extract or process ores. Other commercial operators, in particular carriers and purchasers, are also affected by such a decision, so that it cannot be considered to affect traders whose number or identity was fixed and ascertainable at the time of its adoption.

REPORT FOR THE HEARING
in Case C-6/92 *

I — Facts

Legge Finanziaria No 887 of 22 December 1984 (1985 Finance Law, published in the supplement to *Gazzetta Ufficiale della Repubblica Italiana* No 356 of 29 December 1984, Annex 3) provides that part of the costs connected with the transport by railway of certain goods from Sardinia and Sicily are to be borne by the Italian State, which will be liable for 30% if the goods transported are unrefined ores and 60% if the products are produced and processed in those regions.

The scheme is described in the last paragraph of Article 19 of the Law in the following terms:

'A 30% reduction on national railway tariffs shall apply to the carriage of bulk ores produced in and exported from the islands. This reduction is extended to 60% for products produced and processed in the islands. The amount of the reductions shall be borne by the Treasury which shall reimburse the national railways the amounts due pursuant to Community law.'

The Commission questioned the compatibility of the Italian scheme with Article 80 of the EEC Treaty, which prohibits Member States from granting favourable conditions for the transport of goods in the interest of certain undertakings but enables the Commission to authorize such measures once the demands of the regions involved and the effect of such measures on competition between different modes of transport have been assessed.

Article 80 reads as follows:

'1. The imposition by a Member State, in respect of transport operations carried out within the Community, of rates and condi-

* Language of the case: Italian.

tions involving any element of support or protection in the interest of one or more particular undertakings or industries shall be prohibited as from the beginning of the second stage, unless authorized by the Commission.

2. The Commission shall, acting on its own initiative or on application by a Member State, examine the rates and conditions referred to in paragraph 1, taking account in particular of the requirements of an appropriate regional economic policy, the needs of underdeveloped areas and the problems of areas seriously affected by political circumstances on the one hand, and of the effects of such rates and conditions on competition between the different modes of transport on the other.

After consulting each Member State concerned, the Commission shall take the necessary decisions.

3. The prohibition provided for in paragraph 1 shall not apply to tariffs fixed to meet competition.'

In accordance with Article 80(2), the Commission invited the Italian government to present its observations by letters dated 7 September 1989 and 18 December 1989. Then, by a letter dated 1 August 1990, it endeavoured to organize a meeting. Finally, not having received a satisfactory reply from the Italian authorities, it adopted Decision 91/523/EEC of 18 September 1991 abolishing the support tariffs applied by the Italian railways to the carriage of bulk ores and products produced and processed in Sicily and Sardinia (OJ 1991 L 283, p. 20, 'the Decision').

From the preamble to this Decision, it emerges that the Commission considers the Italian scheme to be incompatible with Article 80 of the EEC Treaty because it is intended to support certain undertakings located in the regions mentioned above, is not necessary for the development of those regions and has a detrimental impact on competition between different modes of transport.

As to the importance of the support system for the development of the regions concerned, the Commission stated that:

'... the tariff reductions in question are granted for an indefinite period ... such aid does not promote structural development or help to improve the situation in the regions in question ... these measures cannot be justified on regional policy grounds and do not serve the needs of less developed regions'.

As to the effect of the scheme on competition between different modes of transport, it pointed out that:

'... this may have a detrimental impact on and significantly change the competitive position of the other modes of transport ... the Commission has taken note of practical examples of such an effect; ... there is a significant imbalance between the volume of freight to and from Sicily and Sardinia ... consequently, under normal conditions of competition, carriers already find it difficult to obtain return loads ... these problems will only be aggravated by support tariffs'.

