JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
27 November 2003 *

In Case T-190/00,

Regione Siciliana, represented by F. Quadri, avvocato dello Stato, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by V. Di Bucci and D. Triantafyllou, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for annulment of Commission Decision 2000/319/EC of 22 December 1999 on the State aid scheme; implemented by Italy for the production, processing and marketing of products listed in Annex I to the EC Treaty (Sicilian Regional Law No 68, of 27 September 1995) (OJ 2000 L 110, p. 17), in so far as it finds that the State aid granted under Article 6 of Sicilian Regional Law No 68 of 27 September 1995 to undertakings in the sectors of agriculture and fisheries is incompatible with the common market and requires Italy to withdraw that aid,

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

composed of: R. García-Valdecasas, President, P. Lindh, J.D. Cooke, A.W.H. Meij and H. Legal, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 May 2003,

gives the following

Judgment

Legal framework

1 Pursuant to Article 93(1) of the Treaty (now Article 88(1) EC), which provides that the Commission is to propose to the Member States appropriate measures concerning systems of aid existing in those States required by the progressive development or the functioning of the common market, the Commission, in a Communication of 16 February 1996 on State aids relating to subsidised short-term loans in agriculture (OJ 1996 C 44, p. 2, hereinafter the 'Communication on operating loans'), set out the criteria for the compatibility of operating loans with the Treaty rules which apply to State aid.

2 On 4 July 1997, the Commission informed the Member States of its decision to suspend the application of the Communication on operating loans, after observing certain problems of interpretation. By letter of 19 December 1997, the Commission informed the Member States that the suspension would end on 30 June 1998, as of when it would apply the Communication on operating loans in accordance with the interpretation set out in that letter.

3 The practice followed by the Commission before implementation of the Communication on operating loans is touched on in a Commission document

entitled 'Competition Policy in Agriculture' (No 22, *Green Europe — Newsletter on the Common Agricultural Policy*, Luxembourg, 1987, p. 12):

'Generally, as regards state aids to [operating loans], the Commission has reserved its right to comment at a later stage. However, aid granted in the form of reduced-interest-rate [operating loans] is deemed to be incompatible with the common market where it is granted,

— for a period exceeding the marketing year (12 months);

— to only one product and for a single operation (e.g., storage of wine, purchase of cattle, etc.).

This attitude is motivated by the fact that agricultural production, being necessarily cyclical in character, must be financed by specific methods.'

4 In that regard, the 17th *Report on Competition Policy* (Office of Official Publications of the European Communities, Luxembourg, 1988, paragraph 259) states that the text cited above describes the guidelines which the Commission follows when implementing the rules of competition in agriculture.

5 That practice is also mentioned in the Communication on operating loans, which points out — before setting out the new rules which will apply in future — that the Commission has for several years been applying a policy of not opposing State aid granted through subsidised short-term loans in the agricultural sector and that 'the only conditions set by the Commission for such subsidies are that the period of the loan is a maximum of one year and that its availability is not limited simultaneously to one product only and one operation only', at the same time noting that 'there is no limit on the intensity of the aid element, nor is there an obstacle as regards each beneficiary, to the subsidised loan being renewed each year' (Communication on operating loans, fifth recital).

6 As regards 'new' State aid, Article 93(3) of the Treaty (now Article 88(3) EC) provides:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92 [now Article 87 EC], 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.'

7 The meaning of Article 93 was made clear in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), which entered into force on 16 April 1999.

Facts

A — *Aid scheme established under Article 48 of Regional Law No 32 of 23 May 1991 and its assessment by the Commission*

8 By letter of 10 June 1991, the Italian Government notified to the Commission, in accordance with Article 93(3) of the Treaty (now Article 88(3) EC), an aid scheme established by the Region of Sicily under Regional Law No 32 of 23 May 1991 (hereinafter 'Regional Law No 32/91'), on subsidies in the agricultural sector.

9 Article 48 of Regional Law No 32/91 provides for a subsidy for the period 1991 to 1993 on the interest payable to credit institutions and banks for loans of less than one year granted to commercial operators with their headquarters and operations in Sicily and at least 70% of whose turnover is accounted for by the sale of fruit and vegetables, including citrus fruits, outside the region. Its provisions are as follows:

'1. The regional official in charge of agriculture and forests shall be authorised to grant, for the years 1991 to 1993, a subsidy on the interest payable to credit institutions and banks for operating loans of a term of not more than one year granted to economic operators which have their headquarters in and operate in Sicily and at least 70% of whose turnover is accounted for by the sale of fruit and vegetables, including citrus fruits, outside the region.

2. The interest rate to be borne by commercial operators is equal to the rate established pursuant to the first subparagraph of Article 4(2) of Regional Law No 13 of 25 March 1986.

3. Apart from the marketing year 1990-1991, a subsidised loan will be granted on the condition that at least 51% of marketed products are bought from agricultural cooperatives and their members and from recognised associations of agricultural producers in accordance with intertrade agreements.

4. The amount of the subsidised loan — proportional to ceilings set annually in accordance with the fourth subparagraph of Article 18 of Regional Law No 13 of 25 March 1986 — may not, in any event, exceed 50% of the average turnover volume of the three last years as given in VAT declarations.

5. Operators receiving aid shall maintain employment levels and comply with collective work agreements. Where it is established that those obligations have not been met, the regional official in charge of agriculture and forests shall revoke the aid in question and recover the sums paid, with legal interest.

6. An amount of 30 000 million lire, of which 10 000 million lire is to be applied towards the financial year 1991, is authorised for the purpose of implementing the present article for the period 1991 to 1993.

7. 70% of the expenditure authorised by this article will be earmarked for the agricultural sector.'

10 By letter of 14 December 1992, the Commission informed the Italian Government, in respect of Article 48 of Regional Law No 32/91, that 'the Commission has decided not to raise any objections to the aid in the form of subsidised short-term loans but reserves the right to review its position at a later date, under Article 93(1) of the Treaty'.

B — *Refinancing of the aid schemes established by Article 48 of Regional Law No 32/91, Article 7 of Regional Law No 81 of 7 November 1995 and Article 20 of Regional Law No 33 of 18 May 1996, and its assessment by the Commission*

11 By letter of 6 December 1995, the Italian Government notified to the Commission, in accordance with Article 93(3) of the Treaty (now Article 88(3) EC), an aid scheme established by the Region of Sicily under Regional Law No 81 of 7 November 1995 (hereinafter 'Regional Law No 81/95'), concerning several subsidies in the agricultural sector. Article 7 authorised the refinancing, for the financial year 1995, of the aid scheme established by Article 48 of Regional Law No 32/91 for the agricultural year 1992-1993:

'For the purposes referred to in Article 48 of Regional Law No 32/91 of 23 May 1991, the expenditure of 2 000 million lire for the [farm] year 1992-1993 is authorised for the financial year 1995.'

12 By letter of 2 May 1996, the Italian Government notified to the Commission the text of Article 20 of Regional Law No 33 of 18 May 1996 (hereinafter 'Regional Law No 33/96'), which referred to Article 7 of Regional Law No 81/95 and

authorised the refinancing for the financial year 1996 of the aid scheme established by Article 48 of Regional Law No 32/91 for the agricultural year 1992-1993:

'For the purposes referred to in Article 48 of Regional Law No 32 of 23 May 1991, the expenditure of 2 000 million lire for the [farm] year 1992-1993 is authorised for the financial year 1996, in addition to the amount referred to in respect of Article 7 of Regional Law No 81/95 of 7 November 1995.'

