OPINION OF ADVOCATE GENERAL ALBER

delivered on 21 November 2002 [1]

I — Introduction

1. This reference for a preliminary ruling by the Consiglio di Stato (Council of State) concerns the question as to whether in 1997 the Italian authorities had power to reclaim aid granted in 1993 under a programme that was co-financed out of the Guidance Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) and out of national funds. Depending on which legal basis applied, it could also have been the Commission that had power to reclaim the aid, either alone or acting in conjunction with the Italian authorities.

2. There are doubts, however, as to whether all the provisions that could potentially apply were still applicable *ratione temporis* at the time the aid was reclaimed. Accordingly, before outlining the legislative context, I will first set out the facts in order to establish the chronology of events. Then I will consider whether and to what extent the provisions referred to by the national court were actually still in force at the material time.

II — Facts and question referred

3. On 24 June 1991, the Italian Government submitted to the Commission the multiregional operational programme entitled '*Miglioramento delle produzioni tipiche del Mezzogiorno e sviluppo delle colture alternative*' (Improvement of typical products of Southern Italy and development of alternative cultivation) and applied for co-financing from the Guarantee Section of the EAGGF. By Decision No C(91)2745 of 29 November 1991, amended by Decision No C(93) 3476 of 29 November 1993 (hereinafter referred to as Decision C(91) 2745), the Commission approved this programme and authorised financial assistance of ECU 86 240 000, equal to 50% of the total volume, to be provided from the Guarantee Section of the EAGGF. The Commission based these

1 — Original language: German.

decisions on Regulation (EEC) No 2052/88[2] and on the implementing regulation, Regulation (EEC) No 4253/88,[3] adopted in pursuance thereof.

4. By Ministerial Decrees No 1905 of 9 November 1992 and No 485 of 7 October 1993, the Ministry of Agriculture and Forestry ('the Ministry') granted the Consorzio Produttori Pompelmo Italiano, a cooperative society with limited liability (Italian Consortium of Grapefruit Producers — 'COPPI'), aid ultimately totalling approximately ITL 45 billion for the years 1991 to 1993. The decrees, which cited the Commission Decision and the Regulations referred to therein, specified yearly tranches and the respective financial contributions of the Community and of Italy.

5. By Decree No 8649 of 16 December 1997, the Ministry partly revoked Decree No 485 and ordered repayment of ITL 627 154 680. The reason given was a breach of the condition laid down in the second subparagraph of Article 19(2) of Regulation (EEC) No 355/77.[4] According to that condition, the equipment acquired with the aid should not have been sold within six years after acquisition or within 10 years after completion of the work without prior authorisation from the Commission.

6. COPPI had transferred part of the aid to Società Concentrati Bevibili Sicilia arl (CBS) to carry out certain works, as provided for in a sub-programme. The latter, however, had sold a branch of its business, including the plant and machinery financed through the programme, to Impianti Brevetti Srl (IBIESSE), without the prior authorisation of the Commission.

7. On an application by COPPI, the Tribunale Amministrativo Regionale (Regional Administrative Court), Lazio, set aside Decree No 8649 of 16 December 1997. It took the view that under Regulation No 355/77 only the Commission, and not the Ministry, had power to reclaim the aid.

2 — Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ 1988 L 185, p. 9, as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993, OJ 1993 L 193, p. 5 (hereinafter: 'Regulation No 2052/88').

3 — Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ 1988 L 374, p. 1, as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993, OJ 1993 L 193, p. 20 (hereinafter: 'Regulation No 4253/88').

4 — Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed, OJ 1997 L 51, p. 1, as amended by Council Regulation (EEC) No 1932/84 of 19 June 1984, OJ 1984 L 180, p. 1 (hereinafter: 'Regulation No 355/77').

