# OPINION OF ADVOCATE GENERAL JACOBS

delivered on 19 September 2002 [1]

1. In the present case Belgium seeks the annulment of Commission Decision 2001/856/EC of 4 October 2000 concerning State aid to Verlipack [2] ('the contested decision' or 'the decision').

2. In that decision the Commission in essence:

(1) revokes its earlier decision of 16 September 1998 ('the 1998 decision') [3] not to raise objections in respect of BEF 350 million of capital injected by Belgium into Verlipack, since that decision was based on incorrect information;

(2) declares State aid totalling about BEF 607 million granted by Belgium to Verlipack incompatible with the common market; and

(3) orders the recovery of that aid from the recipient.

3. In the 1998 decision the Commission had found that the capital injection of BEF 350 million was compatible with the private investor principle essentially because it was concomitant with a capital injection of BEF 515 million by a private investor. Subsequently however it discovered that the Belgian authorities had granted the private investor in question, prior to its capital injection, two loans totalling BEF 500 million which were to be used for its investment in Verlipack.

1 — Original language: English.
2 — OJ 2001 L 320, p. 28.
3 — OJ 1999 C 29, p. 13.

## Background

4. According to the contested decision the Verlipack group of companies ('Verlipack') was at the material time in 1997 the largest Belgian producer of hollow container glass with a 20% share of the Belgian market and 2% of the EU market. It employed 735 people in its factories at Ghlin, Jumet (both in Wallonia) and Mol (in Flanders).

5. The Belgian authorities had intervened for the first time in 1985 in favour of Verlipack: the limited companies Verlipack Ghlin, Verlipack Jumet and Verlipack Mol were set up with the Belgian authorities holding a 49% stake approved by the Commission. In 1989 the Walloon Region acquired the shares held by the Belgian authorities in Verlipack Ghlin and Verlipack Jumet, whilst the corresponding shares in Verlipack Mol were transferred to the Flemish Region. Following a number of capital increases by the private majority shareholder, the Beaulieu group ('Beaulieu'), the public shareholding was gradually reduced.

6. In 1995 and 1996 Verlipack incurred substantial losses due to bad management and in particular to the low quality of its production. Beaulieu alone was not able to finance the substantial investments which were necessary.

### *The restructuring of Verlipack in April 1997*

7. The situation seemed to change in September 1996 with the arrival of the German industrial group Heye-Glas ('Heye'), one of the biggest European producers of hollow container glass and a world leader in container glass technology, which concluded a technical assistance agreement with Verlipack.

8. In December 1996 the Walloon Region transferred its minority holdings in the two Walloon plants, valued at BEF 114 million, to Beaulieu. Thus Verlipack's Walloon plants temporarily became companies without a public shareholding.

9. On 24 January 1997 Beaulieu created the holding company Verlipack I and on 11 April 1997 Heye acquired a stake in that holding company such that Beaulieu and Heye each had a BEF 515.25 million shareholding (total capital of BEF 1 030.5 million). Heye had however one share more than Beaulieu to give it the controlling vote.

10. Also on 11 April 1997 the holding company Verlipack II was set up. The shareholders of Verlipack II were Verlipack I, to the value of BEF 1 030.5 million, and the Walloon Region. The latter contributed BEF 200 million of capital and granted Verlipack II a loan convertible into equity ('prêt participatif') of BEF 150 million. Following the conversion of the loan into equity the Walloon Region's stake in Verlipack II rose to BEF 350 million, or 25.35% of the total capital of BEF 1 380.5 million. Throughout the Opinion I will refer to the capital injection of BEF 200 million and the loan of BEF 150 million together as the capital injection by the Walloon Region of BEF 350 million.

*The 1998 decision*

11. Following complaints concerning aid granted by the Walloon Region to Verlipack the Commission registered the case on 18 November 1997 as non-notified aid.

12. On the basis of information formally transmitted by Belgium by letters of 10 April 1997, 4 September 1997, 10 April 1998, 18 June 1998 and 19 July 1998 and following an examination of the measures under Article 87 EC, the Commission decided on 16 September 1998 [4] not to raise objections to the capital participation of BEF 200 million and the loan subsequently converted into capital of BEF 150 million. The Commission found that those measures were compatible with the guidelines on public authorities' holdings in company capital [5] and consistent with the actions of a private investor operating under normal market economy conditions mainly because at the same time a private investor (Heye) was acquiring a majority stake in Verlipack which indicated prospects of future profitability and viability for the group.

*The loans granted by SRIW to Heye before the restructuring*

13. Subsequently the Commission was informed by a new complaint and a press article that Heye's capital injection into Verlipack I of 11 April 1997 had in reality originated from funds provided by the Walloon Region in the form of two loans from the Société régionale d'investissement de Wallonie ('SRIW').

14. By letter of 14 December 1998 the Commission requested information from

4 — See note 3 above.
5 — Bulletin EC 9-1984, p. 93.

the Belgian authorities on the alleged grant of two loans to Heye and informed the authorities that it might have to revoke its decision of 16 September 1998 since that decision might have been based on incorrect information.

15. Despite Heye's involvement Verlipack continued to incur dramatic losses. On 7 January 1999 the closure of the Mol plant and the application for a scheme of arrangement ('concordat') for the Jumet and Ghlin plants were announced. On 11 January 1999 Verlipack Mol was declared insolvent. On 18 January 1999 six further companies of the Verlipack group, namely Verlipack Jumet, Verlipack Ghlin, Verlipack Belgium, Verlipack Engineering, Verlimo and Imcourlease were declared insolvent.

16. Following further requests by the Commission for information on the two loans by letters of 13 January and 12 February 1999, the Belgian authorities supplied the details requested by letter of 19 February 1999. Those details show that, following decisions of the SRIW management board of 8 January and 12 March 1997, SRIW had in fact granted Heye two loans of BEF 250 million each.

