return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question.

2. Since the undertaking concerned exported about 40% of its output to other Member States, excess production capacity existed in the market in question and, in those circumstances, the aid granted to the undertaking had the effect of reducing its financial costs by comparison with those of its competitors, the Commission was entitled to conclude, in the absence of any information to the contrary, that the aid in question affected trade between Member States and distorted, or threatened to distort, competition within the meaning of Article 92 (1) of the Treaty.

3. Observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question. The principle of the right to be heard requires that the person against whom an administrative procedure has been initiated must have been afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law. Where the person concerned has not been afforded an opportunity to comment on documents containing information covered by business confidentiality, the Commission may not use that information in its decision.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 16 April 1986 *

Mr President,
Members of the Court,

A — The key question in the case on which I am to deliver my Opinion today is whether the subscription of additional capital by State authorities to an industrial undertaking can be regarded as aid within the meaning of Article 92 of the EEC Treaty.

1. Meura SA, a mechanical engineering company, was founded in 1845 at Tournai (Belgium). Until it was declared insolvent in January 1986 Meura SA chiefly produced equipment for the food industry, in particular tanks for the storage of beer. In addition, the undertaking manufactured steam generators and other engineering products.

(a) The undertaking, which had already been in difficulties since 1974, recorded a loss of BFR 95 million at the *end of 1978*. Since its bank, which had earlier granted it substantial overdrafts, refused to give it any further support the undertaking had to turn

* Translated from the German.

to the State, which provided a *guarantee* in the amount of *BFR 75 million.*

(b) In April *1979* State authorities subscribed additional capital, as a result of which the undertaking's *capital was raised from BFR 4 million to BFR 44 million.*

(c) Despite this initial State intervention the undertaking made further losses of BFR 95 million. In August *1980* a further 'reorganization of the company's capital' took place; the shares still in private hands (approximately 30% of its capital) were declared to be invalid and the State became its sole shareholder.

In order to carry out this financial 'reorganization' the undertaking's immovable property was revalued and reserves constituted in the balance sheet. Thereafter, the capital, which as a result came to BFR 180 million, was reduced to nil in order to cover the accumulated losses. Following that, State authorities subscribed *additional capital amounting to BFR 150 million.*

(d) In addition the undertaking benefited from a series of *further support measures,* such as interest-rate subsidies, guarantees, exemption from property tax and authorization to carry out accelerated depreciation.

(e) A restructuring plan adopted in 1980 proved to be a failure; between 1980 and 1983 the undertaking made losses of BFR 20, 33, 91 and 43 million respectively.

In view of this situation, the Region of Wallonia, a regional authority of the Kingdom of Belgium, acting through the Société régionale d'investissement de Wallonie (hereinafter referred to as 'the SRIW'), decided on 23 July 1982 to subscribe *further capital of BFR 145 million.* The implementation of that capital increase was made conditional on other backers also lending money to the undertaking, cutbacks in staff numbers and attempts to initiate intensive cooperation with another undertaking.

When the *Commission* became aware of the increase in capital and of a further measure — an interest-rate subsidy not covered by these proceedings — it contacted the Belgian Government on 22 July and 17 September 1982 *to remind* it of its obligations under Article 93 (3) of the EEC Treaty, which requires the Member States to make advance notification of plans to grant new aid.

On 25 November 1982 the *Belgian Government replied* to this request for information, referring among other things to a new restructuring plan for the undertaking. However, it did not append that plan to its letter.

Subsequently the *Commission* decided to initiate the *aid review procedure* provided for in Article 93 (3) of the EEC Treaty, and gave notice to the *Belgian Government* to submit its comments. In its reply, the Belgian Government confirmed that the decision to acquire the capital holding in the undertaking had been taken on 23 June 1982.

3. In its *decision* of 17 April 1984,[1] which is contested in these proceedings, the Commission stated, in particular, that the aid granted by the Belgian Government in June 1982 to an undertaking manufacturing equipment for the food industry was incom-

1 — Official Journal 1984, L 276, p. 34.

patible with the common market within the meaning of Article 92 of the EEC Treaty and must therefore be abolished. [2]

The preamble to the Commission's decision includes the following reasons:

(i) Subscriptions of capital whether by central government or by public agencies under the government's authority may constitute aid falling within Article 92 (1) of the EEC Treaty. In the case of Meura SA, the undertaking's financial situation was a handicap which made it very unlikely that it could have raised on the private capital market the finance which it needed to survive. Considering its history of repeated serious financial difficulties, the subscription of BFR 145 million of capital by the SRIW constituted aid within the meaning of Article 92 (1) and not a subscription of risk capital according to normal practice in the private sector.

(ii) Since 1977 the firm's gross profits had not been sufficient to cover the depreciation of its assets. In addition, since 1979 its cash flow had been negative, which meant that in all probability the undertaking would be unable to finance the planned BFR 100 million investment programme without State aid.

