JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

30 January 2002 *

In Case T-35/99,

Keller SpA, established in Palermo (Italy),

Keller Meccanica SpA, established in Villacidro (Italy),

represented by D. Corapi, V. Cappucelli and M. Merola, lawyers, with an address for service in Luxembourg,

applicants,

supported by

Italian Republic, represented by U. Leanza and O. Fiumara, acting as Agents, with an address for service in Luxembourg,

intervener,

* Language of the case: Italian.

v

Commission of the European Communities, represented initially by G. Rozet and A. Aresu, then by G. Rozet and V. Di Bucci, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of Commission decision 1999/195/EC of 1 July 1998 on aid granted and to be granted by Italy to Keller SpA and Keller Meccanica SpA (OJ 1999 L 63, p. 55),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: A.W.H. Meij, President, K. Lenaerts, M. Jaeger, J. Pirrung and M. Vilaras, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 6 June 2001, gives the following

Judgment

Legislative framework

Relevant legislative provisions of the region of Sicily

1 Under Article 2 of Law No 119, enacted by the Region of Sicily on 13 December 1983, relating to the grant of credit in the industrial, commercial and craft-industry, fisheries and co-operation sectors (*Gazzetta ufficiale della Repubblica italiana* No 51 of 21 February 1984, hereinafter 'Regional Law No 119/83'), its provisions are applicable to 'industrial undertakings carrying on business within the territory of the region whose objects are to turn to account economic resources and opportunities for work in Sicily'. Article 3 thereof, as amended by Article 31(1) of Law No 25 of the region of Sicily of 1 September 1993 relating to special intervention measures in favour of productive employment in Sicily (*Gazzetta ufficiale della Regione Siciliana* No 42 of 6 September 1993, hereinafter 'Regional Law No 25/93') provides that the rolling fund established with Irfis-Medicredito della Sicila SpA ('Irfis') is to be used to finance orders, obtained by industrial undertakings, which are subject to time-limits of a technical nature and/or major capacity take-up.

2 Regional Law No 25/93 was notified to the Commission then approved by it by Decision SG(94) D/3031 of 3 March 1994 State aid C 12/92 (ex NN

113/A/93) — Italy — Sicily, addressed to the Italian Government (hereinafter the 'decision approving the Sicilian regime'). That decision states, *inter alia* as follows:

'... By letter dated 6 May 1992 ... , the Commission informed your Government of the initiation of a proceeding under Article 93(2) of the EC Treaty against Regional law No 23/1991 of the Region of Sicily concerning extraordinary intervention measures in favour of industry (aid C 12/92).

...

Nevertheless, in light of the urgency invoked by the Italian authorities in regard to the expression by the Commission of a view on the measures concerned and of the availability of information relating to Articles 13 of Law No 23/1991 and 30 to 31 of Law No 25/1993, the Commission decided to withdraw the reservation which it had formulated concerning this specific point under the conditions hereinafter set out. The aforementioned provisions provide for aid in favour of undertakings operating in Sicily, in the form of an advance at the reduced rate of 4%, of 30% of the contractually agreed amount of orders obtained by those undertakings. Such intervention is warranted by the need to offset the non-application at present of extraordinary State intervention in the South of Italy and by the high cost of money in Sicily.

Although in the present case the operational aid is, as a matter of principle contrary to Community law, the Commission took into account economic and social conditions in Sicily, an underdeveloped region with a high rate of unemployment.

For those reasons and in accordance with the method for applying derogations for aid for regional purposes (OJ 1988 C 212, pp. 2 to 5), the Commission decided to authorise a derogation for the aid in question under Article 92(3)(a) of the EC Treaty, inasmuch as those intervention measures were intended to promote the economic development of a region with an abnormally low standard of living and serious unemployment. However, in order to avoid any distortions in the normal functioning of the market to which prolonged application of the measures in question could give rise, the Commission decided to limit its approval to measures adopted prior to 31 December 1994 on the basis of the currently available credit of ITL 50 billion (+/- 27 MECU), and to rule out any renewal of the refinancing of those provisions.

The Commission wishes to draw the Italian Government's attention to the fact that application of those provisions is governed by the Community rules and disciplines relating to certain sectors of industry, agriculture and fisheries and to agricultural undertakings organised in accordance with industrial criteria. ...'

3 Law No 20 of the Region of Sicily of 1 March 1995, entitled 'Incorporation and modification of Regional Law No 119 of 13 December 1983', as later supplemented and amended, on credits granted for the acquisition of orders by industrial undertakings: rules for interpreting Article 9 of Regional Law No 27 of 15 May 1991 (hereinafter 'Regional Law No 20/95' or 'Law No 20/95') contains an Article 1 entitled 'Integration and modification of Article 3 of Regional Law No 119/1983' which is couched in the following terms:

'1. The financing referred to in Article 3 of Regional Law No 119 of 13 December 1983, as amended by Article 31 of Regional Law No 25 of 1 September 1993, is also to be granted to the undertakings subject to the extraordinary administration procedure provided for in Law No 95 of 3 April 1979.

2. The financing granted to the undertakings mentioned at paragraph 1 above is to be accompanied by mortgage guarantees and privileged rights, even if not of the first rank, over the assets of the undertaking in an amount not exceeding 50% of advance payments made or, alternatively, if the undertaking has been so authorised, the financing shall be covered by the guarantee of the State Treasury provided for in Article 2bis of Decree Law No 95 of 20 January 1979 converted with amendments into Law No 95 of 3 April 1979 for an amount equal to 50% of the anticipation granted.'

Relevant legislative provisions of the Sardinia Region

4 Article 1 of Law No 66 of the Region of Sardinia of 10 December 1976 establishing a fund for the protection of levels of production and employment in the industrial sector (*Bolletino ufficiale della Regione Autonoma della Sardegna* No 1054 of 14 December 1976, hereinafter 'Regional Law No 66/76' or 'Law No 66/76') provides for the establishment of an *ad hoc* fund intended to safeguard levels of production and employment in the industrial sector and to facilitate the financial, technical and economic recovery of industrial undertakings whose registered offices and installations are established in Sardinia and who are experiencing difficulties in carrying on their business, though possessing specific productive value. That fund was established in particular with the Società Finanziaria Industriale Rinascita Sardegna ('Sfirs').

5 That Sardinian aid scheme was notified to the Commission by the Italian authorities on 3 August 1984. By a memorandum dated 28 June 1985 those authorities communicated to the Commission draft directives implementing Regional Law No 66/76 which stated as follows:

'Loans may be made only to small and medium sized undertakings whose fixed investments do not exceed ITL 7 billion and which do not employ more than 100 employees (Possono beneficiare dei mutui soltanto le piccole e medie imprese, aventi investimenti fissi non superiori a 7 miliardi di Lire e nei limiti di 100 addetti.)'

6 That aid scheme was approved by a decision of the Commission communicated by note SG(85) D/9533 of 25 July 1985 (hereinafter 'decision approving the Sardinian scheme'). That decision is worded as follows:

'... I am pleased to inform you that, in light of the modifications to the schemes made by the regional implementing directives, the Commission has seen fit to lift its reservations with regard to the measures provided for in Regional Law No 66/1976 and Article 14 of Regional Law No 31/1983. In its examination the Commission took particular account of the fact that those are two schemes in favour of small and medium-sized undertakings, that the rate of interest charged to the beneficiary is generally of the order of 8%, that financing can occur only once in respect of each undertaking and that those undertakings operate in sectors essentially at local level in an unfavoured area ...

