OPINION OF ADVOCATE GENERAL ALBER

delivered on 18 May 2000 [1]

I — Introduction

1. By the present action for annulment Portugal opposes a decision of the Commission by which the latter authorised, by declaring that it raised no objections to, aid newly granted by France for liqueur wines and brandy. The pleas in law — the infringement of essential procedural requirements and of the Treaty — are based above all on the accusations that the Commission had, when assessing the aid, not taken sufficient account of the French system of differential taxation of liqueur wines and natural sweet wines — liqueur wines are taxed at the rate of FRF 1 400 per hectolitre, that is FRF 9 or about EUR 1.37 per bottle, whereas natural sweet wines are taxed at FRF 350 per hectolitre, that is FRF 2.25 or about EUR 0.34 per bottle. Besides, it was not clear under what conditions the aid was allocated.

1 — Original language: German.

II — The legal bases

2. Article 92 of the EC Treaty (now, after amendment, Article 87 EC) states *inter alia* that:

'1. 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, insofar as it affects trade between Member States, be incompatible with the common market.

2. ...

3. The following may be considered to be compatible with the common market:

...

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

...'

3. Article 93 (3) of the EC Treaty (now Article 88 (3) EC) states *inter alia* that:

'...

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant ... aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. ...'

4. Article 95 of the EC Treaty (now, after amendment, Article 90 EC) states that:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.'

III — Facts of the case

1. *Background to the dispute*

5. In protest at the higher taxation of their products, producers of the liqueur wines Pineau des Charentes, Floc de Gascogne and Macvin du Jura refused to pay excise duty in 1993 and in the first half of 1994 in so far as it exceeded the rate of taxation imposed on natural sweet wines. At the same time, the national association of producers of liqueur wines with registered designation of origin lodged a complaint with the Commission against the taxation system applied in France to liqueur wines. In the middle of 1994 the liqueur wine producers ended their refusal to pay taxes. The chairman of the association, in a newspaper interview, gave as the reason for this that the French Government had, as redress for the differential taxation, held out the prospect of annual compensation and refunds for the period 1994 to 1997.

2. *The disputed aid*

6. On 24 March 1995 the association of Portuguese port-wine exporters, Associaçao de Empresas de Vinho do Porto (hereinafter AEVP), filed two complaints with the Commission. One complaint related to the infringement of Article 95 of the EC Treaty by the French taxation system for liqueur wines. The other complaint concerned the infringement of Articles 92 and 93 of the EC Treaty by the measures held out in prospect by the French Government to compensate French producers. The latter complaint forms the starting point for the present proceedings.

7. In response to the complaint lodged by the AEVP, the Commission, on 12 April 1995, called upon the French authorities to inform it of the planned aid. France's Permanent Representative complied with this request by letter of 17 July 1995, according to which the French Government was planning aid for liqueur wines and potable spirits ('eaux de vie') with registered designation of origin. In answer to further queries by the Commission of 10 August 1995, 31 October 1995, 30 January 1996, 3 June 1996 and 12 August 1996, France's Permanent Representative sent it additional information on the planned aid on 6 October 1995, 12 December 1995, 14 February 1996, 26 April 1996, 10 July 1996 and 30 September 1996. The Commission's letter of 30 January 1996 contains the following passage:

'After a preliminary examination, it transpires that the latter (information) is not complete and that additional information is therefore necessary for a thorough examination of this scheme.'

On the basis of a request by the Commission in its letter of 3 June 1996, point 6, the French authorities, in their letter of 10 July 1996, point 6, agreed, *inter alia*, to remove the promotion of investment in stock holding from the aid scheme.

8. In February 1996 the AEVP was notified informally that there were plans to initiate against France the formal administrative procedure provided for in Article 93(2) of the EC Treaty. Since this did not happen, however, the AEVP, on 29 May 1996, called upon the Commission to initiate the procedure provided for in Article 93(2) of the EC Treaty without delay and to inform the AEVP of the status of the investigations made so far of the planned aid. On 19 July 1996 and 2 September 1996 the AEVP repeated this request. Finally, by letter of 25 September 1996, the AEVP, in accordance with Article 175 of the EC Treaty (now Article 232 EC), called upon the Commission to act.

3. *The Commission's decision*

9. On 6 November 1996 the Commission decided to raise no objections to the aid,

which was thus authorised. By letter SG(96) D/9957 of 21 November 1996 the Commission informed the French Government of its decision. An abstract of the decision was published on 6 March 1997 in the *Official Journal of the European Communities*. [2]

10. In the letter of 21 November 1996 the planned aid is divided into two parts — one concerning advertising, the other of a technical nature. The latter has as its object technical support, promotion of research and investment aid. [3] In this letter the Commission points out first and foremost that the aid must comply with all relevant rules, practices and Community parameters.

11. Regarding the method of financing the aid for advertising, the Commission stresses that parafiscal charges or voluntary contributions collected for financing purposes must not encumber imported products. In particular, the 'Commission communication concerning State involvement in the promotion of agricultural and fisheries products' [4] and the 'Framework for national aids for the advertising of agricultural products and certain products not listed in Annex II to the EEC Treaty, excluding fishery products' [5] were to be observed when implementing measures. Both texts contain material guidelines for the form of state-subsidised advertising. The 'Framework' also prohibits the promotion of advertising related to particular firms. It allows the promotion of advertising up to a maximum rate of 50%, if the aid has been correctly notified, in the following cases:

— for surplus products,

— for substitute products,

— for particular products from less-favoured regions,

— for products typically produced by small and medium-sized undertakings or

— for high-quality products and health foods.

12. With regard to aid for research the Commission refers in particular to the

2 — OJ 1997 C 70, p. 14.

3 — Plans for wine production ('conditionnement') and marketing.

4 — OJ 1986 C 272 of 28 October 1986, p. 3.

5 — OJ 1987 C 302 of 12 November 1987, p. 6.

'Community framework for State aid for research and development', [6] which mentions in the section relevant here the possibility of authorisation by virtue of Article 92(3)(c) of the EC Treaty, but otherwise requires a comprehensive assessment taking into account considerations of competition and trade, [7] and to the 'Community guidelines on State aid for small and medium-sized enterprises', [8] which define this type of enterprise and set upper limits for promotion, within which the Commission may authorise aid.

