OPINION OF ADVOCATE GENERAL JACOBS
delivered on 17 February 1993 *

My Lords,
Members of the Court,

1. In this case Italy seeks the annulment of a Commission decision which declared State aid introduced by Italy to be incompatible with the common market within the meaning of Article 92(1) of the EEC Treaty. The background to the case is undoubtedly tragic: in November 1980 a severe earthquake shook southern Italy, causing considerable loss of life and enormous damage to property. A further earthquake occurred in February 1981. In order to repair the damage to the economy of the regions affected the Italian authorities provided, by Law No 219/81 of 14 May 1981, for the granting of aid for reconstruction and development. Article 32 of that Law required the regions of Basilicata and Campania to identify certain areas in which industrial investment should be encouraged. It appears that 20 industrial development zones were identified for that purpose, not just in Basilicata and Campania but also in Apulia. Investment projects in those areas costing up to LIT 20 thousand million were eligible for aid amounting to as much as 75% of the cost of the investment (Article 32, fourth paragraph, in conjunction with Article 21, of Law No 219/81). Aid was to be granted only to undertakings which applied for it by 31 December 1982. The Commission did not oppose those measures.

2. By Law No 64/86 of 1 March 1986 Italy adopted a general scheme of aid in favour of southern Italy. That scheme was notified to the Commission, as required by Article 93(3) of the Treaty. The Commission approved large portions of the scheme by Decision 88/318/EEC of 2 March 1988 on aid to the Mezzogiorno (OJ 1988 L 143, p. 37). In particular, the Commission approved maximum aid levels ranging from 28.07% to 73.78% 'net grant equivalent'.

3. By Decree-Law No 8/87 of 26 January 1987 (later converted into Law No 120/87 of 27 March 1987), Italy revived the aid provisions of Law No 219/81. Under Article 8(2) of Law No 120/87, applications for aid were to be submitted by 30 June 1987. Law No 120/87, in conjunction with Decree-Law No 474/87, made a number of important changes in comparison with the pre-existing law, including the following:

(a) Whereas under Law No 64/86 the maximum percentage of an investment project that could be financed by aid ranged from 28.07% to 73.78%, the limit was now

* Original language: English.

raised to 75% for investment projects located in the commune of Senise (Article 3(5) of Law No 120/87) and for investment projects undertaken by small and medium-sized undertakings in areas of southern Italy affected by earthquakes between 1980 and 1986 (Article 6(14 ter) of Law No 120/87).

(b) The territorial scope of the aid provided for in Article 32 of Law No 219/81 was extended beyond the 20 industrial development zones to which it originally applied (Article 8(7) of Law No 120/87 and Article 10(3) of Decree-Law No 474/87).

(c) The investment ceiling previously set at LIT 32 thousand million (originally LIT 20 thousand million) for investment projects financed under Article 32 of Law No 219/81 was raised to LIT 50 thousand million (Article 8(2 bis) and (2 ter) of Law No 120/87).

4. The Italian Government does not appear to have informed the Commission spontaneously of the alterations made to its existing aid scheme by Law No 120/87 (and by Decree-Law No 474/87). It was of course required to do so by Article 93(3) of the Treaty. It was only in response to a letter from the Commission dated 2 May 1988 that the Italian Government, on 19 July 1988, transmitted a copy of Law No 120/87 to the Commission. On 15 November 1988 the Commission requested additional information, which the Italian authorities supplied on 6 January 1989. The Commission considered that the measures in question were *prima facie* incompatible with the common market and initiated the procedure laid down in Article 93(2) of the Treaty on 18 October 1989. That procedure concluded with the adoption of Commission Decision 91/175/EEC of 25 July 1990 concerning aid provided for in Italian Law No 120/87 to assist certain areas of the Mezzogiorno affected by natural disasters (OJ 1991 L 86, p. 23). That decision (hereafter 'the contested decision') found that the measures provided for in Law No 120/87 and Decree-Law No 474/87 were illegal in so far as:

(a) Articles 3(5) and 6(14 ter) of Law No 120/87 increased to 75% the grants payable under Law No 64/86 to undertakings in areas of the Mezzogiorno affected by natural disasters (Article 1 of the contested decision);

(b) The aid provided for in Article 32 of Law No 219/81 was to be granted for investment outside the 20 industrial development zones originally specified (Article 2 of the contested decision);

(c) Article 8(2 bis) and (2 ter) of Law No 120/87 provided for the granting of aid in excess of LIT 32 thousand million (Article 3 of the contested decision).

