JUDGMENT OF THE COURT (Sixth Chamber)

17 June 1999 *

In Case C-75/97,

Kingdom of Belgium represented by Gerwin van Gerven and Koen Coppenholle, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Freddy Brausch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities represented by Gérard Rozet, Legal Adviser, and Wouter Wils, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of Carlos Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision 97/239/EC of 4 December 1996 concerning aid granted by Belgium under the Maribel *bis/ter* scheme (OJ 1997 L 95, p. 25),

* Language of the case: Dutch.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch (Rapporteur), G.F. Mancini, H. Ragnemalm and R. Schintgen, Judges,

Advocate General: A. La Pergola,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 September 1998,

after hearing the Opinion of the Advocate General at the sitting on 12 November 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 19 February 1997, the Kingdom of Belgium sought a declaration under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) that Commission Decision 97/239/EC of 4 December 1996 concerning aid granted by Belgium under the Maribel *bis/ter* scheme (OJ 1997 L 95, p. 25, hereinafter 'the contested decision') is void.

The measures taken under the Maribel *bis/ter* scheme

2 In Belgium, a Law of 29 June 1981, laying down the general principles of social security for wage earners (*Staatsblad* of 2 July 1981, p. 8575), introduced the so-called 'Maribel' scheme. Under Article 35 of that Law, employers employing manual workers are granted, for each one of them, a reduction in social security contributions.

3 Under the Royal Decree of 12 February 1993 (*Staatsblad* of 9 March 1993, p. 4995), employers were granted, as from 1 January 1993, in respect of manual workers, upon certain conditions, a reduction in contributions, per quarter and per worker, of BEF 2 825 for a maximum of five manual workers and BEF 1 875 for other manual workers if the employer employs less than 20 workers, and BEF 1 875 per manual worker if the employer employs 20 workers or more.

4 The Royal Decree of 14 June 1993 (*Staatsblad* of 7 July 1993, p. 16069), which introduced the 'Maribel *bis*' scheme, introduced a new amendment as from 1 July 1993. The reduction per quarter and per worker was increased to BEF 3 000 for a maximum number of five manual workers in undertakings employing less than 20 workers. In the other cases, the reduction of BEF 1 875 per quarter and per worker was maintained.

5 If an employer carries on his activities primarily in one of the sectors most exposed to internal competition, the Royal Decree of 14 June 1993 increased the reduction in contributions, per quarter and per worker, from, respectively, BEF 3 000 to BEF 7 200 and from BEF 1 875 to BEF 6 250 (hereinafter 'the increased reductions').

6 The Belgian legislature defined the economic sectors concerned by reference to divisions 13 to 22 and 24 to 36 of the statistical classification pursuant to Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification

of economic activities in the European Community (OJ 1990 L 293, p. 1). Consequently, the undertakings receiving increased reductions are undertakings operating in sectors such as the extraction of non-energy materials, the chemical industry, the metal-processing industry, the precision instrument industry, the optical instrument industry and other processing industries.

7 The Royal Decree of 22 February 1994 (*Staatsblad* of 18 March 1994, p. 6724), which introduced the 'Maribel *ter*' scheme, increased, with effect from 1 January 1994, for undertakings carrying on their activity in one of the sectors most exposed to international competition, the amount of increased reductions per quarter and per worker to, respectively, BEF 9 300 for a maximum of five manual workers and to BEF 8 437 for other manual workers, in undertakings with less than 20 employees, and to BEF 8 437 for manual workers in undertakings employing 20 workers or more.

8 With effect from 1 January 1994, this latter Royal Decree also extended the Maribel *ter* scheme to the international transport sector covered by subdivision 60.242 of the national classification, which derives from the statistical classification of Regulation No 3037/90 and, as from 1 April 1994, to certain other sectors covering air and sea transport and to the transport-related activities coming under subdivisions 61.100, 61.200, 62.100, 62.200, 63.111 and 63.220 of the same classification.

9 The scope of the Maribel *ter* scheme was extended still further, with effect from 1 July 1994, by the Royal Decree of 21 June 1994 (*Staatsblad* of 28 June 1994, p. 17355), to horticulture, forestry and the exploitation of forests.

10 However, the increased reductions granted under the Maribel *bis/ter* scheme apply only to manual workers who work at least 51% of the maximum number of working hours or working days stipulated in the collective labour agreement by which they are covered.

