and trade associations. In other words, there is an indeterminate group of persons to whom notice must be given.

It follows that Article 93 (2) does not require individual notice to be given to particular persons. Its sole purpose is to oblige the Commission to take steps to ensure that all persons who may be concerned are notified and given an opportunity of putting forward their arguments. Under those circumstances, the publication of a notice in the Official Journal is an appropriate means of informing all the parties concerned that a procedure has been initiated.

3. The Treaty applies to aid granted by a State or through State resources "in any form whatsoever". It follows that no distinction can be drawn between aid granted in the form of loans and aid granted in the form of a holding acquired in the capital of an undertaking. Aid taking either form falls within the prohibition laid down in Article 92 where the conditions set out in that provision are fulfilled.

The granting of aid, especially in the form of capital holdings acquired by the State or by public authorities, cannot be regarded as being automatically contrary to the provisions of the Treaty. Thus, irrespective of the form in which aid is granted, it is the Commission's task to examine whether it is contrary to Article 92 (1) and, if so, to assess whether there is any possibility of its being exempt under Article 92 (3), giving the grounds on which its decision is based accordingly.

In Case 323/82

SA INTERMILLS, whose registered office is at Andenne (Belgium), represented by Léon Goffin, Jean-Marie de Backer and Jean-Louis Lodomez, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe-II,

applicant,

supported by

SA INTERMILLS-INDUSTRIE ANDENNE, whose registered office is at Andenne,

SA INTERMILLS-INDUSTRIE PONT-DE-WARCHE, whose registered office is at Malmédy,

SA INTERMILLS-INDUSTRIE STEINBACH, whose registered office is at Malmédy,

all represented by Léon Goffin, Jean-Marie de Backer and Jean-Louis Lodomez, with an address for service in Luxembourg at the Chambers of Ernest Arendt,

interveners,

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Marie-José Jonczy, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Manfred Beschel, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Decision 82/670/EEC of 22 July 1982 on aid granted by the Belgian Government to a paper-manufacturing undertaking is void,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), P. Pescatore, A. O'Keeffe, T. Koopmans, U. Everling and K. Bahlmann, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

Until March 1980 SA Intermills, a Belgian paper-manufacturing undertaking whose registered office is at Andenne, operated four factories in Wallonia, at Pont-de-Warche and Steinbach near Malmédy and at Saint-Servais and Andenne near Namur.

By a telex message dated 23 July 1980 the Commission informed the Belgian Government that it had learned that the Belgian Government, and in particular certain decentralized agencies, were about to intervene in favour of

Intermills, such intervention taking the form of State aid. Accordingly, the Commission reminded the Belgian Government of its obligations under Article 93 (3) of the EEC Treaty, which provides that the Commission must be informed in sufficient time of any plans to grant aid and that the Member State concerned may not put the proposed measures into effect until the Commission has decided on their compatibility with the Common Market. The Belgian Government was requested to send information on the proposed aid to the Commission within two weeks.

On 6 February 1981 the Belgian Permanent Representation transmitted to the Commission a short note from the Walloon Regional Executive concerning the assistance in favour of Intermills, which had been decided upon on 17 July and 24 September 1980.

In a letter of 10 March 1981 the Commission informed the Belgian Government that it had failed to comply with the obligations arising from Article 93(3) of the Treaty as regards the notification of any plans to grant aid; that it had decided to initiate the procedure laid down in Article 93 (2) in respect of the aid in question; that, on the basis of the information at its disposal, it considered that the aid granted by the Belgian Government was likely to have an adverse effect on trading conditions between Member States in the writing and printing paper industry, particularly in view of the difficult situation which existed in that industry in the Community; that the information contained in the notification did not provide sufficient details of the contribution made by the undertaking to enable the Commission to examine whether the aid was compatible with the common market; and that the aid not yet granted could not be granted until the Commission had given a final decision.

Finally, the Commission gave notice to the Belgian Government, under Article 93 (2) of the Treaty, to submit its comments within a period of one month.

By virtue of the same provision the Commission, on 11 March 1981, also gave notice to the other Member States to submit their comments within a period of one month. In a notice published in the Official Journal on 20 March 1981 (Official Journal 1981, C 61, p. 3) the Commission stated that it considered that the aid granted in Belgium to a paper-manufacturing firm which had six factories in Belgium and whose principal product was writing and printing paper was likely to have an adverse effect on trading conditions between Member States to an extent contrary to the common interest and that the aid had been granted in breach of the procedure for advance notification to the Commission. As required by the first paragraph of Article 93 (2), notice was given to all parties concerned other than Member States to submit their comments on the scheme in question.

After a reminder had been sent by the Commission on 22 June 1981, the Belgian Government submitted, on 4 August 1981, the comments of the Walloon Regional Executive on the measures adopted in relation to Intermills.

Under those measures a restructuring plan was approved and the financial

contribution for its implementation was fixed.

(a) The restructuring plan involved the following measures in particular:

Reduction of the total production of the factories from 121 000 to 83 000 tonnes;

Progressive abandonment of bulk-production paper and conversion to production of special papers with a high added value;

Closure of the factory at Saint-Servais (and the factory in Huizingen, in Flanders, operated by another undertaking in the group);

Retention of the three production units considered to be profitable by a Finnish firm of experts;

Creation of three independent manufacturing companies on the sites retained, namely those at Pont-de-Warche, Steinbach and Andenne;

Conversion of SA Intermills into a property company.