In addition, the Commission refers to the individual measures of support which the Belgian State authorities had implemented in respect of the undertaking since 1979. It then deals with the effect on intra-Community trade of the contested increase in capital and states that

(i) whenever financial aid granted by a Member State strengthens the position of an undertaking relative to other firms which compete with it in intra-Community trade, there is a presumption that intra-Community trade is affected by that aid.

(ii) In the present case, the decision states, the undertaking concerned exports about 40% of its output to other Member States. By reducing the undertaking's financial costs, the aid granted by the Belgian Government gave it an advantage over its competitors, which had to bear those costs themselves.

(iii) Under Article 92 (3) of the Treaty exceptions to the prohibition of aid are only permitted where the aims sought by the aid are in the common interest and not only of benefit to the aid recipient.

(iv) In particular, the recipient undertaking must make a contribution warranting the grant of the aid. In the present case, no such contribution on the part of the aid recipient is apparent.

(v) The Belgian Government has been unable to give, or the Commission to discover, any justification for a finding that the aid in question falls within one of the categories of exceptions provided for in Article 92 (3).

(vi) The decision adds that the sector supplying equipment to the food industry is unquestionably suffering from overcapacity at the present time and the outlook for the sector suggests that the common interest is not served by preserving production capacity by means of State aid.

2 — This footnote in the original text of the Advocate General's Opinion solely concerns the wording of the German version of the Commission decision. It is not relevant to the English version of the decision.

With regard to the procedure, the Commission states in its decision that two Member State governments and two trade associations in the industry sent submissions stating that they shared the Commission's concern about the Belgian aid.

4. The Belgian Government considers the Commission's decision to be unlawful on several grounds.

The *Belgian Government* claims that the Court should:

(1) Declare void the Commission's decision of 17 April 1984 in so far as it declares that the SIRW's capital holding of BFR 145 million in Meura SA is incompatible with the common market within the meaning of Article 92 of the Treaty and must be abolished;

(2) Order the Commission to pay the costs.

The *Commission* contends that the Court should:

(1) Dismiss the action as unfounded;

(2) Order the applicant to pay the costs.

It adheres to its decision for the reasons given therein, which it sets out in greater detail.

I shall examine the parties' individual legal submissions later.

5. At the Court's request, the Belgian Government produced further details concerning Meura's output in value terms and the distribution of its products with respect to the various markets. In addition, the Belgian Government produced a plan for the restructuring of the undertaking dating from 1982.

B — Since, during the oral proceedings, the Belgian Government, on the basis of the judgment in Case 52/84,[3] withdrew the argument that it was legally impossible for it to comply with the Commission's decision, the following three claims of the Belgian Government still have to be considered:

The contested holding does not constitute an aid within the meaning of Article 92 (1) of the EEC Treaty (the first claim);

The decision has an inadequate statement of reasons, in so far as it does not establish in what respect the contested capital holdings affect trade between the Member States and distort competition (the second claim);

Infringement of the right to a fair hearing in so far as the Commission did not give the Belgian Government access to the submissions of the Member States, the trade associations and the undertakings which took part in the administrative procedure (the fourth claim).

Furthermore, consideration should be given to whether the derogation provided for in Article 92 (3) of the EEC Treaty applies. The Belgian Government did not make an express claim to that effect but it can be inferred from its argument that it should also be considered whether the contested capital holding can be regarded as being compatible with the common market (the third claim).

1. *The question whether the contested capital holding constitutes an aid within the meaning of Article 92 of the EEC Treaty*

(a) The *Belgian Government* considers that, by prohibiting the Region of Wallonia as principal shareholder in the undertaking in question, from taking part in the contested increase in capital, the Commission discriminated against that body

3 — Judgment of 15 January 1986 in Case 52/84 *Commission* v *Belgium*, [1986] ECR 89.

by comparison with a private shareholder. It is not clear how the Region's action differs from that which a private shareholder would have taken in the same circumstances. The fact that an undertaking is experiencing difficulties does not mean that a shareholder should disengage itself from it and precipitate its collapse. It is normal for a shareholder to support the restructuring of the undertaking by subscribing additional capital. Consequently, the Commission is prohibiting action which is usual when carried out by private shareholders — the provision of support for profitable but temporarily loss-making activities — simply because it is being carried out by the State as shareholder. To apply Article 92 of the Treaty in such a way as to impose standards of behaviour which, in the final analysis, discriminate against the public authorities conflicts with the guarantee of the systems of property ownership in the various Member States which is laid down in Article 222 of the EEC Treaty.

In the *Commission*'s opinion, the view of the law put forward by the applicant amounts to putting State undertakings in a privileged position in so far as it argues in effect that the authorities of the Member States are not bound in the case of State undertakings to comply with the competition rules, in particular as regards aid, in the same way that private undertakings are. That assumption manifestly conflicts with Article 90 (1) of the EEC Treaty, which provides that, in the case of public undertakings, Member States are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty, in particular to the rules provided for in Articles 85 to 94.