II — Written procedure and forms of order sought by the parties

By application lodged at the Court Registry on 6 January 1992, the Federazione Sindacale Italiana dell'Industria Estrattiva ('the Federation'), Società Italiana Sali Alcalini SpA, Thalassia SpA, Laviosa Chimica Mineraria SpA and Società Sarda di Bentonite SpA brought an action under the second paragraph of Article 173 of the EEC Treaty in which they claimed that the Court should:

— declare the action admissible;

— declare void Commission Decision 91/523/EEC of 18 September 1991 abolishing the support tariffs applied by the Italian railways to the carriage of bulk ores and products produced and processed in Sicily and Sardinia;

— order the Commission to bear the costs.

By an application made on 7 February 1992, the Commission, pursuant to Article 91(1) of the Rules of Procedure, asked the Court to

— rule on the admissibility of the action without entering into the substance of the case;

— declare the action inadmissible;

— and order the applicants to bear the costs.

In their observations lodged on 23 March 1992, the applicants asked the Court to reject the objection of inadmissibility raised by the Commission and order the Commission to bear the costs of the interlocutory phase of the proceedings, whilst reserving the remaining costs.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry solely on the issue of admissibility.

By orders of 17 December 1992, the President gave leave to the regions of Sicily and Sardinia to intervene in support of the applicants.

III — Submissions and arguments of the parties

The *applicants* maintain that the action is admissible.

In support of that they argue first of all that they have an interest in obtaining the annulment of the contested Decision; their reasoning is structured around three arguments.

First: the Decision prevents the authorization of support measures, an obstacle which would be removed if the Decision were declared void. Once the Decision is declared void, the applicants could require the Commission to adopt a second decision which, to

be consistent with the Treaty, should authorize the measures in question on the grounds that they are necessary for the development of the regions involved and have no detrimental impact on competition between different modes of transport.

The possibility of insisting on such a decision is confirmed by Article 80(2) of the EEC Treaty, which provides that the Commission may authorize support measures on its own initiative, without being asked to do so by a Member State. This provision implies that natural or legal persons can apply to the Commission for authorization and that the Commission must grant their request or, if it rejects it, give its reasons for doing so.

Second argument: contrary to what is argued by the Commission, the prohibition of the Italian measures is a result of the Decision, rather than of the EEC Treaty. The applicants therefore have an interest in applying for the Decision to be declared void.

On this point, the applicants emphasize that if the prohibition was a result of the Treaty, the Commission should have commenced proceedings against Italy for failure to fulfil obligations as soon as the prohibited measures came into force (1 January 1985). Moreover, they point out that the EEC Treaty contains other prohibitions from which the Member States may derogate if the Commission or the Council authorizes them to do so. In this respect, they observe, without giving a specific reference, that in none of the situations thus prohibited has the Court declared inadmissible for lack of interest actions brought by individuals against measures taken by those institutions, refusing to grant the derogation sought.

Secondly, the applicants maintain that the contested Decision is (i) of concern to them (ii) directly and (iii) individually. It is of concern to them inasmuch as they benefit from the support measures to which the contested Decision applies. The effect of the Decision for the applicants is direct because the Decision leaves Italy with no element of discretion, compelling it to discontinue the measures. The Decision is of individual concern to the applicants in so far as they belong to the limited category of undertakings which extract or manufacture in Sicily or Sardinia the goods to which the Decision applies and in so far as those undertakings, because of their limited number, could be identified by the Commission at the time the contested Decision was adopted.

The individual connection between the applicants and the contested measure satisfies the requirements laid down by the Court, according to which there is such a connection if the measure was adopted in the light of the particular circumstances of the applicant, or again if the measure is of concern to a closed circle of persons including the applicant, who are known at the time of its adoption (see Case 25/62 *Plaumann* [1963] ECR 95; Cases 106/63 and 107/63 *Toepfer* [1965] ECR 405; and Case 62/70 *Bock* [1971] ECR 897).

Thirdly, the applicants emphasize that no condition other than those mentioned above needs to be fulfilled for the action to be declared admissible.

In particular, they do not have to establish that the Decision was only superficially addressed to Italy and that in reality it was

addressed to them. They argue that an applicant must show that the contested measure is in fact addressed to him only if the measure in question is a regulation; he must then prove that, under the guise of a regulation, the measure is in fact a decision which is of direct and individual concern to him.

