REPORT FOR THE HEARING
In Case C-225/91 *

I — Summary of the facts

1. In the Community framework on State aid to the motor vehicle industry (OJ 1989 C 123, p. 3, hereinafter 'the Community framework'), the Commission defined the rules for notification of aid in that sector and the guidelines for its assessment.

All aid measures granted by public authorities within the scope of an approved aid scheme to an undertaking operating in the motor vehicle sector are, from 1 January 1989, subject to prior notification on the basis of Article 93(3) of the EEC Treaty, where the cost of the project exceeds ECU 12 million.

Rescue and restructuring aid will only be approved in exceptional circumstances. By contrast, the Commission has a generally positive attitude to aid for vocational training linked to investments, provided that such aid does not simply alleviate the cost burden which undertakings would normally have to bear. Operating aid, which has a direct and ongoing distortive effect, is prohibited even in disadvantaged regions.

The Commission has a positive attitude towards investment aid granted in order to help overcome structural handicaps in disadvantaged regions. Although such aid is usually granted automatically in accordance with modalities previously approved, the Commission requires notification in order to assess the regional development benefits against possible adverse effects on the sector as a whole.

2. In accordance with the provisions of Article 93(3) of the Treaty and the Community framework, the Portuguese Republic notified the Commission by letter of 26 March 1991 of a proposed aid for Newco, an undertaking created in equal shares by Ford Motor Company Inc (hereinafter 'Ford') and Volkswagen AG (hereinafter 'VW') for setting up a factory for multi-purpose vehicles at Setúbal, for the period from 1991 to 1995. That notification was followed on 16 April by a second notification relating to additional factors 'substituting and supplementing' the file.

3. The total cost of the project was given as ESC 454 000 million (ECU 2 550 million), of which ESC 297 000 million were regarded as investment conferring entitlement to State aid.

4. The aid notified, whose total amount is ESC 97 440 million, comprises a regional subsidy of ESC 89 100 million (ECU 500 million) paid under the Sistema de Incentivos de Base Regional (SIBR), the Portuguese regional aid system approved by the

* Language of the case: French.

Commission, and tax reliefs of ESC 8 340 million (ECU 47 million) granted from 1997.

5. The project also envisages a training programme organized by the Portuguese Government and Newco, costing ESC 36 000 million (ECU 202 million), financed to 90% by the Portuguese Government with the support of the European Social Fund, and certain investment in infrastructure, borne by the Portuguese Government with the support of Community funds. By letter of 31 May 1991 the Portuguese Government sent the Commission information on that programme.

6. It appears from the case-file that production was to start at the end of 1994 and reach 190 000 units annually from 1996, sold by Ford and VW in individualized versions via separate commercial networks; the project was to create 5 000 jobs directly and 7 000 indirectly.

7. By letters of 17 June 1991 to Commissioners Bangemann and Millan, Matra, which produces the 'Espace' multi-purpose vehicle distributed by Renault, asked the Commission to ensure that the distortions of competition implied by the project were avoided and to open an official inquiry allowing all those interested to state their positions.

8. On 26 June 1991 Matra lodged a complaint with the Commission alleging infringements of Article 92 et seq. of the Treaty by the Portuguese Government and of Article 85 by VW and Ford.

9. On 27 June 1991 a meeting took place between Commission officials and Matra, at which Matra expressed its concern and the Commission explained why the procedure under Article 93(2) had not been initiated.

10. By decision of 16 July 1991 the Commission informed the Portuguese Government that it had no objections to the aid scheme notified.

The Commission considered that the creation of infrastructure did not constitute State aid; the same was the case with the training programme, which was independent of the joint venture and also served the needs of other vehicle manufacturers. The aid intensity was 33.5% in terms of gross grant equivalent (GGE) and 27.1% in terms of net grant equivalent (NGE); when approving the SIBR the Commission had accepted, for Setúbal, a regional investment aid intensity of 75% GGE and agreed that that aid could be combined with other subsidies, such as fiscal aid, up to 75% NGE, regardless of the size of the project.

