FOR THE HEARING
in Case C-354/90 *

I — Facts and written procedure

1. In the course of an investigation carried out in proceedings instituted under Article 93(2) of the EEC Treaty in respect of 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 ('FIOM') in the sea-fishing sector, the Commission requested the French authorities in July 1984 to inform it of the detailed rules for applying the parafiscal charge adopted, amongst others, for the benefit of FIOM by Decree No 75-22 of 13 January 1975 distinguishing, in particular, between the taxation of landed products and the taxation of imported products. After having sent their reply to the Commission the French authorities informed it in December 1984 that a new decree levying parafiscal charges for the benefit of FIOM was being prepared. It was made clear, in particular, that the rates of charge applied to products imported or landed in France by foreign fishing vessels were lower than those applicable to French catches. This new decree appeared in the *Journal Officiel de la République Française* of 12 January 1985 (Decree No 84-1297 of 31 December 1984).

In response to the doubts expressed by the Commission regarding the compatibility with the Treaty of those charges, the French Government provided further clarification and sent the texts of the decrees and also the Interministerial Order of 15 April 1985 fixing the rates of the parafiscal charges (published in the *Journal Officiel de la République Française* on 20 April 1985). In October 1985, the Commission gave its final, negative decision terminating the proceedings instituted in 1982 in so far as they related to the financial support which is in issue in the proceedings before the referring court.

2. On 21 June 1985, the Fédération Nationale du Commerce Extérieur des Produits Alimentaires and the Syndicat National des Négociants et Transformateurs de Saumon initiated proceedings before the Conseil d'État de la République Française (Council of State of the French Republic) for the annulment of the Inter-ministerial Order of 15 April 1985 implementing Decree No 84-1297 of 31 December 1984 adopting parafiscal charges. In support of their applications they rely, in particular, on the argument that the last sentence of Article 93(3) of the EEC Treaty was disregarded.

3. Article 93(3) provides

'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

* Language of the case: French.

effect until this procedure has resulted in a final decision.'

4. Being of the opinion that the proceedings raise a question concerning the interpretation of the last sentence of Article 93(3) of the Treaty, the Conseil d'État decided on 26 October 1990, pursuant to Article 177 of the Treaty, to stay the proceedings until the Court of Justice had ruled on the question whether

'... the last sentence of Article 93(3) of the Treaty of 25 March 1957 must 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, regard being had *inter alia* to the supervening adoption by the Commission of a decision declaring the aid to be compatible with the common market'.

5. The order for reference was received at the Court Registry on 30 November 1990.

6. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted:

— by the Government of the French Republic, by the Ministère des Affaires Etrangères (Minister of Foreign Affairs), represented by Jean -Pierre Puissochet and Géraud de Bergues, respectively Agent and Deputy Agent of the French Government,

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

7. 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.

II — Summary of the written observations submitted to the Court

8. According to the *French Government*, the disregard by a Member State of the obligation laid down by the last sentence of Article 93(3) of the Treaty does not affect the validity of measures giving effect to planned aid.

9. In support of this argument, the French Government refers to the case-law of the Court of Justice (Case 6/64 *Costa* v *Enel* [1964] ECR 585; Case 77/72 *Capolongo* v *Maya* [1973] ECR 611; Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471; Case 78/76 *Steinike and Weinlig* v *Germany* [1977] ECR 595; and Case C-301/87 *France* v *Commission* [1990] ECR I-307) and infers from it that the last sentence of Article 93(3) of the Treaty is directly enforceable whereas the other provisions of Articles 92, 93 and 94 of the EEC Treaty do not create rights for individuals unless a decision of the Commission (or, as the case may be, an act of the Council on the basis of Article 94) has been adopted. Enforcement of a decision of the Commission declaring the measure in question compatible or incompatible with the common market can be sought in

national courts. It follows from this case-law of the Court that until the Commission has taken a decision national courts must ensure that the prohibition contained in the last sentence of Article 93(3) of the Treaty is observed. Once the Commission has taken its decision, the national courts can only apply that decision.

10. Referring to the Court's judgment in Case 173/73 *Italy* v *Commission* [1974] ECR 709, the French Government states that the Commission does not appear ever to have been obliged to declare aid incompatible with the Treaty merely because Article 93(3) of the Treaty had not been observed. Moreover, the practice followed by the Commission confirms this view. Similarly, the Commission is not obliged to require the repayment of that part of the aid already granted in disregard of the prohibition contained in Article 93(3) of the Treaty, even if the scheme in question ultimately proves to be incompatible with the Treaty (see the judgment in Case 52/83 *Commission* v *France* [1983] ECR 3707).

