REPORT FOR THE HEARING
delivered in Joined Cases 166 and 220/86 *

I — Facts and legal background

(a) *The facts*

Sean Quinn Quarries Ltd, established in Northern Ireland, obtained investment aid from the Department of Economic Development for a project under which it planned to start cement manufacturing (at the rate of 30% in respect of expenditure prior to 1 May 1985 and at the rate of 20% thereafter). As at 10 September 1986 the department had made the following aid payments:

(i) July 1986, to Sean Quinn Quarries Ltd UKL 273 631;

(ii) August 1986, to a leasing company UKL 198 092.

It was proposed to pay further tranches and cement production was expected to start in early 1988.

In a letter dated 17 April 1985 to the Director-General for Competition of the Commission, the applicant set out its complaints about the aid in question. The Commission replied by letter of 14 May 1985 that in accordance with the coordination principles set out in the Commission's Communication of 21 December 1978 (Official Journal C 31, 3.2.1979, p. 9) capital grants of up to 50% of investment projects could be granted without referring the matter to the Commission. In those circumstances, there was little point in the applicant's submitting, as it had offered to do, details of the potential damage which it was liable to sustain.

By letter of 28 March 1986, which was also addressed to the Director-General for Competition, the applicant argued that the Commission's conduct was unlawful and asked it (a) to institute the procedure provided for in Article 93 (2) of the EEC Treaty, (b) to address to Irish Cement Ltd a notification that the Commission had opened the aforesaid procedure, by direct mail and/or by publishing a notice in the *Official Journal of the European Communities* inviting comments from all interested parties, and (c) to modify the coordination principles so that specific regional aid could not be granted without prior notification to the Commission and so that the sectoral implications must be taken into account in each case before a regional aid was declared compatible with the common market. In the alternative, the Commission was requested, pursuant to Article 175 of the EEC Treaty, to define its position in writing addressed to Irish Cement Ltd within two months from the date of receipt of the letter.

Since the Commission failed to reply to that request within the time set, the applicant brought an action on 10 July 1986 under

* Language of the Case: English.

Article 175 of the EEC Treaty (Case 166/86).

By letter of 14 July 1986 addressed to the applicant, the Director-General for Competition stated, in reply to the abovementioned letter of 28 March 1986, that the aid granted to Sean Quinn Quarries Ltd fell under an aid system which the Commission deemed to be compatible with the common market in accordance with Article 92 (3) of the EEC Treaty. The Commission was therefore unable to intervene in the award of the aid.

By application lodged at the Court Registry on 12 August 1986, the applicant brought an action, under Articles 173 and 174 of the EEC Treaty, for a declaration that the abovementioned decision was void and, under Article 175 of the EEC Treaty, for a declaration that the Commission had so far failed to define its position in response to the applicant's letter of 28 March 1986.

(b) *The United Kingdom regional aid system with regard to Northern Ireland*

According to the Commission and a letter dated 10 September 1986 from the United Kingdom Permanent Representation to the European Communities (Annex 4 to the Defence), a standard capital grants scheme has been operating in Northern Ireland since the Re-equipment of Industry Act (Northern Ireland) 1951.

The present scheme was introduced by the Industrial Investment (General Assistance) Act (Northern Ireland) 1966, and was consolidated, with amendment, as Part IV of the Industrial Development (Northern Ireland) Order 1982.

Subsequently, the Industrial Development (Restriction on amount of general assistance grants) Order (Northern Ireland) of 23 August 1983 provided that the aggregate amount of approved capital expenditure towards which grants under Part IV of the aforementioned Order of 1982 were payable to or in respect of any person carrying on a qualifying industrial process in the course of a business in Northern Ireland were not to exceed UKL 5 million with respect to the period 1 October 1983 to 31 March 1984 and UKL 10 million in respect of a subsequent financial year. The Industrial Development (Limit on amount of general assistance grants) Order (Northern Ireland) of 27 March 1985 (No 66) increased that amount to UKL 20 million.

