journal of the European Communities of 10 March 1998 (OJ C 74, p. 9) which, at paragraph 2, explicitly excludes the agricultural sector from its scope. The Spanish Government cannot therefore rely on the exemption provided for in the Communication on regional aid in respect of operating aid to contest the finding that aid granted after 30 June 1998 was incompatible with the common market.

87 Aid granted to Extremadura processing undertakings before that date was found incompatible with the common market on the sole ground that it constituted a restriction on the free movement of goods between Member States because it was limited to Extremadura processors who entered into approved contracts with

agricultural and livestock holdings in Extremadura for the supply of raw materials for processing. In those circumstances there is no need to consider the possible applicability to that aid of the Communication on regional aid.

88 Next, by stating at points 22, 23 and 51 of the grounds of the contested decision that the aid provided for by Decree 35/1993 and the 1998 Order, with the exception of aid for potatoes other than for starch, horsemeat, honey, coffee, vinous alcohol, spirit vinegar and cork, related to products subject to a common organisation of the market, the Commission explained the context in which the aid was granted and the limits laid down as regards the Member States' right to intervene.

89 It is settled case-law that, once the Community has, pursuant to Article 34 EC, legislated for the establishment of a common organisation of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it (see, *inter alia*, to that effect, Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraph 56, and Case 177/78 *McCarren* [1979] ECR 2161, paragraph 14).

90 As stated at paragraph 48 above, the Council has adopted, for most of the products referred to in Annex I to the Treaty, regulations on the common organisation of the market. Since those regulations establish an integrated regulatory framework that already contains measures of financial support for the sectors concerned, a Member State may not unilaterally award aid to those sectors, even if the aid is intended to facilitate the purchase of certain specific

products for industrial processing and even though the quantity is subject to a ceiling. According to settled case-law, it is for the Community to seek solutions to the problems which might arise in the context of the common agricultural policy once, as in this case, it has established common organisations of the market in a number of sectors (see, *inter alia*, to that effect, Case 90/86 *Zoni* [1988] ECR 4285, paragraph 26, and *Italy* v *Commission*, cited above, paragraph 19).

91 It is true that the Notice on short-term loans permits Member States to award aid to the agricultural sector in certain circumstances.

92 As regards the condition in the Notice on short-term loans whereby the aid must be awarded to all operators in the agricultural sector on a non-discriminatory basis, the Spanish Government maintains, first, that products are determined to be eligible for aid only in the case of aid to operators that enter into contracts for the processing of raw materials and, secondly, that there is no discrimination in this case because the compulsory condition for eligibility for aid is not that the aid must relate to one sector or another but that operators in a given sector must have agreed to have their contractual relations approved. Any sector with an approved regional contract may therefore claim entitlement to the aid.

93 As regards the other requirements in the Communication on short-term loans, namely, first, that the aid must be confined to that which is strictly necessary to offset the disadvantages suffered by the agricultural sector and, secondly, that the amount of subsidised loans to any beneficiary must not exceed the cash flow shortfall entailed by financing production before produce is sold, the Spanish Government argues that that is precisely the position here since, in its view, Decree 35/1993 lays down minimum interest which the beneficiary must pay and limits the amount of the subsidy. The interest-rate rebate relates exclusively to financing the purchase of agricultural products under approved contracts.

94 In that connection the Spanish Government has not demonstrated that the conditions for the application of the Notice on short-term loans are met in this case.

95 First of all it must be borne in mind that, as regards the processing industries in Extremadura, the aid in question was not awarded on a non-discriminatory basis since only the sectors selected annually by ministerial order are entitled to interest rebates.

96 It is true, as the Commission itself pointed out at paragraph 35 of the contested decision, that the Notice on short-term loans does not preclude the possibility that certain activities and/or certain operators may be excluded from the interest-rate rebate, provided that the Member State is able to demonstrate that the problems of obtaining short-term loans faced by those excluded are inherently less significant than in the rest of the agricultural economy.

97 That has not been shown in this case and it must therefore be held that the first condition for that Notice to apply is not met.

98 Secondly, it must be observed that, whilst it is true that Decree 35/1993 lays down the minimum interest which the beneficiary of the aid has to pay and establishes a ceiling to the amount of the interest-rate rebate, it does not contain any mechanism for ensuring that the aid will be limited to that which is strictly necessary to compensate for the disadvantages suffered by the agricultural sector.

Decree 35/1993 and the 1998 Order thus contain no mechanism for verifying that the rebate granted does not exceed the gap between the interest rate paid by a typical agricultural operator in Spain and the interest paid in the open economy of that Member State for short-term loans of a similar amount per operator, not linked to investments.