8. The Ministry appealed this decision to the Consiglio di Stato on the ground that Article 23 of Regulation No 4253/88 conferred power on the Ministry to reclaim aid. The Consiglio di Stato has now referred the following question to the Court for a preliminary ruling:

'Does Article 19 of Council Regulation (EEC) No 355/77 of 15 February 1977 — which provides that the Commission, after consulting the Fund Committee on the financial aspects, may decide, in accordance with the procedure laid down in Article 22, to suspend, reduce or discontinue aid from the Fund, and to recover sums paid, if, inter alia, prior to expiry of the period laid down therein, the beneficiary, without prior authorisation from the Commission, sells equipment or buildings having received aid from the Fund — constitute a specific procedure which excludes the Member State's competence to adopt such measures to discontinue aid and recover sums paid, or are the principles laid down in Article 8 of Regulation No 729/70 and Article 23 of Regulation No 4523/88, under which the Member State can and must take the measures necessary to prevent and take action against irregularities and recover amounts lost as a result of an irregularity or negligence, applicable in this context as well?'

III — Whether the Community provisions referred to by the national court were applicable at the material time

9. Before considering the various Regulations individually, I will first give a brief outline of the evolution of the legislation that is potentially relevant to the present case.

10. The EAGGF was established by Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy ('Regulation No 729/70').[5] Alongside this, Regulation No 355/77[6] constituted a specific structural policy instrument for common measures to improve the conditions under which agricultural products are processed and marketed. Implementation of these measures was essentially a matter for the Commission.

11. As part of a fundamental reform in 1988, structural fund assistance was placed on a new legislative footing. The basic regulation, Council Regulation (EEC) No 2052/88,[7] adopted on the basis of Article 130d of the EC Treaty (now, after amendment, Article 161 EC), provided for the coordination of interventions financed

5 — OJ, English Special Edition 1970 (I), p. 218.
6 — Cited in footnote 4.
7 — Cited in footnote 2.

from the various structural funds and for greater coordination of measures with Member States. At the same time the Council adopted a series of implementing regulations on the basis of Article 130e of the EC Treaty (now, after amendment, Article 162 EC). Of these, those of particular relevance here are the aforementioned Regulation No 4253/88 [8] on the coordination of the activities of the different funds and Council Regulation (EEC) No 4256/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Agricultural Guidance and Guarantee Fund Guidance Section [9] ('Regulation No 2052/88'). In 1993, the regulations adopted in 1988 were further revised. [10]

A — *Regulation No 355/77*

12. Under Regulation No 355/77, the Commission can grant aid from the Guidance Section of the EAGGF for common measures to improve the structure of markets in agricultural products. According to Article 19(2) of Regulation No 355/77, the Commission has responsibility for suspending, reducing or discontinuing aid from the fund in the event of irregularities in the implementation of projects. The Commission is to recover any sums the payment of which was not justified. The Member States have only a supporting role, forwarding to the Commission all supporting documents which are of relevance in proving that the financial or other conditions laid down for each project have been fulfilled.

13. It is open to question, however, whether Regulation No 355/77 was actually still in effect at the time the aid was reclaimed or, alternatively, whether certain of its provisions continued to apply by virtue of transitional rules.

14. Significantly, COPPI does not consider this regulation at all in its observations on the reference for a preliminary ruling, despite the fact that it would, on the face of it, support its position. The Commission comes to the conclusion that Regulation No 355/77 is no longer applicable to the case *ratione temporis*, even taking the transitional rules into account. The Italian Government, finally, observes that not only Regulation No 355/77 itself, but also the transitional rules that provided for the continued operation of a number of its provisions, had already been repealed by the time of the official decision reclaiming the aid.

8 — Cited in footnote 3.

9 — OJ 1988 L 374, p. 25.

10 — See Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ 1993 L 193, p. 5; Council Regulation (EEC) No 2082/93 of 20 July 1993 amending Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ 1993 L 193, p. 20, and Council Regulation (EEC) No 2085/93 of 20 July 1993 amending Regulation (EEC) No 4256/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Agricultural Guidance and Guarantee Fund (EAGGF) Guidance Section, OJ 1993 L 193, p. 44.

15. Article 10(2) of Regulation No 4256/88 [11] (original version) provides that Regulation No 355/77 is repealed with effect from the date of entry into force of the Council Decision referred to in paragraph 1 of that article. The Council adopted that decision in the form of Regulation (EEC) No 866/90, [12] which entered into force on 1 January 1990.