(b) The financial contribution of the Walloon Regional Executive consisted of:

A holding of BFR 850 million to be acquired in the capital of the three independent manufacturing companies;

The granting of a low-interest loan of BFR 1 076 million to finance an investment programme of BFR 1 314 million to be implemented by the three manufacturing companies;

A holding of BFR 1 500 million in the capital of Intermills and an advance of BFR 160 million for the conversion of Intermills and the industrial redeployment of the three new companies.

On 22 July 1982 the Commission adopted Decision 82/670/EEC "on aid granted by the Belgian Government to a paper-manufacturing undertaking" (Official Journal 1982, L 280, p. 30).

Article 1 stated that the aid in the form of a low-interest loan and repayable advances granted by the Belgian Government was considered compatible with the common market. However, the aid in the form of the acquisition by the Belgian Government of a holding was declared incompatible with the common market under Article 92 of the EEC Treaty.

Article 2 of the Decision required the Kingdom of Belgium to inform the Commission, within three months of the date on which the decision was notified, of the measures taken to ensure that the aid which was declared incompatible with the common market did not continue to distort competition in the future.

II — Written procedure and conclusions of the parties

On 17 December 1982 SA Intermills lodged an application for a declaration that the Commission's Decision of 22 July 1982 was void.

By an order dated 22 June 1983 the Court decided to allow SA Intermills-Industrie Andenne, SA Intermills-Industrie Pont-de-Warche and SA Intermills-Industrie Steinbach to intervene in support of the conclusions of the applicant, SA Intermills.

The written procedure followed the normal course.

SA Intermills claims that the Court should:

Declare Commission Decision 82/670/EEC of 22 July 1982 void;

In any event, formally record that the Commission will not ask the applicant or the intervener to repay the aid consisting of a holding in the capital; and

Order the Commission to pay the costs.

The *intervener* claims that the Court should:

Declare Commission Decision 82/670/EEC void on the grounds of infringement of an essential procedural requirement and infringement of the Treaty and of the rules of law relating to its application;

In any event, formally record that the Commission will not require the interveners to repay the holding acquired by the Walloon Regional Executive in their capital; and

Order the Commission to pay the costs of the intervention.

The *Commission* contends that the Court should:

Dismiss the application as unfounded;

Order the applicant to pay the costs;

Dismiss the interveners' application;

Order the interveners to bear their own costs.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court, in the course of its preparatory inquiries, requested the Judge-Rapporteur and the Advocate General to meet the parties before the oral procedure was opened. That meeting took place on 2 April 1984; it was devoted essentially to examining the new structure of the Intermills group, the relations within that group, the nature, economic justification, terms and application of the aids in question.

The parties were requested to concentrate on those same questions at the hearing, and also on the Commission's intentions in relation to any possible conversion of the capital holdings.

III — Submissions and arguments of the parties during the written procedure

A — Admissibility

The *Commission* does not dispute that, since the contested decision relates to State aids, it is of direct and individual concern to the recipients, within the meaning of Article 173 of the EEC Treaty, even though it is addressed to the Kingdom of Belgium; furthermore, the application was lodged within the prescribed period.

B — Substance

The *applicant* puts forward a whole series of complaints against the contested decision, relating to both procedure and substance. Those complaints are based in particular on the infringement of an essential procedural requirement, the infringement of Article 6 of the European Convention on Human Rights, the absence of any statement of reasons and the infringement of Articles 92 and 93 of the Treaty.

The *interveners* put forward substantially the same submissions and in addition plead the infringement of Article 222 of the EEC Treaty.

The *Commission* considers that all the submissions put forward in order to challenge the contested decision are unfounded.

Infringement of the essential procedural requirement laid down in Article 93 (2) of the Treaty

The *applicant* and the *interveners* complain that the Commission did not give them notice as required by Article 93 (2) of the Treaty to submit their comments before it adopted a decision on the compatibility of the aid in question with the common market.

That was an essential procedural step and the failure to comply with it rendered the contested decision illegal.

The notice published in the Official Journal on 20 March 1981 does not constitute notice within the meaning of Article 93 (2), which can be given only in the form of a decision addressed individually to the parties concerned, pursuant to Article 191 of the Treaty. Express notice is required, bearing the name of the party to whom it is addressed. It is perfectly possible to notify individually an undertaking which can be easily identified.

The Commission's assertion that under Article 93 of the Treaty the Member States are the only parties with which it must have an exchange of views is contradicted by the very wording of that provision, by the interpretation given to it in legal writings and in the judgments of the Court and by the practice of the Commission. The words "the parties concerned" must include not only the other Member States but also the undertaking benefiting from the aid, its competitors, its employees and any person having a legitimate interest in the maintenance or abolition of the aid.

The *interveners* submit that the obligation contained in Article 93 (2) is no more than an application of the general principle, recognized by the Court, whereby any authority is bound, before adopting a measure likely to seriously affect individual interests, to give the person concerned an opportunity of putting forward his point of view; that rule meets the requirements of justice and proper administration.

The *Commission* states that the requirement formulated by the applicant and the interveners does not follow the wording of Article 93 (2): that provision makes no distinction between the various parties concerned in the grant of State aid, who include not only Member States and recipients of aid but also competitors of the recipient undertakings or even trade associations.