Article 4 of the contested decision required the incompatible aid to be repaid within two months from the date of notification of the decision.

5. The contested decision was notified to the Italian Government on 2 October 1990. By an application lodged at the Registry of the Court on 11 December 1990 Italy sought the annulment of Articles 1 to 4 of the decision. The application is articulated in five separate submissions. The Italian Government's arguments may be summarized as follows:

(1) The contested decision is contrary to Article 92(3)(a) of the Treaty, which provides that aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered to be compatible with the common market. The Commission failed to recognize the importance of the landslide and seismic calamities that beset the regions concerned between 1980 and 1986 and stated no reasons for disregarding that factor. As regards the raising of the intensity of the aid to 75% under Article 6(14 ter) of Law No 120/87, the Commission neglected the fact that the benefit of that provision was confined to small and medium-sized undertakings. The increase was in any event slight, since the previous limit was set at 73.78%.

(2) The Commission failed to carry out a sufficiently thorough study of the effects on the region concerned of the natural disasters that occurred there. Its decision was based on a superficial and erroneous appraisal of the problem.

(3) Article 2 of the contested decision is contrary to the principle of proportionality in so far as it declares illegal the granting of aid outside the 20 industrial development zones originally specified. The Commission failed to take into account the fact that the territorial extension of the existing aid applied only to communes affected by earthquakes, to the commune of Senise (which had been affected by a landslide) and to mountain communities to which the disaster-struck communes belong. Thus the aid would in principle continue to benefit only areas affected by natural disasters. The Commission should in any event not have reached a negative decision on the basis of the general provisions of Law No 120/87 but should have postponed its final decision until specific implementing measures had been adopted. It would then have seen that the territorial extension was limited, reasonable and objectively justified.

(4) The raising of the investment ceiling from LIT 32 thousand million to LIT 50 thousand million merely reflects the fall in the value of the lira between 1982 and 1987.

(5) Article 4 of the contested decision, which requires the aid to be repaid within two months, is devoid of purpose since Italy

had informed the Commission that the aid scheme had not yet been implemented.

The first and second submissions

6. The first and second submissions are closely linked and were for the most part dealt with jointly in the written procedure. They are directed chiefly against Article 1 of the contested decision, which declared incompatible with the common market the increase in the maximum intensity of the aid to 75%; it will be recalled that that increase was effected by Article 3(5) of Law No 120/87, as regards the commune of Senise, and by Article 6(14 ter) of Law No 120/87, as regards investment projects undertaken by small and medium-sized undertakings in areas of southern Italy affected by earthquakes between 1980 and 1986. By the first submission Italy contends that the Commission committed an error of appraisal when it declared the measures in question incompatible with the common market and failed to state adequate reasons for certain aspects of the contested decision; in particular, it did not state why the landslide in Senise and the numerous seismic disturbances that occurred between 1980 and 1986 in the areas concerned by the decision were not serious enough to justify the aid measures in question. By the second submission Italy argues that the Commission failed to carry out a sufficiently thorough study of the problems encountered in the regions in question.

7. It is important to note that, although the aid measures in question were confined to areas afflicted by earthquakes and similar calamities, Italy is not invoking Article 92(2)(b) of the Treaty, which provides that 'aid to make good the damage caused by natural disasters or exceptional occurrences' is compatible with the common market. In fact, Italy expressly recognizes (see pp. 2 and 3 of the reply) that, since the object of the aid is development rather than reconstruction, it falls to be examined under Article 92(3)(a) of the Treaty. Under that derogation from the prohibition laid down by Article 92(1), aid may be considered to be compatible with the common market if it is intended to 'promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment'.

8. The Commission generally considers that the standard of living is abnormally low or that there is serious underemployment where gross domestic product or purchasing power standards (GDP/PPS) amount to 75% or less of the Community average (see Commission communication 88/C 212/02 on the method for the application of Article 92(3)(a) and (c) to regional aid: OJ 1988 C 212, p. 2). It generally regards 75% of 'net grant equivalent' of initial investment as the highest permissible aid intensity, but requires regional differentiation in aid intensity below that level depending on the kind, intensity or urgency of the regional problems *(ibidem)*. It was in accordance with those criteria that, as stated above, the Commission authorized maximum aid levels ranging from 28.07% to 73.78% net grant equivalent (depending on

the circumstances and the region) in Decision 88/318 relating to Law No 64/86 of 1 March 1986.

