JUDGMENT OF THE COURT
14 September 1994 *

In Joined Cases C-278/92, C-279/92 and C-280/92,

Kingdom of Spain, represented by Alberto José Navarro González, Director-General for Community Legal and Institutional Coordination, by Rosario Silva de Lapuerta and Gloria Calvo Diaz and Miguel Bravo-Ferrer Delgado, Abogados del Estado, of the State Legal Department dealing with matters before the Court of Justice, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6, Boulevard Emmanuel Servais,

applicant,

v

Commission of the European Communities, represented by Daniel Calleja y Crespo and Francisco Enrique González Diaz, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Articles 2, 3, 4 and 5 of Commission Decision 92/317/EEC of 25 March 1992 on State aid in favour of Hilaturas y Tejidos Andaluces SA, now called Mediterráneo Técnica Textil SA and its buyer (OJ 1992

* Language of the case: Spanish.

L 171, p. 54), Articles 2, 3, 4 and 5 of Commission Decision 92/318/EEC of 25 March 1992 on aid granted by Spain to Industrias Mediterráneas de la Piel SA (Imepiel) (OJ 1992 L 172, p. 76) and Articles 2, 3, 4 and 5 of Commission Decision 92/321/EEC of 25 March 1992 concerning aid awarded by Spain to Intelhorce SA (ex Industrias Textiles de Guadalhorce SA), now called GTE, General Textil España SA, a State-owned producer of cotton textiles (OJ 1992 L 176, p. 57),

THE COURT,

composed of: O. Due, President, G. F. Mancini, D. A. O. Edward (Presidents of Chambers), R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg (Rapporteur), J. L. Murray, Judges,

Advocate General: F. G. Jacobs,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 February 1994,

after hearing the Opinion of the Advocate General at the sitting on 23 March 1994,

gives the following

Judgment

By applications lodged at the Court Registry on 19 June 1992 the Kingdom of Spain brought an action pursuant to the first paragraph of Article 173 of the EEC

Treaty for the annulment of Articles 2, 3, 4 and 5 of Commission Decision 92/317/EEC of 25 March 1992 on State aid in favour of Hilaturas y Tejidos Andaluces SA ('Hytasa'), now called Mediterráneo Técnica Textil SA and its buyer (OJ 1992 L 171, p. 54), Articles 2, 3, 4 and 5 of Commission Decision 92/318/EEC of 25 March 1992 on aid granted by Spain to Industrias Mediterráneas de la Piel SA (Imepiel) (OJ 1992 L 172, p. 76) and Articles 2, 3, 4 and 5 of Commission Decision 92/321/EEC of 25 March 1992 concerning aid awarded by Spain to Intelhorce SA (ex Industrias Textiles de Guadalhorce SA), now called GTE, General Textil España SA, a State-owned producer of cotton textiles (OJ 1992 L 176, p. 57).

2 The Commission, having learned between 1987 and 1989 that, through the Spanish Patrimonio del Estado (the Property Office of the Ministry of Economic Affairs and Finance), the Spanish authorities had agreed to contribute capital to three companies which belonged to the Spanish State, two of which operated in the textile sector (Hytasa and Intelhorce) and one in the footwear sector (Imepiel), initiated procedures for the purpose of determining whether that action was compatible with Articles 92 and 93 of the Treaty.

3 The Commission's findings show that between 1986, the date of Spain's accession to the Community, and 1989, the State contributed PTA 7 100 million to Hytasa, PTA 6 029 million to Imepiel and PTA 7 820 million to Intelhorce through capital increases intended to cover operating losses. In view of the chronic unprofitability of the three undertakings the Spanish State decided to privatize them.

4 The terms of the sale provided in particular:

— in so far as concerned Hytasa, a contribution of capital in the amount of PTA 4 300 million by the Patrimonio del Estado at the time of the sale in order to improve the financial position of that undertaking, to make investments and

to finance dismissals, and a sale price of PTA 100 million for all the shares of the company;

— in so far as concerned Imepiel, for a capital injection of PTA 8 500 million by the Patrimonio del Estado, to be used for improving the company's financial position, restructuring the workforce and making appropriate investments in equipment and a sale price of PTA 100 million;

— in so far as concerned Intelhorce, a contribution of capital in the amount of PTA 5 869 million by the Patrimonio del Estado and a sale price of PTA 2 000 million to be paid in three instalments before completion of the sale.