The contested decision

11 By letter of 17 August 1993, the Commission requested from the Belgian Government information on the Maribel *bis* scheme. That request was followed by an exchange of correspondence at the end of which the Commission, on 9 July 1996, informed the Kingdom of Belgium of its decision to commence the procedure provided for by Article 88(2) EC (ex Article 93(2)) (OJ 1996 C 227, p. 8, hereinafter 'the Decision of 9 July 1996'). At the end of that procedure, the Commission adopted the contested decision.

12 Article 1 of that decision provides: 'The increased reduction in social security contributions in respect of manual workers granted under the Maribel *bis/ter* scheme to employers who carry on their principal activity in one of the sectors most exposed to international competition constitutes illegal State aid because it was not notified to the Commission in advance in accordance with Article [88(3) EC]. It is furthermore incompatible with the common market within the meaning of Article 92(1) of the EC Treaty [now, after amendment, Article 87(1) EC] and cannot qualify for any of the derogations laid down in Article 92(2) and (3).'

13 Article 2 requires the Kingdom of Belgium to 'take appropriate measures to terminate forthwith the granting of the increased reductions in social security contributions referred to in Article 1 and [to] recover the illegal aid from the recipient undertakings. The aid shall be repaid in accordance with the procedures and provisions of Belgian law, with interest charged, from the date the aid was granted until the date it is actually repaid, at a rate equal to the percentage value on that date of the reference rate used for the calculation of the net grant equivalent of regional aid in Belgium.'

14 As regards the quarterly reduction in the amount of contributions per worker, the Commission states, in section I of the grounds of its decision, that the aid granted to undertakings carrying on their principal activity in one of the sectors most exposed to international competition, constituted by the difference between the basic reduction and the increased reduction, is BEF 26 248 per worker per year. As regards undertakings employing less than 20 workers, the quarterly advantage

relating to each of the first five workers is regarded by the Commission as falling in the category of *de minimis* aid, which is not therefore caught by Article 92 of the Treaty.

The pleas in law advanced by the Kingdom of Belgium

15 The Belgian Government puts forward five pleas in support of its application for annulment. By the first three, it challenges the validity of the contested decision on the ground that, first, the Maribel *bis/ter* scheme is a general measure of economic policy, and not an aid measure, second, it has no effect on intra-Community trade and, third, in the event that it is considered to be State aid within the meaning of Article 92(1) of the Treaty, it must qualify for the derogation provided for in Article 92(3)(c) of the Treaty and must be declared compatible with the common market. By its last two pleas, the Belgian Government denies that it is under any obligation to recover the amounts of social security contributions saved by way of aid under the Maribel *bis/ter* scheme on the ground that recovery would be disproportionate and, moreover, would be impossible to carry out.

The nature of the Maribel *bis/ter* scheme

16 By its first plea, the Belgian Government contests the validity of the contested decision on the ground that the increased reductions granted under the Maribel *bis/ter* scheme constitute general measures of economic policy excluded from the scope of Article 92(1) of the Treaty and are not aid within the meaning of that provision. In advancing this plea, the Belgian Government examines in particular the general criteria for distinguishing State aid measures from general measures of economic policy, the possible justification for the scheme in question and, finally, the budgetary constraints which at present prevent its scope from being widened.

17 Essentially basing its arguments on public positions taken by the Commission, in particular in its *XXIVth Report on Competition Policy of 1994* and Communication 97/C 1/05 on the monitoring of State aid and reduction of labour costs (OJ 1997 C 1, p. 10, hereinafter 'the 1997 Communication'), the Belgian Government contends that, although there are no clear indications for distinguishing between the two concepts in the case-law of the Court of Justice, Article 92 of the Treaty does not apply to general measures applicable to all undertakings of a Member State where those measures meet objective, non-discriminatory and non-discretionary requirements. According to the Belgian Government, by 'all undertakings' must be understood those which are in an objectively similar position. According to the 1997 Communication, measures in favour of certain categories of workers do not constitute, as such, State aid when they apply automatically and without discrimination.

18 According to the Commission, the question to be examined, starting with the body of ordinary law applicable to all undertakings, is whether the exceptions to that body of law which favour a relatively large group of undertakings fall into the internal logic of the general system. In the present case, justification for the measures to reduce the burden of social security costs adopted under the Maribel *bis/ter* scheme should be sought in the internal logic of the general social welfare system existing in Belgium and not in the specific purpose of the scheme.

