OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 29 March 2001 [1]

I — Subject-matter of the proceedings, facts, pre-litigation procedure and arguments of the parties

1. The present case concerns the action brought by the Italian Republic on 18 October 1999 for the partial annulment of the decision of the Commission, communicated by letter of 6 August 1999, concerning the formal initiation of the procedure under Article 88(2) EC. [2] On 15 November 1999 the Commission raised an objection of inadmissibility under Article 91(1) of the Rules of Procedure of the Court of Justice. Oral proceedings on that application took place on 9 January 2001. The facts, the arguments of the parties and the pre-litigation procedure set out below are therefore confined to the issue of the admissibility of the action for annulment.

2. The procedure before the Commission concerns the legal examination of aid measures taken by the Italian Government for the benefit of undertakings in the Italian group Tirrenia di Navigazione (hereinafter: 'the Tirrenia group'). The Tirrenia group operates ferry services in Italian waters.

3. It is common ground that a number of contracts under Italian law were concluded between the Italian State and the Tirrenia group under which annual payments were made to the Tirrenia group, and that these served — at least in part — to secure public services within the meaning of Article 86(2) EC (in the present case, to maintain all-year-round links between Italian islands and the mainland). The dispute centres on whether the financial aid under the current contract goes beyond what is necessary for the purpose. The meaning of Article 4(3) of Council Regulation No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), [3] which provides that 'existing public service contracts may remain in force up to the expiry date of the relevant contract', is also discussed in this context. Finally, the Italian Government pleads that the contracts with the Tirrenia group are based on

1 — Original language: German.

2 — OJ 1999 C 306, p. 2.

3 — OJ 1992 L 364, p. 7.

a number of laws, the oldest of which dates back to 1974. The legal bases for the last contract were communicated to the Commission in a number of letters between 1991 and 1997, and elicited no complaints. Furthermore, the Commission decided in a previous case, after the conclusion of an inquiry into the legality of aid under a similar contract on the same legal bases, that such aid was permissible.

4. By letter of 12 March 1999 the Commission addressed a number of questions to the Italian Government, which were answered by letter of 11 May 1999. After a meeting between representatives of the Italian Government and the Commission on 3 June 1999, the Commission informed the former by letter of 6 August 1999 (SG [99] D 6463) that it had decided to initiate the procedure under Article 88(2) EC (hereinafter: formal initiation of the procedure). After an introduction, an account of the arguments in the pre-litigation procedure and a legal assessment in relation to Community law on aid, there appeared in the letter a passage headed in the original Italian text with the word '*Conclusioni*'. In it the Commission seems to reserve the right to require the Italian authorities to suspend payment of the aid in question. It invites the Italian authorities ('*invita*' in the original Italian text) to provide the Commission with confirmation, within 10 days of receipt of the letter, that it has suspended payments to the Tirrenia group to the extent to which they exceed the amount necessary to secure public services. Failure by the Italian Government to comply with the 'decision to suspend the aid' would entitle the Commission to refer the matter directly to the Court of Justice under Article 88(2) EC and, 'if necessary, apply for an order for provisional interim cessation'.[4] Subsequently a letter from the Italian Government of 19 August 1999, to which the Commission replied on 13 September 1999, revealed a difference of opinion as to the content and legal nature of the '*Conclusioni*' as part of the decision at issue.

5. On 18 October 1999 the Italian Republic brought an action for annulment of the decision communicated in the letter of 6 August 1999 in so far as it ordered suspension of the disputed measures. The Commission countered by raising an objection of inadmissibility.

6. The Commission argues in essence that the letter in question did not contain a formal order to suspend,[5] but merely raised the prospect of one, or contained an invitation to exercise the right to be heard prior to the imposition of such an order. The action is therefore inadmissible because the applicant's arguments are not relevant.

4 — In the original Italian text of the letter of 6 August 1999 '... e richiedere, se necessario, un provvedimento di sospensione provvisoria'.

5 — This clearly means an order for 'provisional suspension pending a final decision' (hereinafter: 'order to suspend').

7. The Italian Government relies on the judgment of the Court in *Cenemesa*, [6] where it was held that the formal initiation of the procedure constituted a decision by the Commission as to the existence of 'new' aid, or conversely the absence of 'existing' aid, and consequently a decision on the suspensive effect of the third sentence of Article 93(3) of the EC Treaty (now the third sentence of Article 88(3) EC). Accordingly, it is an act with adverse legal consequences for them, the effects of which cannot as easily be reversed simply by annulling the final decision. Since an essential issue is whether the measures constitute 'existing' aid, that judgment should be followed here, making the action admissible.

II — Admissibility of the action for annulment in the light of the legal situation prior to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [7]

8. According to the parties, the admissibility of the action for annulment clearly depends first and foremost on what is the subject-matter of the action: the '*Conclusioni*', or the formal initiation of the procedure as such. If it is the former, the Commission considers that the action is inadmissible because it is not an order to suspend, but, at most, the threat of one.

9. If the arguments of the Italian Government are to be understood to the effect that it is seeking annulment only of that part of the letter from the Commission of 6 August 1999 which is labelled '*Conclusioni*', it should be borne in mind that the content of that part of the text is not immediately clear.

10. Firstly, the Italian Republic is 'invited' there ('*invita*') to suspend the measures, which indicates that this part of the decision is not mandatory. At the same time, it is asked to confirm within a relatively short period of time that it has complied with this 'invitation'. If the deadline is not adhered to, the Commission threatens immediate referral to the Court 'under Article 88(2) EC' and 'if necessary' an order to suspend the measures. It remains unclear whether the Commission regards the order to suspend as a precondition for or as an alternative to the action before the Court.