In the Commission's view, the action of the Region of Wallonia in this instance differs absolutely from that which would have been taken by a private shareholder in the same circumstances. The existence of a link between the losses incurred by Meura SA and the aid granted to it up to 1982 can be inferred from the fact that the respective amounts tally with each other: approximately BFR 335 million in aid received as against approximately BFR 320 million in losses incurred. Faced with such losses and with such prospects of returns, no private shareholder would subscribe additional capital. According to the Commission, Meura's losses showed that it was not simply in temporary difficulties due to reasons other than normal market conditions; it can be concluded as a result that the company survived so long only because of the deployment of public funds. Since the contested capital injection therefore constituted rescue aid which was essential in order to offset operating losses, it obviously cannot have been intended at the same time to support the alleged restructuring of the undertaking.

(b) Under Article 92 of the EEC Treaty any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. The only exception is aid which is compatible with the common market by virtue of Article 92 (2) of the EEC Treaty and aid which may be considered to be compatible with the common market pursuant to Article 92 (3).

(aa) As a result of the broad wording of Article 92 — aid in any form whatsoever — the Court came to the conclusion in its judgment of 14 November 1984[4] that no distinction could be drawn between aid granted in the form of loans and aid granted in the form of a holding acquired in the capital of an undertaking. Aid taking

4 — Judgment of 14 November 1984 in Case 323/82 *SA Intermills* v *Commission* [1984] ECR 3809.

either form fell within the prohibition laid down in Article 92 of the EEC Treaty where the conditions set out in that provision were fulfilled.

However, it was not necessary in order to reach the decision in that case to set out in detail the circumstances in which a State capital holding is to be regarded as an aid within the meaning of Article 92 of the EEC Treaty, since the action had to be upheld on other grounds.

The EEC Treaty no more defines the term 'aid' than the ECSC Treaty. To provide a definition in the Treaties would probably be neither feasible nor useful, since concrete definitions would be liable to restrict the scope of the term. However, a broad interpretation is necessary in order that Article 92 of the EEC Treaty may make a meaningful contribution towards ensuring that competition in the common market is not distorted, in accordance with the objective set out in Article 3 (f) of the EEC Treaty.

That is consonant with the general definition of the concept of aid in the context of the ECSC Treaty which the Court provided in the judgment of 23 February 1961 in Case 30/59.[5] According to that definition the concept of aid covers 'interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking'.

In its judgment of 22 March 1977 in Case 78/76[6] the Court bases itself on a formula — 'gratuituous advantage' — used in the relevant request for a preliminary ruling whilst in the judgment of 2 July 1974 in Case 173/73[7] the Court merely refers to 'benefits'.

It can be inferred from those decisions that any type of support granted by a Member State or through State resources other than for commercial purposes constitutes aid within the meaning of Article 92 (1) of the EEC Treaty. At least, support constitutes aid where the recipient undertaking obtains an advantage which it would not normally have obtained, for example, where capital is made available in circumstances which do not correspond to the normal conditions of the capital market.

However, the legality of a State capital participation in an undertaking can still not be assessed on the basis of those criteria alone. It must be inferred from Article 222 of the EEC Treaty, which provides that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership, that the EEC Treaty also accepts the existence of public ownership of industry. Although no provision is made in the EEC Treaty for the Community to influence the existence of public undertakings it does make them subject to the rules of the Treaty in so far as the Member States are prohibited, in the case of such undertakings, from enacting or maintaining in force any measure contrary to the rules contained in the Treaty, in particular to the rules provided for in Articles 85 to 94. Public undertakings must adjust to the common market and may not impede its establishment and operation.

Article 90 (2) of the EEC Treaty provides specific exceptions only for undertakings which are 'entrusted with the operation of

5 — Judgment of 23 February 1961 in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority of the European Coal and Steel Community* [1961] ECR 1, at p. 19.

6 — Judgment of of 22 March 1977 in Case 78/76 *Firma Steinike und Weinlig* v *Federal Republic of Germany* [1977] ECR 595.

7 — Judgment of 2 July 1974 in Case 173/73 *Italian Government* v *Commission of the European Communities* [1974] ECR 709.

services of general economic interest or having the character of a revenue-producing monopoly'. It follows that the Treaty rules apply normally in the case of ordinary public undertakings.

(bb) Following this discussion I am now coming to the central legal questions raised in these proceedings. The *entrepreneurial activities* which proprietors and operators of public undertakings may carry out without being subject to the Communities' supervision of subsidies must be distinguished from the *granting of subsidies* by the public authorities, which is supervised under Article 92 *et seq.* of the EEC Treaty. Consequently it is necessary to distinguish between action taken by the public authorities for entrepreneurial reasons in their capacity as private operators and State measures having political objectives and serving to promote the public good, such as, for example, measures to stabilize the labour market.