16. It is true that Article 10(3) of Regulation No 4256/88 (original version) provided that Articles 6 to 15 and 17 to 23 of Regulation No 355/77 were to continue to apply to projects submitted by 31 December 1989. But the aid application for the programme concerned was not made until 24 June 1991, as stated in the sixth recital of Decision No C(91) 2745.

17. Moreover, Article 10 of Regulation No 4256/88 (original version) was completely revised by Regulation No 2085/93. [13] As a result of the revision, the transitional regime governing Regulation No 355/77 was completely abolished with effect as of 3 August 1993. [14] It was not until four years later that the aid (including the Community's financial contribution) was reclaimed in part under the Ministerial Decree of 16 December 1997.

11 — Cited in footnote 9.

12 — Council Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products, OJ 1990 L 91, p. 1.

13 — Cited in footnote 10.

14 — Case C-500/99 P *Conserve Italia* v *Commission* [2002] ECR I-867, paragraph 82.

18. Consequently, Regulation No 355/77 has no application to the present case.

19. It should be observed that the inapplicability of Regulation No 355/77 affects not only the issue as to who has power to recover the aid but also the substantive conditions specified in that regulation. According to Article 19(2), second subparagraph, fourth indent, of Regulation No 355/77 (as amended by Regulation No 1932/84), aid is recoverable, inter alia: 'if the beneficiary sells equipment or buildings having received aid from the Fund within six or 10 years respectively of the date of their acquisition or of the completion of the work, without prior authorisation from the Commission'.

20. It was however on this provision that the Ministry based the order for recovery in Decree No 8649 of 16 December 1997. It may be that the sale constitutes a breach of other provisions too, for example (ancillary) provisions of Ministerial Decree No 485 or provisions of the relevant regulations. Yet the specific case of grant-aided articles being sold by the beneficiary without the consent of the Commission or of the national authority concerned is no longer expressly mentioned in the relevant provi-

sions of the subsequent regulation in point, Regulation No 4253/88. Such conduct could, however, come under the general heading of irregularity within the meaning of Article 23(1) of Regulation No 4253/88. In the preliminary rulings procedure, however, it is not for the Court to adjudicate on the legality of the contested Ministerial Decree No 8649 of 16 December 1997. That is solely a matter for the referring court, although in its consideration of the Ministerial Decree it is bound to take account of the findings of the Court regarding the applicability of Regulation No 355/77.

B — *Regulation No 729/70*

21. Since the entry into force of Regulations No 4256/88 and No 4253/88 on 1 January 1989, as the Commission rightly observes, these two instruments have formed the legal basis for all measures funded under the EAGGF, Guidance Section. Regulation No 729/70 has since that date had no application to this area, by virtue of Article 11 of Regulation No 4256/88. Accordingly, Article 8 of Regulation No 729/70, which requires Member States to deal with irregularities and to recover sums lost as a result, is also incapable of providing the basis for recovery of the assistance.

C — *Regulation No 4253/88*

22. The implementing regulations adopted in 1988 set out the substantive criteria for financial assistance from the various funds. The rules specific to the EAGGF, Guidance Section, are laid down by Regulation No 4256/88, replacing the corresponding provisions of Regulation No 355/77. Regulation No 4253/88 meanwhile lays down common provisions applicable to all the funds, in particular rules on their coordination and common procedural rules. To that extent, it too replaces Regulation No 355/77. Article 1(2) of Regulation No 4256/88 expressly provides that Regulation No 4253/88 is applicable to measures co-financed out of the EAGGF, Guidance Section.

23. Recovery of aid can therefore be based only on Regulation No 4253/88, as amended by Regulation No 2082/93. It was on the basis of Regulation No 4253/88 also that the aid was granted to COPPI, as recited in Ministerial Decrees No 1905 and No 485. Under Article 54 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, [15] Regulation No 4253/88 was repealed with effect only as of

15 — OJ 1999 L 161, p. 1.

