JUDGMENT OF THE COURT
21 November 1991 *

In Case C-354/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the French Conseil d'État (Council of State) for a preliminary ruling in the proceedings pending before that court between

Fédération Nationale du Commerce Extérieur des Produits Alimentaires,

Syndicat National des Négociants et Transformateurs de Saumon

and

French State

on the interpretation of the last sentence of Article 93(3) of the EEC Treaty,

THE COURT,

composed of: O. Due, President, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn, Presidents of Chambers, G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, M. Díez de Velasco and M. Zuleeg, Judges,

* Language of the case: French.

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the French Government by Jean-Pierre Puissochet, Director of Legal Affairs at the Ministry of Foreign Affairs, acting as Agent, and Géraud de Bergues, Deputy Principal Secretary at the same Ministry, acting as Deputy Agent,

— the Commission of the European Communities, by Antonino Abate, Principal Legal Adviser, and Michel Nolin, a member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the French Government, the United Kingdom represented by Richard Plender QC, acting as Agent, and the Commission of the European Communities, at the hearing on 11 July 1991,

after hearing the Opinion of the Advocate General at the sitting on 3 October 1991,

gives the following

Judgment

1 By order of 26 October 1990, which was received at the Court on 30 November 1990, the French Conseil d'État referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the last sentence of Article 93(3) of the EEC Treaty.

2 The question was raised in the course of two actions, one commenced by the Fédération Nationale du Commerce Extérieur des Produits Alimentaires and the other by the Syndicat National des Négociants et Transformateurs de Saumon. Those actions are for the annulment of the Interministerial Order of 15 April 1985 (published in the *Journal Officiel de la République Française* on 20 April 1985) implementing Decree No 84-1297 of 31 December 1984 imposing parafiscal charges for the benefit of the Comité Central des Pêches Maritimes (the Central Committee for Sea Fishing), local committees for sea-fishing and the Institut Français de Recherche pour l'Exploitation de la Mer (French Research Institute for the Use of Marine Resources) published in the *Journal Officiel de la République Française* on 12 January 1985.

3 It is apparent from the documents before the Court that in 1982 the Commission of the European Communities notified the French authorities of its intention to initiate the procedure provided for in Article 93(2) of the Treaty with respect to the activities and intervention operations of the Fonds d'Intervention et d'Organisation des Marchés des Produits de la Pêche Maritime et des Cultures Marines (Fund for Intervening in and Organizing the Markets in Sea-fishing and Sea-farming products, hereinafter referred to as 'FIOM') in the sea-fishing sector. Following an initial examination of the information provided by the French authorities, the Commission decided on 27 July 1984 to commence the relevant procedure and put the French Government on notice to submit its observations on the detailed rules for levying the parafiscal charge which had been introduced, in particular, for the benefit of FIOM. The French authorities replied to the Commission in September and December 1984 and at the same time informed it that a new decree introducing parafiscal charges for the benefit of FIOM was being prepared. This decree was adopted on 31 December 1984. The Interministerial Order setting the rate of the charges was adopted on 15 April 1985. By letter of 25 October 1985, the Commission stated that it had decided to terminate the procedure commenced in 1982 except as regards certain aspects of the activities of FIOM which do not form the subject-matter of the proceedings before the Conseil d'État.

4 The plaintiffs in the main proceedings contested the validity of the Interministerial Order of 15 April 1985 on the ground that the French authorities had disregarded, in particular, the last sentence of Article 93(3) of the Treaty.

5 Taking the view that an interpretation of that provision was necessary to settle the dispute, the Conseil d'État decided to stay the proceedings pending a preliminary ruling by the Court on the question whether:

'... the last sentence of Article 93(3) of the Treaty of 25 March 1957 is to be interpreted as imposing on authorities of the Member States an obligation whose infringement will affect the validity of measures giving effect to aid, regard being had *inter alia* to the supervening adoption by the Commission of a decision by the Commission declaring the aid to be compatible with the common market'.

6 Reference is made to the Report for the Hearing for a fuller account of the legal context, details of the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed below only in so far as is necessary for the reasoning of the Court.

7 Article 93(3) of the Treaty is worded as follows:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member

State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision'.