19 The Belgian Government contends that the Maribel *bis/ter* scheme is a general measure which reflects a choice of economic policy, consisting in a decision to promote the creation of jobs in industrial sectors employing mostly manual workers earning low wages owing to their low qualifications. By reason of this aim, the increased reductions are restricted to undertakings in the processing industry and to certain international transport sectors, which are the economic areas most affected by redundancies and restructuring. The Belgian Government points out that, even in these areas, only manual workers working for at least 51% of the maximum number of working hours or days allowed are entitled to the increased reductions.

20 The Belgian Government recognises that the reference to the undertakings most exposed to international competition, used to define the scope of the Maribel *bis/ter* scheme, is unfortunate but points out that this is not one of the relevant factors taken into account in restricting the scheme to certain sectors.

21 As regards the sectors excluded from the Maribel *bis/ter* scheme, the Belgian Government points out that these are the tertiary sector and the building sector and that their exclusion is based on objective considerations, namely that employment of manual labour is growing strongly in the tertiary sector and that manual workers in the building industry are subject to special social security and tax systems.

22 Finally, the Belgian Government states that the Maribel scheme forms part of a policy of generalised reductions of social security costs. It explains that the budgetary constraints under which it is operating have obliged it to act progressively, so that it has still not been possible to extend the Maribel *bis/ter* scheme, which is in its first stages, to all sectors of economic activity. Such a temporary restriction, based on budgetary considerations, does not deprive it of its character of a general measure of economic policy when it is already sufficiently generalised. As it is, the increased reductions granted under the Maribel *bis/ter* scheme cover such a large number of undertakings that they must be regarded as being sufficiently general to escape characterisation as State aid and Article 92(1) of the EC Treaty cannot therefore be applied to them.

The selective nature of the increased reductions

23 First of all, it must be borne in mind that Article 92(1) of the Treaty provides that 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 incompatible with the

common market. In particular, measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid (Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34).

24 It is not contested by the Belgian Government that, as the Commission points out in section IV of the grounds of the contested decision, by according to certain undertakings the advantage of increased reductions in social security contributions, the system set up by the Maribel *bis/ter* scheme relieves them of some of their costs and confers on them financial advantages which improve their competitive position.

25 The social character of such State measures is not sufficient to exclude them outright from classification as aid for the purposes of Article 92 of the Treaty (Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 21, and Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 23). Article 92(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 79, and Case C-241/94 *France* v *Commission*, cited above, paragraph 20).

26 According to established case-law, it is necessary to determine whether the increased reductions under the Maribel *bis/ter* scheme entail advantages accruing exclusively to certain undertakings or certain sectors and do not therefore fulfil the condition of specificity which constitutes one of the characteristics of the concept of State aid namely the selective character of the measures in question (see, to this effect, the judgment in *France* v *Commission*, cited above, paragraph 24, and *Ecotrade*, cited above, paragraph 40).

27 As the Belgian Government rightly pointed out at the hearing, it cannot be contended that the measures in question constitute State aid on the ground that the competent national authorities have a discretionary power in the application of the increased reduction of social charges (see *France* v *Commission*, cited above, paragraph 23). In this instance, the conditions for the grant of the increased reductions in question are laid down by the Belgian legislature, in the aforementioned royal decrees, and leave the competent authorities no latitude, in particular in the choice of recipient undertakings or sectors.

28 Nor can it be contested, as both the Belgian Government and the Commission accept, that the restriction of the measures in question to manual workers and only to those manual workers whose working time exceeds a certain number of hours is not sufficient to support the conclusion that aid within the meaning of Article 92 of the Treaty exists.

29 However, as the Belgian Government acknowledges, the increased reductions are granted only to undertakings belonging to certain sectors of the processing industry defined in Article 1 of the Royal Decree of 14 June 1993 by reference to the statistical classification laid down in Regulation No 3037/90 and to the sectors defined in Articles 2 and 3 of the Royal Decree of 22 February 1994 and Article 1 of the Royal Decree of 21 June 1994.

30 The Belgian Government accepts that undertakings belonging to other sectors marked by the employment of manual labour are thus excluded from the benefit of the increased reductions. These include undertakings belonging to the sectors of the processing industry not referred to in the royal decrees and undertakings in the tertiary sector and the building sector.