The Commission has already addressed this problem in its preamble to the directive on the transparency[8] of financial relations between Member States, in which it stated as follows:

'Whereas the Treaty requires the Commission to ensure that Member States do not grant undertakings, public or private, aids incompatible with the common market;

Whereas, however, the complexity of the financial relations between national public authorities and public undertakings tends to hinder the performance of this duty;

Whereas a fair and effective application of the aid rules in the Treaty to both public and private undertakings will be possible only if these financial relations are made transparent;

Whereas such transparency applied to public undertakings should enable a clear distinction to be made *between the role of the State as public authority and its role as proprietor.*'

Article 3 of the directive sets out a list of examples of financial relations between public authorities and public undertakings which are to be made transparent in accordance with the directive:

'...

(a) the setting-off of operating losses;

(b) the provision of capital;

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

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

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

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

Nevertheless, as the Court pointed out in its judgment of 6 July 1982 in Joined Cases 188 to 190/80,[9] that list of financial relations between public undertakings and Member States does not constitute a definition of the concept of aid which appears in Article 92 *et seq.* of the EEC Treaty. It merely specifies the financial transactions of which the Commission considers that it must be informed in order to ascertain whether a Member State has granted aid to a given undertaking without complying with

8 — Commission Directive of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, Official Journal 1980, L 195, p. 35.

9 — Judgment of 6 July 1982 in Joined Cases 188 to 190/80 *French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland* v *Commission of the European Communities* [1982] ECR 2545.

its obligation to notify the Commission under Article 93 (3) of the EEC Treaty.

In the case of a financial transaction between a Member State and a public undertaking special criteria must be used in order to try to differentiate between entrepreneurial conduct and State conduct in the granting of aid. Advantages which the State confers on a public undertaking by way of grant could equally be entrepreneurial investment. The same consideration might apply to the forgoing of profits or the offsetting of losses, since a private businessman may also be in a situation where he has to take such steps. Consequently, comparison with corresponding measures in the private sector takes us a stage further: the test for a State aid might be whether, in comparable circumstances, a private businessman acting on the basis of relevant economic considerations would not support the undertaking concerned in such a manner.

If the hypothetical behaviour of a private proprietor acting in accordance with relevant economic considerations is taken as the criterion, this in itself allows the State as the proprietor of an undertaking a substantial measure of freedom of action. It should not be overlooked that the State — even as a private proprietor — has the possibility of procuring the necessary capital resources on a substantial scale — through taxation or compulsory loans. As a rule it is virtually impossible for a private businessman to obtain funds on such a scale.

According to the case-law of the Court, in ascertaining whether a measure of State intervention constitutes aid reference is to be made, not to the causes or aims of the measure, but to its effects;[10] however, in order to differentiate between State aid and grants to public undertakings by the State in its capacity as a private operator, the aims of the action must be taken into consideration, at least as evidence. The aim may determine in which category a particular advantage given to public undertakings falls in so far as if the reason is one of economic policy — for example, social or structural policy — this may make it appear to be an aid, whereas a viable investment which is intended to produce a return is less likely to be viewed as an aid.

(cc) In considering whether the contested capital holding constitutes an aid we should first look at the development of the recipient undertaking's capital and operating results.

Before the Region of Wallonia first acquired a participation in the undertaking in 1979, its capital amounted to BFR 4 million; as a result of the acquisition of that holding the corporate capital was raised to BFR 44 million.

Against that, the undertaking's losses totalled about BFR 95 million. Further losses of BFR 95 million resulted in the undertaking's having an aggregate deficit of BFR 180 million by August 1980. It was only by revaluing the undertaking's immovable property and constituting reserves in the balance sheet in 1980 that the capital could be brought to BFR 180 million, which, however, was at the same time reduced to nil in order to offset the accumulated aggregate deficit.[11]

10 — Judgment of 2 July 1974 in Case 173/73 *loc. cit.*, paragraph 12.

11 — These figures — including the calculations — are taken from the 1982 restructuring plan.

In order to procure the working capital to allow the undertaking to continue in business, the public authorities subscribed additional new capital of BFR 150 million.

Consequently, the position of the undertaking on the first two occasions when the Belgian public authorities subscribed new capital was as follows:

(i) Accumulated losses at the end of 1978/beginning of 1979: BFR 95 million; withdrawal of credit facilities by the undertaking's bank; capital: BFR 4 million; State guarantee: BFR 75 million.

(ii) 1980: Accumulated losses: BFR 180 million; balance-sheet equilibrium possible solely by revaluing immovable property and constituting reserves.

The figures given show that in 1979 and 1980 alike the undertaking concerned was in a situation which should have led to its liquidation. Only the State measures, namely capital injections and guarantees, enabled it to survive.

Despite the State intervention further losses were incurred in 1980 to 1982 of BFR 20, 33 and 91 million respectively.