11. The second subparagraph of Article 88(2) EC refers to the specific action

6 — Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, '*Cenemesa*'.

7 — OJ 1999 L 83, p. 1.

for a declaration of failure to fulfil obligations brought 'in derogation' from Articles 226 EC and 227 EC [8] to enforce a final decision by the Commission in aid matters, and consequently not to be envisaged while the procedure is in progress. What the Commission clearly has in mind is the 'variant of the action for a declaration of failure to fulfil obligations' before the final decision is issued, mentioned for the first time in the judgment of the Court in *Boussac*; [9] according to that judgment it must be preceded by an order to suspend the measures, after the Member State has been given the opportunity to give its opinion. There is no express reference of this nature in the letter from the Commission of 6 August 1999. The direction to (partially) withdraw the measures within a period of 10 days cannot really be understood in that way.

12. The Commission also leaves unclear to what extent the measures should be suspended. It leaves the determination of the part which may be necessary for the maintenance of public services — and thus covered by Article 86(2) EC — to the Member State.

13. On that view, one would be compelled to conclude at first that the part of the decision labelled '*Conclusioni*' is incapable of having legal effects [10] for want of clarity. If the arguments of the Italian Government are directed solely against this part of the decision, they are irrelevant in law, and the action is inadmissible.

14. However, the fact that according to the case-law cited by the Italian Government itself any declaration that this part of the decision was void would, strictly speaking, have no effect as regards the formal initiation of the procedure militates against the presumption that the Italian Republic is seeking to challenge only the part of the decision labelled '*Conclusioni*', on the ground that it amounts to an order to suspend.

15. The Italian Government cites the judgment of the Court in *Cenemesa*. [11] The judgment is linked to that in *Italgrani*, [12] which the Court delivered on the same day. Both actions challenged the formal initiation of the procedure. In both cases the point in dispute was whether 'existing' aid was involved and whether the Commission was entitled to formally initiate the procedure.

8 — Cf. Case 70/72 *Commission* v *Germany* [1973] ECR 813, '*Kohlegesetz*'.

9 — Case C-301/87 *France* v *Commission* [1990] ECR I-307, '*Boussac*'. Recital 12 in the preamble to Regulation No 659/1999, upon which the Commission is perhaps relying in the text of the decision, is misleading inasmuch as the form of the order to suspend under Article 11(1) and its enforcement under Article 12 of the same regulation correspond, precisely, to this 'variant of the action for a declaration of failure to fulfil obligations' (cf. e.g. *Mederer* in Groeben/Thiesing/Ehlermann (eds.), 'Kommentar zu EU-/EG-Vertrag' (Commentary on the EC/EU Treaty), vol. 2 /II, Articles 88-102 EGV, on Article 93 of Regulation (EC) No 659/1999, paragraph 17), while in *Boussac* the Court clearly differentiated between the possible 'variant of the action for a declaration of failure to fulfil obligations' in the event of aid implemented before conclusion of the main procedure, and the action for a declaration of failure to fulfil obligations under the second subparagraph of Article 88(2) EC.

10 — Cf. the judgment in Joined Cases 23/63, 24/63 and 52/63 *Usines Henricot* v *High Authority* [1963] ECR 219.

11 — Cited in footnote 6.

12 — Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, '*Italgrani*'.

16. In *Cenemesa*, the Kingdom of Spain considered that the aid was 'existing' aid because in its view the conditions set out in *Lorenz* [13] were met. In *Italgrani*, the Italian Government claimed that aid should have been regarded by the Commission as 'existing' aid because it had been granted on the basis of an approved aid scheme. In both cases the judgment relied largely, as regards the admissibility of an action for annulment of the formal initiation of the procedure, on the fact that the formal initiation of the procedure produced a legal effect that could no longer by nullified by the final decision.

17. Thus, if it is assumed that the Italian Republic is challenging only the part of the decision labelled '*Conclusioni*', the conclusion would have to be that removal of that suspensive effect — and generally removal of the suspensive effect is obviously the more important matter for the applicant — could not be justified at all under the case-law it cites. That would seem to indicate that the action for annulment must be directed against the whole decision concerning the formal initiation of the procedure.

13 — Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, paragraph 8.

18. It thus appears, taking into account the case-law cited by the applicant, that the action for annulment, so understood, is admissible inasmuch as the question of whether the aid was 'existing' was at least an issue in the pre-litigation procedure. In any event, the Commission did not deny that the question of 'existing' aid had been raised by the Italian Government during the pre-litigation procedure. The decision concerning the formal initiation of the procedure made no reference to that matter.

19. In this connection, the question might therefore arise, in relation to the admissibility of such an action for annulment generally, as to whether the case-law cited can be understood to mean that the mere assertion that the question of 'existing' aid had been the subject of the pre-litigation procedure might suffice to make an action for annulment admissible. The result would thus be that every action for annulment of the formal initiation of the procedure would in principle be admissible, whereas the grounds in the case-law cited refer solely to the question of aid already claimed to be 'existing' aid in the pre-litigation procedure. The question of the admissibility of the action for annulment must therefore encompass the question of the merits of the arguments in the pre-litigation procedure, because otherwise it might be possible in some circumstances for Member States to bring the question of 'existing' aid into the pre-litigation procedure as a precautionary measure in order to ensure the admissibility of an action for

annulment of the formal initiation of the procedure.

20. In the present case, the Italian Republic puts forward the view in the application that the Commission did not examine the question of 'existing' aid properly. It argues that the question of 'existing' aid was a subject of the pre-litigation procedure, producing as evidence several letters to the Commission containing references to the fact that the current contract with the Tirrenia group was based on laws that had already been examined by the Commission in other aid cases. The argument cannot therefore be said to be entirely without foundation.