13. Finally, regarding investment aid, the Commission requires in particular observance of the conditions contained in the 'Guidelines for state aid in connection with investments in the processing and marketing of agricultural products' in the letter of 20 October 1995. [9] These provide for the appropriate application of the criteria of Commission Decision 94/173/EC of 22 March 1994 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products, [10] which for its part implements Council Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products. [11] Both instruments directly concern the promotion of relevant schemes by European agricultural funds.

14. Since France had promised to observe these regulations, the Commission came to the conclusion that all elements of the aid fell under Article 92(3)(c) of the EC Treaty and accordingly decided to raise no objections.

15. The Portuguese Republic brought an action against this decision on 29 May 1997.

16. The Kingdom of Spain entered the dispute as intervener on the applicant's side, the French Republic on the defendant's.

17. On the basis of an order of the Court of Justice of 21 September 1999 the Commission produced the correspondence with the French Government concerning the aid.

6 — OJ 1996 C 45 of 17 February 1996, p. 5.
7 — Point 5.1.
8 — OJ 1996 C 213 of 23 July 1996, p. 4.
9 — OJ 1996 C 29 of 2 February 1996, p. 4.
10 — OJ 1994 L 79, p. 29.
11 — OJ 1990 L 91, p. 1.

4. *Application and counter-application*

18. The applicant claims that the Court should:

— annul the Commission's Decision of 6 November 1996 concerning State aid N 703/95 — France,

— order the defendant to pay the costs.

19. The Commission contends that the Court should:

— dismiss the action as inadmissible, or in the alternative as unfounded, in so far as the applicant relies on Article 92 in conjunction with Article 95 of the Treaty,

— dismiss the action otherwise as unfounded,

— order the applicant to pay the costs.

20. The submissions of the parties are examined more closely below.

IV — Legal evaluation

1. *Admissibility*

Arguments of the parties

21. The Commission takes the view that the action is in part inadmissible. The applicant felt that the unlawfulness of the Commission's decision arose from the fact that the aid in question intensified the supposedly discriminatory effect of the French system for taxing natural sweet wines and liqueur wines. However, discriminatory taxes were to be assessed in accordance with Article 95 of the Treaty. The Commission could object to them only by way of Treaty infringement proceedings in accordance with Article 169 of the EC Treaty (now Article 226 EC), not within the framework of a decision on aid in accordance with Article 93 of the Treaty. The decision to initiate Treaty infringement proceedings lay exclusively with the Commission and was not open to judicial review. With this plea Portugal was therefore attempting to go beyond the scope of the Community system of legal protection.

22. Portugal, with Spain's support, counters this argument by stating that the action was not aimed at enforcing Article 95 of the EC Treaty but merely asked for certain circumstances, which did, certainly, affect Article 95 of the EC Treaty, to be taken into consideration when applying Article 92 of the EC Treaty.

Analysis

23. As Portugal and Spain submit, this plea is to be understood as meaning that the alleged infringement of Article 95 of the Treaty merely represents one argument intended to prove infringement of Article 92 of the Treaty. Whether such an infringement can have this effect is to be assessed within the context of the interpretation of Article 92 of the Treaty and is thus a question going to the substance. The action is therefore admissible with regard to this plea.

2. *Substance*

24. The applicant bases its action on the infringement of essential procedural requirements and also on the infringement of the Treaty and the rules of law relating to its application.

(a) Infringement of essential procedural requirements

25. Within the context of this plea the applicant first complains of the failure to initiate the formal administrative procedure provided for in Article 93(2) of the EC Treaty, then claims a breach of the duty embodied in Article 190 of the EC Treaty (now Article 253 EC) to state reasons when adopting legal acts.

(aa) Failure to initiate the procedure under Article 93(2) of the EC Treaty

— Obligation to initiate the procedure

Arguments of the parties

26. The applicant takes the view that in the present case the Commission had been bound to initiate the contentious administrative procedure. With reference to the judgment in the *Lorenz* case, [12] it points out that the Court of Justice had limited the maximum duration of the preliminary examination period under Article 93(3) of the EC Treaty to two months. Besides this, initiation of the administrative procedure

12 — Judgment of the Court of 11 December 1973 in Case 120/73 [1973] ECR 1471.

was unavoidable whenever the Commission encountered serious difficulties during examination of an aid scheme.

27. By bringing forward detailed examination of the planned aid from the administrative procedure to the preliminary stage, the Commission had distorted the procedural rules of Article 93 of the EC Treaty and in so doing disregarded the procedural guarantees for other parties, who might have contributed their views.

28. In the applicant's opinion it is obvious that the Commission had not been able to affirm the compatibility of the planned aid with the Treaty immediately within the framework of the preliminary examination and that it had therefore encountered serious difficulties when examining the aid. An investigation lasting almost 19 months, and including lengthy correspondence between the Commission and the French Government, had been necessary before the Commission adopted the contested decision.

29. According to the applicant's submissions the obligation to initiate the administrative procedure arises from the following circumstances in particular:

— The measures adopted by the French Government were very controversial. They were the object of complaints to the Commission by other producers from two Member States.

— According to the published statements of the producers' associations benefiting from the aid, the latter served as compensation for the discriminatory taxation of liqueur wines.

— The French Government had announced the planned aid not on its own initiative but only after being requested to do so by the Commission.

— The Commission had asked the French Government for guarantees and further explanations, which had led to amendments and adaptations of the aid originally planned.

30. In addition, the applicant points out that the Commission had informed one of the complainants, namely the AEVP, of its intention to initiate the formal administrative procedure. The Commission had never given an explanation for why it abandoned this intention.

31. The Spanish Government, which supports the applicant, also complains of an

infringement of Article 93 of the EC Treaty by the Commission. Since the Commission's preliminary examination period is intended only to enable a prima facie opinion to be formed on the compatibility of planned aid with the common market, the Commission should not have authorised the planned aid solely on the basis of the preliminary examination. Because the Commission refrained from initiating the procedure under Article 93(2) of the EC Treaty the other parties to the proceedings had been unable to present their points of view to the Commission, with the result that the Commission had not been fully informed when it took its decision. Finally, the course and duration of the preliminary examination should alone have compelled initiation of the administrative procedure.

32. At the hearing, the representative of the Spanish Government stressed that it was by no means sufficient for the French authorities merely to give their assurance that the aid did not compensate French liqueur-wine producers for the tax disadvantage compared with natural sweet wines. On the contrary, the Commission had been bound to look into this accusation. In view of the unsatisfactory information from the French this could only have been done by way of a procedure under Article 93(2) of the EC Treaty.