The *Commission* considers that the action is inadmissible.

It first recalls that authorization of support measures such as those in force in Italy constitutes a derogation from the prohibition on preferential tariffs and that derogations from the Treaty must be interpreted restrictively; it draws the inference that an action against a decision refusing derogation may be declared admissible only if strict conditions are fulfilled.

It goes on to explain why it considers that the present action does not satisfy those requirements.

In the first place, it argues that the prohibition on preferential tariffs as well as the conditions for obtaining a derogation are provided for in the EEC Treaty itself. The Decision merely states that those conditions are not fulfilled in the present case, but does not itself alter the applicants' position.

The Commission extracts two consequences from this.

First of all, the Decision is without legal effect and, consequently, cannot be the subject of proceedings.

Next, the applicants have no interest in obtaining the annulment of a measure which does not affect them in law.

On the subject of their interest to act, the Commission adds that a declaration that the Decision was void would not affect the prohibition on support measures, since that prohibition comes from the Treaty itself. Moreover, if the applicants obtained such a declaration, they could not require the Commission to adopt a decision authorizing the measures. Article 80 does not, in fact, recognize any right of initiative for undertakings on the subject.

Secondly, the Commission maintains that the contested Decision is not of individual concern to the applicants.

In this respect, it distinguishes between the Federation on the one hand, which, in its capacity as an association of undertakings, is acting in the present action on behalf of its members, and, on the other hand, the undertakings which have brought the action in their own name.

The Federation must establish that its own interest — an interest distinct from that of its members — has been damaged (see the orders in Cases 16/62 and 17/62 *Confédération Nationale des Producteurs de Fruits et Légumes* [1962] ECR 471; Case 60/79 *Fédération Nationale des Producteurs de Vins de Table et Vins de Pays* [1979] ECR 2429; and

the Opinion of Advocate General Mancini which precedes the judgment in Case 282/85 *DEFI* [1986] ECR 2469), for which there is no evidence in the file.

As far as the undertakings are concerned, they are affected only by virtue of their objective position as undertakings carrying on certain activities in Sicily or Sardinia, in the same way as every undertaking which is or may be in the same situation. Such a connection is not sufficient to found an action for annulment (see the judgment in Case 231/82 *Spijker Kwasten* [1983] ECR 2559 and the order in Cases C-232/91 and C-233/91 *Nikou Petridi* [1991] ECR I-5351).

The final ground of inadmissibility concerns the person to whom the Decision is addressed. For the action to be admissible, the applicants must establish that the Decision was only superficially addressed to Italy and that it was in reality addressed to the applicants. That requirement is not fulfilled in the present case, given that the Decision concerns the political choice made by Italy to introduce such measures. That choice was considered incompatible with the Treaty and the Decision is the legal instrument by which the author of those measures was notified of this incompatibility.

IV — Replies to the question put by the Court

At the hearing on 11 February 1993, the Court asked the applicants to provide a list of the beneficiaries of the preferential tariff, indicating the grounds on which they benefited.

The *applicants* provided a list of five beneficiaries. Of those five beneficiaries, two are among the companies which have brought the present action: Società Italiana Sali Alcalini Spa and Società Sarda di Bentonite SpA. Three beneficiaries are not among the applicants: S. I. E. S. SpA, whose registered office is in Trapani, Sviluppo Industriale Miniere Sarde SpA, whose registered office is in Villaspeciosa (although this company is controlled by Laviosa Chemica Mineraria SpA, an applicant in the present case) and Maffei SpA, whose registered office is in Milan (a company which controls Srl Maffei Sarda Cagliari, holder of a concession to exploit a felspar deposit).

