OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 19 September 1989 *

Mr President,
Members of the Court,

1. The Belgian Government is complaining of the decision of 4 February 1987 in which the Commission found that the substantial financial aid (more than BFR 12 000 million) granted in various forms (contribution to an increase in capital and for convertible bonds, conversion of guaranteed loans into capital and other grants in aid) by the Belgian Government to Tubemeuse, a steel company, in the period from 1984 to 1986 was unlawful (as being an infringement of Belgium's obligations under Article 93(3) of the EEC Treaty) and incompatible with the common market under the provisions of Article 92, and required the recovery of the said aid.

Preliminary question

2. Before considering the merits of the application it is necessary to consider a question with which the Commision dealt in some detail in its pleadings and at the hearing, and on which it has asked the Court to rule expressly.

The Commission has raised an objection of inadmissibility to the submissions based on the application of Article 92(3) of the EEC Treaty.

The Belgian Government has not denied that, in this case, there has been a breach of the procedural obligations flowing from Article 93(3). According to the Commission, that infringement entails in itself the unlawfulness of the aid in question, independently of whether or not it is compatible with the substantive provisions of Article 92(3). According to the Commission, that means that the submissions concerning the application of that provision must be regarded as inadmissible.

3. Let me say first, that having regard to its scope and implications, the question raised by the Commission does not appear to be an objection of inadmissibility in the true sense of the term.

Firstly, the contested decision refers to the infringement of both provisions, namely Article 93(3) and Article 92 (Article 1: 'the aid cannot be considered compatible with the common market under Article 92(2) or (3) of the EEC Treaty'), and the reasoning set out in the decision relates to both provisions. Consequently, the Belgian Government's submission concerning the application of Article 92(3) is clearly 'admissible'. Secondly, the Commission, as it expressly confirmed at the hearing, is asking the Court to apply a criterion of procedural economy according to which, once it has been determined that the national measure

* Original language: Italian

at issue is unlawful having regard to Article 93(3), it is not necessary to consider whether the measure is to be considered in conformity with other provisions of the Treaty, in particular whether it is compatible with the common market for the purposes of Article 92(3).

In substance, the Commission is claiming that it is entitled to find incompatible with the common market any State measure which constitutes aid within the meaning of Article 92(1) and which has been put into effect contrary to Article 93(3) (notification requirement and suspensory effect), without being obliged in such a case to verify whether the aid might fall within one of the exceptions in Article 92(3). Furthermore, the Commission claims that the Court should not undertake such a verification (p. 6 of the defence), inasmuch as it does not have 'discretionary power' in relation to such aid.

The Commission's argument is quite clear: infringement of Article 93(3) is incapable of being remedied since the provision is one of public policy endowed with direct effect; such an infringement therefore renders the aid unlawful definitively and *per se* and also incompatible with the common market, so that further substantive examination is unnecessary. Whereas in this case the infringement is not denied, submissions on the substance are 'inadmissible', in the sense that the Court should not consider them.

4. In asking the Court to rule on this question, the Commission emphasized its novelty and importance for the effectiveness of the system of supervision of State aid. [1] It notes that, recently, there has been an increasing tendency to grant aid without giving prior notice thereof. [2] With increasing frequency, therefore, the Member States, rather than giving notice of the aid when it is still at the planning stage — as is required by Article 93(3) — put it into effect directly. They simply wait until the Commission, of its own motion or as a result of a complaint lodged by a third party, asks for an explanation of the measures adopted. Then and only then does the Member State transmit the information requested, thereby permitting the initiation, if necessary, of the procedure under Article 93(2).

Moreover, even when the proceedings are concluded by a decision declaring the aid incompatible with the common market and ordering its withdrawal *ex tunc* by way of recovery, such a result is not, in the Commission's view, satisfactory.

In the first place, the longer the verification procedure lasts the more difficult it is to recover the aid and, according to the Commission, the Member States have a tendency to prolong the procedure artificially by dilatory conduct.

In the second place, in so far as the aid is granted during the verification procedure, notwithstanding the standstill obligation in the last sentence of Article 93(3), there is a

1 — It should be pointed out that the question of the consequences of aid granted in breach of Article 93(3) being unlawful *per se* has been raised by the Commission in a series of applications. See, in particular, the judgments of 14 February 1990 in Case C-301/87 *France* v *Commission* [1990] ECR I-307, of 10 May 1990 in Case C-61/88 *Commission* v *France*, not yet published, of 4 July 1990 in Case C-162/88 *Commission* v *France*, not yet published, of 4 July 1990 in Case C-294/88 *Commission* v *Poclain SA and Tenneco Europe*, not yet published, and the order of 17 March 1990 in Case C-303/88 *Italy* v *Commission*, not yet published.

2 — According to the information supplied by the Commission, more than 100 cases of aid granted in breach of Article 93(3) were identified in the period between 1984 and 1988.

continuing distortion of competition the damaging effects of which, especially in sectors which are in crisis, cannot be offset even by a subsequent, and in any event hypothetical, recovery by the State of the benefits unlawfully granted (reference is being made here in particular to the competitors of the undertaking which has received the aid, who may be forced out of business). [3]

Ultimately, the system of preventive supervision established by the Treaty would be in danger of being set at naught by an increasingly frequent practice of confronting the Commission with a *fait accompli*. That is certainly an unlawful situation and one which the Commission can only partially remedy *ex post facto*. It is therefore necessary to develop a new form of intervention before the aid is granted, a sort of 'deterrent' which would induce the Member States either to give notice in good time of plans to grant aid or, in the case of aid paid prematurely (during the verification procedure), to return to the *status quo ante* at the Commission's request. The latter would be able, at least when it considers it necessary to do so, to carry out the preventive examination of compatibility solely in regard to aid still at the planning stage and, as a result, under the precise conditions provided for in the Treaty.

5. Further to the above comments, it should be pointed out that there are two new aspects to the Commission's argument. First, as has been said, the Commission is claiming a sort of new power of decision entitling it to establish the illegality of aid in regard to Article 93(3). It is therefore, at least prima facie, a power which is outside the procedural scope both of Article 169 (since the Commission itself declares the infringement to have occurred) and of Article 93(2) (since the decision in question does not take account of the question of compatibility).

However, a closer analysis shows that it is not so much that which is the essential point in the Commission's argument. Independently of who declares the infringement of Article 93(3) to have occurred and how that is done, what counts is the consequence that flows from such an infringement. The disuasive effect on the Member States, which is intended to ensure that they comply with Article 93(3), depends in fact on the illegality of the aid, once established, releasing the Commission from the requirement to assess whether it comes within the exceptions provided for in Article 92(3), and thus whether it is compatible in substance within the common market.

I will therefore concentrate my attention on that second aspect.

By way of preliminary I would observe that the question raised by the Commission could be answered in the same — customary but inappropriate — procedural language in which it was formulated. In point of fact the Court could, in strict compliance with the

3 — To all of that must be added the risk that, confronted with public grants in aid not effectively opposed at Community level, the other Member States will decide to intervene directly by granting similar benefits to undertakings in their own country.

procedural limits to its appraisal, restrict itself to ruling on (and rejecting, in my view) the objection of inadmissibility and consider the question of the compatibility of the State aid in question under Article 92, as in fact did the Commission in the contested decision.

However I consider it necessary to consider the substance of the question raised by the Commission, as it is clear that it is of considerable importance and merits close examination beyond the question of procedure.

As a further preliminary point, I would observe that the Commission's argument is based on an underlying consideration, namely that at present infringement of Article 93(3) does not give rise to sufficiently serious consequences. Ultimately, the Member States have 'nothing to lose' by infringing that provision, which explains the increase in the number of cases in which State aid is paid unlawfully.

That argument reflects an analysis which is perhaps a little too pessimistic. An infringement of Article 93(3) in fact involves precise consequences, both internally and at Community level, for the Member State in default. Thus, the provision appears to provide effective guarantees to the same extent, if not to a greater extent, than other provisions of the Treaty.

