# OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 18 June 1987

*Mr President,*
*Members of the Court,*

Rijn-Schelde-Verolme Machinefabrieken en Scheepswerven NV ('RSV'), was at all material times the ultimate parent company of a large Dutch group engaged in a variety of manufacturing and engineering operations. It brings this action under Article 173 of the EEC Treaty to challenge Commission Decision 85/351 dated 19 December 1984 (OJ 1985, L 188, p. 44) which found in Article 1 that certain aid granted by the Netherlands to RSV was incompatible with the common market under Article 92 and ordered the Netherlands to recover the aid (Article 2) and to inform the Commission within two months of notification of the decision of the steps taken to comply with it (Article 3).

It is common ground that RSV was in difficulties before 1979 and that Government aid had been granted to it with the Commission's approval. By letter of 1 June 1979, the Minister for Economic Affairs told the President of the Second Chamber of the States-General that RSV had concluded that it must withdraw from large-scale shipbuilding, offshore equipment manufacturing and repairing carried out by various subsidiaries including one called 'VDSM'. It had therefore been decided that the RSV group should be relieved, retroactively to 1 January 1979, of the financial consequences of continuing those operations pending a final decision by the State whether to take them over. This, as well as other restructuring to be carried out at RSV, would require further State aid.

The last paragraph of the letter reads:

'The aid offer described in this letter will be set out in detail in a letter to RSV. In that connection, I shall reflect as to the appropriate formulation of the aid offer and of the conditions. Those conditions may also cover matters other than those mentioned in this letter if that appears desirable to me in order to attain the aim pursued by the aid. Subsequently, the aid offer will have to be approved by the European Commission. As long as such approval is not forthcoming, the offer is in no way binding. Other conditions considered appropriate in the light of the views stated by the European Commission may be laid down.'

The parties disagree as to the effect of this letter. It is agreed, however, that it was sent to the Commission and that the Commission took no action following its receipt.

Shortly afterwards, the Government decided that it would take over the large shipbuilding and heavy offshore engineering sections of RSV and that a company wholly owned by the State (to be called ROS, an acronym for Rotterdam Offshore en Scheepsbouwcombinatie) should be set up for that purpose. Meanwhile, RSV was to continue those activities on behalf of the State. In early 1980, the Government changed its mind. ROS was not incorporated. The Government decided not to pursue the activities in question and asked RSV to oversee the orderly completion of work in progress, lay-offs and closures. It was understood that that would be underwritten by the State.

The Minister for Economic Affairs put forward proposals for aid further to that already granted in a letter to RSV dated 17 March 1980, and in modified form by letter of 23 April 1980. The proposals in the latter were accepted by RSV in writing. The offer as accepted was to pay HFL 280 million in respect of RSV's losses since 1 January 1979 relating to large shipbuilding and offshore construction and the cessation of shipbuilding by VDSM subject to repayment if the losses proved to be less. The State further undertook to contribute 50% of such losses between HFL 330 and 400 million and 80% of losses above HFL 400 million. The possibility was left open that the State's contribution would be higher if the Dutch National Investment Bank advised the Minister that such higher losses would result in an unacceptable accounting position for RSV. A further HFL 30 million was to be paid in respect of the costs of administration and of the reduction of capacity. Moreover, interest-free advances were to be made available, the value of the interest saved being put by RSV at HFL 20 million. The total of these three specific sums is thus HFL 330 million (280 plus 30 plus 20) apart from any amounts which might subsequently fall to be paid under what has been described as the open-ended or blank cheque arrangement.

It is undisputed that those letters were never sent to the Commission and were not seen by the Commission prior to these proceedings.

