OPINION OF ADVOCATE GENERAL LENZ
delivered on 22 June 1994 *

Mr President,
Members of the Court,

A — Introduction

1. The Cour d'Appel (Court of Appeal), Brussels, has referred to the Court three questions relating to aid, which, as we know, is governed by Article 92 et seq. of the Treaty. The questions relate to an establishment which benefited by a system introduced by the Member State concerned before the Treaty entered into force, and extended its activities to cover a new area. The Cour d'Appel wishes to establish whether such an enlargement of the establishment's activities constitutes the grant or alteration of aid, whether its classification as a new or existing aid may be affected by the fact that the Commission remained silent after it had requested and obtained information from the Member State concerned following a threat to initiate proceedings, and whether, in the circumstances of the case, the aforesaid enlargement of the establishment's activities may be imputed to the Member State concerned.

2. The Court d'Appel referred these questions to the Court in proceedings for interim measures brought by the Belgian credit-insurance company Namur-Les Assurances du Crédit (hereinafter 'Namur') and Compagnie Belge d'Assurance Crédit (hereinafter 'COBAC') against Office National du Ducroire (hereinafter 'the OND'), the agency to which the advantages at issue were accorded, and the Belgian State. Essentially, the application for interim measures, which COBAC (but not, however, Namur) withdrew after the order for reference was submitted to the Court, sought provisionally to restrain OND's activities in the new field.

3. The facts and legal background of the main proceedings are as follows.

4. OND, which was set up by the Law of 7 August 1921, is a public credit-insurance establishment. The framework laying down the content of and conditions for its activities is prescribed chiefly by Royal Decree No 42 of 31 August 1939, [1] which since the entry into force of the Law of 12 January 1981 [2] bears the name 'the Law on the OND' (to which I shall refer as the 'OND Law'). That instrument has been amended on several occasions, in particular on

* Original language: German.

1 — *Moniteur belge* of 4 October 1939.
2 — *Moniteur belge* of 6 February 1981.

17 June 1991, following the institution of the main proceedings.

5. Article 1 of the OND Law bestows legal personality on the OND. Article 3, in the version in force at time of the events with which this case is concerned and in the version in force at the time when the application was made for interim measures (to which I shall refer as 'the 1991 amended version'), defined the OND's purpose as follows:

'Article 1 The Office National du Ducroire shall promote exports and Belgian investments abroad.

Article 2 It shall carry out its task by means of the following actions:

(1) The Office National du Ducroire may provide guarantees so as to reduce the risks attaching to exports and Belgian investment abroad, especially credit risks ...'.

6. Pursuant to Article 12 of the aforementioned version of the OND Law, the OND is administered by a board of directors, consisting of a chairman, a vice-chairman and 18 members. Six of those members (and their alternates) are appointed at the proposal of the Prime Minister and the Ministers responsible for Economic Affairs, Finance, Foreign Affairs, Foreign Relations, Foreign Trade, and Development Cooperation. Each of the six board members represents on the board of directors the Minister who nominated him.

7. According to Article 16(1) of the OND Law, the delegates of the ministers are to inform the board of directors of the general policy to be pursued by the OND.

8. Article 16(2) provides that, when votes are held on the board of directors, those delegates may suspend decisions which, in their opinion, are unlawful or conflict with the rules of the organization or the interests of the State. If a ministerial delegate suspends a decision, he is to report to the minister who conferred his office as board member upon him. The minister then has five clear days following the suspension of the decision in order to take a decision. If he fails to take a decision within the prescribed period, the suspended decision becomes binding.

9. According to Article 13(1) of the Law, the board of directors is to have all the administrative and decision-making powers necessary in order to achieve the OND's objectives. Article 13(3) provides that the board is

to decide upon all transactions and the conditions relating thereto. It follows from Article 13(4) that, within limits to be determined by the board, the latter may delegate to the General Manager or the Managers of the OND the power to grant certain guarantees mentioned in Article 3(2)(1). In order to do so, the board requires the consent of the Minister of Economic Affairs. However, board decisions relating to the acceptance of new risks within the meaning of Article 3(2)(1) are to be submitted to the Minister of Economic Affairs pursuant to Article 13(5). If he does not object within two clear days of the notification of such a decision, the decision becomes binding, subject to the provisions of Article 16.

10. Under Article 10(1) of the Law, the OND was entitled to enter into such collaboration with credit-insurance undertakings as the Law allowed it do for this purpose, in such forms and on such conditions were laid down by the Royal Decree.

11. Lastly, the 1939 Royal Decree conferred various advantages on the OND, which were governed by Articles 1, 5, 7 and 23 of the OND Law in force before the 1991 amendment. These advantages were: it operated under State guarantee (Article 1) and was endowed with State bonds as sole owner (Article 5) together with the income from those bonds (Article 7); its annual financial deficit was covered by the State; and it was exempt from the tax levied on insurance contracts (Article 23) and corporation tax (Article 23 and Article 94(2)(d) of the Law on Income Tax in the version of the Law of 11 April 1983).

12. Within the confines laid down in this manner by the OND Law, the OND's activities gradually expanded. For present purposes, it is pointed out in this connection that the OND has collaborated with COBAC on a contractual footing since 1935. On the basis of the relevant contractual agreements, the OND had been active on the market in insurance for exports to western European countries from a date — which, however, cannot be accurately determined from the information available to the Court — until January 1989 only in certain exceptional cases. According to Article 2 of the version of the cooperation agreement of 30 March 1982, COBAC alone was entitled to insure commercial risks attaching to the export of goods and services to the following countries:

the Federal Republic of Germany, Austria, Denmark, Spain, Finland, France, Gibraltar, the United Kingdom, Greece, Ireland, Iceland, Italy, Malta, Norway, the Netherlands, Portugal, Switzerland and Sweden.

13. Article 3 provided for the following exceptions where the OND was entitled to provide insurance:

the debtor was a person governed by public law or a private person acting with the guarantee of a person governed by public law;

the amount of the transaction to be insured exceeded BFR 100 million;

the maturity of the credit for the transaction to be insured was in excess of five years;

the transaction to be insured related to industrial projects, articles of heavy equipment or works contracts;

the operation to be insured concerned a transaction for which COBAC considered that it was not in a position to participate in the risks as provided for in the cooperation agreement.

In addition, under Article 4(1) of the cooperation agreement, COBAC was debarred from covering political risks, irrespective of the country of destination.

14. On 9 March 1988, the Commission informed COBAC that the cooperation agreement might be caught by the prohibition set out in Article 85(1) of the Treaty, and advised that it be notified to the Commission.

15. By letter of 27 September 1988, the OND terminated the cooperation agreement [3] on the ground that changes were to be expected as a result of the introduction of the single market and that issue could be taken from any quarter at any time with the compatibility of the cooperation agreement with Article 85 of the Treaty of Rome.

16. As appears from the documents before the Court, OND's board of directors resolved to terminate the agreement with COBAC on the same day. At the same time, the board decided to instruct the management to take the necessary measures in order

3 — It is not absolutely clear whether the termination took effect on 31 December 1988, as, according to the order for reference, the OND considered, or at an earlier date (October 1988), in accordance with the wording of the letter of termination in conjunction with the relevant provisions of the cooperation agreement. However, this is of no relevance to the present proceedings.

to take up direct insurance on the European market in such a way as not to interfere with competition or to interfere with it as little as possible.