33. The Commission took the view that the formal administrative procedure always had to be initiated if serious difficulties arose when examining the compatibility of aid with the Treaty or if the difficulties which had arisen could not be overcome by the end of the preliminary examination period. This was, however, in the Commission's opinion, not the case here.

34. Member States' notification of planned aid was often incomplete and imprecise on unimportant points. Strictly speaking, it was not really information within the meaning of Article 93(3) of the EC Treaty but a report to the Commission on the measures which a Member State intended to adopt. The Commission therefore had to seek additional information and confirmation during the preliminary examination period, in order to harmonise the planned aid in detail with the requirements of Community law. Such fine-tuning, however, concerned, as in the present case, only secondary aspects and arrangements for implementing the aid. The Commission therefore had to be granted a certain discretion regarding the surmountability of difficulties when examining notified aid schemes. After all, the difficulties could also be of minor significance.

35. Besides this, the Commission is of the opinion that the two-month period for initiating the administrative procedure does not begin to run until such time as the Commission has all the documents necessary for examining the compatibility of aid with the Treaty. The Commission refers in this connection to the judgment in Case C-301/87. [13]

13 — Judgment of the Court of 14 February 1990 *France* v *Commission* (Boussac) [1990] ECR I-307, at paragraph 27 et seq.

36. With regard to possible difficulties when assessing whether the aid scheme could be authorised, the Commission points out that the disputed scheme was obviously in accordance with the relevant guidelines. Although the Commission representative conceded at the hearing that the Commission was not necessarily bound by these guidelines, any deviation did require what the representative described as 'cast-iron' justification. In the present case there was none.

37. The French Government first of all takes the view that it could not be inferred from the judgment in the *Lorenz* case [14] that the preliminary examination period was generally and absolutely restricted to two months. The Commission's obligation to initiate the administrative procedure depended solely on whether it encountered serious difficulties when examining the compatibility of the planned aid with the Treaty.

38. The French Government assumes that, in view of the legal and factual circumstances of the case, the long preliminary examination period did not constitute a breach of Article 93(2) of the EC Treaty. There had been dialogue between the French authorities and the Commission, which had begun not as usual with the notification of a fully worked-out aid scheme but rather at the planning stage of the future aid. The two-month period commencing only upon notification therefore had to be calculated from the French Government's letter of 23 September 1996.

39. Finally, the French Government felt that the applicant had not given any indication of the nature of the serious difficulties encountered by the Commission. For the planned aid had not undergone any major amendment in the course of the Commission's examination. At the hearing the French Government's representative also pointed out that the Commission had been familiar with the situation on the European market for liqueur wines. After all, it had, shortly before the start of these proceedings, introduced Community aid for Madeira, [15] about which no reservations had been expressed.

Analysis

40. On the question under what conditions the Commission is obliged to initiate the formal administrative procedure under Article 93(2) of the EC Treaty, there is firstly the time element, i.e. the question of observing the two-month limit for completion of the preliminary examination period. Secondly, the substantive requirements for compulsory initiation of the administrative procedure as reflected in previous Court of Justice case-law are to be discussed.

41. Expiry of the two-month limit does not in itself automatically oblige the Commis-

14 — Judgment in Case 120/73 (quoted in footnote 12).

15 — Commission Regulation (EEC) No 3233/92 of 5 November 1992 (OJ 1992 L 321, p. 11).

sion to initiate the contentious administrative procedure. In the judgment in the *Lorenz* case,[16] the Court of Justice demands that the Commission complete the preliminary examination phase with the necessary urgency within a reasonable period. Guided by Article 173 of the EC Treaty (now, after amendment Article 230 EC) and Article 175 of the EC Treaty, it regards a period of two months as reasonable.[17] The purpose of this two-month period, however, is above all to protect the Member State which plans to grant aid but because of the Commission's inaction receives no clarification as to whether the planned aid is compatible with Community law. For the Member State concerned may, after two months have expired, give notice to the Commission of the implementation of the aid. If the Commission does not wish to accept this, it is compelled to initiate the formal administrative procedure under Article 93(2). The two-month limit therefore does not serve first and foremost to protect the procedural rights of any third parties to the administrative procedure.

42. This explains the judgment in Case 84/82[18] on the Commission's decision not to raise any objections to the Belgian aid. There, too, the concern was to guarantee the rights of other parties to the proceedings, in particular the applicant Member State, Germany. The Court of Justice did not give the examination period of more than 16 months as the only reason for the Commission's being obliged to initiate the formal administrative procedure. On the contrary, it distinguished between aid schemes which raise no difficulties or only such as the Commission can overcome in the preliminary examination phase and schemes during the examination of which the Commission encounters 'serious difficulties', which make it appear necessary to give the other Member States and parties concerned the opportunity to present their views.

43. It must therefore be examined whether the present aid scheme gave rise to 'serious difficulties'. The Court of Justice has not yet conclusively defined which circumstances constitute such difficulties. In Case 84/82[19] the Court considered it sufficient that the Commission and Belgium negotiated with each other for more than 16 months with the aim of making important amendments to the aid scheme.

44. In the present case, contact lasted almost 19 months. In the course of this dialogue, France, at the Commission's request, refrained from granting aid for investment in stock holding.[20] Besides this, correspondence between France and the Commission was restricted to giving more precise information about the plan. In the *Matra* case[21] the Court ruled out that

16 — Judgment in Case 120/73 (quoted in footnote 12).

17 — Judgment in Case 120/73 (quoted in footnote 12, at paragraph 4).

18 — Judgment of 20 March 1984 *Germany* v *Commission* [1984] ECR 1451, at paragraphs 13 et seq.; similarly in the judgment of 15 June 1993 in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203 and implicitly also in the judgment of the Court of First Instance of 28 September 1995 in Case T-95/94 *Sytraval* v *Commission* [1995] ECR II-2651 and in the judgment of 2 April 1998 on the related appeal, Case C-367/95 P *Commission* v *Sytraval* [1998] ECR I-1719, in which a processing period of 51 months was involved.

19 — Judgment in Case 84/82 (quoted in footnote 18, at paragraph 14 et seq.).

20 — Commission's request in letter of 3 June 1996, point 6; agreement in letter from the French authorities of 10 July 1996, point 6.