5 Once those new contributions of capital had been provided, the contracts of sale were signed on 22 July 1990 (Hytasa), 3 February 1990 (Imepiel) and 4 August 1989 (Intelhorce) respectively. They included an undertaking on the part of the purchasers not to sell the companies during a period ranging from three to four years.

6 In the three contested decisions the Commission declared the aid provided between 1986 and 1989 to be unlawful on the ground that it had been granted in breach of the procedural rules laid down in Article 93(3) of the Treaty. It nevertheless considered that the aid satisfied the conditions for the exceptions provided for in Article 92(3)(c) of the Treaty and was therefore compatible with the common market (Article 1 of each of the decisions).

7 On the other hand, as regards the capital injections provided to the three companies at the time of their privatization (less the amount of the sale price), the Commission decided that not only was the aid granted in breach of the procedural rules of Article 93(3) of the Treaty but it also did not satisfy any of the conditions of the

exceptions provided for in Article 92(2) and (3) of the Treaty and that it was therefore incompatible with the common market (Article 2 of each of the decisions).

8 The Commission requested that the aid be recovered in accordance with the procedures and provisions of national law (Article 3 of each of the decisions).

9 According to Article 4 of Decision 92/317 regarding Hytasa, any agreement providing for an indemnity for the buyers by the State or the Patrimonio del Estado in respect of the obligation to reimburse the aid should not be carried out.

10 Finally, Article 5 of that decision and Article 4 of Decisions 92/318 and 92/321 concerning Imepiel and Intelhorce respectively require the Spanish Government to inform the Commission of the measures taken.

11 The Kingdom of Spain claims that the decisions at issue were adopted in breach of Articles 92 and 93 of the Treaty. It puts forward various pleas in law based on the unlawfulness of the Commission's finding that the Kingdom of Spain had infringed the procedural rules laid down in Article 93(3) of the Treaty, on the infringement of Article 92(1) and (3)(a) and (c) of the Treaty, on infringement of Article 190 of the Treaty and on the unlawfulness of the obligation to recover the aid.

Unlawfulness of the Commission's finding that the Kingdom of Spain infringed Article 93(3) of the Treaty

12 In Case C-278/92 the Kingdom of Spain maintains that the financial intervention of the State at the time of the privatization of Hytasa was not unlawful as it was effected in conformity with the provisions of Article 93(3) of the Treaty. According to the Kingdom of Spain, the essential elements of the aid had been notified to the Commission by means of documents sent on 30 May and 25 June 1990, that is to say, before they were put into effect on 25 July 1990 and before notification on 3 August 1990 of the decision to initiate the procedure provided for in Article 93(2) of the Treaty.

13 According to Article 93(3) of the Treaty 'the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

14 It follows from the case-law of the Court that the objective pursued by that provision, which is to prevent the implementation of aid contrary to the Treaty, implies that the prohibition laid down to that effect by the last sentence of Article 93(3) is effective during the whole of the preliminary period, which the Court considers to be of two months (judgment in Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 4, and Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 11).

15 Since that time-limit had not expired in the present case, the Kingdom of Spain could not proceed to implement the aid at issue without infringing Article 93(3) of the Treaty.

16 The first plea put forward by the Kingdom of Spain must therefore be rejected.

Infringement of Article 92(1) of the Treaty

17 The Kingdom of Spain argues in the three cases that the capital contributions provided to the undertakings in question do not constitute aid within the meaning of Article 92(1) of the Treaty. It considers that the Commission incorrectly applied the private investor test as laid down by the Court (judgments in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 14 et seq., and Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 13 et seq.; Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 19 et seq.). In particular, it contests the Commission's conclusion that privatization of the undertakings was not the most economically advantageous solution.

18 As regards Hytasa, the Kingdom of Spain claims in particular that the costs of winding up that undertaking would have been substantially greater than the Commission's estimates. Whereas the Commission assesses the total cost of winding up Hytasa at the net value of that company, the operation would have entailed a deficit for the State of PTA 5 312.6 million. The Kingdom of Spain arrives at that amount by deducting from the adjusted value of the company's assets (PTA 8 741.8 million) the adjusted value of its liabilities (PTA 6 388 million) and the cost of redundancies (PTA 7 666.4 million). The privatization scheme was therefore beneficial to the Patrimonio del Estado.