13 By letter of 23 January 1997, the Commission informed the Italian Government that it had no objections to the aforementioned refinancing provisions for the agricultural year 1992-1993 in respect of Article 48 of Regional Law No 32/91. The letter states, inter alia:

'The Commission has decided not to raise objections to the aid referred to in Article 7 of Regional Law No 81/95 and Article 20 of Regional Law No 33/96. In adopting this decision, the Commission has taken notice of the fact that the amounts intended for such a measure relate to the 1992-1993 agricultural year and concern late payments relating to an existing aid measure (aid N 377/91).

Accordingly, the financing provided for in Article 7 of Regional Law No 81/95 and Article 20 of Regional Law No 33/95 may continue to benefit from the Commission's favourable assessment as regards Article 48 of Regional Law No 32/91.'

C — Aid scheme established by Article 6 of Regional Law No 68 of 27 September 1995, and its assessment by the Commission

14 By letter of 8 August 1995, the Italian Government notified the Commission, in accordance with Article 93(3) of the Treaty (now Article 88(3) EC), of an aid scheme which was to be established by the Region of Sicily in the framework of a draft regional law, subsequently adopted as Regional Law No 68 of 27 September 1995 (hereinafter 'Regional Law No 68/95').

15 Article 6 of Regional Law No 68/95 provides for an aid scheme for firms in the agricultural or fisheries sector, the main provisions of which are as follows:

'1. The regional official in charge of cooperation, trade, crafts and fisheries is authorised to grant for the years 1995-1997 and for the marketing years 1993-1994, 1994-1995 and 1995-1996 a subsidy on the interest payable to credit institutions and banks for operating loans of a term of not more than one year granted to economic operators which have their headquarters in and operate in Sicily and at least 70% of whose turnover is accounted for by the sale of fruit and vegetables, including citrus fruits, outside the region.

2. The interest rate to be borne by commercial operators is equal to the rate established pursuant to the first subparagraph of Article 4(2) of Regional Law No 13 of 25 March 1986.

3. The amount of the subsidised loan — proportional to ceilings set annually in a uniform manner, in accordance with the first and second subparagraphs of Article 18(1) of Regional Law No 13, of 25 March 1986 — cannot in any event exceed 50% of the average turnover volume of the three last years, as given in VAT declarations.

4. Operators receiving aid must maintain employment levels. Where infringement of that obligation has been determined, the regional official in charge of cooperation, trade, crafts and fisheries shall revoke the subsidy granted and recover the sums paid, with legal interest.

5. 70% of the amounts granted under this article are earmarked for the citrus fruit sector.

6. An amount of 15 000 million lire is authorised for 1995-1997 for the purpose of implementing this article: 2 000 million lire for the financial year 1995, 7 000 million lire for the financial year 1996 and 6 000 million lire for the financial year 1997.

7. An amount of 2 000 million lire set against the financial year 1995 is covered by the funds available under chapter 21257 of the regional budget for that financial year. The remaining 13 000 million, which apply towards the financial years 1996 and 1997, are provided for in item 2001 of the regional multi-annual budget'.

16 By letter of 13 February 1998, the Commission notified the Italian Government of its decision to initiate the procedure laid down in Article 93(2) of the Treaty (now Article 88(2) EC) in respect of implementation of the aid provided for in Regional Law No 68/95 to the agricultural, fisheries and aquaculture sectors. That decision was published in the *Official Journal of the European Communities* on 21 March 1998 (OJ 1998 C 86, p. 3), and the Commission invited interested parties to submit their comments on the aid in question.

17 The Commission justifies initiating the aforementioned procedure by pointing out, in the decision's section on Article 6, that it has doubts about whether the aid in question can be considered as a true operating loan (in the sense of a 'seasonal credit'), since the loan appears rather to correspond to the definition of export aid in that it is intended for export-oriented undertakings and is calculated on the volume (50%) of the undertaking's turnover, which is mostly accounted for by export earnings (see recital 2.7 of the decision to initiate the procedure referred to in Article 88(2) EC).

18 By letter of 30 June 1998, the Italian authorities submitted their comments to the Commission. No comments were received from other interested parties. The Commission asked for further information on Article 6 of Regional Law No 68/95 by telex on 10 November 1998. By letter of 19 November 1998, the Italian authorities provided the Commission with further observations on Article 6.

19 On 22 December 1999, the Commission adopted Decision 2000/319/EC, which states inter alia that the State aid established pursuant to Article 6 of Regional Law No 68/95 in favour of undertakings operating in the agriculture or fisheries sector is incompatible with the common market and requires Italy to withdraw the aid in question (hereinafter 'the contested decision'). That decision was published in the *Official Journal of the European Communities* on 6 May 2000 (OJ 2000 L 110, p. 17).

Proceedings and forms of order sought

20 By application lodged at the Court Registry on 20 July 2000, the applicant brought the present action.

21 The applicant claims that the Court should:

— annul the contested decision in so far as it finds that the State aid established pursuant to Article 6 of Regional Law No 68/95 in favour of undertakings operating in the sectors of agriculture and fisheries is incompatible with the common market and requires Italy to withdraw the aid in question;

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the application as inadmissible, or in any event as unfounded;

— order the applicant to pay the costs.

23 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure.

24 The parties were duly invited to appear at the hearing of 15 May 2003, which the applicant did not attend. The Commission presented oral argument and responded to the oral questions put by the Court of First Instance at the hearing.

Admissibility

Arguments of the parties

25 The Commission recalls that, pursuant to the fifth paragraph of Article 230 EC, proceedings to annul an act adopted by the Community institutions must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be, and draws the Court's attention — without, however, putting forward a formal plea of inadmissibility — to the fact that in the present case the action was instituted within two months of the publication of the measure, although the applicant had probably had the text of the decision for several months.

26 Be that as it may, the Commission points out that, according to the case-law, when measures are, as in the present case, published in the *Official Journal of the European Communities* as a matter of course, it is the date of publication which marks the start of the period for instituting proceedings (Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraphs 34 to 39). However, in the actions brought by regions which the Court has considered thus far, the application

initiating proceedings was lodged within two months from the date of the decision being notified (Case T-214/95 *Vlaamse Gewest* v *Commission* [1998] ECR II-717, paragraphs 17 and 19) or the day when it came to the knowledge of the applicant (Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* v *Commission* [1999] ECR II-1871, paragraphs 5 and 7).

27 In those circumstances, the Commission takes the view that the regions may be considered to be in the same position as the Member States which grant the aid, inasmuch as it is consistent practice for the Member State in question to inform regions rapidly of decisions which concern them. While noting that the decision is not strictly speaking addressed to the regions and the notification date does not appear decisive, the Commission nevertheless suggests that, in their case, the actual date when regions come to learn of the decision should be taken into account in determining the start of the period for instituting proceedings.

28 The applicant disputes that argument, maintaining that it is clear from the fifth paragraph of Article 230 EC that the criterion of the day on which a measure comes to the knowledge of an applicant as the start of the period for instituting proceedings is subsidiary to the criteria of publication or notification. Failing notification to the applicant of the decision in question, the only date to be taken into account for the purpose of setting in motion the period for instituting proceedings is that of publication of the contested decision in the Official Journal.

Findings of the Court

29 According to the fifth paragraph of Article 230 EC, proceedings must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

30 It follows from the actual wording of that article that the criterion of the day on which the contested decision came to the knowledge of the applicant as the start of the period for instituting proceedings is subsidiary to the criteria of publication or notification (*Germany* v *Council*, cited above, paragraph 35; Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraph 47; Case T-123/97 *Salomon* v *Commission* [1999] ECR II-2925, paragraph 42; and Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 61).

31 In the present case, the Commission did not notify the contested decision to the applicant, but only to the Italian Republic. Since the contested decision was published in the *Official Journal of the European Communities* on 6 May 2000, it is that date which is the start of the period for the applicant to institute proceedings, and not the date on which it might have learned of the decision.