On 19 November 1980, a multilateral meeting between representatives of the Commission and the Member States was held to discuss shipbuilding. One of the topics discussed was the Dutch Government's intention to grant further aid to RSV. Although the Commission has not supplied the Court with the minutes of that meeting, it stated in its reply to the second of the Court's written questions that in October 1980 it had received from the Dutch Government a document headed 'Problems facing RSV' which set out proposed new aid to RSV on the basis of which the Commission sent out a telex to the other Member States dated 4 November 1980 in advance of the multilateral meeting. Following that meeting, the Dutch Government formally notified the Commission of the proposed aid by telex of 12 December 1980 and letter of 26 February 1981, which seem to incorporate by

reference the earlier document and its annex which show that, apart from other sums, HFL 310 million were required to be made available for the dismantling of large shipbuilding at VDSM. It also seems that the figure of 310 million is the same as the 280 plus 30 million referred to in the letter of 23 April 1980.

By letter of 26 March 1981, the Commission informed the Dutch Government that, taking into account the Member States' points of view as expressed at the multilateral meeting, it had no objection to the aid plan proposed in the telex of 12 December 1980 and the letter of 29 February 1981.

The losses relating to large shipbuilding and heavy offshore engineering ('ROS losses') however continued to rise and RSV and the Ministry came to a new arrangement contained in a letter of 6 April 1982. The State put an upper limit on its contribution to the ROS losses. A distinction was made between losses connected with the manufacture of an offshore dredging platform known as the 'Simon Stevin' and other ROS losses.

For the other ROS losses, the State's contribution was limited as follows. The first HFL 330 million were said to be already covered. The State now undertook to pay 100% of losses between HFL 330 and 400 million, 80% of losses between HFL 400 and 470 million and nothing more (thus a further HFL 126 million in all). For the Simon Stevin losses, the State agreed to pay 80% of losses up to HFL 210 million, thus a maximum exposure of HFL 168 million. In total, therefore, the April 1982 arrangement limited the State's contribution to the relevant losses over HFL 330 million to HFL 294 million.

Of that sum, HFL 47.5 million had already been paid on 29 December 1981 under the April 1980 arrangements, since it was clear in 1981 that the ROS losses would be well over HFL 400 million. HFL 238.5 million were paid on or about 29 April 1982 (wrongly stated in the decision to be 2 April 1982). The bulk of the aid was thus paid before the package had been notified to the Commission. The remaining eight million were, it seems, never paid. Thus the ROS losses cost the Netherlands at least HFL 596 million (310 plus 47.5 plus 238.5) in cash and HFL 20 million in foregone interest, or HFL 616 million in all.

The letter of 6 April 1982 was not itself sent to the Commission. However, the Government notified the new arrangement by telex of 19 July 1982, transmitted to the Commission by the Dutch Permanent Representation in Brussels on 20 July 1982. It was said that the final Government contribution to the ROS losses exceeded by HFL 294 million what was foreseen in the middle of 1980, and reference is made to the telex of 12 December 1980. That figure seems to me to be too low if reference is made to the 1980 correspondence. However, the Government stated that RSV was entitled to charge the ROS losses to the State by virtue of the letter of 1 June 1979 which had been sent to the Commission. The Government went on to explain what had happened subsequently, namely the decision not to set up ROS and to ask RSV to supervise the carrying out of the orders obtained in the name of ROS; without referring specifically to the letters of March and April 1980 or of April 1982, the

Government set out the details of its contribution to the ROS losses. It was said that the total amount of the Government's liability would be limited to HFL 680 million and any further losses would have to be borne by RSV.

By telex of 29 July 1982 the Commission asked whether and, if so, when the aid had been made available to RSV and also asked for a detailed statement of RSV's short and medium-term prospects. The last sentence of the telex stated that the information was required for a correct appraisal of the aid and therefore the period laid down for the enquiry procedure was suspended until it had been provided.

The Government replied by telex of 12 August admitting that HFL 286 million had been made available to RSV at the end of April 1982 (though in fact 47.5 million had been paid in December 1981) in pursuance of the State's obligation to contribute towards the cost of phasing out large-scale shipbuilding though the largest part of the sum had been paid in connection with the cancellation of the Simon Stevin platform. The Government added that cautious optimism for the future of the RSV group as a whole was justified.