19 So far as concerns Imepiel and Intelhorce, the Kingdom of Spain claims in particular that their liquidation would have entailed very much greater costs, arising in particular from the dismissal of 1 450 employees (Imepiel) and 1 671 employees

(Intelhorce) — costs working out at PTA 7 900 million and PTA 11 362.8 million respectively —, salaries and unemployment benefits charged to the State (PTA 3 000 million so far as concerns Intelhorce), the loss of the companies' shares, aid for the restructuring of the industrial infrastructure, and so forth.

20 The Court has consistently held that investment by the public authorities in the capital of undertakings, in whatever form, may constitute State aid where the conditions set out in Article 92 are fulfilled (Case C-305/89, cited above, paragraph 18).

21 In order to determine whether such measures are in the nature of State aid, it is necessary to consider whether in similar circumstances a private investor of a size comparable to that of the bodies administering the public sector might have provided capital of such an amount (same judgment, paragraph 19).

22 In that respect a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority. Since the three companies in question were constituted as limited companies, the Patrimonio del Estado, as owner of the share capital, would only have been liable for their debts up to the liquidation value of their assets. That means in the present case that the obligations arising from the cost of redundancies, payment of unemployment benefits and aid for the restructuring of the industrial infrastructure must not be taken into consideration for the purpose of applying the private investor test.

23 In those circumstances, the argument put forward by the Kingdom of Spain must be rejected.

24 The Kingdom of Spain next points out, in connection with the political, social and economic costs that the closure of undertakings of more than 1 000 employees in regions which were in social crisis always entailed, that the image of the Patrimonio del Estado, as an intangible asset, could be seriously affected by such an operation.

25 The Court has held (judgment in Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 21) that a parent company may also, for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions. Such decisions may be motivated not solely by the likelihood of an indirect material profit but also by other considerations, such as a desire to protect the group's image or to redirect its activities.

26 None the less, the Commission is correct in stating that a private investor pursuing a structural policy — whether general or sectoral — and guided by prospects of viability in the long term could not reasonably allow itself, after years of continuous losses, to make a contribution of capital which, in economic terms, proves to be not only costlier than selling the assets, but is moreover linked to the sale of the undertaking, which removes any hope of profit, even in the longer term.

27 In Cases C-278/92 and C-280/92, concerning Hytasa and Intelhorce respectively, the Kingdom of Spain claims moreover that the open and unconditional nature of the sales should not give rise to doubt since the Commission itself acknowledges that the undertakings were sold to the highest bidders. Thus, in the case of Hytasa, the sale was promoted by means of a brochure by which 160 Spanish and foreign undertakings were invited to bid. There was no pre-condition attached to the

invitation to tender. The conditions which were finally imposed were the result of direct negotiations with the tenderers. Those terms were reasonable and in proportion to legitimate objectives such as the prevention of speculation and the implementation of the restructuring plan.

28 In the sixth paragraph in part IV of Decision 92/317 and the sixth paragraph of part V of Decision 92/321, the Commission states, with regard to the sale terms of Hytasa and Intelhorce that:

— the company in fact went to the highest bidder;

— nevertheless, that fact is not sufficient to ensure that no State aid element is involved in the sale of the company;

— in order to arrive at that conclusion, it has to be proved that the sale took place in an unconditional open bid; that is to say, through a tendering process where any potential buyer is invited to bid for the company and where the State does not impose any condition for settling the sale;

— in that respect, the information provided by the Spanish authorities indicates that the State imposed certain conditions on the buyers, limiting temporarily the disposal of the shareholding acquired and their right to request authorization to carry out temporary lay-offs.

29 Since the Kingdom of Spain has not disputed that last statement, its argument on that point must be rejected.

30 In Case C-278/92 the Kingdom of Spain observes that the sale contract for Hytasa requires that it formally waive a claim of PTA 822 750 396 against the Patrimonio

del Estado, which was upheld by a judgment of the Spanish Supreme Court on 22 March 1990, which has the force of *res judicata*. That amount should in any event be deducted from the contribution of PTA 4 200 million since that claim was abandoned solely on account of the sale and made it possible to avoid public expenditure which would otherwise have been inescapable. The cost of the intervention which should therefore be taken into account is PTA 3 377.3 million.

31 That view cannot be accepted. As the Commission rightly points out, it could hardly infer from the term used in the contract of sale ('waiver of possible rights') that Hytasa had a claim of PTA 822 750 396 against the State. The Kingdom of Spain cannot rely on that element since it was put forward for the first time in the application to the Court rather than in the course of the pre-litigation procedure laid down in Article 93 of the Treaty.