The Commission acknowledged the importance of the project for the development of Setúbal. It noted the structural handicap of that region, in particular its geographical remoteness from the principal markets and its relative economic backwardness, which factors entailed increased costs for transport, storage, often non-local personnel, and infrastructure. Despite savings in relation to

labour and building costs, the net cost disadvantages and the need for an additional incentive to attract investment in the region justified the level and intensity of the aid proposed.

As regards the project's effect on the multipurpose vehicle sector, the Commission noted a continuing growth in demand reaching 300 000 to 400 000 units per year by the mid 1990s. Although giving Ford and VW a considerable share of Community production capacity for those vehicles, the project would not lead to excess capacity in the near future, even allowing for the other projects underway or at the planning stage.

11. On 17 July 1991 the Commission replied to Matra's letter of 17 June, stating that substantial improvements had been made to the draft aid project and that the notification from the Portuguese Government, duly supplemented following requests by the Commission, balanced the regional interests of the Community against the concern to avoid any distortion of competition.

12. On 30 July 1991 the Commission sent Matra, for information, a copy of its decision of 16 July. With respect to Article 85 of the Treaty, the Commission stated that in its opinion the exemption provided for in paragraph 3 could be applied to the cooperation between Ford and VW, but it had decided to initiate the procedure provided for in Article 19(3) of Regulation No 17 in order to allow interested third parties to submit their observations.

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

1. The application by Matra SA was lodged at the Court Registry on 6 September 1991.

2. By order of 4 December 1991 the President of the Court dismissed Matra's application for suspension of operation of the decision whose annulment is sought (Case C-225/91 R [1991] ECR I-5823).

3. By orders of 8 April 1992 the Portuguese Republic, Ford of Europe Inc. and Ford Werke AG (hereinafter 'Ford') and Volkswagen AG were given leave to intervene in the case in support of the form of order sought by the Commission.

4. The applicant, *Matra*, claims that the Court should:

— declare the application admissible;

— annul the Commission's decision dated 16 July 1991 and generally take all measures the Court considers appropriate to terminate the existence and consequences of the infringement of the rules of the Treaty of Rome complained of below;

— order the defendant to pay the costs.

5. The defendant, the *Commission*, contends that the Court should:

— dismiss as unfounded the application by Matra SA for annulment of the Commission's decision of 16 July 1991 concerning aid for the joint venture between Ford and Volkswagen for the manufacture of multi-purpose vehicles in Setúbal;

— order the applicant to pay the costs.

6. The *Portuguese Republic*, intervening in support of the form of order sought by the Commission, contends that the Court should:

— declare the application inadmissible on the grounds that the applicant has no interest in bringing proceedings;

— consequently, dismiss the application;

— alternatively, declare that the pleas in law relied on by the applicant in support of its claims are altogether unfounded;

— in either case, order the defendant to pay the costs.

7. *Ford*, intervening in support of the form of order sought by the Commission, contends that the Court should:

— dismiss Matra's application for annulment of the Commission's decision taken on 16 July 1991 approving the aid granted to the Ford/Volkswagen multi-purpose vehicle project in Portugal;

— order Matra to pay the costs of the proceedings, including the costs incurred by the interveners Ford of Europe Inc. and Ford Werke AG.

8. *VW*, intervening in support of the form of order sought by the Commission, contends that the Court should:

— dismiss the claims of the applicant Matra SA;

— order Matra SA to pay the costs of the proceedings, including the costs borne by the intervener.

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

III — Pleas in law and arguments of the parties

A — *Admissibility*

1. The *Commission*, defendant, does not consider that the decision is addressed to Matra, but concedes that it is of direct and individual concern to Matra, in view of its position in the market.

There is no need to ascertain whether all the conditions defined in the judgment in Case 169/84 *Cofaz* v *Commission* [1986] ECR 391 are met, since that judgment concerns the case where the procedure under Article 93(2) has been initiated and a strict application of those conditions would restrict the remedies open to competing undertakings.

2. *Ford*, intervener, submits that the decision is not of direct and individual concern to Matra, since Matra only produces the 'Espace' multi-purpose vehicle; the vehicle is distributed by Renault, which therefore bears the economic risk.