32 The Commission cannot usefully rely on *Vlaamse Gewest* v *Commission* or *Regione autonoma Friuli-Venezia Giulia* v *Commission*, cited above, in support of its argument. In the first of those cases, the Flemish Region instituted proceedings (on 27 November 1995) within two months of the publication of the contested decision in the Official Journal (on 9 November 1995). In addition, in neither of those cases was it held that if the region had learned of a decision prior to its publication, it could no longer benefit from the two-month period allowed from that date of publication for bringing proceedings.

33 Accordingly, the action was brought in due time and is thus admissible.

Substance

34 The applicant relies on four pleas in law in support of its action. The first plea alleges infringement of Article 88(1) EC, of the principles of the protection of legitimate expectations and legal certainty, of essential procedural requirements and of Article 253 EC; the second plea alleges infringement of the principle of *tempus regit actum* and misuse of powers; the third plea alleges infringement of Article 87 EC, misuse of powers and infringement of Article 253 EC on the basis of a failure to state reasons; the fourth plea alleges infringement of essential procedural requirements and the failure to complete within a reasonable period the procedures laid down in Article 87 EC.

First plea: infringement of Article 88(1) EC, of the principles of the protection of legitimate expectations and legal certainty, of essential procedural requirements and of Article 253 EC on the basis of a failure to state reasons

Admissibility

— Arguments of the parties

35 The Commission claims that the complaints put forward by the applicant in its first plea, concerning the classification of the measure as existing rather than new aid, are inadmissible since the classification was the result of the decision to initiate the formal review procedure provided for in Article 88(2) EC, which was not challenged by the applicant and therefore became definitive; the contested

decision classifying the aid as new aid merely confirms the decision to initiate the formal review procedure. The Commission therefore maintains that the classification could and should have been contested by an action brought against the decision to initiate the formal review procedure and that it can no longer constitute the subject-matter of the action against the final decision.

36 The Commission points out that the case-law of the Court makes clear that the decision to initiate the formal review procedure gives rise to definitive legal effects, inasmuch as a final decision by the Commission that the aid in question is compatible with the common market could not subsequently regularise the implementing measures, which would have to be deemed to have been adopted in breach of the prohibition laid down in the final sentence of Article 88(3) (Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraphs 20 and 23, hereinafter '*Cenemesa*', and Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraphs 26 and 29, hereinafter '*Italgrani* of 30 June 1992').

37 In particular, the Commission states that the preliminary question of the classification of aid determines the applicable procedure and the scope and effects of the final decision. Under the second sentence of Article 88(3) EC and Articles 4, 6 and 13 of Regulation No 659/1999, the Commission must, in the case of new aid and when it considers that a plan to establish or modify aid is not compatible with the common market, initiate without delay the formal review procedure provided for in Article 88(2) EC. In the case of unlawful aid already paid, in breach of the prohibition laid down in the last sentence of Article 88(3) EC, Article 14 of Regulation No 659/1999 requires the Commission to order its recovery. In the case of existing aid, the Commission may, according to Article 88(1) EC and Articles 17 to 19 of Regulation No 659/1999, propose appropriate measures to the Member State concerned; it is only where that Member State does not accept such measures that the Commission may initiate the formal review procedure pursuant to Article 88(2) EC, without, however, being able to require recovery of the aid.

38 In the light of those differences, the Commission is of the opinion that it is in everyone's interest rapidly to define the disputes likely to arise in respect of the classification of measures as new or existing aid.

39 As regards the applicant's references to *Cenemesa* and *Italgrani* of 30 June 1992, the Commission takes the view that it is clear from that case-law that the decision to initiate the formal review procedure entails a prohibition on the Member State concerned paying out the planned aid before that procedure has resulted in a final decision and that, even where the measures classified as new aid by the Commission have been implemented, the legal effects relating to that classification are definitive (*Cenemesa*, paragraphs 12 and 23, and *Italgrani* of 30 June 1992, paragraphs 20 and 29).

40 The Commission also maintains that the argument set out in the present case differs fundamentally from those put forward in *Preussag Stahl* and *Moccia Irme*, which were rejected by the Court of First Instance (Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, paragraph 31, and Joined Cases T-164/96 to T-167/96, T-122/97 and T-130/97 *Moccia Irme and Others* v *Commission* [1999] ECR II-1477, paragraph 65). In particular, it recalls that in *Preussag Stahl* it lodged a plea of inadmissibility on the basis that the applicant had not brought an action against the decision to initiate the procedure and that the Court had held that the final decision produces its own legal effects, including the obligation to repay the aid received, and that the undertaking concerned must therefore have the right to bring an action for annulment against such a decision, irrespective of whether or not it challenged the decision to open the formal procedure for examination of the aid in question. The Commission's plea of inadmissibility was rejected since it concerned the application in its entirety, and in particular the parts where the applicant contested the decisions taken by the Commission only at the stage of the final decision, which is not the case here, where the Commission contests the admissibility of the applicant's complaints as regards the classification as new aid set out in the decision to initiate the formal procedure.

41 The applicant challenges that argument on the ground that it is contrary to the principle of procedural economy and that the decision to initiate the formal review procedure can be contested independently only if it produces effects which are harmful with respect to the party to whom it is addressed (*Cenemesa* and *Italgrani* of 30 June 1992), which is the case only when such a decision requires its recipient to adopt or refrain from certain conduct or gives rise in any event to irreversible effects. Such is not the present case, where only the final decision produces effects against the applicant. At the very least, the applicant claims that the final decision declaring the aid incompatible with the common market produces new legal effects which are entirely independent of the decision to initiate the formal review procedure, making it possible to challenge its lawfulness. It is therefore possible to rely in support of such an action for annulment on grounds common to both the final decision and the measure initiating the procedure at issue if the latter has not been the subject of a separate action, independently of whether or not the measure taken in accordance with Article 88(2) EC has been called in question (see *Preussag Stahl* and *Moccia Irme*, cited above).

— Findings of the Court

42 The Commission maintains essentially that the applicant can no longer challenge the final decision in so far as it classifies the measure at issue as new aid, which is the subject-matter of the first plea, inasmuch as that classification is the result of the decision to initiate the formal review procedure, which the applicant did not challenge within the prescribed period and which has therefore become definitive.

43 First, it must be observed that the Court has consistently held that measures or decisions against which proceedings for annulment, as provided for in Article 230 EC, may be brought are measures producing legal effects which are binding on

and capable of affecting the interests of the applicant by having a significant effect on his legal position (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28).

44 In the case of acts or decisions drawn up in several stages, in particular following an internal procedure, in principle only measures definitively laying down the position of the institution upon the conclusion of that procedure may be contested, and not provisional measures intended to pave the way for the final decision (*IBM*, paragraph 10, and *Cimenteries CBR*, paragraph 28, cited above).

45 In accordance with that case-law, the final decision adopted by the Commission in order to conclude the formal review procedure provided for in Article 88(2) EC constitutes a measure which may be contested on the basis of Article 230 EC. Such a decision produces effects which are binding on and capable of affecting the interests of the parties concerned, since it concludes the procedure in question and definitively decides whether the measure under review is compatible with the rules applying to State aid. Accordingly, interested parties are always able to contest the final decision which concludes the formal review procedure and must, in that context, be able to challenge the various elements which form the basis for the position definitively adopted by the Commission.

46 That right is independent of whether the decision to initiate the formal review procedure gives rise to legal effects which may be the subject-matter of an action for annulment. It is true that in the case-law of the Court and the Court of First Instance it is accepted that an action may be brought against the initiation decision when it gives rise to definitive legal effects which cannot subsequently be regularised by the final decision. Such is the case when the Commission initiates the formal review procedure in respect of a measure which it provisionally classifies as new aid, since that decision entails legal effects independent of the

final decision. Suspension of the measure concerned, which under Article 88(3) EC results from the provisional classification of that measure as new aid, is independent of the final decision, limited in time until the conclusion of the formal procedure (see, inter alia, *Cenemesa*, paragraphs 12 to 24, and *Italgrani* of 30 June 1992, paragraphs 29 and 30; Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303, paragraphs 56 to 62 and 69; and Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraphs 80 to 86).