8 In order to assess the implications of Article 93(3), it should be borne in mind that the implementation of the system of supervising State aid, as it is established by Article 93 of the Treaty and the relevant case-law of the Court, is a matter for the Commission and for the national courts.

9 As far as the role of the Commission is concerned, the Court pointed out in its judgment in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, at paragraph 9, that the intention of the Treaty, in providing through Article 93 for aid to be kept under constant review and supervised by the Commission, is that the finding that aid may be incompatible with the common market is to be arrived at, subject to review by the Court, by means of an appropriate procedure which it is the Commission's responsibility to set in motion.

10 As far as the role of national courts is concerned, the Court held in the same judgment that proceedings may be commenced before national courts requiring those courts 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.

11 The involvement of national courts is the result of the direct effect which the last sentence of Article 93(3) of the Treaty has been held to have. In this respect, the Court stated in its judgment in Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471 that the immediate enforceability of the prohibition on implementation referred to in that article extends to all aid which has been implemented without being notified and, in the event of notification, operates during the preliminary period, and if the Commission sets in motion the contentious procedure, until the final decision.

12 In view of the foregoing considerations it must be held that the validity of measures giving effect to aid is affected if national authorities act in breach of the last sentence of Article 93(3) of the Treaty. National courts must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures.

13 It is true that in its judgments in Case C-301/87 *France* v *Commission* [1990] ECR I-307 and Case 142/87 *Belgium* v *Commission* [1990] ECR I-959 the Court did not find that the Commission had the power to declare aid illegal solely on the ground that the obligation to notify had not been complied with and without having to investigate whether the aid was compatible with the common market. However, that finding has no effect on the obligations of national courts deriving from the direct effect which the prohibition laid down by the last sentence of Article 93(3) of the Treaty has been held to have.

14 In this respect it should be noted, as did the Advocate General in point 24 of his Opinion, that the principal and exclusive role conferred on the Commission by Articles 92 and 93 of the Treaty, which is to hold aid to be incompatible with the common market where this is appropriate, is fundamentally different from the role of national courts in safeguarding rights which individuals enjoy as a result of the direct effect of the prohibition laid down in the last sentence of Article 93(3) of the Treaty. Whilst the Commission must examine the compatibility of the proposed aid with the common market, even where the Member State has acted in breach of the prohibition on giving effect to aid, national courts do no more than preserve, until the final decision of the Commission, the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by the last sentence of Article 93(3) of the Treaty. When those courts make a ruling in such a matter, they do not thereby decide on the compatibility of the aid with the common market, the final determination on that matter being the exclusive responsibility of the Commission, subject to the supervision of the Court of Justice.

15 In the second part of its question, the Conseil d'État inquires about the possible effect, on the validity of measures giving effect to the aid, of a final decision by the Commission declaring the aid compatible with the common market.

16 It must be stated in this regard that the Commission's final decision does not have the effect of regularizing *ex post facto* the implementing measures which were invalid because they had been taken in breach of the prohibition laid down by the last sentence of Article 93(3) of the Treaty, since otherwise the direct effect of that prohibition would be impaired and the interests of individuals, which, as stated above, are to be protected by national courts, would be disregarded. Any other interpretation would have the effect of according a favourable outcome to the non-observance by the Member State concerned of the last sentence of Article 93(3) and would deprive that provision of its effectiveness.

17 Taking all these matters into account, the answer to the question asked by the Conseil d'Etat must be that the last sentence of Article 93(3) of the Treaty is to be interpreted as imposing on authorities of Member States an obligation whose infringement will affect the validity of measures giving effect to aid, and that the subsequent adoption by the Commission of a final decision declaring the measures compatible with the common market does not have the effect of regularizing the invalid measures *ex post facto.*

Costs

18 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the French Conseil d'Etat, by order of 26 October 1990, hereby rules:

The last sentence of Article 93(3) of the EEC Treaty is to be interpreted as imposing on the authorities of the Member States an obligation whose infringement will affect the validity of measures giving effect to aid, and that the subsequent adoption by the Commission of a final decision declaring the measure to be compatible with the common market does not have the effect of regularizing the invalid measures *ex post facto*.

Due Schockweiler Grévisse Kapteyn

Mancini Kakouris Moitinho de Almeida Díez de Velasco Zuleeg

Delivered in open court in Luxembourg on 21 November 1991.

J.-G. Giraud
Registrar

O. Due
President