On those grounds,

THE COURT

hereby:

1. **Declares that, by not complying with the Commission Decision of 4 May 1976 on aid from the Belgian Government to the Société Nationale des Chemins de Fer Belges (SNCB) for through international railway tariffs for coal and steel within the period laid down by the Commission, the Kingdom of Belgium has failed to fulfil an obligation under the Treaty.**

2. **Orders the Kingdom of Belgium to pay the costs.**

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 12 October 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 21 SEPTEMBER 1978 [1]

Mr President,
Members of the Court,

I — By way of introduction to my opinion I consider it necessary to recall the previous steps in the procedure since in the present case their chronological order is of decisive importance.

(1) On 27 May 1970 the Belgian Government, through its Permanent Representatives accredited to the European Communities, notified the Commission that the Société Nationale des Chemins de Fer Belges (the Belgian National Railway Company, hereinafter

1 — Translated from the French

referred to as "the SNCB") intended to lodge a claim with the State from which it holds the concession for financial compensation for the economic disadvantage which it allegedly suffered by reason of the application of through international railway tariffs for goods covered by the ECSC Treaty.

The SNCB assessed that disadvantage for 1971, on the basis of the principles defined in Article 11 (1) of Council Regulation No 1191/69 of 26 June 1969, adopted pursuant to Articles 75 and 94 of the Treaty of Rome, concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, at Bfrs 500 000 000.

The international tariffs in question were established pursuant to an Agreement concluded on 21 March 1955 between the representatives of the Governments of the Member States of the European Coal and Steel Community, meeting within the Council; that Agreement was subsequently amended by three Supplementary Agreements of 1 May 1956, 1 May 1959 and 1 March 1974. It was based on Article 70 of the Treaty of Paris and on Article 10 of the Convention on the Transitional Provisions annexed to that Treaty.

The Belgian Government based its application somewhat succinctly on Regulation No 1191/69 of the Council. In fact it should be understood that it was relying upon the nature "of obligations inherent in the concept of a public service" within the meaning of that regulation which, it considered, were entailed in the application of the ECSC international railway tariffs.

Since the Belgian Government foresaw that such applications would also be submitted in other Member States it requested the Commission to consult those States "in order that an identical view of this matter be taken in the six countries".

A meeting of a group of experts appointed by the governments was held in Brussels on 10 September 1970. At that meeting particular consideration was given to whether the application of the ECSC through international tariffs constitutes a public service obligation and, more specifically, a *tariff* obligation within the meaning of Article 2 (5) of Regulation No 1191/69 and if so, whether such obligation entails economic disadvantages within the meaning of Article 5 (2) of the said regulation.

As the views taken by the various national delegations in the course of that meeting displayed considerable differences it was agreed that the problem should be discussed at another meeting before the end of 1970.

An impression of the subsequent course of events may be obtained from the correspondence between the Director General for Transport of the Commission and the Belgian Permanent Representation.

The Commission's departments went into the details of the question and the Director General notified the Permanent Representation on 2 July 1973 that "the Community and intergovernmental provisions do not entail . . . the obligation to apply fixed prices by prescribing particular tariff measures and they accordingly do not impose a tariff obligation within the meaning of Article 2 (5) of Regulation No 1191/69 which could give rise to compensation pursuant to that regulation".

Having found that the Belgian Government had granted compensation to the SNCB amounting to Bfrs 410 000 000 in 1971 and Bfrs 520 000 000 in 1972 pursuant to that regulation, the Commission, through the Director General for Transport, requested the Belgian Government to "communicate to it all necessary details as to the reasons why that government

considered it appropriate to grant the said compensation".

There then occurs an interlude with the Council: on 11 October 1973 the Netherlands delegation to the Council requested that the Agreement of 21 March 1955 be amended to bring it up to date and take account of the enlargement of the Community.

The Council took note of that request and, in the course of its session of 22 November 1973, required the Permanent Representatives Committee to consider the matter.

In reply to a request by the Commission of 2 July 1973 the Belgian Permanent Representation notified the Commission on 7 December 1973 that the table of sums granted to the SNCB in the framework of the normalization of the accounts, adopted definitively for the 1971 financial year and provisionally for the 1972 and 1973 financial years, referred to the amounts in compensation for the ECSC tariffs as *aids* granted pursuant to Regulation No 1107/70 of the Council of 4 June 1970, adopted pursuant to Articles 75, 77 and 94 of the Treaty and relating to the granting of aids for transport by rail, road and inland waterway.

The Permanent Representation stated that "in our opinion this decision is in accordance with the view of the Commission on this point". Accordingly the Belgian Government had, for the year 1971, decided on, and for the financial years 1972 and 1973 was considering, the replacement of the compensation granted pursuant to Regulation No 1191/69 by an equivalent aid covered by Article 3 (2) of Regulation No 1107/70.