Lastly, the Industrial Development (Variation of rate of general assistance grants) Order (Northern Ireland) of 27 March 1985 fixed the maximum rate of grant at 20% (formerly 30%).[1]

The 1982 and 1983 orders were not notified to the Commission. The 1985 orders were notified after they had been made.

In practice, under the scheme, which is the scheme under which the aid was granted to Sean Quinn Quarries Ltd, if the conditions are met, grants are quasi-automatic and are paid out on application from the operator, supported by evidence that investment expenditure has been incurred.

1 — The Industrial Development (Northern Ireland) Order 1982 is reproduced as Annex 1 (a) to the Defence, the Industrial Development (Restriction on amount of general assistance grants) Order (Northern Ireland) 1983 as Annex 3 to the Rejoinder, the Industrial Development (Limit on amount of general assistance grants) Order (Northern Ireland) 1985 as Annex 4 to the Rejoinder, and the Industrial Development (Variation of rate of general assistance grants) Order (Northern Ireland) 1985 as Annex 1 (b) to the Defence.

There is another scheme of regional aid for Northern Ireland known as 'selective financial assistance grants', which is administered by the Industrial Development Board.

(c) *Procedure followed by the Commission with regard to the authorization of regional aid*

Systems of aid must comply with the coordination principles set out in the Communication of the Commission on regional aid systems (Official Journal C 31, 3.2.1979, p. 9). Once a given system has been approved, the implementing measures need not be notified to the Commission except in significant cases where more than one type of aid is awarded (*Fourteenth Report on Competition Policy*, 1985, points 199 and 261). A system of thresholds has been introduced to permit the rapid handling of the growing number of cases of State aid of secondary importance, that is to say, schemes involving low intensities of aid or low volumes of investment being aided. This approach enables the Member States to grant the aid in question without further reference to the Commission, provided that the latter has accepted the basic scheme under which the aid is granted (ibid., point 203).

Individual aids granted under an approved system cannot be called into question, since the Commission merely checks, where appropriate, if the aid in question falls within the authorized system. Only the system itself can be reviewed pursuant to Article 93 (1) of the Treaty.

II — Written procedure and conclusions of the parties

1. The applications were received at the Court Registry on 10 July and 12 August 1986, respectively.

The *applicant* claims that the Court should

in Case 166/86

(i) declare that the Commission, in infringement of the Treaty, has failed to address to the applicant a notice informing it of the opening of a procedure under Article 93 (2) of the EEC Treaty concerning the grant by the Northern Irish Development Board of a capital grant to Sean Quinn Quarries Ltd and inviting it to submit comments;

(ii) declare that the Commission has failed to define its position in respect of the foregoing matter;

(iii) order that the costs of the proceedings be borne by the Commission;

in Case 220/86

(i) declare void, pursuant to Articles 173 and 174 of the EEC Treaty, the Commission's decision not to open a procedure under Article 93 (2) of the EEC Treaty in relation to a grant of aid by the Northern Ireland Development Board to Sean Quinn Quarries Ltd, which decision was addressed to

the applicant's lawyers by letter dated 14 July 1986;

(ii) declare, pursuant to Article 175 of the EEC Treaty, that the Commission has still failed to define its position in response to the applicant's letter and complaint of 28 March 1986;

(iii) order that the costs of the proceedings be borne by the Commission.

The *Commission* claims that the Court should:

(i) declare the application in Case 166/86 inadmissible;

(ii) declare the application in Case 166/86 and that in Case 220/86 unfounded;

(iii) order the applicant to pay the costs in both cases.

2. By letter received at the Court Registry on 12 August 1986, the applicant requested that the two cases be joined. The Court ordered the cases to be joined by order of 3 October 1986.

3. 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. The parties were asked to answer certain questions in writing. That request was complied with within the prescribed period.