21 — Judgment in Case C-225/91 (quoted in footnote 18, at paragraph 38).

merely supplementing information and details was enough to constitute serious difficulties, requiring instead substantial amendments complying with conditions imposed by the Commission. Since the Commission conceded only when questioned at the hearing that the correspondence had led to any amendments at all, it is to be assumed that the Commission at least considered the amendments insignificant. There is hardly any way of checking this appraisal of the situation since in the present case there is no precise information as to the significance of the amendments within the overall context of the aid. It can, however, be concluded from the correspondence between France and the Commission that only a fraction of the total FRF 5.7 million of investment aid from an overall volume of aid of some FRF 24.6 million had been estimated for this particular element, and that therefore presumably less than 10% of the volume of aid was involved. It seemed justifiable if the Commission had not taken this — the sole obvious amendment of the scheme — as cause to initiate the procedure under Article 93(2) of the EC Treaty.

45. There would, however, have been cause to initiate the procedure under Article 93(2) of the EC Treaty if — as in the judgment in the *Cook* case — 'the assessments on which the Commission relied, ..., gave rise to such difficulties as to justify the initiation of that procedure'.[22] The aid in that case concerned markets for specific steel foundry products, whereas the Commission only had available general data on the steel foundries sub-sector, which, moreover, showed the situation on that market to be difficult. The more detailed investigation of the markets concerned, which the Court considered necessary, could only be carried out as part of the procedure under Article 93(2) of the EC Treaty.

46. In the present case, too, the Commission, when applying Article 92(3)(c) of the EC Treaty, had been compelled to make judgments about the common interest, to which the aid could not run counter. Although it pointed out that the guidelines it had mentioned[23] already finalised in concrete form the conditions enabling authorisation of the present aid in view of this derogation, the Commission usually retained some latitude within these texts, allowing it to take into account the particular circumstances of the aid in each case. The 'Framework for national aids for the advertising of agricultural products' and the 'Guidelines for State aid in connection with investments in the processing and marketing of agricultural products' do admittedly seem to leave no room for discretion. However, there is at least some scope for considering, in the present case, whether these guidelines do not fall short of the requirements of Article 92(3)(c) of the EC Treaty, giving cause to fall back on the Treaty directly. For, as the Court found in the *Deufil* case, texts of this type could only constitute 'guidelines setting out the course of conduct which the Commission intends

22 — Judgment of 19 May 1993 in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, at paragraph 31.

23 — See above, paragraph 12 et seq.

to follow', but 'not derogate from the provisions of Articles 92 and 93 of the Treaty'.[24] Moreover, the guidelines on the promotion of investment seem, even from their wording, only to lay down an absolute minimum standard.

47. At the same time there was cause to pay particular attention to the extent of this margin of discretion. In the Treaty infringement proceedings giving rise to the judgment in Case 196/85,[25] the Commission remained convinced that France, through its differential taxation of natural sweet wines and liqueur wines, discriminated against imported products. Although the Court regarded this discrimination as justified within the framework of Article 95 of the EC Treaty it should be noted that because of this taxation the competitive position of liqueur wines on the French market is already burdened.[26] The tax strike of the French producers of Pineau des Charentes, Floc de Gascogne and Macvin du Jura, and the complaint lodged with the Commission by the association of French producers of liqueur wines with registered designation of origin confirm this appraisal of the situation. The calling off of the tax strike once the disputed aid was promised compels one to assume that the aid gives these producers a competitive advantage over foreign producers, as do the complaints lodged with the Commission against the aid and the taxation system by the AEVP and the Spanish association of sherry producers. Furthermore, in the interim, the Commission obviously assumed itself that more detailed examination of the planned aid was necessary. At any rate, the reason it gave the French Government for its request for further information was the fact that a thorough examination ('examen approfondi') was necessary. At least one Commission employee even gave the AEVP verbal notice shortly afterwards of the initiation of the procedure under Article 93(2) of the EC Treaty. Finally, against this background, the lengthy duration of the proceedings also has to be regarded as a further indication of serious difficulties in assessing the market situation.

48. However, none of this would compel initiation of the procedure under Article 93(2) of the EC Treaty if the Commission could have fallen back on investigations of the French market for liqueur wines showing that the aid does not run counter to the common interest in accordance with Article 92(3)(c) of the EC Treaty. In the present proceedings, however, there is nothing of the sort apparent. The Commission merely claims that the general measures it had mentioned were based on appropriate investigations, and points out, besides, that it has insufficient capacity for such investigations on a case-by-case basis.

49. However, only the 'Guidelines for State aid in connection with investments in the processing and marketing of agricultural

24 — Judgment of 24 February 1987 in Case 310/85 *Deufil* v *Commission* [1987] ECR 901, at paragraph 22; cf. also the judgment of the Court of First Instance of 5 November 1997 in Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, at paragraph 61 with further references.

25 — Judgment of 7 April 1987 *Commission* v *France* [1987] ECR 1597.

26 — For consideration of this burden see paragraph 87 et seq. below.

products' in the letter of 20 October 1995 [27] contain a basis for market-specific investigations. They refer to general investigations of the markets concerned which preceded the other Commission decision to be applied analogously when assessing aid — No 94/173 [28] on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products. This decision merely contains, in section 2.11 of the Annex, general rules for restricting the part-financing by the Community of schemes in the wine and alcohol sector. The market for liqueur wines and natural sweet wines in France receives no particular mention.

50. In so far as it is referred to by the French Government, Community aid for Madeira is not based on any obvious investigations of the French market either. Regulation No 3233/92 merely contains rules for implementing Regulation (EEC) No 1600/92, [29] the economic considerations of which are for their part based above all on the exceptional remote situation of Madeira.

51. There are therefore as yet no grounds for believing that the Commission took its decision not to raise any objections on the basis of adequate clarification of the facts. It should therefore have been obliged to initiate the procedure under Article 93(2) of the EC Treaty, in order to carry out the necessary investigations with the participation of interested parties.

27 — Quoted in footnote 9, at paragraph 2.

28 — Quoted in footnote 10.

29 — Council Regulation of 15 June 1992 concerning specific measures for the Azores and Madeira relating to certain agricultural products (OJ 1992 L 173 of 27 June 1992, p. 1).

— On the fundamental nature of the procedural infringement

Arguments of the parties

52. In the alternative, the Commission points out with reference to the judgment in Case 142/87 [30] that even initiating the administrative procedure would not and could not have led to any different result. The decision terminating the administrative procedure would at any rate contain the same elements found in the contested decision and aimed at ensuring compliance with the mandatory provisions of the law on the granting of aid. The applicant had given no indication how the submissions of other parties to the proceedings could have influenced the Commission's decision. Failure to initiate the administrative procedure therefore did not constitute infringement of an essential procedural requirement.