17. It further appears from the case-file that four Belgian ministers, namely the Ministers of Finance, Economic Affairs, Foreign Trade and Development Cooperation asked the OND by letter of 4 January 1989, referring to the board's resolution of 27 June 1988, to suspend the implementation of the planned new insurance operations relating to commercial risks in western Europe by 1 February. The signatories of the letter stated that their delegates had been instructed to act accordingly at the board meeting on 9 January 1989. The ministers justified this on the ground that the competition issues raised by that new activity had not yet been satisfactorily resolved. They stated that a working party would be set up in order to consider the future of the OND in more detail in January 1989.

18. By letter of 1 February 1989, the four ministers informed the OND of the 'recommendations' which the working party had made and which the signatories, as appears from the letter, approved. As the order for reference expressly states, the recommendations were that there should be a 'progressive, prudent and limited entry by the OND into the market of insuring commercial risks connected with Belgian exports to western Europe as from 1 February 1989' and that the 'instruments constituting the OND [should be amended] so as to harmonize the conditions of competition'.

19. It is clear that in 1989 — according to the OND's submissions of 1 February that year reproduced in the order for reference — the OND entered the market in credit insurance for exports to western Europe without the limitations laid down in the cooperation agreement.

20. Namur and COBAC took various steps in order to contest the said enlargement of the OND's field of activity.

21. Accordingly, in October 1989 they lodged a complaint with the Commission in which they argued that the extension of the advantages accorded to the OND to its newly adopted field of activity — insurance transactions relating to exports to western Europe — was incompatible with Article 92(1) of the Treaty. They also maintained that the Belgian State had failed to fulfil its obligations under Article 93(3), according to which the Commission is to be informed of

plans to grant aid and aid measures should not be put into effect until the procedure laid down in Article 93(2) has been concluded.

22. As long ago as 12 January 1990, the Commission had requested the Belgian State for information in the course of an in-depth examination of existing export aid in the Community. It reiterated that request on 4 June 1991, adding explanations: it referred expressly to the complaint which it had received and on 23 August 1991 asked the Belgian State to provide additional information. It was stated in each of those requests for information that if no reply or an inadequate reply was received within the prescribed period, the Commission would be obliged to initiate the procedure provided for in Article 93(2).

23. The Belgian State responded to the requests within the prescribed period. On 22 October 1992, the Commission notified counsel for Namur (and COBAC) that it was pursuing its investigations in the field of export credit insurance generally and those concerning the compatibility of the OND's activities with Articles 92 and 93 of the EEC Treaty in particular. It stated that it would notify the complainants of the progress made with these investigations 'in the near future'. Between the time when the complaints were received and the present date, the Commission has taken no further steps.

24. Also in October 1989, COBAC and Namur initiated the main proceedings. As appears from the order for reference, they asked in particular in their application for interim measures that the OND should be enjoined to suspend any credit insurance operations in respect of exports to the EEC so long as the Commission had not approved the aid which the Belgian State had granted the OND in connection with such operations or a final judgment or decision had not been handed down in the main proceedings taken by Namur and COBAC in the Tribunal de Première Instance (Court of First Instance).

25. The President of the Tribunal de Première Instance, Brussels, considered that the aid at issue was caught by Article 93(1) of the Treaty, and held that, owing to that provision's lack of direct effect, he had no jurisdiction to entertain the application. The applicants appealed to the Cour d'Appel, Brussels, which referred the following questions to the Court for a preliminary ruling:

'(1) Must Article 93(3) of the Treaty be interpreted as meaning that the granting or alteration of aid includes a decision of a Member State to authorize, after the entry into force of the Treaty, a public establishment, which previously engaged only incidentally in credit insurance for exports to other Member

States, to exercise that activity in future without restriction, so that the aid which was granted by that State to the establishment under legislation predating the entry into force of the Treaty now applies to the exercise of that activity as thus extended?

(2) Must Article 93 of the Treaty be interpreted as meaning that it is necessary to regard new aid as being subject to the rules governing existing aid if new aid, not having been notified to the Commission in accordance with Article 93(3), was the subject of a complaint to the Commission and the latter, after carrying out a preliminary examination of the aid and addressing to the Member State concerned a request for information concerning the aid in which it stated that, in the event of failure to reply or receipt of an unsatisfactory reply before the end of the period allowed, it would be obliged to initiate the procedure laid down by Article 93(2) of the Treaty (which request was satisfied), did not initiate the said procedure within a reasonable period?

(3) Must Article 92(1) of the Treaty be interpreted as meaning that the granting or alteration of aid includes conduct of a Member State consisting in:

(a) communicating, through ministerial delegates sitting on the board of directors of a public establishment having its own legal personality and in accordance with the legislation governing that establishment, a general policy entailing enlargement of the scope of an aid;

(b) not opposing, through intervention by the ministerial delegates on the board of directors of the public establishment, a decision by the board entailing enlargement of the scope of an aid, in particular by not bringing about the annulment of that decision, when the legislation governing the public establishment permitted such annulment by the State after suspension of the decision taken by the ministerial delegates?'

B — Assessment

The first and third questions

General

26. As is clear from section VI.3 of the order for reference, the national court's first question has to do with the 'grant or alteration'

of aid within the meaning of the first sentence of Article 93(3). The national court is interested in the interpretation of that expression for the purposes of the prohibition which the third sentence attaches to the grant or alteration of aid:

'The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

27. The national court makes whether it grants the application made to it temporarily to debar the OND from carrying out activities in the new field dependent upon the applicability of that prohibition. It states as follows in this connection:

'... this court must examine whether the Belgian State and the OND have *prima facie* infringed Article 93(3) of the Treaty by implementing, without notification, a new or amended aid measure; if that is the case, it would, where appropriate, have jurisdiction on the basis of that provision and of Article 584(l) of the Code Judiciaire [Judicial Code], to prohibit temporarily the implementation of such a measure.' [4]

28. More specifically, it is a question for the Cour d'Appel of legally categorizing the decision to extend the OND's field of activities if that decision means that 'the aid which was granted by [the State in question] to the establishment under legislation predating the entry into force of the Treaty now applies to the exercise of that activity as thus extended'. The national court therefore considers the possibility that a case such as this may also involve the grant or alteration of aid where it is not the rules set out in the OND Law on the nature and content of the individual aids which are being altered but the OND's activities which those aid measures benefit.

29. Since no other action in regard to the aid system instituted by the OND Law other than the decision to extend its sphere of activities is discernible, the outcome of the main proceedings turns on resolving this problem. This is because the system in question existed even before the EEC Treaty came into force and can therefore be implemented, if it is not impugned, as an existing aid [5] as long as the Commission has not

4 — Last paragraph of section III of the order for reference.

5 — Judgment in Case C-387/92 *Banco de Crédito Industrial* [1994] ECR I-877, paragraph 20.

found it to be incompatible with the common market. [6] Only if it is a question of the grant or alteration of aid will the prohibition on its implementation sought by Namur hold good (third sentence of Article 93(3)).

30. The scope of the first question has hereby been defined.

31. The third question is closely connected with the first. The first question assumes the existence of a 'decision' of the Member State in question 'to authorize' a public establishment to exercise the relevant activity 'in future without restrictions'. The premiss as so worded assumes that the decision to extend the field of activity of the public establishment can be imputed to the Belgian State in so far as it authorized it.