In view of the importance of that aspect of the question, I think it is appropriate, before considering the core of the Commission's argument, to set out the essential nature of the obligations under Article 93(3) and to consider, in the light of administrative and judicial practice, the possible consequences of failure to fulfil them.

6. The system of preventive supervision of 'new aid' (or changes to existing aid) meets the essential objective of preventing such aid from being granted, and thereby producing distortive effects, without there first being an assessment of its compatibility at Community level.

Preventive supervision imposes two obligations on the Member States:

(i) they must inform the Commission in good time of plans to grant or modify aid (commonly known as the obligation to notify, notwithstanding the terms of the Treaty which, perhaps not without reason, are less precise);

(ii) they must not to grant the proposed aid before the end of the Community procedure [4] (standstill obligation or prohibition on implementing the aid).

4 — That procedure, as the Court will be aware, takes place in two stages. The first, preliminary in nature, consists of a summary examination of the aid project of which notice has been given and is intended to determine whether the project is, prima facie, compatible with the common market or if, on the contrary, there is at least a reasonable doubt as to its compatibility. In that case, the Commission is required to proceed to the next stage and initiate the procedure under Article 93(2) under which the *audi alteram partem* principle is respected. It should be pointed out that the preliminary stage necessarily presupposes that notice has been given of the project. Within two months of notice being given (in accordance with the judgment of 11 December 1973 in Case 170/73 *Lorenz* v *Germany* [1973] ECR 1471), one month if the aid is involved is individual aid, the Commission must decide whether the Article 93(2) procedure should be initiated. However, when the Commission considers that the preliminary examination is sufficient to conclude that the aid is compatible with the common market, it may close the procedure without adopting any formal decision. I would point out, finally, that even if there has been no preliminary examination (because the aid was not properly notified to the Commission), the Article 93(2) procedure can still be initiated, either of the Commission's own motion or on the initiative of any interested party who has complained to the Commission about the granting of the aid.

The first of those obligations, considered — it should be noted — in isolation, does not have direct effect in the sense that, as the Court decided in *Costa* v *ENEL*, it 'creates no individual rights',[5] but constitutes an obligation which produces its effects exclusively in the relationship between the Member States which have undertaken it and the Community. Moreover, it is not clear whether the failure to give notice of aid proposed but not granted always involves an infringement of Community law. That is certainly the case if the measure granting the aid provides for its implementation or merely permits such implementation. On the other hand, it may be concluded that the granting of aid without notification by way of a measure which suspends implementation of the aid pending completion of the Community verification procedure is not as such unlawful since the Member State has merely reserved the right to choose between the alternative of subsequent notification of the aid (thus initiating the supervisory procedure) or of withdrawing it in its entirety. This would not be impossible, although is perhaps somewhat unlikely.

The infringement of the standstill obligation is much more important inasmuch as it may actually give rise to distortions of competition. As was stated in the judgment in *Heineken*:[6]

'... the final sentence of Article 93(3) is the means of safeguarding the machinery for review laid down by that article, which, in turn, is essential for ensuring the proper functioning of the common market. The prohibition laid down by that article is intended to ensure that the aid measures do not come into effect before the Commission has had a reasonable period in which to consider the plan in detail and, if necessary, to initiate the procedure provided for in Article 93(2)' (paragraph 20).

Moreover, the Court, in its judgment in *Costa* v *ENEL*, accepted that the prohibition on implementing the aid plan had direct effect.

In addition, the Court set out the scope thereof, indicating that the standstill obligation produces its effects not merely during the verification procedure under Article 93(2) but also 'throughout the preliminary phase consisting in the initial investigation of the draft aid programme'.[7]

A fortiori, the prohibition on implementation applies to aid which has not been notified and in regard to which the preliminary phase could therefore not even be initiated.

7. That having been said, what are the consequences of an infringement of Article 93(3)?

There is a need, firstly, to distinguish between the purely national aspects and the Community aspects.

At the national level, as has been observed, the Court has ruled on several occasions since *Costa* v *ENEL* on the direct effect of the prohibition on implementing aid.

5 — Judgment of 15 July 1964 in Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

6 — Judgment of 9 October 1984 in Joined Cases 91/83 and 127/83 *Heineken Brouwerijen BV* v *Inspecteurs der Vennootschapsbelasting* [1984] ECR 3435

7 — Order of 20 September 1973 in Case 171/83 R *Commission* v *French Republic* [1983] ECR 2621; Judgment of 11 December 1973 in Case 120/73 *Gebr. Lorenz GmbH* v *Germany* [1973] ECR 1471

In *Capolongo*,[8] it was confirmed that, in regard to plans to introduce new aid,

'the last sentence of Article 93(3) establishes procedural criteria which the national court can appraise'.

Subsequently, in *Lorenz*, *Markmann*, *Nordsee* and *Lohrey*,[9] after ruling that the prohibition on implementation is directly effective in regard to the whole of the period to which the prohibition applies, the Court pointed out that that direct effect

'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' (paragraph 8);

and concluded that,

'while the direct effect of the prohibition in question requires national courts to apply it without any possibility of its being excluded by rules of national law of any kind whatsoever, it is for the internal legal system of every Member State to determine the legal procedure leading to this result' (paragraph 9).

In *Steinike* v *Germany*,[10] after deciding that,

'with regard to new aid which the Member States intend to introduce a special procedure is provided and if it is not followed the aid is not regarded as being regularly introduced' (paragraph 9),

the Court added that:

'the limitations [on individuals in regard to] reliance on Article 92 do not however mean that cases cannot come before national courts requiring them to interpret (making use if necessary of the procedure under Article 177 of the Treaty) and apply the provisions contained in Article 92, but nevertheless they cannot be called upon to find that such State aid is incompatible save in the case of aid introduced contrary to Article 93(3). Thus a national court may have cause to interpret and apply the concept of aid contained in Article 92 in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 93(3) ought to have been subject to this procedure'.

It can be seen from those decisions that, at the national level, the completion of the Community examination procedure constitutes an essential element without which the aid cannot be regarded as having

8 — Judgment of 19 June 1973 in Case 77/72 *Capolongo* v *Maya* [1973] ECR 611.

9 — Judgments of 11 December 1973 in Case 120/73 *Gebr. Lorenz GmbH* v *Germany* [1973] ECR 1471, of 11 December 1973 in Case 121/73 *Markmann KG* v *Germany* [1973] ECR 1495, of 11 December 1973 in Case 122/73 *Nordsee, Deutsche Hochseefischerei GmbH* v *Germany* [1973] ECR 1511 and of 11 December 1973 in Case 141/73 *Lohrey* v *Germany* [1973] ECR 1527.

10 — Judgment of 22 March 1977 in Case 78/76 *Steinike and Weinlig* v *Germany* [1977] ECR 595.

been *lawfully introduced* or, consequently, as capable of *producing any effects.*

In other words, it may be concluded that the procedure (legislative or administrative) by which aid is granted in not complete until the Commission has carried out — with a favourable result — its 'preventive' examination of the aid's compatibility with the common market. That examination thus constitutes a legal condition of effectiveness of an essential nature, whose importance stems from the fact that the examination relates to the *merits* of the State intervention, entailing, as the Court has also emphasized, assessments of a political and economic nature made on the basis of a wide discretion.

It follows that any person having an interest in doing so may rely before the national courts on the incompatibility with Community law of the measure granting the aid, where it is envisaged to implement it without Community control and, in any event, on the unlawfulness of the implementing measures adopted for that purpose.

Moreover, the said measures, if they are administrative in nature, may be revoked under the conditions provided for the revocation of unlawful administrative measures. Such revocation is on particularly serious grounds of public interest since the measures in question are likely to involve an infringement of the State's international obligations.