By letter of 8 October 1982, the Commission informed the Dutch Government that it was opening the Article 93 (2) procedure in respect of the aid. The Commission noted that the Government had failed to notify the aid before paying it out and reserved the possibility of applying the procedure laid down for such breach of the rules of the Treaty.

The Government had a meeting with the Commission at the end of October 1982 and sent the Commission a telex of 7 December 1982 in which it emphasized the unusual and urgent nature of the aid, the threat to the continued existence of the RSV group and also of Volker Stevin, the proposed purchaser of the Simon Stevin platform, which would have led to the loss of 43 000 jobs of which 25 000 were in the Netherlands.

In January 1983, the Dutch Government decided to grant no more aid to RSV. Immediately thereafter, RSV filed for an order for suspension of payments (surseance van betaling) which was granted on 9 February 1983. Even subsequent to this, however, it seems that loans were made available to the group.

The Government had subjected the aid which it had given to the condition that it would be repaid if RSV went into liquidation. It appears from RSV's answer to the fifth of the Court's written questions that the State is seeking to recover a total of HFL 892 934 037.04 plus interest and costs from RSV. Of that amount, HFL 576 million is said to relate to the ROS losses since April 1983. Although it seems to me that the figure should be HFL 596 million as already stated the discrepancy is not material for present purposes. RSV has attacked the administrative orders requiring repayment and the matter is still before the national courts.

In the present case, RSV thus challenges a decision taken over two years after the opening of the Article 93 (2) procedure, namely on 19 December 1984.

The Commission raises an issue as to the admissibility of the action. It suggests that, since RSV will be obliged to repay the aid in any case, it has no interest in bringing the action. RSV replies that the recovery obligation imposed by the decision is relied on by the Government in the national proceedings and, if RSV were to win on the domestic law grounds raised in those proceedings, the decision would constitute the Government's sole justification for claiming repayment. It therefore has an interest in challenging it. That I think is right but, in any event, it seems to me that a decision ordering a Member State to recover substantial sums of money paid by way of incompatible aid to an undertaking is of direct and individual concern to that undertaking within the meaning of Article 173 of the EEC Treaty. The action is in my view clearly admissible.

RSV challenges the decision on eight grounds. The parties followed this scheme in their pleadings and it is reflected in the report for the hearing. I shall, therefore, follow it here.

The first argument is that the recovery obligation is illegal because the 1982 arrangements did not have to be notified to the Commission under Article 93 (3). This is because, according to RSV, the April 1982 arrangements only modify the 1980 arrangements (by limiting them rather than extending them) which in turn flow from the letter of 1 June 1979 which the Commission approved. The Commission argues, rightly in my view, that the letter of 1 June 1979 is not an agreement, nor does it institute an aid measure: rather, it is the statement of an intention to grant aid, the details of which were to be set out in a letter to RSV. The Minister described that letter as such a statement in his letter to RSV of 17 March 1980. In any case, the Commission did not approve that letter. Nothing that happened subsequently seems to me to prevent the Commission from saying in these proceedings that it took the letter at its face value and that its silence is not to be taken as approval of an aid programme therein set out. Moreover, it is to my mind clear that the Commission was not aware of the open-ended arrangements made in the letters of 17 March and 23 April 1980 at that time or when the April 1982 arrangements, which for the first time gave the Commission specific details, were notified to it. There was no justification for the Ministry of Economic Affairs to tell RSV (as it did in its letter of 3 April 1981) that the Commission had approved the aid set out in those two letters. In any case, Article 93 (3) requires Member States to notify 'plans to . . . alter aid' and on any view the 1982 arrangements were alteration of aid already given or promised. It seems to me that there is no substance in RSV's first argument and I would reject it.

RSV's second ground of criticism is that the Commission took over two years from the opening of the contentious procedure under Article 93 (2) to the decision. In so doing, the Commission has failed to show the

necessary diligence, has overlooked the importance of legal security and has exceeded the bounds of proper administration, in particular by ordering the recovery at the end of such a long period during which time RSV, as well as its shareholders and creditors, depended on the aid and were led to think that it properly belonged to RSV.