32. That very premiss brings the national court in its third question into doubt again. The third question is concerned with whether, in the light of the circumstances which it sets out in that question, the decision to extend the OND's field of activity should be imputed to the Belgian State. Admittedly, that interpretation of the question does not clearly follow from its wording. The opening words raise a doubt in the light of certain matters raised in the body of the third question. The opening words emphasize the expression 'grant or alteration' of an aid as being the subject of the interpretation sought from the Court. Parts (a) and (b) of the question refer respectively to a 'general policy' communicated by the ministerial delegates and to the ministerial delegates' not opposing a decision by the board of directors 'entailing enlargement of the scope of an aid'. It might be considered that the Cour d'Appel is seeking here to raise again — but in a new guise — the issue brought up in the first question, namely whether the enlargement of the OND's field of activity is to be regarded as the 'grant or alteration of aid'.

33. In reality, the national court is concerned to clarify the Belgian State's responsibility for the enlargement of the OND's field of activity. This emerges first from the arguments of the parties set out in part V of the order for reference: the applicants claim that the Belgian State is responsible, whereas the OND and the Belgian State take the view that the decision was that of the OND (and not of the Belgian State). Secondly, the national court's third question, unlike its first, contemplates not Article 93(3) but Article 92(1). This reference seems to be explained by the fact that only 'aid granted by a Member State or through State resources', that is to say, a measure attributable to a (Member) State, falls within the scope of Article 92(1) (and Articles 93 and 94). [7]

6 — See paragraph 19 of the judgment in *Banco de Crédito Industrial* (cited in the preceding footnote) and the judgment in Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraph 25.

7 — Judgments in Case 72/79 *Commission* v *Italy* [1980] ECR 1411, paragraphs 23, 24 and 25, Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy* v *Commission* [1988] ECR 219, paragraphs 36, 37 and 38, and Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraphs 11 to 14.

34. The interrelationship between the first and the third questions can therefore be characterized as follows:

The *third question* seeks to establish whether in the circumstances of the present case the State responsibility on which the expression 'grant or alteration' of aid turns can be held to exist.

In contrast, the *first question* is concerned with whether the decision (imputed to the State) on the enlargement of the OND's field of activity can be regarded *objectively* as the 'grant or alteration of aid' within the meaning of the Treaty.

35. In these circumstances, I feel that it is appropriate to consider the third question first.

The third question

Admissibility

36. The Belgian Government and the OND have cast doubt on the admissibility of the third question from several points of view, which should be examined *seriatim*. First, they contend that the question is concerned with the assessment of facts, with the result that the Court of Justice has no jurisdiction to answer it. The Belgian Government and the OND base themselves in this respect on the judgment in *Hulst* v *Produktschap voor Siergewassen*. [8]

37. That view cannot be accepted. It is true, however, that it is for the national court to ascertain the relevant facts. [9] That can also consist of drawing inferences from particular circumstances which are (also) of a factual nature for the purpose of resolving the question of fact which is material for deciding the case. To that extent, it is possible to say that there is an 'assessment of facts' which is a matter for the national court alone. [10]

38. In the instant case, however, the Cour d'Appel is not seeking such an assessment from the Court: the circumstances set out in the third question are presented as or at least assumed to be facts. Rather, in its third question the national court is asking the Court, as I have already explained, to elaborate criteria for interpretation on the basis of which it is

8 — Case 51/74 *Hulst* v *Produktschap voor Siergewassen* [1975] ECR 79; see paragraph 12 of that judgment.

9 — See, for example, the judgment in Case C-30/93 *AC-ATEL* [1994] ECR I-2305, paragraph 17.

10 — See *Hulst* v *Produktschap voor Siergewassen*, *loc. cit.* (footnote 8).

to determine whether a sufficient relationship for Article 92 et seq. exists in this case between the enlargement of the OND's field of activity which is at issue and the action of the State. The Court of Justice has jurisdiction to provide such criteria (although it has no jurisdiction to apply Community law to a specific case). [11]

39. Secondly, contrary to that which the Belgian Government and the OND argue, the third question does not relate to the interpretation of national law, which, it is conceded, is a matter for the national court alone. [12] On the contrary, it is clear from the construction and wording of the question that the national court sought to refer to the Court of Justice the problem of the interpretation of Community law defined above.

40. Lastly, it would not affect the admissibility of the question if, as the Belgian Government and the OND maintain, the questions were based on factual hypotheses in dispute between the parties to the main proceedings. Indeed, it is for the national court to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. [13]

Answering the third question

41. In replying to the third question, as resulting from its constructing and wording, parts (a) and (b) should be considered consecutively. This view is also supported by the fact that it is not apparent from the order for reference whether the Cour d'Appel itself was convinced that a general policy existed within the meaning of part (a) of the question.

42. I can deal with *part (a)* of the question briefly. The only possible inference to be drawn from the wording of Article 16(1) of the OND Law in the version in point is that the general policy referred to there is binding on the OND, with the result that it has the effect of an instruction.

43. In such case, responsibility on the part of the State, as required by Article 92 et seq., cannot be doubted.

44. To my mind, such responsibility must also be held to exist in the case of the situation described in *part (b)* of the question. The involvement of the State in the material decision for the purposes of Article 92 et seq.

11 — See, for example, the judgment in Case 7/75 *Mr and Mrs F.* v *Belgian State* [1975] ECR 679, paragraph 10.

12 — Judgment in Case-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 7.

13 — See in particular the judgment in Case C-127/92 *Enderby* v *Frenchay Health Authority* [1993] ECR I-5535, paragraph 10.

does not have to go so far as to constitute an instruction in the aforesaid sense. Instead it is sufficient that the third party (whose action raises the question as to whether it should be imputed to the State) could not take the decision in question without taking account of the requirements of public authorities. [14]

45. According to the wording of the question, the preconditions were satisfied for the ministerial delegates to suspend the board's decision to extend the OND's activities pursuant to Article 16(2) of the OND Law and for the decision to be revoked by the supervising ministers. Consequently, the OND's decision could be issued only if it took account of the requirements of the Belgian State which was in a position under Article 16(2) to enforce them. As a result, in the circumstances referred to by the Cour d'Appel, a decision such as the one at issue taken by the OND's board is to be imputed to the Belgian State for the purposes of Article 92 et seq.

The first question

46. *I.* The background to the first question is the fact that the five advantages [15] accorded to the OND by statute were conferred on it permanently and benefit all the OND's insurance activities, albeit to a differing extent. None of those advantages are confined by reason of its nature to a particular market within the credit-insurance sector. The advantages differ only in point of their effects on individual business data. I shall make this clear.

47. The *State guarantee* affects each individual insurance contract in so far as no costs for reinsurance, which would otherwise be necessary, arise. Also the *exemption from tax on insurance contracts* constitutes an advantage which is effective for every individual insurance contract. Those two advantages take effect irrespective of the aggregate volume of the OND's business, of the profitability of individual transactions and of the aggregate result of OND's operations. The *capital endowment* and the grant of *interest* thereon also have an impact irrespective of the sector of activity, although they have less of an effect as the volume of business rises unless the capital endowment is increased commensurately. The *exemption from corporation tax* and the *coverage of the financial deficit* mitigate the disadvantages flowing from a positive or negative trading result, and this effect is all the more marked the further the result is at one extreme or the other.

14 — See paragraph 37 of the judgment in *Van der Kooy* v *Commission*, cited in footnote 7.

15 — See section 11 above.

48. If the OND's field of activity is extended, the scope of the aid also extends to cover the new activity. In this connection, the State guarantee and the exemption from tax on insurance contracts also mean that the amount of funds made available by the State in a given period increases with respect to the original situation if insurance contracts are concluded in that period in the new field of activity. In the event of such an enlargement of the establishment's field of activity, the exemption from corporation tax and coverage for the annual financial deficit *may possibly* result in State funds flowing into the OND which would not have accrued to it in the absence of the enlargement of the field of activity, in particular if that enlargement results in increased turnover.