3. The *Portuguese Republic*, intervener, likewise challenges the application's admissibility.

The rules on intervention do not prevent an intervener from raising a plea of inadmissibility which has not been put forward by the defendant. The Portuguese Republic states in this respect that the intervener has an autonomous interest, that the plea of inadmissibility does not call into question the Commission's claim that the application should be dismissed, that the 'case as [the intervener] finds it' does not mean that that question cannot be raised, that the intervener cannot be subject to the strict provisions of Article 91 of the Rules of Procedure, and that the applicant retains the possibility of replying to the pleas in law put forward by the intervener. In any event, questions of admissibility are a matter of public policy and should be examined by the Court of its own motion.

Matra is wrong to consider that the decision is addressed to it. Although Article 175 is not referred to, the letters of 17 June 1991 called upon the Commission to act and Matra was aware as from the meeting of 27 June 1991 that that invitation had been rejected. If that date is taken, the question then moreover arises whether the application is time-barred. The Commission's letters of 17 July 1991 are merely confirmatory of that rejection decision, and the communication to Matra of the contested decision on 30 July 1991 is merely a gesture of courtesy.

Nor can Matra claim to be directly and individually concerned. The Portuguese Republic refers to the *Cofaz* judgment cited above, and states that if an undertaking, not being the addressee of a decision, has not taken part in the procedure under Article 93(3), in particular because that procedure has not been initiated, there is no need for a legal remedy intended to protect its legitimate

interests. The contested decision is of concern to Matra only by virtue of its objective capacity as a motor vehicle manufacturer (see Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219). The preservation of certain market shares is not a legitimate interest protected by law. Taking part in the pre-litigation procedure is essential for assessing the interests of the various interested parties: whereas all the persons interested have the right to be heard as part of a procedure and the right to react against a refusal to initiate one, not all those interested persons, even if they have taken part in the procedure, can claim that a decision approving the aid is of direct and individual concern to them.

4. *Matra*, applicant, argues primarily that the question of admissibility was decided by the order of 4 October 1991 on interim measures.

Alternatively, it submits that it is the addressee of the contested decision, in so far as that decision rejected its complaint of 26 June 1991, expressly distinguished it individually and was specifically addressed to it by the Commission.

In the further alternative, Matra submits that it is directly and individually concerned (see the *Cofaz* judgment, cited above). It played an important part in the preliminary procedure under Article 93 and its market position would be affected substantially by the contested aid. The argument put forward by Ford, apart from having no legal foundation, is based on an error of fact in that Matra, not Renault, would be effected by the Newco joint venture.

B — *Procedure*

1. *Matra* puts forward two pleas in law alleging breach of essential procedural requirements and of general principles of Community law.

2. The *Commission* considers that those pleas are unfounded.

The plea of breach of essential procedural requirements

— The complaint of procedural defects

1. *Matra* complains that the Commission committed a first infringement of essential procedural requirements by not initiating the procedure under Article 93(2) despite the existence of serious difficulties in considering whether the aid was compatible with the Treaty, in particular Article 92 and Articles 85 and 86 (see Case 84/82 *Germany* v *Commission* [1984] ECR 1451). With respect to Article 92, Matra refers in particular to the high amount of the aid and the risk of creating excess capacity. It states that the Commission itself was uncertain as to the compatibility with Articles 85 and 86 of the agreement between Ford and VW.

The course of the procedure demonstrated the existence of serious difficulties: secret bilateral negotiations took place between the Portuguese authorities and the Commission from 1990; in view of the length of those negotiations, the formal notification procedure had necessarily been simplified. The Portuguese authorities had made substantial

changes to the original project and the authorization had been granted subject to conditions, relating *inter alia* to making the training programme available to other manufacturers and to the use of infrastructure. The requirement of annual reports showed that the Commission was concerned as to the possible effects of the project on the market.

Matra also refers to elements of fact which it considers required the initiation of a procedure, namely the disproportionate nature of both the project and the aid, the sensitivity of the motor vehicle sector and the Commission's reservations with regard to other, smaller-scale projects.