32 The Kingdom of Spain states lastly that the Commission has not established that the capital contributions provided by the Spanish authorities to the three undertakings in question have affected intra-Community trade. The existence of actual or potential changes, or of a distortion, of competition has to be specifically established on a case-by-case basis since there is no automatic effect on intra-Community trade.

33 As regards Hytasa, the Kingdom of Spain criticizes the Commission for not having succeeded in demonstrating that the Community market in finished cotton and wool products would be affected. All the data, studies and analyses in the contested decision refer to the market in yarns and woven cloth from which, however, Hytasa will disappear as a supplier after the sale and become a consumer. Moreover, as regards the finished products which Hytasa would manufacture and sell, the Commission simply complains about the absence of statistics.

34 So far as concerns Imepiel, the Kingdom of Spain claims that the reprivatized company's share of the market is marginal: 1.5% of the national market and 0.8% of the Community market, from the point of view of capacity, and 0.2% of the Community market from the point of view of production; exports for 1988 came to the negligible figure of PTA 940 million. It further claims that the contributions at issue made by the Patrimonio del Estado did not give rise to any discrimination as regards the part of the market occupied by the competing undertakings. Those contributions were intended to eliminate the financial burdens arising mainly from earlier debts and therefore to enable the undertaking to survive. There would therefore be little or no effect on intra-Community trade.

35 Finally, as regards Intelhorce, the Kingdom of Spain contends that the Commission simply analysed the general situation of the textile sector in the Community without mentioning any data reflecting the situation of the Spanish market in the Community market, or Intelhorce's situation, or even the share of that company in the common market as a whole.

36 It should be noted that the contested decisions include, in so far as necessary, an examination of the textile and footwear sectors.

37 In the decisions concerning Hytasa and Intelhorce, the Commission points out that in 1988 the Community global production of textiles amounted to ECU 86 691 million of which over 20% corresponded to the cotton industry and over 15% to the wool sector. The intra-Community trade is very substantial for both cotton yarns, fabrics and finished fabrics, representing 22, 34 and 63% of Community production.

38 According to the decision relating to Hytasa, the company participates in Community trade both directly for sales of wool fabrics to non-member States and

indirectly by occupying, for both wool and cotton products, a large share of the Spanish market. According to the data provided by the Kingdom of Spain itself, that applies also to the sale of wool and finished cotton products which Hytasa intends to manufacture after privatization. As regards Intelhorce, it participates in the cotton textile trade and occupies a large share of the Spanish market.

39 In the decision concerning Imepiel, the Commission observes that Community footwear production amounts to 1 050 million pairs of shoes and is displaying a downward trend, reflected in a fall of about 15% since 1986. The total market is about 1 290 million pairs and intra-Community trade involves about 440 million pairs (42% of production, 34% of the market). In 1986 Spain had some 14% of the Community market in terms of production, of which 61% was exported. According to the Commission, even if Imepiel does not participate significantly in the Spanish export market, its artificial presence in the Spanish market makes the penetration of that market by other Community producers more difficult.

40 According to the case-law of the Court, when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid (judgment in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11). For that purpose, it is not necessary for the beneficiary undertaking itself to export its products. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State (judgment in Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 19).

41 Having regard to the specific difficulties of the markets in cotton and wool textiles and in footwear, the Commission's assertion that any aid granted to a particular

competitor runs the risk of seriously distorting the conditions of competition does not appear to be mistaken.

42 It should be added that the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected (judgment in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 43).

43 It follows that the submission based on infringement of Article 92(1) of the Treaty is unfounded and must therefore be rejected.

Compatibility of the aid with the common market

(a) *Article 93(3)(a) of the Treaty*

44 In Cases C-278/92 and C-280/92 the Kingdom of Spain points out that, while acknowledging that the regions of Sevilla and Malaga, in which Hytasa and Intelhorce are located, are covered by Article 92(3)(a) of the Treaty, the Commission none the less declares that provision, by virtue of which aid intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered compatible with the common market, to be inapplicable. In that context, it disputes in particular the Commission's affirmation that the restructuring plans were not likely to bring about the viability of the two undertakings in question.