As regards Law No 66/1976 on undertakings in difficulty, the Commission took note in particular of the limitations concerning the size of the recipient undertakings (fewer than 100 employees and fixed investments of no more than ITL 7 billion), of the fact that this scheme does not overlap with other aid having the same objective and of the fact that the chemical, synthetic fibres, textile and clothing sectors are not as a matter of principle entitled to aid under this scheme ...

...

Accordingly, the Commission decided to discontinue the proceeding initiated under Article 93(2) of the EEC Treaty against Article 49 of Law No 26/84 of the Sardinia Region ...'

7 On 22 October 1985 the Giunta of the autonomous region of Sardinia formally adopted directives implementing Regional Law No 66/76 analogous to those approved in the case of the decision approving the Sardinian scheme. By decision of 6 November 1986, however, the Giunta adopted fresh directives implementing that law. Article 2 of those new directives provides:

'Only small and medium-sized undertakings having fixed investments of no more than ITL 7 billion, calculated on balance sheet value net of technical depreciation and any monetary re-evaluation shall be entitled to financing. Financing shall be proportionate to the ceiling of 100 employees.'

8 Those directives were then amended again by decisions of 23 June 1992 and 1 June 1993 of the Giunta of the autonomous region of Sardinia. The conditions laid down in the directives implementing Regional Law No 66/76, as amended, are, *inter alia*, as follows: financing limited to undertakings whose fixed investments do not exceed ITL 80 billion; observance of the parameter represented by the relationship between the number of persons employed and the unit amount of the financing (ITL 65 million per person); ceiling set at 100 persons. Those new directives were not notified to the Commission prior to implementation.

Community guidelines for State aid for rescuing and restructuring firms in difficulty

9 The Community guidelines for State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12, hereinafter 'guidelines on firms in difficulty'), as amended in 1997 (OJ 1997 C 283, p. 2), state in particular that restructuring aid

may be granted only subject to strict conditions. In particular, a restructuring plan presented in this context must satisfy all the following general conditions (point 3.2.2):

'(i) Restoration of viability

The *sine qua non* of all restructuring plans is that they must restore the long-term viability and health of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions. Consequently, restructuring aid must be linked to a viable restructuring/recovery programme submitted in all relevant detail to the Commission. ... To fulfil the viability criterion, the restructuring plan must be considered capable of putting the company into a position of covering all its costs including depreciation and financial charges and generating a minimum return on capital such that, after completing its restructuring, the firm will not require further injections of State aid and will be able to compete in the market place on its own merits. ...

(ii) Avoidance of undue distortions of competition through the aid

A further condition of aid for restructuring is that measures are taken to offset as far as possible adverse effects on competitors. Otherwise aid would be "contrary to the common interest" and ineligible for exemption pursuant to Article 92(3)(c). Where on an objective assessment of the demand and supply situation there is a structural excess of ... capacity in a relevant market in the European Community served by the recipient, the restructuring plan must make a contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market in the European Community by irreversibly reducing or closing capacity. ... A relaxation of the principle of requiring a proportionate capacity reduction may be allowed if such a reduction is likely to cause a manifest deterioration in the structure of the market, for example by creating a monopoly or a tight oligopoly situation. ...

(iii) Aid in proportion to the restructuring costs and benefits

The amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken and must be related to the benefits anticipated from the Community's point of view. Therefore, aid beneficiaries will normally be expected to make a significant contribution to the restructuring plan from their own resources or from external commercial financing. ...'

Commission's communications and guidelines on regional aid

10 At point I.6 of the Commission's communication on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ 1988 C 212, p. 2), it is stated:

'... some regions may experience such serious cost and infrastructural disadvantages that even the maintenance of existing maintenance is extremely difficult. In the early stages of development, maintenance of existing investment, perhaps on a short to medium-term basis, can form a *sine qua non* for the attraction of new investment which will help in turn to develop the region. ... In recognition of the special difficulties of these regions, the Commission, may, by way of derogation, authorise certain operating aid in Article 92(3)(a) regions under the following conditions: ... such aid is not granted in violation of the specific rules on aid granted to companies in difficulty; ...'.

Facts of the dispute

11 At the time when the application in this case was brought, the two applicants, Keller SpA (hereinafter 'Keller') and Keller Meccanica SpA (hereinafter 'Keller Meccanica'), formed part of the Keller industrial group which carries on business as a manufacturer of railway rolling-stock. Keller has its registered office in Sicily and employs 294 persons. Keller Meccanica, a wholly-owned subsidiary of Keller, has its registered office in Sardinia and employs 319 persons. A considerable part of those companies' business is accounted for by orders placed by Ferrovie dello Stato (Italian State railways). Those companies were also awarded contracts under a number of tendering procedures in other Member States, in particular Germany. However, at the beginning of the 1990s demand for railway rolling-stock suffered a major decline. At the same time, the applicants' debt burden grew exponentially. Pursuant to Law No 95/79 of 3 April 1979 governing special administration (*Gazzetta ufficiale della Repubblica italiana* No 94 of 4 April 1979, hereinafter 'Law No 95/79'), both applicants were placed under this regime by ministerial decrees dated 16 June 1994 and 3 August 1994, respectively.

12 A recovery plan presented by the special administrator on the basis of each of the applicants' current order books was approved by ministerial decree of 22 December 1994 ('the recovery plan'). The other undertakings in the Keller group were placed in liquidation. Amongst the financing obtained in this connection, Keller received a soft loan of ITL 33 839 million granted by IRFIS

and Keller Meccanica a soft loan of ITL 6 500 million granted to SFIRS. Those two loans were granted at rates of interest (4% and 5%) lower than the reference rate applicable in Italy at the time when they were granted (11.35% in 1995).

13 More specifically, by an agreement dated 29 December 1994 IRFIS undertook to make available to Keller a credit facility under Regional Law No 25/93. That agreement was entered into on the basis of the recovery plan with a view to fulfilment of orders already placed amounting to ITL 126 131 million. By an agreement of 22 December 1995, after taking note of the fact that the State guarantee could not be obtained, the parties amended the forms of guarantees provided for in the initial agreement, whilst confirming for the rest the financing conditions. The financing was granted in April 1996.

14 By an agreement dated 14 December 1995, SFIRS granted Keller Meccanica a loan under Article 2(a) of Regional Law No 66/76 for the purpose of implementing the recovery plan.

15 By letters dated 12 April and 2 May 1996 the Italian Government notified the Commission of its intention to grant State treasury guarantees to the applicants in connection with the soft loans mentioned above.

16 In a memorandum dated 20 September 1996 and entitled 'C.E — Regional Law of 1 March 1995; state aid in favour of the Keller group (aid No 316/96)', addressed to the Italian Ministry of Industry, trade and craft industries, subsequently communicated to the Commission, the Region of Sicily stated that 'Regional Law No 20/95 extended to firms under special administration the benefits provided for in Article 31 of Regional Law No 25/93, to be drawn down from the credits already authorised but not yet utilised'.

17 Owing to the inadequacy of the information provided by the Italian authorities and the serious doubts which the measures notified engendered, the Commission decided on 5 March 1997 to initiate the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC) in regard to the soft loan granted by IRFIS to Keller Meccanica at an annual rate of interest of 4% and the soft loan granted by SFIRS to Keller Meccanica at an annual rate of interest of 5% and the proposal to grant Treasury guarantees to Keller and Keller Meccanica in order to cover 50% of the abovementioned soft loans.