21. On the other hand, the reliance by the Italian Republic on Article 4(3) of Regulation No 3577/92 (maritime cabotage) is unfounded. A provision in a regulation, as referred to in the second paragraph of Article 189 of the EC Treaty (now the second paragraph of Article 249 EC), constitutes Community secondary legislation and as such is not capable of expanding the primary law definition of 'existing' aid (Article 88(1) EC) in that way, even if it were to be construed in the manner argued for by the Italian Government.

22. If, therefore, it is assumed that the arguments of the Italian Republic are directed against the formal initiation of the procedure, they appear at first sight to be generally sufficiently well-supported to justify consideration of the admissibility of the action for annulment as the case-law cited is to be understood.

23. There is no need at this point to consider whether the Commission's decision is well founded, as that is not necessary in order to determine whether the action for annulment is admissible.

24. It is clear that the parties are at odds in this case as to whether the measure in dispute is to be classified as 'new' or 'existing' aid.

III — The legal position after the entry in force of Regulation (EC) No 659/1999

25. The disputed decision was taken by the Commission after Regulation (EC) No 659/1999 came into force. That regulation and the facts of the present case provide an opportunity to examine the whole system of formal initiation of procedures and orders to suspend and their

suspensive effect, focusing particularly on their effect on the admissibility of an action for annulment. [14]

26. In the general system of law relating to aid, the suspensive effect is based in primary law initially on the core statement in the third sentence of Article 88(3) EC. In addition, the suspensive effect follows from the case-law of the Court in *Cenemesa* and *Italgrani* [15] following the Commission's decision regarding the formal initiation of the procedure. Finally, the suspensive effect is also provided for in the form of an order to suspend as a 'safety measure', described more closely in the Court's judgment in *Boussac*, [16] and now governed by Article 11(1) of Regulation No 659/1999.

27. Since in the present case the nature and purpose of the '*Conclusioni*' was the main subject of the discussion relating to the admissibility of the action for annulment, obvious questions arise as regards the requirements for, and legal nature and effects of, an order to suspend under Article 11(1) of Regulation No 659/1999. An effort will also be made in that context in the following to assess the interpretation of the case-law mentioned upon which the admissibility of the action for annulment in the present case was founded with reference to the suspensive effect of the formal initiation of the procedure. The primary law prohibition on implementation imposed by the third sentence of Article 88(3) EC is central to this issue.

A — *The case-law to date*

28. The judgments of the Court in *Cenemesa* [17] and *Italgrani*, [18] the leading cases on the question of the admissibility of the action for annulment of the formal initiation of the procedure, are based on the following factors:

— the formal initiation of the procedure has legal effects [19]

and

— the interests of the applicant meriting protection cannot be taken into

14 — Furthermore, this would be the first ruling to be given in a case involving the application of Regulation No 659/1999.

15 — Cited in footnotes 6 and 12.

16 — Cited in footnote 9.

17 — Cited in footnote 6.

18 — Cited in footnote 12.

19 — Case 22/70 *Commission* v *Council* [1971] ECR 236.

account to the same extent by challenging the final decision. [20]

1. The 'deliberate' decision of the Commission to 'regard the aid as new', and the legal effects of that decision

29. Acts of a Community organ produce legal effects if they adversely affect the legal position of the plaintiff by interfering in his legal position. [21]

30. According to the judgment in *Italgrani*, the legal effects of the formal initiation of the procedure are to be found in the fact that the decision of the Commission 'prohibited... from paying the proposed aid... before the procedure had resulted in a final decision'. [22] 'That prohibition is the result of a deliberate decision' [23] by the Commission 'to treat aid as new aid'. [24]

31. The first point to be made is that it surely cannot be assumed that the question of 'new' aid, which in fact affects only one of the four elements of aid granted in breach of Community regulations, should as such no longer be considered when the main procedure is initiated.

32. Under *Article 4(4) of Regulation No 659/1999*, a procedure is to be formally initiated when the Commission 'finds that doubts are raised as to the compatibility with the common market of a notified measure' [25] and it has under *Article 6(1) of Regulation No 659/1999 inter alia* carried out a 'preliminary assessment... as to the aid character'. [26] Although the examination of whether the elements of 'new' aid are present, and consideration if relevant of the requirements of Article 86(2) EC, are not mentioned in the new regulation there is no apparent reason why they should no longer be considered in the main procedure. After all, such a procedure, especially because of the inclusion of 'interested parties' (Article 1(h) of Regulation No 659/1999), constitutes a comprehensive investigation and examination of all the elements of law relating to aid.

20 — Case 60/81 *IBM* v *Commission* [1981] ECR 2639 and Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965.

21 — Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9.

22 — Cited in footnote 12, paragraph 20.

23 — Cited in footnote 12, paragraph 21.

24 — Cited in footnote 12, paragraph 26.

25 — It is unclear whether this means 'doubts' regarding the 'compatibility with the common market' in the sense of the existence of all the factual elements of 'aid' under Article 87(1) EC, or possible 'doubts' regarding 'compatibility' under Article 87(2) EC.

26 — Cf. the facts in Case T-14/96 *BAI* v *Commission* [1999] ECR II-139.