III — Submissions and arguments of the parties

A — *Admissibility*

The Commission considers that the application in Case 166/86 is inadmissible. It lacks one of the requirements for an action for failure to act under Article 175 of the Treaty, namely the existence of a duty on the part of the institution concerned to act *vis-à-vis* an individual.

The Court has not yet been called upon to deal with this point, but the case-law which it has already developed in relation to Article 169 of the EEC Treaty may be extended by analogy to cases falling under Article 93 (1). In the same way as Article 169, Article 93 (1) confines examination of existing 'systems of aid' (and, by natural extension, of individual aid measures falling within such systems) to discussion between the Commission and the Member States in which there is no place for individuals (see judgment of 1 March 1966 in Case 48/65 *Lütticke* v *Commission* [1966] ECR 19, and, in particular, the Opinion of Advocate General Gand, at p. 30).

The Commission maintains that the case at issue is not distinguishable from Case 246/81 (judgment of 10 June 1982 *Lord Bethell* v *Commission* [1982] ECR 2277). In that case, the Court denied Lord Bethell any possibility of recourse under Article 175, not

because his interest was merely indirect but because he was not in the precise legal position of the actual addressee of a decision which could be declared void under the second paragraph of Article 173 or in that of a potential addressee of a legal measure which the Commission had a duty to adopt with regard to him, as is the position under the third paragraph of Article 175.

The Court's judgment of 28 January 1986 in Case 169/84 (*Cofaz* [1986] ECR 391) must be distinguished from this case. There, the applicant challenged a Commission decision taken under Article 93 (2) of the EEC Treaty in relation to a new aid, that is to say not an existing aid, nor a grant made under an existing aid system within the meaning of Article 93 (1).

In the applicant's view, the individual aid in question should have been notified to the Commission under Article 93 (3) and the Commission was under a duty to open the procedure provided for in Article 93 (2), under which provision is made for the involvement of all interested parties. Hence there is a difference between that procedure and the procedure under Article 169, as, moreover, the Court has emphasized in the judgment of 30 January 1985 in Case 290/83 (*Commission* v *France* [1985] ECR 439).

Article 93 appears in Chapter 1 of Title I of the EEC Treaty, which deals specifically with competition. It involves no finding that a Member State is 'failing' to meet its obligations. Instead, it results in specific determinations about the way in which State aid distorts competition.

As regards the Court's judgment in *Cofaz*, the applicant maintains that the principles set out therein are applicable in this case. Whether an aid be new or existing, an individual concerned must be entitled to protect his interests by the right to complain, the right to participate in the decision-making process and the right to seek judicial review.

It argues that the case of *Lord Bethell* can be distinguished from this case.

The applicant claims that if the aid in question is uncontrolled, it will have a substantial unfair effect on its business and on the prospects of its employees. In the case of *Lord Bethell*, the applicant was asking the Commission 'not to take a decision in respect of him, but to open an inquiry with regard to third parties and to take decisions in respect of them'. For its part, the applicant in this case is seeking a decision with respect to itself, namely a decision to open the procedure provided for in Article 93 (2) by addressing a notification of the opening of such a procedure to the applicant.

The applicant argues that there is more of an analogy between Article 93 (2) and competition law than with Article 169. In the field of anti-subsidy proceedings, which are regulated by Council Regulation (EEC) No 2176/84 of 23 July 1984 (Official Journal 1984, L 201, p. 1), any natural or legal person is given the right to lodge a written complaint about subsidized imports from a third country (Article 5). The complaint may be about a newly introduced subsidy, or an existing subsidy which had not previously been causing damage to the

complainant. The Commission is obliged to consider the complaint and to consult the Advisory Committee consisting of representatives of the Member States before opening an investigation procedure under Article 7 of the regulation. However, a complainant may apply to the Court of Justice for review of the Commission's decision not to open an anti-subsidy proceeding (see judgment of 4 October 1983 in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913).