53. The applicant, on the basis of the same case-law, counters that it was not up to it to prove that implementing the procedure under Article 93(2) of the EC Treaty would have led to a different result but rather that, on the contrary, the Commission had to prove that this procedure could not have led to a different result. Since, however, in the present case, the parties concerned had been unable to comment, precisely because of the infringement of procedural rules, it

30 — Judgment of 21 March 1990 *Belgium* v *Commission* ('*Tubemeuse*') [1990] ECR I-959, at paragraph 48.

was impossible to tell whether the decision would have been different if the procedural rules had been observed.

Analysis

54. A breach of procedure only results in the annulment of a decision if it is a fundamental breach.

55. The Commission's view is based on an analogy between the failure to initiate the procedure under Article 93(2) of the EC Treaty and the omission of a hearing, and is supported by the fact that, during investigations of aid by the Commission, only the procedure under Article 93(2) of the EC Treaty allows interested third parties to participate, which includes their being heard. A fundamental infringement of the right to be heard is, however, as a rule to be assumed only if exercising this right can influence the outcome of the proceedings. The Court rules out such a possibility (for example in the judgment mentioned by the Commission on a decision regarding the granting of aid) if a hearing which did not actually occur would have concerned only documents which contained no new information for the Commission or the parties to be heard. [31]

31 — Judgments in Case 301/87 (quoted in footnote 13, at paragraph 31) and Case 142/87 (quoted in footnote 30, at paragraph 48).

56. The present case shows, however, that there is no room for such an analogy if the Commission has to initiate the procedure under Article 93(2) of the EC Treaty. If all that were involved was a hearing of known facts, then the 'serious difficulties' required for initiation of the procedure did not exist. What was rather the case here was that the Commission failed to obtain any information that could have become the subject of a hearing. There is therefore always a fundamental breach of procedure if the Commission fails to initiate, where so required, the procedure under Article 93(2) of the EC Treaty. The Commission's decision is therefore to be set aside because the Commission did not initiate the procedure under Article 93(2) of the EC Treaty despite the fact that serious difficulties arose during the examination.

57. Because of this conclusion the following observations on the further pleas are merely of a supplementary nature.

(bb) The insufficient statement of reasons for the Commission's decision

Arguments of the parties

58. The applicant considers that insufficient reasons are stated for the Commis-

sion's decision of 6 November 1996, in the form in which it was published in the Official Journal. This contained no analysis of the relevant market or the conditions of competition in that market. Nor had the Commission, in the published decision, undertaken any assessment of the trade currents within the Community or the effect on the market of the planned aid. Finally, no indication was given of the legal bases either.

59. The applicant does admittedly take the view that its action is directed only against the decision as published in the Official Journal since certain consequences in terms of procedural law are attached to publication — in particular the commencement of the period for an action for annulment in accordance with Article 173(5) of the EC Treaty. However, it none the less points out that no analysis of the relevant market was undertaken in the Commission's letter of 21 November either. Besides, a mere reference to parameters on the granting of aid in the agricultural sector did not release the Commission from its obligation to undertake at least a summary assessment of the consequences of the measures it had approved for the relevant market.

60. In connection with the plea of infringement of the Treaty, the applicant finally complains that the decision gives no indication of the criteria for or forms of practical application of the aid. It was unclear in what legal form and by which national authorities the aid was implemented and how compliance with the requirements of Community law was monitored. In particular it was not known how aid for advertising was allocated and which research projects were supported using which criteria. The scope of the technical support and the conditions for granting investment aid could not be identified.

61. The Commission stresses that only the complete text, as communicated to the French Government, counts for the sufficiency of the statement of reasons within the meaning of Article 190 of the EC Treaty. The publication of an abstract in the Official Journal was voluntary and served merely to inform interested third parties. Those concerned could use this information to obtain the full text of the decision from the Commission.

62. The Commission also points out, however, that the abstract published in the Official Journal contained all the essential elements of the decision. As far as market analyses were concerned, these had preceded the guidelines and parameters on the granting of aid applied by the Commission in this case. Therefore, comments on market analyses were not essential during examination of an individual aid scheme.

63. In connection with the plea of infringement of the Treaty, the Commission submits that more detailed information could not be demanded from a Member State when registering an aid scheme as it was up

to that State alone to determine domestic responsibility and procedures for implementing aid in accordance with Community law.

64. In this connection, France recalls that the Commission had sent a letter to the Member States on 11 October 1990, giving details of the procedure for publishing a description in the Official Journal for information purposes. It followed from this that the version printed in the Official Journal did not reproduce the full text of the contested decision.

Analysis

65. In the judgment on the *Sytraval* case the Court summarised the Commission's obligation to state reasons according to Article 190 of the EC Treaty in aid proceedings as follows:

'As regards the Commission's obligation to state reasons, it is settled case-law that the statement of reasons required by Article 190 of the Treaty must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question ... .' [32]

66. The Court stated in even more concrete terms in the *Matra* case [33] that 'a decision not to initiate the procedure under Article 93(2) of the Treaty, which is taken in a short space of time, need contain only the reasons why the Commission considers that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the common market. Furthermore, the statement of reasons for the contested decision must be assessed in the context of the SIBR [34] and of the criteria laid down by the Community framework on State aid to the motor vehicle industry'.

32 — Judgment of 2 April 1998 in Case C-367/95 P (quoted in footnote 18, at paragraph 63).

33 — Judgment in Case C-225/91 (quoted in footnote 18, at paragraph 48).

34 — This was a regional aid programme previously authorised, covering part of the aid disputed in this case.

67. Admittedly the Court also found in the *Sytraval* case [35] that although, in the context of a criticism of the statement of grounds, deficiencies in investigations carried out by the Commission could not be criticised, the complete lack of any such investigations definitely could be, in so far as these were necessary in order to answer a complaint forming the basis of the Commission's investigation.

68. Whether the Commission has fulfilled the requirements thus made of the statement of reasons has to be examined using the original version of the decision issued to the addressees thereof, namely France. As the Court found in the *Sytraval* case, only this letter is attributed the character of a decision. [36] The abstract of the decision published in the Official Journal on the other hand is only of an informative nature. It is — irrespective of any legal consequences attached to its publication — of no relevance to the obligation to state reasons.

