OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 10 December 1991 *

Mr President,
Members of the Court,

1. The applicants, British Aerospace and Rover Group, request the Court to declare void a decision of 27 June 1990 addressed by the Commission to the United Kingdom Government contained in a letter of 17 July 1990,[1] in so far as the Commission required that government to recover £44.4 million in aid.

Background

2. By Decision 89/58/EEC of 13 July 1988[2] the Commission approved aid granted by the United Kingdom Government consisting of a capital contribution of £469 million in connection with the writing off of debts of the (at that time heavily loss-making) Rover Group (hereinafter referred to as 'Rover'). The capital contribution was made with a view to the acquisition of Rover by British Aerospace. The United Kingdom Government had notified a proposed capital contribution of £800 million but the Commission considered only part of that amount to be compatible with the common market. Moreover, the Commission's approval was granted subject to a number of conditions, of which I shall just mention those that are relevant to the present case.

The first condition was that the United Kingdom should not alter the proposed terms of the sale of Rover as communicated to the Commission, in particular:

(i) the acquisition price paid by British Aerospace would be £150 million;

(ii) British Aerospace would bear all future restructuring costs;

(iii) Rover would not use more than £500 million of its current £1 600 million trading tax losses and those trading tax losses would remain within Rover;

(iv) British Aerospace could not sell the core business of Rover within five years

* Original language: Dutch.

1 — See OJ 1991 C 21, p. 2, where the 'Commission communication pursuant to Article 93(2) of the EEC Treaty to other Member States and interested parties regarding aid which the United Kingdom Government provided to the Rover Group, an undertaking producing motor vehicles' was published.

2 — Commission Decision concerning aid provided by the United Kingdom Government to the Rover Group, an undertaking producing motor vehicles (OJ 1989 L 25, p. 92).

following the decision without incurring a penalty of up to £650 million.

However, the amount of the proposed debt write-off financed by the United Kingdom Government was to be restricted to £469 million. [3]

Secondly, approval was granted subject to the condition that the United Kingdom would refrain until 1992 from granting further aid to Rover in the form of capital contributions and any other form of discretionary aid, with the exception of a regional grant not exceeding £78 million in support of the future investment plan of Rover. [4]

The Commission concluded in Decision 89/58/EEC that the remaining part of the proposed capital contribution notified by the United Kingdom Government (namely £331 million) constituted aid which was incompatible with the common market within the meaning of Article 92 of the EEC Treaty and therefore should not be awarded. [5]

3. By letter of 2 September 1988 the United Kingdom authorities indicated to the Commission that they had properly implemented Decision 89/58/EEC and informed the Commission of the measures adopted for that purpose. On 21 November 1989, however, a report was published by the Comptroller and Auditor General of the United Kingdom National Audit Office (NAO), together with a secret NAO memorandum attached to the report. Those documents revealed that the United Kingdom Government had made additional financial concessions to British Aerospace as a result of the Commission's decision to allow only £469 million of the notified capital contribution/debt write-off of £800 million. It appeared from the report and the memorandum that the value of those additional concessions was an estimated £38 million. At the request of the Commission the United Kingdom authorities forwarded to it the report of the NAO, the secret memorandum and later also the sale contract and related documents.

From an examination of those documents and from the discussions which it had with the Department of Trade and Industry (the DTI) the Commission concluded that the DTI and British Aerospace had agreed as a result of Decision of 89/58/EEC that the United Kingdom Government would grant further financial concessions to British Aerospace in connection with the acquisition of Rover. Again I mention only those findings which are relevant to the present case:

First, it appeared from the documents forwarded to the Commission that the United Kingdom authorities had paid British Aerospace £9.5 million to cover part of the £13.6 million cost to British Aerospace of acquiring Rover's minority shares. [6] According to the Commission the

3 — See Article 1 of Decision 89/58/EEC.

4 — Ibid.

5 — See Article 2 of Decision 89/58/EEC.