The Commission cannot give notice to all the parties who may be concerned to submit their comments; only publication of a notice in the Official Journal guarantees that all the persons concerned, including the beneficiaries of the aid, are able to submit their views.

It is impossible, in many proceedings under Article 93 (2), to give individual notice to all the recipients of aid to submit their comments, especially in the case of aid programmes which may benefit a large number of traders, who cannot be identified in advance by the

Commission or even by the Member States. There is no reason to treat cases in which aid is granted to only one undertaking differently from those in which the recipients, not to mention the other interested parties, are numerous and cannot be identified.

In addition, the statement that the aid was granted without respecting the procedure for advance notification to the Commission was entirely superfluous: only the Member State subject to the duty to notify could submit comments on that point.

Infringement of Article 93 (2) of the Treaty and of the principles of proper administration

The *Commission* considers that the applicant is confusing the legality of aid with its compatibility with the common market.

The *applicant* points out that in the notice published in the Official Journal of 20 March 1981, and thus in a measure having the nature of a preliminary decision, the Commission stated that it considered [1] that the aid in question "is likely to have an effect on conditions of trade between Member States to an extent contrary to the common interest", that, following an initial investigation, some of the conditions required by Article 92 (3) (c) were apparently not fulfilled and that at first sight it could not grant an exemption. Article 93 (2) does not permit the Commission to make such a finding until it has given notice to the parties concerned to submit their comments; moreover, the rules of proper administration require that before adopting a decision the Commission should not prejudge the issue, especially not publicly.

The Commission would have been entitled to declare the aid unlawful, because it was granted in infringement of Article 93 (3); instead, it merely stated that it was granted in breach of the requirement of advance notification.

As regards the compatibility of the aid with the common market, the Commission simply made a finding, following an initial examination, that some of the conditions required by Article 92 (3) (c) were not fulfilled and that it therefore could not at first sight, without being satisfied that an appropriate contribution was forthcoming from the recipient, grant an exemption from the rule that State aids falling within the terms of Article 92 (1) are incompatible with the common market.

Both Article 93 (2) and the principle of *audi alteram partem,* which is an integral part of the rules of proper administration, required the Commission to express itself differently, not by making a finding but by proposing to make a finding; thus it was guilty of an abuse of power.

The Commission was both entitled and obliged to proceed as it did in this case.

As regards the lack of advance notification, attention should be drawn to the principle that Article 93 (3) is directly applicable inasmuch as it lays down procedural requirements which the national courts are entitled to take into account; it was therefore essential for interested parties to be informed of the

1 — *Translator's note:* the French version of the notice uses the word "constate", which appears in Article 93 (2) of the Treaty and for which the English counterpart in that Article is "finds".

infringement of that provision so that they would be able, if they so wished, to enforce their rights before the national courts.

Infringement of Article 6 of the European Convention on Human Rights

The *applicant* and the *interveners* state that the contested decision requires the Belgian State to take measures to ensure that the aid in question "does not continue to distort competition in the future"; those measures should logically result in the repayment of the holding acquired by the Walloon Regional Executive in the applicant's capital. In any event, it cannot be disputed that the Commission decided a question concerning one of the applicant's civil rights, namely its right to the additional company assets acquired as a result of the aid in question. Article 6 (1) of the European Convention on Human Rights, which constitutes an integral part of Community law, requires that in the determination of a person's civil rights it must be possible to apply to an independent and impartial tribunal with jurisdiction to decide both points of fact and questions of law.

On that point it should be stated that the Commission cannot be described as a tribunal and that the only remedy available to the applicant and interveners is that provided by Article 173 of the EEC Treaty, which merely empowers the Court of Justice to review the legality of the measure in question; it therefore does not constitute a tribunal "with full jurisdiction".

The *Commission* contends that, if it had intended to require the Kingdom of Belgium to recover the aid granted unlawfully and considered incompatible with the common market, it would have drafted Article 2 of the contested decision differently.

In adopting the contested decision, the Commission was merely applying the Treaty and did not exceed the powers conferred upon it by Article 93 (2).

Inadequate statement of grounds and infringement of Article 190 of the Treaty

The *applicant* and the *interveners* consider that the statement of reasons on which the contested decision is based is invalidated by a contradiction inasmuch as the decision states, on the one hand, that the aid granted in the form of low-interest loans and repayable advances is linked to a restructuring operation which is in the Community interest and, on the other hand, that the aid granted in the form of a holding acquired in the capital of the recipient undertakings is not directly linked to that restructuring. However, the aid rightly held by the Commission to be lawful is intended and used for exactly the same purpose as the aid which it declares unlawful, namely to implement all the complex and indivisible restructuring measures.

The holding of BFR 2 350 million does not, as the Commission maintains, concern a single undertaking but was divided among several legally independent entities, each complying with the definition of an undertaking as laid down in the judgments of the Court. The holding acquired by the public authorities in the applicant undertaking amounted to BFR 1 500 million, not 2 350 million; the balance represents the participation of the Walloon Regional

Executive in the capital of the interveners, which are newly constituted undertakings.

The only question to be decided by the Court is whether the holding in the capital of the applicant and intervening undertakings is "linked" to the restructuring operation in the same way as the other assistance. The creation of the intervening undertakings was one of the cornerstones of the restructuring plan; the financing of their constitution was therefore inevitably an integral part of it. Moreover, if the total aid granted to the applicant undertaking enabled it to meet the losses arising out of the poor efficiency of the unprofitable factories, it is impossible to distinguish the use of the funds obtained from the increase in capital from the use of the funds obtained from the loans.

