obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question.

2. Since the undertaking concerned exported more than 70% of its output to other Member States, excess production capacity existed in the market in question and the undertaking would have inevitably disappeared from the market if the aid had not been granted, the Commission was entitled to conclude, in the absence of any information to the contrary, that the aid in question affected trade between Member States and distorted, or threatened to distort, competition within the meaning of Article 92 (1) of the Treaty.

3. Observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question. The principle of the right to be heard requires that the person against whom an administrative procedure has been initiated must have been afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law. Where the person concerned has not been afforded an opportunity to comment on documents containing information covered by business confidentiality, the Commission may not use that information in its decision.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 16 April 1986 *

Mr President,
Members of the Court,

A — The key question in the case on which I am to deliver an Opinion today is whether the subscription of additional capital by State authorities to an industrial undertaking can be regarded as aid within the meaning of Article 92 of the EEC Treaty.

1 (a) Boch SA was founded more than 150 years ago at La Louvière (Belgium). Until its liquidation in 1985 it manufactured crockery and sanitaryware.

In 1979 the Region of Wallonia, acting through the Société régionale d'investissement de Wallonie (hereinafter referred to as 'SRIW'), purchased shares in Boch SA for approximately BFR 140 million. SRIW subscribed additional capital of BFR 475 million in 1981 and BFR 83 million in 1983. Those two increases of capital followed

* Translated from the German.

reductions in capital,[1] which were necessary in order to offset balance-sheet losses. Ultimately, SRIW held 94.9% of Boch SA's share capital.

(b) The injection of capital which took place in 1981 was the subject of the proceedings in Case 52/84;[2] the present proceedings are concerned with the capital injection of BFR 83 million which took place in 1983.

(c) Upon learning of the planned capital increase in the Belgian press the Commission asked the Belgian Government to inform it of the plan pursuant to Article 93 (3) of the EEC Treaty.

On 18 February 1983 the Belgian Government replied that authorization to grant the new injection of capital had already been granted in 1981. The decision was therefore not a new one. Subsequently, the Commission asked the Belgian Government on a further six occasions to notify the plan, which it described as aid.

On 29 July 1983 the Belgian Government informed the Commission by telex that its telex message of 18 February 1983 constituted notification, to which the Commission had never responded.

Following the publication in the *Moniteur belge* of 25 August 1983 of a notice of an extraordinary general meeting of Boch SA, to be held on 12 September 1983 to discuss the subscription of BFR 83 million of new capital by the public authorities, the Commission notified the Belgian Government, SRIW and Boch SA that any aid granted without complying with the notification procedure and without the Commission's having the prior opportunity to pronounce on its compatibility with the common market would be liable to have to be repaid.

On 12 September 1983 the Region of Wallonia carried out the plan for the acquisition of a further capital holding in Boch SA of BFR 83 million.

On 17 April 1984 the Commission decided to open the procedure provided for in Article 93 (2) of the EEC Treaty on account of the aid granted in 1983 and, on 25 May 1984, gave the Belgian Government notice to submit observations. In its reply dated 6 August 1984 the Belgian Government stated that the Belgian authorities (the Region of Wallonia) had subscribed new capital amounting to BFR 83 million in 1983 pursuant to a decision taken in 1981, which had been notified to the Commission by telex on 18 February 1983.

(d) In its decision of 24 October 1984,[3] which is contested in these proceedings, the Commission declared that the aid granted in 1983 by the Belgian Government in the form of BFR 83 million of capital aid to a ceramics undertaking was incompatible with the common market within the meaning of Article 92 of the EEC Treaty and must therefore be withdrawn.[4]

The preamble to that decision includes the following grounds:

(i) State intervention in the form of participations may exhibit the characteristics of State aid. In the present case, the financial situation of the

1 — See the notices published in the *Moniteur belge* of 10 December 1981 and 25 August 1983, respectively

2 — Judgment of 15 January 1986 in Case 52/84 *Commission* v *Belgium* [1986] ECR 89.

3 — Official Journal 1985, L 59, p. 21

4 — 'Withdrawn' should correctly read 'abolished', since the French and Dutch texts of the decision, which are the only authentic versions, are based in that respect on the wording of Article 93 (2) of the EEC Treaty

undertaking coupled with overcapacity in the ceramics industry, particularly in the sanitaryware sector, makes it unlikely that the undertaking would be able to raise on the private capital market the finance necessary for its survival. The undertaking concerned has been making substantial losses for several years, namely BFR 134 million in 1979, BFR 243 million in 1980, BFR 302 million in 1981 and BFR 168 million in 1982 or 23%, 39%, 45% and 20% respectively of its turnover.

(ii) The abolition of the aid of BFR 475 million granted in 1981 as ordered by the decision of 16 February 1983 will further aggravate the undertaking's financial position.

(iii) In those circumstances the capital injection of BFR 83 million by the State constitutes aid within the meaning of Article 92 (1) of the EEC Treaty.

(iv) Such aid, intended to preserve production capacity, is likely to have a particularly adverse effect on the conditions of competition, since in the normal course of events, market forces would result in the closure of the undertaking concerned, allowing expansion by more efficient competitors. The undertaking in question exports over 70% of its output of ceramic sanitaryware to the other Member States. Hence the aid given by the Belgian Government is likely to affect trade between Member States and distort competition within the meaning of Article 92 (1) of the EEC Treaty by favouring the firm in question and the production of ceramic sanitaryware and crockery.