6 — In addition to the United Kingdom Government's holding acquired by British Aerospace a further 0.2% of the shares of Rover were held by the public. It is not disputed that British Aerospace could have acquired those shares under the applicable legislation for approximately £300 000, at least if — in the words of the applicants — it had adopted a coldly commercial attitude (see page 12 of the application). Instead British Aerospace decided to pay the remaining shareholders £13.6 million, comprising £10.7 million in cash and the remainder in shares. According to British Aerospace and Rover that inflated price and the contribution of the United Kingdom Government were justified on the grounds of social justice and (more specifically in the case of British Aerospace) public relations.

amount was fixed at £9.5 million in order to remain under the £10 million threshold for parliamentary approval required by the 1982 Industrial Development Act.

Secondly, it appeared from the documents that the United Kingdom Government had paid Rover £1.5 million to cover costs of legal and economic advice incurred by it connected with the sale.

Thirdly, it appeared from the documents that payment by British Aerospace of the £150 million purchase price for Rover was deferred from 12 August 1988 to 30 March 1990. The United Kingdom authorities admitted this and calculated that this deferment represented a net benefit of £22 million for British Aerospace. That figure was calculated by deducting from the gross benefit of £33.4 million saved in interest payments £11.4 million to take account of the fact that the financial costs attaching to a loan of £150 million would have reduced British Aerospace's profits by £33.4 million and consequently reduced its tax liability (at a corporation tax rate of 35%). The Commission does not however agree with that method of calculation, because it is the Commission's established practice to require repayments of illegal aid without taking account of any tax implications. In its view, therefore, the additional financial concession amounted to £33.4 million.

4. After examining the abovementioned documents and information and following further discussions with the United Kingdom Government the Commission sent it the disputed letter of 17 July 1990, which was published as a communication in the Official Journal[7] and in which the Commission 'informed the United Kingdom Government of its decision concerning the incorrect execution of Commission Decision 89/58/EEC of 13 July 1988'.[8] Part I of the letter sets out the conditions for approval of the aid laid down in Decision 89/58/EEC, refers to the documents and additional information which the Commission received from 21 November 1989 onwards and summarizes the additional financial and other concessions made to British Aerospace. Part II of the letter states that the Commission 'considers' that the abovementioned financial concessions constitute aid within the meaning of Article 92(1) and that the aid was unlawful because, according to the Commission, it *either* did not form part of the terms of sale notified to the Commission during the procedure preceding the adoption of Decision 89/58/EEC and hence infringed the first condition of the decision (no amendment to the terms of sale) *or* it infringed the third condition of the decision (no further aid to Rover).[9] Part IV of the letter states as follows:

7 — The reference to the communication is given in footnote 1 above.

8 — See the opening words of the communication.

9 — The Commission also considered Decision 89/58/EEC to be infringed because the penalty to be paid by British Aerospace in the event of an onward sale was relaxed and the United Kingdom authorities had given British Aerospace the assurance of 'sympathetic' consideration of aid applications by British Aerospace for non-Rover businesses. These matters are not, however, the subject of the present case, since the applicants solely claim the annulment of the letter in so far as it requires the United Kingdom Government to recover the abovementioned additional concessions already granted.

'On the basis of the above considerations, the Commission has decided the following:

(a) The additional £44.4 million aid granted in the context of the sale of Rover to British Aerospace constitutes illegal aid which was paid in breach of Decision 89/58/EEC and that your authorities are required to recover it from the beneficiaries (ie the £9.5 million payment to cover the purchase cost of minority shares, the £33.4 million benefit to British Aerospace which occurred from the deferment of the payment of the sales price, and £1.5 million from Rover which it obtained to cover external advice costs linked to the sale).

...

Your authorities shall inform the Commission of the measures taken to comply with this Decision within one month from its notification.

In case of absence or reply or in case of unsatisfactory reply by your authorities within the indicated deadline, the Commission shall be obliged to refer the matter to the European Court of Justice.'

The United Kingdom decided to implement the demands made in the letter. It appears in particular from the statements made by the applicants at the hearing that the United Kingdom Government brought proceedings in the High Court in London for recovery of the abovementioned sums.

Pleas and arguments of the parties

5. British Aerospace and Rover seek a declaration that the abovementioned letter is void. They consider that the letter constitutes a decision for the purposes of Article 189 of the EEC Treaty and that it is void on grounds of infringement of essential procedural requirements. In particular the applicants argue that the Commission wrongly failed to hear them before adopting the contested decision. Moreover, they claim that the conditions for recovery of the payments made to British Aerospace are not fulfilled and that the Commission wrongly characterized the payments as aid incompatible with the common market.