11. The French Government observes that the Commission's view that unnotified aid is illegal *per se* was not adopted by the Court in its judgment in Case C-301/87 *Commission* v *France*, cited above. It is apparent, in particular, from that judgment that the Commission is obliged to undertake a substantive examination of the compatibility with the common market of aid granted by a State, even if the State has disregarded the prohibition laid down by the last sentence of Article 93(3). The Commission may not therefore declare aid incompatible with the Treaty solely on the grounds that that provision has been infringed. The Court has recognized the Commission's right to require the Member State in question to suspend the payment of the aid in dispute until completion of the investigation into the aid. If the State involved does not do so, the Commission may bring the matter directly before the Court for a declaration that the Treaty has been infringed, whilst continuing the substantive investigation into the compatibility of the aid with the common market. The French Government considers that it follows from this decision of the Court that a national court may not annul a decision by a Member State to grant aid merely because the procedural rules of Article 93 have been disregarded. Where there has been such a disregard, the Commission is still obliged to continue the substantive examination of the aid, and, where appropriate, to find that it is compatible with the Treaty. As was stated by the Commissaire du Gouvernement, Mr Fouquet, at the hearing before the French Conseil d'État, 'I do not see why a national court should impose a ruling upon a Member State, where aid has been recognized as compatible, which the Court of Justice refused to apply to the Member State when the Commission asked it to do so'.

12. Finally, the French Government proposes that the Court of Justice should answer the preliminary question referred by the French Conseil d'État by ruling that the last sentence of Article 93(3) of the Treaty is to be interpreted to the effect that it does not impose upon Member States an obligation, the mere disregard of which affects the validity of national measures giving effect to aid.

13. The *Commission* states that the referring court's question requires an answer which safeguards and reinforces the direct effect of the last sentence of Article 93(3) of the Treaty. Without this direct effect and its consequences for national authorities, national courts and individuals, the

Commission would hardly have any power to deal with the unlawful practices often adopted by certain Member States. The prohibition laid down in the last sentence of Article 93(3) and the resultant unconditional obligation upon Member States are justified by the scheme of Article 92 and, in particular, by the exclusive competence which it confers upon the Commission. Article 92(1) lays down the general principle that aid is prohibited. Aid escapes that prohibition only after it has been examined by the Commission and if it is compatible with the derogations laid down by Article 92(2) and (3). In the absence of an express authorization from the Commission, the aid is prohibited. The prohibition contained in the last sentence of Article 93(3) of the Treaty is only the mirror image of the prohibition contained in Article 92(1) of the Treaty and gives real weight and practical effect to the latter prohibition. The absolute, unconditional and binding nature of the prohibition in Article 93(3) of the Treaty is apparent from its wording which leaves no latitude for the slightest exception, and from the function which it fulfils in the attainment of the aims of Articles 92 and 93 of the Treaty. In support of this argument, the Commission cites passages from the Opinion of the Advocate General in Case C-301/87 *France* v *Commission*, cited above.

The Commission contends that in the Community's institutional framework concerning aid it has exclusive competence. National measures giving effect to aid not authorized in advance by the Commission lack a legal basis because they have been implemented by an authority which has no competence to do so. A reading of Article 92(2) in conjunction with Article 93(3) of the Treaty confirms the argument that the Member States have no competence to grant aid outside the Community's institutional framework. It follows that the assessment of the compatibility of aid with the common market pursuant to Article 92(1) may not, at any rate in the period before any decision is taken recognizing the compatibility of the aid, disregard any failure to observe the prohibition set out in the last sentence of Article 93(3). Infringement of that provision necessarily entails the incompatibility of the aid which neither the Commission nor the Court of Justice can subsequently cure because the concept of a common market is of general application and underlies all the provisions of the Treaty and secondary law. Aid cannot be compatible with the common market if it conflicts with provisions of the Treaty other than Article 92. Compliance with Article 93(3) is required to the same extent as compliance with other provisions of the Treaty which have direct effect. In view of the scheme and objectives of Article 93 and, especially, the function of the last sentence of Article 93(3), this serves to ensure the correct functioning of the common market: (see the judgments in *Italy* v *Commission and Steinicke*, cited above, and in Joined Cases 91/83 and 127/83 *Heineken* v *Inspecteurs der Vennotschapsbelasting* [1984] ECR 3435).