Matra accuses the Commission of a second procedural defect, namely authorizing the aid without awaiting the outcome of the exemption procedure under Article 85(3) concerning the Ford/VW agreement. The Court held in Case 73/79 *Commission* v *Italy* [1980] ECR 1533 that a procedure under Articles 92 and 93 must never lead to a result contrary to other provisions of the Treaty, in that case Article 95. That applies *a fortiori* for the relationship between Article 92 et seq. and Article 85 et seq. The Court has sometimes held aspects of an aid which contravene certain provisions of the Treaty other than Articles 92 and 93 to be indissolubly linked to the object of the aid, and consequently applied the procedure under Article 93 alone (see the judgments in Case 75/76 *Iannelli & Volpi* v *Meroni* [1977] ECR 557 and Case 47/69 *France* v *Commission* [1970] ECR 487), sometimes accepted the cumulative application of the procedures (see *Commission* v *Italy*, cited above). Whichever position is adopted, the Commission should have examined all the problems raised from the point of view of competition law before reaching a conclusion either on Articles 92 and 93 or on Articles 85 and 86. The Commission rendered meaningless the exemption procedure under Article 85(3), in particular the consultation of third parties. The separation of the two procedures moreover led the Commission to adopt contrary positions: in the exemption procedure it stated that the Newco project would lead to a fair competition structure; when approving the aid, the Commission asserted that the distortion of competition created was consistent with the objectives of the Treaty.

The legal syllogism consisting of the statement, firstly, that aid cannot be granted unless the project is implemented, secondly, that that implementation is conditional on exemption and, consequently, that aid cannot be granted unless there is an exemption, is erroneous. The major premise does not correspond to reality: the first instalment of aid was paid on signing of the contract, with no condition as to implementation of the investment; similarly, the aid relating to infrastructure and training was to be paid in any event. In any case, the application is directed against the decision as such, not the actual payment of the aid. The minor premise is also defective: the procedure under Article 85(3) does not have suspensory effect, it is often long, and it does not always lead to an explicit decision. Moreover, the effect on the validity of contracts of the automatic nullity of clauses which restrict competition is a matter of national law, and it is doubtful whether a third party can argue before a Portuguese court for the nullity of a contract to which he is not a party. The conclusion of

the syllogism is therefore wrong: the decision to authorize the aid is legally independent of the outcome of the exemption procedure.

2. According to the *Commission*, Matra's argument amounts, having regard to the Community framework and the scale of investment in the motor vehicle sector, to requiring the Commission of its own motion to initiate the procedure under Article 93(2) for every case of regional aid. In the present case the Commission did not encounter serious difficulties in assessing the aid.

The preliminary contacts with the Portuguese authorities took place in the context of good cooperation between Community and national authorities and were neither secret nor excessively long. The notification of 16 April 1991 did not contain any substantial amendment compared with the formal notification of 26 March 1991, but was intended solely to fill in certain gaps and correct some minor errors. The contested decision did not state any condition; the reports requested by the Commission were intended to verify *ex post facto* whether the infrastructure was being used for common purposes and whether payment of the aid was carried out in accordance with the notification.

As to the complaint of a breach of the exemption procedure under Article 85(3), the Commission notes that that procedure cannot preclude the Commission from exercising its powers under Articles 92 and 93. To be sure, the Commission cannot regard systems of aid as compatible with the common market if they contravene other provisions of the Treaty; in the present case, however, the Commission adopted its decision of approval only after reaching a first favourable assessment of the Ford/VW agreement. Be that as it may, the Portuguese Government can grant the aid only if the investment is carried out; if an exemption is refused, the Portuguese authorities cannot grant the aid, since the joint venture and the investment cannot be implemented.

3. *Ford* also points out the difference between Articles 85 and 92, the former concerning undertakings and the latter concerning the Commission and the Member States. The Commission should first have examined whether the aid in question fell within the derogation under Article 92(3), before examining the possibility of exemption for the Ford/VW agreement. Under the terms of the agreement between Ford and VW on the one hand and the Portuguese Government on the other, and in accordance with Portuguese law, any aid would have to be reimbursed if an exemption was refused.

4. The *Portuguese Republic* states that the obligation to notify aid in the motor vehicle sector, an obligation incumbent on Member States under the Community framework, requires the State to know precisely what information to notify. The contacts with the Commission prior to the notification proper concerned technical questions and did not constitute negotiations. The notification itself was made within the time-limit imposed and supplemented in order to remedy certain minor omissions; the terms and the time taken for assessment of the notification corresponded to the Commission's usual practice. The oral contacts subsequent to the notification had the aim of explaining and confirming the information previously notified.