6. The Commission does not deny that the contested letter constitutes a 'decision' and that the decision is of direct and individual concern to the applicants, so that their application for annulment is admissible. At the same time it appears from the Commission's defence that it does not consider the letter to be a fully fledged decision for the purposes of Article 189 of the EEC Treaty. It states that the letter or decision cannot be regarded as an independent measure because it derives its existence entirely from Decision 89/58/EEC [10] and in legal terms may be characterized as no more than an extension

10 — See page 3 of the defence.

of Decision 89/58/EEC implementing that decision and producing no new legal effects. [11]

That the Commission was entitled in this case to adopt such an 'implementing decision' follows, in its view, from the fact that it could have chosen to institute proceedings against the United Kingdom directly before the Court under Article 93(2) of the Treaty on account of its failure to comply with Decision 89/58/EEC. Instead the Commission chose to give the United Kingdom a last opportunity to comply with its obligations by stating in what way and to what extent the United Kingdom had failed in the Commission's view to comply with Decision 89/58/EEC. Consequently, according to the Commission, the letter or decision identified and quantified the aid which had been granted by the United Kingdom Government in breach of Decision 89/58/EEC and ordered its recovery from the parties concerned. [12]

In the light of that analysis of the contested letter or decision the Commission was not obliged to hear the applicants before adopting a decision. The right to be heard was applicable previously (and was properly observed) in the context of the procedure which led to Decision 89/58/EEC. The additional financial concessions dealt with in the letter or decision were (i) contemplated and negotiated between the United Kingdom Government, on the one hand, and British Aerospace and Rover, on the other, before the Commission adopted Decision 89/58/EEC and were not notified to the Commission and (ii) were indissociably linked to the terms of sale of Rover to British Aerospace. Consequently, the concessions fall to be dealt with exclusively in the context of the observance and enforcement of Decision 89/58/EEC. The Commission concludes that the contested letter or decision merely constitutes a measure implementing or enforcing Decision 89/58/EEC and that it was not therefore obliged to grant the applicants a further hearing.

11 — See pages 8 and 10 of the rejoinder.

12 — See pages 6 and 8 of the rejoinder.

The power of the Commission to adopt 'implementing decisions'

7. From the foregoing and from the arguments of the parties it appears that the central issue in this case is to establish what legal means the Commission has at its disposal where a Member State does not comply with the conditions which the Commission lays down in an earlier decision addressed to the Member State approving the grant of aid. More particularly, the question arises whether, where those conditions are infringed as a result of the grant of additional financial concessions, the Commission is empowered, without hearing the interested parties, to adopt an 'implementing decision' on the basis of its earlier decision in which it establishes that the conditions have not been met and in which it concludes, without any further investigation, that the additional financial concessions constitute aid incompatible with the common market and orders the recovery thereof. For the applicants the right to be heard in that connection is therefore the real issue in this case.

8. Under the system provided for by Articles 92 and 93 of the Treaty there are in my view four possible courses of action open to the Commission in the event of an infringement of an earlier (conditional or negative) decision concerning State aid.

First, under the second subparagraph of Article 93(2) of the Treaty the Commission may, by way of derogation from Articles 169 and 170 of the Treaty, that is to say without giving the Member State formal notice and issuing it with a reasoned opinion, refer the matter of the Member State's non-observance of its decision direct to the Court of Justice.

If it wishes the Commission may, before instituting proceedings before the Court, informally give the Member State in question a last chance to remedy the infringements of the earlier decision which it has identified.[13] A final warning of that kind is no more than a reminder and cannot of course constitute a decision for the purposes of Article 189. In other words it is not binding on the Member State to which it is addressed. If an action for annulment of such a final warning were brought before the Court, it would be inadmissible.[14]

The last paragraph of the contested letter or decision (set out in section 4 above) and the fact that the letter was included in the C series of the Official Journal as a 'communication' appear to suggest that the letter should be regarded as such a warning and not as a decision which may be the subject of a legal challenge. On the other hand, terms used elsewhere in the contested letter or decision leave no doubt about the binding or at least imperative nature of the document. Part IV of the authentic, English version of the decision states that the Commission 'decided' (and in that connection I would mention that the letter was referred to as a 'decision' of the Commission — see Official Journal C 21, p. 2, introductory paragraph) that the United Kingdom authorities 'are required' to recover the financial concessions from the beneficiaries. Moreover, in other paragraphs of the decision the Commission uses the mandatory word 'shall'. In addition, the penultimate paragraph of the letter or decision leaves little doubt about the true nature of the document. There it is stated that the United Kingdom authorities 'shall' inform the Commission of the measures taken to comply with 'this Decision' (note the initial capital).