47 Nevertheless, the right to contest a decision to initiate review may not diminish the procedural rights of interested parties by preventing them from challenging the final decision and relying in support of their action on defects at any stage of the procedure leading to that decision.

48 The decision to initiate the formal review procedure, even if it produces independent legal effects, is a preparatory step for the final decision which determines the definitive Commission position. Article 6 of Regulation No 659/1999 therefore provides that the decision to initiate the formal investigation procedure is to summarise the relevant issues of fact and law, include a preliminary assessment as to the aid character of the proposed measure and set out the reasons for doubts as to its compatibility with the common market, in order to call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period. The necessarily provisional nature of the assessments in the decision to open the formal investigation procedure is confirmed by Article 7 of Regulation No 659/1999, which provides that the Commission may decide in the final decision that the notified measure does not constitute aid, that the notified aid is compatible with the common market, that the notified aid may be considered compatible with the common market if certain obligations are complied with or that the notified aid is incompatible with the common market. Moreover, nothing prevents the Commission, after initially determining in the decision to open the formal investigation procedure that the measure in question constitutes new aid, from deciding in the decision concluding the procedure that the measure constitutes existing aid.

49 In the present case, the contested decision is the final decision which concludes the procedure and produces binding and definitive legal effects for the parties concerned, including by classifying the aid as new aid which is incompatible with the common market and by requiring Italy to withdraw that aid. The applicant must therefore have the right to bring an action for the annulment of the decision in its entirety, including the classification of aid as new aid, irrespective of whether or not it challenged that aspect of the decision to open the formal investigation procedure in respect of the aid in question (see *Preussag Stahl* v *Commission*, paragraph 31, and *Moccia Irme* v *Commission*, paragraph 65). In contrast to what the Commission contends, the Court's judgments in *Preussag Stahl* and *Moccia Irme* are based on the same principles as those in the present case, namely that the contested decision is definitive and produces its own legal effects and, accordingly, that the parties concerned are entitled to challenge it. The fact that in *Preussag Stahl* the Commission entered a plea of inadmissibility against the action as a whole and that in the present case that plea is limited to this complaint does not alter the character of the question raised.

50 As regards the argument that it would be in the general interest rapidly to define the disputes which might arise in relation to the classification of the measure in question, that consideration cannot in any event deprive the parties concerned of the right to bring an action against a decision which alters their legal position.

51 In short, the Commission's argument amounts to support for a situation which is contrary to the principles laid down in the case-law as to which measures are open to challenge. According to that argument, a ruling by the Community judicature at a preliminary stage of the procedure on preparatory measures such as the decision to initiate a formal investigation procedure, and in particular on the classification of aid as new aid, would prevent the parties concerned from challenging the final decision, where the Commission may alter the assessment

made in the initiating decision. To accept such an argument would be to anticipate issues of substance and to confuse the different stages of administrative and judicial procedures by depriving of meaning the main objective of the formal investigation procedure initiated by the Commission, which is to allow the parties concerned to submit their comments on all the disputed aspects of the file and the Commission to take a final decision in the light of those comments.

52 Accordingly, it cannot validly be maintained that, since it did not bring an action within the prescribed period against the decision to open the formal investigation procedure, the applicant may no longer contest the classification of the measure at issue as new aid in an action against the final decision.

53 It follows that the first plea is admissible.

Substance

— Arguments of the parties

54 First, the applicant points out that in its decision of 14 December 1992 the Commission took the view that Article 48 of Regional Law No 32/91 was compatible with the provisions of the Treaty applicable to State aid and merely reserved the right to review its position at a later date, in accordance with Article 93(1) of the Treaty (now Article 88(1) EC). It also states that the Commission, by taking the view that successive refinancing for Regional Law No 32/91 by Article 7 of Regional Law No 81/95 and Article 20 of Regional Law No 33/96 were compatible with common market, failed to avail itself of that right.

55 The applicant maintains that, in that context, Article 6 of Regional Law No 68/95 must be considered merely as refinancing for Article 48 of Regional Law No 32/91. A comparison of those two provisions demonstrates that they are similar in respect of recipients, interest rate subsidies and objectives, the differences consisting in the introduction of a specific reference to agricultural years, the widening of the recipient base and a modification of the budgetary years covered by the financing.

56 The applicant therefore submits that for the Commission to investigate whether the aid provided for in Article 6 of Regional Law No 68/95 was compatible with the common market as if it was new aid for the purpose of Article 87 EC, rather than treating it as refinancing of existing, previously approved aid within the meaning of Article 88(1) EC, as it undertook to do, infringes Article 88(1) EC and essential procedural requirements.

57 The applicant claims that it is not possible to state, as does recital 52(c) of the contested decision, that Article 6 of Regional Law No 68/95 introduces a new aid scheme. It maintains that Article 48 of Regional Law No 32/91 sets no time-limit for the agricultural years for which the subsidised loan may be granted. According to the applicant, the reference in Regional Law No 32/91 to the three years included in the period 1991-1993 must be understood in purely financial terms, as authorising loans during those three years, but the agricultural years in which commercial operators can receive those loans are not limited in time. On the contrary, Article 6 of Regional Law No 68/95 was intended to fix more restrictive limits for the agricultural years to which the aid applied, that is to say, the years 1993-1994, 1994-1995 and 1995-1996.

58 Similarly, it takes the view that the refinancing under Article 6 of Regional Law No 68/95 does not differ in detail from that provided for in Article 7 of Regional Law No 81/95 and Article 20 of Regional Law No 33/96 — approved by the Commission — since all those articles sought to restructure sums which had originally been provided for under Article 48 of Regional Law No 32/91.

59 The applicant also maintains that the case-law of the Court upholds the principle that when a general aid scheme has been approved, it is unnecessary for the individual grants of aid to be subject to examination by the Commission (Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, hereinafter '*Italgrani* of 5 October 1994'). To accept further assessment of whether those grants of aid are compatible risks infringing the principles of the protection of legitimate expectations and legal certainty. Those principles must also apply where an aid scheme already approved must be confirmed by means of a simple refinancing of amounts which were not used. The applicant therefore considers that when there is no plan (as was here the case) to propose appropriate measures linked to the gradual evolution or the functioning of the common market in the framework of a permanent assessment of aid schemes, it is not lawful to reassess such an aid scheme. In the present case, that reassessment was not carried out in the light of the preceding approval decision but in accordance with the Treaty, thereby prejudicing the principles of the protection of legitimate expectations and legal certainty.

60 Finally, the applicant states that, in setting out the grounds for considering Article 6 of Regional Law No 68/95 as a new aid scheme, the Commission failed to consider the real scope of that provision since it characterised it as different from and in conflict with the earlier decision approving the aid in question, and that it failed to state reasons as regards the comments which had been submitted to it by the Italian authorities.

61 The Commission contends that the complaints put forward by the applicant as regards the classification of the aid are devoid of any basis, since the measures referred to in Article 6 of Regional Law No 68/95 do not cover existing aid and are in no way part of an alleged aid scheme of unlimited duration established by Article 48 of Regional Law No 32/91 and previously approved by the Commission's decision of 14 December 1992.