As a result the second injection of capital by the public authorities of BFR 150 million was also largely exhausted.

In that situation the public authorities decided to subscribe additional capital of BFR 145 million. It was at this point that the Commission became involved for the first time and found the increase in capital to be aid, on the ground that the undertaking's financial position constituted an impediment which made it improbable that it would have been able to procure the sums necessary for its continued existence on the private capital markets. The Commission supported this contention with details of the development of the undertaking's capital and of its operating results.

That picture is confirmed by the documents which the Belgian Government has produced at the Court's request. The Commission's conclusion that the undertaking would have been unable to procure the necessary finance on the private capital market is incontestable in view of the evolution of the undertaking's operating results. It follows that the Commission was entitled to regard the capital increase planned in 1982 as aid.

2. *The question whether the contested aid affects trade between Member States and distorts competition*

Since the granting of aid, in particular in the form of the acquisition of holdings by the State or public bodies, cannot be viewed as being automatically contrary to the Treaty, it must now be examined whether the aid in question conflicts with Article 92 (1) of the Treaty. In particular, it must be considered whether the aid distorts or threatens to distort competition and whether it affects trade between Member States.

(a) The *Belgian Government* contends that it cannot be ascertained from the Commission's decision in what respect the capital subscription at issue affects trade between Member States or distorts or threatens to distort competition. The turnover of the undertaking in question did not exceed BFR 450 million and its exports were switched to markets outside the

Community; these accounted for 50% of its sales in 1984. The undertaking now employs 232 workers only as against 587 in 1977. Its share of the Belgian market is of market is of the order of 5 to 10% only. Those figures show, in its view, that the impact on competition within the Community of an undertaking of such a modest size can scarcely be perceptible.

It adds the Commission gives no concrete indication of the way in which the aid in question affects competition, a defect which the Court criticized in its judgments of 14 November 1984 in Case 323/82 [4] and of 13 March 1985 in Joined Cases 296 and 318/82. [12] The decision merely notes the objections raised by the governments of two Member States and two trade associations in the industry.

The *Commission* contends that the assessment of the effects of aid on intra-Community trade does not depend on the degree to which those effects are perceptible. There is no *de minimis* principle in relation to the law relating to aid. Accordingly, account did not have to be taken of the undertaking's turnover or of the number of its employees. The decisive factor is that the undertaking in question is producing in a sector indirectly affected by the slow-down in investment. The market for the equipment manufactured by Meura SA is characterized by excess production capacity and keen competition at both national and Community level. That the undertaking exports about half its production to countries outside the Community does not alter that conclusion in the slightest since it follows that half its production is sold in the Community.

4 — Judgment of 14 November 1984 in Case 323/82 *SA Intermills* v *Commission* [1984] ECR 3809.

12 — Judgment of 13 March 1985 in Joined Cases 296 and 318/82 *Kingdom of the Netherlands and Leeuwarder Papierwarenfabrik BV* v *Commission* [1985] ECR 809.

(b) In the first place, it must be observed that the explanations in the contested decision as to whether the contested aid affects trade between Member States and distorts competition are very brief. The only fact given is that the undertaking in question exports approximately 40% of its output to other Community countries. It is claimed that the aid granted results in a diminution of the financial burden of the undertaking and, as a result, gives it an advantage over competitors who have to bear that burden themselves. From the mere fact that the undertaking's position is strengthened by comparison with that of competitors it can be inferred that intra-Community trade is affected by the aid.

No evidence is given of the market share of the undertaking in question and of trade patterns in the products concerned.

Although the Commission certainly was not obliged to set out in its decision all the details bearing on its finding, it was under a duty to provide the main reasons for its decision. The Commission has fulfilled this requirement by providing the minimum permissible amount of information.

The parties agree that the undertaking in question exported a substantial proportion of its output. The Belgian Government referred to that fact in order to substantiate its restructuring plan.

The Commission considered it proven that the undertaking in question exported 40% of its products to other Member States of the Community. As a result, it was entitled to assume that artificially keeping Meura SA in existence was in itself bound to distort competition and affect trade between

Member States. Since the granting of the aid resulted in a diminution of the financial burden on the undertaking and hence gave it an advantage over its competitors it must be assumed in case of doubt that that was liable to distort competition. Had the undertaking concerned not been kept in existence artificially, its competitors, which had received no comparable aid, would have been able to take over its market share both in Belgium and in other Member States.

The Commission's decision would certainly have been clearer and plainer had it included particulars of the volume of business conducted by Meura SA in absolute terms and of its market share in Belgium and in the Community. However, I do not consider such particulars to have been absolutely essential in order to reach the finding made in the contested decision. Unlike in the case of the Commission's two decisions of 22 July 1982 which resulted in the judgments of the Court of 14 November 1984 and 13 March 1985 (Case 323/82 and Joined Cases 296 and 318/82, respectively), the Commission did at least set out in the decision contested in these proceedings the undertaking's share of intra-Community trade. Where an undertaking participating in intra-Community trade receives aid not received by competitors, it is possible to conclude as a result that intra-Community trade is affected and competition distorted by that aid.