49. *II.* Whether, in view of the 'variable geometry' of the aid, the decision enlarging the OND's field of activity can be regarded as the 'grant or alteration of aid' is in dispute between the parties. The Belgian Government and the OND take the view that the question should be answered in the negative. First, they point out that the system of advantages, as it has been laid down in the OND Law since 1939, was not altered when the OND's field of activity was enlarged. They grant that the alteration of the field of activity may change the *effects of the aid on the market*. However, they maintain that this is covered by the express provision of Article 93(1) of the Treaty, according to which the Commission is to keep under constant review existing systems of aid. Changes in circumstances which, as in this case, might influence the effects produced by an aid would be assessed by the Commission in the course of its review. To equate an alteration of the field of activity with the grant or alteration of aid would call in question the difference between paragraphs 1 and 3 of Article 93. Moreover, differences between Member States would arise in assessing such effects of aid. In the final analysis, to equate an alteration in an establishment's field of activity with the grant or alteration of aid in this way would mean that the undertaking benefiting by the aid would have to obtain a positive decision from the Commission as soon as it altered its activity or took a strategic decision which might change the effects of aid. They maintain that this is not what Article 93(3) signifies.

50. The French and Netherlands Governments take a different view. They point out in the first place that a distinction has to be made in the sphere of credit insurance between (a) risks which are reinsurable (*cessible*) and hence can be taken over by private insurance undertakings and (b) other risks. They examine in the light of this distinction the potential effects on the market in credit insurance of an enlargement of the establishment's field of activity. The Netherlands Government states that hitherto the OND dealt exclusively, or virtually exclusively, with non-reinsurable risks. The decision to extend its field of activity means that the OND can now accept reinsurable risks or, at least, that its opportunities for so doing are significantly increased. This does not constitute a negligible change, since it means that the OND has become a competitor for private credit insurers.

51. The French Government's analysis is largely the same. In addition, it points out that, at the time when the decision was taken to enlarge the OND's field of activity, the aid was not confined to its original field of operations, something which could have been done by taking various steps (separate accounting, arithmetical methods). In favour of its view that the OND's original activity was not such as to distort competition, it adds that the agreement between the OND and COBAC, in conjunction with the nature of the transactions earmarked for the OND, ruled out any competition with the OND's operations. Political risks and credits relating thereto with a maturity of more than five years have been classified both by an expert working party at the Council and by the Commission as non-reinsurable risks.

52. The Commission and Namur also take the view that the national court's first question should be answered in the affirmative. However, they do not rely on an appraisal of the potential effects on the market of the alteration at issue, but on the fact that it enlarged the field of application of the aid.

53. The Commission considers in this connection that to apply the aid provided for *in abstracto* in the OND Law since 1939 for the first time to new activities on the basis of an authorization of the Belgian State is to be equated with the alteration of an existing system of aid.

54. Namur argues similarly. In order for Article 93(3) to apply, it turns simply on whether the State gives, by unilateral and autonomous decisions, undertakings resources or procures for them advantages intended to encourage the attainment of the economic and social objectives sought.

55. From this angle, it considers that the aid for transactions relating to exports to Community countries would not have existed before the Belgian State's 1989 decision. It is immaterial that the provisions of the OND Law covered those activities *in abstracto* and hence at the same time the aid for them: *the aid* was not *actually* implemented until after the Treaty entered into force. Article 93(3) should be interpreted in the light of its objective and of the actual economic circumstances. Such an approach is consistent with the Court's case-law. Consequently, matters cannot turn on the fact that there is no (new) legislative measure. It is also irrelevant that even before 1989 the OND operated in the sector of exports to Community countries to the extent permitted by the agreement with COBAC, since according to the wording of the national court's question that constituted merely an incidental activity. For all those

reasons, the decision by the Belgian State constitutes the grant of new aid. The view might also be taken, Namur argues, that there has been an alteration of the system of aid introduced in 1939. Article 93(3) equates this with the grant of aid. It is only exempt from compulsory notification as provided for in that provision if the alteration is negligible. Since the aid in question in this case is being applied for the first time to insurance cover for exports to Community countries, the alteration cannot be regarded as negligible.

56. *III.* Since the issue as defined above cannot be resolved on the basis of the wording of the relevant provision or in the light of case-law, the aim of the relevant provision must be examined, together with the system of which it forms a part.

57. As regards the *objective* of Article 93(3), it should be observed on a general level that it supplements the review mechanism provided for in Article 93(2). By means of the rule on notification laid down in the first sentence of Article 93(3), 'the draftsmen of the Treaty have sought to provide [the Commission] with sufficient time for consideration and investigation to form a *prima facie* opinion on the partial or complete conformity with the Treaty of the plans which have been notified to it'. [16] In other words, the purpose of the first sentence of Article 93(3) is to provide the Commission with an opportunity to review, in sufficient time and in the general interest of the Communities, any plan to grant or alter aid. [17]

58. In this connection, the purpose of the third sentence of Article 93(3) is to 'prevent the implementation of aid contrary to the Treaty'. [18] It safeguards the machinery for review laid down by that article, which, in turn, is essential for ensuring the functioning of the common market. The prohibition laid down in that article on putting any proposed measures into effect is designed to ensure that the effects of a system of aid cannot take place before the Commission has had a reasonable period in which to study the proposed measures in detail and, if necessary, to initiate and conclude the procedure provided for in Article 93(2). [19]

59. Consequently, the expression 'grant or alteration of aid' characterizes an event which, in view of its potential effects on the common market, systematically necessitates a review of whether the advantage conferred on the undertaking is compatible with the principles set out in Article 92(1). Those potential effects on the common market

16 — Judgment in Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, paragraph 3.

17 — Judgment in Joined Cases 91 and 127/83 *Heineken Brouwerijen* v *Inspecteurs der Vennootschapsbelasting, Amsterdam and Utrecht* [1984] ECR 3435, paragraph 14; judgment in Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 17.

18 — Paragraph 4 of the judgment in *Lorenz*, cited in footnote 16.

19 — See the judgments in Case C-301/87 *France* v *Commission*, cited in footnote 17, and in Case C-47/91 *Italy* v *Commission*, cited in footnote 6, paragraph 24.

should not take place before the said review has been concluded — whether at the stage of Article 93(3) or of Article 93(2).

60. The purpose of the provision as so defined is part of the overall *system* of Article 93 and is inextricably bound up with it. The system is characterized by 'the system adopted in the Treaty for the division of powers by means of the procedure for keeping aids under constant review as described in Article 93'. [20]

61. That division of responsibilities, on which there exists a consistent line of case-law, [21] was summarized by the Court of Justice in *Fédération Nationale du Commerce Extérieur des Produits Alimentaires* as follows: [22]

'As far as the role of the Commission is concerned, the Court pointed out in its judgment in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, at paragraph 9, that the intention of the Treaty, in providing through Article 93 for aid to be kept under constant review and supervised by the Commission, is that the finding that aid may be incompatible with the common market is to be arrived at, subject to review by the Court, by means of an appropriate procedure which it is the Commission's responsibility to set in motion.

As far as the role of national courts is concerned, the Court held in the same judgment that proceedings may be commenced before national courts requiring those courts to interpret and apply the concept of aid contained in Article 92 in order to determine whether State aid introduced without observance of the preliminary procedure provided for in Article 93(3) ought to have been subject to this procedure.'