1 January 2000 and was therefore still in force when Decree No 8649 of 16 December 1997 was adopted.

IV — The applicable provisions

24. Article 23 of Regulation No 4253/88, as amended by Regulation No 2082/93, is headed 'Financial control'. Paragraph 1 of that article provides as follows:

'In order to guarantee completion of operations carried out by public or private promoters, Member States shall take the necessary measures in implementing the operations:

— to verify on a regular basis that operations financed by the Community have been properly carried out,

— to prevent and to take action against irregularities,

— to recover any amounts lost as a result of an irregularity or negligence. Except where the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence, the Member States shall be liable in the alternative for reimbursement of any sums unduly paid....

Member States shall inform the Commission of the measures taken for those purposes and, in particular, shall notify the Commission of the description of the management and control systems established to ensure the efficient implementation of operations. They shall regularly inform the Commission of the progress of administrative and judicial proceedings.

...'

25. Article 24 of the Regulation is headed 'Reduction, suspension and cancellation of assistance'. Paragraphs 1 and 2 provide as follows:

'1. If an operation or measure appears to justify neither part nor the whole of the assistance allocated, the Commission shall conduct a suitable examination of the case in the framework of the partnership, in particular requesting that the Member State or authorities designated by it to implement the operation submit their comments within a specified period of time.

2. Following this examination, the Commission may reduce or suspend assistance in respect of the operation or a measure concerned if the examination reveals an irregularity or a significant change affecting the nature or conditions for the implementation of the operation or measure for which the Commission's approval has not been sought.

...'

V — Observations of the parties

26. Observations were made to the Court by COPPI, the Italian Government, and the Commission. In what follows, their observations are reported only in so far as they relate to the applicable provisions.

A — *COPPI*

27. In the view of COPPI, the issue raised in the reference for a preliminary ruling is essentially whether the Italian authorities were entitled, without any involvement on the part of the Commission, to reclaim aid that had been authorised on the basis of a Commission decision adopted pursuant to Regulations No 2052/88, No 4253/88 and No 4256/88. To give the referring court a useful answer required interpreting Article 24 of Regulation No 4253/88 as well as Article 23.

28. Those articles provided for a clear division of responsibilities between the Commission and the Member State. Under Article 24(2), the decision to suspend, reduce or cancel aid was solely a matter for the Commission. The national authorities, on the other hand, in accordance with Article 23 of Regulation No 4253/88, were responsible for carrying out planned changes in relation to the implementation of the activities funded by the Commission and for the recovery of overpayments.

29. This was confirmed by a reading of Regulation No 2052/88 and of Decision No C(91) 2745, by which the aid was granted.

30. The basic regulation, Regulation No 2052/88, was based on Article 130d of the EC Treaty (now, after amendment, Article 161 EC). The regulations laying down special rules for the different funds

(Regulations No 4254/88, No 4255/88 and No 4256/88) and for their coordination (Regulation No 4253/88), by contrast, were based on Article 130e of the EC Treaty (now, after amendment, Article 162 EC). Being implementing regulations, they could not lay down rules which were inconsistent with the basic regulation.

31. Article 4(1) of Regulation No 2052/88 set out the central concept of the regulation, namely that the Commission and the national authorities are to carry out the preparation, financing, monitoring and assessment of operations in close consultations described as 'partnership'. Article 4(2) and Article 18 of Regulation No 2052/88 gave the Commission responsibility for taking the necessary steps to implement the Regulation and the implementing provisions to be adopted by the Council under Article 3(4) and (5).

32. The word 'partnership' meant that the parties concerned were to confer with each other and to make decisions jointly. This was the opposite of a delegation of power, whereby one of the two parties makes decisions on behalf of the other. The essential feature of consultations was that each partner takes decisions falling within its sphere of responsibility and competence after conferring with the other. Regulation No 4253/88, being an implementing regulation, could not contain provisions calling into question this basic principle set out in Regulation No 2052/88.