18 A copy of the letter addressed by the Commission to the Italian authorities was published on 7 May 1997 in the *Official Journal of the European Communities* (OJ 1997 C 140, p. 12). No observations by third parties were received by the Commission during the course of the administrative procedure. By letter dated 19 May 1997 the Italian authorities submitted their observations on the initiation of that procedure. They annexed thereto a letter from the Region of Sicily dated 21 April 1997 in which the latter explained, *inter alia*:

'It was under Regional Law No 119 of 1983, as amended by Regional Law No 25 of 1993, that the loan transaction was completed by IRFIS in accordance with the conditions laid down in fact by the European Union. However, as regards Regional Law No 20 of 1995 that law has no effect on the time-limits: in fact the latter sought merely to render enforceable a transaction entered into previously.'

19 By a letter dated 27 January 1998 the Italian authorities informed the Commission that the guarantees by the State Treasury would not be granted and withdrew the notification in connection therewith. Accordingly, the Commission terminated the proceeding under Article 93(2) of the Treaty to that extent.

Contested decision and procedure

20 On 1 July 1998 the Commission adopted Decision 1999/195/EC on aid granted and to be granted by Italy to Keller SpA and Keller Meccanica SpA (OJ 1999 L 63, p. 55, hereinafter 'the contested decision').

21 The Commission required the Italian authorities to adopt appropriate measures in order to ensure recovery of the unlawfully paid aid. In order to implement the contested decision, IRFIS and SFIRS, by memoranda dated 14 and 18 December 1998, respectively requested Keller and Keller Meccanica to repay that aid.

22 The contested decision mentions the following matters in particular:

'IV

...

B. ITL 33 839 million soft loan granted to Keller SpA

When initiating proceedings, the Commission stated that the Italian authorities themselves had previously confirmed that the loan had been granted on 22 April 1996 under Regional Law No 20/1995, by which the Region of Sicily extended the benefits of Articles 30 and 31 of Regional Law No 25/1993 to companies under extraordinary administrative arrangements. The measures under Articles 30 and 31 of Regional Law No 25/1993 were approved by the Commission in 1994 ... As Regional Law No 20/1995 amended Regional Law No 25/1993, the Commission had considered it as part of the original scheme still under examination (State aid NN 113/A/93 — Italy).

... By letter dated 20 September 1996 ... , the Region of Sicily stated that Regional Law No 20/1995 extended the benefits of Regional Law No 25/1993 to companies under extraordinary administrative arrangements. Moreover, in a letter dated 21 April 1997 ... , the Region of Sicily stated that Regional Law No 20/1995 was designed to permit implementation of a previously agreed operation.

Accordingly, Regional Law No 25/1993 was not applicable to companies under extraordinary administrative arrangements pursuant to Article 2a of Law No 95/1979. This is also borne out by the fact that the Italian authorities decided on 14 March 1995 to notify the Commission pursuant to Article 93(3) of the EC Treaty of the amendments provided for in Regional Law No 25/1993.

...

In addition, the soft loan was granted before adoption of the amendments authorising it and before the Commission could take up a position on those amendments. The aid element involved in the soft loan has thus to be considered illegal ... The Commission has therefore to consider the aid in question as a new individual measure not covered by the approved scheme ...

C. ITL 6 500 million soft loan granted to Keller Meccanica SpA

...

When initiating proceedings, the Commission noted that the soft loan did not meet the conditions on which the Commission had based its approval of the aid scheme (State aid C 4/85 — Italy), in particular the size of possible beneficiaries. The aid scheme, as approved by the Commission, stipulated that beneficiaries would be limited to firms with up to ITL 7 billion in fixed assets and a maximum of 100 employees. According to the information provided by the Italian authorities before the proceedings were initiated, Keller Meccanica SpA had 319 employees and a total of ITL 53 466 million in fixed assets.

...

As regards the soft loan to Keller Meccanica SpA, the Commission considers that the eligibility criteria were clearly set out in its 1985 decision (State aid C 4/85 — Italy). The letter sent to the Italian authorities informing them of the Commission's decision explicitly states that "the Commission has taken note of the limits set on the size of the beneficiary companies (maximum 100 employees and ITL 7 billion in fixed assets)". The limit of 100 employees has thus to be understood as a dimensional criterion and a maximum limit. Even if the Italian authorities thought that the Commission's decision did not reflect the meaning of the notified scheme, they did not challenge it before the Court of Justice of the European Communities within the prescribed time-limit. The decision is therefore final and irrevocable.

Since the approved scheme did not provide for a mechanism to adjust the aid criteria and the eligibility of beneficiaries, the subsequent amendments were substantial and should have been notified to the Commission pursuant to Article 93(3) of the EC Treaty. As there was no such notification, the soft loan already granted to Keller Meccanica cannot be deemed to be covered by the Commission's approval of the original scheme. ...

V

...

The Community Guidelines on State aid for rescuing and restructuring firms in difficulty stipulate that, by its very nature, such aid distorts competition and affects trade between Member States, as is also confirmed by the situation in the sector in which the two companies operate.

The rolling stock sector includes the manufacture of railway and urban rail transport equipment ... After a period of stagnation in the mid to late 1980s, there was a rapid growth in demand from 1991 until 1994. After a slight decline in both production and consumption in 1994 ... , production plummeted ... and consumption ... , both falling below their 1992 levels.

Demand in the sector is concentrated among a small number of customers ... The demand for rolling stock is dependent on long-term transport and infrastructure policies, which are in turn influenced by the political and economic climate.

As the market comprises a rather small number of customers with large projects which arise infrequently and generally last several years, competition between suppliers remains fierce ...

VI

The Italian authorities have described the proposed State guarantee for part of the soft loans to Keller SpA and Keller Meccanica SpA as restructuring aid. ...

In this case, the aid is designed to help the companies to complete their existing orders. ... Moreover, as is explained below, the plans submitted are concerned only with completing the orders and cannot be viewed as restructuring plans capable of restoring the firms' long-term viability.

...

For the Commission to approve aid, the restructuring plan must satisfy [four cumulative conditions]. ...

... The financial plan presented to the Commission by Keller SpA forecast a profit of ITL 1 805 million after the orders have been completed. In the case of Keller Meccanica SpA, the profit forecast is ITL 8 300 million.

At the time the proceedings were initiated, neither company had any new orders. The Commission could not conclude that the restructuring plans for the firms would render them economically and financially viable in the long term because, even if existing orders were completed, the forecast profits would not be sufficient to cover the companies' past losses.

...

On the basis of the above information, the Commission cannot alter its preliminary conclusions that the "recovery programme" established by the extraordinary administrator for both Keller SpA and Keller Meccanica SpA under Law No 95/1979 constitutes simply a financial plan aimed at the completion of orders in hand at the time the law was applied. The recovery programme cannot be regarded as a restructuring plan within the meaning of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty because it does not constitute a feasible, coherent and far-reaching plan to restore the firm's long-term economic and financial viability. To fulfil the viability criterion, the restructuring plan must be considered capable of enabling the company to cover all its costs, including depreciation and tax charges, and generating a minimum return on capital so that, after completing its restructuring, the firm will not require any further injection of State aid and will be able to compete in the market on its own merits.