The infringement of the prohibition on implementation may also lead to an action being brought before the national courts for interim measures (in particular, suspension of payment of the aid of which the compatibility with the common market has not been assessed) and actions for damages against the administration (an action might be brought by competitors damaged by the unlawful grant of aid or by the beneficiary of aid payment of which has been suspended or cancelled by reason of an infringement of the procedural rules). [11]

8. It should also be observed, however, that the possibility of remedying an infringement of Article 93(3) at the national level appears to be limited by a series of factors. Among them are the following:

(a) the lack of transparency in regard to State intervention and the positions adopted by the Commission at the stage of the preliminary examination: up to now, there has not been any system of publicity for the notification of new aid or of any decision adopted by the Commission not to initiate the procedure under Article 93(2) in regard to aid of which notice has been given; this deprives persons concerned of information which is essential if measures are to be contested in good time; [12]

(b) differences between the various legal systems concerning the conditions and extent of judicial protection granted (for example, limitations on applications for interim measures brought before administrative courts);

11 — Those points were analysed in detail at the 12th FIDE Congress (Paris, 1986), to the proceedings of which reference should be made for more precise information.

12 — See Reports to the FIDE Congress, cited above, pp 205 and 296, and E. H. Pinacker Hordijk: 'Judicial protection of private interests under the EEC competition rules relating to State aids', in *Legal issues of European integration*, 1985/1, p. 67 (in particular, pp. 74 to 78)

(c) difficulties specifically in regard to the bringing of certain types of actions (for example, in actions for damages, there is uncertainty, especially in a market which is not oligopolistic, in regard to determining the causal link between the aid granted and the alleged damage [13]);

(d) A certain reluctance on the part of the competitors of the undertaking receiving the aid to go to Court — even if there are no particular difficulties in so doing — inasmuch as they consider it preferable, for various reasons, to seek analogous or equivalent benefits for themselves from the public authorities; [14]

(e) A reluctance, particularly of certain courts, to recognize and apply consistently the principle of direct effect, both in general and with particular reference to the provisions in question, a resistance which, by increasing uncertainty, could contribute to discouraging recourse to national judicial remedies. [15]

9. However, notwithstanding those difficulties, it cannot be concluded that the system of national protection is entirely ineffective.

Reference may be made in that regard to two judgments of the Italian Constitutional Court [16] in which it was decided that regional laws granting aid which were approved by the Regional Assembly before the Community verification procedure had been completed were unconstitutional. [17]

More interesting, because it was more clearly based on the direct effect of Article 93(3), is a judgment of the English Court of Appeal of 24 February 1986 (*R.* v *Attorney General ex parte Imperial Chemical Industries*), in which it was decided that the authorities are required 'not to implement the aid or plan unless and until the Commission [has] approved it'. [18]

There has also been no shortage of signs recently of an increase in national proceedings concerning aid, [19] an indication of a greater attention to the relevance of the issues involved, as resistance to full application of direct effect disappears slowly but surely.

The Commission itself could contribute to resolving certain of the difficulties mentioned above, for example, by establishing arrangements for the publication of notice of draft aid programmes, which would be very desirable.

13 — See FIDE Reports, cited above in footnote 11, pp. 79 and 299.

14 — See FIDE Reports, *supra*, p. 78.

15 — See FIDE Reports, *supra*, p. 183; see also the decision of 24 January 1989 of the Italian Council of State which expressly refuses to recognize the direct effect of a Commission decision under Article 93(2).

16 — Corte costituzionale, 9 April 1963, No 49, *Foro italiano*, 1963, I, 859 and 8 July 1969, No 120, ibid., 1969, I, 2069.

17 — The Constitutional Court decided that the regional legislative bodies had exceeded the limits of the powers granted to them by failing to take account of the procedural requirements of Article 93(3) of the Treaty, which had been properly specified by the competent organs of the State.

18 — See the note by J. Flynn: 'Can misapplication of a fiscal measure constitute State aid?', in *Eur. Law Rev.*, 1986, p. 232.

19 — Reference may be made, by way of example, to administrative legal proceedings in Italy concerning certain provisions of Law No 64 of 1 March 1986 (laying down the basic rules on special intervention measures in the Mezzogiorno), which has given rise to various preliminary references currently pending before the Court of Justice. See also, in particular Lazio Tar, Sez. III, 22 January 1985, in *Foro amministrativo*, 1985, p. 941.

In the light of those observations, I conclude that the various forms of judicial review carried out by the national courts of the observance by the Member States of the prohibition on implementation contained in Article 93(3) represents an important guarantee, which could become more important in the future. It is therefore appropriate for the Court to take this opportunity to confirm the direct effect of the standstill obligation and underline that direct effect permits any interested person to assert the unlawfulness of aid prematurely paid in *any form of judicial proceedings* provided for under national law.

10. With regard to the consequences of an infringement of Article 93(3) at Community level, it should be pointed out that the problem has already been considered on several occasions both by the Court and by the Commission.

The first point which should be clearly stated is that the system of preventive supervision, and in particular of the 'safeguard clause' represented by the standstill obligation, implies that the implementation of proposed aid in breach of the procedural rules laid down in Article 93(3) is unlawful. Thus, the first question which arises is to determine the procedure in accordance with which that unlawfulness is to be determined.

In the judgment in Case 173/73 *Italy* v *Commission*[20] the Court stated clearly that, where a Member State has infringed its obligations under Article 93(3), the Commission may take two *concurrent* forms of action: the procedure under Article 169 and the procedure under Article 93(2).[21] In other words, an infringement of Community law may be determined (where it consists in a failure to fulfil the obligation to give notice or the standstill obligation) either independently, under the general procedure, or in the context of an assessment of the compatibility of aid with the common market. Moreover, nothing prevents the two procedures being used concurrently if the Commission considers it essential to do so.[22]

There is no shortage of examples in that regard. Thus, in Case 171/83 *Commission* v *France*, the Commission acted under Article 169 against France which had implemented an aid scheme (which had been notified) notwithstanding the commencement of the procedure under Article 93(2). In that case, at the same time as it brought the action, the Commission also applied for interim measures under Article 186 of the Treaty intended to obtain an immediate cessation of the contested intervention.[23]

The cases in which the Commission, in regard to aid granted in breach of Article 93(3), has considered it appropriate to initiate immediately the procedure under Article 93(2) are varied. Examples of such cases include, in addition to the judgment in Case 173/73 *Italy* v *Commission*, cited above, the judgment in Case 234/84 *Belgium* v *Commission*, the order in Case 310/85 *Deufil*, and the judgment in Case

20 — Judgment of 2 July 1974 in Case 173/73 *Italy* v *Commission* [1974] ECR 709

21 — The Court pointed out in particular that 'the means of recourse open to the Commission are not restricted to the more complicated procedure under Article 169'.

22 — See A. Dashwood: 'Control of State aids in the EEC. prevention and cure under Article 93', *CMLR*, Vol 12, 1975

23 — That application was granted by the Court by order of 20 September 1983, cited above (the Commission was subsequently able to withdraw its main application).

94/87 *Commission* v *Germany*.[24] In the last two cases, as in fact in this case, the Commission adopted a decision, on completion of the procedure under Article 93(2), in which it found both that the aid was unlawful (as being in breach of the procedural obligations) and, from the substantive point of view, was incompatible with the common market.

11. The possibility of making use of those proceedings for the purpose of taking action against infringements of Article 93(3) has been confirmed on several occasions, in general terms, by the Commission itself. In a communication of 30 September 1980 (Official Journal C 252, p. 2), the Commission, after pointing out that no payments may be made in violation of the provisions of Article 93(3), adds that:

'Henceforth, any evidence of a tendency to systematic or flagrant violation of Member States' obligations will be systematically pursued by virtue of *Article 169 of the Treaty or other measures envisaged therein*.'

The Commission later returned to this matter in the communication of 24 November 1983 (Official Journal C 318, p. 3).[25] Moreover, in the *Fifteenth Report on Competition Policy*, it emphasized that it had instructed its services automatically to open the Article 93(2) procedure in cases where the Member State did not reply to a request for notification within the prescribed period.