33. It is a general principle of law that a Community institution entrusted with a particular duty by virtue of a rule of primary or secondary law must normally perform that duty itself. This is especially so where the institution has been given a discretion in relation to the duty, unless delegation was expressly provided for under a provision of Community law.

34. Article 24 of Regulation No 4253/88 gave the Commission a choice of various courses of action, that is, to suspend, reduce or cancel aid, in the event of an irregularity or a significant change for which approval had not been obtained. That discretion was incapable of delegation.

35. This view also found support in Decision No C(91) 2745. COPPI cites Article 6 of the Decision in conjunction with the implementing provisions in para-

graphs 21 and 22 of Annex 2 thereto, which are in the following terms:

'The Member States and the recipients shall ensure that the Community funding is used for the purposes contemplated. If an operation or a measure no longer warrants more than part of the funds that have been approved for it, the Commission shall immediately reclaim the sum owing in accordance with the provisions of paragraph 23, if the Member State is in agreement...

Under these procedures, the Commission may reduce or suspend assistance in respect of the operation or measure concerned if the examination reveals an irregularity or, in particular, a significant change affecting the nature or conditions for the implementation of the operation or measure for which the Commission's approval has not been sought.' [16]

36. If Article 23 of Regulation No 4253/88 did in fact permit Member States to recover Community funding on their own responsibility, then the Commission Decision would be invalid, since — unlike the Regulation — it assigned this task to the Commission. On this interpretation, Article 23 of Regulation No 4253/88 would in turn be inconsistent with Regulation No 2052/88, since it would delegate a discretion to the Member State in relation to the implementation of Community operations, which Article 18 of Regulation No 2052/88 reserves to the Commission.

37. Of all possible alternatives, the interpretation to be preferred is the one that secures the regulation's validity and is most consonant with the legal context. Therefore Article 23 of Regulation No 4253/88 could not be interpreted in such a way that it authorised Member States to reduce, suspend or cancel aid or to recover same.

B — *The Italian Government*

38. The Italian Government, on the other hand, takes the view that the recovery of the aid had its legal basis in Article 23 of Regulation No 4253/88, as amended by Regulation No 2082/93. That article conferred power on the Member State to recover aid where irregularities had occurred. The recovery of the aid also constituted an instance of the application of Article 280 EC.

16 — The wording of Paragraph 22 is virtually identical to that of Article 24(2) of Regulation No 4253/88.

C — *The Commission*

39. The Commission first points out that the national court refers to two different methods for structural activities. Regulation No 355/70 is concerned with common measures whereas Regulations No 2052/88 and No 4253/88, which were adopted in 1988 for the purpose of coordinating the activities of the structural funds, apply to all structural activities.

40. Under Regulation No 355/70, the Commission has responsibility for all decisions in relation to the implementation of the structural activities and the recovery of amounts paid out without justification, creating a direct relationship between it and the beneficiary.

41. The system of Community structural activities provided for under Regulations No 2052/88 and No 4253/88, which was introduced as part of the 1988 reform, was based instead on partnership between Commission and Member State. Under this arrangement, the Commission approves the national framework programme submitted to it by the Member State. Thereafter, the Member State implements this programme on its own financial responsibility, through the intermediary of implementing bodies designated by it for the individual measures. There is no direct relationship between the Commission and the recipients of the aid.

42. For this reason, the Member State was required, under Article 23(1) of Regulation No 4253/88, to take action against irregularities and, where appropriate, to recover aid from beneficiaries. Prior consultation with the Commission was not necessary in such cases, not least because the Commission had no knowledge of the individual grantor/grantee relationships with the final beneficiaries, such as C.B.S. Article 23(2) and (3), however, also gave the Commission power to carry out checks of its own.