Clearly, this is not the case here. The aim of the measure is to keep both companies in operation for a limited transitional period while a private purchaser is found. ... It must therefore be concluded that the first and most important condition laid down in the Community Guidelines ... is not met.

The requirement that the aid should not unduly distort competition is not met either since, during the transitional period, both companies are being kept in operation artificially to the detriment of non-aided competitors in the sector. In addition, it is not impossible that the companies will obtain new orders.

Consequently, the aid elements in the soft loan[s] ... do not qualify for the derogation under Article 92(3)(c), which is the only basis for exempting aid for rescuing and restructuring firms in difficulty ...

Nor does the fact that both companies are subject to extraordinary administrative arrangements affect the Commission's conclusions. ...

VII

The aid elements may be calculated as the difference between the interest rates charged to the companies and the reference rate used to calculate the net grant equivalent of regional aid in Italy in 1995, i.e. 11.35%. This gives an aid element of ITL 4 288 million for the soft loan granted to Keller SpA and one of ITL 903 million for the soft loan granted to Keller Meccanica SpA.

...

Article 1

The conditions under which soft loans ... were granted ... are not in accordance with the conditions laid down in the regional aid schemes approved by the Commission. Furthermore, the loans were granted before the Commission had submitted its comments on the subsequent alterations to those schemes, in accordance with Article 93(3) of the EC Treaty.

Article 2

The aid in the form of interest rebates amounting to ITL 4 288 million for Keller SpA and to ITL 903 million for Keller Meccanica SpA is illegal.

Such aid does not qualify for any of the exemptions laid down in Article 92(2) and (3) of the EC Treaty ... and is therefore incompatible with the common market within the meaning of Article 92(1) of the EC Treaty ...

Article 3

Italy shall take whatever steps are necessary to recover the illegal aid referred to in Article 2. Repayment shall be made in accordance with the procedures and provisions of Italian law.

The amounts to be repaid shall bear interest from the date on which the aid was granted until the date on which it is effectively repaid. ...'

23 By application lodged at the Registry of the Court of First instance on 8 February 1999, the applicants brought this action without awaiting publication of the contested decision in the Official Journal.

24 By a document lodged at the Registry of the Court of First Instance on 29 July 1999, the Italian Republic applied for leave to intervene in support of the forms of order sought by the applicants. By order of 24 November 1999 the President of the Second Chamber, Extended Composition, granted the leave sought.

25 The Italian Republic lodged its statement in intervention on 19 January 2000.

26 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance, Extended Composition, decided to open the oral procedure. By way of measures of organisation of procedure, it requested the parties to reply to written questions and to produce certain documents. The parties complied with those requests.

27 The parties presented oral argument and their replies to the Court's oral questions at the hearing on 6 June 2001.

Forms of order sought by the parties

28 The applicants claim that the Court should:

— annul the contested decision;

— declare that the aid at issue cannot be recovered;

— in the alternative, annul the operative part of the contested decision concerning calculation of interest on the sums to be recovered;

— order the Commission to pay the costs.

29 The Commission contends that the Court should:

— dismiss the application;

— order the applicants jointly to pay the costs.

30 The intervener claims that the Court should:

— grant the forms of order sought by the applicants;

— order the Commission to pay all the costs including those incurred by the intervener.

Substance

First and second heads of claim

31 Essentially, the applicants are relying on four pleas in support of their first head of claim relating to the annulment of the contested decision. The first of those pleas alleges an erroneous interpretation of the applicable Italian legislation and, thus, misapplication of Article 92 of the EC Treaty (now, following amendment, Article 87 EC), and inadequacy of the statement of reasons in regard to the soft loan granted to Keller; the second alleges an erroneous interpretation of the applicable Italian legislation and, thus, misapplication of Article 92 of the EC Treaty (now, following amendment, Article 87 EC), and inadequacy of the statement of reasons in regard to the soft loan granted to Keller Meccanica; the third plea alleges infringement of the guidelines on firms in difficulty, erroneous application of Article 92 of the Treaty and infringement of the duty to provide a statement of reasons; finally, the fourth plea is based on an infringement of the duty to provide a statement of reasons in regard to the reference to the Italian legislation concerning special administration.

32 It should be pointed out that in the second head of claim under which the applicants seek a declaration that the aid at issue cannot be recovered the applicants are in actual fact seeking partial annulment of the contested decision, more specifically of Article 3(1) thereof, which provides for recovery of the unlawfully paid aid.

33 Moreover, it should also be pointed out that the applicants do not rely on any specific plea in support of that second head of claim. The Court therefore deems it appropriate to deal with the first two heads of claim together.

First plea: erroneous interpretation of the applicable Italian legislation and, thus, misapplication of Article 92 of the EC Treaty, and inadequacy of the statement of reasons in regard to the soft loan granted to Keller

— Succinct account of the parties' arguments

34 First of all, the applicants point out that, in the contested decision, the Commission took the view that Regional Law No 25/93 was not applicable to firms under special administration.

35 In that connection they state that, under Article 3 of Regional Law No 25/93 which forms the subject-matter of the decision approving the Sicilian scheme, Keller was eligible for the grant of the soft loan at issue.

36 The allegation that Regional Law No 25/93 is not applicable to firms under special administration is without foundation, first, because that law seeks to promote the financing of orders obtained by 'industrial undertakings' in a broad sense without any indication that it is not to apply to firms under special administration. In that connection the intervener supports the applicants' arguments. Secondly, according to the applicants, their interpretation of Regional Law No 25/93 and Law No 95/79 is not rebutted by the fact that it was stated in Regional Law No 20/95 that firms under special administration also had access to those sources of finance. The relevant provisions of the latter law are in fact of interpretative value in the sense that they merely seek to delimit the scope of the existing provisions.

37 They go on to stress that the Commission claims in support of its arguments that the Italian authorities stated in the correspondence prior to initiation of the administrative procedure that the financing was granted under Regional Law No 20/95. Indeed they point out that in the letters dated 20 September 1996 and 21 April 1997, the Region of Sicily stated that Regional Law No 20/95, on the one hand, extended to firms under special administration the benefits provided for under Regional Law No 25/93 and, on the other, sought to enable performance of a transaction entered into previously. None the less, they point out that the legislative provisions must be interpreted on the basis of their formal wording and logical and systematic legal criteria. However, the fact that Article 3 of Regional Law No 25/93 excludes certain sectors (electricity, petrochemicals etc.) confirms, in their view, that the Italian legislature expressly stated the limits of application of soft loans and, beyond those limits, wished the regime to be applicable to all local industrial undertakings.

38 In their reply the applicants claim, secondly, that in the contested decision the Commission amply corrected and particularised the arguments deployed in the framework of the decision initiating the administrative procedure, in particular as regards determination of the applicable Sicilian legislation. However, the

erroneous reasoning initially adopted by the Commission vitiated investigation of the present case by preventing those concerned from appropriately putting forward their point of view.

39 The applicants go on to maintain that the Commission's examination of the soft loan granted to Keller was superficial and led to an incorrect assessment of the application of Article 92 of the Treaty to the present case. Finally, the Commission's argument concerning that loan, supported, they maintain, by no legal argument based on the letter or rationale of the legislation under examination, does not constitute a sufficient statement of reasons for the contested decision.