The Commission's response is that during the 26-month period it regularly consulted the Dutch Government on the developments in the liquidation of RSV. Refraining from taking a decision shows, not lack of diligence or failure to observe the rules of good administration, but an appreciation of the difficulties caused by the decline of a large group. RSV's situation was so complex and the implications of its collapse so serious that it was impossible to reach a decision earlier.

RSV retorts that the Commission's delay has caused more problems, not fewer, in the liquidation procedure. In any case, as already explained, the Dutch Government had demanded the repayment of several million in respect of ROS losses (which included the sums with which the decision is concerned) in early 1983, over 18 months before the decision was taken. RSV seems to proceed on the basis that the decision was taken by the Commission to help the Dutch Government, which requires a recovery order to be able to obtain the repayment of what it sees as wasted public money spent on RSV. The Commission was originally tempted to let the matter die quietly but was then urged by the Dutch Government to take a decision.

In my view, the Commission is not entitled to open an Article 93 (2) procedure and then leave it in abeyance or postpone a decision indefinitely. It must go on to reach a decision within a reasonable time, in the light of the circumstances prevailing, both in order to remove such part of the aid as is incompatible with the common market and to let the persons involved know where they stand. That this in inherent in the procedure seems to me to be accepted by the Court in Case 59/79 *Fédération nationale des producteurs de vins de table et vins de pays* v *Commission* [1979] ECR 2425 where it is said: 'If the Commission decides to initiate a procedure pursuant to the provisions of Article 93 of the EEC Treaty it has a reasonable period within which to complete this procedure'.

Clearly the Commission has to investigate the facts and make an assessment and this will take time. However, in the present proceedings, the Commission has not been able to justify, or show any advantage resulting from, the extremely protracted period during which it took no decision. On the contrary, its arguments under other heads of RSV's claim suggest that, in its view, there was never any hope of the aid being declared compatible with the common market. A reply should have been given far

earlier so that all the parties knew where they stood. In those circumstances, its delay is unjustified. The Commission's breach of this requirement to proceed with due diligence is more than merely formal: it has a practical consequence which defeats the object of Articles 92 and 93. It perpetuates the effect of incompatible aid on the market and risks leaving the parties in a false position as with the passage of time, even if they cannot assume that silence amounts to approval affirmatively, they may not unreasonably assume that the aid is not objected to. It does not seem to me possible to say that RSV was not affected by the delay. Even discounting that it had been told (wrongly) in April 1981 that the aid was approved by the Commission, it was entitled to proceed on the basis that if the Commission did not diligently give notice or at any rate warning that the aid was not or might not be approved, the aid would not have to be repaid.

The decision in my view should be annulled on this second ground that there was a failure to reach a decision in anything approaching a reasonable time.

RSV's third argument, which structurally should precede the second, is that the Commission failed to open the Article 93 (2) procedure within two months of notification, which it puts at 19 July 1982. The aid was in fact notified to the Commission on 20 July 1982, the date on which the Dutch Government's telex of 19 July 1982 was transmitted to it by the Dutch Permanent Representation in Brussels. The parties seem to agree that the Article 93 (2) procedure was opened on 8 October 1982, the date on which the Commission wrote to the Dutch Government announcing that it was opening the procedure and that the date of 14 October given in the decision is erroneous. RSV takes this period of two months, as I understand it, from the group of cases decided on 11 December 1973, notably Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471 and from Case 84/82 *Germany* v *Commission* [1984] ECR 1451.