(v) Under Article 92 (3) of the EEC Treaty exceptions to the prohibition on aid are only possible where the aid serves specified Community objectives rather than simply serving the interests of the aid recipient. In particular, the recipient undertaking must make a contribution in return justifying the grant of the aid. Such a contribution by the recipient undertaking is not apparent in this case. The Belgian Government has not given, and the Commission has not discovered, any reasons for finding that the aid in question fulfils the conditions for the application of one of the exceptions provided for in Article 92 (3) of the EEC Treaty.

(vi) All in all, the state of the ceramics industry is such that to preserve production capacity through State aid is contrary to the common interest.

With regard to the procedure, the Commission states in its decision that the Governments of four other Member States, one trade association and two individual firms from the industry share the Commission's reservations about the Belgian aid. With the exception of one of the Member States in question, they emphasized the serious distortions of competition which, they considered, would arise as a result of the repeated assistance granted by the Belgian Government.

2. On 11 February 1985 the Belgian Government brought an action for a declaration that the Commission's decision of 24 October 1984 was void.

By order of 12 June 1985 the Court gave the United Kingdom leave to intervene in support of the Commission's conclusions.

The Kingdom of Belgium considers the Commission's decision to be unlawful on several grounds.

The *Belgian Government* claims that the Court should:

(1) Declare void the Commission's decision of 24 October 1984;

(2) Order the Commission to pay the costs.

The *Commission* claims that the Court should:

(1) Dismiss the action as unfounded;

(2) Order the Kingdom of Belgium to pay the costs.

The Commission adheres to its decision on the grounds which it gave in that decision, which it sets out in more detail.

The *United Kingdom*, intervening, claims that the Court should:

(1) Uphold the Commission's decision of 24 October 1984.

I shall discuss the individual legal arguments of the parties in more detail later.

3. At the Court's request, the Belgian Government produced further details about the recipient undertaking — development of its capital, ownership, turnover, market share, etc.

The Commission produced its correspondence with the Belgian Government.

I shall consider those matters later.

B — Since, during the oral proceedings, the *Belgian Government*, on the basis of the judgment in Case 52/84, withdrew the argument that it was legally impossible for it to comply with the Commission's decision, the following three claims of the Belgian Government still have to be considered:

(i) The contested holding does not constitute an aid within the meaning of Article 92 (1) of the EEC Treaty (the first claim);

(ii) The decision has an inadequate statement of reasons, in so far as it does not establish in what respect the contested capital holdings affect trade between the Member States and distort competition (the second claim);

(iii) Infringement of the right to a fair hearing in so far as the Commission did not give the Belgian Government access to the submissions of the Member States, the trade associations and the undertakings which took part in the administrative procedure (the fourth claim).

Furthermore, consideration should be given to whether the derogation provided for in Article 92 (3) of the EEC Treaty applies. The Belgian Government did not make an express claim to that effect but it can be inferred from its argument that it should also be considered whether the contested capital holding can be regarded as being compatible with the common market (the third claim).

1. *The question whether the contested capital holding constitutes an aid within the meaning of Article 92 of the EEC Treaty*

(a) The *Belgian Government* considers that, by prohibiting the Region of Wallonia, as principal shareholder in the undertaking in question, from taking part in the contested increase in capital, the Commission discriminates against that body by comparison with a private shareholder. It

is not clear how the Region's action differs from that which a private shareholder would have taken in the same circumstances. The fact that an undertaking is experiencing difficulties does not mean that a shareholder should disengage itself from it and precipitate its collapse. It is normal for a shareholder to support the restructuring of the undertaking by subscribing additional capital. Consequently, the Commission is prohibiting action which is usual when carried out by private shareholders — the provision of support for profitable but temporarily loss-making activities — simply because it is being carried out by the State as shareholder. To apply Article 92 of the Treaty in such a way as to impose standards of behaviour which, in the final analysis, discriminate against the public authorities conflicts with the guarantee of the systems of property ownership in the various Member States which is laid down in Article 222 of the EEC Treaty.

In addition, the Belgian Government argues that the Commission's argument is fundamentally flawed in so far as it bases its claims on the undertaking's aggregate results and ignores the specific results of the ceramic sanitaryware division, which is the only division at issue in these proceedings.

The results of the ceramic sanitaryware division have steadily improved over the years: losses of BFR 120 million in 1981 and BFR 72 million in 1982 have given way to a profit of BFR 6 million in 1983. As a result, the Commission's claim that the Region of Wallonia used the contested increase in capital to finance an unviable business is based on a false premise.

In the *Commission*'s opinion, the view of the law put forward by the applicant amounts to putting State undertakings in a privileged position in so far as it argues in effect that authorities of the Member States are not bound in the case of State undertakings to comply with the competition rules, in particular as regards aid, in the same way that private undertakings are. That assumption manifestly conflicts with Article 90 (1) of the EEC Treaty, which provides that, in the case of public undertakings, Member States are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty, in particular to the rules provided for in Articles 85 to 94.