40 The Commission casts doubt on the wellfoundedness of those arguments and accordingly concludes that the soft loan granted to Keller did not accord with the conditions of the scheme at issue, as approved by it, and, consequently, was granted unlawfully.

— Findings of the Court

41 As the Commission rightly pointed out, the first plea deals primarily with the question as to the wellfoundedness of the Commission's assessment as to whether the conditions for the grant of the soft loan obtained by Keller were in conformity with the provisions of Regional Laws Nos 119/83 and 25/93, which constitute the rules referred to by the decision approving the Sicilian regime.

42 It is appropriate to examine the Commission's assessment of the aid granted to Keller in relation to the content of the decision approving the Sicilian regime in light of the information provided to it by the Italian authorities during the administrative procedure preceding adoption of the contested decision.

43 In that connection it should be pointed out, first, that the Commission had available to it, at the time of adoption of the contested decision, the memorandum from the Region of Sicily of 20 September 1996 (see paragraph 16 above). That memorandum refers in its title to both Law No 20/95 and Keller. Moreover, it is therein stated that Law No 20/95 extended the benefit of Law No 25/93 to firms under special administration. That statement constitutes an initial factor which could legitimately have led the Commission to conclude that its approval of the Sicilian regime could not be regarded as including firms placed under that special regime.

44 Next, it should be noted that the Commission had before it the letter from the Region of Sicily of 21 April 1997 (see paragraph 18 above). That letter could be legitimately regarded as confirming the abovementioned conclusion, inasmuch as it stated that Law No 20/95 sought to 'enable effect to be given to a transaction entered into previously'.

45 Finally, proposed Law No 20/95, as notified to the Commission, which was identical as to title and content to that of the law itself, was also capable of leading the Commission to believe that Law No 25/93, as approved, excluded from its scope firms under special administration. In fact, Article 1 of Law No 20/95 provided that Article 3 of Regional Law No 119/83, as amended by Article 31 of Regional Law No 25/93, would also apply to such undertakings. Furthermore, Article 1 aforesaid was entitled 'Incorporation and amendment of Article 3 of Regional law 119/83', in contrast to Article 2 of Law No 20/95 whose title was 'Rules for the correct interpretation of Article 9 of Regional Law No 27/1991'.

46 It follows from the foregoing that the Commission was entitled to take the view that the individual aid granted to Keller went beyond the limits of Regional Law No 119/83, amended by Regional Law No 25/93, as approved in the decision approving the Sicilian rules.

47 As regards, secondly, the applicants' arguments concerning the errors alleged to have been made in the course of the investigative procedure (see paragraph 38 above), it should, first of all, be noted that that is a new plea within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance. Moreover, those arguments as to the comparison of the matters set forth in the contested decision and during the administrative procedure manifestly cannot be based on matters of law and fact coming to light during the procedure before the Court of First Instance, as provided for in the first subparagraph of Article 48(2) of the Rules of Procedure. Consequently, those arguments must be held to be inadmissible.

48 Nor in any event, can those arguments avail the applicants as regards the substance of the case, since the applicants themselves point out that the Commission corrected the errors allegedly made during the administrative procedure at the stage of the contested decision. Moreover, once the Commission had clearly stated in the decision initiating the procedure at issue under which regional legislation it considered that the soft loan at issue had been granted, the persons concerned within the meaning of Article 93(2) of the Treaty, including the Region of Sicily and the applicants, were properly informed in that regard and thus were in a position to let the Commission know the reasons why they considered that loan to have been granted under different regional legislation. Thus, in the present case the objective pursued by that provision was attained and the procedural rights of the applicants were not as a consequence infringed.

49 It follows, finally, from the foregoing considerations that the contested decision contains an adequate statement of the reasons on which it was based which enabled on the one hand the applicants to understand the reasons why the Commission considered the aid at issue granted to Keller to be unlawful and, on the other, enabled the Court of First Instance to exercise its power of judicial review. Consequently, the applicants were in a position to defend their rights in the context of this action in regard to the first part of the contested decision.

50 Consequently, the first plea should be dismissed in its entirety.

Second plea: misinterpretation of the applicable Italian legislation and thus misapplication of Article 92 of the Treaty and inadequacy of the statement of reasons as regards the soft loan granted to Keller Meccanica

— Arguments of the parties

51 First of all, the applicants point out that in the contested decision the Commission alleges that the Sardinian aid scheme, as approved by it, was applicable solely to undertakings whose fixed assets did not exceed ITL 7 billion and who employed no more than 100 persons. More specifically, that institution considers that the soft loan granted to Keller Meccanica does not observe those conditions inasmuch as that company at the time employed 319 persons with total fixed assets of ITL 53 466 million.

52 In the first limb of the plea the applicants maintain, in agreement with the intervener, that the soft loan granted to Keller Meccanica was granted in conformity with the conditions laid down in the directives implementing Regional Law No 66/76 issued by the Sardinian authorities, as amended in 1992 and 1993. In fact, the criterion as to size of 100 employees referred to by the Commission does not appear in the applicable Sardinian legislation, Article 2(2) of those implementing directives merely providing that 'financing is limited to a ceiling of 100 workers'. The Commission therefore misdirected itself in deeming that limit to be a maximum limit for the size of the recipient undertaking. The

applicants go on to point out that the characteristics of an authorised aid scheme are determined by the provisions of the aid scheme at issue in conjunction with the decision approving the scheme.

53 As regards the Commission's assertion that it was misled by the memorandum of the Italian authorities of 28 June 1985, the applicants point out that the content thereof is compatible with the directives implementing Regional Law No 66/76 applied in the present case. It is therefore the Commission which has erred in this case.

54 In a second limb of the plea the applicants maintain that the Commission's argument that the changes made to the directives implementing Regional Law No 66/76 established a new non-notified aid scheme is without foundation inasmuch as they were introduced with the sole objective of adapting the initial implementing conditions dating back to 1980 in line with the loss of purchasing power sustained by the Italian lira in the course of the ensuing years. The Italian lira depreciated in value by 130.6% during the period from 1980 to 1992. Therefore, maintenance of the ceiling at the original level would have resulted in the exclusion of even small craft firms from the benefit of financial aid. It follows according to the applicants that the changes adopted under the implementing directives did not give rise to a new aid scheme but merely enabled the legislation at issue to be adapted to the new requirements, whilst maintaining the overall purpose, the detailed implementing rules, the total volume and intensity of the aid authorised. Since the Commission has the power automatically to re-examine existing aid schemes, it is hardly appropriate to impose on that institution a requirement that it should re-examine changes to those schemes, where overall budgetary credit, maximum aid intensity and the detailed rules for granting the aid at issue remain unchanged.

55 The applicants go on to explain that revaluation of that kind is in conformity with the Court's case-law in which it has been held that the updating of quantitative parameters for intervention within the limits of the initial ceiling

does not entail modification of the scheme approved (judgment in Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097). They claim, in any event, that the Commission infringed its duty to provide a statement of reasons in the present case since in the contested decision it did not state the reasons why the applicants' arguments as to the requisite monetary revaluation of the aid scheme are incorrect.

56 The applicants conclude that, since the Commission rejected in the contested decision that line of argument, which the Italian authorities had also raised during the administrative procedure, yet made no mention of it in that decision, its examination of the file at issue was incomplete and superficial.