Those cases were concerned with Article 93 (3) of the Treaty, by which plans to grant or alter aid must be notified to the Commission. The Court accepted in *Lorenz* that the Commission must, for the purposes of a preliminary assessment under Article 93 (3), have a reasonable time to consider whether a proposed aid is compatible with the common market. In deciding what is a reasonable time guidance is to be obtained from Articles 173 and 175 of the Treaty which in comparable situations provide for a period of two months within which proceedings must be taken. If before the end of the period the Commission has not been able affirmatively to approve the aid, it must open the Article 93 (2) procedure or a Member State, after notice to the Commission, may implement the aid measures which then become existing aids for the purposes of Article 93 (2) of the Treaty. In Case 84/82 *Germany* v *Commission*, the Court referred to the

period 'normally required' for a preliminary examination under Article 93 (3) and it may be that in an exceptional case a longer period may be justified.

This is not, however, a case where planned aid was notified. The aid had already been granted or existing aid altered before notification. Instead of seeking a declaration that the aid had been introduced in breach of Article 93 (3) of the Treaty, the Commission by letter of 8 October 1982 told the Government that it had decided to open the procedure provided for in Article 93 (2) and it invited the Government to present its observations within two months. Other Member States were notified on 10 November 1982 and third parties by notice in the Official Journal on 20 November 1982.

The Commission argues first that the *Lorenz* decision does not apply to aids which have been implemented, but only to duly notified plans for aids.

It is correct that *Lorenz* was dealing only with plans for aids. It seems clear that where a plan is notified the Member State cannot wait indefinitely to know whether it may implement the aid; for that reason (which seems to me to be the basis of the decision) the Court required that the Commission must define its position within two months of the plan being notified. In the absence of approval of the aid, the Article 93 (2) procedure must be opened or the Member State may on notice implement the aid.

Where aid has been already given, though not in accordance with Article 93 (3) of the Treaty and notice is subsequently sent to the Commission, the Member State is not held up. It can be said that there is not the same urgency to know if the aid is approved and that if aid has been operated for some time it may take the Commission longer to decide whether the aid is approved than if it has to consider plans for aid.

Nevertheless things cannot be allowed to drag on indefinitely. It seems to me, that, by analogy with the *Lorenz* decision in relation to notified aids, the Commission must come to a preliminary conclusion with due diligence. It must, within a period which, on the basis of the *Lorenz* decision, I would accept to be normally two months, decide whether the aid is prima facie compatible or not. If it is not satisfied that the aid is compatible it must then with no less diligence open the Article 93 (2) procedure. For my part I do not think that this procedure must necessarily be instituted within the two-month period, though it must be instituted without unjustified delay. In the present case whether (as I think) the Article 93 (2) procedure was opened by the

letter of 8 October 1982 when the Netherlands Government was asked to submit its observations, or whether it was opened on 10 or 20 November 1982 when the Member States and third parties were respectively notified, the procedure was opened within a reasonable time in all the circumstances of the case and without vitiating delay. There is no suggestion here that anyone was prejudiced by the delay to 8 October or 20 November 1982. In a case where prejudice is shown (as in *Germany* where Member States were not properly consulted or in *Lorenz* where a Member State was not able to proceed to implement aid because of the delay) different considerations may arise.

I would therefore not accept the third argument as a ground for quashing the decision.

If I had come to the opposite view, namely that the procedure must be opened within two months of notification, I would not accept the Commission's argument that a request for information stops time running until the answer is received as otherwise the administration could in all cases and more than once extend time by asking for information.

RSV's fourth argument, based on Article 190 of the EEC Treaty, is that the reasoning of the decision is insufficient or at least incomprehensible and/or contradictory.

A number of detailed points are put forward. There are, as I see it, four principal objections. The first three are that the Commission does not (a) state the grounds on which it asserts that the measures in question constituted 'State aid' within the meaning of Article 92 (1), (b) does not explain how those measures affect inter-State trade and competition, and (c) gives inadequate reasons for refusing to exempt the measure under Article 92 (3), especially since the earlier measures had been exempted.

The Commission's reply to the first is that, when a Member State considers that a measure is an aid and notifies it as such and the Commission agrees, there is no need to spell out why. In any case, the Commission considers it self-evident that for the State to advance HFL 294 (or 286) million to RSV constitutes a State aid.