According to the judgment in *Germany* v *Commission*, cited above, the decision to initiate the procedure provided for in Article 93(2) is based on the conclusion reached by the Commission following the preliminary examination. The applicant's view, which consists of identifying serious difficulties which require the initiation of the procedure, would alter the discretion conferred on the Commission by the Treaty and would oblige the Court to take the place of the Commission in exercising that discretion.

The Portuguese Republic shares the Commission's views on the relationship between Articles 85 and 92.

— The complaint of failure to state reasons

1. According to *Matra*, the statement of reasons for the decision, with reference to the compatibility of the aid scheme with Article 92(3), is inadequate or even non-existent. The analysis of the factual situation, in particular the examination of the relevant market on which distortions of competition are to be avoided, is defective. The actual financial impact of the subsidy is measured only as a percentage of the total investment of the parent companies, without being compared with the investment carried out by direct competitors, the different elements of investment, or the net annual profit of a factory of equivalent capacity of one of the parent companies, and without being analysed from the point of view of its effect on the break-even point of the joint venture. Similarly, the decision does not contain any detailed analysis of the investment itself, which in view of its amount clearly exceeded what was normal in the industry. Finally, there is no financial analysis of the effect of the subsidy, with respect to the alleged regional handicap, on the other operators in the market; the elements of the economic backwardness of Setúbal should have been specified, and also the extent to which the investments in infrastructure and occupational training did not correspond thereto.

2. The *Commission* replies that Matra's criticisms of the statement of reasons overlap with those relating to whether the decision is well-founded, and it refers to its arguments on that point.

The statement of reasons for a favourable decision on specific regional aid is necessarily different from that for a negative decision. The statement of reasons should be considered in the context of the general aid scheme, the SIBR, approved by the Commission, the method of application of Article 92(3)(a) and (b) adopted in 1988, and the Community framework. In that perspective the analysis of the market in the contested decision was sufficiently detailed. Similarly, the Commission took into account, at the level of the structural handicap, the additional transport, storage, personnel and infrastructure costs.

3. The *Portuguese Republic* advances similar arguments and submits a detailed account of the national regional aid scheme, approved by the Commission, which was the context of the aid in question.

Breach of general principles of law

— The complaint of infringement of the rights of the defence

1. *Matra* criticizes the Commission for having infringed the general principle of respect for the rights of the defence, which also applies in matters of State aid. The preliminary procedure under paragraph 1 of Article 93 does not give those concerned similar guarantees to those under paragraph 2 (see *Germany* v *Commission*, cited above).

Even supposing that it was able to refuse to initiate that procedure, the Commission would still have infringed Matra's rights of the defence by carrying out a consultation that was inadequate. The meeting on 27 June 1991 remained purely formal, since the contested decision was formally adopted shortly afterwards. None of Matra's arguments were taken up or refuted in the decision; the applicant never had access to the case-file, nor was it able to submit its comments on the draft decision. The distinction between complainants and undertakings which are the object of an investigation against them is immaterial.

2. The *Commission* replies that the procedure provided for in Article 93(2) was not deliberately avoided, but did not prove to be essential. The applicant had had an opportunity to communicate its observations to the Commission before the decision was adopted and the initiation of a formal procedure would not have afforded it any further advantage. The Commission had taken account of all Matra's observations, but was not obliged to include with its decisions a detailed account of the arguments and counter-arguments thrown up by the complaints. The Court distinguishes, as regards the extent of the rights of the defence, between persons against whom an administrative decision is taken and complainants (see Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487).

3. The *Portuguese Republic* adds that the applicant could have challenged the Commission's refusal to initiate the procedure.

— The complaint of breach of the principle of sound administration

1. *Matra* submits that the Commission infringed the principle of sound administration by refusing to initiate the procedure under Article 93(2), which would have enabled it to obtain full information, and by adopting the decision before having established whether the recipient undertaking was validly constituted from the point of view of competition law.

2. The *Commission* submits that it had before it all the elements needed for deciding its position and it took Matra's observations into account.

C — *Substance*

1. *Matra* puts forwards three pleas in law in support of its claim for annulment: manifest errors of assessment, errors of law and misuse of powers.