12. Those therefore are the procedures available at Community level. It should be emphasized that those procedures do not merely involve a finding that an infringement exists. There is a significant substantive consequence to be drawn from a finding that a proposed aid programme has been implemented in breach of the obligations contained in Article 93(3): the possibility that the Member States may be asked to recover the aid unlawfully granted.[26]

The possibility which the Commission has of ordering the Member State to recover aid in the same decision (under Article 93(2)) which makes the finding as to the compatibility of the aid with the common market was recognized by the Court in the judgment of 12 July 1973 in Case 70/72.[27]

It should be noted that repayment, inasmuch as it serves the purpose of restoring Community legality infringed by the unlawful payment of aid, may be ordered irrespective of whether the aid in question has been declared compatible or incompatible with the common market on its merits. That is the conclusion to be drawn from the judgment in Case 173/73

24 — Judgment of 10 July 1986 in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263; order of 6 February 1986 in Case 310/85 R *Deufil GmbH & Co. KG* v *Commission* [1986] ECR 537; judgment of 2 February 1989 in Case 94/87 *Commission* v *Federal Republic of Germany* [1989] ECR 175.

25 — In both of those communications, the Commission specifically referred to the judgment in *Capolongo* on the direct effect of Article 93(3).

26 — See the communication of 24 November 1983, cited above: 'The Commission therefore wishes to inform potential recipients of State aid of the risk attaching to any aid granted them illegally, in that any recipient of an aid granted illegally, i.e. without the Commission having reached a final decision, may have to refund the aid. Whenever it becomes aware that aid measures have been adopted by a Member State without the obligations under Article 93(3) having been fulfilled, the Commission will publish a specific notice in the Official Journal warning potential aid recipients of the risk involved.' It was stated (see the Commission's answer to Written Question No 181/88, Official Journal C 151, 19.6.1989, p. 9) that the total amount of aid illegally granted which the Commission required the Member States to recover was of the order of ECU 5 million in 1985, ECU 11 million in 1986 and ECU 747 million in 1987 (the latter figure includes the recovery of ECU 210 million which Tubemeuse was requested to repay).

27 — Judgment of 12 July 1973 in Case 70/72 *Commission* v *Federal Republic of Germany* [1973] ECR 813.

Italy v *Commission*, cited above, in which it was observed that:

'The spirit and general scheme of Article 93 imply that the Commission, when it establishes that an aid has been granted or altered in disregard of paragraph (3), must be able, *in particular when it considers that this aid is not compatible with the common market having regard to Article 92*, to decide that the State concerned must abolish or alter it, without being bound to fix a period of time for this purpose and with the possibility of referring the matter to the Court if the State in question does not comply with the required speed' (paragraph 16).

Thus, whatever may be the assessment of its merits, aid implemented before the completion of the verification procedure is and remains unlawful. Like a national court in the context of the forms of procedure available under national law, the Commission may declare aid unlawful in a decision which rules, even favourably, on compatibility with the common market, drawing therefrom the necessary conclusions in regard to repayment.

However, there is no evidence that the Commission has ever sought recovery of aid subsequently declared compatible with the common market. That perhaps represents excessive prudence since a more vigorous approach might make clearer the precarious nature of aid granted in disregard of the suspensory effect of Article 93(3). It should be noted that in such circumstances the Member States would be induced to give notice and not to implement prematurely at least those aid projects likely to be covered, perhaps with some agreed adjustments, by one of the exceptions in Article 92(3).

13. It follows from those observations that an infringement of Article 93(3) may be the subject of proceedings at Community level and that, as a result, aid unlawfully paid may have to be recovered. The Commission states however that the practical effect of that 'sanction' is significantly reduced by the fact that the decision under Article 93(2), which may require recovery of the aid, is adopted some considerable time after the actual State intervention. Consequently, the recovery of amounts unduly paid may prove difficult.

There is no doubt that the excessive duration of the verification procedure is a real problem, not merely because, as has just been said, it makes the complete restoration of the *status quo ante* improbable, but above all, because the unlawful implementation of an aid programme subsequently declared incompatible with the common market provokes distortions of competition which it is impossible to remedy.[28]

It should however be pointed out generally that the responsibility of the Commission to supervise the course of such proceedings extends to their duration. Moreover, more specifically on this point, the Commission does not appear to be wholly 'unarmed'.

In the first place, any dilatory conduct on the part of the Member States, taking the form of a tendency not to supply information requested in good time, is not entirely free of unfavourable consequences

28 — See, in that regard, the Reports to the FIDE congress mentioned above in footnote 11, in which it is observed, at p. 359, that 'the longer the gap between grant and recovery, the less effective recovery is', adding, however, that 'the gap is further lengthened by the Commission's dilatoriness in enforcing recovery orders when Member States refuse to comply with them'

for the Member States themselves. The Member States have a duty to cooperate which requires them to participate in a fair and honest manner in the verification procedure, and it is clear that a Member State may not derive an advantage from a defect in the assessment of proposed aid due to its reluctance to produce information requested of it. [29]

Thus, in Case 234/84, [30] the Court decided that the lawfulness of a Commission decision (under Article 93(2)) declaring, *inter alia*, that a subscription of capital by the Belgian State constituted aid,

'is to be assessed in the light of the information available to the Commission when the decision was adopted' (paragraph 16). [31]

In the same judgment, the Court decided that the statement of reasons on which the contested decision was based was adequate

'despite its concise nature — which is due in part to lack of cooperation by the Belgian Government' (paragraph 22).

Consequently, it is not entirely impossible for the Commission to impose on the administrative procedure the 'rhythm' which it considers appropriate to the urgency of the case. It can fix time-limits which are relatively brief, emphasizing the imperative nature of the proceedings, and making it clear that any failure to cooperate on the part of the Member State which has granted the aid will be exclusively to the latter's detriment.

That aspect seems to me particularly important with regard to the real problems with which the Commission must contend. Moreover, the Court has the opportunity to confirm and reinforce that duty of cooperation of the Member States and to state the consequences which follow from it with regard to the obligation on the Commission to state the reasons for its decision. Let me make it clear that in my view there is incumbent on the Member States a genuine burden of proof with regard to the information to be supplied to the Commission in accordance with the required application of Article 92(3), which — it should not be forgotten — contains exceptions from the general prohibition on aid laid down by Article 92(1). Consequently, the Member States must supply the Commission, as soon as the aid is notified or at the latest within the specified period, with all the information supporting a derogation from the prohibition. It clearly follows that the extent of the reasoning required of the Commission can only be proportional to the information received from the Member States.

14. In the second place — and this is an aspect which seems to me to be of particular importance — there is a specific remedy permitting action to be taken in good time against the unlawful implementation of an aid project independently of the duration of the substantive verification procedure. As

29 — The existence of a specific duty of cooperation in that regard, which is a particular expression of the general duty under Article 5 of the Treaty, is emphasized by Smit and Herzog: *The Law of the EEC*, 1982, Vol. 3, p. 414 *et seq.*, which states the following: 'Article 93(1) obligates the Member States to cooperate with the Commission in its investigation and to supply it with all necessary data. This obligation receives further support from Article 5, paragraph 1'.

30 — Judgment of 10 July 1986 in Case 234/84 *Kingdom of Belgium* v *Commission* [1986] ECR 2263.

31 — With regard to the scope of the duty of cooperation in the procedure provided for in Article 93(2) see, in particular, Smit and Herzog, cited above in footnote 29, p. 415: 'Although the Member State wishing to grant an aid does not have the burden of proof in the technical sense, it must supply the Commission with those facts and data which the Commission cannot conveniently obtain itself'.

has already been stated, the Commission may act under Article 169 against a Member State which has not complied with the prohibition of implementation asking the Court at the same time (under Article 186) to order the necessary interim measures. It should be emphasized that, in Case 171/83, the order of the Court granting the interim measures applied for was made only three months after the date of the Commission's letter giving formal notice to the Member State concerned. For that reason, it seems to me to be an effective (having regard also to the importance of an order of the Court in possible national legal proceedings dealing with the same subject-matter) and, most importantly, rapid instrument, since it may be adopted relatively quickly after the receipt by the Commission of the first information concerning the implementation of the aid.