That the contested letter does in fact constitute a decision which produces legal effects and is binding on the United Kingdom Government is apparent finally from the fact that the Commission did not plead that the applicants' action was inadmissible but on the contrary stated that it had 'no comment to make' concerning the applicants' argument that they were directly and individually concerned by the obligations placed upon the United Kingdom Government.[15] For the remainder of my Opinion I shall therefore assume that the letter is to be regarded as binding on the Member State to which it is addressed and

13 — For such a situation see OJ 1991 C 11, p. 7, where the Commission expressed its view that France had not observed the conditions of an earlier aid decision.

14 — See the judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, in which an action brought against a statement of objections in the context of competition proceedings was dismissed on the ground that such a statement was merely a preparatory act and did not oblige the undertaking concerned to alter its trading practices.

15 — See the Commission's defence, p. 1, point 2.

in other words constitutes a decision. The Commission therefore did not avail itself of the first possible course of action, since it immediately addressed a decision to the United Kingdom rather than a non-binding 'final warning'.

9. The *second* possibility open to the Commission is to adopt provisional measures such as those described in the 'Boussac' judgment. [16] Where as in this case a Member State infringes a decision which approved aid on condition that further financial concessions were not granted, the Commission may, if subsequently financial concessions are in fact granted, adopt a decision requiring immediate suspension of the payments and the submission of all the information needed to assess the lawfulness of the payments. The suspension of the payments should give the Commission the opportunity to examine whether the payments are compatible with the common market. [17] If the Member State does not comply with the order to suspend payment and supply the necessary information, the Commission is entitled to assess the compatibility of the additional concessions with Article 92 of the EEC Treaty on the basis of the information at its disposal (that is to say the third possibility mentioned below) or to refer the matter direct to the Court (that is to say the first possibility referred to above). [18]

In the present case the Commission did not adopt this course of action and moreover was unable to do so. It did not become aware of the disputed payments until after they had been made, so that an order to suspend payment would have served no useful purpose.

10. The *third* possibility is that the Commission institutes a new procedure under the first paragraph of Article 93(2) in respect of the newly discovered payments and, if appropriate, finds in a new decision that the payments constitute aid incompatible with the common market. This assessment can and may be made in the light of the earlier decision. [19] Indeed in its recent judgment in Case C-261/89 [20] the Court accepted that the Commission may declare aid incompatible with the common market on the ground that it infringes an earlier decision which approved aid on condition that no further aid would be granted for a certain period. That finding was justified in the judgment on the ground that (i) the Commission was bound under the procedure laid down by Article 93(2) to take account of all relevant information, including the legal and economic context which it assessed in an earlier decision, and (ii) that the investigation procedure under Article 93(2) provides an opportunity to take account of all new information which is of such a nature as to alter the assessment made in the earlier decision. [21] It seems to me that the significant point in that judgment is that the 're-use' of the assessment made in the earlier decision is permissible *only in the context of a new procedure under Article 93(2)*, which requires the Commission to give 'notice to the

16 — Judgment in Case C-301/87 *France* v *Commission* [1990] ECR 307, in particular paras 9 to 24.

17 — See para. 21 of the 'Boussac' judgment. I shall shortly consider the question whether that assessment may be made on the basis of the earlier Commission decision that has been infringed (see section 10).

18 — See paras 22 and 23 of the 'Boussac' judgment.

19 — I am assuming that the earlier decision was not challenged within the prescribed period and hence became definitive.

20 — Judgment of 3 October 1991 *Italy* v *Commission* [1991] ECR I-4437.

21 — See paras 20 to 23 of the judgment.

parties concerned to submit their comments' [22] and to take proper account of any comments made.