At the time when the aid was granted the company had been making a loss for a long time, despite the previous injections of capital. As a result, and since the capital injection in question constitutes rescue aid which was vital in order to offset operating losses, it could not be intended to support alleged restructuring efforts. The continuing losses incurred by Boch SA and the succession of operations mounted until early 1985 with a view to staving off its liquidation clearly show that the survival of the undertaking was due solely to the State support. Consequently, the subscription of capital by the Region of Wallonia was made under circumstances which would not have been acceptable to a private shareholder. Hence it constitutes an aid within the meaning of Article 92 (1) of the EEC Treaty.

In order to assess the undertaking's operating results, the Commission based itself on its aggregate results because it did not receive from the Belgian Government the information necessary in connection with proceedings under Article 93 of the EEC Treaty. The undertaking's annual accounts draw no distinction between the results of the crockery division and those of the sanitaryware division. Consequently the Commission was unable to provide detailed particulars of the various trading sectors of the undertaking. Besides, in the Commission's view the information now provided by the Belgian Government leads

to the same conclusion that it reached in the absence of that information.

The *United Kingdom*, intervening, essentially concurs with the arguments put forward by the Commission. In addition, it contends that the circumstances under which the contested provision of capital — and likewise other injections of capital — was made suggest that it was not part of a coordinated plan to restructure the undertaking in question. As a result, the Commission was entitled to conclude that such provision of capital took on the character of State aid.

(b) Under Article 92 of the EEC Treaty any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. The only exception is aid which is compatible with the common market by virtue of Article 92 (2) of the EEC Treaty and aid which may be considered to be compatible with the common market pursuant to Article 92 (3).

(aa) As a result of the broad wording of Article 92 — aid in any form whatsoever — the Court came to the conclusion in its judgment of 14 November 1984[5] that no distinction could be drawn between aid granted in the form of loans and aid granted in the form of a holding acquired in the capital of an undertaking. Aid taking either form fell within the prohibition laid down in Article 92 of the EEC Treaty where the conditions set out in that provision were fulfilled.

However, it was not necessary in order to reach the decision in that case to set out in detail the circumstances in which a State capital holding is to be regarded as an aid within the meaning of Article 92 of the EEC Treaty, since the action had to be upheld on other grounds.

The EEC Treaty no more defines the term aid than the ECSC Treaty. To provide a definition in the Treaties would probably be neither feasible nor useful, since concrete definitions would be liable to restrict the scope of the term. However, a broad interpretation is necessary in order that Article 92 of the EEC Treaty may make a meaningful contribution towards ensuring that competition in the common market is not distorted, in accordance with the objective set out in Article 3 (f) of the EEC Treaty.

That is consonant with the general definition of the concept of aid in the context of the ECSC Treaty which the Court provided in the judgment of 23 February 1961 in Case 30/59.[6] According to that definition the concept of aid covers 'interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking'.

In its judgment of 22 March 1977 in Case 78/76[7] the Court bases itself on a formula — 'gratuituous advantage' — used in the relevant request for a preliminary ruling whilst in the judgment of 2 July 1974 in Case 173/73[8] the Court merely refers to 'benefits'.

It can be inferred from those decisions that any type of support granted by a Member

5 — Judgment of 14 November 1984 in Case 323/82 *SA Intermills* v *Commission* [1984] ECR 3809.

6 — Judgment of 23 February 1961 in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority of the European Coal and Steel Community* [1961] ECR 1, at p. 19.

7 — Judgment of 22 March 1977 in Case 78/76 *Firma Steinike und Weinlig* v *Federal Republic of Germany* [1977] ECR 595.

8 — Judgment of 2 July 1974 in Case 173/73 *Italian Government* v *Commission of the European Communities* [1974] ECR 709.

State or through State resources other than for commercial purposes constitutes aid within the meaning of Article 92 (1) of the EEC Treaty. At least, support constitutes aid where the recipient undertaking obtains an advantage which it would not normally have obtained, for example, where capital is made available in circumstances which do not correspond to the normal conditions of the capital market.

However, the legality of a State capital participation in an undertaking can still not be assessed on the basis of those criteria alone. It must be inferred from Article 222 of the EEC Treaty, which provides that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership, that the EEC Treaty also accepts the existence of public ownership of industry. Although no provision is made in the EEC Treaty for the Community to influence the existence of public undertakings it does make them subject to the rules of the Treaty in so far as the Member States are prohibited, in the case of such undertakings, from enacting or maintaining in force any measure contrary to the rules contained in the Treaty, in particular to the rules provided for in Articles 85 to 94. Public undertakings must adjust to the common market and may not impede its establishment and operation.

Article 90 (2) of the EEC Treaty provides specific exceptions only for undertakings which are 'entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly'. It follows that the Treaty rules apply normally in the case of ordinary public undertakings.

(bb) Following this discussion I am now coming to the central legal questions raised in these proceedings. The *entrepreneurial activities* which proprietors and operators of public undertakings may carry out without being subject to the Communities' supervision of subsidies must be distinguished from the *granting of subsidies* by the public authorities, which is supervised under Article 92 *et seq.* of the EEC Treaty. Consequently it is necessary to distinguish between action taken by the public authorities for entrepreneurial reasons in their capacity as private operators and State measures having political objectives and serving to promote the public good, such as, for example, measures to stabilize the labour market.