62. According to the case-law of the Court of Justice, the tasks connected with these roles are *different in kind*. As far as the Commission's task of determining whether or not an aid is compatible with the common market, the Court held as follows in *Steinike and Weinlig*: [23]

'In judging in these cases whether State aid is compatible with the common market complex economic factors subject to rapid

20 — See the judgment in Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557, paragraph 12 *in fine*.

21 — See, in addition to the judgment cited below and the judgment in *Steinike and Weinlig* referred to therein, the judgments in Case 77/72 *Capolongo* v *Maya* [1973] 611, in *Ianelli*, cited in footnote 20, in Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* [1992] ECR I-1847, in Case 17/91 *Lornoy and Others* [1992] ECR I-6523, in Case C-114/91 *Claeys* [1992] ECR I-6559, in Joined Cases C-144/91 and C-145/91 *Demoor and Others* [1992] ECR I-6613, in Joined Cases C-149/91 and C-150/91 *Sanders Adour and Guyomarc'h Orthez Nutrition Animale* [1992] ECR I-3899, in Case C-266/91 *CELBI* [1993] ECR I-4337, in Case C-72/92 *Scharbatke* [1993] ECR I-5509 and in Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185.

22 — Judgment in Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires* [1991] ECR I-5505, paragraphs 9 and 10.

23 — Cited in section 61, first two sentences of paragraph 9.

change must be taken into account and assessed.

Article 93 of the Treaty therefore provides for a special procedure whereby the Commission shall keep aid under constant review.'

63. This means in particular that the Commission has to examine the adverse effects on the common market of national aid measures — distortion of competition and the effects on trade between Member States. Those effects constitute the actual reason for the prohibition of aid laid down in this prohibition: if the scheme of Article 92 were to be compared with the accounts of a company, it would be on the debit side.

64. As far as the tasks of the national courts are concerned, they have to ensure that the aid measure is not implemented before the Commission has carried out the aforementioned review. Consequently, that task is tailored to prevent, through the application of certain 'procedural criteria', [24] the practical importance of the Commission's prerogative to check the compatibility of every new or altered aid with the common market from being impaired by precipitate conduct on the part of the Member States. [25]

65. In any event, it cannot be denied that the checks that are necessary on one side and the other in order to carry out the various tasks overlap to a certain extent. In order to be able to secure the prohibition of implementation provided for in the third sentence of Article 93(3), the national court must find whether a 'grant or alteration of aid' has taken place. In this connection, the Court has consistently acknowledged in its case-law that the concept of aid — which characterizes the field of application of Article 92 et seq. and therefore is to be interpreted and applied in each individual case by the Commission — may also be interpreted and applied by the national courts within the confines of the task conferred upon them.

66. The concept of aid which, accordingly, it is competent to the national courts to review, alongside the Commission, refers to the first part of the causal connection described in Article 92(1) and resulting in distortion of competition or effects on trade between Member States or both. The concept of aid stands for the grant of certain unmarketlike advantages attributable to the State which are liable to improve the economic situation of the undertaking which benefits from them in comparison with that of other undertakings. In other words, it covers the effects to which the State measure gives rise at the level of the

24 — Judgment in *Capolongo*, cited in footnote 21, paragraph 6.

25 — Section 58 above.

undertaking or undertakings which benefit by the advantages. The Court stated as follows in the judgment in *Denkavit*: [26]

'[Article 92(1)] refers to the decisions of Member States by which the latter in pursuit of their own economic and social objectives, give, by unilateral and autonomous decisions, undertakings or other persons *resources* or *procure for them advantages* intended to encourage the attainment of the economic and social advantages sought.' [27]

67. The Court held in *Steinike and Weinlig* [28] as follows:

'In applying Article 92 regard must primarily be had to the *effects of the aid on the undertakings or producers favoured* and not the status of the institutions entrusted with the distribution and administration of the aid.'

68. Whilst that aspect is also to be checked by the national courts, the second part of the causal connection — the relationship between the aid and any distortion of competition and effects on trade between Member States — falls to the Commission alone. Naturally, the Commission's conduct is subject to review by the Community court.

69. Under the same system of Article 93, supervision of existing aid is a matter for the Commission under paragraph 1 of that article. This covers not only aid granted by the original Member States before the EEC Treaty entered into force, to which aid granted by new Member States before their accession is equated. [29] The system of paragraph 1 also applies to aid which, after it has been reviewed by the Commission as new aid and deemed compatible with the common market, is implemented by the Member State concerned. [30] In all those cases, circumstances may arise in the course of time which raise the question whether the aid is still compatible with the common market. However, of those circumstances, only the 'alteration' of (existing) aid triggers the mechanism provided for in Article 93(3) in which the national courts are involved in the manner which I have indicated. Moreover, it is for the Commission constantly to review

26 — Judgment in Case 61/79 *Amministrazione delle Finanze dello Stato* v *Denkavit* [1980] ECR 1205, paragraph 31; see, to the same effect, the definition set out in the judgment in *Banco de Crédito Industrial*, cited in footnote 5, paragraph 13, on the basis of the case-law on the ECSC Treaty.

27 — My emphasis.

28 — Cited in section 61; paragraph 21 of the judgment (my emphasis).

29 — See the judgment in Case C-387/92 *Banco de Crédito Industrial*, cited in footnote 5.

30 — Judgment in Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 12, and judgment in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 25.

those circumstances in the light of the criteria set out in Article 92. [31]

70. All those principles relating to the division of responsibilities, however, are subject to a reservation which the Court has developed in its case-law on the direct effect of the provisions of Articles 92 and 93.

71. The case-law draws a distinction in principle, corresponding to the considerations set out above, between Article 92 and the third sentence of Article 93(3): the third sentence of Article 93(3) has direct effect and gives rise to rights in favour of individuals, which national courts are bound to safeguard; [32] in contrast, individuals are precluded from relying solely on Article 92 in order to assert before a national court that aid is incompatible with Community law and claim that that court should directly or incidentally declare the aid incompatible with the common market. [33]

72. Yet, in the words used by the Court of Justice, an individual is entitled to rely on Article 92 if the provisions of that article

'have been put in concrete form by acts having general application provided for by Article 94 or by decisions in particular cases envisaged by Article 93(2)'. [34]

73. The reference to the case of a decision pursuant to Article 93(2) can be construed as a harmonious addition to the division of responsibilities described above: if the Commission has concluded the review of an aid by reaching a negative decision, the national courts are not only entitled, but obliged, to have regard to that decision, in particular in disputes concerning the recovery of the aid in question. [35]

74. In contrast, I understand the reference to possible acts having general application within the meaning of Article 94 as mitigating *de facto* the principle that Article 92 does

31 — See section 62 above.

32 — See, in particular, the judgment in *Lorenz*, cited in footnote 16, paragraph 8. This has been consistently held since the judgment in Case 6/64 *Costa* v *ENEL* [1964] ECR 585, at 596; see most recently the judgment in *Kirsammer-Hack*, cited in footnote 21, paragraph 14.

33 — See the judgments in *Ianelli*, cited in footnote 20, paragraph 12, *Steinike and Weinlig*, cited in section 61, paragraph 10, *Compagnie Commerciale de l'Ouest*, paragraph 33, *Sanders*, paragraph 25, *Lornoy*, paragraph 29, and *Scharbatke*, paragraph 19, all cited in footnote 21.

34 — Judgment in *Capolongo*, cited in footnote 21, paragraph 6 *in fine*; judgment in *Steinike and Weinlig*, cited in the preceding footnote.