69. When examining the statement of reasons, however, irrespective of how this fits into the plea of infringement of the Treaty, consideration must also be given to Portugal's criticism regarding the lack of clarity of the decision on the granting of aid. [37]

70. If the requirements stated in the *Matra* case were taken literally, then the statement of grounds would in principle satisfy the minimum requirements expressed there. The present Commission decision makes it sufficiently clear that compliance with the general rules, practices and Community parameters for the monitoring of aid is enough to eliminate any reservations on the part of the Commission.

71. When analysing the Commission's decision, however, it is noticeable that although it contains fragmentary information on the arrangements for applying the aid, it does not even once name the recipients or indicate the extent of the aid in concrete terms. Only for that part of the aid affecting advertising for Cognac, Armagnac and Calvados does the Commission name the products concerned. Somewhat more detailed information emerges only from the Commission's correspondence with the French authorities, which, however, the Commission treats as confidential. It therefore cannot be regarded as an element of the statement of reasons. The significance of this deficiency in the statement of reasons is exemplified by the fact that in the present proceedings Portugal assumed, until France and Spain intervened, that the

35 — Judgment in Case C-367/95 P (quoted in footnote 18, at paragraph 68 et seq.).

36 — Judgment in Case C-367/95 P (quoted in footnote 18, at paragraph 45).

37 — For interpretation of the applicant's submission see judgment of 17 May 1984 in Case 338/82 *Albertini* v *Commission* [1984] ECR 2123, at paragraph 5 et seq.

disputed aid was granted also to natural sweet wines. [38] This shows that the requirements of the *Matra* case can refer only to the decision not to initiate the procedure under Article 93(2) of the EC Treaty, and do not also contain all the necessary elements of a statement of reasons for the simultaneous authorisation of aid. For this reason alone, there must in principle be held to be a deficiency in the statement of reasons, since neither the Court nor the parties concerned can assess, on the basis of the decision alone, to which aid the Commission raised no objections.

72. However, again with regard to the decision not to initiate the procedure under Article 93(2) of the EC Treaty, account must be taken not only of the requirements in the *Matra* case but also the requirements stated in the *Sytraval* case in respect of the complainants' criticisms. The AEVP points repeatedly to its reservations, which arise from the combination of the aid with the existing taxation system for liqueur wines and natural sweet wines. The Commission does not say a single word about this central point of the complaint. There is therefore in this respect also a deficiency in the statement of reasons.

73. Consequently, the Commission's decision must also be set aside on the grounds of insufficient statement of reasons.

38 — Part of the reason for this must also be the notice regarding authorisation of this aid (quoted in footnote 2), according to which 'natural sweet wines' were also being promoted.

(b) The alleged infringement of the Treaty or one of the rules of law relating to its application

74. As a second ground for annulment, the applicant invokes infringement of the Treaty or one of the rules of law relating to its application. Within this plea it mentions two different aspects. Firstly, it complains, on the basis of a substantive examination of the aid, of the infringement of the combined provisions of Article 92 and Article 95 of the EC Treaty. Secondly, it submits that the aid scheme is not transparent and that the Commission has not imposed the necessary conditions.

(aa) On the alleged infringement of Article 92 in conjunction with Article 95 of the EC Treaty

Arguments of the parties

75. From the substantive point of view the applicant considers that the Commission's decision infringes Article 92 in conjunction with Article 95 of the EC Treaty. In this respect, the applicant stresses that examination of the aid in question should not be confined to considering its lawfulness on the basis of the Community parameters and the guidelines set in place by the Commission. On the contrary, what was needed was to measure it against Article 92 of the EC Treaty itself.

76. The breach of Article 92 in conjunction with Article 95 of the EC Treaty arose from the interaction of the French taxation system for liqueur wines with the authorised aid. In view of the discriminatory effect of the taxation system for liqueur wines, the authorised aid intensified the already distorted conditions of competition and adversely affected trade within the Community.

— Even if Directive 92/83/EEC [39] permitted different rates of taxation, this should not lead to the distortion of competition in the internal market. If the reduced tax rate amounted to only one quarter of the normal tax rate, however, such distortion did exist.

77. The French taxation system for liqueur wines was indeed discriminatory. As emerged from the statistics for 1993, 92% of the natural sweet wines sold in France were from French production and were taxed at the rate of FRF 350 per hectolitre. On the other hand, 81% of the liqueur wines sold in France were imported from other Member States (in particular from Portugal) and taxed at FRF 1 400 per hectolitre. A similar picture emerges for the following years.

— Although in its judgment of 7 April 1987, [40] the Court had dismissed the Commission's action against the French taxation system for liqueur wines and natural sweet wines, this judgment referred only to facts, in particular with regard to the market analyses, which related to a period before 1986, i.e. before the accession of Portugal and Spain.

78. By introducing the present system of aid the French authorities were at least partially compensating French liqueur wines for the tax disadvantage suffered by liqueur wines compared with natural sweet wines.

— Thirdly, the contested decision had not taken into account the significance of port and sherry in the relevant market since 1986. The production of port was subject to extremely stringent quality standards, and the regions of origin were in a comparable economic situation to the regions producing natural sweet wines in France.

79. The applicant puts forward four arguments to prove that the aid regime authorised by the Commission goes beyond the limits laid down in Article 92:

39 — Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21).

40 — Judgment in Case 196/85 (quoted in footnote 25).

— Finally, after the sales increases in 1994 and 1995, exports of port and sherry to France had collapsed. Exports of port to France had fallen by 12.4% in 1996.

80. At the same time, the applicant emphasised that its concern was not, by some roundabout way, to obtain a judgment from the Court of Justice on the compatibility of national provisions with Article 95 of the EC Treaty. The applicant did not intend circumventing the various procedural provisions of either the law relating to the granting of aid on the one hand or taxation law on the other. On the contrary, its concern was whether the Commission, when examining aid in accordance with Articles 92 and 93 of the EC Treaty, was allowed completely to disregard the existence of tax discrimination and its effects on imported products.

81. Spain considers, without reference to Article 95 of the EC Treaty, that the aid was unjustifiable on the basis of Article 92(3)(c) of the EC Treaty. The French taxation system altered the conditions in the markets concerned in a way that adversely affected the common interest, which the Commission, when exercising its discretion, had failed to recognise. The aid strengthened the position of French producers of liqueur wines by compensating them for the disadvantage resulting from the taxation system, whereas foreign competitors did not enjoy such compensation.