62 According to the Commission, the decision of 14 December 1992 relating to Article 48 of Regional Law No 32/91 merely approves an aid scheme limited to the three-year period 1991-1993, a period which can be taken to coincide with the farm years 1990-1991, 1991-1992 and 1992-1993. Article 6 of Regional Law No 68/95 can therefore not be considered as mere refinancing for Article 48 of Regional Law No 32/91, since the new provision concerns the three-year period 1995-1997 and the agricultural years 1993-1994, 1994-1995 and 1995-1996, that is to say, periods subsequent to those covered by the earlier provision.

63 Accordingly, Article 6 of Regional Law No 68/95 is in fact new aid and, more precisely, new aid with retroactive effects, and not new financing for an aid scheme. The Commission therefore contends that the reference to the judgment in *Italgrani* of 5 October 1994 is irrelevant and that it cannot be accused of infringing the principles of the protection of legitimate expectations and of legal certainty. Similarly, the Commission maintains that recital 52 of the contested decision establishes exhaustively and conclusively the reasons for which the assessed measures must be considered to be new aid.

— Findings of the Court

64 First, it must be pointed out that the contested aid was notified by the Italian authorities not in the context of the Commission's permanent cooperation with Member States established by Article 88(1) EC, which refers to the case of

existing aid, but under Article 88(3) EC, which relates to new aid. The letter of 8 August 1995 by which the Italian authorities notified the Commission of the draft regional law which subsequently was adopted as Regional Law No 68/95 expressly refers to Article 88(3) EC and contains no reference to Article 48 of Regional Law No 32/91 or the Commission's decision of 14 December 1992 which approved the aid provided for in that provision.

65 The Commission was therefore logically justified in initiating the formal investigation procedure in the framework of the regime applicable to new aid.

66 None the less, the classification of aid reflects an objective situation which is independent of the assessment made at the time the aid was notified or at the stage when the procedure provided for in Article 88(2) EC was initiated, and it is therefore appropriate to examine the various complaints put forward by the applicant under this plea.

67 First, the applicant maintains that the assessment of Article 6 of Regional Law No 68/95 as new aid rather than as refinancing of the aid provided for in Article 48 of Regional Law No 32/91, previously approved by the Commission, infringes Article 88(1) EC.

68 It should be noted at the outset that Article 7 of Regional Law No 81/95 and Article 20 of Regional Law No 33/96 expressly refer to the objectives of Article 48 of Regional Law No 32/91. By contrast, Article 6 of Regional Law No 68/95 makes no reference to Article 48.

69 In addition, Article 6 of Regional Law No 68/95 concerns a period other than that examined in the context of Article 48 of Regional Law No 32/91. Article 6(1) and (6) of Regional Law No 68/95 provide for aid for the 'years 1995-1997' and the 'period 1995-1997', while under Article 48(1) and (6) of Regional Law No 32/91, the aid authorised by the decision of 14 December 1992 refers to the 'years 1991 to 1993' and the 'period 1991-1993'.

70 Consequently, the Commission could validly take the view that it was not necessary to assess an aid scheme for the years 1995-1997 in the framework of the approval decision for an aid scheme concerning a different period, namely 1991-1993.

71 None of the arguments invoked by the applicant in respect of that point is such as to call that conclusion in question.

72 The argument that reference to the 'years 1991 to 1993' and the 'period 1991-1993' in Article 48 of Regional Law No 32/91 merely seeks to specify that the appropriations under that article could be used during the years 1991, 1992 and 1993 and could not therefore be construed as referring to the agricultural years corresponding to each of those three years does not affect the above analysis. Even if the three-year period 1991-1993 referred to in Article 48 of Regional Law No 32/91 did not relate to the corresponding agricultural years, it would not be sufficient to make Article 6 of Regional Law No 68/95 a mere refinancing measure for previously approved provisions, since the period referred to by Article 48 is different from the three-year period 1995-1997 referred to in Article 6 and examined in the contested decision.

73 Similarly, there is no foundation for the applicant's claim that if Article 48 of Regional Law No 32/91 does not set any time-limit for the agricultural years when the subsidised loan may be paid, then the agricultural years for which the operators concerned may receive the loans provided for under that scheme (ITL 30 million) are not limited in time and Article 6 of Regional Law No 68/95 therefore merely refinances that scheme for the agricultural years 1993-1994, 1994-1995 and 1995-1996 (for an amount of ITL 15 million). There is in fact a fundamental difference between those two provisions, since the first authorises aid only 'for the years 1991 to 1993' (see Article 48(1) of Regional Law No 32/91), while the second does so only 'for the years 1995-1997' (see Article 6(1) of Regional Law No 68/95). Any extension of the period 1991 to 1993 must be covered by a new notification under Article 88(3) EC, as was done by the Italian authorities, which also implies a new assessment of the aid.

74 As regards the argument that the supposed refinancing brought about by Article 6 of Regional Law No 68/95 is no different from those carried out by Article 7 of Regional Law No 81/95 and Article 20 of Regional Law No 33/96, which were approved by the Commission, the contested decision explains why those measures are distinct, since Article 7 of Regional Law No 81/95 and Article 20 of Regional Law No 33/96 refer to Article 48 of Regional Law No 32/91 and are intended to finance measures provided for for the 'agricultural year' 1992-1993 during the financial years 1995 and 1996 (see the contested decision, recital 52(b)), while Article 6 of Regional Law No 68/95 does not mention Article 48 of Regional Law No 32/91 and authorises financing for measures provided for for the agricultural years 1993-1994, 1994-1995 and 1995-1996 (see the contested decision, recital 52(d) and end).

75 It is clear from the foregoing that the complaint concerning infringement of Article 88(1) EC must be rejected.

76 Secondly, the applicant claims that in deciding that Article 6 of Regional Law No 68/95 was new aid, the Commission infringed the principles of the protection of legitimate expectations and of legal certainty.

77 It relies on *Italgrani* of 5 October 1994, which establishes the procedure to be followed when it is claimed that aid being assessed falls under a previously authorised aid scheme. In paragraph 24 of that judgment, the Court states:

'... when the Commission has before it a specific grant of an aid alleged to be made in pursuance of a previously authorised scheme, it cannot at the outset examine it directly in relation to the Treaty. Prior to the initiation of any procedure, it must first examine whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving it. If it did not do so, the Commission could, whenever it examined an individual aid, go back on its decision approving the aid scheme which already involved an examination in the light of Article 92 of the Treaty [now Article 87 EC]. This would jeopardise the principles of the protection of legitimate expectations and legal certainty from the point of view of both the Member States and traders since individual aid in strict conformity with the decision approving the aid scheme could at any time be called in question by the Commission.'

78 That case-law cannot properly be relied on in the present case, however, since the Italian authorities first claimed that the aid in question constituted refinancing of previously authorised aid only in response to the Commission's decision of 13 February 1998 to initiate the procedure provided for in Article 88(2) EC (see the letters of 30 June and 19 November 1998 from the Italian authorities to the Commission). Prior to the decision to initiate the formal investigation procedure, the same authorities had situated their actions within the regime applicable to new aid by notifying the measure in question to the Commission under Article 88(3) EC.

79 Moreover, when the Commission, by letter of 23 January 1997, authorised the refinancing of Article 48 of Regional Law No 32/91 for the agricultural year 1992-1993 pursuant to the measures provided for in Article 7 of Regional Law No 81/95 and Article 20 of Regional Law No 33/96, it took care to warn the Italian authorities that approval of that refinancing was without prejudice to the on-going examination of Article 6 of Regional Law No 68/95 (see the contested decision, recital 52(c)).

80 It is clear from the foregoing that the complaint alleging infringement of the principles of the protection of legitimate expectations and of legal certainty must be rejected.

81 Thirdly, the applicant maintains that, by deciding that Article 6 of Regional Law No 68/95 was new aid, the Commission infringed essential procedural requirements and failed to comply with the obligation to state reasons laid down in Article 253 EC.