43. Article 24 of Regulation No 4253/88 regulated the financial relationship between Commission and Member State and enabled the Commission to vary the Community's financial contribution in the case of irregularity and following a hearing of the parties. It was only in exceptional cases that the Commission had directly recovered aid from beneficiaries on the basis of this provision, namely where it had also directly granted the aid to them. [17]

VI — Legal analysis

44. Having established that, in the instant case, only Regulation No 4253/88 can form

17 — The Commission refers in this connection to the decision that was at issue before the Court in the *Conserve Italia* case (cited in footnote 14).

the basis for the reduction and recovery of aid, it now has to be considered whether Article 23 of that regulation confers the relevant power on the Member State. In interpreting the article, besides its wording, particular weight must be given to schematic and teleological considerations.

A — *Wording of Article 23 of Regulation No 4253/88*

45. According to Article 23(1), first subparagraph, second indent, Member States are to take the necessary measures in implementing operations 'to prevent and take action against irregularities'. Under the third indent, first sentence, of the same article, Member States are required 'to recover any amounts lost as a result of an irregularity...'.

46. If the transfer by C.B.S. to IBIESSE of the subsidised plant and equipment constitutes an irregularity, which — as noted above — is a matter for the referring court to decide, it would be the responsibility of the national authorities to take action against that irregularity and to recover the sums unduly paid in consequence thereof.

47. Narrowly construed, the German term 'ahnden' [*take action*] might be understood as denoting only the imposition of penalties for criminal offences committed with intent or through negligence. However, other language versions do not offer any support for this restrictive interpretation. [18] In any case, the word 'ahnden' does not exclude other ways of dealing with irregularities, such as administrative measures and penalties. [19] It includes, in particular, the power to reduce and recover aid.

48. Mention must also be made of paragraph 27 of Annex 2 to Commission Decision No C(91) 2745, which similarly requires the Member State, by reference to Article 23(1), first subparagraph, second indent, of Regulation No 4253/88, to take the necessary measures to deal with irregularities and to recover sums paid without legal justification by reason of irregularities.

B — *Schematic interpretation of Article 23 of Regulation No 4253/88*

49. Both COPPI and the Commission rely principally on schematic arguments to

18 — The English version, for example, has 'to prevent and take action against irregularities'.

19 — On the concept of administrative measures and penalties in Community law see in particular Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ 1995 L 312, p. 1.

support their views, but they arrive at opposite conclusions.

50. For COPPI, the juxtaposition of Articles 23 and 24 of Regulation No 4253/88 appears to point to a sort of tiered competence as between Commission and Member State. Under Article 24, on this view, the Commission alone has power to make a decision reducing or cancelling a subsidy vis-à-vis the recipient. The role of the national authorities, on the other hand, is to carry out regular adjustments in the course of the implementation of projects and to effect the 'material' recovery of aid.

51. In the Commission's view, by contrast, Articles 23 and 24 of Regulation No 4253/88 apply to different relationships. Article 24 deals with the Commission's power to reduce or cancel the Community's financial contribution *to the national programme* in the event of irregularities or changes to the programme. Article 23, on the other hand, concerns the *private relationship* between the national authorities and the beneficiary (emphasis added).

52. The Commission's argument finds support in the process by which aid is granted, the details of which were explained again by the Commission at the hearing. The Member State submits an operational programme to the Commission. The Commission approves the programme and fixes the (proportionate) contribution that the Community will make to the implementation of the programme. The Member State on that basis grants the overall subsidies (consisting of the Community's contribution plus that of the Member State) to implementing bodies, such as COPPI, which in turn pass the funds on to the entities that carry out the actual projects.

53. Accordingly, Commission Decision No C(91) 2745 approving the operational programme was addressed to the Member State and not to the beneficiaries. [20] In the instant case, there was no direct legal relationship between the beneficiaries and the Commission. The argument of COPPI to the effect that the Commission had granted it aid by virtue of the Decision is therefore not correct.

54. Rather is it the case that the Ministry, by Ministerial Decree No 485, established a grantor/grantee relationship between the Italian State and COPPI with a view to the implementation of parts of the programme.

20 — See Article 7 of the Decision.

Under this grantor/grantee relationship, the Ministry granted COPPI a composite subsidy, comprising the Community contribution and the contribution by the Italian State, to the projects carried out or coordinated by COPPI.