17. The first loan was a debenture loan of BEF 250 million granted on 27 March 1997 (and thus two weeks before Heye's investment in Verlipack I) for five years at a fixed rate of 5.10% plus a 1% risk premium. The loan agreement contained a conditional loan write-off clause. Under that clause, if Verlipack II and the three operating companies, SA Verlipack Jumet, SA Verlipack Ghlin and SA Verlipack Mol, were to be declared insolvent, the amounts owed by Heye as from the date of that declaration no longer had to be repaid to SRIW.

18. The second loan was granted one day later on 28 March 1997 for ten years at the six-month BIBOR rate in force on the first working day of each half-year for which it was due plus 1.5%. It contained a three-year repayment holiday from the date of completion so that repayments were to commence only as of 28 March 2000.

19. Both loan agreements contained identical financial allocation clauses and immediate repayment clauses.

20. Under the financial allocation clauses the full amount of the two loans (BEF 500 million) was to be used to finance the cash capital injection by Heye into Verlipack I. The operation of the allocation clauses was 'to result in a cash increase in the capital of SA Verlipack Ghlin of at least BEF 400 million and... in SA Verlipack Jumet of at least BEF 300 million and in

investments by the three operating companies of the group in accordance with the investment plan...'.

21. Under the immediate repayment clauses SRIW could demand the immediate repayment of the loans in the event of, inter alia, 'significant inaccuracy of the information provided; failure, whether or not partial, of [Heye] to satisfy a legal or contractual obligation relating to the loan; failure to implement by 31 July 1997 at the latest the allocation clause (financing operations) or if at least 80% of the investments planned have not been carried out by 31 December 2000 at the latest...; the voluntary liquidation of SA Verlipack Jumet, SA Verlipack Ghlin and SA Verlipack Mol...'.

22. According to the Belgian Government, following the insolvency in early January 1998 of several companies of the Verlipack group, SRIW terminated the two loan agreements by letter of 20 January on the basis of the immediate repayment clauses. SRIW apparently believed that the information provided by Heye was inaccurate and that Heye had failed to comply with its obligations under the loan agreements. SRIW therefore initiated repayment proceedings before courts in Liège (Belgium) and in Bückeburg (Germany).

*The contested decision and the application for annulment*

23. The Commission decided on 19 May 1999 to initiate the procedure for the revocation of its 1998 decision under Article 9 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 [6] and informed Belgium of its decision to open the procedure provided for in Article 88(2) EC by letter of 1 June 1999. [7]

24. Following comments from Belgium on the initiation of the procedure, comments from two complainants and Heye on the aid and observations from Belgium concerning those latter comments the Commission on 4 October 2000 adopted the contested decision. [8]

25. In that decision the Commission found that

— the capital injected by the Walloon Region in April 1997 into Verlipack

6 — OJ 1999 L 83, p. 1.
7 — OJ 1999 C 288, p. 24.
8 — Cited in note 2.

and the two loans granted by the SRIW in March 1997 to Heye to finance its capital contribution to Verlipack stemmed from public resources (paragraph 98);

— the capital injection by the Walloon region and the two loans to Heye should have been notified together to the Commission (paragraph 99);

— Belgium failed to inform the Commission about the two loans and the lack of such decisively important information prevented the Commission from applying the State aid rules correctly (paragraph 100);

— in view of the allocation clauses in the loan agreements Verlipack must be regarded as the real beneficiary of the loans to Heye (paragraph 111);

— Belgium, in providing Verlipack with fresh capital and in granting the two loans to Heye, did not act like a private-sector investor operating under normal market economy conditions (paragraph 114);

— in view of the write-off clause and Verlipack's bad operating results the debenture loan to Heye of BEF 250 million constituted aid to Verlipack of BEF 250 million (paragraphs 114 and 115).

— the second loan to Heye of BEF 250 million was granted under favourable conditions different from normal market conditions (interest rates of 4.92% and 5.30%, three-year repayment holiday, absence of collateral) and thus contained on the basis of a reference rate of 7.21% an element of aid of 2.85% gross, corresponding to BEF 7 125 million (paragraphs 117 and 118);

— the aid granted to Verlipack totalling BEF 607.125 million (the capital injection of BEF 350 million plus the debenture loan of BEF 250 million plus the aid element in the second loan of BEF 7.125 million) did not qualify for exemption under Article 87(2) or (3) EC (paragraphs 119 to 134).

26. On the basis of those findings the Commission decided:

'*Article 1*

The Commission decision of 16 September 1998 not to raise objections in respect of the capital contributed to Verlipack is hereby revoked under Article 9 of Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

*Article 2*

The State aid totalling EUR 8 676 273 (BEF 350 million) granted by Belgium to Verlipack is incompatible with the common market.

*Article 3*

The State aid totalling EUR 6 197 338 (BEF 250 million) granted by Belgium to Verlipack is incompatible with the common market.

*Article 4*

The State aid totalling EUR 6 197 338 (BEF 250 million) granted by Belgium to Verlipack contains an element of State aid amounting to EUR 176 624 (BEF 7.125 million) that is incompatible with the common market.

*Article 5*

1. Belgium shall take the necessary steps to recover from the recipient the aid referred to in Articles 2 to 4, which was granted to it unlawfully....'

27. In support of its application of 18 October 2000 for the annulment of the contested decision Belgium raises two main pleas in law:

(1) the Commission infringed Articles 87 and 295 EC since the capital injected

into Verlipack by the Walloon Region and the two loans granted to Heye by SRIW do not constitute State aid within the meaning of the Treaty;

(2) the Commission infringed its duty to give reasons by making erroneous statements and by not giving reasons for some of its conclusions.

28. Before examining those pleas I note that Belgium does not contest that both the capital injection granted by the Walloon Region and the loans granted by SRIW were 'granted by the State or through State resources' within the meaning of Article 87(1) EC. Nor does Belgium challenge either the findings on the non-applicability of Article 87(2) and (3) EC (paragraphs 119 to 134 of the decision) or the order to recover the aid (Article 5 of the operative part).