33. The Court states in the *Italgrani* case that 'the Commission decided to treat as new aid aid which the Government regarded as existing aid because it had been granted under Italian Law No 64/86 which had been approved by a Commission decision. It cannot therefore be considered that in this case suspension of payment of the aid follows automatically from the Treaty. Since it involves a choice by the Commission of the applicable rules of procedure, the contested decision to initiate the Article 93(2) procedure has legal effects.' [27]

34. In the *Cenemesa* case, the Court states that in the event of a dispute as to whether aid is 'new' or 'existing', 'it cannot be considered that in this case suspension of payment of the aid follows automatically from the Treaty. Since it clearly involves a choice of the relevant category of aid and the rules of procedure relating to it, the contested decision to initiate the Article 93(2) procedure has legal effects.' [28]

35. Both cases, despite having different backgrounds, concerned aid which in the view of the Member States was 'existing' aid. [29] Since the conclusion that 'in this case payment of the aid does [not] follow automatically from the Treaty' cannot be understood to mean that in the cases stated the primary law prohibition on implementation would not have applied, the fact that the formal initiation of the procedure has legal effects gives rise to the following questions: Does this decision by the Commission to initiate a procedure under Article 88(2) EC result in a prohibition on implementation because of the substance of the classification, in other words the 'classification' of the disputed measure as 'new' aid? Is the decision to that extent 'constitutive'? Since the primary legal prohibition on implementation for 'new' aid cannot result from the decision of the Commission, does the present operation of this prohibition on implementation — based on the classification as 'new' aid — rest on the decision by the Commission? Does that mean that suspension does not follow automatically from the EEC Treaty?

For that to be the legal effect, it must be assumed that authority was given to the Commission here to class aid (at least temporarily) as 'new' *constitutively*. The judgment gives no indication of this. It also seems difficult to show why such an effect should be necessary for the investigation of the legality of any aid to be effective. Furthermore, it should not be forgotten that the prohibition on implementation in the third sentence of Article 88(3) EC for

27 — Cited in footnote 12, paragraph 26.
28 — Cited in footnote 6, paragraph 20.
29 — Cf. point 16 above for the background.

'new' aid implies the concomitant conclusion that 'existing' aid enjoys special protection. [30]

36. The third sentence of Article 88(3) EC provides that the prohibition on implementation follows directly from the existence of 'new' aid, while Article 3 of Regulation No 659/1999 expressly extends this to 'notifiable aid'. This is also clearly the basis of the judgment in *Lorenz*. [31] Here, the Court formulated the direct prohibition on implementation under the third sentence of Article 93(3) of the EC Treaty (now the third sentence of Article 88(3) EC) as follows: 'Thus the direct effect of the prohibition extends to all aid which has been implemented without being notified and, in the event of notification, operates during the preliminary period, and where the Commission sets in motion the contentious procedure, up to the final decision'.

37. The Court thus assumes that the direct effect of the prohibition applies at every stage of the procedure, in other words also before or *without the formal initiation of the procedure*. It can be concluded from this that the suspensive effect occurs solely as a result of the *objective* existence of all the elements mentioned in the third sentence of Article 88(3) EC ('aid character' of the measure, not an instance of Article 86(2) EC, existence of 'new' aid), and to that extent no legal act is necessary on the part of the Commission to put the prohibition into effect.

38. Also, the fact that the Court only recently, in *CELF*, [32] again stressed the *safeguard function* of the third sentence of Article 88(3) EC, which ensures the operation of the legal review mechanism in matters relating to aid, would not seem to support the presumption that operation of the suspensive effect requires a legal act on the part of the Commission. If that presumption was correct it might be concluded that Member States did not have to observe the prohibition on implementation of 'new' aid measures until the formal initiation of the procedure. Viewed in this light, however, the machinery for reviewing aid matters would clearly be robbed of one of its main pillars, since Member States would hardly be motivated to notify measures as 'new' if their implementation were 'lawful', at least until the formal initiation of the procedure, due to the absence of any suspensive effect.

39. Another factor militating against the basic presumption of the legal effect of the formal initiation of the procedure in relation to the commencement of the suspen-

30 — Cf. Case C-387/92 *Banco Exterior de España* [1994] ECR I-877.

31 — Cited in footnote 13 [point 8, in fine].

32 — Case C-332/98 *France* v *Commission* [2000] ECR I-4833, '*CELF*'. In this case the Court held that no exception to the provisions of the third sentence of Article 93(3) of the EC Treaty (now the third sentence of Article 88(3) EC) can be made, even where the Member State granting aid assumes that the exception provided for for public services (Article 90(2) of the EC Treaty, now Article 86(2) EC) applies.

sive effect in the cases of interest here is that otherwise *conflicts* between procedures before the Commission and parallel proceedings before *national courts* might arise.

40. The Court has consistently stressed the role of the national courts in reviewing matters relating to aid law. [33] Owing to the direct effect of the third sentence of Article 88(3) EC 'national courts must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures.' [34] In so doing, 'national courts may be required to interpret and apply the concept of aid contained in Article 92.' [35] Only the 'compatibility with the common market' within the meaning of Article 87(2) EC, the assessment of which lies within the discretion of the Commission, [36] cannot be the subject of such proceedings. There has apparently been no occasion so far to broach the question of whether national courts must also examine the question of 'new' aid [37] or the possible applicability of Article 86(2) EC. At first sight there seems to be no reason why they should not, since the presence of all the criteria listed in the third sentence of Article 88(3) EC must be objectively ensured before the Commission may use its discretion to determine that (exceptionally) aid is compatible with Article 87(3) EC.

41. Accordingly, if the requirements of the third sentence of Article 88(3) EC are met, a national court must enforce the prohibition on implementation of 'new' aid resulting from primary law regardless of the state of progress of the formal enquiry before the Commission. National court proceedings to enforce the prohibition are thus possible even in the preliminary period, [38] in other words, precisely at a time when the Commission has not yet reached any decision on whether to formally initiate the procedure.