If the losses had not been taken over, the restructuring plan would have been in a serious jeopardy.

The Commission itself admitted that the cost of redundancies, estimated at BFR 289 million, formed an integral part of the restructuring plan. Those redundancy payments were made without distinction out of the funds from the capital holding and those from the loans.

The *Commission* denies that the holding acquired by the public authorities in the capital of the applicant and interveners forms an integral part of the restructuring operation. In relation to an undertaking which had consistently suffered losses since 1975, averaging BFR 350 million a year, including about BFR 300 million in debt-servicing costs, and whose capital and reserves amount to BFR 1 250 million, a holding of BFR 2 350 million acquired by public agencies could not be regarded as anything other than an operation intended to extract it from a precarious financial situation; the crucial problem posed by the burden of debt-servicing costs was thus resolved by the injection of new capital, the cost of which was not even borne by the undertakings. The aid thus granted reduced the fixed costs of the undertaking and even now helps to cause, independently of the restructuring operations, distortions of competition in relation to other, competing undertakings within the Community.

Only the costs directly linked to the redundancies resulting from the restructuring operation can form an integral part of that operation and be added to the restructuring costs properly so called, in respect of which aid acknowledged to be compatible with the Common Market was paid. The Commission has not been informed of the actual cost of those redundancies, which could not in any event amount to BFR 2 350 million.

Experience has shown that the great majority of injections of capital by public agencies occur in the framework of financial restructuring necessitated by difficulties confronting the undertaking concerned. In this case, if the public agencies had not intervened, the undertaking would have disappeared; it was therefore a rescue operation. Where the capital injection exceeds the sum of the net assets of the undertaking and where its losses and resulting indebtedness are such that there is nothing to justify any expectation of a normal return on the capital invested within a reasonable period, the undertaking in question would not have been able to obtain on the unsubsidized capital market the

funds needed to enable it to carry out the investment programme rendered essential because of its expected cash-flow development. In such circumstances, the public agencies are clearly pursuing objectives other than that of securing a financial return, essentially in fact the rescue of the undertaking. In a single market, any aid for the rescue of an undertaking, in particular in an industry which is itself in difficulty, in fact involves the exportation of unemployment.

If instead of taking the form of the acquisition of a holding in the capital the aid in question had been granted in the form of a guarantee or a loan at market rates, the Commission could perhaps have permitted it, in accordance with its general policy on emergency aid, as forming an integral part of the restructuring plan. However, the advantage accruing to an undertaking from the acquisition of a holding in its capital is far greater and in this case it was not justified by any sacrifice on the part of the recipient. Consequently, the Commission did not call for the repayment of the aid but merely for the abolition of its effects in the future.

The creation of subsidiaries is not part of industrial restructuring; at the very most, it might constitute financial restructuring, effected by means of the aid, but it cannot be the restructuring operation itself. The creation of new undertakings, whose object is to pursue the activities of an undertaking in difficulty, is merely a legal artifice; it in no way alters the economic position: in economic terms, it is still a question of the same undertaking and of the economic activities of a single group. In that sense, the contested decision concerns only one undertaking.

Infringement of Articles 92 (1) and 190 of the Treaty, inadequate statement of reasons and inaccurate assessment of the facts

The *applicant* considers that the Commission's statement that the aid granted by the Belgian Government affects trade between Member States is unsubstantiated and inaccurate. Intra-Community trade cannot be considered to be influenced by aid unless it strengthens the position of the undertaking in question compared with competing undertakings and, consequently, helps to increase its capacity to maintain the flow of trade; the aid in question was granted by reason of the restructuring plan, the object of which was, on the contrary, to reduce production capacity and thus the level of supply.

Even if the holding acquired by the Walloon Regional Executive in the applicant's capital permitted the applicant to discharge its prior debts, the fact that its creditors were thus paid did not affect trade between Member States.

The *Commission* observes that since the payment of creditors permits the survival of an undertaking which would have been insolvent if its losses had not been taken over, trade was inevitably effected. The undertaking, in the economic sense of the word, did not cease production and since the aid reduced its costs it obviously had an impact on its prices.

Infringement of Article 92 (1), inaccurate assessment of the facts

The *applicant* complains that the contested decision was wrongly based on the view that the aid granted by means of a holding acquired in its capital was merely "rescue aid intended to allow the undertaking to meet its financial commitments".

In fact, the aid in question made it possible for unprofitable production to be abandoned and production capacity to be reduced. The applicant ceased its activity by becoming a property company; the aid granted to the three new undertakings was to implement a restructuring plan.

The Commission made a mistake by not distinguishing between the holding acquired in the capital of the applicant and the holding acquired in the capital of the interveners. The first enabled the applicant to cease its activity and the three interveners to be created under favourable conditions; the second clearly was no rescue aid but was intended to make possible the specialized production desired by the Commission.

The *interveners* observe that the capital aid of BFR 850 million was used solely to create the three new undertakings and to provide them with the means needed to go into production: they did not have to meet any financial commitments or contend with any precarious financial situation predating their constitution. The new production units set up by means of the aid were considered profitable by a Finnish firm of experts and their production was centred, in accordance with the Commission's wishes, on products with a high added value.