The latter provision provides that:

"... Member States shall... [not] impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article 77 of the Treaty except in the following cases or circumstances:

(2) As regards reimbursement for the discharge of obligations inherent in the concept of a public service:

until the entry into force of relevant Community rules, when payments are made to rail... transport undertakings as compensation for public service obligations imposed on them by the State or public authorities and covering ...:

— tariff obligations not falling within the definition given in Article 2 (5) of Regulation (EEC) No 1191/69".

The Commission, having had this new measure considered in detail by its departments, in collaboration both with the Belgian experts and the Advisory Committee on Aids to Transport set up under the above-mentioned Regulation No 1107/70, notified the Permanent Representation, by way of a letter from the Director General of 24 June 1974, that "it is impossible to consider as compatible with the common market pursuant to Article 3 (2) of Regulation No 1107/70 an aid the object of which is to cover such charges", that is to say the charges entailed by the alleged tariff obligation imposed within the meaning of Article 2 (5) of Regulation No 1191/69.

The Commission observed, as an ancillary point, that "in any event, the Commission must, in accordance with *Article 93 (3)* of the EEC Treaty, be informed of an aid granted pursuant to Article 3 (2) of Regulation No 1107/70".

That was the date on which mention was first made of that provision of the Treaty.

The Commission concluded by requesting the Belgian Government to notify it, if possible before the end of July 1974, of its views on this point and of the measures which it intended to take to rectify the situation.

On 29 November 1974, that is six months later, the Belgian Permanent Representation informed the Director General, in reply to his letter of 24 June 1974, that "it may in fact be concluded that all the conditions necessary for the application 'to the letter' of Regulation No 1191/69 have not been fulfilled" and that "Belgium concedes this point"; on the other hand, the Belgian Representation considered that "the matter in question is indeed a public service obligation of a tariff nature, not a tariff obligation as referred to in Regulation No 1191/69, which justifies the application of Article 3 (2) of Regulation No 1107/70". In short, whilst the Belgian Government had ceased to grant the compensation pursuant to the former regulation it continued to grant it pursuant to provisions in the latter regulation.

In support of its argument the Permanent Representation referred to the judgment of the French Conseil d'Etat of 22 December 1961, *Société Nationale de Chemins de Fer Français* v *Ministère des Travaux Publics, des Transports et du Tourisme*, observed that the Agreement of 21 March 1955 "exceeded the requirements of Article 70 of the Treaty" and added that the Member States were empowered to request the amendment of the said Agreement, pursuant to the wording of Article 17 thereof.

With regard to the Commission's reply to the effect that it required to be informed, pursuant to Article 93 (3) of the Treaty, of an aid granted pursuant to Article 3 (2) of Regulation No 1107/70, the Representative maintained that the formality in question had been completed by a letter No 28.103/ G.12.123 of 21 January 1974 which "was addressed to you by my predecessor; that letter mentioned *inter alia* for 1974 an aid within the meaning of Regulation No 1107/70 of 4 June 1970 amounting to 530 000 000 francs in respect of the ECSC tariffs". Finally, the Permanent Representative transmitted to the Commission the request of the Belgian Government for a review of its position.

I have been unable to find this letter on the file but it is clear from subsequent correspondence that the Commission conceded that it had been informed that the aid granted by the Belgian Government amounted to 410 000 000 francs for 1971, 441 500 000 for 1972, 489 000 000 for 1973 and that the budgetary estimates for 1974 and 1975 amounted to 530 000 000 and 525 000 000 francs respectively.

21 January 1974 is thus the date which must *prima facie* be adopted in establishing whether, in accordance with Article 93 (3), the Commission was "informed, in sufficient time to enable it to submit its comments", of the plan to establish an aid which might be considered compatible with the common market pursuant to Article 92 or to Article 77 of the Treaty and whether the Commission, considering that that plan was not compatible with the common market having regard to Article 92, initiated without delay the procedure provided for in Article 92 (2).

In this connexion, whilst it may be admitted that the notification was indeed made in good time so far as the amounts for the financial years 1974 and 1975 are concerned, I also consider that, having regard to the complexity of the problem and to the prior exchange of correspondence, the letter addressed on 24 June 1974 to the Belgian Permanent Representation by the Director General of the Commission constitutes the initiation "without delay" of the procedure provided for in Article 93 (2), at least for the sums to be granted for the financial year 1975.

(2) At this point it is necessary again to make a "legislative" detour in order to recall that on 20 May 1975 the Commission adopted a decision "on the

improvement of the situation of railway undertakings and the harmonization of rules governing financial relations between such undertakings and States", Article 13 of which states:

"In conjunction with the railway undertaking the State shall draw up a financial programme aimed at achieving the financial balance of the undertaking.