57 As to the first limb of the plea, the Commission points out, first of all, that the Sardinian scheme was examined in the context of a procedure under Article 93(2) of the Treaty and that, in the decision approving the Sardinian scheme, it states that it has taken note of the limits laid down in regard to the size of the recipient undertakings (maximum of 100 employees and fixed assets of ITL 7 billion). The fact that, following notification, the Sardinian authorities expressed those limits ambiguously in the directives implementing Regional Law No 66/76, thus amending without notice the text approved by the Commission is the responsibility of the Italian authorities alone.

58 With regard to the second limb of the plea concerning the ceiling on fixed assets of ITL 7 billion, the Commission points out that, at the time when it obtained the aid at issue, Keller Meccanica had fixed assets of ITL 53 466 million, in other words an amount more than eight times greater than the ceiling provided for in the decision approving the Sardinian scheme. As to the arguments based on monetary revaluation, it points out first of all the approval decision at issue included no machinery for adjustment. It was therefore right for the Commission to state in the contested decision that any subsequent amendment ought to have

been notified to it and thus that the aid at issue is not covered by the decision approving the Sardinian scheme. Finally, the judgment cited above in *Italy* v *Commission* which is relied on by the applicants is not relevant to the present case since in that judgment the Court merely annulled the decision at issue for failure to provide an adequate statement of reasons.

— Findings of the Court

59 It is appropriate to examine first of all the Commission's assessment of observance in the present case of the condition as to the maximum amount of fixed assets, which forms the subject-matter of the second limb of the plea.

60 The parties do not dispute that at the time when the decision approving the Sardinian scheme was adopted undertakings whose fixed investments were greater than ITL 7 billion did not come within the scope of the Sardinian scheme as approved. Nor do the applicants dispute in fact that their fixed assets exceeded at the time when the aid at issue was obtained the ceiling as fixed at the time when the Sardinian scheme was notified to the Commission and its approval by the latter. None the less, they are claiming that the ceiling was increased in order to enable account to be taken of the devaluation of the Italian lira by 130.6% since the date of the decision approving the Sardinian scheme. The aid granted to Keller Meccanica is lawful, inasmuch as at the time when the loan in question was granted the fixed assets of that company were lower than that ceiling as revalued.

61 It should be pointed out first that the applicants' arguments that alterations of the quantitative parameters of an approved scheme owing to monetary depreciation do not constitute the introduction of a new scheme cannot be upheld. In fact, in

its judgment in Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraph 28), the Court held that 'whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it'.

62 In light of those criteria it must in any event be held that the increase in fixed assets from ITL 7 billion to ITL 80 billion as a result of the decisions of 23 June 1992 and 1 June 1993, mentioned above, amended the provisions of the Sardinian aid scheme and, more specifically, the limits thereof, as approved by the Commission. Indeed, that major adjustment of the directives implementing Law No 66/76 entailed an increase in the number of potential recipients of the aid scheme at issue, thus opening it up to Keller Meccanica whose fixed assets at the time when the loan at issue was granted amounted to ITL 53 466 million. Consequently, the Commission did not infringe Articles 92 and 93 of the Treaty by considering that that non-notified increase in the ceiling of fixed assets was to be regarded as a substantive amendment to the Sardinian aid scheme and, thus, that the aid at issue granted to Keller Meccanica constituted new aid not covered by that scheme, in the form in which it was approved.

63 Even if the Court were to uphold the applicants' arguments according to which adjustment of the ceiling on fixed assets in line with the devaluation of the Italian lira did not constitute a notifiable alteration of an existing scheme, it none the less remains the case that that devaluation during the period at issue, that is to say from 1985, the year in which the Sardinian aid scheme was approved, to 1998, when the contested decision was adopted, was, according to the assessment of the applicants themselves, of the order of 130.6% (see paragraph 60 above). However, Keller Meccanica's fixed assets at the time when the aid at issue was granted, amounting to ITL 53 466 million, were more than seven times greater than the permitted ceiling. Thus the increase in the ceiling on fixed assets from ITL 7 billion to ITL 80 billion under the directives implementing Regional Law No 66/76, as amended, is in no way proportional to the devaluation of the Italian lira during the period in question. it follows that the applicants' arguments cannot be upheld.

64 It should be pointed out, secondly, that the applicants' arguments based on the judgment in *Italy* v *Commission*, cited above, cannot in any event be upheld since, as adjudged above, the increase in the ceiling on fixed assets from ITL 7 billion to ITL 80 billion cannot constitute an updating of quantitative parameters of intervention within the limits of the initial ceiling. Nor does it in any way follow from that judgment that any existing aid scheme may undergo monetary revaluation without first being notified to the Commission and approved by it. In that judgment the Court, as the Commission rightly pointed out, limited itself to partial annulment of the decision at issue owing to the inadequacy of the statement of reasons in regard to the arguments submitted in the course of the administrative procedure in that case by the Italian authorities concerning the problem of the devaluation of the Italian lira.

65 As regards, finally, the applicants' argument that the Commission infringed its duty to provide an adequate statement of reasons or conducted an incomplete and superficial examination of the case file by not stating in the contested decision the reasons why automatic adjustment of the criteria governing the aid scheme at issue in line with the devaluation of the Italian lira was unlawful, it is sufficient to note that at point IV.C of the decision, the Commission stated that '[s]ince the approved scheme did not provide for a mechanism to adjust the aid criteria and the eligibility of beneficiaries, the subsequent amendments were substantial and should have been notified'. That statement of reasons, which is moreover consistent with the Court's previous reasoning, constitutes an adequate response to the arguments presented in this regard by the Italian authorities in the course of the administrative procedure inasmuch as it enabled on the one hand the applicants to understand the reasons why the Commission considered the aid at issue granted to Keller Meccanica to be unlawful and, on the other, the Court of First instance to exercise its power of judicial review. Accordingly, the applicants were able to defend their rights in regard to the assessment by the Commission of the increase in the ceiling on fixed assets provided for in the Sardinian aid scheme, as is borne out, if need be, by the arguments which they submitted under the heading of this plea.

66 It must therefore be concluded that the applicants have adduced no argument such as to invalidate the Commission's assessment that the individual aid granted

to Keller Meccanica did not comply with the condition concerning the ceiling on fixed assets imposed by the decision approving the Sardinian scheme. Consequently, the Commission was on that basis right to conclude that that aid was unlawful.

67 Under those conditions there is no longer any need to examine the applicants' arguments as to the criterion of 100 employees. In fact, irrespective of the question whether the limit of 100 employees determines the maximum size of the recipient, no conclusion which it would be possible for the Court to reach in this connection could invalidate the conclusion drawn at paragraph 66.

68 It follows from foregoing that second plea must be rejected.

Third plea: breach of guidelines on firms in difficulty, misapplication of Article 92 of the Treaty and breach of the duty to provide a statement of reasons

— Succinct account of the parties' arguments

69 First of all, the applicants point out that, having ruled out that the soft loans at issue could form part of the approved aid schemes, the Commission in the contested decision stated that those loans could not, moreover, be regarded as compatible with the common market in light of the guidelines on undertakings in difficulty.