35 — See the judgment in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833.

not have direct effect. Moreover, that is consonant with the case-law on Article 85 of the Treaty. The Court of Justice recognizes that, in areas covered by an implementing regulation within the meaning of Article 87 of the Treaty, [36] Article 85(1) produces direct effect in relations between individuals and creates rights directly in respect of the individuals concerned which the national courts must safeguard. [37] As far as the sphere of aid is concerned, it follows from these considerations that the application of Article 92 by national courts is not completely precluded by the Treaty, but depends on the Council's adopting appropriate provisions under Article 94. There are no such provisions as regards the sector in question here.

75. Obviously, it is not for the Court of Justice to alter the aforementioned rules of the Treaty governing the division of responsibilities. But it accords with the task laid down for it in Article 164 of the Treaty to secure for individuals the legal protection corresponding to the aim of Article 92 et seq. [38]

76. *IV.* Against this background, it should first be observed that the change on the common market on which the French and Netherlands Governments chiefly rely *does not as such* enable one to speak of the grant or alteration of aid. Such effects do not appertain to the concept of aid. Changes in them may, it is true, be caused by the grant or alteration of aid, but this is not necessarily so.

77. 2. In contrast, whether aid has been granted or altered depends, as also emerges from the foregoing considerations, on whether in the portfolio of measures of a Member State providing for advantages (in the nature of aid) for the benefit of undertakings, a change has occurred which has affected the content or extent of those advantages. In this connection, it is clear from a comparison between paragraphs 1 and 3 of Article 93 that the term 'aid' in paragraph 3 is synonymous with the expression 'system of aid' in paragraph 1. It follows that an aid is granted within the meaning of Article 93(3) where a new system of aid is created, whilst the alteration of aid presupposes a substantive change in a system of aid.

78. It is clear that, as regards its aspects of interest in this case, the OND Law underwent no change when the OND's field of activity was enlarged.

36 — If there is no provision within the meaning of Article 87 in the area in question, then, in the absence of a decision of the national authorities under Article 88 or of the Commission under Article 89(2), Article 85(1) is not directly applicable: judgment in Joined Cases 209 to 213/89 *Ministere Public* v *Asjes* [1986] ECR 1425, paragraphs 60 to 69.

37 — Judgment in Case 127/73 *BRT* v *SABAM* [1974] ECR 51, paragraph 16; judgment in Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 45.

38 — This consideration seems to me to inform the judgments in Case C-198/89 *Cook* [1993] ECR I-2487 and Case C-225/91 *Matra* [1993] ECR I-3203, albeit in a different connection.

79. However, a change did take place in so far as the limitation of the OND's activity with regard to exports to other Member States laid down in the agreement with COBAC has now been eliminated. On that ground, it should first be examined whether that limitation is part of the system of aid. If it is, it should next be considered whether that part of the system of aid was altered as a result of the decision on the enlargement of the OND's field of activity.

80. *(a)* Was the limitation of the OND's activity laid down in the agreement between the OND and COBAC part of the system of aid within the meaning of Article 93(1)?

81. *(aa)* For this to be so, it presupposes first that the limitation in question is to be imputed to the Belgian State.

82. Admittedly, the cooperation agreement as such is merely in the nature of an agreement governed by private law between a private undertaking and a public establishment. However, that circumstance is not conclusive. The conclusion of that agreement assumed the existence of a decision to effect the limitation of the field of activity provided for in the agreement. That fact that that decision took the form of a cooperation agreement of the kind in question does not rule out its being imputed to the Belgian State. It is sufficient for the purposes of such imputation that the decision could not have been taken if it had not been sought by the Belgian State. [39]

83. This seems probably to have been the case according to the case-file. Article 15 of the cooperation agreement in the 1982 version produced to the Court provides that it was not to enter into force until the consent of the Minister for Economic Affairs had been obtained.

84. Those considerations suffice in order to hold that the responsibility of the Belgian State for the limitation in question of the OND's field of activity is by no means out of the question. The task of definitively examining this question falls to the national court, which for this purpose can apply the criteria elaborated with regard to the third question.

85. *(bb)* Next it should be considered whether the limitations laid down by the cooperation agreement are *objectively* part of the system of aid within the meaning of Article 93(1).

86. In my view, a system of aid within the meaning of Article 93(1) is to be regarded in

39 — See section 44 above.

general as the act of the Member State which constitutes the basis for the actual grant of the advantages. [40] It may be a decision in an individual case, or, however, a measure providing for the grant of the advantages defined in the measure in a number of individual cases. The constant review provided for in Article 93(1) will usually be necessary only in the latter case.

87. The system of aid also includes any provisions relating to the *use* by the recipient of aid of the funds granted by the public authorities. Depending on its use, the aid may have quite different effects — on the undertaking itself and consequently on the common market. In the instant case, a provision of the system of aid concerning the OND's field of activity would fall into that category of provisions. The limitations laid down therein on the OND's field of activity would constitute at the same time limitations on the use of the aid.

88. In attempting to answer on this basis the question raised earlier, [41] one might be tempted to infer from a comparison of Article 3(2)(1) and Article 10(1) of the OND Law that that law alone constitutes the basis of the advantages and hence the sole system of aid. Seen from that angle, the agreement with COBAC would constitute merely a corporate measure of the OND concerning the utilization of the aid conclusively governed by the OND Law within the framework laid down by Article 3(2)(1) of the OND Law. This is the manner in which the OND and the Belgian Government have presented the matter.

89. Certainly, there would be no objection to such an approach in the case of a private undertaking. In such a case, a distinction would have to be drawn in the way described between the system of aid, on the one hand, and the actions of the undertaking by means of which the undertaking utilizes the advantages of the scheme of aid, on the other.

90. However, in the present case it is doubtful whether such a distinction is appropriate. In particular, I regard it as dubious whether the analysis of the present case can be linked solely with Article 3(2)(1) and Article 10(1) of the OND Law.

91. This is because the Belgian State cannot only determine the legal framework of the activity of the OND, but can involve itself in its very activity by means of the powers described in the opening part of this Opinion. If the limitation of the OND's field of activity contained in the cooperation agreement could be imputed to the Belgian State, this would constitute such involvement.

40 — Cf. the Opinion of Mr Advocate General Darmon in Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6487, sections 23 to 31.

41 — In section 86 above.

92. In those circumstances, the system of aid must not necessarily be confined to the content of the legal provisions, but may also cover other decisions of the Belgian State by means of which it limits the activity of the OND.

93. What decisions may be involved?

94. Doubtless, it would be wrong to regard all decisions of the OND which are capable of being imputed to the Belgian State as being part of the system of aid simply on the ground of the their imputation to the Belgian State. The fact that the State involves itself directly in the management of undertakings was known to the draftsmen of the Treaty, since they laid down in Article 90(1) a special provision for 'public undertakings' (undertakings in respect of which such a possibility exists [42]). However, that provision merely declares Articles 7 and 85 to 94 to be applicable to such undertakings. It was not thought appropriate to subject them to differing provisions.

95. In my view, the limits of the system of aid are to be determined with the assistance of the criteria to be elaborated below which must be fulfilled *in addition to the requirement that the measure is to be imputed to the State*.

96. As appears from the judgment in *Denkavit* cited above, [43] an important characteristic of aid is that the Member State uses it to attain its own economic and/or social objectives. That part of the definition of the concept of aid dovetails with the conception underlying the Treaty, according to which the State and undertakings play different roles on the market: the State determines its economic and social policy, whilst undertakings pursue private interests, namely directly towards profit-making, within the framework of that policy. [44]

97. The following demarcation line follows as regards the present case: if the measure in question constitutes the expression of the State interest in defining its economic and social policy, it is part of the system of aid, as it has effects on the scope of the aid. If, in contrast, it constitutes the expression of a commercial interest, it is a corporate measure, which has effects only on the nature and extent of the utilization of the system of aid.