31 Having regard to the exclusion of those sectors, which, like those covered by the Maribel *bis/ter* scheme, employ manual workers, the Commission rightly found, in section V of the grounds of the contested decision, that the limitation of the

increased reductions to certain sectors rendered those reduction measures selective, so that they fulfilled the condition of specificity.

The derogating character of the increased reductions

32 Neither the high number of benefiting undertakings nor the diversity and importance of the industrial sectors to which those undertakings belong warrant the conclusion that the Maribel *bis/ter* scheme constitutes a general measure of economic policy, as the Belgian Government claims.

33 According to the case-law of the Court, aid in the form of an aid programme may concern a whole economic sector and still be covered by Article 92(1) of the Treaty (Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18) and a measure designed to give the undertakings of a particular industrial sector a partial reduction of the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system, must be regarded as aid (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33).

34 Consequently, a measure aimed at promoting the creation of jobs by reducing, for certain undertakings, the amount of social security contributions which they must pay must be regarded as State aid when it is not justified by the nature or general scheme of the social welfare system.

35 In the present case, the general scheme of social protection laid down by the Law of 29 June 1981 has as its aim, according to Article 3, 'to replace or supplement the occupational income of the worker in order to protect him from the consequences of certain employment risks, certain family situations and life

conditions and social risks'. According to Article 22 of that Law, social security contributions, expressing solidarity between workers and employers, are amongst the means of funding social security and are therefore intended to contribute to the attainment of the objectives pursued.

36 It is true that an increased reduction of social security contributions, concerning only a limited category of employers owing to their belonging to certain industrial sectors, thus relieving them of certain social security charges, does not at first sight appear to derogate from the nature and scheme of the general system of social protection.

37 Moreover, as Community law stands at present, the Member States retain their powers to organise their social security systems (Case C-238/94 *García and Others* [1996] ECR I-1673, paragraph 15). They may therefore pursue objectives of employment policy, such as those relied on by the Kingdom of Belgium, amongst which are, in particular, the maintenance of a high level of employment amongst manual workers and the maintenance of an industrial sector in order to balance the Belgian economy. As regards social welfare costs, the Member States have even been urged by the Commission to reduce labour costs, as appears in particular from point 1 of its 1997 Communication, and from the 'Guidelines on aid to employment' published in 1995 by the Commission (OJ 1995 C 334, p. 4, hereinafter 'the Guidelines').

38 However, it must be emphasised that the increased reductions introduced by the Belgian authorities in order to attain that objective have the sole direct effect of according an economic advantage to the recipient undertakings alone, relieving them from part of the social costs which they would normally have to bear. This is even more true for the horticulture and forestry sectors in relation to which the Maribel *bis/ter* scheme can under no circumstances be justified by the objectives of employment policy, as the Belgian Government has itself admitted.

39 So, the Maribel *bis/ter* scheme, which pursues an employment policy by means affording a direct advantage only in relation to the competitive situation of the undertakings concerned, belonging to certain sectors of economic activity, is not justified by the nature or scheme of the social security system in force in Belgium.

Budgetary restrictions

40 The explanations provided by the Belgian Government, according to which the Maribel *bis/ter* scheme is a general measure of economic policy whose planned extension to all sectors of economic activity can only be done progressively for reasons related to budgetary restrictions, cannot be accepted.

41 Even when a Member State states that it intends ultimately to extend to its entire economy measures initially restricted to certain sectors of activity and thereby generalise them, such a declared intention cannot be taken into account for avoiding application of Article 92(1) of the Treaty since, according to the case-law of the Court of Justice referred to in paragraph 25 above, such measures must be assessed solely in relation to their effects.

42 The opposite approach — assessing the character of a measure liable to constitute unlawful State aid according to the intention of the Member State to generalise the measure — would deprive Community law of its effectiveness in the area of State aid. The Member State concerned would then be able, in such a case, to escape application of the Community rules simply by declaring its intention to generalise the contested measure in the future.

43 The same applies where the Member State concerned can produce evidence of a first stage towards generalisation of the measure under consideration. Consequently, the extension of the Maribel *bis/ter* scheme to undertakings in the horticulture and forestry sectors cannot alter the assessment in relation to this argument concerning the intention of the Belgian Government.