9. In the contested decision the Commission gave the following statement of reasons for its refusal to authorize an increase in the maximum aid level to 75% for investments in the commune of Senise and for investments undertaken by small and medium-sized undertakings in areas of southern Italy affected by earthquakes:

'The Commission takes the view ... that an increase in regional aid in areas affected by natural disasters may be justified, for limited periods, only if the natural disaster has brought about a major change in the socio-economic situation in the whole of a region or several regions, as was the case with the earthquakes which hit Irpinia in November 1980 and February 1981.

It was for this reason that it did not oppose the measures introduced for this purpose under Article 32 of Law No 219/81 directly after the earthquake took place.

Since the other earthquakes which occurred between 1980 and 1986 and the landslide at Senise were not of the same magnitude and [did not] bring about a major change in the socio-economic situation in the regions concerned, the Commission considers that there are no grounds for granting aid in excess of the amounts provided for in Article 9 of Law No 64/86 and that, consequently, the measures introduced under Articles 3(5) and 6(14 ter) of Law No 120/87 ... are incompatible with the common market within the meaning of Article 92(1) of the Treaty.'

10. The Italian Government does not seem to question the Commission's view that the increase in the level of aid for areas affected by natural disasters could only be justified if the disasters had brought about a major change in the socio-economic situation of the regions concerned. Instead, it criticizes the Commission for failing to explain why it came to the conclusion that no such change in the socio-economic situation was caused by the earthquakes that occurred between 1980 and 1986 and by the Senise landslide. But, as the Commission points out, the onus must be on the Italian Government to prove that the natural disasters did have the necessary effect on the regions in question. Without its being necessary to enter into the general issue of where the burden of proof lies when the derogation in Article 92(3)(b) is invoked, there are sound practical reasons why the burden of proof on this particular point must fall on the Italian Government; it is surely better placed than the Commission to prove, on the basis of statistics and other data, what effect a series of natural disasters had in certain regions of southern Italy.

11. The Italian Government has, however, done very little to prove that the natural disasters suffered by southern Italy between 1980 and 1986 caused a serious deterioration in the socio-economic situation of the regions in question. Admittedly, it produced over 400 pages of documents annexed to its reply but none of those documents adduces the necessary proof. Indeed, when the Italian Government was expressly asked by the

Court, in a written question, to indicate which parts of those documents were particularly significant, it could do no better than state:

'La documentazione esibita dal Governo italiano alla Commissione nel corso della procedura non contiene specifici elementi di apprezzamento circa l'aggravamento delle condizioni socio-economiche delle zone disastrate.' [1]

12. The Italian Government added that the aggravation of the economic situation as a result of earthquakes may be presumed on the basis of common experience. It also gave details, again in answer to a written question from the Court, of the earthquakes that struck various regions of southern Italy in 1982 and 1984; two reached grade VII on the Mercalli scale and one reached grade VI. It is true that earthquakes of that intensity can cause moderately severe damage to property (see *Encyclopaedia Universalis*, vol. 14, p. 842 et seq.). However, it seems to me that the Italian Government has not succeeded in showing that those earthquakes affected the economic structure of the regions in question so severely as to justify increasing the intensity of the generous aids already available under the existing law. I conclude therefore that, although the reasoning of the contested decision is somewhat laconic on this point, it was sufficient to justify the refusal to authorize increasing the intensity of the aid to 75%.

1 — 'The documentation produced by the Italian Government does not contain specific items with which to appraise the exacerbation of socio-economic conditions in the disaster-struck areas.'

13. Nor am I persuaded by the Italian Government's claim that the Commission failed to carry out a sufficiently thorough examination of the effect of natural disasters on the economy of the regions concerned. It will be clear from what I have said already that it was primarily incumbent on the Italian Government to carry out the necessary investigations and to show that the disasters had a particular effect on the economy of the regions concerned. The Italian Government has failed to produce the required data. The documents contained in Annex V to the reply are particularly revealing on this point. By a letter dated 15 December 1988, the Presidency of the (Italian) Council of Ministers passed on to the Ministry for the Mezzogiorno a request from the Commission for a description of the socio-economic situation in the areas covered by the aid scheme (in particular, the rate of unemployment, per capita income and the rate of industrialization). The Commission stated in the rejoinder that it had still not received the required information from the Italian Government.

