OPINION OF ADVOCATE GENERAL MISCHO

delivered on 11 October 2001 [1]

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1 — Original language: French.

1. The Italian Republic requests that the Court of Justice annul the decision of the Commission of the European Communities of 16 December 1998 approving amendments to the indicative allocation of Community initiatives ('the contested decision'), communicated to the Italian Republic by letter from the Secretary-General of the Commission of 19 January 1999, and of all measures on which it is based or with which it is connected.

I — Legislative background

2. Article 130a of the EC Treaty (now, after amendment, Article 158 EC) provides that the Community is to develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular, it is to aim at reducing disparities between the levels of development of the various regions and the backwardness of the least-favoured regions in order to promote its overall harmonious development. In accordance with Article 130b of the EC Treaty (now Article 159 EC) the Community is also to support the achievement of these objectives by the action it takes through the Structural Funds.

3. In order to achieve those aims and to regulate the tasks of the Funds, the Council adopted Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments,[2] as amended in particular by Regulation (EEC) No 2081/93 of 20 July 1993[3] (hereinafter 'Regulation No 2052/88'), and Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments,[4] as amended in particular by Regulation No 2082/93 of 20 July 1993[5] (hereinafter 'Regulation No 4253/88').

4. The first paragraph of Article 4(1) of Regulation No 2052//88 provides:

'Community operations shall be such as to complement or contribute to corresponding national operations. They shall be established through close consultations between the Commission, the Member State concerned and the competent authorities and bodies ... designated by the Member States at national, regional, local or other level, with all parties acting as partners in pursuit of a common goal. These consultations shall hereinafter be referred to as the "partnership". The partnership shall cover the preparation and financing, as well as

2 — OJ 1988 L 185, p. 9.
3 — OJ 1993 L 193, p. 5.
4 — OJ 1988 L 374, p. 1.
5 — OJ 1993 L 193, p. 20.

the *ex ante* appraisal, monitoring and *ex post* evaluation of operations.'

Objectives, the needs of rural development. ...

5. Under the third subparagraph of Article 5(5) of that regulation:

...

'Assistance [under the Structural Funds] shall be undertaken on the initiative of the Member States or of the Commission in agreement with the Member State concerned.'

For the period [1994–99], 9% of the commitment appropriations for the Structural Funds shall be devoted to funding assistance undertaken on the initiative of the Commission in accordance with Article 5(5).'

6. It is assistance provided on the initiative of the Commission that is known as 'Community initiatives'.

8. Last, according to Article 17(2) of Regulation No 2052/88:

7. Article 12(4) and (5) of the regulation provides as follows:

'In implementing assistance undertaken on its own initiative in accordance with Article 5(5), last subparagraph, the Commission shall be assisted by a management committee composed of representatives of the Member States.'

'The Commission shall, using transparent procedures, make indicative allocations by Member State for each of the Objectives 1 to 4 and 5(b) of the Structural Fund commitment appropriations taking full account, as previously, of the following objective criteria: national prosperity, regional prosperity, population of the regions, and the relative severity of structural problems, including the level of unemployment and, for the appropriate

9. Article 11(1) of Regulation No 4253/88, which deals with Community initiatives, provides:

'In accordance with Article 5(5) of Regulation (EEC) No 2052/88, the Commission

may, on its own initiative and in accordance with the procedures provided for in Title VIII, and after having informed the European Parliament accordingly, decide to propose to the Member States that they submit applications for assistance in respect of measures of significant interest to the Community. ...'

10. Article 20(1) of that regulation provides:

'Budgetary commitment shall be made on the basis of the Commission decisions approving the measures concerned. ...'

11. Moreover, according to Article 24 of that regulation, entitled '*Reduction, suspension and cancellation of assistance*':

'1. If an operation or measure appears to justify neither part nor the whole of the assistance allocated, the Commission shall conduct a suitable examination of the case in the framework of the partnership, in particular requesting that the Member State or authorities designated by it to implement the operation submit their comments within a specified period of time.

2. Following this examination, the Commission may reduce or suspend assistance in respect of the operation or measure concerned if the examination reveals an irregularity or a significant change affecting the nature or conditions for the implementation of the operation or measure for which the Commission's approval has not been sought.

[...]'

12. Article 25 of Regulation No 4253/88 provides:

'1. Within the framework of the partnership, the Commission and the Member States shall ensure effective monitoring of implementation of assistance from the Funds, geared to the Community support framework and specific operations (programmes, etc.). ...

...

3. Monitoring committees shall be set up within the framework of the partnership, by agreement between the Member State concerned and the Commission.

...

5. The monitoring committee shall, if necessary, without modifying the total amount of the Community contribution and within harmonised limits by Objective, adjust the procedure for granting assistance as initially approved, as well as, in conformity with available resources and budgetary rules, the financing plan envisaged, including any transfers between Community sources of finance and the consequential adjustment of the rates of assistance. The harmonised limits by Objective referred to above shall be established by the Commission according to the procedure referred to in Title VIII and included in the Community support frameworks.

These amendments shall be notified immediately to the Commission and the Member State concerned. They shall become effective as soon as confirmation has been provided by the Commission and the Member State concerned; such confirmation shall be given within a period of 20 working days from receipt of this notification, the date of which will be confirmed by the Commission by acknowledgment of receipt.

Other amendments required shall be decided by the Commission, in collaboration with the Member State concerned, after the monitoring committee has delivered its opinion.

...'

13. Article 9 of the Rules of Procedure of the Commission [6] provides:

'Minutes shall be taken of all meetings of the Commission.

The draft minutes shall be submitted to the Commission for approval at a subsequent meeting. The approved minutes shall be authenticated by the signatures of the President and the Secretary-General.'

14. Article 16 of the Rules of Procedure is worded as follows:

'Instruments adopted by the Commission in the course of a meeting shall be attached, in the authentic language or languages, in such a way that they cannot be separated, to the minutes of the meeting at which they were adopted. They shall be authenticated by the signatures of the President and the Secretary-General on the first page of the minutes.

6 — Rules of Procedure of the Commission of 17 February 1993 (93/492/Euratom, ECSC, EEC), OJ 1993 L 230, p. 15, as amended by Commission Decision of 8 March 1995 amending its Rules of Procedure (95/148/EC, Euratom, ECSC) (OJ 1995 L 97, p. 82).

Instruments adopted by written procedure shall be attached, in the authentic language or languages, in such a way that they cannot be separated, to the day note referred to in Article 10. They shall be authenticated by the signature of the Secretary-General on the last page of the day note.

Instruments adopted by delegation procedure shall be attached, in the authentic language or languages, in such a way that they cannot be separated, to the day note referred to in Article 11. They shall be authenticated by the signature of the Secretary-General on the last page of the day note.

For the purposes of these Rules, "instruments" means any instrument as referred to in Article 14 of the ECSC Treaty, Article 189 of the EC Treaty or Article 161 of the Euratom Treaty.'

II — Facts

15. By decisions of 13 July, 12 October and 21 December 1994 and 8 May 1996, the Commission adopted an indicative allocation for all Community initiatives for the programming period 1994–99.

16. Correspondence was subsequently exchanged on a regular basis between the Italian Republic and the Commission in connection with the monitoring of the implementation of the Community initiatives in that Member State.

17. For 1999 the Commission decided to amend the indicative allocation of Community initiatives in order to release the sum of ECU 100 million to finance a Community initiative consisting in a special aid programme for peace and reconciliation in Northern Ireland and in the border counties of Ireland (hereinafter 'the Peace initiative').

18. In taking account of the various criteria, in particular the state of implementation of the various Community initiatives in the Member States, the Commission drew up a proposal for the alteration of the allocation of Community initiatives, in the form of a working document which was approved by the management committee at its meeting of 22 September 1998.