In this case the Commission did not adopt this course of action either. It is true that in the contested decision the legality of the additional financial concessions was assessed on the basis of Decision 89/58/EEC, but the Commission itself emphasizes (see section 6 above) that the contested decision was not adopted under the procedure laid down by Article 93(2) but was merely an extension of, or measure implementing, Decision 89/58/EEC. In view of this the Commission did not call upon the interested parties (namely British Aerospace and Rover) to submit their comments.

11. The Commission also has, in my view, a *fourth* possibility. Where, as appears to be the case here, the Commission concludes that in adopting its earlier decision it did not have all the relevant facts at its disposal because it was unaware that the Member State concerned, in addition to the notified aid, paid a certain amount of unnotified aid (for example in order to overcome the effect of a decision finding part of the aid to be incompatible with the common market), it may withdraw the partial and conditional approval which it gave earlier to the notified aid on the basis of the principle *fraus omnia corrumpit.* The early approval was given on the basis of an error which resulted from the withholding of information by the Member State concerned. The Commission may then re-examine the previously notified aid in the light of the new information and, if appropriate, conclude on the basis of that investigation that part of the aid that was previously approved (or even the whole of the aid) is incompatible with the common market and order its recovery. The 'renewed' examination must of course be carried out by means of a procedure under Article 93(2), so that the Member State concerned and all the interested parties are given the opportunity to make their views known concerning the consequences which the unnotified aid has for the earlier approval of the notified aid. The investigation will result in a new decision in which the Commission gives its findings concerning both the previously approved aid and the unnotified payments and in which it, if appropriate, demands recovery of all aid (both previously approved and subsequently discovered) which it finds to be incompatible with the common market in the light of the new information.

In this case, however, the Commission did not use this fourth possibility either. Nowhere in the contested letter or decision or in its submissions before the Court does it refer to the withdrawal of its earlier approval and the opening of a new procedure under Article 93(2). On the contrary, in Part II, point B, of the contested letter or decision, the Commission concludes that, in assessing the price paid by British Aerospace for Rover at the time in the light of the additional information which it subsequently received, it would not have come to any other conclusion than that to which it came in Decision 89/58/EEC

22 — See the first subparagraph of Article 93(2). The Commission always announces the opening of a new procedure in the Official Journal. In its Fifteenth Report on Competition Policy (No 171) it stated moreover that such announcements would in future be accompanied by considerably more information with the aim of encouraging the intervention of interested third parties in any procedure opened by it.

even if it had had that information at the time when it adopted that decision, that is to say that 'the proposed acquisition price reflects fairly the real net worth of the company in the market'.[23]

12. In my view the possible courses of action outlined above, taken individually or together, provide the Commission with effective powers to ensure that its decisions on aid are observed. By the letter or decision in question the Commission none the less chose a different method. As already stated, it adopted an 'implementing decision' on the basis of Decision 89/58/EEC in which it found that the United Kingdom Government had infringed Decision 89/58/EEC by granting a number of additional financial concessions and required that government to remedy the infringement by recovering the concessions from the undertakings which had received them. In my view, however, the system laid down by Article 92 and 93 of the EEC Treaty does not confer upon the Commission the power to adopt such a decision. The Commission's power to adopt decisions under Article 93 is intended to allow it to assess whether national aid is compatible with the common market. It cannot, on the other hand, be used solely to establish non-observance of an earlier decision. In particular, the Commission does not have the power, once it has adopted a decision concerning the compatibility of aid with the common market, to adopt a new decision in which it finds that that decision has not been observed (in this case because the Member State granted additional financial concessions). It appears from Article 93(2), second subparagraph, that in such a case the Commission must refer the matter to the Court.[24]

That does not mean, however, that the Commission may not adopt a *new* decision with regard to the additional financial concessions granted in breach of an earlier decision in which it makes a finding concerning the compatibility of the additional concessions with the common market. Nor does it prevent (see the judgment in Case C-261/89 mentioned in section 10 above) that new decision from assessing the compatibility of the additional financial concessions with the common market in the light of the earlier decision. However, where such a new decision is taken the Commission's assessment should — even in the lastmentioned case, as the Court made clear in the judgment in Case C-261/89 mentioned in section 10 above — be carried out in accordance with the procedure laid down by Article 93(2), that is to say after advising and consulting the interested parties. It is common ground that in this case that did not occur.