82 On that point, it must be observed that by adopting the contested decision under Article 88(2) EC in response to a notification made by the Italian authorities in accordance with Article 88(3) EC, the Commission did not infringe essential procedural requirements in the present case, since recital 52 of the contested decision sufficiently explains why the Commission took the view that Article 6 of Regional Law No 68/95 could not be considered to be a refinancing of Article 48 of Regional Law No 32/91 within the meaning understood by the Italian authorities in the context of the formal investigation procedure.

83 It is clear from the foregoing that the complaints concerning infringement of essential procedural requirements and failure to state reasons must be rejected.

84 Accordingly, the first plea must be rejected in its entirety.

Second plea: infringement of the principle of tempus regit actum *and misuse of powers*

Arguments of the parties

85 The applicant complains that the contested decision failed to find the aid scheme provided for in Article 6 of Regional Law No 68/95 compatible with the rules on operating loans for agriculture.

86 First, the applicant states that the Commission infringed the principle of *tempus regit actum* and the principle that administrative measures do not have retrospective effect (Case C-325/91 *France* v *Commission* [1993] ECR I-3283, and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125) by applying the Communication on operating loans — which was adopted while the formal investigation procedure was still in progress — to the aid scheme provided for by Article 6 of Regional Law No 68/95, which predated that provision. The Commission several times during the administrative procedure considered applying the new provisions on operating loans. In its letter of 2 October 1995 to the Italian Permanent Representation asking for details concerning the 1995-1996 agricultural year, the Commission invited the Italian authorities to confirm that the criteria set out in the draft communication on operating loans, attached as an annex, had been complied with. Similarly, in its letter to the Minister of Foreign Affairs of 23 January 1997, the Commission took the view that the Communication on operating loans was applicable 'as it was a new scheme which remains in force after 1 January 1996'.

87 Secondly, the applicant claims that the Italian authorities were misled by the information provided by the Commission during the administrative procedure; they understood that they were not to concentrate on the character of the aid (since it appeared to be established that it was an operating loan) but rather on whether the necessary conditions for receiving the aid had been met, namely those used prior to the Communication on operating loans (as was the case, according to the applicant) or the stricter requirements set out in that communication (also the case, according to the applicant). Such a course of action amounts to misuse of powers.

88 In support of its argument, the applicant states that the Commission took into account the criteria laid down in the Communication on operating loans when it examined the contested measures, as shown by the reference to the 'seasonal' character of the loans in recital 54(c) of the contested decision. In particular, the applicant disputes the Commission's statement that the seasonal nature of the aid was in practice already a mandatory condition before the entry into force of the new rules defined by the Communication on operating loans, as the text of the fifth recital of the Communication clearly indicates that the two conditions applicable before its entry into force were that the period of the loan be a maximum of one year and that its availability not be limited simultaneously to one product only and one operation only, with no mention of its seasonal character. It was in fact the Communication on operating loans which introduced, in the seventh indent, the requirement that under the new rules applicable in future the loan be seasonal, in order to enable agricultural operators to defray expenditure relating to the production cycle before receiving income from sales.

89 The applicant maintains that the two conditions to be met under the Commission's earlier practice had been satisfied (the period of the loans was a maximum of one year and the aid applied to all citrus fruit, other fruit and vegetables), as the contested decision acknowledged in recital 54(c) ('even assuming that the

subsidised loan were not granted for a single product (but for two categories of products) or linked to a single operation (but mainly to one type of operation, export), and that the duration of the loan did not exceed 12 months').

90 The Commission points out, first, that the applicant is in essence complaining that it wrongly applied the rules set out in the Communication on operating loans. It observes that there is no factual basis for such an argument, since the fifth subparagraph of recital 53 of the contested decision states that the relevant rules in the present case were those applicable before the entry into force of the Communication on operating loans.

91 The Commission also states that the Italian authorities were not misled, since recitals 2.4 et seq. of the decision to initiate the formal investigation procedure make clear that the Commission accepted their view as regards determination of the applicable rules and expressly refer to the practice prior to the Communication on operating loans.

92 Finally, in contrast to the applicant, the Commission maintains that seasonal character is not a new condition established by the Communication on operating loans but is intrinsically related to the very notion of operating loans or farm loans: indeed, it is their essence.

Findings of the Court

93 It is necessary to define the rules which are applicable *ratione temporis* to the notified measure before examining the contents of those rules and their application in the present case.

1. Definition of the rules applicable *ratione temporis*

94 The contested decision indicates that after the Commission considered applying the new rules set out in the Communication on operating loans (see the third subparagraph of recital 53), it finally decided against doing so and simply applied the rules resulting from its previous practice (see the fourth and fifth subparagraphs of recital 53).

95 In particular, the fifth subparagraph of recital 53 expressly states that in the light of the fact that the aid introduced by Article 6 of Regional Law No 68/95 would apply to the 1993-1994, 1994-1995 and 1995-1996 agricultural years and that the Communication on operating loans which was subsequently adopted applies only in respect of aid entering into or remaining in force after 30 June 1998, Article 6 of Regional Law No 68/95 must be examined 'under the criteria applicable to subsidised short-term loans before the entry into force of the new communication [on operating loans] (30 June 1998)'. That being the case, the Commission merely set out the contents of the comments submitted by the Italian authorities in the letter of 30 June 1997 (see the contested decision, recital 36).

96 The applicant is therefore wrong to complain that the Commission's analysis of the comments submitted by the Italian authorities infringes the rules applicable *ratione temporis* to operating loans by applying the new rules defined in the Communication on operating loans or that the Commission misused its powers in the context of that analysis.

2. Content of the rules applicable *ratione temporis*

97 The applicant claims that the contested decision was adopted in breach of the rules which were applicable before the new rules defined in the Communication

on operating loans entered into force as a result of the consideration of the seasonal character of the aid, a criterion which it maintains was not provided for under the Commission's previous practice.

98 It must be pointed out that, before defining the new rules which were to apply as from 30 June 1998, the Communication on operating loans states that the Commission has for several years applied a policy of not opposing State aid granted through subsidised short-term loans for agriculture. The Communication observes that: 'The only conditions set by the Commission for such subsidies are that the period of the loan is a maximum of one year and that its availability is not limited simultaneously to one product only and one operation only', while noting that 'there is no limit on the intensity of the aid element, nor is there an obstacle as regards each beneficiary, to the subsidised loan being renewed each year' (Communication on operating loans, fifth recital).

99 None the less, and contrary to what the applicant claims, such a definition cannot disregard the seasonal character of the aid in question, since that character is intrinsic to the very definition of operating loans, which necessarily refers to the notion of 'loans for the marketing year', that is to say, a credit intended to cover advance payments of the operator's expenditure linked to the agricultural production cycle pending receipt of income during that same cycle (see the Commission decision of 13 February 1998 on initiation of the procedure provided for in Article 88(2) EC, recital 2.8, end).

100 The seasonal character of operating loans is apparent from the Commission document 'Competition Policy in Agriculture', the 17th *Report on Competition Policy* of which states that it describes the guidelines which the Commission follows when implementing the rules of competition in agriculture, which are thus a reference framework known to the Member States, public bodies and the operators concerned. According to that document, grants of aid given in the form of operating loans are considered to be incompatible with the common market

when those loans are 'granted for a period exceeding the marketing year (12 months), to only one product and for a single operation' (conversely, grants of aid which satisfy those two criteria will be considered to be compatible with the common market). The document goes on to explain that the Commission's attitude is 'motivated by the fact that agricultural production, being necessarily cyclical in character, must be financed by specific methods'.