Unlike in the case of *Lord Bethell*, the Commission is under a duty to open a procedure under Article 93 (2) of the EEC Treaty and the applicant does not have an indirect interest in the outcome of the proceedings, but an express right set out in the EEC Treaty to submit comments before a decision on the compatibility of the aid with the common market can be taken. The applicant is very directly concerned.

The fact that the decision of the Commission at the end of the procedure under Article 93 (2) would be addressed to the Member State granting the aid is no reason why the applicant, as a party concerned, cannot challenge the Commission's decision not to open the procedure under Article 93 (2). This follows from *Fediol* v *Commission*, cited above, in which the ultimate decision at the end of the procedure would have been a regulation addressed, not to the applicant (Fediol), but to the Member States.

B — *Substance*

The application in *Case 166/86* is based on two grounds:

(1) in the light of the information provided by the applicant's lawyers by letter of 28 March 1986, the Commission had no alternative but to open a procedure under Article 93 (2) of the EEC Treaty in respect of the aid to Sean Quinn Quarries Ltd and to give notice inviting comments from the parties concerned, of which the applicant is one; the Commission failed to do this or otherwise define its position in response to the summons made by the applicant's lawyers pursuant to Article 175 of the EEC Treaty;

(2) since the aid to Sean Quinn Quarries Ltd had not been notified and in the light of the information provided by the applicant's lawyers by letter of 28 March 1986, the Commission had to open a procedure under Article 93 (2) of the EEC Treaty (whether or not preceded by a proceeding under Article 169 of the EEC Treaty) in respect of the aid to Sean Quinn Quarries Ltd and to give notice inviting comments from the parties concerned, of which the applicant is one; the Commission failed to do this or otherwise define its position in response to the summons made by the applicant's lawyers pursuant to Article 175 of the EEC Treaty.

The application in *Case 220/86* is based on the following grounds:

(1) contrary to the requirements of Article 190 of the EEC Treaty, the reasons given by the Commission for its decision are insufficient;

(2) in stating that it was 'unable to intervene in the award of the aid' the Commission's decision contained in the letter of 14 July 1986 is founded on an error of law;

(3) the Commission's express reason for not opening a procedure under Article 93 (2) of the EEC Treaty, namely that the aid to Sean Quinn Quarries Ltd 'falls under an aid system which the Commission has deemed to be compatible with the common market', is unfounded in law;

(4) the Commission failed to define its position under Article 175 of the EEC Treaty because it failed to address the further elements of fact and law drawn to its attention by the applicant in its letter and complaint of 28 March 1986;

(5) the Commission failed to define its position under Article 175 of the EEC Treaty because, in stating that it was 'unable to intervene in the award of this aid', the Commission made an error of law;

(6) the Commission failed to define its position under Article 175 of the EEC Treaty because its express reason for not opening a procedure under Article 93 (2) of the EEC Treaty, namely that the aid to Sean Quinn Quarries Ltd 'falls under an aid system which the Commission has deemed to be compatible with the common market', is unfounded in law.

In essence, all those grounds can be reduced to three, the last of which applies only to Case 220/86, as follows:

(1) by taking the view that the aid in question should not have been notified to it, the Commission infringed Article 93 (2) of the EEC Treaty;

(2) in view of the nature of the aid (regional aid with sectoral repercussions) and of the information provided by the applicant, the Commission infringed Article 93 (2) of the EEC Treaty by refusing to open the procedure provided for in that provision;

(3) the reasons given by the Commission to justify its decision are insufficient and hence the Commission has infringed Article 190 of the Treaty.

1. *The first ground*

The applicant claims that the Commission's policy with regard to regional aid is unlawful in so far as individual aids granted under a general scheme which existed prior to the entry into force of the Treaty or of an accession treaty or was subsequently authorized are not required to be notified, except in the cases indicated in the coordination principles. It bases that view on the following arguments.

1. The Commission has no power to authorize aids *en bloc* or otherwise to exempt them from the requirement of notification under Article 93 (3). Only the Council has such power, by virtue of Article

94 of the EEC Treaty, which reads as follows:

'The Council may, acting by a qualified majority on a proposal from the Commission, make any appropriate regulations for the application of Articles 92 and 93 and may in particular determine the conditions in which Article 93 (3) shall apply and the categories of aid exempted from this procedure'.