I therefore reject completely the Commission's view that the application of the abovementioned procedure may be dismissed as an unnecessary formal requirement. The new investigation procedure and above all consultation of all

23 — OJ 1989 L 25, p. 95.

24 — See also para. 3 of the 'Boussac' judgment (cited above in section 9), in which the Court held that, if a Member State continues to pay unnotified aid notwithstanding a Commission decision, the Commission may bring that Member State before the Court direct — but not, I would add, establish the infringement of the decision of its own motion.

the interested parties should allow the Commission to take account of all the relevant changes in the factual circumstances which have taken place since the adoption of the earlier decision. That is moreover illustrated by the present case. The applicants have raised four points which were not covered by Decision 89/58/EEC and which were dealt with by the Commission in the contested decision without giving the applicants the opportunity to submit their comments. Those points concern (1) the characterizing of the subsequently discovered additional financial concessions to British Aerospace and Rover as State aid (in the applicants' view the transactions concerned correspond to ordinary commercial practice); (2) the quantification of the benefit which British Aerospace obtained from deferment of payment of the purchase price (see section 3 above); (3) the characterizing of the £1.5 million reimbursement to Rover of the cost of legal and economic advice as aid (in the applicants' view this reimbursement also formed part of ordinary commercial practice); and (4) the calculation of the value of the minority shares in Rover subsequently acquired by British Aerospace. As is apparent from my discussion — which I undertake only by way of alternative — of the arguments put forward by the parties in connection with those points, examination of the second point in particular is made difficult by the fact that the applicants were not heard before the Commission adopted its decision.

13. On the basis of the foregoing I therefore conclude that the Commission, by assuming that the Treaty granted it an independent power of decision allowing it, without any prior procedure, to find in an 'implementing decision' that an earlier aid decision has not been complied with and to require in that implementing decision that the Member State concerned recover from the recipients payments made in breach of the earlier decision, infringed the principle laid down in Article 4 of the Treaty that each institution must act within the limits of the powers conferred upon it by the Treaty.

In the alternative: the applicants' remaining pleas

14. In case the Court does not follow my main conclusion, I should like to consider briefly the remaining pleas put forward by the applicants. For this purpose I shall assume that the Commission does in fact have the power to adopt 'implementing decisions' in which it finds that an earlier decision on State aid has not been observed and specifies the consequences of that non-observance (including recovery of the unlawfully granted aid). Moreover, I assume, just as I did in my main discussion, that the Commission may in its later decision assess the compatibility of subsequently granted aid with the common market on the basis of its earlier decision.

Specifically I must consider, with respect to the three points to which the applicants' action relates (namely the £9.5 million acquisition costs that were paid to British Aerospace, the £1.5 million paid to Rover in respect of consultancy costs and the benefit which British Aerospace obtained as a result of the deferment for 20 months of payment of the acquisition price for Rover), whether it was correctly found in the contested decision that the measures (1) were to be regarded as aid for the purposes of Article 92 of the Treaty, (2) were incompatible with the common market and were capable of

affecting trade between Member States, and (3) should be recovered from the recipients.

15. Let me first consider the question whether the measures constitute aid. Contrary to the applicants' view, I consider that the Commission correctly considered in each case that the benefits in question must be regarded as aid for the purposes of Article 92 of the Treaty.

As regards the £9.5 million acquisition costs, the applicants argue that a majority shareholder may well have an interest in acquiring the remaining shares of the minority shareholders and that the £13.6 million paid in that connection was a fair price for reasons of social justice and public relations (see footnote 6 above). In any event, according to the applicants, the payment made by the United Kingdom Government to British Aerospace of £9.5 million could not be regarded as a benefit for British Aerospace, since the latter immediately paid the amount out to the minority shareholders.