The applicants added: 'Previously, for brief periods and in respect of limited quantities of products, the following also benefited from the opportunities referred to: Thalassia SpA, applicant in the present case (Thalassia SpA is entirely controlled by Società Italiana Sali Alcalini SpA); the ENI Group, through EVC SpA and SAMIM SpA, which it controls; and the EFIM Group, through ALUMIX SpA, which it controls'.

The applicants have attached four copies of consignment notes.

The Region of Sardinia submits that the list shows that all the undertakings which benefited from the preferential tariff exploit mines or saltworks in Sicily or Sardinia. By virtue of Royal Decree No 1443 of 29 July 1927, mines and saltworks can only be exploited under a concession. An undertaking can only benefit from the tariff in question, therefore, if it holds such a concession.

For Sardinia, the contested Decision is of direct concern to the applicants because it compels Italy to discontinue a measure which has actually benefited them. Moreover, the Decision is of individual concern to them because they are holders of a mining concession granted by Italy and this position distinguishes them from other economic operators in general.

Sardinia argues that a decision addressed to a third person can be of individual concern to another when factual or legal circumstances distinguish the latter from other subjects just as in the case of the person to whom the measure is formally addressed. It supports this view by an analysis of the judgments in *Philip Morris* (Case 730/79 [1980] ECR 2671) and *Van der Kooy e. a.* (Cases 67/85, 68/85 and 70/85 [1988] ECR 219).

In the *Philip Morris* case, only one undertaking was eligible for the aid proposed by a Member State. No other undertaking could, of its own accord, have been in the same situation as Philip Morris. By contrast, in *Van der Kooy*, anyone could have been in the same situation as beneficiary of the aid as the applicant. Relying on the judgments in *Toepfer* and *Bock* (cited above) and *Agricola Commerciale Olio* (Case 232/81 [1984] ECR 3881), Sardinia considers that the individual interest of a person arises when that person cannot, of his own accord, decide whether or not he is part of the category of persons to whom the measure is of direct interest.

The Region of Sicily also supports the applicants. It argues that the nature of the products subject to the preferential tariff is such that, being holders of mining concessions, the beneficiaries constitute a closed circle and are therefore identifiable.

As far as the *Commission* is concerned, it points out that it has questioned the Italian railways about the list provided by the applicants.

The railways replied that this list was accurate but that the undertakings quoted could not consider themselves to be a closed category since all those who fulfilled the conditions imposed by law in order to benefit from the preferential tariff were entitled to it.

Accordingly, the Commission does not consider that the list proves that a closed category exists.

The Commission emphasizes that the applicants' assertion that only the holders of a quarrying concession can take advantage of the tariff is wrong. The consignment notes produced by the applicants show that in order to obtain the benefit of the tariff, the user merely has to testify that the consignment was of ores produced or processed in Sardinia or Sicily. The processing of ores requires no concession from the public authorities, nor does the consignment of those products. The Commission also points out that certain consignment notes submitted

by the applicants bear the name of a consignor not included in the list of companies. In any event, making an administrative concession to exploit a quarry a requirement would not be sufficient even to make the concessionaires a category of subjects to whom the Decision would be of individual concern within the meaning of Article 173 of the EEC Treaty. Anyone could, in fact, apply for such a concession.

The Commission then observes that the list does not mention the beneficiaries, but only the users of this tariff. In this respect, it emphasizes that the applicants were unable to specify whether the carriage contracts signed by those users enable the latter to benefit, in whole or in part, from the reduction in charges. In fact, certain contracts could have been signed including a CIF or FOB clause making the purchasers liable for transport costs. Moreover, it emphasizes that the price reduction may benefit solely the carrier, or may be shared between the carriers and purchasers who then also become beneficiaries.

Finally, the Commission submits that its Decision may be considered to be of individual concern to the railways alone. In effect, the Decision takes away the preferential treatment which they receive compared to their competitors and returns to a level playing field the different public and private operators who provide services for the transport of goods by sea and by land on journeys from Sicily and Sardinia.

The Commission therefore maintains that the application is inadmissible.

R. Joliet
Judge-Rapporteur