That the undertaking concerned is relatively small does not alter that basic finding. Admittedly, the principle of perceptibility was employed in the Court's previous decisions[13] on cartel law. According to those decisions, the prohibition laid down in Article 85 of the EEC Treaty cannot apply, despite the presence of the factual criteria laid down in Article 85, where, having regard to the weak position of the parties concerned, their cartel agreement cannot be detrimental to the aims of a single market between Member States.

To date, the Court has not recognized the existence of such a principle in the sector of State aid. In my view, to adopt such a principle in the context of the aid review procedure would not be appropriate, since State aid disrupts the system of undistorted competition which is sought by the Treaty (Article 3 (f) of the EEC Treaty). Given, in addition, that under Article 5 of the EEC Treaty the Member States are obliged to facilitate the achievement of the Community's tasks, there are, in principle, good grounds for subjecting their conduct to a stricter standard than the conduct of undertakings. Furthermore, there is nothing in the wording of Article 92 of the EEC Treaty to suggest that minor distortions of competition should not be subject to the incompatibility rule. Also in the light of the extensive derogations from the prohibition on aid which are set out in Article 92 (2) to (4) of the EEC Treaty it appears appropriate to treat all distortions of competition as relevant irrespective of their degree.

Since aid consists in the granting of advantages to which the recipient undertaking would normally have no claim, it must be assumed in case of doubt that they improve the competitiveness of the recipient undertaking *vis-à-vis* competitors which receive no similar grants, and hence distort competition. Since, as a result, aid artificially improves the situation of the recipient undertaking, it must further be assumed in

13 — See for example the judgment of 9 July 1969 in Case 5/69 *Franz Völk* v *SPRL Etablissements J. Vervaecke* [1969] ECR 295, and the judgment of 6 May 1971 in Case 1/71 *SA Cadillon* v *Firma Höss Maschinenbau KG* [1971] ECR 351.

case of doubt that they also affect trade between Member States. In view of this very strong presumption, excessively strict requirements should not be placed on the Commission with regard to its duty to provide explanations and reasons, once it is found that an aid has been granted.

In the result, therefore, I consider that the Commission has provided sufficient evidence and reasons for its decision that the contested aid distorts competition and affects trade between Member States.

3. Although, in view of its contention that the contested capital holding does not constitute aid, the Belgian Government did not expressly argue that Article 92 (3) of the EEC Treaty had been infringed, I consider it to be necessary to examine that derogation.

(a) The *Belgian Government* stated that a second restructuring plan for the undertaking in question was adopted in 1982. In view of the undertaking's considerable exports and its reputation in the technological sphere, the increase in capital was justified in order to support a restructuring plan providing for a further reduction in the number of persons employed and an investment programme to promote the specialization of the undertaking, to develop a new range of products in the sector of boilers and to prepare for the establishment of business outside the EEC.

The increase in capital was subscribed in order to adapt the production capacity of the undertaking to suit new markets and reduce capacity in the sector in which the undertaking had hitherto been active (equipment for the food industry). In the Belgian Government's view, it follows that the contested capital holding was not used to finance an increase in existing production capacity.

In the *Commission*'s view, the contested injection of capital was essential in order to offset existing operational losses; consequently, it could not also have been intended to support the undertaking's alleged restructuring efforts.

In the course of the written procedure before the Court the Commission denied that a genuine restructuring plan had been submitted and carried out. It claimed that the Belgian Government had adduced no concrete evidence to show that the investment and job cuts differed from a normal, non-State-aided adjustment such as any undertaking must carry out when a significant change is observed on the market.

During the oral procedure, the Commission put forward its views on the 1982 restructuring plan for the undertaking, which the Belgian Government had produced at the request of the Court.

The Commission adheres to the view set out in its contested decision, even following its perusal of that plan. In order to qualify for the derogations provided for in Article 93 of the EEC Treaty, restructuring plans must embody a contribution on the part of the recipient undertaking justifying the aid. The aims pursued by the aid must be in the common interest, such as, for example, the development of certain economic activities or of certain economic areas. A decisive factor in that connection is that the aid should not be granted in respect of an economic sector suffering from overcapacity at Community level. However, in

the Commission's view, that is precisely the case here.

Moreover, the restructuring involved must relate to an economic sector which is of Community interest. Routine aid for straightforward modernization, that is to say, for the necessary substitute investments, could not fall within Article 92 (3), since such aid is operating aid. The restructuring plan contains no details of the specialization of the undertaking. The Commission doubts whether a new product range has been developed, since as late as 1984 71% of the undertaking's total production was for the brewing industry.

In sum, the Commission denies that there was a genuine restructuring plan for the recipient undertaking.