101 Similarly, the seasonal character of the measure at issue is referred to in the seventh recital of the Communication on operating loans, in the section which sets out the Commission's conclusions following the review of that practice, which states that 'agriculture in the Community may, for reasons inherent in the nature of farming and related activities, in particular seasonality of production and structure of farm businesses, be at a relative disadvantage [compared] to operators elsewhere in the economy both in terms of their need for, and ability to finance, short-term loans'.

102 It is therefore the need to respond to specific financing needs related to the seasonal character of agricultural production which warrants the two criteria established for the purpose of defining the compatibility of operating loans with the rules of the Treaty, and such measures cannot be assessed without taking that character into account.

103 The definition of prior Commission practice provided in the second subparagraph of recital 53 of the contested decision, according to which 'the rules applying to subsidised short-term agricultural loans in force at the time of notification prohibited the grant of a loan for a single product or operation and limited their length to 12 months' is supplemented by the first subparagraph of recital 54, which refers not only to the aforementioned two criteria but also to the seasonal character of the measure in question, when it states that the criteria applying to

the measure notified before the entry into force of the new rules set out in the Communication on operating loans are as follows: 'the loans must be "seasonal credits" to cover general overheads (purchase of input, the payments of workers, etc.), the loan must not be granted for a single product or linked to a single operation, the duration of the loan must not exceed 12 months'.

104 Moreover, the applicant cannot be surprised by the use of the seasonal character of the aid, which is explicitly mentioned in recital 2.5 of the decision to initiate the procedure provided for in Article 88(2) EC, as 'criteria used by the Commission for operating loans before adoption of the guidelines published in OJ C 44 of 16 February 1996 [the Communication on operating loans]', recital 2.6 of which states that there are doubts 'about whether the aid in question can be considered as a true operating loan (in the sense of a "seasonal credit").'

105 Accordingly, there can be no objection to the Commission's analysis of the comments submitted by the Italian authorities relating to the classification of the measure notified as an operating loan in terms of its seasonal character.

3. Application of those rules in the present case

106 As regards the Commission's application in the contested decision of the rules which apply to operating loans, suffice it to observe that the applicant does not deny that the aid in question is not seasonal in character but merely states, wrongly, that the need to demonstrate that character was laid down only as from the entry into force of the new rules established in the Communication on operating loans.

107 In particular, it emerges clearly from the application that the applicant acknowledges that the aid at issue is not seasonal in character ('there is no doubt that the aid provided for in Article 6 of Regional Law No 68/95... applies to commercial operators and that it therefore comes into play after the farmer has incurred production costs').

108 Moreover, the applicant does not deny that the criterion for the duration of the loan (which must not exceed 12 months even if the loan may be renewed annually) was not satisfied in the present case, since the redemption of the debt was over 36 months (or, more precisely, an 'average duration... much less than 36 months' and it could not be excluded that it might 'be for longer than 12 months') (see recital 54(b) of the contested decision, and by reference recital 32).

109 Therefore, there can be no objection to the Commission's having taken the view that the operating loans in the present case were not seasonal in character.

110 It follows from the foregoing that the second plea must be rejected in its entirety.

Third plea: infringement of Article 87 EC, misuse of powers and infringement of Article 253 EC by a failure to state reasons

111 This plea includes three types of argument: those relating to the notion of export aid, those concerning the notions of aid for rescuing and restructuring firms in difficulty and of employment aid and those which provide for the notion of operating aid granted for the purpose of rescheduling past debts.

1. Complaints relating to the notion of export aid

— Arguments of the parties

112 The applicant takes issue with the contested decision inasmuch as it concluded that the aid at issue must be classified as 'export aid'. According to the applicant, the Commission arrived at that conclusion not by assessing the aid at issue in the light of the principles set out in Article 87 EC, but by elimination, on the basis of a residual criterion without any basis in the legislation on State aid. In addition, the contested decision justifies the classification as 'export aid' by the absence of evidence provided by the Italian authorities as to the effect of exports outside Italy on exports outside Sicily. That being the case, the applicant considers that the Commission has infringed Article 87 EC and misused its powers, since it is for the Commission to establish that the aid in question distorts competition in the common market.

113 That conduct is also reflected in the statement of reasons. The case-law of the Court affirms the principle that a decision which contains no information relating to the situation on the market in question, the market share of the undertaking which is the beneficiary of the aid, the patterns of trade in the products in question among Member States and the exports by recipients of the aid does not satisfy the minimum requirements regarding the statement of reasons (see *France* v *Commission* and *CIRFS and Others* v *Commission*, cited above). The applicant points out that the information referred to in recital 41 of the contested decision as regards Italian exports of citrus fruit, other fruit and vegetables provides no indication as regards the percentage of products which comes from the Region of Sicily, so that the alleged effect of the State aid on Community trade is determined on the basis of the 'absence of information', until the Italian authorities prove otherwise.

114 The Commission states that even if the applicant's complaints are founded they cannot result in annulment of the contested decision, since they refer to a passage in the account of the grounds which, as explicitly stated in the decision itself, has no effect on the operative part (see recital 55 of the contested decision).

— Findings of the Court

115 The applicant's argument that the contested decision concludes that the aid at issue must be classified as export aid has no factual basis, since the decision explicitly states that although that classification was initially envisaged, it was finally abandoned.

116 Recital 55 of the contested decision states that, in response to the comments by the Italian authorities contesting the classification of the measure notified as export aid, the Commission took notice of the fact that '"sales outside the region" need not necessarily and exclusively mean export out of Italy, and so it will no longer pursue this line in its examination of the aid under this decision'.

117 It is true that after stating that the classification as export aid was dropped, recital 55 goes on to say: 'Nevertheless, as the Commission noted when initiating the procedure, since the method for calculating the aid (see recital 23) seems to correspond to the method for calculating an export aid and given that the national authorities have based their comments on a literal interpretation of Article 6 of Regional Law No 68/95, without supplying documentary evidence on, for instance, exports from the region to elsewhere in Italy and out of Italy, the Commission cannot rule out the fact that the aid may be a de facto export aid.'

Nevertheless, that comment, which merely states the obvious — the fact that the Commission abandons an inquiry does not mean that aid may not at some point be classified as export aid if that is proved to be the case — does not make it possible to conclude, as does the applicant, that the contested decision states that the aid at issue must be classified as export aid.

118 Accordingly, the complaints relating to the notion of export aid must be rejected without further consideration, since the Commission explicitly waived pursuit of that classification in the contested decision.

2. Complaints relating to the notions of aid for rescuing and restructuring firms in difficulty and employment aid

— Arguments of the parties

119 The applicant maintains that the references in the contested decision to the notions of aid for rescuing and restructuring firms in difficulty and employment aid are irrelevant. The Italian authorities never stated that the aid at issue could be classified other than as aid for subsidised short-term loans for agriculture ('operating loans'), and they did not need to provide information demonstrating that the aid was of a different character. In particular, the reference in Article 6 of Regional Law No 68/95 to maintaining employment levels does not confer the character of employment aid on the aid at issue but rather explains its importance at the social level.

120 The Commission considers that the contested decision is free of flaws in that regard, since it rules out the compatibility of the aid at issue with the common market with reference to the rules on aid for rescuing and restructuring firms in difficulty and employment aid.

— Findings of the Court

121 The arguments put forward by the applicant on that point are immaterial, since it merely affirms that the references to the notions of aid for rescuing and restructuring firms in difficulty and to employment aid are irrelevant, which is precisely the conclusion of the contested decision.

122 Thus, while recital 56 of the contested decision makes clear that the Italian authorities did not refer to the possibility that the aid provided for in Article 6 of Regional Law No 68/95 satisfies the relevant requirements laid down by the Community guidelines for State aid for rescuing and restructuring firms in difficulty (OJ 1997 C 283, p. 2) and refers to the content of those requirements, it concludes that 'no evidence that the notified measure complies with the above criteria has been provided by the Italian authorities or is apparent from the information supplied'.