42. The previous interpretation of 'legal effect' to found admissibility of the action for annulment of the formal initiation of

33 — Case 6/64 *Costa* v *E.N.E.L.* [1964] ECR 585, a fundamental decision; Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595; and Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *French State* [1991] ECR I-5505, hereinafter '*Commerce extérieur*'.

34 — *Commerce extérieur*, cited in footnote 33, paragraph 12.

35 — *Commerce extérieur*, cited in footnote 33, paragraph 14.

36 — *Commerce extérieur*, cited in footnote 33; Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557.

37 — Cf., however, the Commission in its 'Notice on cooperation between national courts and the Commission in the State aid field', OJ 1995 C 312, p. 8, paragraph 16.

38 — Held expressly by the Court in *Lorenz*, cited in footnote 13, paragraph 8.

the procedure therefore seems, on closer examination, no longer to be persuasive, in the light of the new legal situation.

2. Whether the legal effects of formal initiation of the procedure are definitive

43. The possibility of challenging the formal initiation of the procedure was previously based, relying on the judgment in *Commerce extérieur*,[39] on the argument that the legal effects of classification as 'new' aid were 'definitive'[40] because they could no longer be removed by a decision of the Commission to the contrary.

44. In that judgment, the Court stated that the final decision to declare aid (in that case, clearly 'new' aid) compatible with the common market did 'not have the effect of regularising *ex post facto* the implementing measures which were invalid because they had been taken in breach of the prohibition laid down by the last sentence of Article 93(3) of the Treaty'.[41] The Court thus found that the final decision to declare a measure 'compatible with the common market' (substantive lawfulness) could not subsequently rectify the unlawfulness attributable to the fact that the measure had been implemented before the conclusion of the main proceedings, contrary to the prohibition in the third sentence of Article 88(3) EC (procedural unlawfulness). Such a breach of the primary legal prohibition on implementation cannot therefore be remedied.

45. Even if formal initiation of the procedure is assumed to produce legal effects, it does not simply follow that the reasoning in *Commerce extérieur* is applicable in all cases where the Commission makes a final decision on the substantive lawfulness of a measure.

46. The final decision in that judgment was in favour of a Member State, based on a change in, or finalisation effected at that time of, the attitude of the Commission regarding the compatibility of measures with the common market for the purpose of Article 87(3) EC. The irremediability of the defect in the case in question must consequently be considered in conjunction with those cases in which the Commission

39 — *Commerce extérieur*, cited in footnote 33.

40 — [See cases] cited in footnote 6 (paragraph 23) and footnote 12 (paragraph 29).

41 — *Commerce extérieur*, cited in footnote 33, paragraph 16.

took a *discretionary decision*.[42] Cases relevant for the admissibility of an action for annulment, however, would involve (positive) final decisions, which after correction of a provisional *legal view* on the part of the Commission (classification as 'new' aid) might not be the same as at the time of the formal initiation of the procedure.

47. In the first case mentioned, the requirements of *effet utile* support the presumption that the unlawfulness of measures implemented prematurely cannot be rectified, since the prerequisite for considering the 'compatibility with the common market' under Article 87(3) EC is the *objective* existence of all other criteria outside the discretion of the Commission. The irremediable unlawfulness in the circumstances of *Commerce extérieur* logically presupposes that there was aid, that it was 'new' and that Article 86(2) EC was not applicable.

48. If in accordance with the *Commerce extérieur* judgment one were to apply the presumption that such legal effect flowed from the formal initiation of the procedure generally to all other instances of final decisions in favour of Member States, that is to say, decisions allowing the measures to be implemented lawfully, one would ultimately arrive at the conclusion, difficult to justify, that a measure would be irremediably unlawful even if from the outset it did not meet the conditions for being 'aid' at all, for example.

49. The same would have to apply in the present case, provided that the measure really was objectively 'existing' aid from the outset, or in cases in which the requirements of Article 86(2) EC were met in practice.

50. Unlike the discretionary decision by the Commission as to 'compatibility with the common market' within the meaning of Article 87(3) EC, evaluations of a measure as 'aid' or 'new aid', and the determination that the requirements of Article 86(2) EC are not met, are linked decisions. At least at first there seems to be no reason for the purposes of *effet utile* of aid supervision to presume irremediable unlawfulness in all such cases.

51. That would seem to support the conclusion that the formal initiation of a

42 — *Commerce extérieur*, cited in footnote 33.

procedure based on an incorrect presumption that the aid is 'new' aid, even if it were acknowledged to have legal effects, does not generally have *definitive* legal effects. In that case, however, the argument in such cases that legal effects associated with this definitiveness are a prerequisite for the admissibility of an action for annulment would cease to be valid.

52. If one were to doubt the general existence of legal effects of the formal initiation of the procedure as regards the suspensive effect, and deny that the legal effects of formal initiation of the procedure are generally definitive, the action for annulment would in principle be directed against a procedural measure, which if unlawful could be remedied by challenging the final decision. Such an action would be inadmissible.

53. It should also be added that the recent judgment by the court in *Austria* v *Commission*[43] indicates that in the particular circumstances required by *Lorenz*,[44] which are now regulated by Article 4(5) and (6) of Regulation No 659/1999, an action for the annulment of the formal initiation of the procedure is in any event admissible.[45] Since the Italian Government has adduced nothing in the present case that might indicate the presence of the necessary conditions for this, there is no need to consider this question further.

B — *Possibilities and limits of Community legal protection before conclusion of the main procedure*

54. It is undisputed that the uncertainty regarding the lawfulness of planned support or aid measures during what may turn out to be a protracted enquiry procedure can delay important economic decisions. As well as doubts regarding the legal grounds generally, doubts as to the effectiveness of, and need for, a possible action for annul-

43 — Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, '*Siemens*'.