However, that is not all. The Commission has in fact the power — which it has never exercised, but which none the less has been expressly recognized by the Court — itself to adopt immediate interim measures. In the aforesaid judgment of 12 July 1973 in Case 70/72, the Court observed, although *obiter*, that Article 93(3)

'involves the power of the Commission to take immediate interim measures, where necessary'.

It seems to me that such measures, if adopted, could resolve a large part of the difficulties of which the Commission is complaining. By a decision which it itself adopts — although that decision is provisional in nature — it could require the Member States to fulfil their obligations under Article 93(3). Furthermore, such a decision, since it is directly applicable, could be relied on before the national courts. Finally, such measures could be adopted within a few days of receiving notice that the proposed aid has been implemented since all that is required is to determine whether or not the Member State has intervened in favour of an undertaking without the necessary verification having been carried out. The rapidity of that form of response would therefore make it possible to reduce to a minimum — and perhaps totally eliminate — the risk that the aid which has been paid would create either a situation which could not later be altered or create distortions of competition which could not subsequently be undone.

Interim measures, independently of whether they are adopted by the Court or the Commission, are a particularly appropriate remedy also by reason of the flexibility of their content. They can be used either to prevent State intervention taking place, to suspend the operation of such intervention or to order the recovery of aid already paid. They may therefore be regarded as the most appropriate remedy for obtaining an immediate return to the *status quo ante* whenever that is necessary to prevent the implementation of aid depriving the subsequent decision of useful effect.

15. On the basis of the foregoing analysis, it is possible to consider specifically the arguments put forward by the Commission in this case.

As has already been indicated, the Commission is asking the Court to decide that it has a decision-making power different in nature, content and effect from any power which has been considered heretofore.

The decision involved is one which:

(i) finds that certain State intervention constitutes aid within the meaning of Article 92(1) and that it is unlawful inasmuch as it has been implemented in breach of Article 93(3);

(ii) calls upon the Member State to terminate the said infringement by recovering aid (whether notified or not) granted prematurely and, therefore, unlawfully.

Secondly — and this is the main point — the examination, in accordance with the procedure under Article 93(2), of whether the exceptions provided for in Article 92(3) are applicable would be subject to the aid having been notified.

Consequently, in the second place, and this is the principal aspect, such notification and/or recovery is subject to an assessment within the context of the procedure under Article 93(2) of whether it is possible to apply the exceptions provided for in Article 92(3).

Such a decision would therefore be totally independent of the procedure under Article 93(2), inasmuch as it would exclude and in fact render unnecessary the assessment of compatibility with the common market, under Article 92(3). Moreover, unlike the interim measures which have already been considered, such a decision would be definitive in nature, permitting the Commission to dispense with initiating or pursuing the procedure under Article 93(2).

16. The Commission's position is certainly not illogical. There is also no doubt that such a view involves a significant extension of the Commission's range of action: it would become the 'master' of the verification procedure, being in a position to control the course of that procedure with a wide discretion and, most importantly, being able, where aid has been unlawfully implemented, to decide if and how that aid is to be assessed under Article 92(3).[32]

None the less, although I agree to a great extent with the premisses and reasons underlying it, I cannot avoid having some doubts as to the more novel and far-reaching implications of such a view. In that regard, there are several considerations, both of a schematic and of a practical nature.

In the first place, some doubt could arise as to the basis of the decision-making power claimed by the Commission. As has been observed, the infringement of the obligations contained in Article 93(3) may be determined either, generally, by the Court in the context of an application under Article 169 or, in exceptional cases, by the Commission, in the context of a decision under Article 93(2), the essential purpose of which is to determine whether or not aid is compatible with the common market. On the other hand, the power to adopt definitive decisions as to the unlawfulness of aid without considering compatibility and following the procedure laid down for that purpose is clearly outside the scope of either of those forms of procedure.

32 — Moreover, following the Commission's argument to its conclusion, the illegality stemming from the infringement of Article 93(3) would completely exclude the examination of compatibility under Article 92(3), since it is impossible to infer — on the basis of correct legal construction — any discretionary power on the part of the Commission (or on the part of the Court, as the Commission states itself in its pleading).

However, that is not of itself an insurmountable obstacle. A finding that aid is unlawful is in fact the basis of the decision ordering recovery of the aid provided for in Article 93(2). The power expressly[33] granted in that regard, therefore, impliedly includes a power to declare that there has been an infringement of the prohibition on implementation and of the obligation to notify.

It is true that the Commission normally orders recovery of aid unlawfully granted in the same decision which rules on compatibility. However, those two aspects of the question are independent of each other, to such an extent that, as the Court has observed, recovery *ab initio* of aid may be requested even if the aid is, at the same time, declared compatible, but only with effect for the future. Consequently, there is no reason why the Commission, before ruling on compatibility, should not decide that the aid has been unlawfully implemented and order its recovery.

In practice, however, it may be more expedient to adopt, at the end of the procedure under Article 93(2), a single decision ruling at the same time on both aspects. That is true firstly for reasons of simplicity, since it is possible, in a single measure, to deal fully with the validity and temporal effects of the aid, deciding the position in regard to the past (having regard to the possibility that it may have been unlawfully implemented) and for the future (having regard to its substantive compatibility with the common market). However, there is also a substantive reason. The order to recover the aid is not an automatic consequence of unlawful implementation. It is the Commission which decides whether it should or should not adopt such an order on the basis of assessments in regard to which it has a wide discretion. It may therefore be preferable to adopt the definitive decision on recovery at the end of the procedure under Article 93(2) when the Commission, having heard, *inter alia*, all the interested parties, has at its disposal all the information necessary to assess the effect on the market of the aid in question and thus to enable it to exercise its discretionary powers in the best possible way.

That, of course, is without prejudice to the possibility that the Commission, during the procedure under Article 93(2) or even before the initiation of that procedure, might adopt interim urgent measures to deal with aid unlawfully implemented. The decisions concerned are in such a case provisional in nature and not definitive.

17. In any event, as I have repeatedly emphasized, that is not the decisive aspect. The principal novelty in the Commission's argument is the possibility that the unlawful implementation of the aid, however determined, could permit the Commission not to initiate or pursue its verification of compatibility with the common market.

It is in regard to that point that most of the doubts are concentrated.

33 — The basis of the power to declare aid unlawful could at first sight also be found in the provisions of Article 93(2) on the basis of which the Commission may decide that aid should be abolished if it is 'being misused' However, it seems preferable to consider that that expression refers not to aid granted in breach of Article 93(3) but to aid which has proved to be incompatible with the common market only at the implementation stage. In such cases, therefore, the Commission will adopt a decision on the substantive compatibility of the aid and not a decision on unlawfulness.

There is no doubt that the failure to notify and, above all, the premature implementation of an aid project, is unlawful. Such conduct constitutes a clear infringement of the obligations under Article 93(3).

It is also clear that such an infringement alters the conditions under which the verification of compatibility must be carried out. Since the latter is no longer being carried out in regard to an aid plan which has been notified, it is being carried out in an abnormal context that is to say, a context radically different from that envisaged in the Treaty.

18. However, are those considerations sufficient to conclude, as the Commission claims, that the verification of compatibility need not take place?

I consider that that question is better answered in the negative.

In the first place, it should be pointed out that the obligations under Article 93(3) are procedural in nature. By defining the conditions under which the verification is to take place, they are incidental to the carrying out of that verification.

Having regard to their purpose and nature, such obligations are relevant only at the verification stage. An infringement of them, as has been said, will entail the unlawfulness of the measure granting the aid and the measures implementing it adopted during the verification procedure. However, once a decision on compatibility, whether positive or negative, has been adopted, and with effect from that point, the earlier infringement of the procedural obligations is no longer relevant. From the moment at which the decision on compatibility is adopted, it alone determines *ex nunc* the position regarding the aid, without prejudice, of course, to the possibility that previously adopted implementing measures might be unlawful.