45 As regards Hytasa, the Kingdom of Spain observes that the central concern throughout the privatization process was to bring about the viability of the undertaking by means of substantially modifying its production and sales by bringing in valuable know-how, design capability, fashion awareness and technological innovation. The recovery plan envisaged a substantial reduction in the workforce: the number of employees was to fall from 1 034 to 720. The company was to reduce its production of yarns and woven cloth by amounts varying from 20.8% to 30.2%. It was to cease selling those products completely, restricting production to the manufacture of products finished by the undertaking itself; the company was to concentrate henceforth on the manufacture of finished garments.

46 So far as concerns Intelhorce, the Kingdom of Spain claims that the new owners agreed to undertake a large financial and organizational effort in order to make the undertaking viable after reducing its size, the key element to that effort consisting in the know-how of the new owners. The object of the sale was not to keep the company in business artificially but to ensure its economic, technical and financial recovery. The recovery plan provided for a reduction of the workforce by 40% and a reduction of the traditional production of Intelhorce. Thus, the projected production for 1991 to 1993 represented at the end of the period a reduction of 21% of the manufacture of yarns and finished products and a reduction of 50% of that of woven cloth.

47 The Commission maintains first of all, in the decisions at issue, that the aid measures in question were not granted under the corresponding regional aid schemes but on the basis of *ad hoc* decisions of the Spanish Government, taking the form of discretionary capital contributions. The aid should therefore not be considered as regional.

48 In that regard, it should be noted that in a communication of 3 February 1979 on regional aid systems (OJ 1979 C 31, p. 9), to which Decision 92/317 and 92/321

refer, the Commission indicated that regional specificity is fulfilled where regional aid awarded in the regions benefiting from the European Regional Development Fund in principle forms part of a regional development programme within the meaning of Article 6 of Regulation (EEC) No 724/75 establishing that fund (OJ 1975 L 73, p. 1). In application of Council Regulation (EEC) No 1787/84 of 19 June 1984 (OJ 1984 L 169, p. 1), which replaced the abovementioned regulation, the Fund finances in particular national programmes of Community interest. Such a programme is defined at national level and consists of a set of consistent multiannual measures corresponding to national objectives and serving community objectives and policies (Article 10).

49 On the basis of those provisions, which were applicable at the material time, the Commission was justified in considering that *ad hoc* aid, that is to say, aid which does not form part of a national programme of Community interest, does not in principle meet the criterion of regional specificity. That aid is not primarily intended to facilitate the development of certain economic regions, but is granted, as in the present case, in the form of aid for the operation of undertakings in difficulty. In those circumstances, it is for the Member State concerned to establish that the aid in question actually fulfils the regional specificity criterion. None the less, the Commission must first specify the criteria according to which it considers *ad hoc* aid, exceptionally, to be regional in character. The fact that the aid in question was granted on the basis of *ad hoc* decisions cannot therefore preclude them from being described in the present case as regional aid within the meaning of Article 92(3)(a) of the Treaty.

50 The Commission states in the second place that even if the aid in question were to be considered as regional, it would not however be eligible for compatibility under Article 92(3)(a), because it did not contribute to the long-term development of the region without adversely affecting the common interest and competition conditions within the Community.

51 The Court has consistently held that, as regards the application of Article 92(3) of the Treaty, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context (judgment in Case C-303/88 *Italy* v *Commission*, cited above, paragraph 34). However, the reasoning followed by the Commission must remain consistent.

52 According to the Commission, the restructuring plan submitted by Hytasa did not offer a viable solution for the undertaking, given that

— the projected reductions in the manufacture and sale of semi-finished products (from 13 to 25% for yarn and fabric) were compensated for by the increase in the manufacture and sale of finished products (from 50 to 320%), which increased the pressure in a sector in difficulty;

— no reduction of the productive assets was envisaged, which enabled Hytasa to relaunch in the future its activities in a sector which was saturated;

— the measures for reducing the workforce were insufficient.

53 The Commission observes at the eighth paragraph of part VI of the decision at issue that:

'Even if the aid in question were to be considered as regional, it would not however be eligible for compatibility under Article 92(3)(a), because aid granted pursuant to the provisions of that Article must contribute to the long-term development of the region — this notably means in this case that the aid must at least

serve for restoring the company's viability, an objective not attained for Hytasa in the light of the information submitted so far to the Commission (this aspect was already discussed in part IV above) — without having unacceptable negative effects on competition conditions within the Community.'

54 Part IV of the decision at issue, to which the Commission refers, concerns the question of ascertaining to what extent the measure in question contained State aid elements within the meaning of Article 92(1) of the Treaty. It does not deal with the question of the restoration of the viability of Hytasa.