Under this programme the State may grant to the railway undertaking *deficit subsidies* which must be *distinct:*

— from compensation granted in respect of categories of public service obligations provided for by Article 2 of Regulation (EEC) No 1191/69, or of categories of normalization of accounts provided for by Article 4 (1) and (4) of Regulation (EEC) No 1192/69;

— from aid granted in respect of categories of aid provided for by Article 3 of Regulation (EEC) No 1107/70 and Article 9 (2) of this decision;

— from the financial assistance provided for by Article 5 (1) of this decision".

The said Article 9 (2) of the decision provides:

"Pursuant to Article 3 (2) of Regulation (EEC) No 1107/70, compensation may be made in respect of tariff obligations imposed upon railway undertakings and not covered by Regulation (EEC) No 1191/69. Acting on a proposal from the Commission to be submitted not later than 1 January 1978, the Council shall harmonize the procedures for granting such compensation".

As a result of the adoption of that decision, Article 4 of Regulation No 1107/70 no longer applied to national railway undertakings; henceforth Member States might, on the one hand, give financial assistance to such undertakings within the framework of the business plans of the latter in accordance with Article 5 (1) of the decision and, on the other, grant them *deficit subsidies* in accordance with Article 13 of that decision.

It was thus necessary to modify Article 4 of Regulation No 1107/70; this was effected by Regulation No 1473/75 of the Council of 20 May 1975, published in the Official Journal of 12 June 1975, the same day as the decision of 20 May which I have just mentioned, but an earlier page, although the decision gave rise to the regulation. Article 4 as amended reads as follows:

"1. Until the expiry of the period laid down for attaining financial balance in accordance with Article 15 (1) of Council Decision No 75/327/EEC of 20 May 1975... and without prejudice to Regulations (EEC) No 1191/69 and (EEC) No 1192/69 Article 3 shall apply neither to financial assistance given to railway undertakings within the framework of their business plans in accordance with Article 5 (1) of that decision nor to the deficit subsidies granted to them in accordance with Article 13 of that decision.

2. In the absence of Community regulations on the harmonization of the rules governing the financial relations between States and railway undertakings other than those referred to in Article 1 of Decision No 75/327/EEC and without prejudice to Regulations (EEC) No 1191/69 and (EEC) No 1192/69, Article 3 shall not apply to payments by States and public authorities to these undertakings made by reason of any failure to achieve harmonization."

Nevertheless, it was indeed stated in the recitals of the preamble to the regulation that "in view of the special nature of these financial measures, it is advisable to retain, pursuant to Article

94 of the Treaty, the special procedure for informing the Commission provided for in Article 5 (2) of Regulation (EEC) No 1107/70".

Regulation No 1473/75 thus constitutes one of the "appropriate regulations for the application of Articles 92 and 93", adopted by the Council on the basis of Article 94 and in particular determines "the conditions in which Article 93 (3) shall apply and the categories of aid exempted from this procedure".

Article 5 (2) of Regulation No 1107/70 contains the following provisions establishing the *special procedure for informing the Commission:*

„The aids referred to in Article 4 [that is to say, the deficit subsidies and payments provided by States and public authorities for railway undertakings by reason of any failure to achieve harmonization of the rules governing the financial relations between railway undertakings and States, the purpose of such harmonization being to make those undertakings financially autonomous, unlike aids in the form of reimbursement for the discharge of obligations inherent in the concept of a public service, as referred to in Article 3] shall be exempt from the procedure provided for in Article 93 (3) of the Treaty. Details of such aids shall be communicated to the Commission in the form of estimates at the beginning of each year and subsequently, in the form of a report, after the end of the financial year".

It must further be noted that Regulation No 1473/75 did not amend Article 7 of Regulation No 1107/70 whereby:

"The provisions of Article 3 [of Regulation No 1107/70] shall not apply to *measures* adopted by any Member State in *implementation* of a system of aid upon which the Commission has, pursuant to Articles 77, 92 and 93 of the Treaty, already pronounced".

The amounts which the Belgian Government communicated to the Commission in the form of estimates at the beginning of 1974 did not constitute "measures adopted in implementation" of a system of aid upon which the Commission had already pronounced or, at all events, such "implementing measures" were "provisionally incompatible" with the common market since, as early as July 1973, the Commission had clearly stated that it was opposed to the granting of what the Belgian Government described after 7 December 1973 or 29 November 1974 as aids granted on the basis of Article 3 (2) of Regulation No 1107/70 but which it treated, from the point of view of informing the Commission, as aids referred to in Article 4.

It follows — and this appears to me to be a fundamental point — that the aids granted by the Belgian Government are covered by Article 3 (2) of Regulation No 1107/70 and that they *were not* exempted from the procedure prescribed in Article 93 (3) of the Treaty, which remains fully applicable to aids to be granted on the basis of that provision.