It appears from this that the 'procedural technique' adopted in the coordination principles and consisting in the notification of 'significant cases' is incompatible with the Treaty. Moreover, that technique is incorrect because an aid may be significant not just because of its size but because of its nature and effect on the relevant market. In this case, the aid to Quinn is significant, not just because it involves UKL 3 million, but also because it helps a newcomer to enter a market which is already suffering from overcapacity, and therefore has immediate repercussions on the profits and jobs of direct competitors.

2. The Commission's interpretation to the effect that Article 93 (1) provides for a 'dialogue' between the Commission and the Member State on a given system of aid, followed by the opening of the procedure referred to in Article 93 (2) in the event that the Commission's proposals are not accepted, with the final decision having effects only in the future, is not acceptable. The wording of Article 93 (1) does not say when a Member State is to reply, if at all. No mechanism or timetable is set out in the Treaty for passing from the claimed 'dialogue' phase under Article 93 (1) to the 'contentious' procedure under Article 93 (2). In order to arrive at its interpretation the Commission has mistakenly read Article 93 (1) ('as required by the progressive development . . . of the common market') to mean the same thing as the narrow wording of Article 93 (2) ('compatible with the common market').

Article 93 (1) is confined to providing for general policy reviews of systems of aid existing in Member States. Such a review may be conducted prior to opening a procedure under Article 93 (2), but there is no obligation to do so.

3. A scheme of supervision of aid based on the notification of only regional schemes would be inadequate because questions of distortion of competition would be examined at a general abstract level and individual parties would not always be able to identify their concern until a specific grant was made under the scheme.

4. By notifying only systems of aid, but not specific individual grants, a Member State can prevent individual grants from being controlled by the Commission and from being subject to review upon complaint by a party concerned.

5. The Commission has not proved the alleged existence of the relevant aid system for Northern Ireland at the time of the accession of the United Kingdom to the European Economic Community or notification and approval on the occasion of each

subsequent modification of the relevant aid system.

The Commission maintains that it is lawful for it to implement a policy which involves acceptance of notification of general, sectoral or regional aid systems in lieu of specific notification of each and every individual aid coming thereunder, and — its corollary — *en bloc* authorization of certain aids.

To require advance notification of such aids would be otiose and bad administration since the factors to be taken into consideration would be the same as those which the Commission had already taken into consideration when approving the aid system or effecting *en bloc* authorization. There is a trade-off between two opposing interests: on the one hand, the need to attract investment to the underdeveloped regions of the Community and, on the other, the necessity to avoid as far as possible distortion of competition and effects on intra-Community trade which will necessarily result from industry's receiving public money as a contribution towards investment cost which normally it should bear itself.

Such a policy does not conflict with Article 94 of the Treaty. Admittedly, only the Council has power to *legislate* on the authorization of certain aids *en bloc*. But this cannot mean that in the absence of action on the part of the Council the Commission is powerless to develop a policy which necessarily involves interpretation of the broad principles laid down in Articles 92 and 93 of the EEC Treaty.

The Commission considers that the policy described above enables the objectives of those provisions to be observed and attained, provided appropriate safeguards are built into it. In the field of regional aids, the Commission has weighed and considered the opposing interests involved and stipulated the appropriate guarantees, as a reading of the coordination principles and of certain passages from the *Fourteenth Report on Competition Policy* clearly reveals.

Even if not legally binding in the strict sense, the Commission communications defining its policy with regard to aids surely have authority in that since the Commission has publicly set out the policy which it intends to follow, Member States and all others concerned are entitled to expect, by virtue of the principles of legal certainty and legitimate expectation, that that policy will be followed.