*First part of the first plea: the two loans and the capital injection should have been analysed not as one global aid package but separately*

29. Although this argument does not come first in Belgium's submissions I shall none the less consider it first because I regard it as crucial for understanding the contested decision and Belgium's other arguments.

30. Belgium contends that the Commission misapplied the concept of State aid in particular in paragraphs 100, 112 and 141 of the contested decision by regarding the two loans granted by SRIW to Heye and the Walloon Region's capital injection into Verlipack as one global aid package in favour of Verlipack. It argues that the loans and the capital injection were granted by two distinct entities (SRIW and the Walloon Region) to two distinct recipients (Heye and Verlipack). Each of those interventions should thus have been considered separately in applying the test of whether State aid was involved.

31. That argument must be rejected. The contested decision must be read in the light of the Commission guidelines on public authorities' holdings in company capital [9] and of Article 9 of Regulation No 659/1999.

32. In the guidelines the Commission distinguishes inter alia the following cases:

'3.2. [State aid is not] involved where fresh capital is contributed in circumstances that

9 — See note 5 above.

would be acceptable to a private investor operating under normal market economy conditions. This can be taken to apply:

...

(iii) where the public holding in a company is to be increased, provided the capital injected... goes together with the injection of capital by a private shareholder; the private investor's holding must have real economic significance;...

3.4. Some acquisitions may not fall within the categories indicated in sections 3.2.... so that it cannot be decided from the outset whether they do or do not constitute State aid. In certain circumstances, however, there is a presumption that there is indeed State aid. This is the case where:

(i) the authorities' intervention takes the form of acquisition of a holding combined with other types of interventions which need to be notified....'

33. Article 9 of Regulation No 659/1999 is entitled 'Revocation of a decision' and provides:

'The Commission may revoke a decision... where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision...'

34. In its 1998 decision the Commission found on the basis of the information at its disposal that the Walloon Region's capital injection of BEF 350 million was compatible with the private investor principle since a private investor (Heye) was at the same time acquiring a majority stake. According to that decision the parallel involvement of Heye also indicated prospects of future profitability and viability for Verlipack.

35. The Commission thus relied on the two criteria set out in Section 3.2. (iii) of the guidelines on public authorities' holdings in company capital, namely (a) the capital injected by public authorities must 'go together' with the injection of capital by a private investor and (b) the private investor's holding must have 'real economic significance'. Since Heye had injected fresh capital of BEF 515 million at the same time

as the Walloon Region and thereby acquired a majority stake in Verlipack the Commission concluded that the Belgian authorities had acted like a private investor operating under normal market conditions.

36. In the contested decision the Commission notes first that Belgium had failed to inform the Commission about the existence of the two loans and the write-off clause: the Commission 'regrets' that Belgium did not notify the two loans to Heye since 'the lack of such decisively important information prevented the Commission from applying the rules on State aid correctly and efficiently' (paragraphs 99 and 100 of the decision).

37. The second point made in the decision is that the 1998 decision was based on incorrect information which was a determining factor for its initially positive attitude. The Commission had assumed that the private investor Heye had taken similar or even greater risks than the Walloon Region when it injected capital of BEF 515 million into Verlipack. In reality, however, Wallonia (SRIW) had granted Heye prior to the latter's capital injection two loans totalling BEF 500 million to finance its stake in Verlipack. Through the loan write-off clause SRIW had moreover assumed 50% of the risk of Heye's capital injection into Verlipack. In the words of the contested decision 'Heye was not therefore running any risk in respect of [BEF 250 million], which accounted for half its capital injection into Verlipack' (paragraph 115 of the contested decision).

38. Third, in the light of the new information at the Commission's disposal the conditions of Section 3.2. (iii) of the guidelines were no longer fulfilled and the 1998 decision must be revoked. The capital injection by the Walloon Region did not intervene in conjunction with a genuinely comparable intervention by a normal private investor. Heye's capital injection was in fact financed by two loans from the Walloon authorities and those authorities assumed 50% of the risk of that injection.

39. Fourth, in the light of those new facts there was a situation falling under Section 3.4. (i) of the guidelines, namely in that the Walloon authorities' intervention took the form of acquisition of a holding 'combined with other interventions' (the two loans) which should have been notified under Article 88(3) EC. The loans and the capital injection were made by two institutions (Walloon Region and SRIW) which were closely related, they were made more or less simultaneously and, most importantly, it followed from the allocation clauses in the two loan agreements that both served the

same purpose, namely to allow the restructuring of Verlipack which found itself in financial difficulties.

40. In my view the Commission thus correctly applied its guidelines on public authorities' holdings in company capital and Article 9 of Regulation No 659/1999 and in that context rightly regarded the loans to Heye and the capital injection into Verlipack as two components of a single package.

41. Belgium's argument that the two loans and the capital injection should have been analysed in isolation must therefore be rejected.

*Second part of the first plea: the two loans granted by SRIW to Heye do not constitute State aid in favour of Verlipack*

42. Belgium challenges the Commission's finding that the two loans granted by SRIW to Heye constitute State aid in favour of Verlipack on the basis of five submissions which I will consider separately.

First submission: the assumption in paragraph 99 of the decision that the two loans constitute State aid infringes Articles 87 and 295 EC

43. Belgium challenges a sentence in paragraph 99 of the decision where the Commission states: 'It can be assumed that the two loans granted by SRIW to Heye to finance the latter's stake in Verlipack constitute aid...'

44. In Belgium's view such an assumption does not follow from the guidelines on public authorities' holdings in company capital, prejudges the result of the Commission's analysis and is incompatible with the objective nature of the concept of aid in Article 87 EC [10] and the principle of neutrality in Article 295 EC.