44 It follows from all those considerations that the Belgian Government's contention that the Commission was wrong to find that the Maribel *bis/ter* scheme constitutes aid within the meaning of Article 92 of the Treaty cannot be upheld. The first plea of the Belgian Government must therefore be dismissed.

The effect of the Maribel *bis/ter* scheme on trade between Member States

45 By its second plea, the Belgian Government contends that, in the event that the Maribel *bis/ter* scheme is held to be aid within the meaning of Article 92 of the Treaty, it does not affect intra-Community trade.

46 It also contends that the contested decision is not sufficiently reasoned, in particular in that it does not explain the impact of the measures in question on trade between the Member States and that it therefore infringes the obligation to state reasons, laid down in Article 253 EC (ex Article 190).

47 As regards the effects of the Maribel *bis/ter* scheme on intra-Community trade, it must be recalled that, according to the case-law of the Court, when State aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by

the aid, even if the beneficiary undertaking is itself not involved in exporting. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased, with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State (Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 40).

48 In the case of an aid programme, the Commission may confine its examination to the characteristics of the programme in question in order to determine whether it gives an appreciable advantage to the recipients in relation to their competitors and is likely to benefit essentially undertakings engaged in trade between Member States (*Germany* v *Commission*, cited above, paragraph 18). Moreover, in the case of unnotified aid, it is not necessary for the reasoning on which the Commission decision is based to contain an up-to-date assessment of the effect of the aid on competition and on trade between Member States (Case 301/87 *France* v *Commission* [1990] ECR I-307, paragraph 33).

49 According to that case-law, and contrary to what the Belgian Government contends, it is not necessary in this particular instance for the undertakings benefiting from the Maribel *bis/ter* scheme to be engaged in exporting. They may even operate only at local level.

50 According to the actual wording of Article 1 of the Royal Decree of 14 June 1993 referred to in section V of the grounds of the contested decision, an employer qualifies for the increased reduction if it 'carries on its principal activity in one of the sectors most exposed to international competition'. In the previous section, the contested decision explains that the 'primary purpose [of the increased reductions] is to reduce the costs of undertakings which are either exporters or face competition from imports into Belgium of goods produced and services provided by foreign undertakings, including undertakings from other Member States'. This is borne out by a 'statement on the overall plan for employment' of the Belgian Government which, according to the explanations given in the same section, was communicated to the Commission on 27 December 1993 and in which the Belgian Government pointed out, in particular, the contraction in

exports as a justification for granting greater reductions in social security contributions. The Belgian Government has not contested the truth of that statement.

51 Thus, intra-Community trade is liable to be affected by the scheme in question, since, as sectoral aid, it improves the competitive position of the undertakings concerned, both on the Belgian market and on the export market, in relation to undertakings established in other Member States by relieving them of part of their social costs. Consequently, it must be held that the Maribel *bis/ter* scheme is liable to affect trade between Member States and to distort or to threaten to distort competition.

52 Moreover, according to the case-law of the Court referred to in paragraphs 47 and 48 above, the Commission cannot be criticised, in these circumstances, for not providing sufficient reasoning to satisfy the requirements of Article 253 EC.

53 Having regard to the foregoing considerations, the Belgian Government's second plea, to the effect that the Maribel *bis/ter* scheme has no effect on trade between Member States and that the obligation to state reasons was infringed, cannot be upheld.

Compatibility of the Maribel *bis/ter* scheme with the common market

54 By its third plea, the Belgian Government contends that, if the Maribel *bis/ter* scheme were to be considered to be aid affecting trade between Member States, it must be declared compatible with the common market pursuant to Article 92(3)(c) of the Treaty. It argues in particular that the Commission did not accept, either in the contested decision or in the procedure before the Court, that the scheme was in the nature of aid for the creation of jobs.

55 According to established case-law, in the application of Article 92(3) of the Treaty the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context (Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 34).

56 As regards the exercise of its discretion, the Commission states, in particular in point 13 of the Guidelines and in point 1 of its 1997 Communication, that it has traditionally adopted a favourable attitude towards aid which is intended to promote the creation of jobs.

57 However, as appears from section IV of the grounds of the contested decision, in the present case the Commission refused to apply the derogation provided for in Article 92(3)(c) of the Treaty essentially on the ground that the increased reductions are granted without any direct social or economic compensatory contribution on the part of the recipient undertakings and are not therefore linked to either the creation of jobs in small and medium-sized enterprises or to the hiring of certain groups of workers experiencing particular difficulties entering or re-entering the labour market. Consequently, the aid system introduced by the Maribel *bis/ter* scheme does not in any way guarantee attainment of the objective of creating jobs.