55. The idea of a splitting into two levels, the level of the operational programme and the level of the implementation of that programme, also finds expression in the sixth recital to Regulation No 2082/93, amending Regulation No 4253/88. That recital is in the following terms:

'Whereas, in application of the principle of subsidiarity, and without prejudice to the Commission's powers, particularly its responsibility for the management of the Community's financial resources, implementation of the forms of assistance contained in the Community support frameworks should be primarily the responsibility of the Member States at the appropriate territorial level according to the specific needs of each Member State'.

56. If a subsidy has been granted in this way, the Member State is primarily responsible at the implementation level for supervising the proper use of the funds by the beneficiaries. For that reason, Article 23 of Regulation No 4253/88 also expressly specifies the measures to be taken by the Member State 'in implementing operations'. The beneficiary has financial responsibility for the proper implementation of the part of the programme under its management vis-à-vis the Member State that granted it the subsidy.

57. Under Article 23(1), second subparagraph, second sentence, the Member State is required to inform the Commission regularly of the progress of administrative and judicial proceedings. This reporting requirement is doubly significant. First, it shows that it is incumbent on the Member States to bring such proceedings, in connection with the implementation of the operational programme, proceedings which can have no object other than the recovery of unjustified subsidies. Secondly, the reporting requirement is an expression of the Member State's responsibility vis-à-vis the Commission for the proper implementation of the programme.

58. As a further consequence of this responsibility of the Member State, Article 24 of Regulation No 4253/88 empowers the Commission to reduce, suspend or cancel the Community contribution and recover it from the Member State in the event of non-compliance with the approved operational programme. Granted, Article 24(3), first sentence, laconically provides only that any sum received unduly and to be recovered is to

be repaid. Whom this obligation concerns is not specified. However, it appears clear that the Commission can recover aid only from the party to whom it directly granted the aid, which will normally be the Member State.

59. The proposition that Article 24 primarily concerns the Member State-Commission relationship is also borne out by the fact that it provides specifically for the submission of comments by the Member State but not by those who received aid from the Member State under an operational programme.

60. If the Commission had power, in the instant case, to reduce the aid to COPPI and to recover overpayments directly, that would amount to it being given the right to set aside in part a decision to grant aid of a national authority (Ministerial Decree No 485). There is no provision in the EC Treaty for a Community body to intrude on national sovereignty in this way.

61. These findings are not contradicted by the fact that in certain circumstances the Commission can, by way of exception, recover aid directly from beneficiaries, under Article 24 of Regulation No 4253/88. The *Conserve Italia* case concerned such an exception. [21] Unlike the present case, there the Commission had granted the aid directly to the beneficiary. The national matching funds had been provided by the Member State via a separate national administrative decision. [22]

62. The Commission had thus established a grantor/grantee relationship with the beneficiary and was entitled to cancel the aid under the terms of that relationship and to recover the relevant sums from the beneficiary. Since the Community contribution and the national matching funds had been granted by separate decisions, the cancellation of the Community contribution did not affect the national decision to grant aid, revocation of which was solely a matter for the national authorities.

63. I must also reject the argument of COPPI that authority to recover the aid lay with the Commission by virtue of paragraphs 21 and 22 of Annex 2 to Decision No C(91) 2745. That passage of the ancillary provisions reproduces virtually word-for-word Article 24 of Regu-

21 — Cited in footnote 14. A similar situation fell to be considered by the Court in Case T-199/99 *Sgaravatti Mediterranea* v *Commission* [2002] ECR II-3731.

22 — See the findings of fact set out under points 25 and 26 of paragraph 20 of the Court's judgment in *Conserve Italia* (cited in footnote 14).

lation No 4253/88 and is therefore to be interpreted in the same manner. For that reason also, there can be no doubt as to the validity of the Decision on the ground of a putative infringement of the Regulation.

64. Finally, COPPI refers to Articles 4 and 18 of Regulation No 2052/88 (as amended by Regulation No 2081/93). Article 4(1) of Regulation No 2052/88 lays down general principles governing cooperation between Commission and Member States. It requires both sides to work together in partnership at all stages of the aid process. According to the fifth sentence of Article 4(1), however, the partnership 'will be conducted in full compliance with the respective institutional, legal and financial powers of each of the partners'.