14. In order to stop infringements of Article 93(3) by Member States, this provision must be interpreted on the basis of its practical effect. Legal certainty and uniformity of application of the Treaty are to be assured, in particular, by the possibility of commencing proceedings before a national court to interpret the concept of aid 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 that procedure (judgment in *Steinicke*, cited above).

The Commission stresses in particular that in its view the power of national courts is to be preserved and even reinforced. They constitute one of the clearest achievements of subsidiarity and the second pillar on which the system of supervision of aid is based. Moreover, it would be impossible for those courts to ensure repayment of aid which has been unlawfully granted if they could not base their assessment on the infringement by Member States of an absolute and unconditional obligation, namely the one laid down in the last sentence of Article 93(3). Undertakings which have suffered damage as a result of an infringement by a Member State of the prohibition contained in the last sentence of Article 93(3) must be afforded the fullest guarantees, including the repayment of aid unlawfully granted to a competitor and damages where appropriate.

The Commission should also be able to declare aid unlawful for being in breach of the last sentence of Article 93(3). The Commission could thus make use of this possibility in certain cases and subject to certain conditions, in order, for example, to deal with individual aid measures which are unlawful, that is to say aid in respect of which the urgent measures recognized by the Court in its judgment in Case C-301/87 *France* v *Commission*, cited above, do not appear to be applicable, that judgment being concerned essentially with systems of aid.

15. The Commission goes on to point out that direct effect is indissociable and intrinsic; it is an original property which characterises certain legal provisions in relation to others. It is true that the decisions of the Court reveal direct effect but direct effect is an integral part of a provision from the beginning.

The relevant case-law concerning the direct effect of Article 93(3) of the Treaty is laid down in the judgments in Case 6/64 *Costa* v *Enel*; Case 77/72 *Capolongo*; Case 120/73 *Lorenz*, cited above; Case 121/73 *Markmann* v *Germany* [1973] ECR 1495; Case 141/73 *Lohrey* v *Germany* [1973] ECR 1527); Case 78/76 *Steinike*, cited above. In view of the mandatory and irreversible nature of direct effect, the Commission has no power to modify the effect of Article 93(3) of the Treaty. Thus, the decision adopted by the Commission on 9 October 1985 under Article 93(2) could never affect the operation of the prohibition laid down by Article 93(3) or even less limit the extent of the power of assessment of national courts.

16. The Commission contends, finally, that once it is established that there is an unconditional obligation to respect the prohibition laid down by the last sentence of Article 93(3) and that it has direct effect, any decision by the Commission authorizing aid unlawfully put into effect cannot alter the legal position laid down by the Treaty and cannot affect the powers of national courts. The Commission's decision cannot not have retrospective effect and can never cure *ex post facto* the infringement which has been found to exist. It follows that, if a national court were to decide that aid was unlawful and require its repayment, the Member

State concerned could be compelled to comply with the court's decision.

The Commission states that it is aware of the risk of national courts annulling the national aid measure for infringement of Article 93(3) of the Treaty. It could therefore happen that the Commission might authorize aid, or rather the continuation of aid, as being compatible in substance, although it is unlawful for being in breach of Article 93(3), an irregularity which cannot be reversed. This is only an approach and not a position based on the law. It is intended only to meet the administrative requirements of the Commission and is inspired in particular by the principle of procedural economy. The aim is to avoid the commencement of two sets of proceedings in order to achieve the same result. Such an approach could be as follows: when a Member State receives a final, negative decision on account of its infringement of Article 93(3), it could initiate an action to recover the unlawful aid and, if it wishes, notify the Commission at the same time of a plan to grant aid identical to that which was not authorized. Upon receipt of this new plan for aid which in substance is compatible, the Commission would be obliged to authorize it quite quickly, for example within a period of two months. The recovery action already commenced would then lose its purpose, because the undertaking concerned could keep the (unlawful) aid by way of compensation for aid which is compatible and authorized thereafter by the Commission.

17. The Commission proposes that the Court reply to the question posed by the French Conseil d'État as follows:

'(1) The prohibition laid down by the last sentence of Article 93(3) of the EEC Treaty imposes on Member States an unconditional obligation the disregard of which affects the validity of measures giving effect to aid.

(2) The last sentence of Article 93(3) of the EEC Treaty has direct effect and creates rights for individuals which national courts must safeguard.

(3) A final, positive decision adopted by the Commission under Article 93(2) and (3) of the EEC Treaty cannot have retrospective effect and cannot therefore cure defects affecting the validity of measures giving effect to aid.'

G. F. Mancini

Judge-Rapporteur