123 Similarly, while recital 58 of the contested decision states that the observations made by the Italian authorities 'vaguely refer' to a connection between the measure and the maintenance of employment, it points out immediately that no evidence was offered that the aid observes the spirit and the letter of the Community guidelines on employment (OJ 1995 C 334, p. 4). In particular, the decision states that while Article 6(4) of Regional Law No 68/95 provides for the cancellation and recovery of the aid if the beneficiaries do not meet their obligation to maintain employment levels, that aid does not appear to comply

with the criteria laid down by Community guidelines on employment aid since it is not adopted or designed specifically as an aid to protect employment, its amount does not depend on the number of employees and its form bears no relationship to the labour costs. The decision therefore concludes that even if the aid in question can indirectly contribute to maintaining employment, as is the case in many other aid categories, it cannot be deemed employment aid within the meaning of the relevant guidelines.

124 Accordingly, the complaints relating to the notions of aid for rescuing and restructuring firms in difficulty and employment aid must be rejected.

3. Complaint relating to the notion of operating aid granted to reschedule past debts

— Arguments of the parties

125 The applicant criticises the statement in recital 59 of the contested decision which classifies the aid in question as 'operating aid granted to reschedule past debts' without examining the reasons put forward by the national authorities with respect to the fact that the interest rates applied by Sicilian banks are considerably higher than those in the rest of Italy. It also notes that by classifying the aid at issue as operating aid, incompatible with the rules of the common market, the Commission failed to tackle the question of whether that aid could be classified as 'export aid' — a classification which, had the national authorities known of it in

time, would despite its incorrect basis have allowed the aid in question to benefit from the derogations referred to in Article 87(3)(a) and (c) EC. Moreover, the Commission provides no explanation for the classification as operating aid, and the contested decision is therefore vitiated by a failure to state reasons.

126 The Commission disputes that argument, drawing attention to the fact that the aid in question was classified by the Italian authorities themselves as aid granted to reschedule past debts. Moreover, its being operating aid was never called in question and the reason for the classification is duly provided by recital 59 of the contested decision. The Commission also notes that the measure may not in the present case be authorised as an operating loan; the difference in interest rates between Sicily and the rest of Italy is irrelevant in that regard, since that parameter is not required by the rules relevant to operating loans.

— Findings of the Court

127 According to recital 59 of the contested decision, the aid provided for in Article 6 of Regional Law No 68/95, 'which is clearly not an aid for investment, does not appear to satisfy the requirements for subsidised short-term loans, or for rescuing or restructuring companies in difficulty, or for maintaining employment, or any of the requirements for exemption set by some other legal basis', and appears to be 'pure operating aid granted to reschedule past debts, whose effect disappears when the payment of aid ceases'.

128 Recital 60 of the contested decision recalls that in the agriculture sector it has been consistent Commission policy to prohibit the payment of operating aid in all regions, including regions which fall under Article 87(3)(a) EC since, by its very

nature, such aid is likely to interfere with the mechanisms of the common organisation of the market, which takes precedence over the competition rules laid down in the Treaty.

129 Having explained that, the contested decision states in recital 61 that since 'the Italian authorities' comments confirm that the objective of the measure under examination is to relieve the beneficiaries of their debt burden, and that there is no counterpart on the part of the beneficiaries which might benefit the development of certain economic activities or certain regions', the measure cannot benefit from the derogations under Article 87(3)(a) and (c) EC and is therefore incompatible with the common market.

130 It is settled case-law that operating aid, that is to say, aid intended to relieve an undertaking of the expenses which it would normally have had to bear in its day-to-day management or its usual activities, does not in principle fall within the scope of Article 87(3) EC. According to the relevant case-law, the effect of such aid is in principle to distort competition in the sectors in which it is granted, whilst being incapable, by its very nature, of achieving any of the objectives of the exceptions provided for in the EC Treaty (judgments of the Court of Justice in Case C-86/89 *Italy* v *Commission* [1990] ECR I-3891, paragraph 18, and Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 50; judgment of the Court of First Instance in Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 48).

131 In the present case, the applicant does not provide any information which refutes the Commission's assertion that aid granted in order to reschedule the past debts of its recipients by relieving their debt burden constitutes operating aid which is incompatible with the rules of the Treaty in respect of State aid. The fact that interest rates differ as between Sicily and the rest of Italy does not amount to a defence which makes that aid compatible with the aforementioned rules, since Article 87(3) EC does not provide for such a derogation.

132 Accordingly, the complaint relating to the notion of operating aid granted to reschedule past debts must be rejected.

133 It is apparent from the foregoing that the third plea must be rejected in its entirety.

Fourth plea: infringement of essential procedural requirements and failure to complete within a reasonable period the procedures laid down in Article 87 EC

Arguments of the parties

134 The applicant claims that the Commission did not complete the administrative procedure within a reasonable period, inasmuch as the aid scheme provided for in Regional Law No 68/95 was notified on 8 August 1995 and almost two years went by between the decision of 13 February 1998 to initiate the procedure provided for in Article 88(2) EC and the final decision of 22 December 1999.

135 The Commission disputes that argument, contending that the period of 30 months which passed between notification of the aid scheme provided for in Regional Law No 68/95 and the initiation of the formal investigation procedure and the period of 22 months for that formal investigation procedure were in essence attributable to the Italian authorities. Moreover, the Commission points out that the period of 22 months cannot be considered excessive in the light of Article 7(6) of Regulation No 659/1999, according to which the period of 18 months laid down in that provision is not mandatory and a slightly longer period is acceptable.

Findings of the Court

136 It is a principle of good administration that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy (see, in respect of State aid, Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 4, and Case 223/85 *RSV* v *Commission* [1987] ECR 4617, paragraphs 12 to 17; in respect of rejection of a complaint, see Case C-282/95 P *Guérin automobiles* v *Commission* [1997] ECR I-1503, paragraphs 37 and 38). Whether or not the duration of an administrative procedure is reasonable must be determined in relation to the particular circumstances of each case, and especially its context, the various procedural stages to be followed by the Commission, the complexity of the case and its importance for the various parties involved (see, as regards competition, Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 57).

137 However, in the present case, the applicant merely states that the aid scheme provided for in Regional Law No 68/95 was notified on 8 August 1995, that the decision to initiate the review procedure referred to in Article 88(2) EC was adopted on 13 February 1998, that the final decision was given on 22 December 1999 and that those periods are not reasonable, without providing any reasons.

138 It should be recalled that the lapse of 30 months between the notification of the aid scheme and the initiation of the formal investigation procedure is in essence the responsibility of the Italian authorities, which replied in a partial or incomplete manner to the Commission's requests for information, as stated in the third recital of the contested decision and not denied by the applicant. The Commission cannot be held responsible for that delay.

139 As regards the 22 months which elapsed between the initiation of the formal investigation procedure and the final decision, according to Article 7(6) of Regulation No 659/1999, which came into force on 16 April 1999, 'the Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure'. A period of 22 months cannot be considered unreasonable merely because it exceeds 18 months, which is an objective to be observed and not a mandatory time-limit. Moreover, the applicant does not deny that the period of relative inertia which occurred in the middle of the formal investigation procedure was attributable to the Italian authorities, which were asked — unsuccessfully — to provide detailed information concerning the possible classification of the aid as export aid.

140 The fourth plea must therefore be rejected.

141 Consequently, the application must be dismissed in its entirety.

Costs

142 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to bear its own costs and pay those of the Commission.

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay its own costs and those incurred by the Commission.**

García-Valdecasas Lindh Cooke

Meij Legal

Delivered in open court in Luxembourg on 24 November 2003.

H. Jung R. García-Valdecasas

Registrar President