19. It is apparent from table 5 attached to that document that the financial redistribution of ECU 100 million in favour of the Peace initiative was to entail, for the Italian Republic, a reduction of ECU 44.7 million,

while the other substantial reductions affected France (ECU 18.1 million), the United Kingdom (ECU 16.4 million), Portugal (ECU 6.8 million) and Germany (ECU 6 million).

20. That new allocation was the subject-matter of the contested decision. The point at issue in the minutes of the meeting of the Commission held on 16 December 1998 is worded as follows:

'8. Structural policies — indicative allocations by Community initiative and by Member State [SEC(1998)2152 A/4)]

The Commission approves the indicative allocations set out in document SEC(1998)2152 and /4 and resolves to notify the Member States, the European Parliament, the Economic and Social Committee and the Committee of the Regions of that decision.

The Commission's other resolutions on this point are covered by a special minute.'

21. Two tables were attached to documents SEC(1998)2152 and SEC(1998)2152/4, which were mentioned in point 8 of the minutes and contained the proposal for the decision. Table 1, entitled 'Proposal for financial reallocation of Community initiatives (in MECU, 1999 prices)', was, at least in so far as concerns the final result for Italy, identical to Table 5 attached to the aforementioned working document.

22. Table 2 was entitled 'Indicative allocations per Community initiative and per Member State (in MECU, 1999 prices)', and set out for each Member State the total amount indicatively allocated to it and the allocation of that amount between the various Community initiatives. In the case of the Italian Republic an asterisk referred to a footnote stating that '[t]hese appropriations can only be programmed in full where the Member State confirms that it agrees to a reduction of the resources programmed within the framework of the PME initiative.'

23. The new allocation was subsequently communicated to the applicant by letter from the Secretary-General of the Commission dated 19 January 1999, which was worded as follows (in translation):

'At the meeting on 16 December 1998 the European Commission approved the alterations to the indicative allocation of the Community initiatives in respect of which the competent management committee had expressed a favourable opinion on

22 September 1998. The decision takes into account the state of advancement of the initiatives and the need to allocate further financial resources for 1999 to the "Peace and Reconciliation in Ireland and Northern Ireland" initiative.

The new table enclosed herewith replaces the corresponding tables enclosed with the letters from Mr Williamson dated 13 July 1994 and 13 June 1996).'

24. The letter was accompanied by a table which, apart from its translation, was identical to Table 2 attached to the aforementioned minutes, except in so far as concerns the amounts relating to the Refex programme in the United Kingdom.

III — Procedure

25. The application was lodged at the Court Registry on 29 March 1999. By orders of the President of the Court of Justice dated 17 June 1999 and 1 July 1999, the United Kingdom and Ireland were given leave to intervene in support of the form of order sought by the defendant.

26. Italy, the applicant, requests that the Court should:

— annul the Commission's decision of 16 December 1998 approving amendments to the indicative allocation of Community initiatives and all measures on which it is based or with which it is connected;

— order the defendant to pay the costs.

27. The Commission, the defendant, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

28. An application, lodged by the Italian Republic, for suspension of operation of the contested decision was dismissed by

order of the President of the Court of 29 June 1999.[7]

IV — Assessment

Admissibility

29. On this point, I shall consider three different problems, namely:

— the grounds of inadmissibility invoked by the Irish Government;

— the legal effects of the contested decision;

— the existence of the contested decision.

A — The grounds of inadmissibility invoked by the Irish Government

30. The Irish Government invokes two grounds of inadmissibility.

31. Firstly, according to the Irish Government, the Italian Republic lodged its application out of time. The time-limit for contesting the Commission's decision had begun to run on 20 January 1999 and 'therefore, any action under Article 230 [EC] should have been brought before or on 19 March 1999'. In the present case, the application was not lodged until 29 March 1999.

32. Secondly, the Irish Government refers to the 1999 budget 'under which the funds originally earmarked as an indicative allocation to Italy were, in fact and in law, reallocated to the Peace initiative'. It maintains that, 'since the applicant Government has not contested the 1999 budget in an action against the Parliament and/or the Council and the Commission, it cannot now be permitted to do so indirectly when it has not done so or has opted not to do so directly and when the legality of the adoption of the budget is indisputable at this stage'.

33. According to the Italian Government, it is doubtful whether these arguments raised

7 — Case C-107/99 R *Italy* v *Commission* [1999] ECR I-4011.

by the Irish Government are admissible, 'since they go beyond the submissions of the defendant, which, although it seeks the dismissal of the action, has not called into question its admissibility'.

34. I share the view of the Italian Government.

35. Indeed, in its judgment in *Matra* v *Commission*, [8] the Court held that '... it must be noted that under the third paragraph of Article 37 of the Protocol on the Statute of the Court of Justice of the EEC, submissions made in an application to intervene are limited to supporting the submissions of one of the parties. Moreover, under Article 93(4) of the Rules of Procedure, the intervener must accept the case as he finds it at the time of his intervention. It follows that the interveners have no standing to raise a plea of inadmissibility and the Court is thus not obliged to examine the pleas put forward by them ... .'

36. More recently, the Court has also declared that Article 37 of the EC Statute of the Court of Justice does not prevent an intervener from using arguments different from those used by the party it is supporting, provided the intervener seeks to support that party's submissions. [9] Since the Commission does not claim that the application is inadmissible, I do not believe that the Irish Republic, as intervener, is entitled to do so. Its submissions concerning the inadmissibility of the action should therefore be held to be inadmissible.

37. However, since the Irish Government's first plea, which alleges that the application was lodged out of time, is an objection involving public policy considerations, [10] 'the Court should examine it of its own motion under Article 92(2) of the Rules of Procedure'. [11]

38. However, in that regard, it need only be stated that that, since the Italian Republic had received on 20 January 1999 the letter from the Secretary-General of the Commission dated 19 January 1999 notifying it of the contested decision, the time-limit for bringing an action, taking into account the extension of the time-limit on account of distance established in Article 1, third indent, of Annex II of the Rules of Procedure of the Court of Justice, as in force on the date the action was brought, expired on 30 March 1999. As the application was lodged on 29 March 1999, the action cannot therefore be regarded as out of time.

8 — Case C-225/91 [1993] ECR I-3203, paragraphs 11 and 12. See also the judgment in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 19 to 22.

9 — Case C-200/92 P *ICI* v *Commission* [1999] ECR I-4399, paragraph 31, Case C-227/92 P *Hoechst* v *Commission* [1999] ECR I-4443, paragraph 33, and Case C-245/92 P *Chemie Linz* v *Commission* [1999] ECR I-4643, paragraph 32.

10 — Joined Cases 193/87 and 194/87 *Maurissen and Public Service Union* v *Court of Auditors* [1989] ECR 1045, paragraph 39, and order in Case C-44/00 P *Sodima* v *Commission* [2000] ECR I-11231, paragraph 51.

11 — *CIRFS and Others* v *Commission*, cited above, paragraph 23. See also *Matra* v *Commission*, cited above, paragraph 13.

39. On the other hand, the second plea of inadmissibility raised by the Irish Government, to the effect that the Italian Republic had not brought an action against the 1999 budget, is not, in my view, an objection involving public policy, that is to say, a plea concerning the basic principles of the Community legal order, such as, as in the case of time-limits for bringing proceedings, legal certainty. This plea cannot therefore be examined by the Court of its own motion.