The Belgian Government does not contest the substance of this assessment of the plan put forward by the Commission.

(b) With regard to the possible application of Article 92 (3) of the EEC Treaty, the *Commission's* decision starts with a theoretical exposition. It then points out that Article 92 (3) (a) cannot be applied since the area in which Meura SA is established is not one where the standard of living is abnormally low or where there is serious underemployment. Before the Court the Commission stated that it was referring to the situation in the Community as a whole. This is acceptable, since in its judgment of 17 September 1980 in Case 730/79 [14] the Court held that the Commission is entitled to assess the standard of living and underemployment in a particular area, not with reference to the national average, but in relation to the Community level.

As regards the possibility of considering an aid to be compatible with the common market under Article 92 (3) (b) of the EEC Treaty, the Commission stated that Belgium was one of the Community's central areas; although its social and economic problems were not among the most serious in the Community it did present the greatest danger of escalating subsidies and any aid granted was likely to affect trade between Member States. Furthermore, it did not appear from available economic and social data with regard to Belgium that there was a serious disturbance in its economy within the meaning of the Treaty.

Those explanations also appear to me to be clear; in any event, the Belgian Government has not put forward anything capable of seriously shaking them.

(c) There remains therefore only the derogation provided for in Article 92 (3) (c) of the EEC Treaty. The Commission stated that that derogation was inapplicable on the ground that the industry supplying equipment to the food industry was manifestly suffering from overcapacity, and that the outlook for the industry suggested that the common interest was not served by preserving production capacity in that sector through State aid. That conclusion remained valid even where the aid was linked to a financial or commercial restruc-

14 — Judgment of 17 September 1980 in Case 730/79 *Philip Morris Holland BV* v *Commission* [1980] ECR 2671, at p. 2691 *et seq.*

turing of the company or a restructuring of its production facilities.

Elsewhere in the decision the Commission stated that the Belgian Government has been unable to give, or the Commission to discover, any justification for a finding that the aid in question fell within one of the categories of exemptions provided for in Article 92 (3).

That explanation might make it seem possible to draw the conclusion — which the Belgian Government draws with reference to the judgment of the Court of 13 March 1985 in Joined Cases 296 and 318/82 — that the Commission failed to take sufficiently into account an important factor which might possibly have led to a different assessment, that is to say that the aid in question was related to the restructuring of the recipient undertaking.

In the event that this should be the case the contested decision would have to be declared void in the same way as the decision which resulted in the judgment of 13 March 1985 in Joined Cases 296 and 318/82.

Although the Belgian Government did notify the Commission of the existence of the restructuring plan in 1982 it did not provide any further details. During the procedure before the Court the plan was explained in somewhat more detail for the first time in a footnote to the reply, and it was only at the Court's express request that it was finally produced. That circumstance itself, in conjunction with the undertaking's actual record of repeated losses and, eventually, insolvency, suggests that the so-called restructuring programme cannot have been a viable concept. If a closer look is taken at the 1982 plan it can be seen that in fact it consists mainly of declarations of intent, wishes for the future development of the undertaking and its market situation, and appeals to the management and staff.

However, where the plan does contain concrete data it dwells mainly on the undertaking's need for more capital. In the report on the planned measures which was submitted by the SRIW to the Region of Wallonia it is stated that in normal circumstances the implementation of the restructuring plan would require the active collaboration of a capable industrial partner, who would have to enter into a substantial commitment, particularly from the financial point of view. Nevertheless, owing to social conditions and the magnitude of the Region of Wallonia's commitment to the undertaking it was not possible to prepare for such a step in time; consequently, the plan put forward by the undertaking — involving the subscription of capital by the public authorities — should be supported. Negotiations were being conducted with various undertakings with a view to achieving a joint marketing strategy; however, given Meura SA's current situation, negotiations with one of those undertakings with a view to its acquiring a financial stake in the undertaking offered no prospect of success.

However, in my view it is unnecessary to examine this plan in more detail since the Belgian Government has not seriously contested the Commission's assessment that the plan contains no viable restructuring concept.

The Commission was therefore entitled to conclude that the aid granted by the Belgian Government could not be regarded as being compatible with the common market within the meaning of Article 92 (3) of the EEC Treaty. That finding is not altered by the

fact that the Commission did not have knowledge of the details of the plan drawn up in 1982 until the Court proceedings and therefore could not take account of the details of the plan in its decision.

The Belgian Government failed to inform the Commission of the aid in accordance with Article 93 (3) and subsequently to submit the plan spontaneously. Accordingly, it failed to fulfil its duties under the aid-review procedure. If the Commission, although lacking full information, took a substantively correct decision, it cannot be reproached with having failed to take account in its decision of documents which were withheld from it. Since, moreover, Article 92 (3) of the EEC Treaty constitutes an exception to the principle that aid is not permissible, it can properly be argued that the party wishing to invoke that exception — the Belgian Government in this case — must, even at the stage of the administrative procedure, make extensive notification of all the details which might warrant the application of the derogation.