44 — Cited in footnote 13. Moreover, the question of the presence of the *Lorenz* requirements at the time of the opening of the formal inquiry was central to one of the two leading judgments on the question of the admissibility of an action for annulment (*Cenemesa*, cited in footnote 6); the action would therefore ultimately also have been admissible under the new legal situation, had the conditions been met.

45 — The wording of the first sentence of Article 4(6) of Regulation No 659/1999 clearly provides that if all the necessary conditions are met, aid 'shall be deemed to have been authorised by the Commission'. It should also be borne in mind that the actual conditions required by *Lorenz* — unlike 'genuine' cases of 'existing' aid — *must* all be present at the time of the opening of the formal inquiry. There is also the risk with the formal initiation of the procedure that if after a certain time the aid was 'artificially existing' aid, the proceedings in this specific instance would not be sufficiently focused on the 'compatibility with the common market' pursuant to Article 87(3) EC. While the case cited raised additional questions, on the basis of the previous legal situation, it would appear that the question of whether the formal initiation of the procedure can be challenged should now concentrate on whether the period laid down in the second sentence of Article 4(5) of Regulation No 659/1999 has started to run (receipt of 'complete' notification), and if so, when.

ment of the formal initiation of the procedure may give rise to considerations as to whether permitting the formal initiation of the procedure to be challenged is sufficient to ensure legal protection in advance, or whether other possibilities might exist which might prove to be appropriate in the circumstances.

order to suspend, which has not yet come before the Court, and as an alternative the variant of the action for a declaration of failure to fulfil obligations.

1. The possibility of challenging the formal initiation of the procedure as a means of obtaining legal protection in advance, taking particular account of the new legal position under Regulation No 659/1999

55. Member States obviously endeavour to obtain such legal protection *in advance*, so far by means of an action for the annulment of the formal initiation of the procedure. Under the current system for reviewing aid, however, legal certainty is only brought about by the final decision at the end of the main procedure. [46] It should be noted that no mechanism for ensuring legal protection in advance has been provided for by the Community legislature even under the new rules.

57. Assuming that an action for annulment of the formal initiation of the procedure is admissible, it can only succeed if the Member State can show that the Commission failed to comply with the requirements for formal initiation of the procedure. The requirements are set out in Regulation No 659/1999, though expressly only in part.

56. None the less, the possibilities and limits of such advance legal protection are set out below on the basis of a comparison of the hitherto-existing action for annulment of the formal initiation of the procedure, a possible action for annulment of an

58. Under Article 4(4) of Regulation No 659/1999, a requirement for formal initiation of the procedure is that the Commission finds that '*doubts are raised*' regarding the 'compatibility [of a measure] with the common market'. It is not quite clear whether this means 'doubts' as regards the 'compatibility with the common market' for the purposes of the discretionary decision under Article 87(3) EC *or* 'grounds for suspecting' that the

46 — The only exceptions to this are decisions under Article 4(2) and (3) of Regulation No 659/1999.

measure could be 'incompatible with the common market' within the meaning of Article 87(1) EC. In the latter instance, the Commission would none the less still have to scrutinise the elements 'aid character', 'new' aid, and possibly the presence of the conditions of Article 86(2) EC, in a preliminary examination before formally initiating the procedure. It must have made a '*preliminary assessment*' of at least the 'aid character' of the measure pursuant to Article 6(1) of Regulation No 659/1999.

sion must in principle take a decision within two months of receipt of a complete notification, and is subject to the possible applicability of the *Lorenz* conditions while simultaneously having on the one hand to open the formal proceedings as soon as possible, pursuant to the first sentence of Article 4(5) in conjunction with Article 4(6) of Regulation No 659/1999, and on the other hand to comply with the conditions for formal initiation of the procedure under Article 4(4) of Regulation No 659/1999.

59. In that context it is clear that [those] requirements, clearly designed to give the Commission a wide discretion, permit the Commission to meet the conditions for the formal initiation of the procedure relatively easily.[47] It follows, however, that if the action for annulment is admissible the Court cannot at that stage be asked to undertake a full examination as to whether all the elements of aid contrary to Community law are present, but must restrict itself to considering whether the Commission undertook such a 'preliminary examination' and could have 'doubts' regarding compatibility with the common market. It must also be remembered in that context that under the first sentence of Article 4(5) of Regulation No 659/1999, the Commis-

2. The possibility of challenging an order to suspend pursuant to Article 11(1) of Regulation No 659/1999 as a means of obtaining legal protection in advance

60. If the Italian Republic intended in its application to challenge the part of the decision on the formal initiation of the procedure under Article 88(2) EC designated as '*Conclusioni*' in isolation, the

47 — The recent judgment of the Court (still on the basis of the old legal situation) in Case T-73/98 *Société Chimique Prayon-Rupel* v *Commission* [2001] ECR II-867 is an illustration of this.

question arises, if the relevant requirements for this part of the decision were met, whether such an action for annulment could be admissible.

61. According to the judgment of the Court in *Boussac*,[48] and under Article 11(1) of Regulation No 659/1999, the Commission can, in the case of 'unlawful' aid, issue what is known as an 'order to suspend'. The question then arises, again, of how this 'order to suspend' is related to the suspensive effect dictated by primary law in the case of measures which meet all the conditions laid down in the third sentence of Article 88(3) EC. The considerations set out above as part of the question of the admissibility of an action for annulment of the formal initiation of the procedure therefore apply here too by analogy.