40. In any event, even if it were otherwise, I would propose that the Court should not uphold this argument.

41. The argument starts from the premiss that the 1999 budget constitutes the act which, factually and legally, reallocated to the Peace initiative the funds originally earmarked as an indicative allocation to Italy. However, this reasoning does not take account of the fact 'that, in the system of the Treaty, any implementation of expenditure by the Commission in principle presupposes, in addition to the entry of the relevant appropriation in the budget, an act of secondary legislation (commonly called the "basic act") from which the expenditure derives'. [12] The reason for that is that, in the 'system of the Treaty, ... the conditions governing the exercise of legislative powers and budgetary powers are not the same'. [13]

12 — Case C-106/96 *United Kingdom* v *Commission* [1998] ECR I-2729, paragraph 22.

13 — *United Kingdom* v *Commission*, cited above, paragraph 28. See also Case 242/87 *Commission* v *Council* [1989] ECR 1425, paragraph 18.

42. In the present case, although the 1999 budget comes, in the system of the Treaty, under the exercise of budgetary powers, the adoption of the indicative allocations, which, according to the Commission, has its legal basis in Article 12(4) of Regulation No 2052/88, comes under the exercise of legislative powers. In my view, the distinction between these two powers, which must be exercised in accordance with their own rules, would not be observed if it were held, as the Irish Government suggests, that the adoption of the 1999 budget prevailed over one of the stages of the legislative process, namely, the determining of the indicative allocations.

43. In actual fact, the two acts are therefore independent of each other and the fact that one has not been contested cannot prevent the other from being contested.

B — The legal effects of the contested decision

44. It is apparent from the arguments put forward by the Italian Republic, on the one hand, and by the Commission, on the other, that these two parties disagree about the legal effects of the contested decision. At the hearing, during submissions by the Commission that the contested decision was not a decision within the meaning of Article 189 of the EC Treaty (now Article 249 EC), the question was even

raised as to whether the contested decision could have any legal effect at all.

45. I think it is important to consider the matter of the legal effects. Firstly, it affects the admissibility of the action. An action for annulment is admissible only if it is brought against a measure which is intended to have legal force.[14] Secondly, and in any event, I think that it is necessary to understand the precise scope of the legal effect, if there is one, in order, subsequently, to evaluate the pleas put forward by the Italian Republic.

46. I shall therefore take a closer look at the contested decision.

47. I have referred in extenso above to point 8 in the minutes of the Commission's meeting held on 16 December 1998, and also to the letter from the Secretary-General dated 19 January 1999.

48. In its pleadings, the Commission explains at length how these two documents should be construed.

49. It refers to two stages in the adoption of the decision: 'firstly, the allocation *between the Member States* of *all* the resources available for Community initiatives during the 1996–99 planning period ("the first stage in the adoption of the decision") and, secondly, the allocation *between the various Community initiatives* implemented *in each Member State* ("second stage in the adoption of the decision")'.

50. According to the Commission, the first stage in the adoption of the decision 'has the result, for the applicant, of a reduction of ECU 44.7 million in the total indicative allocation originally made to it for the 1994–99 planning period. The legal effect of this first stage was therefore a cut, of the abovementioned amount, in the approximate level of financing which might be available to the applicant for implementing Community initiative programmes.'

51. In so far as concerns the second stage in the adoption of the decision, the Commission explains that 'once the result of the first stage in the adoption of the decision has been obtained, it is necessary to make an optimum allocation of the available funds between the different Community initiative programmes implemented in Italy. ... That is where the footnote is inserted making conditional the part of the contested allocation which, according to the applicant, refers to the second stage. Since it was a question of deciding which programmes could be reduced in order to find the ECU 44.7 million ..., the Commis-

14 — Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 39 (the '*AETR*' case).

sion's staff considered that the fact of knowing which amounts had already been allocated was less important, for the purposes of making an objective evaluation of the state of progress of the various programmes, than the percentage of legally binding commitments which had actually been undertaken. ... [T]his method led to reductions relating partly to increases not yet granted and partly to increases already granted.'

52. Anyway, in its account of the facts, the Commission, aware of the fact that this last proposal could not be fully implemented without the applicant's consent, 'pointed out, in the footnote to the table containing the new indicative allocations, that its implementation was subject to the condition that the applicant accepted certain reductions ...'.

53. The truthfulness of these statements seems to me to be confirmed by the two tables which were annexed to documents SEC(1998)2152 and SEC(1998)2152/4 referred to in the minutes of the Commission's meeting of 16 December 1998. These tables reflect, in fact, these two stages in the adoption of the decision, in the sense that Table 1 contains the allocation between the Member States of all the funds available for Community initiatives and mentions the reduction of ECU 44.7 million for Italy, while Table 2 shows the allocation between the various Community initiatives implemented in each Member State and contains the aforementioned footnote.

54. It follows, in my opinion, that the Italian Government's interpretation, that 'the contested decision has ... reduced the funds already granted to the PME, URBAN and KONVER initiatives' cannot be upheld.

55. Indeed, the aforementioned footnote means that the allocation proposed in Table 2, which, if it were implemented, would — it is true — lead to the reduction of funds already granted, become definitive only 'where the Member state confirms that it agrees to a reduction of the resources programmed within the framework of the PME initiative'.

56. Since this consent has not been given by the Italian Government — which is not disputed by the parties — the allocation proposed in Table 2 has not been implemented for Italy, as the Commission also confirmed at the hearing. Consequently, there has been no reduction in funds already granted. Furthermore, the Italian Government adduces no evidence to show that, for one of the projects concerned, a reduction was actually made in funds already granted.

57. It is apparent from the foregoing that the 'second stage in the adoption of the

decision' has produced no effect. Indeed, the condition precedent necessary for its implementation, namely, the consent of the Italian Government, has never been fulfilled.

58. What is, then, the legal effect of the contested decision?

59. According to the Commission, since the condition has not been fulfilled, '[i]n practice, that means that the part of the contested decision resulting from the first stage of its adoption created the legal effects described above', namely a reduction of ECU 44.7 million in the indicative allocation which had initially been made to Italy for the programming period 1994–99, 'at the date of adoption of the contested decision'.

60. At the hearing, the Commission confirmed that it deducted this ECU 44.7 million from the ECU 46.3 million which, according to its information, represented in December 1998 the part of the indicative allocation initially made in favour of Italy for which Community funds had not yet been granted.

61. According to the Italian Government, this deduction, in its effect, amounts to 'reductions or alterations to the intended use of the funds for Community initiative programmes'.

62. Now, to the extent that this argument of the Italian Government means that the contested decision affected, up to the amount of ECU 44.7 million, any entitlement to Community funds, I must concur with the Irish Government's reply to that argument, that the indicative allocations 'do *not* constitute [15] the grant of aid to the Member State concerned for the total amount in question. Still less do they constitute the approval of one or more projects not yet formulated ...'.

63. Indeed, Article 12(4) of Regulation No 2052/88 which, according to the Commission, formed the basis of the contested decision, does not lead to the conclusion that the indicative allocations create an entitlement to Community funds on the part of a Member State. On the contrary, it is apparent from Article 20(1) of Regulation No 4253/88, which provides that '[b]udgetary commitments shall be made on the basis of the Commission's decision approving the measures concerned ...', that an entitlement to Community funds arises only by Commission decision, within the meaning of Article 14 of Regulation No 4253/88, in which it decides on the assistance to be given from the Funds following applications made by the competent authorities designated by the Member States. This decision is taken at a much later stage than that at which the indicative allocations are established.

64. According to the Commission, the effect of the contested decision is therefore,

15 — Emphasis added in the original text.

as has already been pointed out above, 'a cut [of ECU 44.7 million] in the approximate level of financing which might be available to the applicant for implementing Community initiative programmes'. To put it another way, the Commission had imposed on itself a duty not to exceed a certain level, albeit an approximate one, in respect of the funding, in a given Member State, for specific projects within the framework of the various Community initiative programmes.