In that sense, the relationship which exists between Article 93 and Article 92 cannot be assimilated to that between Article 92 and any other substantive rule of the Treaty such as, for example, Article 30 or Article 95.

Where there are concurrent substantive rules (between which there is no relationship of rule and exception), the fact that a measure adopted by a Member State is contrary to one of those rules may make it unnecessary to assess the measure in the light of the other: the measure is in any event incompatible with the common market, be it for reasons other than those inherent in the specific rules on aid in Articles 92 and 93.

On the other hand, the infringement of the procedural criteria under Article 93(3), although it implies that the premature implementation of the aid is unlawful, does not in fact influence the assessment to be made of compatibility for the purposes of Article 92.

Thus, the assessment of compatibility can always be made unless the legislature intended compliance with the procedural conditions to be regarded as a condition precedent of that assessment.

However, that that is not so is shown first of all by the established practice of the Commission, which has never until now

regarded an infringement of Article 93(3) as a circumstance precluding consideration of the compatibility of the aid with the common market.

On the contrary, as can also be seen from the contested decision, an infringement of Article 93(3) is given the significance due to it, that is to say, it constitutes the basis for the recovery of aid unlawfully granted without precluding a substantive assessment of the substantive aspects of the aid. Furthermore, even in cases in which the Commission has applied to the Court for a declaration that Article 93(3) has been infringed, that has neither suspended nor prevented the pursuit of the verification procedure. [34]

That compliance with procedural obligations does not constitute a condition precedent of the examination of compatibility can also be seen from the aforementioned judgment in Case 173/73 *Italy* v *Commission*, in which it was decided that recovery of the aid may be ordered regardless of the result of the verification procedure.

Leaving aside, once again, the characteristic effects of an infringement of Article 93(3), that means that that is not of such a nature as to prevent a decision being taken for the future on the substantive validity of the aid.

19. There is a further consideration which I regard as important.

It must not be forgotten that the examination of compatibility is carried out not in the interest of the Member State granting the aid but in the general interest of the Community.

To that end, the procedure provided for in Article 93(2) is intended to provide the Commission with all the relevant information needed to decide in the shortest possible time whether certain State measures are compatible with the requirements of the common market. In both cases, there is a need to ensure that a general requirement of certainty is fulfilled. [35]

If the aid is incompatible (as well as being unlawful), it may serve no purpose, in certain cases, to stagger the verification procedure by ruling on the infringement of Article 93(3). On the contrary, it is preferable that it should be determined definitively and without delay that the State intervention in question, in addition to infringing the procedural requirements, is contrary to the interests of the Community.

34 — See, in particular, the judgments in Cases 171/83, 173/73, 234/84 and 94/87, cited above.

35 — It seems that the Court's case-law confirms that the initiation or pursuit of the procedure under Article 93(2) is required even when there are merely doubts as to the compatibility of aid. An indication to that effect is to found in the judgment of 20 March 1984 in Case 84/82 *Federal Republic of Germany* v *Commission* [1984] ECR 1451 in which the Court granted the Federal Republic's application for a declaration that the Commission had infringed its obligations under Article 93(2) by failing to initiate the verification procedure in regard to compatibility. In particular, the Court decided that 'one of the main characteristics distinguishing the examination under Article 93(2) from the preliminary examination under Article 93(3) resides in the fact that the Commission is under no obligation at the preliminary stage to give notice to the parties concerned to submit their comments. However, such a procedure, which guarantees the other Member States and the sectors concerned an opportunity to make their views known and allows the Commission to be fully informed of all the facts of the case before taking its decision, is essential whenever the Commission has serious difficulties in determining whether a plan to grant aid is compatible with the common market' (paragraph 13). Although that case was concerned with an aid project of which proper notice had been given, the Court's observations on the nature and scope of the examination of compatibility are of general application and, for that reason, the initiation of the relevant procedure is required even if the Commission has received notice of aid unlawfully granted.

If the aid is compatible, at least under certain conditions, it is even more important that its compatibility should be determined *erga omnes* and that the aid itself may rapidly and lawfully be paid out.

That applies in particular to the exceptions under Article 92(3). It is clear that those exceptions are provided, and must be applied, 'in the general interest'. There is thus no reason to suspend or exclude the application of those exceptions merely because the Member State granting the aid has infringed Article 93(3). If it were otherwise, there would be a risk of failing to authorize the payment of aid meeting important objectives which were compatible with the interests of the Community.

In addition, following the Commission's request to its logical conclusion, even aid falling within Article 92(2) — and hence lawful *per se* — would be incompatible with the common market if it has been granted contrary to the requirements of Article 93(3).

Without prejudice to the possibility of independent proceedings being brought in respect of such an infringement, I consider that the Commission is required to make an assessment of the aid in the light of the exceptions mentioned in Article 92(3) and cannot therefore restrict itself to an assessment in regard to Article 92(1). Although it is true that the assessment is of a discretionary nature, the purpose of such an assessment is none the less laid down in the Treaty and corresponds to the three paragraphs of Article 92. Just as it is not possible to go beyond that content, I conclude that the Commission is required to carry out a complete examination of compatibility, that is to say, in regard to all the criteria laid down in Article 92, including those in Article 92(3).[36]

20. Finally, it should be observed that in the context of the procedure under Article 93(2), all interested parties, both Member States and private persons, are entitled to 'submit their comments' (which in fact conforms to the principal objective, namely to ensure that the substantive assessment is as clear and complete as possible).

Moreover, Community law protects the position of the person who informed the Commission of the existence of aid, guaranteeing him a right of action both against a Commission decision declaring the aid compatible with the common market and against a possible failure to act on the part of the Commission if, following the complaint, it adopts no measure, either positive or negative, under Article 93(2).

It is clear that any system which has the result of impeding or delaying the completion of the procedure under Article 93(2) is necessarily prejudicial to the procedural and substantive guarantees which third parties (Member States and private persons) enjoy under the Treaty.

I therefore consider that, whenever it becomes aware of the existence of aid, the Commission is required to pursue the

36 — In regard to the unitary and binding character of the verification of compatibility, see, in particular Smit and Herzog, cited above, p. 415: 'When investigating the incompatibility of an aid with the common market, the Commission should also examine on its own motion whether any of the exceptions of Article 92(2) or 92(3) are applicable, in particular if the facts and the arguments advanced indicate that an exception may be applicable'.

procedure under Article 93(2) until a final decision on compatibility has been adopted.

21. Naturally, if it appeared essential to ensure the effective functioning of the system of preventive supervision to subordinate the application of Article 92(3) to compliance with the obligations under Article 93(3), the Community legislature could intervene on the basis of Article 94. However, until such time as such intervention takes place, it seems to me that it must be accepted that the procedural obligations under Article 93(3) and the verification of compatibility are quite distinct and, therefore, the infringement of the former does not affect the requirement to carry out the latter in a proper and timely manner.

That conclusion is supported by the fact that, as has been said, unlawfulness on the ground of an infringement of Article 93(3) may be effectively dealt with either at national level or at Community level and that, in particular, in order to prevent the prolongation of the verification procedure from depriving a subsequent order for recovery of the aid of all significance, the Commission may apply to the Court, or may itself adopt, the necessary interim measures. However — and this is the point to be emphasized — such measures, even when they are adopted directly by the Commission, do not preclude but prepare the way for the final decision on compatibility (over which the Court may exercise fully its powers of judicial review), since they merely make it possible to prevent circumstances which distort competition and which are subsequently impossible or very difficult to remedy, from coming into existence or persisting for the time being.