Consequently, there are no grounds casting doubt on the lawfulness of the Commission's finding that the aid granted by authorities of the Belgian State could not be regarded as compatible with the common market under Article 92 (3) of the EEC Treaty.

4. *Infringement of the right to a fair hearing*

(a) The *Belgian Government* points out that, according to the contested decision, the Commission received submissions from the Governments of two Member States and two trade associations in the industry concerned stating that 'they shared the Commission's concern about aid to the company'.

The Belgian Government contends that it was never informed of the substance of those submissions or of the identity of the parties who made them. For that reason, it could not prepare its defence effectively. Moreover, it considers it paradoxical that it, in its capacity as a Member State, received less information about the complaints made about the contested capital holding than a non-member country which is the subject of anti-dumping proceedings pursuant to Council Regulation No 2176/84 [15] would have received. It is provided that in such proceedings interested parties and, in particular, representatives of the exporting country may inspect all information made available to the Commission by any party to any investigation and are entitled to be informed of the essential facts and considerations on which the Community authorities base themselves.

In the *Commission*'s view, the aim of its giving notice to interested parties to submit observations is solely to enable it to compile all the information necessary in order for it to evaluate the compatibility of the aid with the common market. Consequently, in the case of aid, there is no adversary procedure comparable to that which exists in the field of competition rules applicable to undertakings (Article 85 *et seq.* of the EEC Treaty).

Moreover, as a result of the duty to preserve official secrecy in accordance with Article 214 of the EEC Treaty the Commission is not in a position to pass on the submissions of the parties in question, since they may contain data internal to the undertakings concerned, including confidential data. If the Commission failed to observe a certain discretion in that area third parties might be dissuaded from

15 — Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community, Official Journal 1984, L 201, p. 1.

bringing certain matters to its notice, which would prevent it from performing its duties correctly.

As for the comparison made with anti-dumping procedures, this simply shows that action by the Community legislature is necessary in order to be able to invoke an arrangement of the type claimed by the Belgian Government.

(b) In principle the Belgian Government is correct in its contention that before an administrative decision is taken the party concerned must have the opportunity of putting forward its point of view on the points on which the decision is based. The Court expressly recognized that in particular in its judgment of 13 February 1979 in Case 85/76 [16] and in its judgment of 20 March 1985 in Case 264/82. [17]

However, it does not follow that the Member State concerned has in every case the right to examine the submissions made to the Commission. In fact, in the event the Commission may be debarred from disclosing certain communications on the ground of confidentiality pursuant to the principle of official secrecy laid down in Article 214 of the EEC Treaty. [18] However, the corollary of that is simply that the Commission cannot rely on such communications in the administrative procedure and that since they were not disclosed to the persons concerned they cannot be used as grounds for its decision. [19]

16 — Judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche & Co. AG* v *Commission of the European Communities* [1979] ECR 461, at p. 510 *et seq.* (competition procedure).

17 — Jugment of 20 March 1985 in Case 264/82 *Timex Corporation and Others* v *Council and Commission* [1985] ECR 849 (anti-dumping procedure).

18 — See my Opinion of 22 January 1986 in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965.

19 — See the judgment of 13 February 1979 in Case 85/76 *loc. cit.*, at p. 512 *et seq.* (paragraph 14).

The Commission's contention that in the absence of legislation governing the right to inspect documents in the context of the aid procedure there can be no such right is certainly not correct at that level of generality, since the right to information about the subject-matter of the charge arises simply out of the right to a fair hearing. The Belgian Government stated in the course of the oral proceedings that it was treated worse than a non-member country would be treated under Regulation No 2176/84 (anti-dumping or anti-subsidy procedure). Consequently the question of the application of that regulation by analogy might arise.

In the result, however, I consider that it is not necessary to resolve this issue definitively even if reliance is not placed on the fact that, as the Belgian Government itself admitted during the oral proceedings, it never applied to the Commission to examine the documents in question.

The Commission decision refers to the submissions of the other parties involved in the procedure only in so far as it states that the latter share the Commission's reservations about the aid. The fact that some of the participants shared the Commission's reservations is certainly not a matter on which the Belgian Government should have been heard. Rather, it constitutes an assessment of facts of which the Belgian Government was in any case aware.

As a result, the contested decision is not based on the views submitted to the Commission by the other participants mentioned. The participants' submissions were of significance, at most, in so far as they may have reinforced the Commission's view with regard to the legal assessment of the conduct of the Belgian Government. However, it is not apparent that the Belgian Government's interests were adversely affected by the withholding of the

participants' submissions, since the facts on which the Commission's decision were based were fully known to the Belgian Government: the export business of Meura SA, Meura SA's losses and the fact that those losses were offset by State authorities.

C — In the light of the foregoing I propose that the Court should dismiss the application and order the applicant to pay the Commission's costs.