2. The *Commission* contends that those pleas are unfounded.

The plea in law alleging manifest errors of assessment

— The complaint of failure to recognize a risk of excess capacity

1. *Matra* criticises the Commission for a manifestly erroneous assessment of the facts: according to independent experts, known European investment projects would lead to a production capacity by the end of 1995 estimated at 500 000 vehicles, for a market of 300 000 units, in other words excess capacity of over 50%. It submits that Ford's figures are incomplete and even by extrapolating forecasts for the year 2000, there is excess capacity of 40 to 50%.

The answer to the contradiction between a reduced but expanding market and the Newco project's process of large series manufacture consists in 'preempting' the market, firstly by obtaining a dominant position as rapidly as possible and secondly by massively subsidizing production in the initial period while waiting for sales to increase. Consequently, all operators not subsidized have to bear additional costs, reduced profitability and destabilised competition.

The Commission cannot contest the danger of a dominant position on a part of Ford and VW by requiring the maintenance of different models and distribution networks. The benefits flowing from the aid, the neutralization of competition between Ford and VW and the economies of scale will allow the joint venture to act independently of its competitors. In its assessment of the economic impact of the subsidy, the Commission did not take account of the existence of the economic rent following from the joint dominant position.

2. The *Commission* notes that in the Community framework it stated that regional aid should not lead to important overcapacities. The Newco venture would not reach full production until 1996 and total sales from present or future factories for 1995 should not exceed demand, estimated at 325 000 units; that demand was likely to develop and reach 500 000 units in 1999, approximately equivalent to production capacity. Even taking Japanese imports into account, the Newco project ought not to lead to substantial excess capacity.

A dominant position is defined by economic independence with respect to other operators in the market. Despite a market share of 35%, Ford and VW cannot act without taking into account the other European manufacturers of multi-purpose vehicles, Chrysler/SDP, PSA/Fiat and Matra/Renault. Given that Ford and VW market different models via independent networks, their market shares can moreover not be aggregated to establish a joint dominant position. The economies of scale are neutralized in part by the additional costs of developing the joint product and of differentiating the models; Matra moreover benefits from similar economies by reason of its cooperation with Renault.

3. *Ford and VW* note to begin with that in applying Article 92(2) the Commission has a wide discretion (judgments in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671; Case 310/85 *Deufil* v *Commission* [1987] ECR 901; Case C-301/87 *France* v *Commission* [1990] ECR I-307). The Court must therefore limit its review of lawfulness to ascertaining whether there is a manifest error of assessment of the facts or a misuse of powers.

VW considers that there is no principle under which investment aid is authorized pursuant to Article 92(2) and (3) only if it does not lead to excess capacity. In the Community framework the Commission only pointed out the risk of substantial overcapacity. VW is uncertain whether a separate market exists for multi-purpose vehicles in view of the possibilities of substituting brakes or other small commercial vehicles. The market surveys carried out by Matra are limited to 1995, proceed from the false premise that Newco will be in full production immediately, and disregard sales outside western Europe.

Ford considers that an extrapolation of the market development forecasts submitted by Matra for the year 2000 allows a prediction of demand between 450 000 and 980 000 units, as against the production capacity of 536 000 units. Account must also be taken of exports outside western Europe and of the excess production capacity which the motor vehicle industry requires for economic reasons.

The existence of different models and distribution networks has the result of maintaining competition between Ford and VW with respect to prices, brand name, services and even quality. The joint enterprise, far from creating a new dominant position, helps to eliminate that of Matra/Renault.

— The complaint of manifestly erroneous assessment of the regional handicap

1. *Matra* complains that the Commission erred in analysing the facts with respect to the assessment of the structural handicap justifying the level and intensity of the aid. The additional costs in respect of transport, training, relocation of some management personnel and investment should have been set against the savings which could be realised at Setúbal; Matra refers in this respect to the lower costs for the workforce, land, construction and maintenance, to economies of scale as a result of the agreement between Ford and VW, and to the savings from infrastructure having being put in place and from the presence of other motor vehicle manufacturers. According to Matra, the additional cost of ECU 170 to ECU 220 per vehicle corresponds to a direct aid of ECU 600 to ECU 1 000, amortized normally over seven years.