That argument is certainly not convincing. The applicants deny neither that the obligation to buy out the minority shareholders lay with British Aerospace nor that the decision to pay £13.6 million instead of £300 000 was that of British Aerospace and provided British Aerospace with favourable publicity as regards the investing public. Seen in that light the £9.5 million paid by the United Kingdom Government is undoubtedly to be regarded as State aid, since it covers expenditure which British Aerospace would otherwise have had to bear. Even though British Aerospace used that amount wholly for paying the remaining shareholders an inflated price, it did so on the basis of a decision which it took itself for its own benefit. In response to the applicants' argument that an inflated price was paid on the basis of a contractual obligation (not notified to the Commission) which British Aerospace undertook towards the United Kingdom Government in connection with the acquisition of Rover, it can only be said (1) that Decision 89/58/EEC approved the capital contribution by the United Kingdom Government on the express condition that the terms of sale notified would not be altered and (2) that the buying out of the minority shareholders of Rover for an inflated price did not form part of the notified terms of sale.

In relation to the £1.5 million which was paid to Rover in respect of consultancy costs, the applicants observe that, contrary to what the Commission maintains, those costs were not related to the sale of Rover to British Aerospace, but to the policy objective of the United Kingdom Government to privatize Rover. They add that, seen in that light, the costs constituted judicious expenditure by the United Kingdom Government and in any event merely reimbursed British Aerospace for expenditure that had already been incurred. For the abovementioned reasons that argument also seems to me to be inapposite. The amount paid by the United Kingdom Government would normally have been borne by British Aerospace or Rover or both. It is clear therefore that the payment constitutes aid.

As regards the deferment by 20 months of payment of the purchase price, I share the

Commission's view that this also constitutes aid in favour of British Aerospace. That deferment constitutes an infringement of the condition laid down in Decision 89/58/EEC that British Aerospace would, immediately after the capital contribution, pay £150 million to the United Kingdom Government in return for the transfer of the Rover shares held by the government.[25] The applicants' only argument on this point is that there were sound commercial reasons for deferment of the payment. Without that deferment British Aerospace would have had to borrow the purchase price without being able to finance the interest on the loan from Rover's profits. That does not, however, alter the fact that the deferment of the payment was *interest-free* and was thus to be regarded as aid in favour of British Aerospace. A private seller would allow such deferment of payment only if the buyer undertook to pay interest on the sale price on account of late payment. In other words, the aid consists in the failure to charge interest on account of the deferred payment.

16. The second question is whether the Commission correctly concluded that the three aid measures (1) were incompatible with the common market and (2) were capable of affecting trade between Member States.

As already stated, the Commission may assess the compatibility of subsequently discovered aid with the common market on the basis of an earlier decision. The same applies in my view to the assessment of whether aid may affect trade between Member States. The real question therefore is whether Decision 89/58/EEC constituted a sufficient basis for the assessments made by the Commission in the contested decision concerning the compatibility of the aid with the common market. In my view that question must be given an affirmative answer. Each of the three aid measures is stated in the contested letter or decision to be in breach of the first condition laid down in Decision 89/58/EEC (namely that the terms of sale notified to the Commission should not be altered) and/or the third condition (namely that no further aid in the form of capital contributions or any other form of discretionary aid should be granted to Rover). The applicants put forward no substantive arguments on this point and, moreover, have not produced any evidence (see the judgment in Case C-261/89 mentioned in section 10) to suggest that the factual situation has altered after the adoption of Decision 89/58/EEC in such a way as to make the assessment made in that decision no longer valid for the aid measures now at issue.

17. The third and last question is whether the Commission in the contested decision may require the recovery of the aid which it has found to be incompatible with the common market on the basis of Decision 89/58/EEC. In principle this question must be given an affirmative answer if it is assumed, as I do in this part of my Opinion, that the Commission has the power to adopt an 'implementing decision' in which it establishes the infringement of an earlier decision and specifies the consequences of that

25 — See the terms of sale set out in Part II of Decision 89/58/EEC. The applicants cannot rely on the argument — put forward at the hearing — that the operative part of the decision does not expressly mention that the price must be paid immediately, since the statement of reasons makes clear that that is the case; moreover, in the absence of a contractual clause to the contrary, immediate payment is the normal rule.

infringement (including recovery of unlawful aid).

The applicants' argument concerning the lack of any specific statement of reasons concerning the requirement to recover the aid from British Aerospace must therefore fail. The unlawfulness of the advantages granted to British Aerospace (which at the same time constitutes a ground for recovery) follows from Decision 89/58/EEC, which was implemented by the contested decision.