22. The conclusions I draw from the foregoing analysis are thus as follows:

(i) the question of admissibility raised by the Commission should be reformulated as indicated above;

(ii) the content and purpose of the obligations under Article 93(3) imply that any aid implemented in breach of those obligations is unlawful;

(iii) that unlawfulness gives rise to precise consequences in respect of which proceedings may be brought both at national level and at Community level;

(iv) in particular, the Commission may order that aid unlawfully implemented should be recovered even if the aid itself has subsequently been declared compatible with the common market;

(v) furthermore, interim measures may be adopted to prevent the effects of the Commission's definitive decision from being prejudiced by the unlawful implementation of the aid;

(vi) however, an infringement of the obligations contained in Article 93(3) is not of such a nature as to permit the Commission not to assess the compatibility of the aid with the common market in the light of the provisions of Article 92(3).

Substance of the case

A — The application of Article 92(1)

The nature of the contribution to capital made by the Belgian Government

23. The Belgian Government denies that the financial intervention carried out in regard to Tubemeuse constitutes aid within the meaning of Article 92(1). On the contrary, it represents a perfectly normal addition to capital in accordance with current business practice in a market economy. In particular, the Belgian Government behaved like any shareholder which, having already made a substantial investment, found itself confronted with a difficult situation and felt obliged to make further contributions in order to ensure the continuation of the undertaking's activities and, therefore, the possibility of obtaining a return, however limited.

In support of that argument, Belgium points in particular to the fact that its conduct as a shareholder is essentially similar to that of other shareholders in competing undertakings. It also observes that the investments in Tubemeuse were in part financed by an international banking consortium, which shows that, at least in the medium term, there had to be some prospect of economic revival. Finally, the Belgian State points out that its financial contributions were carried out on the basis of information supplied by a well-known international firm of business consultants.

24. In that regard, I would point out that, according to now settled case-law, a State holding in the capital of an undertaking may be regarded as State aid if the conditions laid down in Article 92 are fulfilled.[37]

The Court also pointed out in *Intermills* that:

'... the granting of aid, especially in the form of capital holdings acquired by the State or by public authorities, cannot be regarded as being automatically contrary to the provisions of the Treaty. Thus, irrespective of the form in which aid is granted, be it as a loan or as a capital holding, it is the Commission's task to examine whether it is contrary to Article 92(1) and, if so, to assess whether there is any possibility of its being exempt under Article 92(3), giving the grounds on which its decision is based accordingly' (paragraph 32).

In the judgment in Case 234/84 *Belgium* v *Commission*, it was also stated that, in order to establish whether financial participation by the State in an undertaking may be regarded as aid, it was appropriate:

'to apply the criterion of determining to what extent the undertaking would be able to obtain the sums in question on the private capital markets. In the case of an undertaking whose capital is held by the public authorities, the test is, in particular, whether in similar circumstances a private share-

37 — See, in particular, the judgments of 14 November 1984 in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, of 13 March 1985 in Joined Cases 296 and 318/82 *Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, and of 10 July 1986 in Case 234/84 *Belgium* v *Commission* [1986] ECR 2281.

holder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question' (paragraph 14).

25. In the contested decision, the Commission stated that Tubemeuse could not have obtained the finance in question on the private capital market for a series of reasons. In particular, it was demonstrated in detail that the sector involved was marked by a considerable structural excess of production capacity, that the demand for non-welded tubes for oil exploration, which represents the largest single source of demand for that product, was slowly contracting, that the financial situation of Tubemeuse has been marked for some time by substantial losses (in 1984, the loss was greater than 14% of turnover, including financial costs of 8.4%), which led to a gradual disengagement of the private shareholders.

In such circumstances — which are not contested — it must be concluded that the Commission correctly applied Article 92(1) by concluding that the financial intervention in question constituted State aid intended to permit the survival of an undertaking which could not otherwise have obtained on the financial markets the funds necessary to continue in business.

26. Furthermore, the Commission replied convincingly to the arguments put forward by the Belgian Government to show that the financial contributions at issue could not be regarded as aid intended to save the undertaking from collapse.

In particular, it should be noted with regard to the conduct of shareholders in competing undertakings that no comparison may be drawn with the conduct of the Belgian Government as an investor in Tubemeuse since such undertakings, as well as having undertaken effective restructuring measures, had a substantially positive financial position and economic prospects.

With regard to the finance which Tubemeuse obtained from the banks, the decisive factor in my opinion is that such investments were in fact covered by a guarantee provided by the Belgian State, which thereby assumed the risks inherent in such transactions.

Finally, with regard to the fact that the Belgian Government acted in accordance with the advice of an international consultancy firm, it should be noted first that, as the Commission has pointed out, the report drawn up in 1986 by that firm itself highlights the fact that the undertaking's overall position had been extremely precarious since 1983 from several different points of view (operating results, insufficient diversification, financial charges and liquidity). Moreover, the Commission produced a document drafted in 1985 by the Comité national belge de planification et de contrôle de la sidérurgie (Belgian National Committee for Planning and Supervision in the Steel Industry) which stated that, even if the undertaking had succeeded in reducing its financial burdens by means of a financial restructuring, production costs would none the less have remained 3.9% higher than selling prices. That report also revealed how Tubemeuse, confronted with the structural financial difficulties which appeared in 1979, turned to the public authorities (both local and regional) to find a solution to those problems.

Therefore, it must be concluded that the Commission was right in believing that the Belgian company probably could not obtain the money it needed on the financial markets and that, consequently, the State intervention involved must be regarded as State aid within the meaning of Article 92(1).

The effect on intra-Community trade

In this context, the Belgian Government points out that, at the time at which it received aid, Tubemeuse exported 90%, that is to say, almost all, of its production, outside the Community, more precisely, to the Soviet Union.

The Belgian Government concludes firstly from that fact that the intervention in question may be regarded at most as aid for exports to third countries and is therefore a measure permitted under Article 112 of the Treaty.

In the second place, having regard to the quantity of the exports to non-member countries, it must be concluded that the aid in question is not of such a nature as to have any influence on intra-Community trade. In any event, the Commission has not provided an adequate statement of the reasons on which that part of the decision is based.

27. With reference to Article 112, it should be pointed out that it cannot be ruled out a priori that aid for exports to non-member countries might, at least in certain circumstances, have an effect on intra-Community trade thereby provoking distortions of competition. It may be, for example, that a subsidy scheme for exports to non-member countries would permit the undertaking receiving the aid to offer prices on the Community market significantly below those which it would otherwise be possible to charge. In such a case, I do not believe that Article 112, which merely provides for the progressive harmonization of systems of aid for exports to non-member countries, is of such a nature as to put an intervention by the public authorities outside the scope of Article 92.

Article 112, having regard to its scope, its purpose and to the legislative context in which it is placed, cannot be interpreted as a rule permitting exceptions to be made to other provisions of the Treaty such as those dealing with State aid. It is therefore necessary to determine in each individual case whether a given system of aid for exports to non-member countries is or is not likely to affect trade and distort competition within the Community. [38]

In general, therefore, it does not appear that the interpretation of Article 112 relied on by the Belgian Government can be upheld. In any event, it must be emphasized that, in this particular case, the aid granted to Tubemeuse cannot be regarded as aid for exports to non-member countries. It is not in fact a benefit granted in connection with commercial transactions with non-member countries. On the contrary, it is intervention intended to support the undertaking's production and, as such, falls outside the scope of Article 112.

38 — See, for example, Smit and Herzog, cited above in footnote 29, p. 397.

28. What must therefore be decided is merely whether the production aid offered by the Belgian Government, through the financial contributions in question, is of such a nature as to affect trade within the Community.

The condition concerning the effect on trade between the Member States is intended to define the scope of the Community rules designed to regulate competition. In accordance with that criterion, the Community rules do not cover measures or conduct the effect of which is exclusively limited to the territory of one Member State and which, therefore, are not capable of affecting, even indirectly, freedom of intra-Community trade in a way which could hinder the realization of a single market, as might be the case, for example, in a situation in which the measures or conduct significantly altered the structure or development of competition in the common market. [39]

Firstly, the products in question here are traded between the Member States. In particular, as can be seen from the contested decision, approximately 50% of Community production is absorbed by internal demand. Furthermore, about 25% of exports (in 1984) were to other Member States. At the same time, Tubemeuse's production constituted 17% of Community output and, as has been said, about 90% of that production was exported to the Soviet Union.