45. I tend to agree with Belgium that the language used in that sentence is unfortunate, since it seems to suggest that the Commission has formed a view without reason. But reading on in the decision it is clear that the Commission has not done so. Instead the decision goes on to consider in detail the terms of the loans and concludes after extensive analysis (paragraphs 101 to 118) that those terms are incompatible with

10 — Belgium refers to Case T-67/94 *Ladbroke* v *Commission* [1998] ECR II-1, paragraph 52 of the judgment.

the private investor principle. Nothing in that analysis suggests that the Commission has actually made any assumptions. I therefore agree with the Commission that the sentence in question must be read as a mere introductory statement which did not have any effect on the Commission's analysis or findings. It would thus be wrong to annul the decision on the basis of the wording of that ultimately irrelevant sentence.

46. The submission that the assumption in paragraph 99 of the decision infringes Articles 87 and 295 EC must therefore be rejected.

Second submission: SRIW acted like a private investor when it granted the loans to Heye

47. Belgium argues that SRIW acted like a true private investor when it granted the two loans to Heye. In its view, at that time several elements confirmed both the credibility of Heye and the feasibility of the planned restructuring of Verlipack. As regards the relations with Heye, it was Heye who had requested the loans, SRIW had stressed in a letter to Heye that its role was to grant financing for industrial or commercial activities and not to grant subsidies, and SRIW had access to detailed information about the competence, prosperity, solvency and good reputation of Heye. As regards the planned restructuring of Verlipack, SRIW thoroughly examined the business plan for Verlipack and the other documents transmitted by Heye, there was parallel financing by the two private investors Beaulieu and Heye and by two banks in the form of loans and there was the technical assistance agreement with Heye, a world leader in container glass technology.

48. A first problem with that line of argument is that Belgium does not challenge any specific passage of the contested decision, nor does it indicate any specific infringement of a rule of Community law.

49. A second more fundamental problem is that Belgium regards the two loans in isolation, whilst the loans must be analysed together with the capital injection (see above).

50. Third, it must be recalled that the debenture loan contained a loan write-off clause. Moreover, both loans contained financial allocation clauses in favour of Verlipack and interest and repayment conditions advantageous to Heye. Therefore the issue is not so much the solvency of the borrower Heye, but whether a private investor with the Walloon authorities'

knowledge of Verlipack's financial situation would have granted loans with those characteristics to Heye.

51. Fourth, Belgium's line of argument about the favourable prospects of the planned restructuring of Verlipack is contradicted in particular by an internal and confidential note drafted on 9 December 1996 and submitted to the board of management of SRIW on 7 January 1997. That note informs the board of management that

— by taking over Verlipack Heye takes enormous risks for its image within the industry and enormous financial risks;

— Beaulieu, despite investments of BEF 2 billion, was not able to obtain better product quality, normal productivity or financial results which would allow for some hope for the future of Verlipack; Beaulieu was therefore unable to continue its efforts;

— taking into consideration the difficulties of obtaining the product quality required, it is feared that the business plan established by Heye is too optimistic;

— Verlipack is unable to pay instalments on bank loans, totalling about BEF 369 million, which are due at the end of 1996; the banks are however willing not to start recovery proceedings if the other partners in the restructuring take their decisions before 31 December 1996; the file should therefore be treated urgently;

— considering the current situation of Verlipack and its evolution since 1985 (Verlipack accumulated losses in every accounting year between 1985 and 1996) the takeover of Verlipack by Heye is the 'only and last chance to prevent a practically imminent insolvency'.

52. The Commission therefore rightly noted that 'Verlipack's financial position prior to Heye's arrival could not have indicated viability' and rightly doubted 'that Heye... would in fact have taken a financial holding in [Verlipack] without the public resources that covered almost the whole of its capital contribution' (paragraph 107 of the decision).

53. Finally, in the course of the negotiations of the loans SRIW stated in a letter to Heye of 21 November 1996 that a '50/50 division' seemed to be a good

compromise and that Heye should 'cover 50% of the risk that Heye regards as minor' since Heye itself had previously indicated that 'if Heye were to join Verlipack that company would no longer be a high risk company'. It follows that Heye had asked SRIW to cover the risk of its investments in Verlipack since it regarded that company as a risk company; SRIW however wanted to cover only 50% of that risk since Heye's arrival would reduce the risks associated with Verlipack.

54. In view of Heye's prosperity and solvency it is thus indeed very likely that 'the sole reason why [Heye] called on a public financial institution to finance its entry into Verlipack was to offset the risk to a maximum through the terms of the loan agreements concluded with SRIW' (paragraph 106 of the decision).

55. It can be concluded in my view that the Walloon authorities were aware of the considerable risk of a failure of the restructuring of Verlipack and none the less agreed to cover 50% of that risk through the loan write-off clause and to grant Heye two substantial loans with very favourable interest and repayment conditions. It therefore seems clear that they did not grant the loans to Heye in circumstances that would be acceptable to a private investor operating under normal market economy conditions.

56. The submission that SRIW acted like a private investor when it granted the loans to Heye must therefore be rejected.

Third submission: the Commission's finding that Verlipack was the real beneficiary of the aid contained in the loans is wrong

57. Belgium contends that the Commission erred in law and committed several errors of assessment when it regarded Verlipack as the real beneficiary of the aid contained in the two loans granted by SRIW to Heye.

58. Belgium argues first that, since the two loans do not constitute State aid in favour of Heye (that assumption follows from the next two submissions made by Belgium which will be discussed below), they cannot constitute indirect State aid in favour of Verlipack. In its view, State aid granted indirectly via third parties requires as a necessary precondition the existence of State aid granted directly to those third parties.

59. That argument must be rejected. Belgium accepts that under the Treaty [11] and the Court's case-law [12] State aid may be granted indirectly via private third parties. Contrary however to Belgium's submission, it follows from *Germany* v *Commission* [13] that indirect State aid does not necessarily require the existence of direct State aid to the immediate addressee of the measure in issue. In that case Germany had granted a tax concession to investors who acquired holdings in east German companies. The Court held that the tax concession did not constitute direct aid to the investors since it was a general measure applicable without distinction to all economically active persons; it none the less constituted indirect aid since it conferred an economic advantage on specific undertakings situated in the new Länder. It follows that the question whether Verlipack received State aid is separate and in principle independent from the question whether Heye received State aid.

60. Belgium argues, second, that the Commission failed to acknowledge the entirely different features and objectives of on the one hand SRIW's loans to Heye and on the other Heye's subsequent capital injection into Verlipack. As regards the loans, Heye had a legitimate interest in borrowing the funds necessary for the investment in Verlipack from SRIW and SRIW had a legitimate interest in seeking financial gains from loans to an undertaking investing in Wallonia. As regards Heye's capital injection into Verlipack, the Commission failed to recognise that Heye took real risks with its own funds. In exchange for the capital injection it received shares: if Verlipack had become profitable, Heye could have received dividends. Moreover, if Heye had financed the capital injection into Verlipack from its own funds the effect on competition would have been the same.

61. Those arguments must also be rejected.

62. First, it follows from the allocation clauses in the two loan agreements, the loan write-off clause in the debenture loan agreement and the internal note summarised above [14] that SRIW's main objective was not to make a profit but to motivate Heye to participate in the restructuring of Verlipack. In the words of the contested decision the two loans were granted to Heye 'to finance its acquisition of a stake in Verlipack' (paragraph 108 of the contested decision). The Commission was therefore

11 — Article 87(1) EC applies to aid 'in any form whatsoever' and Article 87(2)(a) EC shows implicitly that Article 87(1) EC applies to aid granted to individual consumers but intended in reality to further the consumption of certain products.

12 — See in particular Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857.

13 — Cited in the previous note.

14 — See paragraph 51.

right to insist on the link between the two loans and Heye's capital injection.

63. Moreover, even if Heye received shares which could have generated dividends, it follows from the loan write-off clause that Heye did not have to bear in full the corresponding risk of Verlipack becoming insolvent. The Commission thus rightly noted 'the relative disengagement on the part of Heye at the time of its acquisitions' in Verlipack (paragraph 106 of the decision) and that 'Heye had not provided its own risk capital but funds stemming from state resources' (paragraph 101).

64. Finally, the issue is not whether the detrimental effects on competition would have been the same if Heye had financed its capital injection into Verlipack from its own funds; the crucial issue is whether Heye would have provided any capital at all if SRIW had not granted the loans in question. In that regard the internal note summarised above confirms the Commission's doubts whether 'Heye, whose previous relationship with Verlipack was limited to technical assistance, would in fact have taken a financial holding in that company without the public resources that covered almost the whole of its capital contribution' (paragraph 107 of the decision).

65. Belgium's third argument is that if the loan contained any aid at all then Heye must be regarded as the beneficiary of the aid and not Verlipack. In its view, under the Court's case-law [15] the behaviour of an independent and entirely privately owned undertaking cannot be imputable to the State. Heye cannot be regarded as an instrument of the Walloon region since it was Heye which had asked for the loans. Heye's obligations under the allocation clauses in the loan agreements are merely contractual and should therefore not be compared in their effects with binding instructions given by a State to public undertakings under its control. That difference is evidenced by the fact that Heye did not comply with its obligations under the allocation clauses (and thus obliged Belgium to start separate legal proceedings against Heye). It must also be borne in mind that allocation clauses such as those in issue are to be found in practically all loan agreements. Finally the consequence of regarding Verlipack as the true beneficiary of the aid is that it is impossible for Belgium to recover the aid. As a matter of logic and of Belgian civil law Belgium cannot recover directly from Verlipack funds which it has never transferred to that undertaking. The Belgian authorities also have no means of requiring the private undertaking Heye to recover its investment from Verlipack.

66. That third set of arguments must also be rejected.

15 — Belgium refers in that regard to the recent judgment in Case C-482/99 *France* v *Commission*, judgment of 16 May 2002.

67. It is established case-law [16] that the concept of State aid includes aid granted indirectly via private third parties as long as under Article 87(1) EC the measure is (i) financed through State resources and (ii) imputable to the State.

68. As to the first condition Belgium does not contest that SRIW's resources must be regarded as State resources. Furthermore, I agree with the Commission that in view of the allocation clauses in the loan agreements 'Heye was unable to use the funds for any purpose other than to transfer them immediately... to the Verlipack plants...' (paragraph 109 of the decision) and that the funds in issue 'only transited through Heye' (paragraph 111 of the decision). The Commission thus rightly regarded Verlipack as the true recipient of the State funds granted by SRIW to Heye (paragraphs 110 and 111 of the decision).

69. As to the second condition of 'imputability to the State' Belgium appears to start from the premiss that the conduct of undertakings can be imputable to the State only where there is evidence of a unilateral and binding instruction by the State. First, however, it follows from the recent judgment in *France* v *Commission* that in order to establish imputability it is enough to show in the particular case that the public authorities were involved in the adoption of a measure or that it is unlikely that they were not involved. [17] Second, as regards in particular the imputability of conduct of independent private undertakings to the State, the Court held in *Germany* v *Commission* that a fiscal measure encouraging private undertakings to invest in certain other undertakings may constitute State aid in favour of the latter. In the present case Heye was not merely given an incentive to inject capital into Verlipack, but by virtue of the allocation clauses legally obliged to do so. [18] The intervention by SRIW in favour of Verlipack and hence the Belgian State's 'involvement' is thus much more direct than the intervention by the German authorities in favour of East German companies in *Germany* v *Commission*. Therefore Belgium's arguments that Heye's obligation was 'merely' contractual and that Heye had asked for the loans cannot be accepted.

70. Furthermore, it may be the case that most loan agreements contain allocation clauses. But, as the Commission rightly notes, normally allocation clauses in loan agreements refer to the collateral. A housing loan, for example, often provides that the funds must be invested in the house which serves as the security for the loan. In the present case the purpose of the allocation clauses was not to secure the loans

16 — See in particular *Germany* v *Commission*, cited in note 12.

17 — *France* v *Commission*, cited in note 15, paragraph 56 of the judgment.

18 — See for another case in which private undertakings are obliged under a contract to act in favour of the real beneficiaries of a measure my Opinion of 30 April 2002 in Case C-126/01 *GEMO*, not published in the ECR, paragraphs 61 to 63.

to Heye, but to oblige Heye to use the funds granted by SRIW for the restructuring of Verlipack.

71. Finally, as regards the difficulties of recovering the aid from Verlipack it will be recalled that Belgium does not challenge the order to recover the aid (Article 5 of the operative part of the decision), but only the finding that State aid within the meaning of Article 87(1) EC was involved. It is however clear that any difficulties in the requirement to 'abolish or alter' an aid measure (see the wording of Article 88(2) EC) can affect at most the legality of an order to recover the aid, but never the legality of the classification of the measure as aid.

72. The submission that Verlipack should not have been regarded as the real beneficiary of the aid contained in the two loans must therefore be rejected.

Fourth submission: the debenture loan did not contain State aid

73. Belgium maintains that the Commission wrongly regarded the debenture loan of BEF 250 million as aid.

74. Belgium challenges, first, the last sentence in paragraph 115 of the decision where the Commission refers to the loan write-off clause in the debenture loan agreement and states:

'No lender would have agreed to write off BEF 250 million to refinance Verlipack, its operating results before the arrival of Heye very clearly pointing up the group's difficulties.'

75. In Belgium's view, that statement (which relates to Verlipack's financial situation in March 1997) totally contradicts a parallel statement in the Commission's 1998 decision according to which in April 1997 Verlipack had reasonable prospects of profitability. The Commission thus committed a manifest error of assessment and an error of reasoning, misapplied the concept of State aid and infringed the principle of legal certainty.

76. That argument cannot be accepted. When the Commission adopted its 1998 decision it had not been informed by the Belgian authorities about the existence of the two loans granted by SRIW to Heye or about the internal note to the SRIW summarised above. That failure by the Belgian authorities to inform the Commis-

sion correctly was a determining factor for the latter's 1998 decision. When the Belgian authorities transmitted the information, the Commission revoked its 1998 decision (Article 1 of the operative part of the contested decision) and reassessed the situation of Verlipack in spring 1997 in the light of the new information at its disposal. On the basis of that reassessment the Commission correctly concluded that Verlipack's operating results before the arrival of Heye showed Verlipack's financial difficulties.

77. Belgium challenges, secondly, the Commission's finding that the debenture loan of BEF 250 million granted by SRIW to Heye must be regarded in its entirety as State aid.

78. Belgium accepts that a loan may contain State aid if the loan is granted under more favourable conditions — in particular as regards the interest rate charged and the security sought to cover the loan — than the recipient undertaking would obtain on the markets. In its view, however, the aid element contained in such loans depends exclusively on the financial situation of the recipient undertaking. Where the recipient undertaking's financial situation is sound the aid element amounts only to the difference between the rate which that undertaking should pay and that actually paid.

79. In that regard Belgium contends that it has provided clear evidence of Heye's excellent financial situation and its creditworthiness. Belgium refers to a letter of 9 December 1996 in which the Dresdner Bank stated:

'The financial situation of... Heye is absolutely sound... We grant credit facilities in a two-digit million DEM range without collaterals...'

80. Belgium adds that the risk for SRIW entailed by the loan write-off clause in the debenture loan agreement was not as great as the Commission considers: despite the insolvency of some companies of the Verlipack group, Heye must reimburse the debenture loan since SRIW terminated the contract by letter of 20 January 1998 on the basis of the immediate repayment clause before all the requirements for the operation of the loan write-off clause were satisfied.

81. Those arguments cannot be accepted. The crucial element here is the loan write-off clause. Under that clause, in the event of Verlipack being declared insolvent, the amounts owed by Heye no longer needed to be repaid to SRIW. The risk attached to the debenture loan therefore depended not so much on the financial situation of Heye, but on the financial situation of Verlipack.

It follows from the internal note summarised above that when SRIW granted the debenture loan to Heye the financial situation of Verlipack was poor, a fact of which SRIW was fully aware. The Commission could thus validly find that by virtue of the loan write-off clause and Verlipack's poor financial situation there was a substantial risk that Heye would not repay the debenture loan and that in normal circumstances no lender would have taken such a risk. Since moreover Verlipack's insolvency was not unlikely the Commission could also validly regard the debenture loan in its entirety as State aid.

82. As to Belgium's additional argument that the Commission overestimated the importance of the loan write-off clause, it must first be recalled that Heye disagrees with SRIW's view that the contract was validly terminated before the loan write-off clause could start to have legal effects and that SRIW's proceedings against Heye before the Belgian and German courts are still pending. Second, even if those national courts were to find that Heye had to repay the debenture loan by virtue of the immediate repayment clause, the Commission could validly consider that at the material time, namely when SRIW granted the loan, there was a major risk that Heye would never have to reimburse the loan.

83. The submission that the debenture loan of BEF 250 million does not contain State aid at all or should at least not be regarded as State aid in its entirety must accordingly be rejected.

Fifth submission: the second loan did not contain State aid

84. Belgium challenges the Commission's use in paragraph 117 of the contested decision of the standard reference rate applicable in Belgium of 7.21% as a normal market rate by reference to which the Commission allegedly assessed the aid element contained in the second loan.

85. Belgium argues first that the Commission infringed the duty to state reasons since it applied the standard reference rate of 7.21% without discussing several forceful arguments against the use of that rate submitted by Belgium during the procedure leading to the contested decision.

86. Second, in Belgium's view the Commission infringed Article 87 EC since it used the criterion of the standard reference rate of 7.21% absolutely and unconditionally to the exclusion of all other

factual elements instead of assessing the loan more realistically according to the normal market investor test. [19]

87. Third, the second loan actually complied with the market investor principle: the interest rate fixed in the loan agreement was close to both the interest rates used at that time by two private Belgian banks; moreover, the fact that the Dresdner Bank granted Heye 'credit facilities in a two-digit million DEM range without collaterals' shows that SRIW behaved like a normal private investor when it did not require any security.

88. Those arguments must be rejected.

89. As to Belgium's third argument, which I will address first, in paragraph 117 of the contested decision the Commission compared the normal market conditions with those accompanying the loan in question.

90. In doing so it referred first to the standard reference rate of 7.21% applicable in Belgium when the loans were granted. In that regard it will be noted that the Commission regularly publishes reference rates which are used to calculate the aid element resulting from interest subsidy schemes for loans. Those rates are supposed to reflect the average level of interest rates charged, in the various Member States, on medium and long-term loans (five to ten years) backed by normal security. The method of calculating the reference rate applicable when the loan in question was granted on 28 March 1997 was the one set out in a Commission notice of 10 August 1996. [20] That method was based on the rate of yield on state bonds on the secondary market multiplied by a specific premium for each Member State and resulted for Belgium for March 1997 in a standard reference rate of 7.21%.

91. It is true that in August 1997 on the basis of a study carried out for the Commission by KPMG the Commission replaced the former method of establishing the reference rate and started to use instead one based on the five-year interbank swap rate, plus a premium. It is also true that the application of that new method would have resulted in a reference rate lower than 7.21%. That new method applied however only from 1 August 1997 onwards. [21] In the

19 — Belgium refers to the judgment in Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 36 of the judgment.

20 — OJ 1996 C 232, p. 10.

21 — Commission notice on the method for setting the reference and the discount rates, OJ 1997 C 273, p. 3.

contested decision the Commission therefore rightly referred to the standard reference rate applicable in March 1997, since under the market investor principle a loan must be evaluated from the point of view of the lender at the moment when the loan is approved and since under the principle of equal treatment all loans granted at the same period of time must be assessed according to the same criteria.

92. The standard reference rate of 7.21% was however not the only element which the Commission took into account in its comparison between the normal market conditions and the conditions accompanying the loan. According to paragraph 117 of the contested decision the Commission also took into account the 10-year duration of the loan, the three year grace period, the extent to which the interest subsidy was variable and the fact that Heye was not required to give any collateral for the loan from SRIW.

93. All those features are clearly relevant for determining whether the loan contained State aid. The relatively long duration of the loan would under normal market conditions have to be remunerated by a higher interest rate. The three-year grace period and the variability of the interest rate agreed are favourable conditions which Heye would not easily have obtained from a normal private lender. The most unusual feature of the loan is perhaps the fact that SRIW did not require any collateral.

94. As regards that last point the fact the Dresdner Bank granted Heye 'credit facilities in a two-digit million DEM range without collaterals' is not directly relevant. According to the letter referred to by Belgium Dresdner Bank was Heye's 'main banking connection', Dresdner Bank had been maintaining excellent business relations with Heye 'for decades' and a considerable turnover had been conducted through Dresdner Bank. Dresdner Bank thus had a very special relationship with Heye which cannot serve as a valid point of reference for the relations between other 'normal' private financial institutions and Heye. In that regard the Commission rightly doubts whether an 'ordinary' private financial institution would have granted a loan of BEF 250 million without any security.

95. Since the Commission took into account not only the interest rate but also other features of the second loan, Belgium's arguments about allegedly similar interest rates in loans granted by two private banks must also fail. In my view under the private investor principle the Commission is fully entitled to regard even a loan with an entirely 'normal' interest rate as State aid where that loan is characterised by other unusual features such as the absence of any collateral.

96. In the light of the foregoing I consider that by taking all the relevant features of

the loan agreement into account the Commission correctly applied the market investor principle. There is therefore no reason to suppose that the Commission wrongly concluded that the loan contained an aid element of 2.85% gross.

97. In the light of these considerations Belgium's first and second arguments can be dealt with more briefly. Belgium's second argument, that the Commission relied exclusively on the criterion of the standard reference rate, must fail, since as I have just pointed out the Commission took into account also the other features of the loan. Belgium's first argument that the Commission infringed its duty to state reasons must also fail since the Commission clearly explained why it had to use as a starting point of its analysis the reference rate of 7.21% and could not use a reference rate calculated on the basis of a method which was not yet applicable.

98. The submission that the second loan did not contain State aid accordingly fails.

99. It follows that all five submissions challenging the classification of the two loans granted by SRIW to Heye as State aid must be rejected.

*Third part of the first plea: the capital injection by the Walloon Region into Verlipack did not constitute State aid*

100. Belgium submits first that the Commission misapplied the concept of State aid by regarding the two loans granted by SRIW to Heye and the Walloon region's capital injection into Verlipack as one global aid package.

101. I have already discussed and rejected that submission above. [22]

102. Belgium submits secondly that the Commission committed a manifest error of assessment when it analysed the nature of the different interventions by the Walloon Region, SRIW and Heye.

103. Under that head Belgium does not discuss the features of the Walloon Region's capital injection of BEF 350 million but essentially repeats the arguments summarised above [23] about the dif-

22 — See paragraphs 31 to 41.
23 — See paragraph 60.

ferences between the two loans to Heye and Heye's capital injection into Verlipack. For the reasons given above [24] those arguments must be rejected.

104. Belgium submits thirdly that the Commission committed a manifest error of assessment when it analysed the concomitant and effective participation of the private investor Heye. It will be recalled that under Section 3.2. (iii) of the guidelines on public authorities' holdings in company capital an increase of public authorities' holdings in a company does not constitute State aid where the capital injected 'goes together' with the injection of capital by a private shareholder and where the latter's holding has 'real economic significance'. Belgium argues that Heye's capital injection into Verlipack was a genuine capital injection with real economic significance by a credible private investor which went together with the Walloon Region's investment.

105. In that regard Belgium challenges, again on the basis of essentially the same arguments, [25] the findings (i) that in view of the allocation clauses the funds granted by SRIW to Heye merely transitted through Heye to Verlipack and (ii) that in view of the loan write-off clause Heye did not have to bear the full risk of its investment.

106. For the reasons given above [26] those arguments must be rejected.

107. Belgium's first plea that the two loans and the capital injection do not constitute State aid within the meaning of Article 87(1) EC must accordingly be rejected.

**Second plea: infringement of the duty to state reasons**

108. Belgium submits that the Commission infringed the duty to state reasons laid down in Article 253 EC in essentially four respects.

109. Belgium argues first that the operative part of the contested decision refers merely to 'Verlipack' without indicating precisely

24 — See paragraphs 62 to 64.

25 — See paragraphs 60 and 65.

26 — See paragraphs 62 to 64 and 68.

which of the companies of the group are meant. The implementation of Article 5 of the contested decision, on the recovery of the aid, is therefore impossible.

110. In my view it is however clear both from the exchange of letters during the administrative procedure leading to the contested decision (in which both sides indiscriminately referred to 'Verlipack') and from the contested decision itself that the aid was to be recovered from the Verlipack group of undertakings composed of the two holding companies Verlipack I and II and their subsidiaries.

111. Moreover if Belgium has serious doubts in that regard it can, like any Member State which encounters unforeseen difficulties in implementing an order for recovery, submit those problems for consideration by the Commission. The Commission and Belgium must then, in accordance with the duty of genuine cooperation stated in Article 10 EC, work together in good faith with a view to overcoming any difficulties. [27]

112. The first argument about the alleged uncertainty of the identity of the addressees of the decision must accordingly be rejected.

27 — Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 58 of the judgment.

113. Belgium argues secondly that Article 4 of the operative part of the contested decision contains an internal contradiction since it provides that '[t]he State aid totalling... BEF 250 million... contains an element of State aid amounting to... BEF 7 125 million...'.

114. I agree that that passage contains a clerical error. That error does not however create any confusion in the mind of the reader of the contested decision. It is clear both from the logical structure of the operative part and from the equally unambiguous body of the contested decision that Article 4 of the operative part refers in fact to the second loan of BEF 250 million which contains an aid element of BEF 7 125 million. By committing the clerical error in issue the Commission did not therefore infringe the duty to state reasons.

115. The second argument about the internal contradiction in Article 4 of the operative part must accordingly be rejected.

116. Belgium argues thirdly that the contested decision is an exact replica of the position expressed by the Commission in its decision of 19 May 1999 to open the procedure provided for in Article 88(2) EC. It follows that the Commission does not seem to have taken into account the

observations by Belgium and the other interested parties and thereby infringed its duty to state reasons.

117. In my view, it is not correct that the contested decision is an exact replica of the decision to initiate the procedure. Moreover, in paragraphs 36 to 97 the Commission has summarised in a detailed and objective way all the arguments submitted by Belgium and the other interested parties. Finally many statements in paragraphs 98 to 140 of the decision which contain the Commission's assessment of the aid are evidently formulated in order to respond to arguments made by Belgium and other interested parties in the course of the procedure leading to the contested decision.

118. The third argument must accordingly be rejected.

119. Belgium argues fourthly that the Commission failed to explain in the contested decision why the aid in question 'distorts or threatens to distort competition' and 'affects trade between Member States' within the meaning of Article 87(1) EC.

120. Belgium raised that issue only at the stage of the reply. Belgium argues that it is none the less not precluded from raising the issue. In its view an infringement of the duty to state reasons constitutes a matter of public interest which may be raised at any moment by one of the parties or by the Court. [28]

121. In my view in the present case it is not necessary to decide whether the Court may or must raise the alleged infringement of the duty to state reasons of its own motion, [29] since the Commission clearly complied with its duty to state reasons.

122. As regards the two conditions of effect on trade between Member States and distortion of competition in Article 87(1) EC it is settled case-law (i) that the very circumstances in which the aid has been granted may show that it is liable to affect trade between Member States and to distort or threaten to distort competition and (ii) that in order to comply with its duty to state reasons the Commission must set out those circumstances. [30]

28 — Belgium refers to Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 24 of the judgment.

29 — See on the broader question which issues the Court may or must raise of its own motion my Opinion in Case C-210/98 P *Salzgitter* [2000] ECR I-5843.

30 — See *Germany and Others* v *Commission*, cited in note 19, paragraph 52 of the judgment.

123. In paragraph 130 of the contested decision the Commission complied with that obligation where it stated as follows:

'Verlipack operated in the market for hollow container glass, of which its share was 20% in Belgium and 2% in the European Union. With a market share of 13%, the container glass industry takes third place in the packaging sector, after plastic with 35% and paper-board, with 32%. The period 1996 to 1998, when Belgium granted the aid to Verlipack, was affected by a fall in prices which, according to Heye and the sector in general, was not foreseeable in 1997. The rapid downward trend in prices continued as a result of competition from other packaging products (PET, cardboard and cans) and the collapse of the Russian market. Given the economic situation, the investment in Verlipack had the effect of increasing its production. Any aid to that firm was thus liable to affect Verlipack's position on the market with regard to its competitors in the EU.'

124. Belgium's fourth argument about the alleged failure to explain why the aid affected trade between Member States and distorted competition must accordingly also be rejected.

## Conclusion

125. Accordingly the Court should in my opinion:

(1) dismiss the application;

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