The Commission has already addressed this problem in its preamble to the directive on the transparency[9] of financial relations between Member States, in which it stated as follows:

'Whereas the Treaty requires the Commission to ensure that Member States do not grant undertakings, public or private, aids incompatible with the common market;

Whereas, however, the complexity of the financial relations between national public authorities and public undertakings tends to hinder the performance of this duty;

Whereas a fair and effective application of the aid rules in the Treaty to both public and private undertakings will be possible only if these financial relations are made transparent;

Whereas such transparency applied to public undertakings should enable a clear distinction to be made *between the role of*

9 — Commission Directive of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, Official Journal 1980, L 195, p. 35.

the State as public authority and its role as proprietor.'

Article 3 of the directive sets out a list of examples of financial relations between public authorities and public undertakings which are to be made transparent in accordance with the directive:

'...

(a) the setting-off of operating losses;

(b) the provision of capital;

(c) non-refundable grants, or loans on privileged terms;

(d) the granting of financial advantages by forgoing profits or the recovery of sums due;

(e) the forgoing of a normal return on public funds used;

(f) compensation for financial burdens imposed by the public authorities.'

Nevertheless, as the Court pointed out in its judgment of 6 July 1982 in Joined Cases 188 to 190/80,[10] that list of financial relations between public undertakings and Member States does not constitute a definition of the concept of aid which appears in Article 92 *et seq.* of the EEC Treaty. It merely specifies the financial transactions of which the Commission considers that it must be informed in order to ascertain whether a Member State has granted aid to a given undertaking without complying with its obligation to notify the Commission under Article 93 (3) of the EEC Treaty.

In the case of a financial transaction between a Member State and a public undertaking special criteria must be used in order to try to differentiate between entrepreneurial conduct and State conduct in the granting of aid. Advantages which the State confers on a public undertaking by way of grant could equally be entrepreneurial investment. The same consideration might apply to the forgoing of profits or the offsetting of losses, since a private businessman may also be in a situation where he has to take such steps. Consequently, comparison with corresponding measures in the private sector takes us a stage further: the test for a State aid might be whether, in comparable circumstances, a private businessman acting on the basis of relevant economic considerations would not support the undertaking concerned in such a manner.

If the hypothetical behaviour of a private proprietor acting in accordance with relevant economic considerations is taken as the criterion, this in itself allows the State as the proprietor of an undertaking a substantial measure of freedom of action. It should not be overlooked that the State — even as a private proprietor — has the possibility of procuring the necessary capital resources on a substantial scale — through taxation or compulsory loans. As a rule it is virtually impossible for a private businessman to obtain funds on such a scale.

According to the case-law of the Court, in ascertaining whether a measure of State intervention constitutes aid reference is to be made, not to the causes or aims of the measure, but to its effects;[11] however, in

10 — Judgment of 6 July 1982 in Joined Cases 188 to 190/80 *French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland* v *Commission of the European Communities* [1982] ECR 2545.

11 — Judgment of 2 July 1974 in Case 173/73, *loc. cit.*, paragraph 12.

order to differentiate between State aid and grants to public undertakings by the State in its capacity as a private operator, the aims of the action must be taken into consideration, at least as evidence. The aim may determine in which category a particular advantage given to public undertaking falls in so far as if the reason is one of economic policy — for example, social or structural policy — this may make it appear to be an aid, whereas a viable investment which is intended to produce a return is less likely to be viewed as an aid.

(cc) In order to assess whether the contested capital injection constitutes an aid it is necessary to look first at the development of the recipient undertaking's capital and operating results. Prior to the time when the Region of Wallonia acquired for the first time a holding in the capital of the undertaking concerned, its capital amounted to BFR 150 million. In 1979 the undertaking's reserves were capitalized and its capital was reduced by BFR 319 million to BFR 3 million; at the same time some BFR 140 million and BFR 44 million respectively of new capital was subscribed by the Region of Wallonia and third parties, with the result that the undertaking's capital then amounted to BFR 304 million.

In 1980 and 1981 the undertaking made losses totalling BFR 545 million, which led to its capital being reduced by BFR 579 million and to the State's subscribing a further BFR 475 million, with the result that at the end of 1981 the undertaking's capital came to BFR 200 million. In 1982 the company was again making a loss, this time of BFR 168 million. In 1983 the undertaking's capital capital was reduced by a further BFR 169 million whereupon the Region of Wallonia subscribed the capital increase contested in these proceedings of BFR 83 million.

In the result, at the end of 1983 Boch SA's capital stood at BFR 113 million. In other words, in 1979 the undertaking's capital had been BFR 150 million; despite injections of capital amounting to approximately BFR 742 million — including BFR 698 million or approximately 94% contributed by the Region of Wallonia — the undertaking's capital failed to increase, on account of reductions in capital; instead by 1983 it had fallen to BFR 113 million. Despite a capital injection of BFR 739 million the undertaking's capital fell by BFR 37 million.

At the same time, losses of BFR 945 million were recorded between 1979 and 1983.