58 In those circumstances, the Belgian Government has adduced no arguments or evidence to support the conclusion that the Commission exceeded the bounds of its discretion in holding that the Maribel *bis/ter* scheme did not meet the conditions for the derogation provided for in Article 92(3)(c) of the Treaty to be applied.

59 Since the refusal to apply Article 92(3)(c) of the Treaty was not vitiated by any manifest error of assessment, the Belgian Government's third plea must also be dismissed.

The obligation to recover the aid is disproportionate

60 By its fourth plea, the Belgian Government contests the requirement to recover aid granted in the form of an increased reduction in social security contributions on the ground that such recovery is disproportionate. In support of its plea, it advances three arguments.

61 First, the Belgian Government, which accepts that the Commission has a discretion whether or not to require recovery of unlawful aid, considers this measure to be a sanction which is excessively heavy in relation to the gravity of the infringement, having regard to the uncertainty which, in its view, surrounds the concept of general measures and their definition in relation to aid.

62 Second, it considers that, having regard to the obligation of cooperation laid down in Article 10 EC (ex Article 5), the Commission was under an obligation to limit the damage flowing from the finding that the Maribel *bis/ter* scheme was unlawful and for this reason should have resorted to less coercive means. In its view, it should, in particular, have directed the Belgian Government to suspend the aid, which had not been notified, while it examined its compatibility with the rules of the Treaty on State aid.

63 Finally, the Belgian Government criticises the Commission for not providing precise information as to its intention whether or not to require recovery of amounts granted under the Maribel *bis/ter* scheme. By not being clear on this matter during the examination stage, the Commission acted in breach of the rights of the defence and the principle of legal certainty.

The Commission's power to require recovery

64 It must be borne in mind first of all that the removal of unlawful State aid by means of recovery is the logical consequence of a finding that it is unlawful (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 66) and that the aim of obliging the State concerned to abolish aid found by the Commission to be incompatible with the common market is to restore the previous situation (Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 21). Furthermore, the Belgian Government has recognised that this is the function of repayment of amounts granted by way of unlawful aid.

65 By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (Case C-350/93 *Commission* v *Italy*, cited above, paragraph 22). Since repayment of the aid is meant only to restore the prior legal situation, it cannot in principle be regarded as a sanction.

66 It also follows from that function of repayment of aid that, as a general rule, save in exceptional circumstances, the Commission will not exceed the bounds of its discretion, recognised by the case-law of the Court (Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 24), if it asks the Member State to recover the sums granted by way of unlawful aid since it is only restoring the previous situation.

67 Although the Belgian Government refers to two particular cases in which the Commission found that it was unable to require repayment, there is nothing in the present case to indicate the existence of exceptional circumstances justifying the same course. Moreover, the Belgian Government itself makes no submissions in support of this course, but confines itself to criticising the recovery demand as disproportionate.

The disproportion between the breach of obligations and the requirement to recover the aid

68 As regards the contention that the requirement to recover the aid is disproportionate in relation to the breach of obligations of which the Kingdom of Belgium is accused, it must be borne in mind that, according to the case-law of the Court, the recovery of State aid unlawfully granted, for the purpose of restoring the situation existing previously, cannot in principle be regarded as disproportionate to the objectives of the provisions of the Treaty on State aid (Case C-142/87 *Belgium* v *Commission*, cited above, paragraph 66, and Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, cited above, paragraph 75).

69 The uncertainty, which, according to the Belgian Government, surrounds the concept of general measures and consequently the scope of application of the Community rules on State aid cannot alter this assessment and render the recovery demand inappropriate.

70 The Belgian Government has itself disclosed that the Commission, by letter of 17 August 1993, had asked for information concerning the Maribel *bis* scheme shortly after its entry into force. It is therefore clear that it could be under no misapprehension as to the Commission's intention to investigate whether or not the scheme constituted unlawful aid. Moreover, the letter which the Belgian Minister for Social Affairs sent to Belgium's permanent representative to the Communities on 15 September 1993 following the Commission's request refers to 'aid for exporting undertakings'.