62. Consequently, a parallel argument for the admissibility of an action for annulment of an 'order to suspend' appears to be equally unconvincing, and in this context it would appear useful to discuss the role now played by the 'order to suspend' provided for in Article 11(1) of Regulation No 659/1999.

48 — Cited in footnote 9.

63. In this connection, the 'variant of the action for a declaration of failure to fulfil obligations' introduced in *Boussac* must be considered in more detail.

3. The 'variant of the action for a declaration of failure to fulfil obligations'

64. As well as the general action for declaration of failure to fulfil obligations under Articles 226 and 227 EC, two further versions of the action for a declaration of failure to fulfil obligations exist as part of the system for reviewing the legality of aid. Under the second subparagraph of Article 88(2) EC the Commission may, 'in derogation from the provisions of Articles 226 and 227' EC, bring an action for failure to fulfil obligations if a Member State does not comply within a prescribed time with a final decision by which the Commission orders the cessation or alteration of State aid. This corresponds to an abbreviated action for a declaration of failure to fulfil obligations.

65. Since the judgment in *Boussac*, the Commission may also, even before the final decision (in fact, at any stage in the proceedings), after it has given the Member State an opportunity to submit its comments, and after it has made an order to suspend, bring the 'variant of the action for

a declaration of failure to fulfil obligations',[49] mentioned in the judgment for the first time, 'as in the case of the means of redress provided for under the second subparagraph of Article 93(2) of the EC Treaty', if a Member State has introduced aid in breach of the third sentence of Article 88(3) EC either after notification but before the conclusion of the main proceedings, or without any notification. Provision is now made for the possibility of such an action in Article 12 of Regulation No 659/1999 in the event of a Member State failing to comply with an order to suspend under Article 11(1) of Regulation No 659/1999 and putting a measure into effect.[50]

66. Taking all the above considerations into account, it might be asked whether, conversely, the variant of the action for a declaration of failure to fulfil obligations might also be used to give the Member State that possibility of legal protection in advance which, assuming that the action for annulment of the formal initiation of the procedure is admissible, it is unable to obtain itself owing to the absence of a definitive review by the Court as to whether all the elements which constitute aid contrary to Community law are present.

67. In the first place, this variant of the action for a declaration of failure to fulfil obligations might offer more legal protection generally than a successful action for annulment of the formal initiation of the procedure. This is because in an action for a declaration of failure to fulfil obligations the Court is required to undertake an examination of the elements set out in the third sentence of Article 88(3) EC (aid character of the measure, absence of the conditions referred to in Article 86(2) EC, 'new' aid). Consequently, after the conclusion of the action for a declaration of failure to fulfil obligations, the advance legal protection which is clearly being sought by means of the challenge to the formal initiation of the procedure, but cannot be achieved in that way, would be achieved as regards those elements — at least on the basis of the facts shown by the Commission up to then. The question of 'compatibility with the common market' pursuant to Article 87(3) EC would be left open. However, according to the case-law of the Court, this is a discretionary decision of the Commission,[51] which the Commission is generally not in a position to make final until the main procedure has been completed, with the participation of the parties involved. Review by the Court of the discretionary decision therefore remains confined to a possible action for annulment of the final decision.

68. Article 12 of Regulation No 659/1999 expressly provides: 'If the Member State

49 — Cited in footnote 9, paragraph 23.

50 — Article 11(2) of Regulation No 659/1999 also provides for a possible 'recovery injunction' by the Commission.

51 — *Commerce extérieur*, cited in footnote 33.

fails to comply with a suspension injunction [pursuant to Article 11(1)]...., the Commission shall be entitled, while carrying out the examination on the substance of the matter on the basis of the information available, to refer the matter to the Court of Justice of the European Communities direct and apply for a declaration that the failure to comply constitutes an infringement of the EC Treaty'. [52]

69. Since it should not be presumed that Article 12 of Regulation No 659/1999 provides for a possible fourth form of the action for a declaration of failure to fulfil obligations, and non-compliance with a provision in a regulation would in principle constitute a failure to fulfil obligations under Articles 226 and 227 EC, it may be presumed that Article 12 of Regulation No 659/1999 was intended to embody the *Boussac* case-law in secondary legislation. [53]

70. If the *Boussac* case-law is transposed to the new legal situation, the order to suspend assumes the legal nature of a procedural condition for the admissibility of an action by the Commission for a declaration of failure to fulfil obligations. The Commission could therefore not initiate this variant of the action for a declaration of failure to fulfil obligations until after it has given an 'opportunity to submit... comments' and adopted a corresponding decision [54] (Article 11(1) of Regulation No 659/1999). [55]

71. If the special form of the action for a declaration of failure to fulfil obligations under Article 12 of Regulation No 659/1999 were to be used as a means of obtaining legal protection in advance, both the Commission *and* the Member State would be forced to undertake, as regards their actions in each instance, a detailed examination as to whether they wanted to take further steps, and if so, on what grounds.

72. This would also have the effect of providing both parties with an opportunity, out of court, of specifically tackling the legal questions to be dealt with in any procedure (aid character, absence of the conditions of Article 86(2) EC, 'existing' or 'new' aid) and the appropriate facts to be relied on, disregarding all arguments relating to the question of the 'compatibility with the common market' under Article 87(3) EC, which is not material to this context.

52 — Cf. paragraph 23 of the *Boussac* judgment, cited in footnote 9: '... the Commission is entitled, while carrying out examination on the substance of the matter, to bring the matter directly before the Court by applying for a declaration that such payment amounts to an infringement of the Treaty'.

53 — See footnote 9 above.