Article 93 (1) of the EEC Treaty cannot be interpreted in the way claimed by the applicant. If that paragraph merely related to general policy reviews it would be superfluous because the Commission is enabled at all times to carry out 'general policy reviews' of areas of its competence without having to point to an express provision of the Treaty bearing upon the particular area concerned. The dialogue provided for therein covers aid systems existing in the Member States, which includes those existing prior to the entry into force of the Treaty or of the Treaties of Accession and those which were notified subsequently and approved by the Commission tacitly (in so far as it did not react within the prescribed two-month period) or expressly. All measures adopted with regard to those systems (and accepted

by the Member States or imposed under Article 93 (2)) have effects *ex nunc* and cannot affect individual aids which have already been authorized.

The aid contested in this case comes within a system existing, not because it was expressly notified and expressly approved, but because it was 'brought in' by the United Kingdom upon accession to the European Communities in 1973. It has been under review, in accordance with Article 93 (1), since then but has not been the subject of appropriate measures. It has been, and continues to be, tacitly approved by the Commission. Proof of the existence of that system prior to the accession of the United Kingdom is afforded by the letter dated 10 September 1986 from the United Kingdom Permanent Representation to the European Communities (Annex 4 to the Defence), a telex message sent by the Commission on 30 July 1985 to the United Kingdom Permanent Representation (Annex 3 (b) to the Defence) and the letter, dated 6 February 1979, sent by a Commission official to an official of the said Permanent Representation and the latter's reply dated 8 March 1979 (Annexes 2 (a) and (b) of the Rejoinder).

Admittedly, since 1982 certain modifications have been made to the aid system in question, of which one was not notified and others were notified after they had been made. But those modifications were not material for the purposes of Article 93 (3). As far as the 1982 Order in Council is concerned, it was not a notifiable alteration, as can be seen from the declaration made by the United Kingdom Representation to the effect that it did not involve alteration of the existing system (Annex 4 to the Defence, paragraph 4).

As regards the difficulties facing individuals in obtaining adequate court protection in view of the policy adopted, the Commission points out that it is not to be concluded that individuals in the applicant's position are totally without redress. For example, if it can be shown that the aid which purports to fall within an approved system of existing aid has been misused, within the meaning of the first subparagraph of Article 93 (2) of the EEC Treaty, then it is illegal and can be challenged before a national court. It would be the same if the measure complained of purported to be within an approved regional scheme but was granted to a firm not in the region concerned.

2. *The second ground*

The applicant argues that the Commission cannot accept the 'trade-off' between the opposing interests of, on the one hand, the need to attract investment to the under-developed regions of the Community and, on the other, the necessity to avoid as far as possible distortion of competition and effects on intra-Community trade which will result from the aid, without first opening the procedure under Article 93 (2). Since some distortion of competition is inherent in a regional aid system, the Commission must open that procedure (see the judgment of 11 December 1973 in Case 120/73 *Lorenz* [1973] ECR 1471).

In the light of the applicant's second complaint, the Commission should have opened the procedure under Article 93 (2). The economic assessment effected by the Commission appears to be based on statistics provided by the applicant rather than on independent inquiries; it is therefore insufficient.

In the Commission's view, the applicant takes no account of its clearly stated policy over many years that it will tolerate a degree (and even, in some regions of which Northern Ireland is one, a considerable degree) of 'anti-competitiveness'. The argument that the applicant's having made a prima-facie case for incompatibility is cause in itself to oblige the Commission to act is wrong because it considers the aid complained of *in vacuo*, as if there were no regional considerations. The Commission tolerates, for regional aids, a considerable degree of what under normal circumstances would be incompatibility with the common market.

3. *The third ground*

The applicant maintains that in its letter of 16 July 1986 the Commission does not refer to any of the facts and arguments which it raised in its letter of 28 May. The Commission should have explained why the applicant had not established a prima-facie case that the aid to Sean Quinn Quarries Ltd was incompatible with the common market.