65. I consider that the documents in the case confirm this interpretation put forward by the Commission. Indeed, in a letter dated 16 February 1999 sent to the Italian Government and produced in Annex 27 of its application, the Commission states its position in respect of a request for an increase in the Community funding for the Interreg II B programme in the following terms (in translation): '[I]n consequence of the decision of 16 December 1998 ..., the Community resources now available for Italy, as resources not yet programmed, are EUR 1.4 million. That means that the overall FEDER contribution which may be used to increase the Italian part of the Interreg II B programme, must be limited to EUR 57.172 million (EUR 55.772 million + EUR 1.4 million) and cannot be EUR 67.626 million, as requested by the Italian authorities and as indicated in the financing plan specified at the monitoring committee meeting held on 1 December 1998.'

66. In so far as concerns the sum of EUR 1.4 million referred to in that letter, it must be stated that this is, in fact, approximately equal to the difference between the aforementioned sums of ECU 46.3 million and ECU 44.7 million, that is, ECU 1.6 million; the difference of ECU 0.2 million may be attributed to the fact that the sum of ECU 46.3 million corresponded to the part of the resources not yet programmed in December 1998, whereas the aforementioned letter is dated two months later.

67. It is therefore apparent from the Commission's statements and the documents in the case that the contested decision did indeed produce a legal effect. This does not consist either in a reduction in the funds already granted, or in a curtailment of an established right to Community funding, as the Italian Government believes, but consists in the fact that the Commission imposed on itself, before receiving the applications for assistance, a limit — albeit approximate — in respect of each Member State, to the funding of projects within the framework of Community initiatives, a limit which, by the contested decision, it reduced by ECU 44.7 million for Italy.

68. At this stage of the argument, I therefore consider that the action is not inadmissible on the ground that the contested act has no legal effect.

C — The existence of the contested decision

69. In connection with the first branch of its first plea, alleging infringement of the duty to provide a statement of reasons, the Italian Government pleads the non-existence of the contested decision. I think it is appropriate to consider this plea under the section on admissibility. Indeed, if the Italian Government were successful on this point, the contested decision should be declared non-existent and, consequently, the action should be dismissed as inadmissible. [16]

70. In its application, the Italian Government, when referring to the letter of 19 January 1999 from the Secretary-General of the Commission, claimed that the contested decision was non-existent 'since it is signed by the Secretary-General and not by the President or a member of the Commission'.

71. After the Commission stated in its defence that the contested decision had been adopted on 16 December 1998 and that the letter of 19 January 1999 represented only the communication of that decision to the Italian Republic, the Italian Government maintained its line of argument in its reply, pointing out that there is no text containing the decision adopted by the Commission on 16 December 1998.

72. In its rejoinder, the Commission replied that the fact that it did indeed decide to establish the contested allocations at its meeting of 16 December 1998 'is ... clearly evidenced by the minutes of that meeting, read together with the proposal for a decision to which it refers'.

73. At the request of the Court, the Commission submitted a copy of the minutes signed by the President and by the Secretary-General of the Commission.

74. On that occasion, it stated that the minutes, signed by the President and the Secretary-General, were enough on their own for the contested decision to be legitimately adopted. The first three paragraphs of Article 16 of the Rules of Procedure, which provide, in essence, that measures adopted by the Commission shall be inseparably annexed to the minutes or to the day note, do not apply in this case, according to the Commission, on the ground that, under Article 16(4) of the Rules of Procedure, this procedural requirement applies only to measures having one of the forms established in Article 189 of the Treaty. The contested decision is not a decision within the meaning of the latter provision but should be regarded as an 'a typical' or 'sui generis' act. The Commission takes the view that 'there has not therefore been, in this case, any infringement of its Rules of Procedure and ..., consequently, the contested decision is not invalidated on the grounds that it infringes essential procedural requirements'.

16 — See, for example, Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 21.

75. What are we to make of these arguments?

76. In its judgment in *Commission* v *BASF and Others*, cited above, the Court held that 'acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say that they must be regarded as legally non-existent'. [17]

77. The analysis must therefore begin by asking whether, by adopting the contested decision, the Commission committed an irregularity and, more particularly, having regard to the arguments of the parties, an infringement of its Rules of Procedure.

78. By that decision, as is apparent from the minutes, the Commission '[approved] the indicative allocations contained in document SEC(1998)2152 and /4 ...'. The minutes do not give details of the content of the contested decision, that is to say, 'the indicative allocations contained in document SEC(1998)2152 and /4', which are not in an instrument inseparably annexed to the minutes, a fact which the Commission also confirmed at the hearing.

79. The Commission considers, for the reasons already stated above, that it was not necessary to explain the content of the contested decision in an instrument inseparably annexed to the minutes.

80. However, I am not convinced by this argument.

81. The fourth paragraph of Article 189 of the Treaty defines a decision as 'binding in its entirety upon those to whom it is addressed'.

82. Now, as I have said, the contested decision constituted an act having a legal effect, in the sense that it did, in fact, impose a limit on the Community funding which could be granted to programmes implemented within the framework of the Community initiatives on Italian territory, irrespective of the merits of an application for assistance submitted to the Commission. It therefore cannot be denied that the contested decision was 'binding' in nature.

83. Nor can it be disputed that the Italian Republic must be regarded as an addressee of that decision, both substantively, since the decision has produced legal effects relating to the implementation of the pro-

17 — Paragraph 49.

grammes on its territory, and procedurally, since it is stated in the minutes that the Member States will be informed of the decision.

84. I therefore consider, on the basis of an analysis of the definition of a decision given in the fourth paragraph of Article 189 of the Treaty, that the contested decision does constitute a decision within the meaning of that provision.

85. Two other considerations confirm my view.

86. Firstly, at the hearing the Italian Government drew attention to Commission Decision 93/589/EEC of 28 October 1993 fixing an indicative allocation between Member States of the commitment appropriations of the Structural Funds and the financial instrument for fisheries guidance (FIFG) under Objective 1, as defined in Council Regulation (EEC) No 2052/88. This decision was published in the *Official Journal of the European Communities* [18] and its legal basis, Article 12(4) of Regulation No 2052/88, is the same as that which, according to the Commission, provides the basis for the contested decision.

87. Furthermore, the decision of 28 October 1993 is unquestionably a decision within the meaning of the fourth paragraph of Article 189 of the Treaty. Indeed, we need only refer to Article 2 of that decision, which contains the standard sentence: 'this Decision is addressed to the Member States.'

88. If the fixing of the indicative allocations on the basis of Article 12(4) of Regulation No 2052/88 gave rise, in 1993, to the adoption of a decision within the meaning of the fourth paragraph of Article 189 of the Treaty, I cannot understand why that was not the case in 1998, when the contested decision was adopted. In any event, the mere fact that the Commission chose a different form for the two decisions does not matter, since the choice of form may not alter the nature of a measure. [19]

89. Secondly, it seems to me that the strict interpretation given by the Commission to the definition of a decision within the meaning of the fourth paragraph of Article 189 of the Treaty is, at least in the present case, hard to reconcile with the case-law of the Court, according to which '[f]ar from being ... a mere formality for archival purposes, the authentication of acts provided for in the first paragraph of Article 12 of its Rules of Procedure is intended to guarantee legal certainty by ensuring that the text adopted by the college of Commissioners becomes fixed in the languages which are binding. Thus,

18 — OJ 1993 L 289, p. 30.