I agree with the Commission. There could be no clearer case of 'aid granted by a Member State' than the direct payment of large sums to cover an undertaking's debts. There was no issue between the Commission and the Dutch Government on that score, and RSV does not contest, as a matter of substance, the payment's characterization as aid (as opposed to its effect on trade and competition and its compatibility with the common market, on which there is an issue between the parties); rather, it alleges that the Commission should have made a specific finding to that effect, instead of merely implying it, and that failure to do so constitutes a fatal lack of reasoning. This is too formalistic. The Commission was here entitled to take for granted what was not contested by the Dutch Government and is not now contested by RSV, namely that the sums paid as aid by the government are indeed aid.

On the second and third objections, whether the decision contained sufficient reasoning to demonstrate the aid's effect on

trade and competition and to justify the refusal of exemption, the Commission is reticent if not silent.

In Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek BV* v *Commission* ('*LPF*'), judgment of 13 March 1985, the Court stated that Article 190 requires reasoning which is 'sufficient to permit a review by the Court and gives those concerned an appropriate opportunity to express their views on the accuracy and relevance of the alleged facts and circumstances' (paragraph 21). In that case, whilst satisfied that the decision's reasoning was sufficient on the question whether the measure constituted aid, the Court held (paragraphs 22-24) that there was no reasoning on the criteria relating to the effect on trade or distortion of competition within Article 92 (1) because 'the contested decision does not contain the slightest information concerning the situation of the relevant market, the place of [the applicant] in that market, the pattern of trade between Member States in the products in question or the undertaking's exports'. The reasoning on the inability of the aid to qualify for exemption under Article 92 (3) (c) was also held to be defective since the Commission confined itself to a recitation of its belief that the aid would not facilitate the development of certain economic areas and that the maintenance of capacity in the relevant sector was not in the common interest: it did not indicate whether the Commission took into consideration the fact that the aid was part of a restructuring programme under which LPF was to diversify into high-quality products, reducing its capacity and market share.

The obligation is not necessarily to give full reasoning on all points but to give sufficiently clear reasoning on the essential points. Thus in the judgment of 10 July 1986 in Case 40/85 *Belgium* v *Commission* ECR 2263, the Court approved the Commission's reasoning on the aid's effect on trade and competition although it was confined to the following sentences:

'Such aid intended to preserve production capacity which market forces would ordinarily cause to go out of business, allowing expansion by more efficient competitors, is likely to have a particularly adverse effect on competitive conditions. The company exports over 70% of its output of ceramic sanitary ware to the other Member States. Hence the aid is likely to affect trade between Member States and distort competition within the meaning of Article 92 (1)...' (Official Journal 1985, L 59, p. 22).

Even on that basis, and without requiring too detailed an exposition of the Commission's reasoning, I am of the opinion that the contested decision does not satisfy the requirements of Article 190 as

interpreted by the Court in respect of the two related issues of the aid's effect on trade and competition and its compatibility with the common market. In the first place it contains practically nothing on the relevant market or RSV's share of that market and there can be no suggestion here (as there was in Case 40/85) that the Commission suffered from any lack of cooperation since the Commission admitted in its reply to the first of the Court's written questions that it had not sought any information from the Dutch Government on the question of RSV's market share in the offshore engineering sector. Secondly, the Commission says nothing to substantiate the assertions in the decision that the relevant market was suffering from overcapacity. Thirdly, and more seriously, in part IV of the decision it is said: 'According to the information which the Commission has in its possession concerning the sector, which is in serious difficulties, the recipient undertaking's competitors, both in the Netherlands and in the other Member States, have been prevented for more than two years from bidding for one or more offshore structures in the market which the recipient undertaking has set its sights on. As a result, attempts by the Community shipbuilding industry to diversify have been hampered.' The Court's third written question asked the Commission to give an account of the data on which it relied to make that assertion and to produce the relevant documents. The Commission replied that it was using the phrase figuratively and had no documents to support its assertions since no complaint to that effect had been made to it. This is unacceptable. If the Commission wishes to draw an inference that competitors will be deterred from going to the considerable expense of tendering for contracts if they believe that a company such as RSV has its losses underwritten by the State, it must say so and not set out an inference as a statement of fact that on information in its possession competitors have been prevented from tendering. Finally, the reasoning in my view is defective because the Commission does not explain why it felt able to approve the aid notified in December 1980, the relevant part of which was designed to close down the large-scale shipbuilding and offshore engineering divisions of RSV, but did not feel able to approve the 1982 arrangements which were, so far as the Commission was aware, designed to cover unanticipated further costs of the same operation. There may be good reasons for this, but if there are they should be spelled out.