Furthermore, the fact, as referred to by the Commission, that the aid granted to Sean Quinn Quarries Ltd 'falls under an aid system which the Commission has deemed to be compatible with the common market in accordance with Article 92 (3) of the EEC Treaty' is not in itself a reason for refusing to open the procedure following the complaint.

The Commission considers that the adequacy of the reasons given depends on the correctness of its position as to its power to open the procedure provided for in Article 93 (2) and in particular *vis-à-vis* the applicant.

IV — Replies to the questions put by the Court

The parties were requested by the Court to state their views on the issue of the admissibility of the two actions, having regard to the following considerations.

In Case 166/86

By a letter of 14 May 1985 the Director-General for Competition informed the applicant that there were no grounds for initiating the procedure provided for in Article 93 (2) of the EEC Treaty, inasmuch as the aid granted was part of an aid scheme which had been notified to the Commission and in respect of which the Commission had made no objection. Where such an act was not challenged under Article 173, can the applicant rely on the provisions of Article 175?

In Case 220/86

Almost a year later the applicant repeated its request for the initiation of the procedure referred to above. By a letter of 14 July 1986 the Director-General for Competition, referring to the abovementioned letter, again refused to initiate that procedure. Was that an act confirming the initial refusal or did it constitute a new decision?

A — *The point of view of the Commission*

In Case 166/86

(i) The Commission has already stated its views and taken position on the admissibility of this action, in paragraphs 11.1 to 11.5 of its Statement of Defence. The Commission's conclusion was, and still is, that this action is inadmissible.

(ii) The Commission has nothing further to add to what it said in its Statement of Defence and accordingly would reply to the question in the negative.

In Case 220/86

The Commission considers that the letter of 14 May 1985 was not a decision capable of being challenged under Article 173 of the EEC Treaty.

In the first place, it was possible to infer from the letter that the Commission had not taken a definitive and final stance on the applicant's complaint. In fact, the Commission said that there would be 'little point' in the applicant's producing further details; it did not say 'no point' and the applicant could legitimately infer that if it supplied further particulars the Commission would look at the matter afresh, and that is what did happen.

Secondly, the Commission questions whether the 1985 letter could be said to produce legal effects *vis-à-vis* the applicant or modify its legal position given the terms in which the complaint was couched and the absence of any formalized procedure of the sort applicable in the field of Articles 85 and 86 of the EEC Treaty.

The Commission further considers that the letter of 14 July 1986 constitutes a new decision susceptible of challenge before the Court. It was in that letter that the Commission for the first time refused to initiate the procedure provided for in Article 93 (2) of the Treaty. Moreover, the complaint went further than the first complaint in that it protested against the Northern Ireland authorities granting any aid at all in the cement sector, even taking into consideration the fact that the applicant's own investment had been grant-aided in Ireland.

B — *The point of view of the applicant*

Reply to the first question

The applicant considers that the letter of 14 May 1985 does not constitute a decision on

the part of the Commission not to initiate the procedure provided for in Article 93 (2) of the Treaty. That letter merely sets out information relating to a system of aid and to accept that it is a decision is to accept that the Commission is entitled to confine itself to a review of the general parameters of an aid system on the date on which it is notified.

The letter of 17 April 1985, to which the letter of 14 May 1985 replied, did not constitute notice under Article 175 of the Treaty calling on the Commission to act but was designed to set up a dialogue with the Commission.

Reply to the second question

The letter of 14 July 1986 is a decision which can be challenged before the Court. That letter does not merely confirm a previous decision; it was the first decision taken by the Commission not to initiate the procedure provided for in Article 93 (2) of the Treaty. Furthermore, the letter was based on elements of fact and law not taken into account when the letter of 14 May 1985 was written. First, the applicant had provided the Commission with information which it could use to assess the impact on competition of the investment at issue and, secondly, the Commission already knew that the aid system under which the contested aid had been granted was the standard capital grants scheme and not the selective assistance scheme erroneously referred to in the letter of 14 May 1985.

J. C. Moitinho de Almeida
Judge-Rapporteur