If account is also taken of the fact that a reduction in capital took place in 1979 before the Region of Wallonia made the injection of capital and a capital of BFR 3 million could be shown only by recourse to the reserves, this suggests that, even at that time, the recipient undertaking was in a hopeless financial situation. This further suggests that in a comparable situation a private proprietor, acting on the basis of relevant economic considerations, would not have injected further capital into the undertaking. This is reinforced by the fact that *some 94%* of the new capital injected into the undertaking came from public funds. The most recent injection of funds by other shareholders in the undertaking — it is not known whether they are private undertakings or other public institutions — of just under BFR 44 million took place in 1979.

If, in addition, account is also taken in this connection of the existing overcapacity in the ceramics industry in the Community it must be considered that the Commission was entitled to take the view that, in the

normal course of events, the free play of market forces would have led to the closure of the undertaking concerned.

Consequently, the Commission was entitled to regard the increase in capital contributed by the Belgian Government as rescue aid.

In this connection reference should also be made to the decision of 16 February 1983 by which the Commission ordered the aid of BFR 475 million granted in 1981 to be withdrawn. That decision had become definitive at the time of the further increase in capital on 12 September 1983, since neither the Belgian Government nor the undertaking concerned had taken proceedings against the decision, which subsequently resulted in the judgment of 15 January 1986 in Case 52/84.[12] Consequently, the Belgian Government and the undertaking concerned had to take account of the fact that that aid, amounting to BFR 475 million would be withdrawn from the undertaking. As a result, the undertaking's financial position would not merely deteriorate further, as the Commission stated in its contested decision; its capital, which amounted to BFR 113 million following the capital increase in September 1983, would in fact be more than exhausted by the withdrawal of the said earlier aid of BFR 475 million.

That is not contradicted by the Belgian Government's view that the Commission should have differentiated between the two principal sectors of activity of the undertaking concerned. The Belgian Government maintains that it ought to have taken account of the fact that in 1983 the sanitaryware division made a profit of BFR 6 million.

12 — Judgment of 15 January 1986 in Case 52/84 *Commission* v *Belgium* [1986] ECR 89.

However, the capital increase was granted to a single undertaking, although it did in fact make a modest profit of BFR 6 million in the sanitaryware sector in 1983, made a loss of BFR 104 million in the crockery sector.

In sum, the Commission based its view that the participation at issue was in the nature of aid on the fact that funds could not have been raised on the private capital markets. In particular, it considered that the undertaking's financial situation and the overcapacity in the ceramics industry constituted impediments which made it unlikely that the sums necessary for the undertaking's survival could be procured on the private capital markets.

The Commission based this finding in particular on the trend of the losses incurred by the undertaking.

Furthermore, the Commission's view of the undertaking's financial situation has been corroborated by the documents concerning the evolution of the undertaking's capital which the Belgian Government submitted at the Court's request. In my view, it was not necessary to set out details of the development of the undertaking's capital in the decision, especially since they were, if not known, at least accessible to the Belgian Government. After all, the public authorities were the owners of the undertaking concerned to the extent of at least 94%.

That evidence and the grounds for the decision appear to me to be sufficient, especially in view of the conduct of the Belgian Government and its relationship to the undertaking concerned.

(dd) One of the main reasons why the reasons stated for the contested decision are relatively brief and terse is that the Belgian Government failed to notify the planned aid measure to the Commission or to provide it,

in the course of the administrative procedure, with fuller details of the measures planned or taken.

Such conduct is not consonant with the duties of a Member State under Articles 92, 93 and 5 of the EEC Treaty. In order to ensure the progressive development and functioning of the common market in accordance with the provisions of Article 92, Article 93 provides for constant review of aid granted or planned by the Member States, 'an operation which assumes constant cooperation between these States and the Commission', as the Court stated in its judgment of 2 July 1974 in Case 173/73, which has already been cited on several occasions.

The very wording of the first sentence of Article 93 (3) — the Commission is to be informed of *any* plans to grant aid — as well as the meaning and intention of that provision point to the existence of a comprehensive duty to notify on the part of the Member States, since the very existence of differences of opinion between the Commission and the Member States regarding the permissibility of an aid should be avoided as far as possible. Furthermore, it cannot be overlooked that there may be considerable difficulty in eliminating the results of an aid which was granted illegally. The arguments adduced in connection with Case 52/84 provide a clear example.

If it is the duty not of the Member States but of the Commission to consider whether an aid is permissible in Community law, that division of responsibilities must also apply with regard to the question *whether* an aid is involved at all.

The obligation to notify which is set out in Article 93 (3) of the EEC Treaty therefore does not only cover measures which unquestionably constitute aid, in which case it only has to be considered whether they are compatible with the EEC Treaty, but also to measures whose very character as aid may appear to be in doubt.

That is true in particular of measures taken by the Member States with regard to undertakings of which they are the proprietors, since in such cases it can frequently only be determined by thorough investigation whether the State acted simply as an entrepreneur or in its capacity as a public authority.

Since all measures which relate to public undertakings and are also only 'suspected' of being aid must be notified to the Commission, the Belgian Government cannot exculpate itself by stating that it did not have to notify the capital increase in question because it did not consider the increase to have been aid.