70 In a first limb of the plea the applicants consider that the Commission erred in its appraisal by taking the view, based on the fact that the recovery plan solely sought to maintain them in activity during a limited transitional period pending their transfer to a private buyer, that the condition as to a return to viability was not satisfied in the present case. The applicants point out that under that plan return to viability would be ensured by investing as necessary in order to ensure the modernisation of equipment, completion of orders booked, recourse to adequate financing, redundancies, disposal of assets not needed for production and liquidation of certain undertakings controlled by the Keller Group. Return to viability was moreover regarded as a condition precedent to the transfer of the two undertakings concerned to third parties and had on that account to be achieved before the transfer. On the basis of those measures and on completion of all orders, the recovery plan provided for a positive final result of ITL 1 805 million for Keller and ITL 8 700 million for Keller Meccanica. In so doing, that plan enabled the entirety of costs to be covered including costs of depreciation and financial charges, together with an adequate return on capital within a reasonable period in accordance with the applicable guidelines.

71 Moreover, it should not be inferred from the limited nature of the objective of the recovery plan that it merely envisaged a purely financial and not a structural restoration of the undertakings concerned. In fact, an analysis of the plan must not, in the applicants' view, disregard the characteristics of special administration. In fact, there is nothing to prevent, in a case such as this, the special administrator from taking the initiative to ensure recovery and such recovery from then being continued by the acquirer of the undertaking.

72 In a second limb of the plea the applicants claim that it is generally accepted that inherent in any State aid is the possibility of a distortion of competition. In that case the case-law of the Community judicature requires the Commission specifically to verify whether such an effect is actually occurring in order to be able to evaluate the Community interest as defined in Article 92(3)(c) of the Treaty. However, in the present case the Commission conducted no detailed

examination in that regard. More specifically, it is incorrect to state that the applicants were maintained in business artificially since they had demonstrated that the recovery plan was actually to allow them to be restored to viability. They stress that the recovery plan did not provide for new orders in the initial phase since orders already booked allowed sufficient utilisation of existing production capacity. On the other hand, provision was made at the next phase for the acceptance of new orders dependent upon progress achieved in the completion of current orders.

73 They go on to state in that connection that the objectives of restructuring have been amply achieved, as is borne out in particular by the fact that a German undertaking has acquired Keller. Moreover, negotiations were under way in regard to Keller Meccanica.

74 Moreover, the applicants point out that it is stated at point 1.2 of the guidelines on undertakings in difficulty that 'there are circumstances in which State aid for rescuing firms in difficulty and helping them to restructure may be justified ... by the desirability of maintaining a competitive market structure when the disappearance of firms could lead to a monopoly or tight oligopoly situation'. At no point in the contested decision is mention made of such considerations, notwithstanding the fact that, from the point of view of market structure, the presence of the applicants constitutes a guarantee of competition in a sector whose structure is already clearly oligopolistic.

75 In a third limb of the plea the applicants claim that the assessments in the contested decision are contradictory. In fact, on the one hand, the Commission refers therein to the lack of new orders as a symptom of their inability to restore the applicant undertakings to viability. On the other hand, the Commission regards the possibility that they may obtain new orders as being unduly restrictive

of competition. That contradictory approach means that, whatever the result obtained by the applicants in the context of the recovery plan, they could never satisfy the conditions laid down by the Commission.

76 The Commission contends that the arguments relied on in the context of that third plea are unsubstantiated.

— Findings of the Court

77 First of all, the Commission may provide itself with guidance for the exercise of its powers of assessment by adopting acts such as the guidelines on undertakings in difficulty inasmuch as those acts contain indications as to the direction to be followed by that institution and do not depart from the Treaty rules. Thus it is in light of those rules that the contested decision must be reviewed. In that context it is for the Court to verify whether in the present case the requirements which the Commission has itself laid down, as mentioned in those guidelines, have been observed. Moreover, it is settled case-law that Article 92(3) of the Treaty confers on the Commission a wide margin of discretion to allow aid by way of derogation from the general prohibition laid down in paragraph (1) of that article, inasmuch as the determination in such cases of whether State aid is compatible with the common market raises problems which make it necessary to examine and appraise complex economic facts and conditions. Judicial review must therefore be limited to checking that the rules on procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment and no misuse of powers. It is not for the Court, therefore, to substitute its economic assessment for that of the Commission (see, in particular, Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraphs 61 to 63).

78 It is in light of those principles that the different arguments advanced by the applicants in the context of that third plea must be examined.

79 Under the first limb of that plea the dispute between the parties essentially concerns the assessment of the recovery plan in light of the restructuring plan imposed by the guidelines on undertakings in difficulty in order to determine whether the applicants' undertakings were capable of becoming profitable again following implementation of that plan. In the contested decision it is stated in that connection that 'even if existing orders were completed, the forecast profits would not be sufficient to cover the companies' past losses'.

80 In that connection it is appropriate, first of all, as the Commission rightly suggested, to draw a comparison between, on the one hand, the profits expected from the recovery programme enabling the applicants to honour orders current at the time of adoption of the contested decision (worth ITL 1.8 billion in the case of Keller and ITL 8.5 billion in the case of Keller Meccanica) and, on the other, the extent of the applicants' existing debts (ITL 222.7 billion in the case of Keller and ITL 109 billion in the case of Keller Meccanica). That comparison shows that the profit expected from fulfilment of those orders, and thus from implementation of the recovery plan, represents approximately a hundredth of Keller's liabilities and a tenth of Keller Meccanica's liabilities. Under those circumstances the finding in the contested decision that the criterion of a return to viability was not satisfied does not constitute a manifest error of assessment. In fact, on that basis, the Commission was entitled to conclude, at the time when the contested decision was adopted, that that ratio as between expected profits from implementation of the recovery plan and the applicants' liabilities would not permit them to become profitable again in the short or medium term.

81 More particularly, it should be pointed out that the guidelines on firms in difficulty, applied by the Commission in the present case, state that restructuring plans must be capable of 'putting the company into a position of covering all its

costs including depreciation and financial charges and generating a minimum return on capital such that, after completing its restructuring, the firm will not require further injections of State aid and will be able to compete in the market place on its own merits'. Regard being had to the applicants' liabilities and financial charges, the Commission was entitled to conclude that they would not be able to guarantee a minimum profitability of the capital invested, as required by the guidelines at issue.

82 Finally, it should be noted that, according to the general introduction of the recovery plan produced by the Commission following a request to that effect by the Court of First Instance, any restructuring of the applicants such as to enable them to become viable again in the long term presupposed fresh capital injections which were not available at that stage.

83 The fact that the applicants, after adoption of the contested decision, were, or were to be, taken over by new investors cannot affect the legality of that decision. In fact, the precise terms under which the sales have been or are to be effected have not been explained and such sales are matters subsequent to adoption of the contested decision to which, in accordance with settled case-law (Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7), the Court cannot have regard. In particular, the complex assessments made by the Commission must be examined solely on the basis of the information available to the Commission at the time when those assessments were made (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16, Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33, and Joined Cases T-371/94 and T-394/94 *British Midlands Airways* v *Commission* [1998] ECR II-2405, paragraph 81).

84 In regard to the second branch of the third plea it should be noted first of all that appraisal of it is dependent to a large extent on the conclusion reached by the Court in regard to the first limb of the same plea. Indeed the Commission's main

reasoning in regard to the distortions of competition caused by the aid at issue is that that aid artificially maintained the applicants in business which as such affected competing undertakings which had not received such aid.