55 Nor is that question referred to in part III of the decision. After summarizing the contents of the two restructuring plans, the Commission questions, in the sixteenth paragraph, the validity of the statements put forward by the Spanish authorities and the forecast results. According to the Commission, the several contradictions noted between the two plans did not allow it to share the optimistic forecasts in the conclusion of the revised plan (same paragraph). The Commission does not however put forward any specific argument on that point other than that the new restructuring plan would not ensure the viability of Hytasa.

56 Finally, the Commission states in the ninth paragraph of part VI that the question of ascertaining whether the investment projects are in line with the interest of the Community and of ascertaining whether they contribute to a sound restructuring of the company are 'discussed further below'. In fact, the Commission discusses below the adverse effects of the aid on the conditions of competition without analysing the impact of the revised plan on the restoration of Hytasa's profitability. Such an analysis was necessary in the present case, particularly because the plan provided for a substantial redirection of production towards the manufacture of clothing.

57 It must therefore be concluded that the Commission's analysis of the compatibility of the aid in question with Article 92(3)(a) of the Treaty does not meet the criteria established by itself.

58 The second paragraph of Article 2, and Articles 3, 4 and 5 of the decision concerning the undertaking Hytasa must therefore be annulled.

59 So far as concerns Intelhorce, the Commission notes in the second paragraph of part IV of the decision at issue that the key objective of the new strategy was placed on the attainment of a considerable strengthening of the marketing structure, by means of the creation of a double network of shops selling own-produced finished articles in the range of both household linen and clothing, with innovative design and a new promotional registered mark. According to this strategy, over 1990 to 1992 Intelhorce planned to open 15 of its own shops in Spain for household linen, and in 1993 to 1994 another 22 under franchising contracts. As regards clothing, it planned to open 14 of its own shops in Spain over 1991 to 1992, and 50 others under franchising contracts in the period 1993 to 1994 (third paragraph of part IV). In terms of turnover, that strategy meant that Intelhorce's result would pass from losses of PTA 2 491 million in 1990 to profits of PTA 1 044 million in 1994, this being the first year of positive surplus in the five-year planning covered by the initial restructuring programme (fourth paragraph of part IV).

60 The initial programme had to be revised, partly as a result of floods suffered by the province of Malaga in November to December 1989 which had affected the production structure of Intelhorce but also because of the proven lack of capabilities in the company to undertake the launching of the strategy for clothing products (eighth paragraph of part IV). The revised programme provided for the postponement for an indefinite time of the clothing line and its corresponding shops network, a reduction in production levels and a further reduction in workforce (same

paragraph). The programme anticipated that Intelhorce's final results would pass from PTA 1 894 million losses in 1990 to PTA 1 712 million losses in 1992 (tenth paragraph of part IV).

61 Since the Commission had serious doubts as to the possibilities of the restructuring programme submitted to secure Intelhorce's viability, as in both its initial and revised versions the company recorded persistent negative financial results, on 18 March 1991 the Commission requested the Spanish authorities to present a newly-revised restructuring plan. Although the Spanish authorities had intended to propose a revised plan, it had still not been presented at the time of the disputed decision, 25 March 1992 (15th to 19th paragraphs of part VII).

62 On the basis of those factors, the Commission rightly decided that the programme which was presented did not contribute to a genuine restructuring fully ensuring the viability of the Intelhorce. It therefore justified considering that the conditions which must be fulfilled in order for Article 92(3)(a) to apply had not been met in that case.

(b) *Article 92(3)(c) of the Treaty*

63 The Kingdom of Spain considers that the aid granted to Imepiel and Intelhorce must be classified as sectoral aid within the meaning of Article 92(3)(c) of the Treaty, by virtue of which aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect

trading conditions to an extent contrary to the common interest may be considered to be compatible with the common market. That aid was necessary in view of the situation of the industry concerned. The object of the aid was to restore the long-term viability of the undertaking. It was bound up with a restructuring of the sector in so far as it formed part of the viability plan drawn up by the Patrimonio del Estado and by the buyers. Moreover, it complied with the principle of proportionality since the distortion of the market was minimal.

64 The Commission states in the sixth paragraph of part VI of the decision concerning Imepiel and in the 11th paragraph of part VII of the decision concerning Intelhorce that the aid granted to the two undertakings falls under the category of aid to undertakings in difficulty, since both companies' financial position and financial record have always been precarious. According to those decisions, aid to firms in difficulties carries the greatest risk of transferring unemployment and industrial problems from one Member State to another because it acts as a means of preserving the status quo by preventing market economy forces from their normal consequences in terms of the disappearance of uncompetitive firms in their process of adaptation to changing conditions in competition.