(3) On 9 October 1975 the Commission wrote, in the name of one of its Members, to the Belgian Minister for Foreign Affairs, stating that it had taken note of the attitude of the Belgian Government (as set out in the letter of the Permanent Representation of 29 November 1974) which the Commission summarized as follows:

"The Agreement ... of 21 March 1955 must be treated as equivalent to the imposition of a tariff obligation by a Member State and has created a tariff obligation not falling within the definition given in Article 2 (5) of Regulation No 1191/69. Whilst the transport charges in question are not fixed directly by the authorities, the method of arriving at such charges is nevertheless laid down in a binding tariff structure, the result of which is

that the SNCB suffers an actual loss by reason of the fact that, in the absence of an increase in internal tariffs, which is ruled out by the need to remain competitive, or of any modification of the co-efficients of degressivity applicable in Belgium, the tariff provisions under the 1955 Agreement cause a reduction in the international transport charges for ECSC products compared with those normally applied to internal transport".

The Commission, having set out in detail the reasons for its attitude, proceeded *to find* that the aid thus granted by the Belgian Government to the SNCB "is covered by Articles 92 and 93 of the EEC Treaty and cannot be justified either by the provisions of Article 92 (2) and (3) of the Treaty or by those of Article 3 of Regulation No 1107/70".

Nevertheless, the Commission did not rule out the possibility that "if the abolition of the compensation in question were to entail an increase in the SNCB's deficit that additional deficit might ... properly be covered by the Belgian State pursuant to *Article 4* of Regulation No 1107/70" in order to permit the SNCB to achieve a financial balance pursuant to Article 13 of the Council Decision of 20 May 1975.

The Commission, still on the basis of Article 93 (3), requested the Belgian Government, in accordance with the procedure laid down in Article 93 (2), to submit its observations to it before 15 November 1975.

The objection cannot be made that the Commission once again "initiated" the procedure provided for in Article 93 (2), or that such initiation was belated, bearing in mind the amendment introduced by the Council Decision of 20 May 1975 and by Regulation No 1473/75 of the same date, both published on 12 June 1975 in the Official Journal, whilst notification of the aid, assuming that it was in fact effected on 21 January 1974, was undertaken by the Belgian Government on the basis of the earlier version of Regulation No 1107/70. In fact in view of this "legislative" amendment the Belgian Government itself should have undertaken a fresh notification.

On the same date, 9 October 1975, the Commission notified to the other Member States its decision to initiate the procedure provided for in Article 93 (2) in relation to the Belgian system of aids for the SNCB in connexion with the ECSC international tariffs and invited them to submit any comments which they might have within a period of one month. The file contains the comments of the Netherlands Government (letter of 17 November 1975) and of the French Government (letter of 3 December 1975).

It is accordingly clear that the Commission specifically elected to proceed under Article 93 (3) in that, in accordance with Article 93 (2), it gave notice to "the parties concerned" (Belgium and the other Member States) to submit their comments.

On 14 November 1975 the Belgian Minister submitted his comments to the President of the Commission: the Belgian Government confirmed that it was aware, as a result of the previous correspondence, that the Commission categorically ruled out the applicability of Regulation No 1191/69 and that it had accepted the Commission's "narrow" interpretation of the concept of "tariff obligations" within the meaning of that regulation; it nevertheless considered that the application of the ECSC tariff certainly constituted, if not a *tariff* obligation within the meaning of Regulation No 1191/69, at least a *public service obligation* of a tariff nature, which in its view justified the application of Article 3 (2) of Regulation No 1107/70.

The Belgian Government then repeated in detail the line of argument which

had already been set out in the letter from its Permanent Representation of 29 November 1974 concerning the judgment of the French Conseil d'Etat, the Convention on the Transitional Provisions and the Agreement of 21 March 1955; in particular, it relied upon the fact that, contrary to the provisions of subparagraph (2) of the third paragraph of Article 10 of the Convention, the Agreement of 1955 did not undertake the "apportionment of the receipts among the carriers concerned". The Belgian Government, in concluding its comments, which were specifically submitted within the framework of Article 93 (2), expressed the hope that "a fair *decision will be taken* in this matter on the basis of Article 93 of the Treaty".

At this point we must return briefly to that Agreement of 1955. In accordance with the terms of reference laid down for it in January 1974 the Commission drew up and submitted on 2 February 1976 to the representatives of the Governments of the Member States of the ECSC meeting within the Council a draft for a new agreement on the establishment of through international railway tariffs for the carriage of coal and steel. The delegations of the Member States, meeting within the *ad hoc* Working Party on Transport Questions of the Council, first discussed that draft on 23 March 1976 and at the conclusion of the discussion the representative of the Commission declared that he would endeavour to draw up within a period of four weeks a "document setting out the Commission's views on the substance of the problem".

(4) In the meantime, the procedure pursuant to Article 93 (2) followed its normal course and terminated in a decision adopted by the Commission on 4 May 1976 "on aid from the Belgian Government to the Société Nationale de Chemins de Fer Belges (SNCB) for through international railway tariffs for coal and steel".