82. The Commission points out that tax questions were generally only relevant in connection with examination of the granting of aid if the aid itself consisted of preferential tax treatment or if certain tax revenue specifically served to finance aid. In the case of the tax measures mentioned by the applicant, there was, however, no legal or financial connection with the aid in question. The fact that the recipients of the aid were not identical to the subjects of the tax on alcohol confirmed that the tax system and the aid were not linked with each other. Elements of an aid scheme which were not essential for the attainment of its object or for its proper functioning were in fact, according to Court of Justice case-law,[41] not subject to examination during proceedings on the granting of aid but to general provisions, such as Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

83. Besides, the applicant's approach altered the consequences of Articles 92 and 93 of the EC Treaty. Established Court of Justice case-law[42] assumed, however, that Articles 92 and 93 of the EC Treaty on the one hand and Article 95 of the EC Treaty on the other each had independent significance. There was overlap only where certain tax revenue was inseparably linked with a system of aid. At any rate, discrimination within the meaning of Article 95 of the EC Treaty did not constitute aid. In this connection the Commission refers to the judgment in Joined Cases 142/80 and 143/80.[43]

41 — Judgment of 22 March 1977 in Case 74/76 *Iannelli & Volpi* v *Ditta Paolo Meroni* [1977] ECR 557.

42 — Judgment of 3 July 1985 in Case 277/83 *Commission* v *Italy* [1985] ECR 2049.

43 — Judgment of 27 May 1981 *Amministrazione delle Finanze dello Stato* v *Salengo* [1981] ECR 1413, at paragraph 28.

84. The Commission points out, moreover, with reference to Court of Justice case-law, [44] that, on the basis of the existing facts, the French system of taxation for liqueur wines and natural sweet wines did not infringe Article 95 of the EC Treaty.

85. The French Republic also largely supports the views presented by the Commission. It further submits in the alternative that the preferential tax treatment of natural sweet wines was covered by the relevant provisions of Community law, in particular Article 18 of Directive 92/83, [45] and had been confirmed by Court of Justice case-law. [46]

86. The aid for producers of liqueur wine and brandy was in no way connected with the taxation system. On the contrary, it was a reaction to the crisis in white wine production. Besides, the French tax system did not restrict competition, as could be seen from the increase in sales of port on the French market.

Analysis

87. First of all it must be stated that neither in connection with a direct action against a decision by the Commission to raise no objection to aid nor in connection with the Commission procedure leading to such a decision do observations have to be made on the compatibility of a national taxation system with Article 95 of the EC Treaty. In this respect the Commission and Member States are to be referred to the Treaty infringement procedure under Article 169 of the EC Treaty or Article 170 of the EC Treaty (now Article 227 EC), and the individual to the protection provided against such taxation by national laws. National courts may if necessary bring the matter before the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC), even where a certain form of taxation is inseparably linked with aid. [47] For this reason it is of no significance for the compatibility of aid with Article 92 of the EC Treaty whether there exists simultaneously a discriminatory system of taxation within the meaning of Article 95 of the EC Treaty.

88. On the other hand, it is not possible to judge whether aid runs contrary to the common interest within the meaning of Article 92(3)(c) of the EC Treaty without simultaneously taking into account the conditions of competition and trade on that market. These conditions are of course influenced by a discriminatory system of taxation within the meaning of Article 95 of the EC Treaty — whether this is justified or not. A system of tax discrimination may be justified for objective reasons, and even a certain aid scheme may, viewed in isolation, be basically compatible with Community law. But there is much to be said in support of the fact that the cumu-

44 — Judgment in Case 196/85 (quoted in footnote 25).

45 — Quoted in footnote 39.

46 — Judgment in Case 196/85 (quoted in footnote 25).

47 — Judgment in Joined Cases 142/80 and 143/80 (quoted in footnote 43, at paragraph 28).

lative influence of both measures on a certain market is no longer compatible with the common interest within the meaning of Article 92(3)(c) of the EC Treaty. In such a situation a Member State should at least not implement the aid scheme until it eliminates or reduces the differences in taxation to such an extent that the additional effect of the aid on the market concerned no longer runs counter to the common interest. [48]

89. It cannot be judged how things stand in the present case as the Commission has not yet carried out the necessary investigations.

90. It is, however, noticeable that the aid for advertising for the brandies Cognac, Armagnac and Calvados — the only aid which does not relate to products coming under the system of taxation mentioned — is, in structural terms, out of place in the authorised scheme. This aid almost exclusively promotes advertising in states outside the European Union, with only Calvados also being advertised in Germany. The liqueur wines are advertised in France. In addition, the financing in the case of these three brandies is based on so-called compulsory voluntary contributions ('cotisations volontaires obligatoires'), which otherwise applies only to Floc de Gascogne — one of the French liqueur wines. The aid for advertising for liqueur wines on the other hand is financed by non-compulsory voluntary contributions. If the aid for brandies is separated from the other aid on this basis, the remaining, substantial, part of the aid seems to favour a group which largely coincides with the group of French producers suffering a tax disadvantage. Should the necessary investigations confirm this impression, it could indeed be inferred from this that the purpose was compensation as alleged by the Portuguese Government. There is much to be said in support of regarding such compensation as incompatible with the common interest within the meaning of Article 92(3)(c) of the EC Treaty.

91. Ultimately, however, weighing up these points of view in the case of a particular aid scheme is the responsibility of the Commission, which, after taking the necessary steps in terms of procedural law, is granted broad powers of discretion in making its decision. [49]

(bb) Infringement of Article 92(3) of the EC Treaty

92. Finally, the applicant submits two further pleas under the heading of 'infringement of Article 92(3) of the EC Treaty'. Firstly, it criticises the lack of clarity of the

48 — See *mutatis mutandis* the judgment of 15 May 1997 in Case C-355/95 P *Textilwerke Deggendorf (TWD)* v *Commission* [1997] ECR I-2549, at paragraph 26.

49 — Judgment of the Court in Case T-149/95 (quoted in footnote 24, at paragraph 63 with further references).

aid scheme and, secondly, the absence of conditions which the Commission should have imposed.