42 — See the ninth recital in the preamble to Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, OJ 1980 L 195, p. 35.

43 — Section 66 above and footnote 26.

44 — Cf. the Opinion of Mr Advocate General Darmon in Case C-185/91 *Reiff* [1993] ECR I-5823, paragraphs 33 to 38, which contains examples from the case-law confirming this analysis of the EC Treaty.

98. How can it be determined which of these two alternatives applies here?

99. In my estimation, it depends on the circumstances of the particular case. The present case exhibits the particularity in this regard that the OND could, in principle, have operated under the OND Law in the field which the cooperation agreement reserved to COBAC and, what is more, in so doing it could have benefited by the advantages provided for in that law.

100. In those circumstances, it should be asked, for the purposes of the demarcation between measures in the economic and social interest of the State and measures in the commercial interest of undertakings, whether a private undertaking of comparable size to the public establishment in question could have been induced in a similar situation to restrict its activity in the same way.

101. This test is based on the 'private investor' test which has been developed for ascertaining whether or not public injections of capital constitute aid in a given case. [45] In fact, there is a parallel between the two cases. In both cases, it is necessary to categorize a State measure which, on the face of it, could be classed either as an aid measure or as a commercial measure.

102. In applying this test, the national court will have to examine how the types of risk reserved to COBAC (and therefore withdrawn from the OND) were to be commercially assessed. The same assessment will have to be made of the types of risk left to the OND (in particular, political risks).

103. This prompts me to propose to the Court that the mechanism of Article 93 should be supplemented by an aspect of cooperation between the national courts and the Commission. It is unusual within the division of tasks described above [46] for a national court to undertake economic assessments of this sort, especially in a strongly internationally oriented sector. That division

45 — See, in particular, the judgments in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 14, Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 29, Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraphs 19 to 23, Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 8.

46 — Sections 60 to 74 above.

of tasks is evidently designed to couple the legal protection afforded by Article 93(3) of the Treaty with clear, easily managed criteria. Questions of economic assessment should, in principle, be reserved to the Commission, whilst in the case of questions relating to the interpretation of Community law it is intended that the avenue afforded by Article 177 should be available. In addition, in the instant case, there is the fact that, in order for the Commission to be able to form a definitive judgment as to whether the legislation and practice relating to the OND comply with Article 92, it must also carry out a commercial assessment of the transactions (types of risk) which benefit by the aid. In any event, it must carry out that assessment with the aim of determining the effects of the aid on the common market, in so far as they remain after the amendment of the OND Law in 1991. In so doing, it must take account of the fact that in its 1991 version the OND Law conferred a special status on transactions (in particular, taking them outside the State guarantee) which, depending on their nature and duration and the severity of the risk, are usually insured by private companies which do not work for the account of the State or with a State guarantee. Furthermore, since in the present proceedings the Commission characterized the extension of the OND's field of activity — for the first time [47] — as a case covered by Article 93(3), it is not excluded that the Commission will exercise the rights of redress conferred on it by the judgment in the *Boussac* case. [48] For that purpose, too, it would have to examine whether aid has been granted or altered in this case.

104. Thus, the national court is faced with complex economic questions in an area in which its responsibilities overlap with those of the Commission which cannot be resolved by a reference for a preliminary ruling. I therefore propose that the *case-law relating to competition law in such cases* be extended to cover the present case.

105. That case-law is based on the consideration that it is useful in such cases for the national court to know the criteria which the Commission has employed or contemplates employing. [49] When choosing among the various forms of cooperation recognized to that end, [50] account must be taken of the fact that proceedings under Article 93(3) before the national court have the function of safeguarding the Commission's prerogatives and therefore should be concluded as quickly as possible. It seems therefore to be out of the question that the proceedings should be suspended until the Commission has taken a decision. Since no decision of the Commission in a parallel case is known it is also not

47 — In the correspondence between the Belgian Government and the Commission, the Belgian Government argued from outset that the aid in question was existing aid. The Commission did not question that view.

48 — Judgment in Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 18 to 23.

49 — See the judgments in Case 48/72 *Brasserie de Haecht* v *Wilkin and Janssen* [1973] ECR 77, Case 127/73 *BRT* v *SABAM* [1974] ECR 51, Case 99/79 *Lancôme* v *Etos* [1980] ECR 2511 and *Delimitis*, cited in footnote 37.

50 — See Notice 93/C 39/05 on collaboration between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (OJ 1993 C 39, p. 6), in which the Commission sets out the various possibilities on the basis of the judgments cited in the previous footnote.

meaningful to refer the national court to such a decision.

106. In contrast, I consider that the decision in *Delimitis* [51] can be applied to the present situation. In that case the Court held that the national court may, within the limits of the applicable national procedural rules and subject to Article 214 of the Treaty,

'contact the Commission where the concrete application of Article 85(l) or of Article 86 raises *particular difficulties*, in order to obtain the *economic* and legal *information* which that institution can supply to it'. [52]

107. The Court went on to hold that

'Under Article 5 of the Treaty, the Commission is bound by a duty of sincere cooperation with the judicial authorities of the Member State, who are responsible for ensuring that Community law is applied and respected in the national legal system (order of 13 July 1990 in Case C-2/88 *Zwartveld* [1990] ECR I-3365, paragraph 18).'

108. It must be emphasized that these considerations are based on the *practical utilization* of such information, since such information can be neither definitive nor binding for the national court.

109. *(b)* If the national court finds in the light of those criteria that the limitation of the OND's field of activity as determined by the cooperation agreement is part of the system of aid, it will have in turn to be examined whether that part of the system of aid was altered by the decision enlarging the OND's field of activity.

110. In that regard, the national court assumes for the purposes of the first question that the said enlargement of the OND's field of activity was dependent on the authorization of the State and hence is to be imputed to the State. The national court must check those assumptions in the light of the criteria elaborated with regard to the third question.

111. Subject to that reservation, the said 'authorization' would constitute the *grant or* (better) *the alteration* of aid, if the limitations laid down in the cooperation agreement were part of the system of aid. Unlike

51 — See footnote 37.

52 — Paragraph 53 of the judgment in *Delimitis*; my emphasis.

the limitation of the OND's activities, the *enlargement* of those activities could only be effected by *intervening* in the system created by the Belgian State itself *by an act in the sphere of economic and/or social policy.*

112. In less abstract terms, that intervention would have consisted in no longer restricting the financial support for credit-insurance transactions, which, for their part, are intended, according to Article 3 of the OND Law, to promote exports, to certain export risks enumerated in the cooperation agreement and in allowing them to benefit other export risks as well as a result of the enlargement of the OND's field of activity.

113. *V.* The reply to the first question should therefore be as follows:

A decision of a Member State to authorize, after the entry into force of the EEC Treaty, a public establishment, which previously engaged only incidentally in credit insurance for exports to other Member States, to exercise that activity without restrictions so that the aid which was granted by that State to the establishment under legislation predating the entry into force of the EEC Treaty now applies to the exercise of that activity as thus extended, is to be regarded as the grant or alteration of aid,

if the decision on the establishment's former — narrower — field of activity is to be imputed to the State and

if a private undertaking of comparable size to the public establishment in question in a similar situation would not have taken such a decision to restrict its activity on commercial grounds.

The second question

114. In its second question, the Cour d'Appel asks whether the two-month period from receipt of notification laid down in the *Lorenz* case-law [53] during which the Commission is to act and on the expiry of which the aid becomes existing aid if the Commission fails to act, can start to run even in the absence of notification if the Member State concerned answers questions from the Commission concerning particulars of the system of aid at issue.