29. The position of an undertaking which represents 17% of Community production certainly cannot be regarded as marginal; consequently, the massive aid granted to it is of such a nature as to alter the normal course of competition and, therefore, to have an effect on the flow of trade. Moreover, the fact that at the time that the aid was granted, the undertaking exported the greater part of its production to a non-member country does not appear decisive. What is important is that the product in question is traded between the Member States and, in particular, that Tubemeuse was in a position to take part in that trade in a significant way. Moreover, the Court has already decided on other occasions that the fact that an undertaking endeavours to direct its exports to non-member countries does not mean that aid granted to it will not hinder trade between the Member States. [40]

The latter observation is consistent with the need to assess, in a dynamic perspective, whether the condition of hindrance to trade (and also that of distortion of competition) exists. [41] In this case, the Commission, in assessing the effect on trade of the aid in question, rightly took account of the foreseeable development of the pattern of trade. In the contested decision, the Commission in particular pointed out how, in a general

39 — Those principles, laid down by the Court in the context of the interpretation of Articles 85 and 86 (see, in particular, the judgment of 31 May 1979 in Case 22/78 *Hugin* v *Commission* [1979] ECR 1869) also concern Article 92, the condition concerning the effect on Community trade obviously having the same function in the context of all three provisions, which all form part of the chapter of the Treaty concerned with 'rules on competition'.

40 — See the judgment of 10 July 1986 in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 23

41 — See, on that subject, J. Megret: *Le droit de la Communauté économique européenne*, Vol 4, p. 384.

context marked by a high degree of integration of world markets and a growing imbalance between world supply and demand (due to the increased production capacities of recently industrialized countries and State-trading countries and to the reduction in demand in the United States — because of the entry into force of import restrictions — and in demand in the oil industry), a reorientation of Tubemeuse's activities towards the internal EEC market could reasonably be predicted. It should be pointed out that the validity of those predictions is confirmed by developments since 1984. Information supplied at the hearing by the Commission's representative showed that in 1987 Tubemeuse exported 23% of its production to the common market and that that figure had increased to 33.3% in the first half of 1988.

It must therefore be concluded that, in this case, the Commission was right in believing that the aid granted by the Belgian Government would have an effect on intra-Community trade and that, therefore, the contested decision was adequately and clearly reasoned in regard to the facts and assessments on the basis of which the Commission formed its opinion on that point.

B — The application of Article 92(3)

30. The Belgian Government considers that in this case, the Commission should have accepted that the aid in question fell under the exceptions provided for in Article 92(3)(a) and (c).

It should be pointed out that the arguments put forward in that regard are very brief and are not supported by any real evidence.

In particular, it can be seen from the contested decision that the Commission rejected in this case the application of the provisions of Article 92(3)(a) on the basis of an earlier socio-economic analysis of the Belgian regions in question (Decision 82/740/EEC of 22 July 1982, Official Journal L 212, 9.11.1982, p. 18, amended by Decision 45/544/EEC of 31 July 1985, Official Journal L 341, 19.12.1985, p. 19), which showed that in those regions the standard of living was not abnormally low and there was no serious underemployment. The Belgian Government merely supplied information concerning the closure of certain undertakings located there without contesting the content of the assessments made in those decisions.

With regard to the exception in Article 92(3)(c), the Commission points out that in this case the undertaking is operating in a market marked by a considerable structural excess of supply and that the Belgian Government's financial intervention appears to have been wholly unlinked to any effective restructuring plan, with consequent reductions in production capacity. Under those circumstances, the aid granted to Tubemeuse permitted it to maintain or increase its share of the market to the disadvantage of other undertakings which were not receiving similar support from the public authorities and which were obliged to restructure their own production capacity in accordance with the needs of a market in which supply exceeded demand. The aid in question thus affected trade in a way which was undoubtedly contrary to the general interest. The Commission therefore was

right to consider that the exception provided for in Article 92(3)(c) should not be applied.

C — The implementation of the contested decision

31. In the view of the Belgian Government, the Commission did not take account of the fact that Tubemeuse was subject to judicial composition proceedings at the time that the contested decision was adopted and that, for that reason, the decision could not be implemented.

The Belgian Government puts forward the following arguments in that regard:

(i) the contested decision is without purpose and, therefore, cannot be implemented inasmuch as the undertaking had ceased to exist from an economic point of view;

(ii) the composition proceedings made immediate implementation of the decision impossible;

(iii) having regard to the fact that the company was subject to such proceedings, the obligation to recover the aid was disproportionate.

32. The arguments put forward by the Belgian Government, if correctly understood, lead to a result which is likely to undermine the effectiveness of the rules on aid. It would be sufficient for an undertaking which has obtained massive financial support from the State to enter into composition proceedings to prevent the application to it of the provisions of Article 92 *et seq.* It should also be added that in this case, even after the adoption of the contested decision, Tubemeuse continued to carry on its activities. Full implementation of the Commission's decision was therefore essential in order to avoid a continuation of the distortions of competition brought about by the aid.

There is also no reason to grant an undertaking subject to composition proceedings more favourable treatment than is granted to any other undertaking in regard to the obligation to recover aid. As has already been pointed out at some length, the Commission is always entitled to call for recovery of aid which has been unlawfully paid. It is then for the Member State concerned to find the appropriate way of arriving at that result. That also applies to undertakings which are subject to composition proceedings, having regard to the fact that the amounts which the State is required to recover became part of the undertaking's assets unlawfully.

Finally, it should be emphasized that the Commission has not sought immediate recovery of the unlawful payments but has merely called upon the Belgian Government to take the necessary steps, within the context of the means offered by the national legal system, to obtain such repayment. The Member State has fulfilled that obligation by recording the amounts in question in the debts forming part of the composition with the company's creditors, a step which the Commission has stated to be adequate to ensure compliance with the obligation to recover stemming from the contested decision. Having regard to that fact, there is no need to refer in this case to the settled case-law of the Court according to which only absolute impossibility can justify the

failure to implement an order for recovery.[42]

I therefore conclude that the special position in which the undertaking found itself at the time that the contested decision was adopted is not of such a nature as to prevent implementation of that decision, particularly since it appears, at least on the basis of what has emerged in these proceedings, that the Member State has actually carried out the obligation imposed on it.

D — Failure to grant a fair hearing

33. The Belgian Government points out that, in the contested decision, the Commission refers to the observations submitted by 'three other Member States and four professional associations of producers of steel tubes'. Those documents, relevant to the decision, were not produced to, and commented upon by, the parties concerned.

In that regard, it is sufficient to point out that the contested decision is based on a series of objective economic factors relating to the situation and development of the relevant market of which the Belgian Government was informed and in relation to which it submitted its own arguments. I therefore conclude that the observations in question, regrettable as it may be that they were not properly communicated, had no influence on the content of the decision and that, therefore, the failure to communicate them does not make it possible to annul that decision.

I would refer in that regard to the judgment in Case 234/84 *Belgium* v *Commission*, cited above, in which the Court, in reply to a similar observation, stated that:

'the contested decision is sufficiently supported by the objective information referred to in the statement of the reasons on which it was based, of which the Belgian Government was fully apprised and in respect of which it was afforded every opportunity to make known its views. It follows that, even without the comments which the Commission received from interested third parties in the course of the procedure, the decision could not have been substantively different. In those circumstances the mere fact that the Commission mentioned those comments in its decision without having afforded the Member State concerned an opportunity to comment on them does not justify a declaration that the decision is void' (paragraph 30).

34. Having regard to all of the foregoing considerations, I conclude that the Court should:

(i) declare the application admissible in all respects;

(ii) dismiss it on its merits;

(iii) order the Belgian Government to pay the costs.

42 — See, most recently, the judgment of 2 February 1989 in Case 94/87 *Commission* v *Federal Republic of Germany* [1989] ECR 175, in particular paragraphs 8 and 9 (footnote 24 above).