In its fourth objection concerning reasoning, RSV criticizes the decision for not considering whether the aid in respect of the Simon Stevin apparatus could have been compatible with the fifth shipbuilding directive (Council Directive 81/363/EEC, Official Journal 1981, L 137, p. 39). The Commission replied that the Dutch Government did not ask it to consider the aid in the light of the fifth directive but also contended that the Simon Stevin could not qualify under the fifth directive. The Commission alleged in its pleadings that, first, the Simon Stevin itself was not an object which fell within the terms of the directive and, second, in any case, even if it

did, the RSV group was too diversified to qualify as a shipbuilding undertaking under the directive. In its sixth written question to RSV, the Court asked RSV whether it maintained its argument that the Simon Stevin platform qualified under Article 1 (a) of the directive as a 'dredger' and, if so, to provide a written expert's report supporting that argument. In reply, RSV merely submitted a letter from an engineer who confined himself to certifying that the Simon Stevin platform did indeed qualify for aid under the fourth directive. In my view, this certificate is not a written expert's report supporting RSV's argument. It does not assist the Court to decide whether the Simon Stevin platform came within the terms of the fifth directive. Accordingly, I am not satisfied at present that this platform was a dredger within the meaning of the fifth directive and that the Commission was required to deal with it in its reasoning. Moreover, the Commission considered, correctly in my view, that even if the Simon Stevin platform did qualify under the fifth directive, it had not been shown that RSV as a group was capable of being an aid recipient under that directive. On this basis the argument fails and it is not necessary to come to a view on the question whether the Commission is obliged to consider the terms of the shipbuilding directives of its own motion when notification is made under Article 93 (2) of an aid or a proposed aid.

The decision, for a matter of this complexity and importance, on any view is brief and lacking in an analysis of the details of the events which occurred. I would in the event accept the arguments of RSV that the decision should be annulled for a failure to comply with Article 190 of the Treaty in respect of the first three specific matters to which reference has been made.

RSV's fifth argument is that the April 1982 arrangements do not constitute State aid within Article 92 (1). Those arrangements were inseparable from the earlier agreements: they create a situation in which RSV incurred the ROS losses on behalf of the State. Money paid to cover those losses therefore does not represent munificence on the State's part but the fulfilling of a real contract between RSV and the State. The Commission contents itself with the observation that the 1982 arrangements are a development of the April 1980 arrangements which were never, and would never have been, approved by the Commission and Article 93 (3) itself puts Member States under the obligation to notify plans to modify existing aids. In my view, whether or not the ROS losses were incurred at the State's behest, they were covered by public money and that is enough on the facts of this case to constitute a State aid. It is irrelevant that RSV might have refused to carry out the ROS orders if it had been fully aware of the implications.

RSV's sixth argument repeats the point made within its fourth argument that the purpose of the aid was not to strengthen

RSV's position in the market or to rescue certain of its operations but to wind them down: therefore the aid did not affect trade or competition. RSV refers to the judgment in *LPF*, in paragraph 24 of which it is said: 'Even if in certain cases the very circumstances in which the aid is granted are sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision.'

This quotation from *LPF* deals, of course, with reasoning, not substance. However, the Commission's position in its pleadings is identical with that taken in the decision, namely that trade and competition must be taken to have been affected since, without the aid, market forces would have forced the closure of the relevant divisions of RSV earlier.