In accordance with Article 191 of the Treaty that decision was notified on 6 May 1976 to its addressee, namely the Belgian Government, and published on 20 August 1976 in the Official Journal of the European Communities (No L 229, pp. 24 to 26).

The recitals in the preamble to that decision refer first to Article 93 of the Treaty and to the observations presented by the Member States concerned, recalling much more briefly than my immediately preceding exposition the background to the matter, and then set out the reasons why the Commission decided that the aid granted by the Belgian State to the SNCB for the said tariffs on the basis of Article 3 (2) of Council Regulation No 1107/70 (as amended by Regulation No 1473/75 of 20 May 1975) is compatible with the common market only if it was granted under Article 4 of the said regulation.

The Kingdom of Belgium had three months, that is until 6 August 1976 at the latest, in which to terminate the aid in question or to grant it pursuant to and under the conditions laid down in Article 4 of Regulation No 1107/70.

More precisely, this meant that the SNCB had to begin by requesting the Belgian Government to sanction an increase in tariffs for the transport of ECSC products; the Belgian Government could not request and obtain the Commission's authority to grant the SNCB a *temporary* deficit subsidy pursuant to Article 4 of Regulation No 1107/70, intended to compensate for the inadequacy of the undertaking's income deriving from the international rail transport of ECSC products, unless it were opposed to such an increase.

It appears to me that this undoubtedly constitutes the "final decision" referred to in Article 93 (3) of the Treaty.

However, the Belgian Government completely ignored that decision, which therefore became *definitive* on the expiry of the period of two months referred to in the third paragraph of Article 173 (two months from notification, that is on 6 July 1976) or in any case on the expiry of the period of three months which it was allowed by the decision, that is 6 August 1976.

The Commission, once again demonstrating patience, waited until 11 November 1976 before writing, in the name of the Director General for Transport, to notify the Belgian Permanent Representative that it noted that the period of three months had elapsed without any information having been received and to request the Permanent Representative to notify it without delay of the measures which the Belgian Government had taken to comply with that decision. In the meantime, the Government continued to pay the aid, notifying the amount to the Commission in accordance with the procedure laid down in Article 5 (1) of Regulation No 1107/70 as though it were an aid covered by Article 4.

The Commission, in an application of 19 December 1977 which was received at the Registry on 21 December, decided to eschew the more complex procedure under Article 169 and to refer the matter to the Court of Justice direct in accordance with the provisions of the second subparagraph of Article 93 (2), claiming that the Court should declare that the Kingdom of Belgium, by failing to comply with the decision of 4 May 1969 within the time-limit laid down therein, had failed to fulfil an obligation incumbent upon it under the Treaty and that the Court should order it to pay the costs.

II — I apologize for taking the Court through the ins and outs of this procedure, but I think that the subsequent passage of my opinion will thereby be eased.

The Court is already acquainted with the situation where the Commission, having found that an aid granted by a Member State was incompatible with the Common Market, had decided that the Member State concerned must abolish or modify it within a period prescribed by the Commission while the Member State concerned instituted proceedings under Article 173 for the annulment of that decision.

In the situation brought before the Court in Case 47/69 the Commission had found in its decision of 18 July 1968 that a system of aids established by the French Government for the benefit of the textile industry was incompatible with the common market and required that government to discontinue its application from 1 April 1970. The French Government lodged an application on 26 September 1969 against that decision, which was dismissed by the Court on 26 July 1970 ([1970] ECR 487).

In the procedure which gave rise to Case 73/73 (family allowances in the textile industry) the Government of the Italian Republic contested a decision of the Commission of 25 July 1973 whereby it was found that an aid granted within that industry was improper. The Court, in its judgment of 2 July 1974 ([1974] ECR 709), dismissed the Italian Government's application against that decision.

The situation with which the Court is confronted today is that the Member State "played possum", allowing the time-limit laid down in Article 173 and that specified in the decision (Article 93 (2)) to expire. It is of the consequence of the procedure which is governed by the second subparagraph of Article 93 (2) that the Court must take cognizance at this point. That is the measure, quite apart from the relevance which its decision will have for the transport sector properly so-called, of its importance in terms of principle.

Certain aspects of the procedure which gave rise to Case 70/72 resemble the present case: on 17 February 1971 the Commission, in accordance with the first subparagraph of Article 93 (2), had required the Federal Republic of Germany to put an end to a system of aids for the redevelopment of the mining regions set up by that State. Since the German Government failed to comply with that decision and refrained from requesting the Court to annul it, the Commission brought the matter before the Court of Justice. The Court dismissed the Commission's application in its judgment of 12 July 1973 ([1973] ECR 813), but on the grounds that the Commission "did not exercise the powers conferred upon it by the second and third sentences of Article 93 (3) but confined itself in a communication dated 1 August 1969 to protesting and to requesting further information" (p. 827) and that the Commission had failed to indicate to the Member State concerned the aspects of the aid which were regarded as incompatible with the Treaty and therefore subject to abolition or alteration (p. 832).