2. *Whether the contested aid adversely affects trade between the Member States and distorts competition*

Since the granting of aid, especially in the form of the acquisition of participations by the State or by public bodies cannot be regarded as being automatically contrary to the Treaty, it should now be considered whether the contested aid conflicted with Article 92 (1) of the EEC Treaty. In particular, it must be established whether the aid distorts competition or threatens to distort competition and whether it affects trade between Member States.

(a) The *Belgian Government* considers that it is not apparent from the Commission's decision to what extent the capital subscription at issue affects trade between

Member States or distorts or threatens to distort competition.

In addition — an objection also raised by the Court in its judgments of 14 November 1984 in Case 323/82 and of 13 March 1985 in Joined Cases 296 and 318/82 [13] — the Commission has provided no specific indication of the way in which the aid in question distorted competition; the Commission's decision does not contain the slightest information concerning the situation on the relevant market, the market share of the undertaking concerned, the pattern of trade between Member States in the products in question or the undertaking's exports. The Belgian Government states that the decision merely notes the objections raised by the governments of Member States, one trade association and two other companies in the sector concerned.

Furthermore, it claims that the investment was designed to bring about rationalizations and did not result in any increase in capacity.

In the *Commission*'s view the contested decision clearly explains that the aid in question is liable to affect the conditions of competition particularly seriously, since in the normal course of events market forces would have made it necessary for Boch SA to have closed down, which would have enabled more efficient competitors to expand. The market situation is also clearly described as being characterized by overcapacity and by very intense intra-Community trade. The position of Boch SA on the relevant market is described as being that of an undertaking which in 1983 exported more than 70% of its output to other Member States.

In addition, the Commission provided further details of the undertaking's market share in various Member States of the Community and of aggregate Belgian exports of ceramic sanitaryware, which showed that Belgium's share of intra-Community trade in the sector in question has risen from 19.4% in 1979 to 34.8% in 1983.

In the Commission's view, the repeated aid enabled Boch SA better to utilize its production capacity and to sell its products on the Community market at any price it liked.

The *United Kingdom* also contends that the aid granted distorts competition and affects trade between Member States.

The provision of capital must have a major impact in keeping in business a company making such substantial losses. The United Kingdom contends that it is an undisputed fact that Boch SA entered into intra-Community trade. That view is supported by the fact that imports of sanitaryware from Belgium, in comparison with imports from other Member States, have increased considerably whilst the general tendancy has been for imports to decrease.

(b) In the first place, it must be observed that the explanations in the contested decision as to whether the aid in question affects trade between Member States and distorts competition are very brief. The only facts mentioned are that Boch SA exported more than 70% of its output of sanitaryware to other Member States and that at the same time the market is characterized by excess capacity in the ceramics sector. On the basis of an assumption that in the normal course of events the free play of

13 — Judgment of 13 March 1985 in Joined Cases 296 and 318/82 *Kingdom of the Netherlands and Leeuwarder Papierwarenfabrik* v *Commission of the European Communities* [1985] ECR 809.

competition would have caused the undertaking in question to have to close, it is concluded that had the aid not been granted more efficient competitors would have been able to expand.

It is in fact correct that there is no evidence as to the market share of the undertaking in question or as to trade patterns in the products concerned. The Commission provided no particulars of Boch SA's market share in the Member States of the Community or of its prices until the proceedings before the Court.

Certainly the Commission was not obliged to set out in its decision all the details bearing on the outcome. However, it had to give the main reasons for the decision; accordingly, additional details furnished at a later time can be taken into account only in so far as they relate to matters which are in substance already set out in the decision or which might be assumed to be generally known.

Since, as far as the Commission was concerned, it was an established fact that Boch SA exported 70% of its output of sanitaryware to other Member States of the Community — in the proceedings before the Court it became clear that over 70% of its total production was exported, mostly to Member States of the Community — the Commission was entitled, in my view, to assume that artificially keeping Boch in existence was in itself bound to distort competition and affect trade between the Member States. The considerable proportion of Boch's production accounted for by exports suggested, in conjunction with the total volume of its production, which had to be disclosed pursuant to Directive No 68/151 [14] and hence is deemed to be known, that Boch was substantially involved in intra-Community trade. In view of the fact that, in addition, the undertaking's survival was due only to State aid or, to put it the other way, that without State aid Boch SA would have been unable to continue trading, trade between the Member States was indeed affected. Since the aid consisted of an advantage which in the normal course of events would not have been obtained on the market, it must be assumed in case of doubt that it improved the undertaking's competitiveness *vis-à-vis* rival undertakings which did not receive similar advantages, and hence distorted competition.

In view of Boch's aggregate turnover and its export activities, the Commission was therefore entitled to assume that Boch's continuing existence itself distorted competition and affected trade between Member States. The closure of Boch would have enabled more efficient competitors to expand both on the Belgian market and on the markets of the other Member States, which in that event would no longer have been supplied by Boch.

The Commission's decision would certainly have been clearer and plainer had it included particulars of Boch's volume of business in absolute terms (however, they can be calculated from the losses and the percentages of turnover mentioned in the

14 — First Council Directive of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, Official Journal, English Special Edition 1968 (I), p. 41.

decision) and of its market share in Belgium and in the Community. However, in my view such particulars were not absolutely imperative in order to reach the view set out in the contested decision. Indeed, the decision appears to me to be sufficiently supported by facts and sufficiently reasoned.