The *Commission* considers that it has refuted the arguments put forward by the applicant and interveners in the course of tis discussion of their other submissions.

Infringement of Article 92 (3) (c) and incorrect assessment of the facts

The *applicant and the interveners* consider that the contested decision wrongly excluded the application of Article 92 (3) (c) on the ground that the Community interest required a reduction in the output of bulk-production paper and conversion to special papers. That provision authorizes aid to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest; the principal object of the aid criticized was precisely to reduce the output of bulk-production paper and to facilitate the development of the production of special papers.

The *Commission* observes that Article 92 (3) does not authorize aid: it merely provides for exemptions from the rule that aid is in principle incompatible with the common market; those exemptions are applicable only where the Commission is able to establish that there is a specific compensatory justification forthcoming from the particular recipient: the aid must be necessary in order to promote the attainment of one of the objectives set out in Article 92 (3). There should therefore be a direct connection between, on the one hand,

the level and intensity of the aid and, on the other hand, the compensatory justification. In this case, having regard to the restructuring attempt being made, the Commission could not regard as compatible with the common market aid which was not necessary to attain the objective laid down in Article 92 (3) (c).

Infringement of Article 222 of the EEC Treaty

The *interveners* stress the fact that the "aid" of BFR 850 million included in the BFR 2 350 million referred to by the contested decision was used for the creation of the intervening undertakings; their creation was one of the cornerstones of the restructuring operation, which the Commission itself acknowledges to be in the Community interest.

By thus denying the Walloon Regional Executive the right to create new undertakings, the Commission infringed Article 222 of the EEC Treaty, which provides that the Treaty "shall in no way prejudice the rules in Member States governing the system of property ownership".

The *Commission* takes the view that there is a contradiction in the interveners' argument: either new undertakings were in fact created with public participation and there could be no State aid since the public authorities were no different from a contributor of risk capital under the normal conditions of a market economy, or the creation of the new undertakings was part of the restructuring operation and the injection of capital by the public authorities constituted State aid within the meaning of Article 92 (1) in the same way as the other measures taken by the State to provide financial support for that restructuring programme.

In any event, Article 222 of the Treaty does not provide for a systematic exemption from Article 92 for any holding acquired in the capital of undertakings. Not every public holding is *ipso facto* a State aid; everything depends upon the circumstances in which it is acquired. A public injection of capital which is intended to enable an undertaking in difficulty to continue trading through the creation of new legal undertakings, and which is also accompanied by other financial intervention which is indisputably State aid, is itself State aid within the meaning of Article 92 (1) of the Treaty. That is the position in this case, where the "creation" of the intervening undertakings did not represent the commencement of new economic activities but was merely a legal artifice, whereby each factory became a subsidiary in order to enable an undertaking in difficulty, which would shortly have been insolvent if its losses had not been taken over, to continue trading.

IV — Oral procedure

At the sitting on 23 May 1984 the following persons presented oral argument and replied to questions asked by the Court: Léon Goffin and Jean-Louis Lodomez, for the applicant and the interveners; and Marie-José Jonczy, for the Commission.

The Advocate General delivered his opinion at the sitting on 11 July 1984.

Decision

1 By an application lodged at the Court Registry on 17 December 1982, SA Intermills (hereinafter referred to as "the applicant"), whose registered office is at Andenne, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision 82/670/EEC of 22 July 1982 on aid granted by the Belgian Government to a paper-manufacturing undertaking (Official Journal 1982, L 280, p. 30) is void.

2 The application was supported by three undertakings, SA Intermills-Industrie Andenne, SA Intermills-Industrie Pont-de-Warche and SA Intermills-Industrie Steinbach, which were granted leave to intervene in the action by order of the Court of 22 June 1983. Those undertakings are referred to hereinafter as "the interveners", the expression "the applicants" being used to refer to the applicant together with the interveners.

3 In so far as it is possible to establish the facts on the basis of the contested decision and the information contained in the papers put before the Court, a restructuring plan financed by aid granted by the Belgian State through the Walloon Regional Executive was adopted. Under that plan the applicants abandoned bulk production and went over to the manufacture of special papers with a high added value. Two factories were closed, namely those at Saint-Servais and Huizingen (the latter situated in Flanders and operated by another undertaking in the group); at the same time, production at the factories at Andenne, Pont-de-Warche and Steinbach was reorganized and entrusted to manufacturing undertakings, each endowed with its own legal personality.

4 The contents of the contested decision may be summarized as follows:

In the course of 1980 the Commission learned that a paper-manufacturing undertaking had received from the Belgian authorities assistance in the form of loans (a low-interest loan of BFR 1 076 million and repayable advances of BFR 510 million), linked to measures for the restructuring of the undertaking concerned, and assistance in the form of a holding of BFR 2 350 million acquired by the Walloon Regional Executive, the main effect of which was to rescue the undertaking from a very difficult financial situation.