19 — Case 307/81 *Alusuisse* v *Council and Commission* [1982] ECR 3463, paragraph 7.

in the event of a dispute, it can be verified that the texts notified or published correspond precisely to the text adopted by the college and so with the intention of the author. Authentication of acts referred to in the first paragraph of Article 12 of the Commission' s Rules of Procedure therefore constitutes an essential procedural requirement within the meaning of Article 173 of the EEC Treaty breach of which gives rise to an action for annulment'. [20]

90. To put it another way, I believe there is a conflict between, on the one hand, the importance which the Court attaches to the authentification of acts adopted by the Commission with the aim of guaranteeing legal certainty and, on the other, the restrictive interpretation suggested by the Commission of the scope of the acts for which such authentication is necessary.

91. Therefore, the aforementioned case-law leads me rather towards a broad interpretation of the fourth paragraph of Article 16 of the Commission's Rules of Procedure which defines the instruments which require authentification.

92. I therefore consider, in the light of all the above, that, under Article 16 of its Rules of Procedure, the Commission should have inseparably annexed to the minutes the instrument containing the indicative allocations which it approved at its meeting of 16 December 1998. By not doing so and by referring only to a proposal for a decision which is not annexed and which is not authenticated, it did not, in my view, observe its Rules of Procedure and thus infringed an essential procedural requirement.

93. It should be added that the problem is not only theoretical. Indeed, as I have pointed out above, it is apparent, from a comparison of Table 2 which was annexed to the proposal for a decision and, more particularly, to document SEC(1998)2152, with the same Table 2, which was communicated to the Italian Republic by letter of the Secretary-General dated 19 January 1999, that there is a difference between these tables, which are supposed to be the same, in so far as concerns two sums relating to the Refex programme in the United Kingdom. Therefore, in least in respect of these two sums, it is impossible, in the absence of authentication, to know which sum was approved by the college of Commissioners.

94. It still remains for me to consider whether the irregularity committed by the Commission is so serious that it renders the contested decision non-existent.

95. I consider that the answer to this question is in the negative.

20 — *Commission* v *BASF*, cited above, paragraphs 75 and 76.

96. Indeed, as the Court held in *Commission* v *BASF and Others*, cited above, '[f]rom the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent it is self-evident that, for reasons of legal certainty, such a finding is reserved for quite extreme situations'. [21]

97. The infringement of the procedural requirements which, in my view, the Commission committed does not come within the category of 'quite extreme situations'. There has, admittedly, been an irregularity but it is not sufficiently serious to justify a decision that the act concerned is non-existent.

98. In this connection, I consider that the fact that, as the minutes show, the Commission did approve the indicative allocations is significant. I base this point on the judgment in *Commission* v *BASF and Others*, cited above, in which the Court held that the measure contested in that case did exist, having regard to the fact that 'at the meeting of 21 December 1988, as is shown by the relevant minutes, the Commission did decide to adopt the operative part of a decision as set out in those minutes, whatever defects may have affected that decision'. [22]

99. I am therefore of the opinion that the contested decision does exist and, accordingly, that the action is admissible.

Substance

A — The first plea, alleging failure to state reasons

100. In its first plea, the Italian Government alleges infringement of Article 190 of the EC Treaty (now Article 253 EC). It has subdivided the plea into two parts, the first part alleging non-existence of the contested decision and the second part alleging complete failure to state reasons.

101. In so far as concerns the *first part*, alleging the non-existence of the contested decision, I have just considered this and reached the conclusion that the contested decision infringed essential procedural requirements because the Commission did not observe the authentication procedure provided in Article 16 of the Rules of Procedure.

102. I am therefore moved to propose the annulment of the contested decision.

21 — Paragraph 50.
22 — Paragraph 51.

103. However, in order to deal with the matter fully, it is also necessary to examine the other pleas put forward by the Italian Government.

104. In the *second part* of the plea, the Government alleges a complete failure to state reasons for the contested decision.

105. The Commission disputes this argument, pointing out that the Italian Government had been closely involved in the procedure to draw up the contested decision and was therefore aware of the Commission's reasons. In the circumstances, and also having regard to the letter of the Secretary-General of 19 January 1999, an adequate statement of reasons had been given for the contested decision.

106. It must be stated that the duty to provide a statement of reasons is a procedural requirement. 'In imposing upon the Commission the obligation to state reasons for its decisions, Article 190 is not taking mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty.' [23]

107. In the present case, it must be said that the document which, as far as concerns the contested decision, expresses the intention of the college of Commissioners, namely, point 8 of the minutes of the meeting held on 16 December 1998, does not contain any statement of reasons. It merely mentions that the Commission approves the indicative allocations and decides to inform the Member States, in particular, of them.

108. It is true that the letter of the Secretary-General dated 19 January 1999 contains a very brief statement of reasons. However, since the Secretary-General is not the college, it cannot be claimed that the contested decision is reasoned. 'Since the operative part of, and the statement of reasons for, a decision constitute an indivisible whole, it is for the college of Commissioners alone to adopt both the operative part and the statement of reasons, in accordance with the principle of collegiate responsibility.' [24]

109. It is also true that the Italian Government, having been involved in the work which culminated in the contested decision, for example through its attendance at the meeting of the management committee held on 22 September 1998, was aware of the reasons on which the Commission based the adoption of the contested decision. However, this fact is not enough, in my opinion, to remedy the complete failure to state reasons in the act itself.

23 — Case 24/62 *Germany* v *Commission* [1963] ECR 131.

24 — *Commission* v *BASF and Others*, cited above, paragraph 67.

110. Indeed, as is apparent from the judgment in *Germany* v *Commission*, cited above, the statement of reasons has the aim not only of giving the parties the opportunity to defend their rights, but also, amongst others, of enabling the Court to exercise its supervisory power. Therefore, the fact that one of the parties before the Court, in this case the Italian Government, may be aware, in one way or the other, of the reasons for the decision is not sufficient basis for a finding that the decision is adequately reasoned.

111. Furthermore, it is clear from the case-law cited by the Commission in support of its argument that knowledge of the reasons is a factor which may supplement the statement of reasons, not replace it. For example, in its judgments in *United Kingdom* v *Commission* [25] and *Italy* v *Commission*, [26] the Court held that 'decisions concerning the clearance of accounts *do not require detailed reasons* [27] if the government concerned was closely involved in the process by which the decision came about'.

112. Also, in the judgment in *Delacre and Others* v *Commission*, [28] it was stated: 'The Court has consistently held that the question whether the statement of the grounds for a decision meets the requirements of Article 190 of the Treaty must be assessed *with regard not only to its wording but also to* [29] its context and to all the legal rules governing the matter in question.'

113. The wording of a decision must therefore contain at least the basic considerations which have led to its adoption. Only in addition to that is it possible to refer to its factual and legal context.

114. As this is not the case in respect of the contested decision, I consider that it lacks a statement of reasons, which is also a ground for proposing its annulment.

B — The second plea, alleging infringement of Article 24 of Regulation No 4253/88

115. The Italian Government considers that the Commission has also infringed Article 24 of Regulation No 4253/88.

116. Like the Commission, I take the view that there has been no such infringement. Indeed, the aforementioned provision concerns, as its title states, the reduction,

25 — Case 347/85 [1988] ECR 1749, paragraph 60.
26 — Case 14/88 [1989] ECR 3677, paragraph 11.
27 — Emphasis added.
28 — Case C-350/88 [1990] ECR I-395, paragraph 16.
29 — Emphasis added.

suspension or cancellation of assistance already granted. Since, as we have already seen, the Commission, by the contested decision, has not reduced, suspended or cancelled assistance already granted, it also has not infringed Article 24 of Regulation No 4253/88.