Nothing of this nature obtains in the present case: as I think I have demonstrated, it is impossible to complain that the Commission was tardy; the aid in question had not become an "existing" aid within the meaning of Article 93 (1), as defined in the judgment of the Court of 11 December 1973 in the *Lorenz* case ([1973] ECR at p. 1482), since the Commission did not remain "silent". Furthermore, that aid has been held *entirely* incompatible with the common market; its abolition required a mere administrative measure, that is the omission of the subsidy or aid from the estimates or reports for the accounting year, unless the Belgian Government consented to an alteration in the basis on which it was granted. The decision of 4 May 1976 contained all the information necessary to establish with clarity the duty imposed upon the Kingdom of Belgium.

1. The Belgian Government begins by describing the Commission's application as "inadmissible", but without emphasizing this point overmuch. It maintains that the types of compensation concerned in Article 2 (5) of Regulation No 1191/69 and Article 3 (2) and Article 4 of Regulation No 1107/70 do not fall within the scope of Article 77 of the Treaty, which states:

"Aids shall be *compatible* with this Treaty if they meet the needs of co-ordination of transport or if they represent reimbursement for the discharge of *certain* obligations inherent in the concept of a public service".

According to the Belgian Government, the derogation "save as otherwise provided in this Treaty" at the beginning of Article 92 means that its measure, which is based on Regulation No 1107/70, itself adopted pursuant in particular to Article 77 of the Treaty, is exempt from the application of Articles 92 to 94 of the Treaty.

I cannot share this point of view: in fact, whilst Regulation No 1107/70 indeed refers to Article 77 it also refers to Article 94; Article 1 of the regulation provides that: "This regulation shall apply to aids granted for transport by rail, ... in so far as such aids relate specifically to activities within that sector".

Article 2 states that:

"Articles 92 to 94 of the Treaty *shall apply* to aids granted for transport by rail ...".

It is consequently clear that the compensation granted by the Belgian Government falls within the scope of Articles 92 and 94 and, more particularly, having regard to the legal basis on which it was granted, of Articles 92 and 93.

2. The Belgian Government does not maintain that it has complied with that decision. Likewise it does not complain that the Commission did not clearly indicate to it the measures which it was required to take in order to comply with the operative part of the decision or that it did not prescribe a time-limit therefor or that it reacted only half-heartedly to the alleged failure to act. The period of three months imposed in the decision of 4 May 1976, within which the Belgian Government was required to terminate the aid in question, might well be considered superfluous since that aid could not be "implemented" after the point when the Commission initiated the procedure under Article 93 (2), other than by resorting to the exceptional procedure provided for in the third subparagraph of Article 93 (2). However, the concession of such a period can be explained by the fact that the aid in question had in the meantime been "established" *de facto* and that the Commission did not wish to lay itself open to certain criticisms. The period was in any case justified if the Belgian Government opted for the alternative with which it was presented in the decision and, in any case, it does not raise a complaint on this point.

Furthermore, the Belgian Government does not complain that the Commission was out of time in bringing the matter before the Court of Justice. The Treaty requires that the Commission should *without delay* initiate the procedure for the submission of comments provided for in Article 93 (2) only if it has arrived at a purely *provisional* view of the nature of the aid planned. In the present case that *oppositional* procedure had taken place, the Member State having had ample time to submit its comments. The finding contained in the decision of 4 May 1976 was definitive and the decision was "final", subject to an application to the Court. The Commission is required to act swiftly only where there is a *plan* to provide aids.

The Belgian Government merely maintains that the decision of 4 May 1976 "is unfounded in law and must be considered non-existent".

It recognizes that it failed to contest the decision of 4 May 1976 within the time-limit but it argues that to prohibit it from relying on the submissions which it could properly have invoked within the time-limit against a decision which it alleges "is unfounded in law and must be considered as *non-existent*" would amount to unfairness and undue regard for formal rules. It further cites Article 184 which provides that, notwithstanding the expiry of the period laid down in the third paragraph of Article 173, any party may, in proceedings in which a *regulation* of the Council or of the Commission is in issue, plead the grounds specified in the first paragraph of Article 173, in order to invoke before the Court of Justice the inapplicability of that regulation.

It then relies upon the judgment of the Court of 10 December 1969 in Joined Cases 6 and 11/79 *Commission* v *French Republic* and *French Republic* v *Commission* ([1969] ECR 523) and the jurisdiction of the Court of Justice to give preliminary rulings concerning the validity of acts of the institutions of the Community. The Belgian Government maintains that it is better to settle the problem in the context of the present procedure, rather than by way of an application to establish the validity or interpretation of the measure pursuant to Article 177.