71 Consequently, any uncertainty as to the concept of general measures could not prevent the Belgian Government from being aware, right from the beginning of the investigation, that the Maribel *bis* scheme might constitute State aid within

the meaning of Article 92 of the Treaty. Consequently, given the case-law of the Court which, in *Deufil* v *Commission*, cited above, had already recognised that the Commission had the power to direct national authorities to order repayment of sums paid, and having regard to the practice developed by the Commission following that judgment, the Belgian Government could not have been unaware of the possibility that the Commission might order it to recover the sums granted under the Maribel *bis/ter* scheme.

72 As regards the Commission's practice, it must have been known, and it cannot be denied, that, before the Maribel *bis/ter* scheme was introduced, the Commission was accustomed to order recovery when it found that aid was incompatible with the rules of the Treaty on State aid (see, in this regard, Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 9; Case C-301/87 *France* v *Commission*, cited above, paragraph 6; Case C-142/87 *Belgium* v *Commission*, cited above, paragraph 8; Case C-303/88 *Italy* v *Commission*, cited above, paragraph 2; and Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 3).

Suspension of the increased reductions during the examination stage

73 As regards the Belgian Government's second argument concerning the breach by the Commission of an alleged duty to employ a less coercive measure, it must be recalled first of all that, according to the case-law of the Court, when the Commission finds that aid has been introduced without being notified, it has the power, after giving the Member State in question the opportunity to submit its comments on the matter, to issue an interim decision requiring it to suspend immediately the payment of the aid pending the outcome of the examination of the aid (Case C-301/87 *France* v *Commission*, cited above, paragraph 19, and Case C-303/88 *Italy* v *Commission*, cited above, paragraph 46).

74 However, that case-law does not mean that the Commission is obliged to require automatically the Member State concerned to suspend payment of aid which has not been notified in accordance with Article 88(3) EC (Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, paragraph 83). The opposite outcome would render nugatory the legal obligation imposed on the Member State by Article 88(3) EC not to implement planned aid before the Commission's final decision and would have the consequence of reversing the roles of the Member States and the Commission.

75 In any event, in the present case a direction to suspend the aid would not have had the same effect as an obligation to recover it since part of the increased reductions had already been implemented at the time when the Commission first requested information, whether this was on 17 August 1993 as contended by the Belgian Government or on 4 February 1994, the date stated by the Commission in the decision of 9 July 1996 and in the contested decision.

76 Moreover, before directing the Belgian Government to suspend the Maribel *bis/ter* scheme, the Commission would have been obliged, under the case-law of the Court, to give the Kingdom of Belgium an opportunity to submit its comments on such a measure (Case C-303/88 *Italy* v *Commission*, cited above, paragraph 46, and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 43), which would have necessarily delayed suspension of the aid.

Lack of information as to the Commission's intentions

77 As regards the alleged lack of information as to the Commission's intention to require the unlawful aid to be recovered if necessary, it must be observed that the

Commission has stated, without being contradicted, that its first request for information, which, according to the Belgian Government, was made on 17 August 1993, contained the following warning: 'The Commission would draw the Belgian Government's attention to the letter which it has sent to all the Member States on 3 November 1983 regarding their obligations under Article [88(3) EC] and to the Communication published in the *Official Journal of the European Communities* No C 318, p. 3, of 24 November 1983, which pointed out that any aid granted unlawfully was liable to be the subject of a demand for repayment.'

78 It must also be pointed out that the penultimate paragraph of the decision of 9 July 1996 again referred to the letter of 3 November 1983 and to the Communication published on 24 November 1983 and also reiterated the terms of the letters of 4 March 1991, 22 February and 30 May 1995, addressed by the Commission to all the Member States on the matter of unlawfully granted aid and the Commission Communication to the Member States (OJ 1995 C 156, p. 5) on the same subject.

79 Thus, the Communication did not lead the Belgian Government to believe that it might decide against demanding repayment of the amounts granted under the Maribel *bis/ter* scheme. Consequently, the Belgian Government must have been aware of the possibility that the unlawful aid would be required to be recovered and its claims of breach of the principle of legal certainty and of the rights of the defence must be dismissed.

Failure to state reasons

80 The Belgian Government argues, alternatively, that the Commission failed to state reasons for its decision to order recovery of the aid and thus acted in breach of Article 253 EC.

81 According to the case-law of the Court, in principle the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the need which the addressee may have in receiving explanations (Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19, and Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 31).