14. The Italian Government contends further that the Commission disregarded the fact that the beneficiaries of Article 6(14 ter) of Law No 120/87 were exclusively small and medium-sized undertakings, for which more generous treatment is normally authorized. I do not see how that argument can succeed. The Commission is certainly entitled to adopt a relatively benign attitude towards aid which benefits small and medium-sized undertakings, but that does

not mean that it must systematically approve aid schemes which give preferential treatment to such undertakings. It is equally entitled, in the exercise of its discretion, to consider that the general scheme available to all undertakings is sufficiently generous and that there is no justification for granting even greater sums of aid to small and medium-sized undertakings.

15. The Italian Government also contended, in the application, that the increase in the intensity of the aid was insignificant, since the previous maximum aid level was 73.78%. However, as the Commission pointed out in the defence, the intensity of the aid varied under Law No 64/86 between 28.07% and 73.78%.

16. On the basis of the above considerations I conclude that the first and second submissions are unfounded.

The third submission

17. This submission is directed specifically against the second paragraph of Article 2 of the contested decision, which prohibited the aid provided for in Article 32 of Law No 219/81 in so far as it is granted for investment outside the 20 zones originally specified. The extension of the territorial scope of the aid was effected in particular by Article 8(7) of Law No 120/87 and Article 10(3) of Decree-Law No 474/87 (see section II, first paragraph, indent (c) of the contested decision).

18. Article 8(7) of Law No 120/87 provided that the industrial development zone of Calaggio, hitherto confined to Campania, was to be extended in the direction of Apulia; the region of Apulia was to determine the extent of the new zone within the limits of the communes bordering the existing zone. Article 10(3) of Decree-Law No 474/87 provided that investment projects referred to in Article 32 of Law No 219/81 which were deemed acceptable but unrealizable in so far as they extended beyond the areas there referred to might be undertaken in communes affected by natural disasters, in the commune of Senise and in mountain communities to which the communes affected by natural disasters belong, in accordance with a programme of localization which the regions of Campania and Basilicata were to lay down within 120 days of the entry into force of the law converting the decree-law into a law.

19. The Italian Government contends that the Commission breached the principle of proportionality and committed a misuse of power by prohibiting the extension of the territorial scope of the aid, in particular because the extension applies only to areas affected by natural disasters.

20. When the Italian Government alleges a breach of the principle of proportionality, it does not seem to be invoking that principle in the technical sense in which it is normally understood in Community law. Rather it seems to be contending simply that the extensions effected by Article 8(7) of Law No 120/87 and Article 10(3) of Decree-Law

No 474/87 were so limited in scope that it was unreasonable of the Commission to refuse to authorize them. The main defect in that argument is, as the Commission pointed out at the hearing, that it is impossible to determine the precise scope of the territorial extensions to the existing aid scheme made by the aforesaid provisions. As we have seen, those provisions required certain administrative authorities in Italy to define the additional zones within which investment projects could qualify for State aid. In a written question the Court expressly asked the Italian Government to state which regions were affected by the measures in question. The Italian Government did not give an answer to that specific question. The reason for its silence emerged at the hearing: the additional zones have not yet been defined, the explanation being — according to the Italian Government — that decisions defining those zones would have amounted to implementation of the aid measures and were therefore precluded by the last sentence of Article 93(3) of the Treaty once the Commission had initiated proceedings under Article 93(2).

21. I do not find that argument convincing. A decision defining the territorial scope of the aid scheme would not have constituted implementation of the proposed measures for the purposes of Article 93(3), last sentence. On the contrary, such a decision was essential in order to enable the Commission to determine whether the measures should be authorized or not. If the principle of transparency is to have any meaning at all it is surely necessary for the Commission to be informed in advance of the precise territorial scope of the proposed aid measures. In the absence of such information it is difficult to see how the Commission could be expected to do anything other than declare the measures incompatible with the common market. Though once again the reasoning given by the Commission is laconic in the extreme, I conclude that the third submission must be dismissed.