It seems to me that those arguments must be rejected for reasons which I shall set out, the principal one being that to recognize the admissibility of the submissions relied upon by the Belgian Government in the context of this application against the decision of 4 May 1976 would amount to standing the "system" of the Treaty on its head.

With regard to Article 184 it is sufficient to observe that that article

only concerns *regulations* of the Council or of the Commission, whilst in the present case we are dealing with an *individual decision* of the Commission.

Further, Joined Cases 6 and 11/69 ([1969] ECR 523), upon which the Belgian Government relies, do not constitute a comparable precedent: those cases concerned the balance of payments. The French Government, the *applicant* in Case 11/69, maintained that the Commission's decision had been adopted in a sphere in which only the Member States were competent (Article 104). Even if the decision of 4 May 1976 could be criticized as to its substance it cannot be disputed that the Commission was competent to adopt it. It is thus impossible to classify the decision as non-existent or "*automatically* void".

The possibility that the Court of Justice might one day be required again to interpret the decision of the Commission or to appraise its validity following a reference for a preliminary ruling from a national court is to be rejected not so much because such a reference is improbable but because Article 177 refers to *jurisdiction* and not to admissibility.

Such a reference would, furthermore, pre-suppose that the Commission's decision exists in law and that it has created individual rights or obligations — as the Belgian Government expressly recognizes — in which case, however, it is self-contradictory to state that the Court may encounter that decision in the future in the context of a preliminary ruling and at the same time to maintain that it is void, unless legality and validity are confused. In fact, as the Belgian Government repeats, that decision "*enacts* the legal rule which the Commission alleges has been infringed", which is a further reason why the Belgian Government should have contested the decision in good time.

3. The Belgian Government relies, finally, upon an argument which it did not submit at any time prior to the adoption of the Commission decision of 4 May 1976, namely that, even if the aid which was granted were incompatible with the common market within the meaning of Article 92 (1), it is appropriate to apply Article 90 (2) which states that "Undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community".

Since the SNCB is an undertaking entrusted with the operation of services of general economic interest the abolition of the aid granted to it would obstruct the performance of the tasks assigned to it; the Belgian Government accordingly maintains that the SNCB is not subject to Article 92.

This, however, appears to me to be a play on words: pursuant to Article 90 (1) the rules on competition in the Treaty (Articles 85 to 94) are specifically applicable to the SNCB and consideration of the compatibility of the aid which could be granted to it pursuant to Article 90 (2) is indeed governed, with regard to procedure, by Article 93.

III — My remaining comments can be brief.

1. Whilst the Commission considers that the aid can be granted only pursuant to Article 4, the Belgian Government has granted and continues to grant that aid pursuant to Article 3 (2) of Regulation No 1107/70 as compensation for tariff obligations; it

considers that "it is a simple question of the interpretation of Regulation No 1107/70, neither more nor less". However, the classification of the aid in question on the basis of Regulation No 1107/70 is not merely a simple question of interpretation. Such classification affects both the procedure which governs the granting of the aid and its "legal status": if it comes under Article 3 (2) the procedure of Article 93 (3) applies. If it comes under Article 4 it is exempt from that procedure, with the consequences thereby entailed: the Government has merely to notify the Commission at the beginning of each year of its intention to grant the aid and then, after the end of the financial year, confirm that it has carried out its intention. The Commission may criticize the grant or improper application of that aid only on certain conditions which apply to *existing* systems of aid. The Belgian Government had only to opt for this latter classification, as permitted by the decision of 4 May 1976. However, a fundamental difference follows from this: in the former case the aid cannot be paid before the "final" decision of the Commission; in the latter case it is "provisionally valid".

To hold otherwise would gravely compromise the effectiveness of the provisions of the Treaty concerning aids and would substitute, as in the field of agreements, the system of "provisional validity" for the principle of prohibition. As Mr Advocate General Roemer stated "... the basic idea of the Treaty is the *prohibition in principle* of state aids, and ... it clearly emphasizes that this type of aid is *incompatible* with the common market" (Opinion in Case 47/69, *French Republic* v *Commission* [1970] ECR at p. 499). Or again: "The law on aids in the Community therefore also requires an act of the Community executive and this precisely is a fact which in the light of the existing case-law tends to exclude direct applicability" (Opinion in Case 77/72, *Capolongo* [1973] ECR at p. 628). This emphasizes the prime importance of the "measure" of the Community executive: it is only after the adoption of a measure that individuals can have any right to rely on the prohibition in principle of aids. It is essential for the Commission to act because the general scheme of Article 92 is not directly applicable; if the decision of the Commission is deprived of all importance Article 92 (1) will never be applicable.