82 However, in the matter of State aid, where, contrary to the provisions of Article 88(3) EC, the proposed aid has already been granted, the Commission, which has the power to require the national authorities to order its repayment, is not obliged to provide specific reasons in order to justify the exercise of that power (Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, cited above, paragraph 78).

83 In the present case, the contested decision contains no reasons explaining the demand for the aid to be recovered. Although that total lack of reasoning taken in isolation or in another context may appear unacceptable in view, in particular, of the administrative difficulties which implementation of this decision will entail, owing to the scope of the Maribel *bis/ter* scheme and its complexity, it must be observed that its adoption came as no surprise in a context with which the Belgian Government was quite familiar and pursuant to a decision which explains in detail how the aid in question was incompatible with the common market. Consequently, this complaint of the Belgian Government must also be dismissed.

84 It follows from the considerations explained above that the plea alleging that the requirement to recover the amounts granted by way of aid is disproportionate cannot be upheld.

Impossibility of carrying out the obligation to recover the aid

85 By this last plea, the Belgian Government maintains that it is absolutely impossible for it to recover the amounts granted in the form of increased reductions in social security contributions owing, in particular, to the wide scope and complexity of the Maribel *bis/ter* scheme. It explains that it will be necessary to determine, in more than 2 000 enterprises and for each quarter, the number of manual workers employed at precise periods. Moreover, recovery is excluded from the outset in the case of undertakings which have in the meantime filed their balance sheets in insolvency proceedings.

86 The Commission, which claims that this plea is inadmissible, rightly points out that the alleged absolute impossibility cannot invalidate the contested decision where it emerges only at the stage of implementation. According to the case-law of the Court, any procedural or other difficulties in regard to the implementation of the contested measure cannot have any influence on the lawfulness of the measure (Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, cited above, paragraph 80). However, the Commission may not impose, by a decision such as the contested decision, which would then be invalid, an obligation whose implementation would, from the beginning, be impossible in objective and absolute terms. Consequently, the Belgian Government's plea could be accepted only if recovery could never objectively have been carried out.

87 After the period for bringing an action for annulment against a Commission decision ordering a Member State to recover unlawful aid has expired, the argument that it is absolutely impossible to carry out such an order is the only defence which the Member State concerned may still advance in proceedings brought by the Commission on the basis of the second paragraph of Article 88(2) EC (Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraphs 13 and 14; Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 8; *Commission* v *Greece*, cited above, paragraph 10, and Case C-280/95 *Commission* v *Italy* [1998] ECR I-259, paragraph 13).

88 In addition, a Member State which, in giving effect to a Commission decision on State aid, encounters unforeseen and unforeseeable difficulties or becomes aware of consequences overlooked by the Commission, must submit those problems to the Commission for consideration, together with proposals for suitable amendments to the decision in question. In such cases, the Commission and the Member State must, by virtue of the rule imposing on the Member States and the Community institutions a duty of genuine cooperation which underlies, in particular, Article 10 EC, work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions and, in particular, the provisions on aid (Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 17). In view of those considerations, the arguments put forward by the Belgian Government in support of this plea must be examined having due regard for the limits set on this action for annulment.

89 The fact that a certain number of undertakings have lodged their balance sheets in insolvency proceedings after the adoption of the contested decision cannot prevent recovery of the aid from the majority of the undertakings which continue to trade. That argument is not therefore relevant (see, to this effect, Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, cited above, paragraph 80).

90 As regards the administrative and practical difficulties which will incontestably arise owing to the large number of undertakings involved, as was made clear in Case C-280/95 *Commission* v *Italy*, cited above, these also do not warrant regarding recovery as technically impossible. Despite the incontestable existence of the difficulties referred to by the Belgian Government at the time when the Commission ordered the aid to be recovered, there is nothing to prove that it is absolutely impossible for recovery to be carried out and that such absolute impossibility already existed when the Commission took its contested decision. To hold, in those circumstances, that recovery is impossible would undermine the effectiveness of Community law in the matter of State aid, which cannot be allowed.

91 Consequently, the Belgian Government's last plea, to the effect that recovery is impossible, must also be dismissed.

92 Since none of the Belgian Government's arguments have succeeded, the action must therefore be dismissed.

Costs

93 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has failed in its submissions, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. **Dismisses the application;**

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

Kapteyn Hirsch Mancini

Ragnemalm Schintgen

Delivered in open court in Luxembourg on 17 June 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber