of financial relations between Member States and public undertakings, was published in the C Series of the Official Journal and was notified to each Member State.

That communication, which requires Member States annually to report to the Commission, on a general, systematic basis, data relating to the financial relations of a particular category of undertaking achieving a specified turnover, constitutes an act intended to have legal effects of its own distinct from those of Article 5(2) of the directive and adds new obligations to those provided for by that provision.

2. The principle of legal certainty, which is part of the Community legal order, requires Community legislation to be clear and its application to be foreseeable for all interested parties. As a result of that requirement, any act intended to have legal effects must derive its binding force from a provision of Community law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis, failing which the act in question will be null and void.

REPORT FOR THE HEARING
in Case C-325/91 *

I — Facts and relevant legislation

1. On 25 June 1980, the Commission adopted Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35; hereinafter 'the directive'). Article 1 of the directive provides as follows:

'The Member States shall ensure that financial relations between public authorities and public undertakings are transparent as provided in this Directive, so that the following emerge clearly:

(a) public funds made available directly by public authorities to the public undertakings concerned;

(b) public funds made available by public authorities through the intermediary of public undertakings or financial institutions;

* Language of the case: French.

(c) the use to which these public funds are actually put.'

Article 3 provides that:

'The transparency referred to in Article 1 shall apply in particular to the following aspects of financial relations between public authorities and public undertakings:

(a) the setting-off of operating losses;

(b) the provision of capital;

(c) non-refundable grants, or loans on privileged terms;

(d) the granting of financial advantages by forgoing profits or the recovery of sums due;

(e) the forgoing of a normal return on public funds used;

(f) compensation for financial burdens imposed by the public authorities.'

Article 5 reads as follows:

'1. Member States shall ensure that information concerning the financial relations referred to in Article 1 be kept at the disposal of the Commission for five years from the end of the financial year in which the public funds were made available to the public undertakings concerned. However, where the same funds are used during a later financial year, the five-year time limit shall run from the end of that financial year.

2. Member States shall, where the Commission considers it necessary so to request, supply to it the information referred to in paragraph 1, together with any necessary background information, notably the objectives pursued.'

2. By letter dated 8 October 1991, the Commission notified to the Member States a communication on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ 1991 C 273, p. 2; hereinafter 'the communication'). That communication is in two parts.

The first part (points 1 to 44) sets out the Commission's interpretation of the Court's case-law on public undertakings and the manner in which it intends to apply the rules on State aid to the following public intervention: injections of capital, guarantees, loans and returns on invested capital.

In the second part (point 45 et seq.), the Member States are asked to report to the Commission annually pursuant to Article 5(2) of directive 80/723/EEC. The information to be provided in the reports relate to public undertakings in the manufacturing sector whose annual turnover is more than ECU 250 million and, as is specified in point 46, the reports must contain details of annual financial statements (balance sheet and profit and loss account) for each public undertaking concerned.

In so far as the financial statements are incomplete in this respect, the following data must also be provided for each undertaking:

— the provision of any capital/equity;

— non-refundable grants or grants which are only refundable in certain circumstances;

— the award of any loans to the enterprise;

— guarantees given to the enterprise in respect of loan finance;

— dividends paid out and profits retained;

— the change in conditions of any previous State intervention, in particular, the forgoing of sums due to the State by a public undertaking;

— in accordance with the definition of the Fourth Council Directive 78/660/EEC of 25 July 1978 on annual accounts of certain types of companies, the following information:

— profit or loss on ordinary activities before tax;

— interest payable;

— creditors: amounts becoming due and payable after more than one year;

— capital and reserves;

3. As far as France is concerned, the request for information provided for in Article 5 of the directive was confined to 14 undertakings. The list was set out in a facsimile message of 25 June 1991 from the Ministry for the Economy, Finance and the Budget and comprised the following undertakings: Bull, Thomson, Aérospatiale, Snecma, Renault, Seita, Elf-Aquitaine, Rhône-Poulenc, Entreprise Minière et Chimique, Société nationale des poudres et explosifs, Usinor-Sacilor, Pechniney, Société le Nickel, Framatome.

II — Written procedure and forms of order sought

4. The application of the French Republic was received at the Court Registry on 16 December 1991.

5. The written procedure followed its normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

6. The *French Republic* claims that the Court should:

— declare null and void Commission communication 91/C 273/02 on 'the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector';

— order the Commission to pay the costs.

7. The *Commission* claims that the Court should:

— dismiss the application as inadmissible or unfounded;

— order the applicant to pay the costs.

III — Pleas and arguments of the parties

Admissibility

8. The *French Government* considers that, in spite of its title, the contested measure constitutes a challengeable act. As the Court has consistently held, an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects. Consequently, the fact that the act in question takes the form of a communication and uses the word 'requests' has no bearing on whether it is challengeable. The communication is based on Article 5 of Directive 80/723/EEC. The link made by the Commission between that provision and the communication cannot be fortuitous and discloses the scope which, to the Commission's mind, it has. That link is particularly obvious in point 46, which determines the nature and content of the information with which the Member States are to provide the Commission. Those new requirements would result in certain public industrial groups producing very numerous reports, since many tens of public undertakings belonging to the groups in question satisfy the criteria laid down. Consequently, the measure in question imposes supplementary obligations both on the Member States and on public undertakings in the Member States.

9. In the French Government's view, in so far as the communication requests the Member States to make systematic annual reports to the Commission, it exceeds the obligations laid down by Article 5 of Directive 80/723 and in fact creates new obligations on the Member States. Article 5 requires Member States to keep information on financial relations at the disposal of the Commission for five years and to supply it with that information on request. The directive does not lay down a requirement for annual reports. As the Commission intimated in the course of the proceedings which led to the judgment in Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545, the directive requires only *ex post* information and not automatic or systematic information.

Although the Commission sent a communication to the Member States by letter of 17 September 1984 concerning the application of Articles 92 and 93 to public holdings in company capital, it is not binding and merely indicative. Although Article 5 of the directive confers a broad discretion on the Commission as far as the information sought is concerned, it cannot be interpreted — in the light, *inter alia*, of the indications given by the Commission at the time when it was sent and during the ensuing litigation — as authorizing it to transform a system providing for the provision of information on a case-by-case basis into a procedure for the systematic transmission of information.

10. The French Government acknowledges that the directive would be made nugatory if the Commission invariably had to restrict its requests to an undertaking, a transaction or even a particular year. But to place the 14 largest French public groups under an open-ended obligation henceforward systematically to send annual reports to the Commission exceeds the scope of the very wording of Article 5 of the directive. The French Government adds that the Commission supported that interpretation in the proceedings in Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom* v *Commission* and in its eighth and ninth reports on competition policy. Consequently, it cannot now go back on that interpretation except by amending its directive. Contrary to that which the Commission claims, the communication is general and systematic. It cannot constitute a cluster of individual acts, within the meaning of Court's case-law, specifically aimed at the Member State concerned and each of the 14 undertakings concerned. Regard being had to its title and contents, the communication does indeed apply to categories of persons contemplated in the abstract and as a whole. Next the French Government argues that the interpretation and validity of a Community act cannot ensue merely from the conviction of the institution which adopted the act or from a consensus between it and the addressees of the act as to how it is to be applied. If the scope and validity of the communication had to be assessed in the light of the list of the 14 French public undertakings, it would have to be concluded that its scope and validity were apt to change with the content of the list, which the Commission retains the right to alter unilaterally. If that were so, once the two-month limitation period had run out, the Member States would no longer be able to bring an action for annulment against it. The communication is intended to have legal effects and an action for annulment will therefore lie against it.

11. The *Commission* argues that it is clear from its observations on the substance that the communication does not create any new obligation over and above those laid down by Article 5. Since the requirement that new, distinct legal effects must have been created is not fulfilled, the application should be regarded as being inadmissible.

Substance

12. The *French Government* submits that, in so far as it imposes new obligations, the communication should have been given a precise legal basis. The absence of such a legal basis is conducive to uncertainty as to the actual scope of the new obligations laid down by the communication. Yet the Commission is not entitled to amend a directive

by means of a mere communication in breach of the elementary rule that an administrative measure may in principle be amended or repealed only by a measure adopted using the same forms laid down for the adoption of the act sought to be amended or repealed. A mere communication — no more than internal instructions to staff — cannot create new legal obligations in accordance with Article 189 of the Treaty. The absence of a legal basis infringes Article 190 of the Treaty. What is more, it is contrary to the principle of legal certainty, which requires Community legislation to be unambiguous.

13. It is not sufficient merely to invoke the complexity of financial relations between the public authorities and private undertakings and the very different forms which public undertakings are apt to take in the various Member States in order to justify imposing any additional obligation on undertakings simply because they are part of the public sector. The French Government takes the view that the obligation henceforward to produce systematic annual reports sets out to organize an exhaustive system of returns relating to the public undertakings' financial operations which is disproportionate to the intended aims. One of the grounds used by the Commission to justify the adoption of the communication is the inadequacy of the rules on State aid. That explanation appears incorrect in so far as the directive on transparency covers all public undertakings and the financial assistance which they receive. The degree of detail of the communication seems manifestly excessive having regard to the requirements of Articles 92 and 93, which already provide for compulsory prior notification.

14. The new obligations imposed by the communication involve discrimination against public undertakings and testify to a blanket suspicion of such undertakings on the part of the Commission. Looking forward to the single market, public undertakings alone cannot be required to develop and use a special accounting instrument introduced solely for the purpose of satisfying the Commission's demands for information. To seek a detailed account of relations between public undertakings belonging to the same group creates discrimination. The Commission implies that it will not permit internal transfers to be made within a given group between sectors which, at a given time, are profitable and those which are loss-making, yet that is common practice in the private sector.

15. The communication does not comply with the principles of legal certainty and the protection of legitimate expectations. Since no precise time-limit is laid down within which the Commission must rule on the documents in question, the public undertakings will be exposed, without any safeguards, to risks of litigation several years after the matters which might possibly be open to proceedings took place. There is also uncertainty about the scope of the communication, given that the Commission reserves the right to extend it beyond manufacturing industry. In any event, the communication, which already has no legal basis, exceeds the discretion conferred on the Commission by Article 90(3) of the EEC Treaty in view of the lack of necessity for the communication, the disproportionate nature of the requirements which it lays down and the discrimination which it introduces against public undertakings in comparison with private undertakings.

16. The *Commission* argues that the wording and the spirit of Article 5 do not preclude in

principle the introduction of a general, systematic obligation to provide information. The directive would be made nugatory if the Commission invariably had to restrict its request to a particular company or transaction. It is entitled and ought to interpret and apply Article 5 differently today by comparison with the interpretation which was given to it in the past. However, the communication does not introduce a new general, systematic obligation to provide information. The information required by the communication is confined to undertakings in the manufacturing sector and solely to those with a turnover of more than ECU 250 million.

17. In addition, following the bilateral negotiations carried out before the communication was adopted, the request for information provided for in Article 5 was limited to 14 undertakings. The list of undertakings was drawn up by mutual agreement following discussions between the Commission and France. The communication should be read, interpreted and applied in the light of the exchange of letters which took place with the French authorities before the communication was adopted and which forms an integral part of it. As far as France is concerned, the aim of the communication is and remains that of obtaining *ex post* information concerning 14 clearly identified public undertakings, the names of which were provided by the French authorities. As a result, the communication constitutes a mere measure applying and implementing the obligations set out in Article 5. In the final analysis, the communication is a complex act made up of a cluster of individual acts specifically aimed at each Member State and each undertaking or group of undertakings in respect of which the Commission expects data to be provided pursuant to Articles 3 and 5 of the directive.

18. As for the question of necessity, the Commission points out that there have been numerous instances in which aid was granted to public authorities in breach of Article 93(3). It emerges from the relevant figures that three times more non-notified aid was granted to public undertakings that was granted to private undertakings.

19. As for the duration of the obligation to provide information, Article 90(3) of the Treaty and Article 5 lay down no time-time either for the exercise of the Commission's powers of verification or for the obligation for the Member States to provide the Commission with the necessary information.

20. Next the Commission argues that the 1991 communication does not reflect the stance which it took in 1980. The new factor, which constitutes a genuine turning point as far as State aid is concerned, stems from the Court's case-law on subsidies granted through non-public — but State controlled — undertakings. The communication sets out to institutionalize, in accordance with the Court's case-law, the provision of accounts and financial data of groups of undertakings which have already been used and the consideration of that data by the Commission. The inclusion within the scope of Article 5 of movements of capital within groups of public undertakings satisfies the need to apply that provision consistently with the development of economic life and, above all, the case-law of the Court. That position, albeit differing from that adopted in 1980, does not conflict with the spirit and

the letter of Article 5 of the directive, since its wording draws no distinction depending on whether or not the public funds come from within a group of publicly-owned companies. Point 29 of the communication clearly states that cross-subsidies within a group do not constitute *per se* State aid. According to the Court's case-law, transfers within a group may constitute State aid. There is no reason why such transfers should be able to escape the supervisory task which the Commission is under a duty to carry out.

21. The Commission states that Article 5 constitutes the legal basis of the communication and, regard being had to its limited scope as an administrative act embodying a cluster of individual acts, the Commission was not bound to use the form of a directive within the meaning of Article 189 of the Treaty. As far as the principle of legal certainty is concerned, Member States have a straightforward means of securing certainty in their financial relations with public undertakings. It is sufficient to effect a notification.

22. As far as the whole set of information required is concerned, it is hard to argue that the provision of the data will put new burdens on public undertakings, since they are already subject to the accounting requirements of the Fourth Directive. Given that public and private undertakings are not in a comparable position as regards the financial operations which they carry out, it is completely justified, even necessary, for the Commission to monitor them in order to ensure that they comply with the provisions of Article 92.

P. J. G. Kapteyn
Judge-Rapporteur