The Commission also committed a manifest error of law by accepting, contrary to its 1979 communication on regional aid and to the Community framework, that the aid should neutralise not only additional investment costs but also operating costs. A distinction should be drawn between current operating expenditure, included in the

operating accounts of undertakings, and aid for investment corresponding to the balance sheet headings 'tangible or intangible assets'.

The Commission is wrong to accept that regional aid may lead to delocalization of industries and the transfer of existing jobs. Matra also challenges the regional character of the project, in so far as its actual economic effect will materialise to a significant extent outside Portugal. The aid allows Ford and VW to reduce the investments which would normally have had to be carried out; the planned factory will be an assembly plant with limited local added value and with no significant transfer of technology; the trade flows caused will benefit essentially the producers of primary components, in particular Ford and VW, located in the centre of Europe; 95% of production will be re-exported, which makes the contested aid appear to be a direct subsidy to export; to the extent that it constitutes operating aid, the aid will benefit the finances of the joint venture, not the region described as disadvantaged.

The fact that the subsidy is lower than 75% (NGE) does not constitute a guarantee that the Commission did not commit a manifest error of assessment. Matra submits figures showing an aid intensity of 67% with respect to the eligible physical investment, the only relevant investment.

The data provided by Ford on the structural handicap emphasizes the absence of any justifying figures in the decision. Matra challenges Ford's figures, however, and by setting the net regional handicap against the aid, reaches a net benefit per vehicle which is thirteen to twenty times higher than that submitted by Ford.

2. The *Commission* points out that a competitive advantage is inherent in all aid referred to by Article 92(1). All that matters is the compatibility of the aid with the derogations provided for in Article 92(3)(a).

With respect to the regional handicap, the Commission states that the aid is to neutralise the additional costs not only of investment, but also of the operation of the new plants. The aid should also encourage undertakings to transfer to the regions in question. The Commission analysed all the factors in order to ensure a balance between the requirements of competition and of regional development, the importance of which is emphasized in the Community framework. The Commission thus examined each item of investment, and also the additional operating costs (for a period of 5 years) resulting from the Setúbal location, taking into account any savings as a result of that location. The aid intensity was assessed with reference to the criteria used for other investment for regional purposes, namely the impact of the investment and the associated production on the market segment in question, the nature of the eligible expenditure for the determination of aid intensity, a cost/benefit analysis of the investment taking into account the geographical component, and the direct and indirect benefits at regional level.

Determination of the intensity of regional development aid falls within the discretion with respect to economic policy conferred on the Commission by Article 92. The regional assistance constitutes no more than one third of the ceiling authorized by the Commission in the context of the SIBR in Portugal, and is justified by relation to the additional costs incurred in setting up at Setúbal; the tax advantages, spread over a period from 1997 to 2001, represent a regional incentive proper. The intention is to create jobs, not to delocalize them.

The Commission states that the notification does not refer to a commitment by Ford and VW to obtain a certain amount of supplies from Portuguese undertakings. Such a commitment might be contrary to Article 30 of the Treaty. However, that is a condition which is not closely linked with the aid scheme notified, and it does not call in question the decision of 16 July 1991 (see the *Iannelli & Volpi* judgment, cited above).

3. *VW, Ford and the Portuguese Government* observe that regional development is one of the objectives of the Treaty and that Article 92(3) lays down an exception to the principle of free competition, in favour of the economic development of least favoured regions. Portugal meets the criteria set out by the Commission in its communication on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ 1988 C 212, p. 2). In that method the Commission accepted a maximum of 75% (GGE) of the initial investment for the regions in question. However, the contested aid has an intensity of only 27%. Moreover, it is integrated into the SIBR programme, previously approved by the Commission, and complies with the Community framework which stresses the importance of investment in the motor vehicle sector in less favoured regions. Since the Commission, in the exercise of its discretion, is bound by the principles defined for the application of Article 92(3)(a), it could not refuse to authorize the aid in question, once the conditions determined were satisfied.

The *Portuguese Government* refers to the structural difficulties of the Setúbal region and notes the positive effects of the investment at the level of transfer of technology, local added value, the balance of payments and employment; the Government states that Ford and VW have undertaken to acquire from national undertakings in the motor vehicle accessory sector, up to a certain value, products to be used for vehicles made in other Ford or VW factories.