65 According to the two decisions, for this reason the Commission takes a strict approach in assessing the compatibility of aid for restructuring firms in difficulty. In particular, the Commission requires that such public intervention be strictly conditional on the implementation of a sound restructuring or conversion programme capable of restoring the long-term viability of the beneficiary; the intervention must also contain a compensatory justification for the aid in the form of a contribution by the beneficiary or to the development of the sector as a whole on a Community level by a reduction of its presence in the market.

66 So far as concerns Imepiel, the Commission stated (20th paragraph of part VI) that upon privatization the Commission had not been presented with a restructuring plan demonstrating the company's future viability, portraying a reduction in the company's productive capacity, and showing a decrease in the company's presence in the market place. The plan presented by the buyers for the company's future provided in fact for an increase in production instead of the necessary restructuring in the interest of the sector concerned at the level of the Community (19th paragraph of part VI).

67 The Commission is right in considering that, in order to be declared compatible with Article 92(3)(c) of the Treaty, aid to undertakings in difficulty must be bound to a restructuring programme designed to reduce or redirect their activities. Since, according to the plan presented at the time of Imepiel's privatization, the sole purpose of the aid in question was to allow the beneficiary to continue its activities on a larger scale, the Commission was justified in declaring inapplicable the derogation provided for in Article 92(3)(c) of the Treaty.

68 So far as concerns Intelhorce, the Commission noted (14th paragraph of part VII) that none of the proposed restructuring programmes envisaged a commitment for reducing production capacities; on the contrary, the initial programme foresaw a relaunching of the company's activities by a substantial increase in its global sales, both in traditional products and in the shops network; although the revised programme foresaw a slight sales reduction by 6.5% between 1990 and 1992, nothing prevented Intelhorce from expanding its activities after 1992 to take advantage of idle capacity.

69 In those circumstances, Intelhorce too could not benefit from the derogation provided for in Article 92(3)(c) of the Treaty.

Infringement of Article 190 of the Treaty

70 The Kingdom of Spain claims that the decisions at issue infringe Article 190 of the Treaty inasmuch as the Commission does not justify the different treatment which it applies to the aid granted by the State in 1988 and 1989, considered to be compatible, and the subsequent contributions made by reason of privatization, which are considered to be incompatible. According to the Kingdom of Spain, the aid granted upon privatization follows directly from previous aid and pursues the same objectives.

71 On that point, it is sufficient to observe that the assessment of the compatibility of the aid with the common market is based on a specific analysis of the contributions in question and not on a comparison with earlier interventions, whose legality is not challenged.

72 The plea based on infringement of Article 190 of the Treaty must therefore be rejected.

Unlawfulness of the obligation to recover

73 The Kingdom of Spain observes, in Cases C-279/92 and C-280/92, that the obligation to recover the aid, mentioned in Article 3 of Decisions 92/318 and 92/321, infringes the principles of proportionality, legal certainty and the protection of legitimate expectation and also the requirement to give appropriate reasons. In particular, it is not sufficient that an aid should be declared prohibited by Article 92 in order for there to arise simultaneously an obligation to recover. According to the

Kingdom of Spain, the Commission has an option and, where it exercises it, it must give reasons for its decision. Although the obligation to recover may not be out of proportion in principle in relation to the objectives pursued, that does not mean that it is never disproportionate. There must be a case-by-case analysis in order to verify whether the balance sought between the advantage obtained and the damage caused is real or whether, on the contrary, in a specific case, the obligation imposed by the Commission is disproportionate.

74 The Kingdom of Spain considers that an obligation to recover the capital contributions made by the Patrimonio del Estado would be totally out of proportion with the minimum damage which the aid may have had on unrestricted competition in intra-Community trade, if account is taken of the serious consequence which would follow for the creditors, the harm caused to the employees, the potential for labour disputes and unemployment and the abnormally low level of development in the regions in question.

75 The Court has consistently held that the recovery of State aid unlawfully granted for the purpose of re-establishing the previously existing situation cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aids (judgment in Case C-142/87, cited above, paragraph 66).

6 Moreover, a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 93 may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid (judgment in Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 17). Nor may it rely, for the same purposes, on the principle of legal certainty.