The fourth submission

22. The fourth submission is directed against Article 3 of the contested decision, which declared incompatible with the common market aid granted on the basis of Article 8(2 bis) and (2 ter) of Law No 120/87 in respect of investment in excess of LIT 32 thousand million. The last-mentioned provisions raised the investment ceiling laid down by Article 32 of Law No 219/81 to LIT 50 thousand million. Although the contested decision refers to the raising of the investment ceiling from LIT 32 thousand million to LIT 50 thousand million, it is clear from the Commission's reply to a written question put by the Court that the ceiling was originally fixed at LIT 20 thousand million by Article 32 of Law No 219/81 and that one year later it was raised to LIT 32 thousand million by Law No 187/82 of 29 April 1982. The Commission states that the alteration effected by Law No 187/82 was not notified under Article 93(3) of the Treaty and was never authorized by the Commission. However, that point is not mentioned at all in the contested decision, which appears to take for granted the legality of the ceiling of LIT 32 thousand million and condemns Italy for raising that ceiling to LIT 50 thousand million. Hence, the question now before the Court is whether it could have been incompatible

with the common market to fix the investment ceiling at LIT 50 thousand million in March 1987, given that the legality of a ceiling fixed at LIT 32 thousand million in April 1982 was recognized.

23. Italy contended, in its application, that the increase from LIT 32 thousand million to LIT 50 thousand million did not represent an increase in the real value of the aid but simply reflected the depreciation of the lira in the intervening period. It annexed to the application a document from the Istituto Nazionale di Statistica which appears to support that argument. The Commission does not deal with the substance of that argument but simply contends that it is inadmissible on the ground that it was never pleaded in the administrative procedure under Article 93(2). However, it should be noted that, according to the contested decision (section II, fifth paragraph), the Italian authorities stated in the course of that procedure 'that, after five years, it was felt necessary to adapt ["aggiornare" in Italian, the only authentic text of the decision] the original investment ceiling by increasing it to LIT 50 billion in order to make the aid provided for by Article 32 of Law No 219/81 sufficiently attractive'. The existence of inflation is such a well-known phenomenon that the Commission should have been able to infer from those words, in particular from the term 'aggiornare', that the Italian Government's essential argument was that it had done nothing more than index-link the aid scheme. The Commission should therefore have given reasons for not permitting such index-linking in the contested decision. No such reasons are given; instead, the contested decision simply states that 'other measures, such as the increase in the investment ceiling from LIT 32 billion to LIT 50 billion, would constitute a further exception to the general aid scheme introduced by Law No 64/86'. It follows from the inadequacy of that statement of reasons that the fourth submission must, in my view, succeed.

The fifth submission

24. This submission is directed against Article 4 of the contested decision, which required the aid declared incompatible with the common market to be repaid within two months from the date of notification of the contested decision. Italy contends that such a requirement was purposeless, since the Commission recognized (in section II, third paragraph, of the contested decision) that Italy had informed it that the measures in question had not been implemented.

25. This submission need not detain us for long. In fact, it would be sufficient to observe that, if Article 4 of the contested decision is without purpose, so too — by the same token — is the Italian Government's claim for the annulment of Article 4. It would be doubly otiose for the Court to annul a provision that is itself otiose.

26. The Commission contends, however, that it was necessary to include a provision requiring repayment of the illegal aids because there was no guarantee that the aid

would not be implemented and the potential recipients must not be allowed to acquire a legitimate expectation of being allowed to retain monies received. The simplest solution, in my view, is to apply a modicum of common sense to the construction of Article 4 of the contested decision and to read it as requiring any unlawful aid actually granted to be repaid.

Costs

27. It follows from the above that Italy should succeed on one of its five submissions and fail on the remaining four. It is appropriate, in my view, to order the parties to bear their own costs, in accordance with Article 69(3) of the Rules of Procedure.

Conclusion

28. Accordingly I am of the opinion that the Court should:

(1) declare void Article 3 of Commission Decision 91/175/EEC of 25 July 1990 concerning aid provided for in Italian Law No 120/87 to assist certain areas of the Mezzogiorno affected by natural disasters;

(2) dismiss the remainder of the application;

(3) order the parties to bear their own costs.