117. In my view, this plea should therefore be rejected.

C — The third plea, alleging infringement of Article 12 of Regulation No 2052/88

118. After first stating that '[t]he complete failure to provide a statement of reasons in the contested decision makes it impossible ... to know what legal basis the Commission intended to use', the Italian Government, in its application, considered that 'the expression "indicative allocations" was probably taken from Article 12 of Regulation No [2052/88]', It inferred from that that, by adopting the contested decision, the Commission applied that provision. However, according to the Italian Government, the Commission infringed the provision by not following the procedure laid down in Article 25 of Regulation No 4253/88.

119. The Commission replies that the procedure laid down by Article 25 did not have to be followed, since it applies in the case of an alteration to assistance already granted. Furthermore, it considers that the allocations provided for in Article 12(4) of Regulation No 2052/88 are and remain indicative and may, therefore, be altered throughout this period.

120. In its rejoinder, the Commission states, however, that '[i]t is necessary ... to correct the assertion that Article 12 of Regulation [No 2052/88] applies directly to Community initiatives. As is apparent from the text of that article, the Commission makes indicative allocations "for each of the Objectives 1 to 4 and 5(b)", that is to say, for the main structural assistance and not expressly for Community initiatives. In spite of that, the Commission decided to apply that article, by analogy, to Community initiatives, in the belief that the indicative allocations were a programming instrument which could also be relevant to those initiatives.'

121. When the Commission repeated this remark at the hearing, the Italian Government submitted that, in those circumstances, the contested decision had no legal basis.

122. How, then, should this plea be construed?

123. I believe that, following the statement made by the Italian Government at the hearing, it should be construed as a plea alleging that the contested decision has no legal basis.

124. In spite of the statement made at the hearing, I do not consider that it is a new plea, which would be out of time under Article 42(2) of the Rules of Procedure. In the light of the exchange of arguments described above, the plea is, in my view, an expansion of the plea initially raised by the Italian Government. Furthermore, if this were not the case, it would seem to me that the fact that the plea was not put forward until the hearing is the consequence of a fact revealed during the proceedings, namely, the Commission's aforementioned remark, which was made for the first time in the rejoinder.

125. I must therefore examine whether the contested decision has its legal basis in Article 12(4) of Regulation 2052/88.

126. Article 12(4) of Regulation No 2052/88 provides that '[t]he Commission shall ... make indicative allocations *by Member State for each of the Objectives 1 to 4 and 5(b)* of the Structural Fund commitment appropriations ...'. [30]

127. On the basis of Article 12(4) alone, I might be tempted to endorse the Commission's argument that the reference to 'each of the Objectives 1 to 4 and 5(b)' implies that only the main structural assistance, that is to say, Community assistance undertaken on the initiative 'of the Member States' within the meaning of the third paragraph of Article 5(5) of Regulation No 2052/88 is involved, and not Community initiatives, that is to say, assistance undertaken on the initiative 'of the Commission in agreement with the Member State concerned', within the meaning of that same provision. Owing to their interest for the Community in general, these Community initiatives are perhaps less well suited to allocation by objective in each of the Member States.

128. If this argument were upheld, it would lead to the conclusion that the indicative allocations relating to assistance undertaken 'on the initiative of the Commission' have no legal basis but are only general policy guidelines which the Commission has laid down for itself.

129. However, in that case, the Commission was not entitled to draw legal infer-

30 — Emphasis added.

ences. To be specific, it was not entitled, invoking only the reduction in Italy's share, to refuse part of the increase in Community funding for the Interreg II B programme mentioned in point 65 above. It could only refuse this extra funding by putting forward arguments regarding the characteristics or implementation of the programme itself.

130. However, I am of the opinion that the interpretation that Article 12(4) does not apply to assistance undertaken on the initiative of the Commission does not take account of the organisation and structure of Article 12.

131. Indeed, it must be stated that, by Article 12*(1)*, the Council first of all determines all the resources available for commitment of the Structural Funds and the financial instrument for fisheries guidance which, at 1992 prices, is ECU 141.471 million for the period 1994–99. After giving a few details, in Article (2) and (3), about Objective 1, the Council gives the Commission the authority, in Article 12*(4)*, to fix indicative allocations 'of the Structural Funds commitment appropriations'. Only afterwards, in Article 12*(5)*, does the Council decide to apportion 1.9% of the commitment appropriations to Community initiatives.

132. I think that this structure provides grounds for inferring that the Commission's duty to fix indicative allocations covers all the commitment appropriations of the Structural Funds, not only commitment appropriations relating to main structural assistance. Indeed, it seems to me that, where Article 12(4) refers to the 'commitment appropriations of the Structural Funds', these, within the structure and aim of the article, are commitment appropriations as established by the Council in Article 12(1) and therefore cover all the types of assistance. The fact that the allocation of these appropriations to main structural assistance, on the one hand, and to Community initiatives, on the other, is not made until the following paragraph, does not, in my opinion, affect the content of the concept of 'commitment appropriations of the Structural Funds' in Article 12(4).

133. Furthermore, it may be inferred from Article 12(4) that the Council takes the view that the fixing of indicative allocations by the Commission constitutes a necessary tool in the management of the Funds. It is not certain that it is necessary only for the main structural assistance and not for Community initiatives.

134. Therefore, in the absence of a clear indication in the text of Regulation No 2052/88 that the obligation to fix indicative allocations does not cover Community initiatives, and in the light of the structure of Article 12 of the regulation, I consider that Article 12(4) of Regulation

No 2052/88 constitutes an adequate legal basis on which the Commission may fix Community allocations for Community initiatives.

135. The contested decision does not, therefore, in my view, lack a legal basis.

136. It is still necessary to examine again whether, as the Italian Government claims, the Commission infringed Article 12(4) by altering the indicative allocations without following the procedure laid down in Article 25 of Regulation No 4253/88.

137. In that connection, it need only be stated that it is apparent from the wording of that provision that it applies in the case of amendment to the detailed rules relating to assistance already granted and not in the case of amendment to the indicative allocations.

138. It is therefore clear from all the above that I consider this plea to be unfounded.

D — The fourth plea, alleging infringement of Article 4 of Regulation No 2052/88 and of the principle of legitimate expectations

139. The Italian Government believes that the Commission also infringed Article 4 of Regulation No 2052/88, which lays down the partnership principle in respect of 'the preparation and financing, as well as the *ex ante* appraisal, monitoring and *ex post* evaluation of operations'. According to the Italian Government, the Commission should have involved the Member States to a greater extent in the decision-making process, even asking for their approval of the new indicative allocations.

140. It should be noted that Article 4 also provides that 'the partnership will be conducted in full compliance with the respective institutional, legal and financial powers of each of the partners'. Since Article 12(4) of Regulation No 2052/88 authorises the Commission to fix the indicative allocations, I do not consider that the Commission infringed the partnership principle by adopting the contested decision without the consent of the Italian Government.

141. Nor, contrary to what the Italian Government claims, do I believe that the Commission infringed the partnership principle by not following the procedure laid down in Article 25 of Regulation No 4253/88. Indeed, as I have already stated above, it is clear from the wording of

that provision that it applies in the case of amendment to the detailed rules relating to assistance already granted and not in the case of amendment to the indicative allocations.

142. Moreover, as the Commission points out, it involved Member States to a significant degree in the preparation of the contested decision, in particular by submitting the proposal for the decision to the management committee for its opinion.

143. It is apparent from all the foregoing that it cannot, in my view, be held that the Commission infringed the partnership principle.

144. Under the same plea, the Italian Government also alleges breach of the principle of the protection of legitimate expectations.

145. I take the view, as does the Commission, that Article 12(4) of Regulation No 2052/88 does not lead to the conclusion that, once the indicative allocations have been fixed, they are frozen forever and that, in spite of a change in circumstances rendering an adjustment to the allocations appropriate or necessary, no further amendment may be made.

146. Not only is this interpretation not apparent from the aforementioned provision; it also seems to me to be contrary to the principle of sound financial management.