54 — As regards the question of whether an order of suspension of a purely procedural character, as postulated here, could be challenged, reference is made to the reasoned opinion as a procedural condition of the general action for a declaration of failure to fulfil obligations under Article 226 EC, cf. Case 48/65 *Lütticke* v *Commission* [1966] ECR 19.

55 — The comments of the Court in *Boussac* (cited in footnote 9) must also be seen in this light. The Court introduced a pre-litigation procedure, similar to that used for the general action for a declaration of failure to fulfil obligations under Article 226 EC, to meet the requirements of the rule of law.

73. The applicability of the variant of the action for a declaration of failure to fulfil obligations would, however, presuppose that the measure in dispute might, in breach of the third sentence of Article 88(3) EC, be introduced or implemented 'deliberately' for the purpose of achieving legal protection in advance. [56] The Commission would have to be equally sure of its legal assessment before initiating the variant of the action for a declaration of failure to fulfil obligations, since the subject-matter of the proceedings would be not its 'preliminary' examination of the elements of the case, but their objective existence, and the Commission would have to show this. [57] Finally, the Commission would not be bound to raise the variant of the action for a declaration of failure to fulfil obligations at all, since Article 12 of Regulation No 659/1999 is a discretionary provision. Neither side can be forced against its will in that respect to submit to review by the Court.

74. It should also be mentioned that in order to bring the variant of the action for a declaration of failure to fulfil obligations into play so as to obtain legal protection in advance, the party concerned must 'provoke' an action against himself. However, such a situation is not unusual in principle in connection with the operation of directly-applicable Community law which is open to interpretation, [58] and the review of the legality of aid already operates in this way to bring about legal certainty out of court.

75. None the less, it remains a possibility that in connection with the implementation of the variant of the action for a declaration of failure to fulfil obligations pursuant to Article 12 of Regulation No 659/1999 a Member State might be left to some extent uncertain as to the relationship between a judgment of the Court in a variant of the action for a declaration of failure to fulfil obligations, and a subsequent, possibly contrary, final decision by the Commission after conclusion of the main procedure. [59] However, that question may well arise generally if such a procedure occurs, as a result of the judgment in *Boussac*. [60]

56 — Cf. paragraph 66 above.

57 — Cf. e.g. Case C-157/91 *Commission* v *Netherlands* [1992] ECR I-5899, Case 141/87 *Commission* v *Italy* [1989] ECR 943, and Case C-375/90 *Commission* v *Greece* [1993] ECR I-2055.

58 — Cf. the facts in Case C-335/94 *Mrozek and Jäger* [1996] ECR I-1573 and Case C-39/95 *Goupil* [1996] ECR I-1601. These cases concerned the interpretation of a derogation from the driving periods regulation, Regulation No 3820/85 ('refuse disposal' privilege extended to commercial operators of special waste transport services). Lorry drivers and the undertakings employing them can clearly be 'forced' to accept fines for exceeding driving periods as a means of obtaining legal certainty, inasmuch as the preliminary ruling is the only route open to them.

59 — Various combinations are conceivable here, most of which would probably arise from the fact that after the conclusion of the main procedure and with the involvement of a third party a different set of facts could exist which might result in new assessments as regards the (in)compatibility of any aid. Reference is made in this regard to Case C-388/95 *Belgium* v *Spain* [2000] ECR I-3123, where on the basis of different proceedings (here: the variant of the action for a declaration of failure to fulfil obligations and possibly an action for annulment of the final decision), different sets of facts could constitute the basis of different judgments by the Court.

60 — Cited in footnote 9.

IV — Concluding remarks

76. In this case, if in accordance with the judgments in *Italgrani* and *Cenemesa* regard is to be had to the obvious purpose of the application, the action brought by the Italian Government is to be understood as directed not only against that part of the decision designated '*Conclusioni*', but also against the formal initiation of the procedure as such.

77. The previous understanding of the grounds for the admissibility of an action for annulment of the formal initiation of the procedure may well on closer examination no longer be valid following the entry into force of Regulation No 659/1999, since the action for annulment of the formal initiation of the procedure would be directed against a procedural preparatory measure, the unlawfulness of which would have to be remedied by challenging the final decision.

78. Legal protection in advance of the conclusion of the main procedure would be conceivable in the context of the variant of the action for a declaration of failure to fulfil obligations, and now under Article 12 of Regulation No 659/1999, including the necessary pre-litigation procedure under Article 11(1) of Regulation No 659/1999 (opportunity to submit comments, and order to suspend). Viewed in this context, the action would be one in which, among other things, another aspect of reviewing the legality of aid would be involved, for which a pre-litigation procedure meeting the requirements of the rule of law with a right to be heard would be a prerequisite, and in which finally no element of coercion to the detriment of the Member State could be exercised. [61]

V — Costs

79. Under the first subparagraph of Article 69(3) of the Rules of Procedure, the Court may order parties to pay their own costs if there are exceptional circumstances. This provision should apply in the present case in the event of the Court adopting the proposed result.

61 — This view would provide less legal protection to undertakings receiving aid or about to receive aid, which under the previous legal situation, relying on the *Italgrani* and *Cenemesa* judgments cited in footnotes 12 and 6 respectively, could bring an action for annulment before the Court of First Instance; see Case T-246/99, pending before the Court of First Instance, parallel to the present case. This possibility would cease to exist due to the lack of applicability of the variant of the action for a declaration of failure to fulfil obligations. However, this cannot be considered in any greater detail in the present Opinion, having regard to the subject-matter of the proceedings.

VI — Conclusion

80. It is therefore suggested that the Court decide as follows:

(1) The action brought by the Italian Republic is inadmissible.

(2) The parties shall each pay their own costs.