65. It follows that legally binding rules as to who has power to adopt individual measures cannot be derived from Article 4(1). The powers and duties vested in the Commission and the Member States are instead to be found in the implementing provisions adopted by the Council pursuant to Articles 3(4) and (5) of Regulation No 2052/88, in this case Articles 23 and 24 of Regulation No 4253/88. In view of the express proviso as to legal, institutional and financial powers in the fifth sentence of Article 4(1) of Regulation No 2052/88, there is no basis for calling into question the validity of Regulation No 4253/88 on the alleged ground of a breach of the partnership principle.

66. Nor do the partnership principles set out in Article 4 of Regulation No 2052/88 entail any obligation on the Member State to seek the Commission's approval before taking action against irregularities and recovering 'any amounts lost', as COPPI appears to assume.

67. All that the implementing provisions laid down in Regulation No 4253/88 require of the Member State is that it regularly inform the Commission of the progress of administrative and judicial proceedings (Article 23(1), second subparagraph, second sentence). There is no provision in the Regulation requiring the Member State to involve the Commission in any way before adopting measures pursuant to Article 23(1) of Regulation No 4253/88.

68. Such a requirement would be of little practical use in a case such as the present. This is because the Commission, as it explained at the hearing, has no knowledge of the individual projects in the subprogrammes being carried out by third parties subcontracted to COPPI.

69. It is true that Articles 4(2) and 18 of Regulation No 2052/88 give the Commission responsibility for implementing the regulation. But that does not mean that it is also the Commission's responsibility to adopt measures in relation to the implementation of operational programmes, such as taking action against irregularities and recovering aid from beneficiaries. What Regulation No 2052/88 is primarily concerned with is the objectives and guidelines for Community action through the various structural funds. The implementation of the actual measures and the administration of grants awarded to individual recipients are matters specifically not addressed in this Regulation. Consequently, Article 18 does not require the Commission to take implementing measures of this kind.

71. Member State authorities are best placed in terms of having the staff and resources as well as the knowledge necessary to detect irregularities on the ground and to instigate the administrative and judicial proceedings required to recover funds unduly paid. A centralised procedure for aid recovery under the Commission's control would entail considerable delays which in the worst case could even mean that recovery of the Community funds was no longer possible, for instance if the beneficiary had become insolvent in the meantime. It is therefore in the Community interest and is in accordance with the purposes of Regulation No 4253/88 if the Member State takes action immediately in the event of irregularities.

C — *Teleological interpretation of Article 23 of Regulation No 4253/88*

70. An interpretation of Regulation No 4253/88 in the light of its purposes also confirms the view that Article 23 confers power on the Member State to reduce and recover aid. Scarce budget resources must be used only in accordance with the conditions of aid. If there is a breach of those conditions, it accords with the aims of the Regulation for action to be taken against the irregularities as swiftly and as effectively as possible, so as to minimise the loss to the Community budget.

72. The conclusion to be drawn is therefore that Article 23(1) of Regulation No 4253/88 confers power on Member States to reduce aid in the event of irregularities and to recover amounts unduly received by beneficiaries as a result. That is the position at any event if the aid was granted to the beneficiary as a composite subsidy, including the Community contribution, by a decision of a national authority. Accordingly, a Member State adopting measures under Article 23(1) of Regulation No 4253/88 is acting in exercise of its own powers. A delegation of the relevant powers by the Commission to the Member State — as suggested by COPPI — is therefore not required.

VII — Conclusion

73. In the light of the foregoing considerations, I propose that the question referred be answered as follows:

'In accordance with Article 23(1) of Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993, a Member State had power, in 1997, to take action against irregularities in the implementation of an operational programme and to recover from the beneficiary any amounts lost as a result of such irregularities, including the Community contribution, which the authorities of that Member State had granted to the beneficiary as a composite subsidy under the operational programme.'