85 Moreover, it should be pointed out that according to settled case-law, the Commission is not required to demonstrate the real effect of illegal aid on competition and trade between Member States. In fact, if it were required to do so, that would ultimately favour those Member States which grant aid in breach of the duty to notify laid down in Article 93(3) of the Treaty, to the detriment of those which do notify aid at the planning stage (Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 67). Moreover, that case-law is corroborated by the wording of Article 92(1) of the Treaty under which not only aid which 'distorts' competition is incompatible with the common market but also aid which 'threatens' to do so.

86 Under those circumstances the finding that the recovery plan did not ensure to the requisite legal standard that the applicants would be returned to viability was sufficient in itself to substantiate the existence of at the very least potential distortions of competition brought about by the aid at issue.

87 Accordingly, it is not necessary, in the appraisal of the present limb of the third plea to adjudicate on whether the Commission's ancillary considerations relating to the distortions of competition arising from new orders which the applicants could have obtained after achievement of the recovery plan are well founded.

88 As regards, finally, the applicants' arguments concerning the fact that their disappearance from the market would be likely to bring about a narrow oligopoly situation, suffice it to point out that the Commission has demonstrated to the requisite legal standard in the contested decision that it was not the manufacturers of rolling stock who formed an oligopoly but, if that is the case, the railway undertakings which were supplied by those manufacturers.

89 In regard to the third limb of the plea (see paragraph 75 above), it must first be stated that in the contested decision (point VI, third and fourth paragraphs), the Commission points out that, in accordance with the guidelines on firms in difficulty, restructuring aid may be authorised only when four conditions are all satisfied.

90 After finding that the first two conditions — restoration of long-term viability within a reasonable time-scale and avoidance of undue distortions of competition caused by the aid — were not met, the Commission concluded that the aid elements examined did not 'qualify for the derogation under Article 92(3)(c) [of the EC Treaty], which is the only basis for exempting aid for rescuing and restructuring firms in difficulty' (point VI, 13th paragraph).

91 In order to arrive at the conclusion that the 'first and most important condition laid down in the Community guidelines (namely, a restructuring plan to restore the firms' long-term economic and financial viability) is not met' (point VI, 11th paragraph), the Commission based itself, *inter alia,* on the finding that, at the time the proceedings were initiated, the companies concerned had no new orders (point VI, sixth paragraph).

92 Then, in examining the second condition, avoidance of undue distortions of competition caused by aid, the Commission had regard to the possibility of new orders (point VI, 12th paragraph).

93 However, no contradiction in the grounds of the contested decision can be established in that connection. In fact the possibility of new orders does not contradict the unchallenged finding that, at the time when the procedure was initiated, there were no such orders.

94 The applicants cannot allege that they could never satisfy the conditions laid down by the Commission.

95 It is clear from the contested decision that in the framework of the second condition the Commission is highlighting the distortions of competition resulting from the artificial maintenance on foot of the undertakings concerned (point VI, 12th paragraph). It is therefore reasonable to take the view that assessment of the second condition — and of the potential effects of any future orders — would have been different if a restructuring plan had been in existence allowing for the long-term viability of the undertakings concerned.

96 Under those circumstances the third limb must also be rejected.

97 For all those reasons the third plea raised by the applicants must be rejected.

Fourth plea: infringement of the duty to provide a statement of reasons as regards the reference to the Italian legislation concerning special administration

98 The applicants point out, in particular, that the Commission states, at Point VI, last paragraph, of the contested decision, that its conclusion concerning the irregular nature of the aid granted to them was unaffected by the fact that the recipients are under special administration. They assert that those arguments are entirely without relevance since the aid measures at issue were granted not under Law No 95/79 but under Sicilian and Sardinian regional laws. The relevant question in fact would have been whether the grants of aid at issue could be regarded as specific applications of aid schemes previously approved by the Commission.

99 It is sufficient to note in that connection that Paragraph VI, last paragraph, of the contested decision merely confirms the fact that the applicants are under special administration is, as the applicants state, irrelevant in determining whether the aid granted is lawful. Accordingly, it is not apparent in what way the Commission on this point was in breach of its duty to provide a statement of reasons under Article 190 of the EC Treaty (now Article 253 EC).

100 Consequently, the fourth plea must be rejected.

101 Since none of the pleas relied on in support of the first and second heads of claim can be upheld, those two heads of claim must be rejected.

The third head of claim presented in the alternative

102 In support of their third head of claim which was raised in the alternative, the applicants raise a single plea based on an error of assessment concerning the starting point for calculation of interest on the amounts to be reimbursed.

Arguments of the parties

103 The applicants point out, first of all, that in the contested decision the Commission states that the aid included in the soft loans at issue is constituted by the difference between the rates of interest applied to them and the reference rate in force in Italy in 1995 (11.35%). That results in aid amounting to ITL 4 288 million in favour of Keller and ITL 903 million in favour of Keller Meccanica. The contested decision provides also that the sums to be recovered are to bear interest with effect from the date of the grant of aid until the date when the sums at issue are actually recovered.

104 The applicants consider that these amounts of interest have been calculated incorrectly inasmuch as they must, in the least favourable situation, be calculated as from the time when the applicants in fact began to benefit from the loans in question. The advantage which they benefited from was a reduced interest rate on those loans. However, that reduction began to be perceptible only on the first anniversary of the loans at issue.

105 The Commission contends that the applicants began to enjoy the positive effects of the soft loans as from the time when the funds were made available to them since those funds were necessary for the resumption of their operations. In accordance with usual practice, the relevant date for recovery of aid is the date on which that aid was granted.

Findings of the Court

106 It should be noted, first of all, that the applicants are in fact challenging only the starting point for calculation of interest on the amounts to be repaid.

107 Then, it should be recalled that, according to settled case-law, restoration of the situation prior to payment of the unlawful aid presupposes that all the financial benefits of the aid which have anti-competitive effects on the common market have been eliminated (see, in particular, Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 97). As regards determination of the date from which interest must be calculated it follows from the foregoing that that interest can run only from the date as from which recipients of the aid were actually able to avail themselves of the capital amounts in question. That rule must be interpreted as meaning that interest runs with effect from the date on which the aid is in fact made available (*Siemens* v *Commission*, cited above, paragraphs 98 to 102). In a judgment of 16 December 1999 in Case T-158/96 *Acciaierie di Bolzano* v *Commission* [1999] ECR II-3927, paragraph 98, the Court of First Instance confirmed that case-law by stating that, as regards determination of the date as from which that type of interest must be calculated, interest represents the counterpart of the financial benefit stemming from the making available for a certain period of the capital in question.

108 In light of that case-law it appears that the Commission was right to take the view that interest on the aid at issue began to run with effect not from the actual utilisation of the loans at issue but from the date of the grant of those loans, inasmuch as the undertakings must be deemed to have had those amounts available to them with effect from that date.

109 The plea must therefore be declared unfounded and, consequently, the third head of claim must be rejected.

Costs

110 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay their own costs and, jointly, those of the Commission, in accordance with the form of order sought by the Commission.

111 It is appropriate also to reject the claim by the Italian Republic that the Commission be ordered to pay the costs of its intervention since, under Article 87(4) of the Rules of Procedure, Member States intervening in a dispute are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition),

hereby:

1. **Dismisses the application;**

2. **Orders the applicants to pay their own costs and, jointly, those incurred by the Commission;**

3. **Orders the intervener to pay its own costs.**

Meij Lenaerts Jaeger

Pirrung Vilaras

Delivered in open court in Luxembourg on 30 January 2002.

H. Jung

Registrar

A.W.H. Meij

President