— The lack of clarity of the scheme

Arguments of the parties

93. As already explained in connection with the infringement of essential procedural requirements as the cause of the present action, under the plea of insufficient statement of grounds, the applicant criticises the lack of clarity of the present aid scheme as an infringement of the Treaty. [50] At the hearing it also pointed out that the Commission had dispensed with obtaining relevant information although relevant requests had been contained in a form with advice on registering aid which the Commission had sent to the French authorities along with the invitation to give notification of the scheme.

94. The Commission objects that the aim of the correspondence preceding the decision had been to clarify the circumstances under which aid was granted. The fact that the French authorities had in this context specifically guaranteed compliance with the relevant guidelines ensured compatibility of the aid with Article 92(3)(c) of the EC Treaty.

95. More detailed information could not be demanded from a Member State when registering aid as it was up to that State alone to determine domestic responsibility and procedures for implementing aid in accordance with Community law. Besides, it followed from the case-law that it was up to Member States to monitor compliance with the conditions for the authorisation of aid whilst the Commission could if necessary order repayment of the aid where those conditions were infringed.

Analysis

96. The accusation of lack of clarity of the present aid scheme is of importance in connection with the plea of infringement of the Treaty only in so far as it is directed at the fact that the Commission had never even determined the relevant facts.

97. In so far as the applicant complains of the risk of infringement of the conditions for the authorisation of aid, attention should first of all be drawn to the findings of the Court of First Instance in the AIUFFASS case, to which the Commission refers. According to this, 'a mere statement that one of the conditions on which a decision authorising the grant of aid was based will not be complied with cannot cast doubt on the legality of the decision. If the recipient undertaking were to fail to observe the conditions of authorisation, it would be for the Member State to make sure that the decision was properly carried

50 — See above, paragraph 58 et seq.

out and for the Commission to assess whether it was appropriate to demand that the aid be repaid'. [51]

98. This finding refers to the risk of aid being used contrary to the purposes authorised by the Commission. This risk can never be completely ruled out in advance. [52] The applicant's complaint, however, is levelled at the fact that the Commission did not obtain sufficient information about the aid to rule out the possibility of even its authorised form's being incompatible with Article 92(2)(c) of the EC Treaty. This complaint is to be endorsed in so far as establishing that aid basically gives no cause for concern requires a minimum amount of information on such aid and, in particular, the measures taken to prevent it being used inappropriately.

99. Commission practice, as it emerges from the form on the information which the notification of aid under Article 93(3) of the EC Treaty has to contain, [53] basically provides the model for the information required. According to the present documents and the Commission's oral submissions, the latter did not have all the details mentioned there when making its decision. In particular, there is no information about the French authorities responsible for distributing the aid or the criteria for distributing it to individual recipients. Only the limits on the granting of aid which can be derived from the texts mentioned in the decision offer some guidance in that respect. It therefore seems difficult, at the least, to monitor, on a case-by-case basis, whether the French have kept their promises, since the Commission does not know where to carry out monitoring. Besides, it is not possible to judge to what extent national regulations and criteria prevent aid from being misused.

100. Whether this lack of information is enough for the decision to be set aside does not, however, need to be decided here since the Commission can take it into account when carrying out the procedure under Article 93(2) of the EC Treaty.

— The accusation of lack of conditions

Arguments of the parties

101. In this respect the applicant complains that the Commission had authorised measures which were to be applicable for an unspecified period and which altered the

51 — Judgment of the Court of First Instance of 12 December 1996 in Case T-380/94 *Association internationale des utilisateurs de fils de filaments artificiels et synthétiques et de soie naturelle (AIUFFASS) and Apparel, Knitting & Textiles Alliance (AKT)* v *Commission* [1996] ECR II-2169, at paragraph 128; the reference to be found there, quoted by the Commission, to the judgment of the Court of Justice of 4 February 1992 in Case C-294/90 *British Aerospace and Rover* v *Commission* [1992] ECR I-493, at paragraph 11, refers merely to the possibility of demanding repayment as a sanction for infringement of conditions for authorisation, not to responsibility for monitoring the implementation of aid.

52 — See Article 16 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

53 — Annex to the Commission's invitation to the French Government of 12 April 1995 to notify the aid.

conditions on the market concerned. However, if the aid were for restructuring, as the Commission asserted, it was permissible only if digressive and only for a limited period of time.

102. The Commission objects that, in so far as the applicant referred to the regulations on aid for restructuring, it ignored the fact that the 'Community guidelines on State aid for rescuing and restructuring firms in difficulty' [54] were not to be applied to the disputed aid, which related *inter alia* to the restructuring of a sector of French agriculture. The texts applicable in this case did not require a time-limit or digressive arrangement.

103. France also points out that the Commission was granted broad powers of discretion when judging whether aid was justified under Article 92(3). The applicant had not shown that the Commission in this respect had made a mistake when ascertaining the facts, or made a grave error of judgment, which alone could have helped this plea to succeed.

104. In view of the period of validity of the aid, France assumes that authorisation applied only to the funds identified in the 1995 budget.

54 — OJ 1994 C 368 of 23 December 1994, p. 12.

Analysis

105. The Commission's objection is to be endorsed in so far as none of the texts mentioned by it in the decision for putting Article 92(3)(c) of the EC Treaty in concrete terms provides for a time-limit or digressive form. Such an arrangement does admittedly emerge from the guidelines mentioned by the Commission but — as the Commission submits — the purpose of the present aid is not to restructure or rescue individual businesses. Nor can the Commission be accused of having exceeded its powers of discretion by not applying business-related requirements to regional and sectoral aid also. Even if such aid is directed at restructuring, it differs so greatly from business-related aid that automatic equal treatment cannot be demanded. Besides, as France submits, the Commission also only authorised the aid planned for 1995. [55] This plea must therefore be rejected.

55 — This shows again that the Commission in its statement of reasons for the decision did not present the authorised aid scheme in sufficient detail. According to the notice in the Official Journal, quoted in footnote 2, the aid is authorised for an unspecified duration.

V — Costs

106. Under Article 69(2), subparagraph 1, of the Rules of Procedure the unsuccessful party is to pay the costs if they have been applied for. Paragraph 4, subparagraph 1, states that the parties which intervene in the proceedings shall bear their own costs.

VI — Conclusion

107. In the light of the foregoing, I propose that the Court should decide as follows:

(1) The decision addressed to the French Government of 21 November 1996, SG(96) D/9957, 'to raise no objections' to aid No N 703/95, is annulled.

(2) The Commission bears the costs of the proceedings.

(3) The Kingdom of Spain and the French Republic must bear their own costs.