In a letter dated 23 July 1980 the Commission drew the attention of the Belgian Government to its obligations under Article 93 (3) of the EEC Treaty, which requires prior notification of plans to grant aid. By a letter dated 6 February 1981 the Belgian Government notified the Commission of the aid in question. It is clear from that notification that the decision to grant the aid had already been adopted on 17 July 1980 by the Walloon Regional Executive. Having decided to initiate the procedure laid down in Article 93 (2), the Commission invited the Belgian Government to submit its comments by 10 April 1981. Only after a reminder had been sent did the Belgian Government finally submit its comments to the Commision on 24 August 1981. In the course of the procedure laid down by Article 93 three Member States indicated that they objected to the aid granted by the Belgian authorities; the Commission also recorded the opposition of two trade associations and one undertaking, all of which drew attention to the fact that the industry in question was suffering from over-capacity.

The Commission found that in this case the assistance granted by the Belgian authorities was such as to have an adverse effect on trade between Member States and to distort or threaten to distort competition within the meaning of Article 92 (1) of the Treaty. It considered that the undertaking concerned was in a very difficult financial situation, which appeared to rule out any recourse to the unsubsidized capital market; in its opinion, the holding of BFR 2 350 million was intended to resolve the undertaking's financial problems. According to the Commission, the prohibition on State aids laid down in Article 92 (1) extends to injections of capital both by the Government itself and by regional or local authorities or other public agencies.

The Commission also considered whether an exemption could be granted for the aid in question under Article 92 (3) of the Treaty. Having recalled that that provision permits the grant of aid "to facilitate the development of certain economic activities", it stated that the aid granted in the form of low-interest loans and repayable advances could be acknowledged to be compatible with the requirements of the Treaty; those loans were in fact linked to an investment programme which was in the Community interest, in so far as it was intended to reduce bulk production and convert the undertaking to the production of special papers with a high added value.

On the other hand, the Commission considered that the aid granted by the Belgian authorities in the form of a holding in the undertaking's capital did not qualify for exemption under Article 92 (3) because that part of the aid was not directly linked to the restructuring of the undertaking; it in fact constituted "rescue aid", intended to allow the undertaking to meet its financial commitments. In that regard the Commission noted that "aid of this kind, aimed at keeping production capacity in operation, threatens to do serious damage to the conditions of competition, as the free interplay of market forces would normally call for the closure of the undertaking, allowing more competitive firms to develop".

On the basis of those considerations, the Comission decided in Article 1 that the aid in the form of a low-interest loan and repayable advances was compatible with the common market, whereas the aid in the form of the acquisition of a holding was contrary to Article 92 of the Treaty.

Article 2 of the decision provided that the Kingdom of Belgium was to inform the Commission within three months "of the measures it has taken to ensure that the aid ... does not continue to distort competition in the future".

5 The Commission does not dispute the admissibility of the application. Although the contested decision is addressed to the Kingdom of Belgium, the Comission acknowledges that the applicant is directly and individually concerned, in its capacity as the recipient of the aid in question, within the meaning of the second paragraph of Article 173.

6 In addition to various submissions relating to the procedure adopted, the applicant challenges the decision on the grounds that it contained an inaccurate assessment of the facts in relation to the criteria set out in Article 92 (1) and (3) and was based on a contradictory and inadequate statement of reasons.

7 The three interveners put forward substantially the same submissions, claiming in addition that the Commission failed to recognize the fact that, precisely as a result of the restructuring financed by the aids in question, they each acquired a legal personality separate from Intermills SA, the company

referred to by the contested decision. That fact was ignored by the Commission.

8 Since that question must be decided prior to the assessment of the various submissions put forward by the parties, it is necessary first to examine the status of the applicants in relation to the contested decision.

The structure of the Intermills group

9 The applicants claim that the Commission, in finding that the aid in question — in the form of loans, repayable advances and capital holdings — benefited the applicant alone, gave an inaccurate description of the companies concerned. In June 1980, before the contested decision was adopted, three new and independent manufacturing companies were set up under the restructuring plan financed by the aid. The Walloon Regional Executive acquired a holding in those companies of BFR 850 million, compared with the figure of BFR 2 350 million which is quoted in the decision. Since the new undertakings were created, the applicant has no longer carried on any industrial activity of its own. It was therefore wrong to describe the injection of capital as having been intended in its entirety to meet the commitments of the former SA Intermills, in order to enable it to escape from a precarious financial situation.

10 In addition, the interveners claim that there was a breach of the principle laid down in Article 222 of the EEC Treaty on the rules in Member States governing the system of property ownership, in so far as the Commission, by ignoring the creation of the new manufacturing companies, in reality purported to prohibit the Walloon Regional Executive from participating in the capital of undertakings created in its territory.

11 It is clear from the information supplied by the applicants themselves that following the restructuring both SA Intermills and the three manufacturing companies are controlled by the Walloon Regional Executive and that, following the transfer of the plant to the three newly constituted companies, SA Intermills continues to have an interest in those companies. It must

therefore be accepted that, in spite of the fact that the three manufacturing companies each has a legal personality separate from the former SA Intermills, all those undertakings together form a single group, at least as far as the aid granted by the Belgian authorities is concerned. The Commission was therefore justified in considering the entire group to be a single "undertaking" for the purposes of the application of article 92 of the Treaty.

12 Moreover, it should be noted that the applicants, in stressing that the restructuring carried out by means of the aid in question constituted an indivisible whole, from an industrial and financial point of view, have implicitly acknowledged that the original undertaking and the new manufacturing companies form a single economic unit.

13 Finally, the Commission's decision cannot be criticized for failure to have regard to Article 22, which provides that "this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership". In fact the application of the Treaty rules on State aids in no way affects the legal status conferred by the Walloon Regional Executive upon the new manufacturing companies created with its assistance.