Although I consider that the reasoning is deficient and that the Commission does not show how inter-State trade was affected (not least since most of the work was for domestic buyers and since its exports were for third countries) it does not seem to me that it has been shown that inter-State trade was not affected. Even if RSV accepted no new orders in the relevant period, its competitors would have been able to tender for the ROS work in RSV's place and could, in particular, have tendered for work in the Netherlands. I do not accept RSV's sixth argument.

RSV's seventh argument is that, if (which RSV denies) the April 1982 measures constitute aid, the Commission was wrong not to exempt them under Article 92 (3) (c). It criticizes the Commission's statement to the effect that at the time when the aid was granted it was not accompanied by any restructuring plan capable of contributing to a Community objective within the meaning of Article 92 (3). RSV emphasizes that the whole purpose was indeed to restructure the large-scale shipbuilding and offshore equipment manufacturing activities of the RSV group. It is, however, to be noted that in the fifth paragraph of Part I of the decision it is said: 'The Commission also established that the case in point involved the rescue of an undertaking experiencing difficulties as a result of mismanagement and unfavourable market conditions and that the aid in question seemed to pursue no objective of rationalization with a view to ensuring the future viability of the firm. By enabling the undertaking to pay off its debts, the aid made it possible to retain uneconomic production units in a market suffering from overcapacity.' I think the position is that in April 1982 there was a slight hope that the final State cash injection would allow RSV's activities in question to be run down in an orderly fashion, a hope which subsequent developments frustrated; that might be characterized as restructuring of a sort, but not necessarily one which the Commission was obliged to exempt under

Article 92 (3) (c). For instance, it might have been more desirable (as indeed seems to have happened subsequently) either for the potentially viable divisions of RSV to have been hived off as independent companies or for their assets and work in progress to have been sold to competitors. RSV does not pursue the exemption point in detail in its pleadings and I doubt that it contains anything not covered by the other grounds. I am not persuaded that the Commission exceeded the bounds of its discretion in deciding whether to exempt the aid under Article 92 (3) and accordingly would reject RSV's seventh argument.

RSV's eighth and final argument is directed against the recovery order contained in Article 2 of the decision. RSV claims that it could not reasonably be expected to have known that the payment of the aid was illegal. The State did not inform it of any possibility of illegality under Community law; RSV could legitimately believe that no notification was necessary (since the 1982 arrangements served only to put an upper limit on the early arrangements which RSV had been led to believe were approved by the Commission), RSV was not involved in the notification procedure either by the State or by the Commission, and it did not see the announcement in the Official Journal of the opening of the Article 93 (2) procedure. In any case, that notice appeared after the money had been paid and did not contain the now standard formula warning recipients that aid paid out before the Commission has had a chance to pronounce on its compatibility may subsequently be recovered. Apparently, the Dutch Government did not inform RSV of the negative decision (which is of course addressed only to the Government) until May 1985. RSV adds in its reply that the notice concerning the opening of the Article 93 (2) procedure in RSV's case appeared before the communication from the Commission in November 1983 (Official Journal 1983, C 318) stating that it intended to make more use of the possibility of ordering recovery.

On the basis that the decision should be anulled on the second ground advanced this argument does not arise; if I had come to the view that the decision was taken in due time, I would reject the arguments advanced under the eighth ground. On any view, the Commission cannot be responsible for expectations aroused by the Dutch Government and apart from the delay there is no evidence that the Commission positively encouraged RSV to think that the aid would be approved and not recoverable. It is not sufficient for RSV merely to assert that it was not warned that the aid might be unlawful and might be recoverable.

In summary, my opinion is that the decision should be annulled on two grounds, namely that the Commission's failure to take a position on the notification of the aid made on 20 July 1982 until 19 December 1984 was in breach of its obligation to proceed with due diligence and that the reasoning contained in the decision is inadequate. The Commission should be ordered to pay RSV's costs.