147. Indeed, the Commission states that the new indicative allocations have not been fixed only with a view to releasing the sum of ECU 100 million for the Peace programme, but also in response to a request from the committee on budgets of the European Parliament to the Commission to assess the state of implementation of the Community initiatives in each Member State and also possible opportunities for reallocation which might ensure a better rate of outlay of the amount entered in the budget for those initiatives.

148. According to the Commission, 'this assessment became more important as the end of the programming period drew near. All the operations for which commitment at national level had not been agreed before 31 December 1999 would no longer be eligible for subsidies and the corresponding funds, after being restored to the general budget of the Communities, would be lost to structural policies.'

149. It is clear from these statements that an interpretation according to which the indicative allocations originally adopted were definitive, as the Italian Government

suggests, is hardly compatible with the requirements of sound financial management. Consequently, this interpretation, which has no basis in Article 12(4), cannot be upheld.

150. Therefore, since an adjustment to the indicative allocations is possible, a Member State cannot claim that the indicative allocations originally adopted have created legitimate expectations on its part.

151. Furthermore, the Commission submits documents proving that, during the preparation of the initial allocations in the course of the meeting of the management committee held on 25 and 26 May 1994, and also in the letter in which the Member States were notified of those allocations, the right to make subsequent amendments to the financial allocations was expressly reserved.

152. In the circumstances, I consider that it cannot be held that the initial allocations had created legitimate expectations on the part of the Italian Government.

153. I therefore consider that the fourth plea is unfounded.

E — The fifth plea, alleging infringement of Article 2 of the EC Treaty (now Article 2 EC, following amendment) and of the principle of non-discrimination

154. According to the Italian Government, the Commission 'did not feel the obligation, imposed on it by Article 2 of the Treaty, to put forward a proposal for implementing [the policy, common to all the Member States, of giving tangible expression to their solidarity with the peace process in Northern Ireland], by calling upon the whole Union to contribute specifically and proportionately to the funds needed to achieve that objective. The Commission, on the contrary, chose a solution which, based on totally irrelevant criteria, breached the principles of social cohesion and solidarity among Member States. Furthermore, the solution chosen with the contested decision also breaches the principle of non-discrimination, given that the reduction in the allocation already made to Italy is higher than that of all the other Member States.'

155. The Italian Government therefore considers that the reduction in the indicative allocations had a disproportionate effect on the Italian Republic, which constituted an infringement of Article 2 of the Treaty and also of the principle of equality of treatment.

156. In so far as concerns Article 2 of the Treaty, the Commission maintains that the contested decision does not violate that provision, since it is not formulated in such

a way as to create any specific obligations and rights on the part of Member States and the various institutions. The United Kingdom Government takes the view, to the same effect, that the 'objectives must be achieved by the application of specific provisions in the Treaty, by the adoption of secondary legislation, and by the implementation of these rules by the Community institutions and/or the Member States. ... Consequently, the legality of the contested decision should be assessed in the light of the specific Community rules on which the decision is based, including the general principles of [Community] law.'

157. I believe reference should be made to the Court's judgment in *Giménez Zaera*, [31] in which it was held that '[w]ith regard to [the objective stated in Article 2 of the EEC Treaty and consisting in] the promotion of an accelerated raising of the standard of living, it should ... be stated that this was one of the aims which inspired the creation of the European Economic Community and which, owing to its general terms and its systematic dependence on the establishment of the common market and progressive approximation of economic policies, cannot impose legal obligations on Member States or confer rights on individuals'.

158. By analogy, I am of the opinion that the aim of strengthening economic and social cohesion, as provided in Article 2(j) of the Treaty, [32] is not specific enough for it to be inferred that a precise obligation is imposed on the Commission, such as a particular method according to which the Commission should have divided between the Member States the reduction made in the indicative allocations for the benefit of the Peace programme. Nor does this provision lead to the conclusion that the Commission should have put forward a proposal for legislation to implement solidarity with the Peace process in Northern Ireland.

159. I do not therefore consider that there has been an infringement of Article 2 of the Treaty.

160. In so far as concerns the principle of equal treatment, the Italian Government points out that, out of the total amount of the reductions made, ECU 83.6 million, Italy suffered a cut of ECU 44.7 million although it receives only about 13% of the total resources.

161. It takes the view that 'the Commission should have tried to find funds to finance the Peace programme — with the involvement of all the Member States, naturally —

31 — Case 126/86 *Giménez Zaera* [1987] ECR 3697, paragraph 11.

32 — The Italian Government refers to the aims of economic and social cohesion and solidarity among Member States. These appear in Article 2 EC, which was not yet applicable on the date on which the contested decision was adopted, since the Treaty of Amsterdam was not yet in force on that date.

in such a way as to obtain the necessary means on the basis of joint information', and 'that a reduction could have been obtained in a different way, namely, by making use of the unprogrammed resources and indexation proportionately'.

162. In its reply, the Italian Government criticises the criterion used by the Commission to calculate the new allocations, namely, the state of implementation of the Community initiatives at 31 December 1997. In its view, '[t]his criterion is discriminatory. It places at an advantage those Member States which, by chance, have had their programmes approved at the right time, and at a disadvantage those which, like Italy, have suffered very long delays in the approval of the programmes submitted.'

163. The Commission replies that the calculation method used was in accordance with the principles of sound financial management laid down in Article 2 of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities,[33] as last amended, at the date of the contested decision, by Council Regulation (EC, ECSC, Euratom) No 2548/98 of 23 November 1998.[34]

164. As regards the argument concerning the delay in taking the decisions to make the grants, the Commission considers that this plea is new and therefore inadmissible. In any event, the Commission points out that the delay was due to the fact that, for most of the proposals received from the Italian authorities, the conditions laid down in Article 14(2) and (3) of Regulation 4253/88, which had to be fulfilled in order for the proposals to be valid, were not satisfied.

165. In that connection, I am of the opinion, first of all, that the argument concerning the delay in taking the decisions to make the grants does not constitute a new plea. It is clear, in fact, from the wording of this argument that it forms part of the plea alleging breach of the principle of equal treatment and, what is more, expands that plea in response to the explanations, given by the Commission in the defence, regarding the calculation method. In my view, this argument should therefore be examined in the context of the present case.

166. Secondly, it should be noted that, according to settled case-law, the general principle of equality, which is one of the fundamental principles of Community law, precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified.[35]

167. As the Italian Republic suffered a larger reduction than the other Member

33 — OJ 1977 L 356, p. 1.
34 — OJ 1998 L 320, p.1.

35 — See, in particular, Case C-189/01 *Jippes* [2001] I-5689, paragraph 129.

States, it is necessary to examine whether this difference in treatment was objectively justified.

168. The difference in treatment is the consequence of the calculation method used by the Commission. Referring to the working document presented to the management committee at its meeting on 22 September 1998, the Commission explains that it took the average of two values. The first value was the result of a calculation reflecting 'the comparison between the actual state of implementation of the various programmes and the *minimum*[36] rate of implementation at which they were viable: if, between 1994 and 1997, the Member State concerned had been unable to commit more that 25% of the appropriations which had been allocated to it, it was particularly unlikely that these programmes would qualify for a subsidy (taking into consideration commitment and payment dates). In the interests of sound financial management, it had been appropriate to put an end to those programmes and to reconsider their funding.'

169. The second value was the result of a calculation reflecting 'the comparison between the actual state of implementation of the various programmes and a *desirable*[37] state of implementation: at the end of 1997, a 65% commitment rate could be regarded as the full implementation rate for programming covering the period 1994 to 1999, in accordance with the annual allocation fixed by the Edinburgh European Council and codified in Annex II of Regulation No 2052/88. The result of this calculation gave the share and, therefore, the specific liability, of each Member State in the event that the desirable rate of 65% were not achieved.'