14 The submission based on the Commission's disregard of the true legal status of the applicant and interveners must therefore be dismissed.

Submissions relating to procedure

15 In relation to procedural matters, the applicants claim first that they were not given notice individually to submit their comments before a decision was taken on the compatibility with the Treaty of the aid granted to them, contrary to the provisions of Article 93 (2). They contend that the general notice published in the Official Journal on 20 March 1981 (Official Journal 1981, C 61, p. 3), did not satisfy the requirements of that provision.

16 According to Article 93 (2), the Commission is to take a decision in relation to aid granted "after giving notice to the parties concerned to submit their comments". It must be noted that the "parties concerned" referred to in that provision are not only the undertaking or undertakings receiving aid but

equally the persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations. In other words, there is an indeterminate group of persons to whom notice must be given.

17 It follows that Article 93 (2) does not require individual notice to be given to particular persons. Its sole purpose is to oblige the Commission to take steps to ensure that all persons who may be concerned are notified and given an opportunity of putting forward their arguments. Under those circumstances, the publication of a notice in the Official Journal is an appropriate means of informing all the parties concerned that a procedure has been initiated.

18 In this case, the details set out in the aforesaid notice, which referred to "the granting of aid in Belgium to a paper-manufacturing firm which has six factories in Belgium and whose principal product is writing and printing paper", were sufficiently precise for the undertakings concerned — which were at that time fully aware of the aid already granted to them — to be entirely certain that they were the subjects of the inquiry.

19 The submission must therefore be dismissed.

20 In addition the applicant claims that in the notice in question the Commission publicly prejudged its decision by using the following words: "The Commission considers [1] that the aid is likely to have an effect on conditions of trade between Member States to an extent contrary to the common interest".

21 It is true that the Commission's use of the word "constate" may at first sight give the impression that the Commission had already made a finding which Article 93 (2) does not permit it to make until after it has invited the parties concerned to submit their comments; nevertheless, viewed in the context of the procedure laid down by that provision, the notice did not and could not

1 — *Translator's note:* the French version of the notice uses the word "constate", which appears in Article 93 (2) of the Treaty and for which the English counterpart in that Article is "finds".

have any effect other than to make known the initiation of the procedure for the investigation of the aid granted by the Belgian authorities. Moreover, that was apparent from the fact that the notice requested the parties concerned to submit their comments within a specified period. In any event, the Commission was at that stage fully entitled to make known its reservations about the plan which had come to its attention, so as to notify all the parties concerned of its initial reaction and thus permit the undertaking concerned to ensure that its interests were defended.

22 This submission must therefore also be dismissed.

Submissions alleging an inaccurate assessment of the facts and a contradictory and inadequate statement of reasons

23 The applicants criticize the contested decision — without distinguishing between the application of Article 92 (1) and that of Article 92 (3) — on the ground that it is based on a mistaken assessment of the facts and on a contradictory and inadequate statement of reasons.

24 They claim, more particularly, that the aid granted in the form of a capital holding is not, as the Commission alleges, merely "rescue aid" intended to resolve the undertaking's financial problems; according to them, that part of the aid — together with the loans and advances considered by the Commission to be compatible with the Treaty — was used to finance the closure of unprofitable factories and the conversion to products offering a better prospect of profitability. In that regard, the applicants stress that the various financial contributions were all used for the implementation of the restructuring plan as a whole, without its being possible to distinguish betwen the use of the contribution made in the form of a capital holding and the use of the contribution made in the form of loans and advances.

25 Secondly, the applicants complain that there is a contradiction in the statement of reasons on which the contested decision is based. The aid

described as incompatible with the Treaty was specifically intended to achieve a form of restructuring — namely the abandonment of bulk-production paper and the undertaking's conversion to special paper — which the Commission describes in the same decision as an economic objective that deserves to be pursued in the Community interest.

26 Finally, the applicants consider that the contested decision contains an inadequate statement of reasons, in so far as the Commission failed to show that trade between Member States was affected and competition in the common market distorted by the granting of the aid. They maintain that the aid, far from having strengthened the applicant's position on the market, was intended to be used to reduce output and convert production to more profitable sectors. On that point the applicants refer to the judgment of 17 September 1980 in Case 730/79 *(Philip Morris* v *Commission,* [1980] ECR 2671, at p. 2688, paragraph 11), in which the Court recognized that competition was adversely affected only when "State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade".

27 The Commission justifies its decision by contending that it is "obvious" that a holding of BFR 2 350 million acquired by public agencies in an undertaking whose capital and reserves amount to BFR 1 250 million must be regarded as an operation intended to extract the undertaking from a precarious financial situation, as the crucial problem posed by the burden of the undertaking's debt-servicing costs is thus largely resolved by the injection of fresh capital on which the undertaking does not even have to pay interest. The aid thus granted reduces the undertaking's fixed costs and thereby distorts competition in the Community. Where the injection of capital exceeds the sum of the net assets of the recipient undertaking, it constitutes rescue aid, intended to ensure the survival on the market of an undertaking otherwise destined to disappear. Such a measure, especially in an industry in difficulty, in reality involves the exportation of unemployment to other Member States.