77 In the present case the Kingdom of Spain has not put forward any argument which would allow a derogation from those rules.

78 As regards the obligation to state reasons, it should be borne in mind that in the judgment in Case C-310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 24, to which the decisions at issue refer, the Court held that where, contrary to the provisions of Article 93(3), the proposed aid has already been granted, the decision may take the form of an order to the national authorities to recover the aid. In those circumstances, the Commission need not provide specific reasons in order to justify the exercise of the power which the Court has thus held it to have.

79 In Case C-279/92 the Kingdom of Spain claims, moreover, that in the context of proceedings for cessation of payments currently in progress, Imepiel finds it impossible to implement the measure imposed by the Commission.

80 It follows from the case-law of the Court that any procedural or other difficulties in regard to the implementation of the contested measure cannot have any influence on the lawfulness of the measure (judgment in Case C-142/87, cited above, paragraph 63). The fact that Imepiel was the subject of insolvency proceedings subsequent to the decision at issue has no bearing on the present dispute.

81 Finally, in Case C-280/92 the Kingdom of Spain criticizes the Commission for having wrongly calculated the sum to be recovered. It notes that, according to the contested decision, the aid element contained in the injection of capital amounts to PTA 4 405 million, that is to say, the difference between PTA 5 869 and PTA 1 464 million, the latter amount representing the updated value, at the moment of the

sale, of the three instalments totalling PTA 2 000 million in nominal terms to be paid by Intelhorce's buyers (actualization rate calculated by applying the interest rate fixed by the Spanish State for the ICO bonds issued in June 1989). According to the Kingdom of Spain, that mathematical calculation of the amount to be recovered is not correct. If the purchase price cannot be taken into account as a whole because its payment was spread over three instalments, neither can the capital contribution be taken into consideration as a whole since that contribution was not made in one payment either.

82 According to the fifth paragraph of part IV of the decision at issue

' ... the capital contribution of PTA 5 869 million provided by the State before the sale plays an outstanding role in the restructuring programme. This contribution was deposited by the State in a blocked bank account, and Intelhorce's managers can only make use of it gradually, if they show to the State as much investment in tangible or intangible fixed assets as the amount they had previously withdrawn. The availability of the blocked account was also limited in time according to the following schedule:

— a first section of PTA 1 869 million available just after the sale without justification, and can also be used for expenses other than investments,

— two successive sections of PTA 1 500 million each available not before 1 July of 1991 and 1992, respectively,

— a last section of PTA 1 000 million not before 1 July 1993.'

83 The Commission maintains that the amount in question had thus been disbursed by the State at the time when it transferred ownership of the shares and that therefore it was part of the assets of the company at the time of sale, even though its availability was subject to certain conditions. It emphasizes that funds deposited in a bank account generally produce interest for their owner, that is to say, in the present case, Intelhorce. The Commission has no knowledge that that did not occur in the present case.

84 Since the Kingdom of Spain has not disputed that the capital contribution did not produce interest for Intelhorce from the date of the sale, it does not appear that the method adopted by the Commission in order to calculate the amount of aid is erroneous.

85 It follows that in Case C-278/92 the second paragraph of Article 2 and Articles 3, 4 and 5 of Decision 92/317 should be annulled and that the actions in Cases C-279/92 and C-280/92 should be dismissed.

Costs

86 Under the second paragraph of Article 69(2) of the Rules of Procedure, where there are several unsuccessful parties the Court shall decide how the costs are to be shared. Since the Commission was unsuccessful in Case C-278/92 and the Kingdom of Spain was unsuccessful in Cases C-279/92 and C-280/92, the Commission should bear one-third of the costs and the Kingdom of Spain should bear two-thirds.

On those grounds,

THE COURT

hereby:

1. **Annuls the second paragraph of Article 2 and Articles 3, 4 and 5 of Commission Decision 92/317/EEC of 25 March 1992 on State aid in favour of Hilaturas y Tejidos Andaluces SA, now called Mediterráneo Técnica Textil SA, and its buyer;**

2. **Dismisses the applications in Cases C-279/92 and C-280/92;**

3. **Orders the Commission to bear one-third and the Kingdom of Spain to bear two-thirds of the costs.**

Due Mancini Edward

Joliet Schockweiler Rodríguez Iglesias

Grévisse Zuleeg Murray

Delivered in open court in Luxembourg on 14 September 1994.

R. Grass

Registrar

O. Due

President