99 Thirdly it must be pointed out that the Spanish Government has not shown that the aid scheme in question contains a mechanism for ensuring that the amount of subsidised loans to any beneficiary does not exceed the cash flow shortfall arising from the fact that production costs are as a rule incurred before income from output sales is received.

100 In those circumstances the Spanish Government cannot rely on the Notice on short-term loans.

101 Nor, finally, did the Commission err in stating that the aid scheme in question constituted an actual restriction on the free movement of goods and, more particularly, an infringement of Article 28 EC.

102 Whilst processing undertakings in Extremadura are entitled to buy raw materials in other countries or areas for processing — just as farmers in other regions of the Community are entitled to sell their products to processing industries in Extremadura — Decree 35/1993 and the 1998 Order do not provide for the award of aid in such circumstances.

103 The aid scheme in question therefore establishes a financial incentive to buy raw materials from agricultural and livestock holdings in Extremadura. In those circumstances, it must be regarded as a measure having equivalent effect to a quantitative restriction on imports, which is prohibited by the Treaty (see, to that effect, Case 249/81 *Commission* v *Ireland* [1982] ECR 4005, paragraphs 20 to 30).

104 In the light of all of the foregoing considerations, it must be held that the Commission did not exceed the limits of its discretion in finding that the aid scheme in question could not benefit from any of the exemptions provided for in Article 87(2) or (3) EC. It is settled case-law that State aid, certain conditions of which contravene other provisions of the Treaty, cannot be declared by the Commission to be compatible with the common market (see, *inter alia*, Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889, paragraph 20; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 78; and Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175, paragraph 41).

105 It follows that the third and fourth pleas, in their entirety, cannot be upheld.

First plea

106 By its first plea, which may be considered last, the Spanish government argues that, by requiring the aid awarded after 30 June 1998 to be reimbursed, the Commission made a manifest error of assessment which is such as to vitiate the contested decision because no aid was paid after that date. It submits, first, that the features of the system instituted by Decree 35/1993, in particular the requirement to conclude contracts approved by the Ministry of Agriculture, lead

to the conclusion that the 1998 Order necessarily refers to rights that arose in 1997, that is, before the final date laid down by the Commission in the contested decision. It also maintains that the Junta de Extremadura automatically suspended the aid relating to rights that arose in the marketing year 1998/1999, that is, those arising under contracts signed in 1998.

107 In that connection it must be borne in mind first of all that abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is incompatible with the common market. A Member State may not claim that such a measure is disproportionate to the objectives of the Treaty in regard to State aids nor rely on the legitimate expectations of the undertaking that receive the aid in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 87 and 88 EC would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive of their effectiveness decisions taken by the Commission under provisions of the Treaty (see, *inter alia*, the judgment in *Spain* v *Commission*, cited above, paragraphs 47 and 48).

108 Secondly it is also clear from the case-law of the Court that the legality of a decision adopted by the Commission in the area of State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (see, *inter alia*, Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 16).

109 In this case, there is no indication in the file before the Court that, when it adopted the contested decision, the Commission was in possession of information suggesting that no aid had been paid after 30 June 1998. The 1998 Order, which laid down detailed rules for the application of Decree 35/1993 for the marketing

year 1997/1998, was itself only adopted on 29 September 1998, that is, nearly three months after the date set by the Commission for reapplication of the Notice on short-term loans, whereas the Spanish Government acknowledged in its reply that Decree 35/1993 was still in force on 4 June 1999, the date of the decision to open the procedure provided for in Article 88(2) EC.

110 In those circumstances, it cannot be claimed that the Commission committed a manifest error of assessment in requiring repayment of the aid granted after 30 June 1998, since it was not impossible that aid might have been granted after that date under the abovementioned national provisions.

111 It is true, as the Spanish Government argued in its comments submitted following initiation of the procedure provided for in Article 88(2) EC, that application of Decree 35/1993 had been suspended pending its repeal and replacement with a decree more in accord with the Notice on short-term loans. However, as the Commission rightly pointed out in its defence, the Spanish Government's comments did not indicate the date on which that suspension took effect. In those circumstances, when it adopted the contested decision the Commission could not have known for sure whether aid had been granted after 30 June 1998 or not.

112 In the light of the foregoing considerations, the first plea advanced by the Spanish Government must therefore also be rejected.

113 Since the Kingdom of Spain has been unsuccessful in all of its pleas, its action must be declared unfounded.

Costs

114 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for. Since the Commission has applied for costs, the Kingdom of Spain, which has been unsuccessful, must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the Kingdom of Spain to pay the costs.

Jann Edward La Pergola

Wathelet Timmermans

Delivered in open court in Luxembourg on 19 September 2002.

R. Grass P. Jann

Registrar President of the Fifth Chamber