It should be mentioned once more in this connection that the brief statement of facts and reasons in the decision is largely due to the conduct of the Belgian Government, which, in breach of the duties imposed upon it by Articles 93 and 5 of the EEC Treaty, in no way cooperated with, even less supported, the procedure initiated by the Commission for investigating the aid. In view of such defective cooperation on the part of the Member State concerned, the onus on the Commission of providing explanations and reasons should not be excessively strict. After all, when investigating aid the Commission does not have the powers available which it has, for instance, in connection with the procedure for supervising competition, which it can use to obtain the required particulars if need be by threatening to apply or actually applying coercive measures.

In the final analysis, I therefore consider that the Commission has supported its decision with sufficient facts and reasons.

3. Although, in line with its view that the capital holding in question does not constitute an aid, the Belgian Government did not expressly argue that Article 92 (3) has been infringed, I consider it to be necessary briefly to consider that derogation. Indeed, since the Belgian Government maintains that the increase in capital subscribed by the Region of Wallonia was made in connection with a programme of renovation, designed to result between 1981 and 1984 in rationalizing investments and a reduction in the number of staff employed, this can be seen as embodying the legal view that the contested aid might be regarded as being compatible with the common market within the meaning of Article 92 (3) of the EEC Treaty.

With regard to the possible application of Article 92 (3) of the EEC Treaty, the *Commission*'s decision starts with a theoretical exposition. It then points out that Article 92 (3) (a) cannot be applied since the area in which Boch SA is established is not one where the standard of living is abnormally low or where there is serious underemployment. Before the Court the Commission stated that it was referring to the situation in the Community as a whole. This is acceptable, since in its judgment of 17 September 1980 in Case 730/79 [15] the Court held that the Commission is entitled to assess the standard of living and underemployment in a particular area, not with reference to the national average, but in relation to the Community level.

As regards the possibility of considering an aid to be compatible with the common market under Article 92 (3) (b) of the EEC Treaty, the Commission stated that Belgium was one of the Community's central areas; although its social and economic problems were not among the most serious in the Community it did present the greatest danger of escalating subsidies and any aid

15 — Judgment of 17 September 1980 in Case 730/79 *Philip Morris Holland BV* v *Commission* [1980] ECR 2671, at pp. 2691 and 2692.

granted was likely to affect trade between Member States. Furthermore, it did not appear from available economic and social data with regard to Belgium that there was a serious disturbance in its economy within the meaning of the Treaty.

Those explanations also appear to me to be clear; in any event, the Belgian Government has not put forward anything capable of seriously shaking them.

There remains therefore only the derogation provided for in Article 92 (3) (c) of the EEC Treaty. The Commission stated that that derogation was inapplicable on the ground that the situation of the ceramics industry suggested that to preserve production capacity through State aid was against the common interest.

That succinct explanation might make it seem possible to draw the conclusion — which the Belgian Government draws with reference to the judgment of the Court of 13 March 1985 in Joined Cases 296 and 318/82 — that the Commission failed to take into account an important factor which might possibly have led to a different assessment, that is to say that the aid in question was related to the restructuring of the recipient undertaking.

In the event that this should be the case the contested decision would have to be declared void in the same way as the decision which resulted in the judgment of 13 March 1985 in Joined Cases 296 and 318/82. However, I consider that that is not the case.

Although the existence of the alleged programme of renovation for the undertaking concerned for the period 1981 to 1984 was notified to the Commission, the Belgian Government did not submit the actual programme either to the Commission during the aid review procedure or to the Court of Justice in the course of the judicial proceedings. That circumstance itself, in conjunction with the undertaking's record of increasing losses and its ultimate liquidation, suggests that the so-called programme of renovation cannot have been a viable restructuring plan. However, that assumption does not have to be examined further, since during the oral proceedings the Belgian Government stated that the actual restructuring did not take place until after the liquidation of the company in January 1985, which resulted in the undertaking discontinuing its activities in the crockery sector and continuing its business in the sanitaryware sector through a new company, Noviboch SA.

In the final analysis, therefore, the existence of a restructuring plan, which might possibly have enabled the State rescue or rehabilitation aid to be seen in another light, [16] was neither claimed nor proved.

Consequently, there are no grounds casting doubt on the legality of the Commission's finding that the aid granted by the State authorities of the Kingdom of Belgium could not be regarded as being compatible with the common market under Article 92 (3) of the EEC Treaty.

4. *Infringement of the right to a fair hearing*

(a) The *Belgian government* points out that, according to the contested decision, the Commission received submissions from the governments of four other Member

16 — See in this connection the aforementioned judgments of 14 November 1984 in Case 323/82, paragraph 39, and of 13 March 1985 in Joined Cases 296 and 318/82, paragraph 26.

States, one trade association and two individual firms from the sector concerned, stating that they shared 'the Commission's concern about the Belgian Government's assistance of the company' and in which they considered that the repeated assistance given to Boch would cause serious distortions of competition.

The Belgian Government contends that it was never informed of the substance of those submissions or of the identity of the parties who made them. For that reason, it could not prepare its defence effectively.