The Commission exercised the power conferred upon it under the second sentence of Article 93 (3) to initiate without delay the procedure provided for in the foregoing paragraph, "giving notice to the parties concerned to submit their comments", that is to say not only the Kingdom of Belgium but the other Member States. It thus "blocked" the Belgian administrative procedure and Belgium was prevented *by law* from implementing the measures it had planned until that procedure had produced a final decision. The Belgian aid did not thereby become an *existing* aid: it did indeed continue to exist, but such existence was *at variance* with the Treaty, at least with regard to procedure, which is all-important here.

Unlike decisions adopted pursuant to Article 93 (2) concerning "existing systems of aid", the system laid down in Article 93 (3) gives the Commission the power to enact, where necessary, *immediate* provisional measures. The Court of Justice upheld this principle in its judgment of 11 December 1973 in Case 120/73, *Lorenz* ([1973] ECR at p. 1481):

"The objective pursued by Article 93 (3), which is to prevent the implementation of aid contrary to the Treaty, implies that this prohibition [and thus the decision adopted on the basis thereof by the Commission] is effective during *the whole of* the preliminary period".

The effect of the decisions adopted in pursuance of that provision cannot be suspended unless the Member State follows the procedure laid down in the third subparagraph of Article 93 (2) or unless, after submitting an application pursuant to Article 173 for the annulment of the decision, it is successful in claiming from the Court an order in accordance with Article 185 that the application of the contested measure should be suspended.

The Belgian Government did not think it necessary or possible to have recourse to that exceptional power. The request of 11 October 1973 submitted by the Netherlands delegation for the amendment of the Agreement of 1955 cannot constitute the application referred to in the third subparagraph of Article 93 (2). Neither the Council decision of 20 March 1975 nor the regulation of the Council of the same date had any effect at all on the procedure for informing the Council of aids granted pursuant to Article 3 (2) of that regulation. Finally, the plan for the new agreement on the establishment of international tariffs submitted by the Commission to the Council on 2 February 1976 has not yet been adopted. The circumstances foreseen in the fourth subparagraph of Article 93 (2) accordingly were not present. Consequently, the system to be applied is the ordinary rule laid down in the second subparagraph of Article 93 (2), the salient feature of which is that the Commission may refer the matter to the Court of Justice direct without being required to issue a reasoned opinion which would duplicate what it stated in its decision of 4 May 1976. The effect of the contested decision was reinforced upon the expiry of the period laid down in Article 173 for instituting proceedings and may be called in question as regards the *future* only by means of a new measure of the Commission or of the Council. The contrary view conflicts both with the principle of legal certainty and with the principle of the uniform application of law in the Community.

2. The Belgian Government maintains that the charge entailed by the application of the Agreement of 1955 constitutes a public service obligation of a *tariff* nature which is not covered by Article 2 (5) of Regulation No 1191/69.

If the Court agrees with me it will not consider in depth the arguments which have already given rise to the lengthy correspondence which I have analysed and which ultimately amount to calling that agreement into question. Furthermore, there is reason for surprise at the thinly-veiled criticisms of the Belgian Government: if that government now considers that the "simplified form" in which that agreement was concluded in fact constituted an irregularity one wonders why its representative signed it. It is indeed possible that in present economic circumstances the agreement has turned out to be less favourable to Belgium than the latter expected when it signed or even that it is in part out of date and should be amended. This matter is at present being negotiated. A partial solution to the SNCB's problem no doubt lies in an amendment to the agreement; however the work which is in progress on that amendment cannot be relied upon in order to obtain a ruling from the Court on that agreement. It is not possible, by way of the present proceedings, to call into question either the conditions under which the agreement was enacted or its subject-matter, and the Belgian Government cannot, in order to expedite, as it were, the revision of the agreement, continue unilaterally to pay an aid which the Commission contests not only as to its legal basis but also as to its amount.

To re-open this point "would involve accepting that a Member State may steal a march on the Commission: that ... it can by-pass the requirements of Article 93 (3) and have the question of

the compatibility of a new aid with the common market considered after its introduction. This means nothing less than placing a Member State which infringes Article 93 (3) in a more advantageous position than one which complies with it" (Opinion of Mr Advocate General Warner in the case of *Italian Republic* v *Commission* [1974] ECR at p. 725).

I am of the opinion that the Court should rule that the Belgian Government, by its failure to suspend the grant of the aid to which objection was made in the Commission decision of 4 May 1976, failing the institution of any proceedings against that decision or the submission of any application pursuant to the third subparagraph of Article 93 (2) and in the absence of any amendment to the Agreement of 21 March 1955 and to any regulation of the Council adopted on the basis of Article 94 (apart from Regulation No 1473/75 of 20 May 1975 which makes provision for exemption from the procedure laid down in Article 93 (3) only for the categories of aid referred to in Article 4 of Regulation No 1107/75, in the version amended by that Regulation), has failed to fulfil its obligations under Article 93 (3) of the Treaty and the said decision of the Commission.