28 However, the Commission concedes that the costs directly attributable to the redundancies arising from the closure of plants may be considered to be part of the restructuring costs properly so called, in respect of which the undertaking received aid considered compatible with the common market. Since the Commission was not informed of the actual cost of those redundancies, it was unable to take them into account and, in any event, those expenses could not have exhausted the capital holding in its entirety.

29 Article 92 (1) provides that "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market".

30 Article 92 (3) (c), to which the contested decision refers, states that aid "to facilitate the development of certain economic activities" may be considered to be compatible with the common market, provided that such aid does not adversely affect trading conditions to an extent contrary to the common interest.

31 It is clear from the provisions cited that the Treaty applies to aid granted by a State or through State resources "in any form whatsoever". It follows that no distinction can be drawn between aid granted in the form of loans and aid granted in the form of a holding acquired in the capital of an undertaking. Aid taking either form falls within the prohibition laid down in Article 92 where the conditions set out in that provision are fulfilled.

32 As the Commission has itself acknowledged, the granting of aid, especially in the form of capital holdings acquired by the State or by public authorities, cannot be regarded as being automatically contrary to the provisions of the Treaty. Thus, irrespective of the form in which aid is granted, be it as a loan or as a capital holding, it is the Commission's task to examine whether it is contrary to Article 92 (1) and, if so, to assess whether there is any possibility of its being exempt under Article 92 (3), giving the grounds on which its decision is based accordingly.

33 In the light of those criteria the criticism raised by the applicants appears to be well founded, inasmuch as the contested decision does indeed contain contradictions and does not make clear the grounds for the Commission's action on certain vital points. Such doubts and contradictions relate both to the economic justification for the aid and the question whether the aid was likely to distort competition within the common market.

34 First, as regards the economic justification for the aid, the Commission concedes in the statement of reasons on which its decision is based that the restructuring aimed at by the applicants corresponds, as such, to the Commission's own objectives for the European paper industry. That factor seems to be the chief ground on which the Commission recognized the compatibility with the Treaty of the aid granted in the form of low-interest loans and advances.

35 On the other hand, the Commission gave no verifiable reasons to justify its finding that the holding acquired by the public authorities in the capital of the recipient undertaking was not compatible with the Treaty. It merely stated that that holding was "not directly linked to the restructuring operation" and, in view of the losses suffered by the undertaking over several financial years, constituted purely financial "rescue aid"; in the course of the written procedure, it stated that the amount of the holding acquired by the public agencies exceeded the sum of the undertaking's capital and reserves. In making those assessments without giving any indication of its reasons, other than the statements just referred to, the Commission did not properly explain why its assessment of the restructuring operation in question — which was both industrial and financial and which, according to the applicants, formed an indivisible whole — called for such a clear-cut distinction between the effect of the aid granted in the form of subsidized loans and the effect of the aid granted in the form of capital holdings.

36 On that point it should be noted that in the course of the proceedings the Commission conceded that, although it had condemned the capital holdings in their entirety, they might nevertheless be compatible with the Treaty in so far as they were intended to cover the redundancy costs attributable to the abandonment of unprofitable production. It thus appears that the redundancy payments due to the conversion, which are an essential factor in the operation, were also not given sufficient consideration.

37 In relation to its claim that the contested aid damages competition in the common market, the Commission referred to the provisions of Article 92 (1) and to the requirement laid down in Article 92 (3), according to which aid may be exempted only if it does not adversely affect trading conditions to an extent contrary to the common interest.

38 As regards the first part of that requirement, the relevant paragraphs of the preamble to the decision merely note the objections raised by the governments of three Member States, two trade assocations and an undertaking in the paper industry. Apart from that reference, the decision gives no concrete indication of the way the aid in question damages competition.

39 As regards the second part of the requirement, the Commission, having stated that the aid granted in the form of a capital holding is not directly linked to the restructuring of the undertaking but constitutes "rescue aid", asserts that such aid "threatens to do serious damage to the conditions of competition, as the free interplay of market forces would normally call for the closure of the undertaking, allowing more competitive firms to develop". On that point it must be stated that the settlement of an undertaking's existing debts in order to ensure its survival does not necessarily adversely affect trading conditions to an extent contrary to the common interest, as provided in Article 92 (3), where such an operation is, for example, accompanied by a restructuring plan. In this case, the Commission has not shown why the applicant's activities on the market, following the conversion of its production with the assistance of the aid granted, were likely to have such an adverse effect on trading conditions that the undertaking's disappearance would have been preferable to its rescue.

40 On those grounds, the contested decision must be declared void.

41 In view of the foregoing it is not necessary to examine the submissions that the Commission erred in its appraisal of the facts of the case or the submission that the contested decision interfered with the applicant's civil rights without there being available to it, under the judicial system established by the EEC Treaty, any right of action complying with the requirements of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Costs

42 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions it must be ordered to pay the costs, including those of the interveners.

On those grounds,

THE COURT

hereby:

1. **Declares Commission Decision 82/670/EEC of 22 July 1982 on aid granted by the Belgian Government to a paper-manufacturing undertaking void;**

2. **Orders the Commission to pay the costs, including those of the interveners.**

Mackenzie Stuart Bosco Due Kakouris

Pescatore O'Keeffe Koopmanns Everling Bahlmann

Delivered in open court in Luxembourg on 14 November 1984.

For the Registrar

D. Louterman
Administrator

A. J. Mackenzie Stuart
President