170. It cannot be denied that the calculation method used by the Commission to determine the new allocations is objective in nature. Moreover, it seems to me that the method is also justified, in particular in relation to the principle of sound financial management, the importance of which is confirmed not only by Article 2 of the Financial Regulation but also by Article 205 of the EC Treaty (now, after amendment, Article 274 EC). Indeed, this calculation method, unlike the Italian Government's suggestion that the unprogrammed resources and indexation should be used proportionately, takes account of the likelihood that the various programmes will be implemented correctly.

171. The Italian Government also maintains that the result of the calculation method was distorted to the detriment of the Italian Republic by the delay, until 31 December 1997, in the decision to make grants for the Italian projects. As evidence in support of its argument, it refers to paragraph 6.16 of Special Report No 16/98 of the Court of Auditors on the implemen-

36 — Emphasis added in the original text.

37 — Emphasis added in the original text.

tation of appropriations for structural operations for the programming period 1994–99, together with the Commission's replies. [38]

172. Since the Court of Justice has made it clear that the reports of the Court of Auditors constitute relevant evidence, [39] this paragraph should be studied carefully. It is worded as follows:

'The weakness of some programmes submitted to the Commission and the efforts made by the latter to improve their quality have resulted in delays in their adoption. However, in many cases, these delays are disproportionate to the improvements that have to be made. They stem more from the Commission's difficulties in managing the plethora of forms of intervention that have been proposed, in coordinating its departments and in building up an effective partnership culture with the Member States. In some cases, it took several months or even years for the detailed rules for implementing the individual projects to be laid down, following exchanges of correspondence and discussions which did not make much headway. As regards Italy, for example, at 31 December 1994, only 5 130.3 Mio ECU of aid had been approved out of a planned total of 14 860 Mio ECU, and programmes presented in 1994 were not adopted until 1997.'

173. This paragraph shows, in fact, that — contrary to what the Commission states — the delays were not due only to the fact that the applications did not satisfy the conditions laid down in Article 14(2) and (3) of Regulation No 4253/88. However, it must also be inferred that the problem of the delays attributable to the Commission was a general problem affecting not only Italy but also other Member States. Indeed, Italy was mentioned only by way of example in the aforementioned paragraph. Moreover, in the context of that example, the Court of Auditors refers to the approval rate for aid at 31 December 1994 in Italy, which still does not lead to the conclusion that the problem was the same at 31 December 1997.

174. Accordingly, I consider that the Italian Government has not proved that the calculation method and, in particular, the criterion of the state of implementation of the Community initiatives at 31 December 1997, had been distorted, to the detriment of the Italian Republic, by wrongful conduct on the part of the Commission which affected the Italian Republic to a greater extent than the other Member States.

175. It is apparent from all the foregoing that, in my view, the plea alleging infringe-

38 — OJ 1998 C 347, p. 48.

39 — Case C-366/95 *Steff-Houlberg Export and Others* [1998] ECR I-2661, paragraph 32.

ment is unfounded and that the fifth plea should therefore be rejected.

F — The sixth plea, alleging misuse of powers

176. In this plea, the Italian Government claims that the Commission acted inconsistently. It states that '[i]n his letter of 15 December 1997 ..., Commissioner Wulf-Mathies asked the Italian authorities, within the framework of the examination of the state of advancement of the Community initiatives, to "arrange for the verification and supplementation, on the basis of the situation at 31 December 1997, of the enclosed information relating to the commitments and payments currently entered in the accounts by the authorities administering each of the programmes ...".' The Italian Government infers from that that the Commissioner concerned was referring, for the purposes of that examination, to the concept of legally binding commitments, 'as contained in Commission Decision No C(97)1035/6 [40] ... in particular in datasheet 3 ... '.

177. According to the Italian Government, this concept was not used as a criterion at the time of the adoption of the contested decision. It refers, in this regard, to the opinion of the management committee of 22 September 1998, which refers to the concept of 'commitments in place', that is to say, according to the Italian Government, 'a factual, not a legal, concept, which does not meet the criteria stated by the Commissioner concerned ... or match the content of the aforementioned Commission Decision ...'.

178. The Italian Government infers from this that the state of advancement of the initiatives was ascertained on the basis of heterogeneous data, in the sense that the Italian Republic provided the Commission with information regarding the state of advancement of the initiatives for which legally binding commitments had already been made whereas other Member States may have used the other criterion, which was much vaguer.

179. The Commission replies that the term 'commitments in place' is the term usually used to refer to the single concept used in the management of the Structural Funds, which is that of 'commitment at Member State level', defined in eligibility datasheet 3, annexed to Decision 97/322, as the legally binding commitment which is entered into by the final beneficiary and which must be accompanied by the commitment of the public funds required.

40 — Commission Decision 97/322/EC of 23 April 1997 modifying the decisions approving the Community support frameworks, the single programming documents and the Community initiative programmes in respect of Italy (OJ 1997 L 146, p. 11).

180. The Commission adds that, in any event, the Italian Government does not show how the letter from the Commissioner concerned dated 15 December 1997, which clearly referred to the concept of commitments at final beneficiary level, could have misled the Member States.

181. In that regard, it must be pointed out, first of all, that the Italian Government does not provide details of the way in which the term 'commitment in place' should be interpreted if it is not the same as 'legally binding commitment'. It must also be stated that, as may be inferred from the information received by the Commission, the Member States were all asked, at the end of 1997, to supply information about the state of implementation of the programmes on the basis of the same letter from the Commissioner concerned and, therefore, on the basis of the same concept of 'legally binding commitment'. The Italian Government does not establish how a concept which appears in a document dated September 1998, even if it is different from the other one, could have influenced the Member States when they had sent information to the Commission several months previously.

182. I therefore consider that the sixth plea is unfounded.

G — The seventh plea, alleging infringement of Article 2 of Regulation (EEC) No 1866/90 [41]

183. According to the Italian Government, the Commission infringed Article 2 of Regulation No 1866/90, paragraph 2 of which provides that '[i]n decisions proposing Community initiatives to the Member States, the Community aid decided upon for the entire period and the annual breakdown thereof shall be set out in ecus at the rate for the year of each decision and shall be subject to indexation.' The Italian Government maintains that 'any action involving [indexation], like appropriation for the programmes, may be undertaken only in accordance with the partnership principle and the rules governing the reduction of resources'.

184. The Commission replies that indexation is an integral part of the indicative allocations, which means that the general rules applicable to indicative allocations are also applicable to that part of the allocations which results from indexation.

41 — Commission Regulation (EEC) No 1866/90 of 2 July 1990 on arrangements for using the ecu for the purposes of the budgetary management of the Structural Funds (OJ 1990 L 170, p. 36), as amended by Article 1 of Regulation No 2745/94 (OJ 1994 L 290, p. 4).

185. I consider that Regulation No 1866/90, which is a regulation adopted by the Commission pursuant to Article 22 of Regulation No 4253/88, cannot affect the conditions upon which the Commission fixes, on the basis of Article 12(4) of Regulation No 2052/88, the indicative allocations. It follows that Regulation No 1866/90, on its own, cannot alter the conclusion which I have reached above, that the Commission did not infringe the partnership principle or the rules governing the reduction of resources, namely, Articles 24 and 25 of Regulation No 4253/88.

186. I therefore consider that the seventh plea is unfounded.

V — Conclusion

187. I propose that the Court should:

— annul the Commission's decision of 16 December 1998 approving the amendment to the indicative allocations for Community initiatives, which is contained in point 8 of the minutes of the Commission's meeting held on that day; and

— order the Commission to pay the costs.