VW states that the investment aid is aimed not only at the additional net costs resulting from setting up a project in an underdeveloped region, but also the additional net costs resulting from operation of the project in that region.

Ford submits data on the additional costs resulting from the Setúbal site compared with an investment in northern Europe. A comparison of those additional costs with the savings resulting from that site leads to an investment incentive of ECU 53 per

vehicle. Ford also emphasizes the importance of the project for the regional development of Setúbal.

— The complaint of manifestly erroneous assessment of the aid for infrastructure and training

1. *Matra* criticizes the Commission for not having taken into account the aid for infrastructure and training when assessing the impact on competition.

Even if other undertakings could in future benefit from the new infrastructure at the level of roads, water and electricity supply and treatment of waste, in practice they benefit only VW and Ford and therefore constitute State aid.

The aid for the training programme is excessive and there is no evidence to show that other undertakings have access to the programme. Moreover, a not inconsiderable part of the training will be carried out within the joint venture.

Matra states that in the initial notifications the Portuguese Government indicated 'prelaunch' costs of the order of ECU 200 million relating to the training and diminished productivity of the employees. By a mere stroke of the pen those ineligible costs were transformed into training costs of an equivalent amount, subsidized with the agreement of the Commission.

2. The *Commission*, expressly supported on this point by *Ford*, replies that the infrastructure at the level of roads, urbanization and waste disposal will be for general use. As to the other infrastructure work, the services supplied to Ford/VW will be charged at the market price.

The amount of the aid for occupational training is not disproportionate for 4 000 workers. The training programme is accessible to other motor vehicle manufacturers and only a small part of the training will be carried out in the new installations.

3. The *Portuguese Republic* adds that Article 92(1) covers aid relating to costs which are normally borne by undertakings, which is not the case for investment in infrastructure or training.

The plea in law alleging an error of law

1. *Matra* complains that the Commission authorized the aid on the basis of the SIBR without taking into account the actual distorting effect on the market, and accepted the need for an additional incentive going beyond that justified on the basis of the regional handicap. Article 92(3) makes the compatibility of an aid with the common market subject to the existence of a benefit which cannot be obtained by means of the market, but on condition that the distortion of competition is not excessive compared

with the interests of the Community and that the aid is indispensable for achieving the regional, social or economic objective. The Commission cannot deviate from those limits by means of legislative or administrative provisions such as the authorization of the SIBR.

In this respect Matra notes the excessive character of the investment compared with similar projects and the intensity of the aid. The new figures put forward by Ford show that the Commission took its decision on the basis of exaggerated data. Matra also repeats the complaint of the excessive character of the aid compared with the regional handicap. It claims that Ford and VW themselves acknowledge that the joint venture is not viable without subsidy and concede that the aid is not really intended to compensate for an alleged regional handicap but to allow two multinationals to carry out an attractive project.

2. The *Commission* states that analysis of the contested aid in the context of regional development is at the heart of the dispute, and refers to its previously stated position on the aid intensity and competitive benefit.

3. *Ford* criticizes Matra for comparing the investment in the Newco scheme with other projects with different technical and economic characteristics. The estimated costs of the investment have, moreover, meanwhile been reduced by approximately ECU 268 million, so that the Newco project is in line with other similar investments.

According to *Ford and VW*, it is only aid which has caused investment in a disadvantaged region which falls within Article 92(3)(a) (see the *Philip Morris* judgment, cited above). If the aid did no more than compensate the regional handicap, it would not have fulfilled that condition as to causality.

The plea in law alleging misuse of powers

1. *Matra* submits that by prejudging the outcome of the procedure initiated pursuant to Article 85(3), the Commission committed an abuse of procedure.

2. The *Commission* does not accept that criticism and refers to its reply to the plea alleging breach of essential procedural requirements.

3. The *Portuguese Republic* adds that Matra has failed to show that the means used, namely the acceptance of the aid, enables the alleged objective to be achieved, namely the authorization of the Ford/VW agreement without awaiting the outcome of the exemption procedure.

F. A. Schockweiler
Judge-Rapporteur