18. There remain three specific arguments which the applicants put forward with regard to the supposedly incorrect calculation of the amount to be recovered from British Aerospace in respect of the deferment of payment of the purchase price (see section 3 above, last indent, and part III D of the Report for the Hearing). At issue here therefore is not the question of principle as to whether recovery was possible but the *amount* which the Commission could order to be recovered.

First, the applicants argue that the Commission should have taken account of the fact that a large part of British Aerospace's turnover derives from trading activities carried on outside the common market or on markets which are unconnected with the market on which Rover is active and thus cannot disrupt competition on that market. In other words, the Commission should have regarded only part of the benefit as falsifying competition.

That argument is unconvincing. It is clear that the aid granted by the United Kingdom Government in connection with the acquisition of Rover by British Aerospace was to be used for Rover's activities. The mere fact that part of British Aerospace's turnover derives from markets outside the Community or markets on which Rover is not active is not a sufficient ground for regarding (part of) the aid as compatible with the common market, since British Aerospace does not claim that (part of) the aid granted was actually used on such markets.

19. Secondly, the applicants maintain that in calculating the benefit resulting from deferment of the payment the Commission used an excessively high interest rate (a rate put forward by the United Kingdom Government). They point out that the benefit accruing from deferment of the payment consisted in the fact that British Aerospace would otherwise have been obliged to borrow money at the time of the sale in order to pay the purchase price. Relying on an opinion given by a merchant bank the applicants argue that British Aerospace could have obtained a long-term loan on the capital market in August 1988 at an interest rate of 10.97% per annum. On the basis of that interest rate the interest saved amounts not to £33.4 million but to £26.8 million.

The Commission replies that it accepted the calculation put forward by the United Kingdom Government (which was based on the average interest rate on the market for a loan for 20 months). The lower interest rate which British Aerospace suggests it could have obtained if it had made long-term borrowings in July 1988 is not suitable because payment was deferred only for 20 months, and therefore a comparison with long-term borrowing is inappropriate.

Moreover, the Commission's established practice is to calculate aid on a general basis, that is to say *not* specifically with reference to the individual undertaking receiving the aid.

In principle I consider that the applicants correctly state, in reply to the Commission's argument, that under Articles 92 and 93 of the EEC Treaty an undertaking which receives prohibited aid can only be required to pay back aid *which it has actually received.* However, I do not think that they can conclude from that that the benefit which British Aerospace actually received is equal to the interest which they would have paid for 20 months on the most favourable long-term borrowings which an undertaking such as British Aerospace could have obtained in August 1988 on the capital market. That does not appear to me to be correct since deferment of payment must be regarded as a loan by the seller (namely the United Kingdom Government) of the sale price to the buyer (namely British Aerospace). The benefit obtained by British Aerospace from an interest-free deferment is in other words equal to the interest (on account of late payment) which in normal commercial circumstances it would have had to pay to the United Kingdom Government in exchange for the deferment of payment for 20 months and which normally must at least be equal to the amount of interest which the United Kingdom Government could have earned by investing the sale price for the period of that deferment at the average interest rate on the market in August 1988. Consequently, it must be concluded that the interest rate chosen by the Commission is correct.

20. The applicants argue thirdly that the Commission wrongly took no account of the fiscal implications of the deferment of payment. For the Commission's views I refer to section 3, third indent, above. In the present case the applicants challenge that view and in my view do so wrongly. It would be unreasonable to oblige the Commission, wherever it discovers aid in the form of a saving (savings in taxation, interest and so forth), to calculate the tax implications of that benefit under the applicable national law. More specifically with reference to the present case, the Commission may reasonably assume that, if unduly paid aid is recovered, the repayment of £33.4 million by British Aerospace and/or Rover will, just like an interest payment of that amount, give rise to a tax *deduction*, so that the net cost of the repayment (just like the net value of the benefit) amounts to only £22 million. There is therefore no reason to take account of the deductibility of the interest saved in calculating the amount of the aid.

Conclusion

21. On the basis of the foregoing I propose that the Court declare void the Commission decision contained in the letter of 27 June 1991 on the ground of lack of powers or infringement of essential procedural requirements, in so far as that decision requires the United Kingdom to recover an amount of £44.4 million from the applicants; in addition the Commission should be ordered to pay the costs.