Moreover, it considers it paradoxical that it, in its capacity as a Member State, received less information about the complaints made about the contested capital holding than a non-member country which is the subject of anti-dumping proceedings pursuant to Council Regulation No 2176/84 [17] would have received. It is provided that in such proceedings interested parties and, in particular, representatives of the exporting country may inspect all information made available to the Commission by any party to any investigation and are entitled to be informed of the essential facts and considerations on which the Community authorities base themselves.

In the *Commission*'s view, the aim of its giving notice to interested parties to submit observations is solely to enable it to compile all the information necessary in order for it to evaluate the compatibility of the aid with the common market. Consequently, in the case of aid, there is no adversary procedure comparable to that which exists in the field of competition rules applicable to undertakings (Article 85 *et seq.* of the EEC Treaty).

17 — Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community, Official Journal 1984, L 201, p. 1.

Moreover, as a result of the duty to preserve official secrecy in accordance with Article 214 of the EEC Treaty the Commission is not in a position to pass on the submissions of the parties in question, since they may contain data internal to the undertakings concerned, including confidential data. If the Commission failed to observe a certain discretion in that area third parties might be dissuaded from bringing certain matters to its notice, which would prevent it from performing its duties correctly.

As for the comparison made with anti-dumping procedures, this simply shows that action by the Community legislature is necessary in order to be able to invoke an arrangement of the type claimed by the Belgian Government.

In the *United Kingdom*'s view, the EEC Treaty does not specify that the Commission should pass the comments of other parties on to the Member State notifying the aid. However, on the grounds of fairness it might be appropriate to imply such an obligation. A categorical answer to this question is not possible but depends on consideration of the individual case in question. The Commission is not under an obligation to notify the comments of other parties where these raise no points which have not already been considered in the comments of the Member State notifying the aid. Similarly, the Commission may be unable to disclose certain information on grounds of commercial confidentiality. Exceptionally, however, there may be circumstances where the comments of other parties raise new points which may substantially affect the Commission's decision. In such a case it is appropriate for the Commission to give the Member State concerned a further opportunity to comment before the Commission takes its final decision.

(b) In principle the Belgian Government is correct in its contention that before an administrative decision is taken the party concerned must have the opportunity of putting forward its point of view on the points on which the decision is based. The Court expressly recognized that in particular in its judgment of 13 February 1979 in Case 85/76 [18] and in its judgment of 20 March 1985 in Case 264/82. [19]

However, it does not follow that the Member State concerned has in every case the right to examine the submissions made to the Commission. In fact, in the event the Commission may be debarred from disclosing certain communications on the ground of confidentiality pursuant to the principle of official secrecy laid down in Article 214 of the EEC Treaty. [20] However, the corollary of that is simply that the Commission cannot rely on such communications in the administrative procedure and that since they were not disclosed to the persons concerned they cannot be used as grounds for its decision. [21]

The Commission's contention that in the absence of legislation governing the right to inspect documents in the context of the aid procedure there can be no such right is certainly not correct at that level of generality, since the right to information about the subject-matter of the charge arises simply out of the right to a fair hearing. The Belgian Government stated in the course of the oral proceedings that it was treated worse than a non-member country would be treated under Regulation No 2176/84 (anti-dumping or anti-subsidy procedure). Consequently the question of the application of that regulation by analogy might arise.

In the result, however, it is not necessary to resolve this issue definitively, even if reliance is not placed on the fact that, as the Belgian Government itself admitted during the oral proceedings, it never applied to the Commission to examine the documents in question. The Commission decision refers to the submissions of the other parties involved in the procedure only in so far as it states that the latter share the Commission's reservations about the aid and that some of them referred to the serious distortion of competition to which the aid would give rise.

The fact that some of the participants shared the Commission's reservations is certainly not a matter on which the Belgian Government should have been heard. Rather, it constitutes an assessment of facts of which the Belgian Government was in any case aware. The same applies to the reference made to the fact that some of the participants stressed the serious distortions of competition to which the repeated grant of aid would give rise. The Commission provided evidence for distortions of competition on the basis of facts which it could establish even without submissions to that effect from the parties concerned.

As a result, the contested decision is not based on the views submitted to the Commission by the other participants mentioned.

The participants' submissions were of significance, at most, in so far as they reinforced the Commission's view with regard to the legal assessment of the conduct of the Belgian Government. However, it is not

18 — Judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche & Co. AG* v *Commission of the European Communities* [1979] ECR 461, at p. 510 *et seq.* (competition procedure).

19 — Judgment of 20 March 1985 in Case 264/82 *Timex Corporation and Others* v *Council and Commission* [1985] ECR 849 (anti-dumping procedure).

20 — See my Opinion of 22 January 1986 in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965.

21 — See the judgment of 13 February 1979 in Case 85/76, *loc. cit.*, at pp. 512 and 513 (paragraph 14).

apparent that the Belgian Government's interests were adversely affected by the withholding of the participants' submissions, since the facts on which the Commission's decision were based were fully known to the Belgian Government: the export business of Boch SA, Boch SA's losses and the fact that those losses were offset by State authorities.

C — In the light of the foregoing I propose that the Court should dismiss the application and order the applicant to pay the Commission's costs. No order need be made concerning the intervener's costs since it has made no such application.