53 — Case 120/73 *Lorenz* v *Germany*, cited in footnote 16, which was confirmed, for instance, in Case 84/82 *Germany* v *Commission*, cited in footnote 30.

115. In this connection, the Cour d'Appel wishes the following features of the present case to be taken into account:

(i) the new aid was the subject of a complaint to the Commission from a third party;

(ii) in the course of its preliminary examination of the aid, the Commission addressed to the Member State concerned a request for information in which it stated that, in the event of failure to reply or receipt of an unsatisfactory reply before the end of the period allowed, it would be obliged to initiate the procedure laid down by Article 93(2);

(iii) the Member State complied with that request.

116. Since this question contemplates an extension of the principles set out in *Lorenz*, it is necessary to determine the *ratio decidendi* of that judgment.

117. The Court states as follows in the relevant passages of the judgment:

'According to the last sentence of Article 93 the Member State shall not put its proposed measures into effect until this procedure has resulted in a final decision.

The objective pursued by Article 93 (3), which is to prevent the implementation of aid contrary to the Treaty, implies that this prohibition is effective during the whole of the preliminary period.

While this period must allow the Commission sufficient time, this latter must, however, act diligently and take account of the interest of Member States of being informed of the position quickly in spheres where the necessity to intervene can be of an urgent nature by reason of the effect that these Member States expect from the proposed measures of encouragement.

In the absence of any Regulation specifying this period, the Member States cannot unilaterally terminate this preliminary period which is necessary for the Commission to fulfil its role.

The latter, however, could not be regarded as acting with proper diligence if it omitted to define its attitude within a reasonable period.

It is appropriate in this respect to be guided by Articles 173 and 175 of the Treaty which, in dealing with comparable situations, provide for a period of two months.

When this period has expired, the Member State concerned may implement the plan, but the requirements of legal certainty involve that prior notice should be given to the Commission. [54]

...

Aid implemented, during the Commission's silence, after a period necessary for its preliminary examination, is thus subject, as an existing aid, to the provisions of Article 93(1) and (2).' [55]

118. The Court concluded from this as follows:

'If the Commission, after having been informed by a Member State of a plan to grant or alter aid, fails to initiate the contentious procedure provided for in Article 93(2), by giving notice to the Member State concerned to submit its comments, the latter may, at the expiration of a period sufficient to enable the aid to undergo a preliminary investigation, grant the proposed aid, provided that it has given prior notice to the Commission, and this aid will then come under the system of existing aids.' [56]

119. It follows from the construction of the above that two requirements must be met in order to start the two-month period running within which the Commission should act.

120. *First*, notification must be given which puts the Commission in a position to decide what action to take with knowledge of the facts.

121. *Secondly*, the Member State concerned must have a justified interest in the Commission's acting swiftly. This presupposes that

54 — Paragraph 4 of the judgment in *Lorenz*.

55 — Paragraph 5 of the judgment in *Lorenz*.

56 — Paragraph 2 of the operative part and paragraph 6 of the judgment.

the Member State makes the implementation of the aid dependent upon the attitude taken by the Commission, that is to say, that it refrains from implementing the aid pending the outcome of the preliminary examination by the Commission. The situation is different if the Member State implements the aid contrary to Article 93(3). Logically, once the aid is completely implemented, the two-month period ceases to apply.

122. The national court's question raises the problem as to whether *for the purposes of the first requirement* the answer to a request for information from a Member State may be equated with notification. If that were the case, as the OND and the Belgian and French Governments argue it is, it could only result in the application of the *Lorenz* formula, if the second of the two aforementioned requirements were satisfied as well. However, that is not the case here, since the OND's field of application was extended without the Belgian State's having at any time made that action dependent on a Commission decision. On the contrary, since the beginning of its correspondence with the Commission it took the view that the case related to existing aid within the meaning of Article 93(1). Consequently, even if the informative value of the replies to the Commission's request for information was such as to enable it to be treated as notification, this case would not be on all fours with the case contemplated by *Lorenz*.

123. It is in that light, too, that the argument that the Belgian Government and the OND base on the judgment in the *Boussac* case [57] must be examined.

124. In the *Boussac* judgment, the Court afforded the Commission certain means in cases where a Member State fails to fulfil its obligations under Article 93(3). Paragraphs 19, 20 and 21 of that judgment read as follows:

'Once it has established that aid has been granted or altered without notification, the Commission therefore has the power, after giving the Member State in question an opportunity to submit its comments on the matter, to issue an interim decision requiring it to suspend immediately the payment of such aid pending the outcome of the examination of the aid and to provide the Commission, within such period as it may specify, with all such documentation, information and data as are necessary in order that it may examine the compatibility of the aid with the common market.

The Commission has the same power in cases where it has been notified of aid but the Member State in question, instead of awaiting the outcome of the procedure provided for under Article 93(2) and (3) of the Treaty, has instead proceeded to put the aid into effect, contrary to the prohibition contained in Article 93(3).

57 — Footnote 48.

Where a Member State has complied in full with the Commission's order, the Commission is obliged to examine the compatibility of the aid with the common market, in accordance with the procedure laid down in Article 93(2) and (3) of the Treaty.'

125. The OND and the Belgian Government conclude therefrom that the 'normal procedure' under Article 93(2) and (3) and hence also the *Lorenz* case-law apply where the Commission learns of a new, unnotified aid and the Member State adopts a 'cooperative attitude' during the preliminary examination of the aid. In my view, that conclusion is not correct. According to the clear wording of paragraph 21 of the judgment, the Commission is obliged to 'examine the compatibility of the aid with the common market, in accordance with the procedure laid down in Article 93(2) and (3) of the Treaty,' only where 'a Member State has *complied in full with the Commission's order*'. [58] This assumes, as can be seen by comparing that passage with paragraphs 19 and 20 of the judgment, that the oMember State has suspended the grant of aid — even if only after it has been ordered to do so by the Commission.

126. The national court's second question should be answered accordingly.

C — Conclusion

127. In the light of the whole of the foregoing, I propose that the reply to be given to the questions referred for a preliminary ruling by the Cour d'Appel, Brussels, should be as follows:

(1) A decision of a Member State to authorize, after the entry into force of the EEC Treaty, a public establishment, which previously engaged only incidentally in credit insurance for exports to other Member States, to exercise that activity without restrictions so that the aid which was granted by that State to the establishment under legislation predating the entry into force of the EEC Treaty now applies to the exercise of that activity as thus extended, is to be regarded as the grant or alteration of aid,

58 — My emphasis.

(i) if the decision on the establishment's former — narrower — field of activity is to be imputed to the State and

(ii) if a private undertaking of comparable size to the public establishment in question in a similar situation would not have taken such a decision to restrict its activity on commercial grounds.

(2) Article 93 of the Treaty is to be interpreted as meaning that the two-month period laid down in the judgment in Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471 — on the expiry of which, if the Commission fails to act, a new aid measure becomes subject to the rules on existing aid if its implementation has previously been indicated — does not start to run unless the Member State has suspended the aid measure pending the outcome of the Commission's preliminary examination.

(3) In order to impute a measure of a public establishment to a Member State for the purposes of Article 92 et seq. of the Treaty, if is sufficient if

(a) under the provisions in force, the measure was the subject of a directive from the services of the Member State which was binding on the establishment, or

(b) the measure was decided upon by the administrative organ of the establishment without the State's having exercised its right to prevent that decision from becoming binding.