In Joined Cases

188/80

FRENCH REPUBLIC, represented by G. Guillaume and P. Moreau Defarges, acting as Agent and Deputy Agent respectively for the French Government, with an address for service in Luxembourg at the French Embassy,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, B. van der Esch, acting as Agent, assisted by G. Marenco, a member of its Legal Department, with an address for service in Luxembourg at the office of its Legal Adviser, O. Montalto, Jean Monnet Building, Kirchberg,

defendant,

supported by

KINGDOM OF THE NETHERLANDS, represented by A. Bos, acting as Agent,

and by

FEDERAL REPUBLIC OF GERMANY, represented by M. Seidel, Ministerialrat at the Federal Ministry of Economic Affairs, and by A. Deringer, Rechtsanwalt at the Oberlandesgericht Köln [Higher Regional Court, Cologne], acting as Agents,

189/80

ITALIAN REPUBLIC, represented by A. Squillante, Head of the Department for Diplomatic Disputes, Treaties and Legislative Affairs, acting as Agent, assisted by I. M. Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

applicant,

supported by

FRENCH REPUBLIC, represented by its Agent, G. Guillaume, assisted by A. Carnelutti, Deputy Agent,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, B. van der Esch, acting as Agent, assisted by S. Fabbro, a member of its Legal Department, with an address for service in Luxembourg at the office of its Legal Adviser, O. Montalto, Jean Monnet Building, Kirchberg,

defendant,

supported by

KINGDOM OF THE NETHERLANDS and by

FEDERAL REPUBLIC OF GERMANY,

190/80

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, represented by W. H. Godwin, Treasury Solictor, acting as Agent, with an address for service in Luxembourg at the British Embassy,

applicant,

supported by

FRENCH REPUBLIC, represented by its Agent, G. Guillaume, assisted by A. Carnelutti, Deputy Agent,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, B. van der Esch, acting as Agent, assisted by P. J. Kuyper, a member of its Legal Department, with an address for service in Luxembourg at the office of its Legal Adviser, M. Cervino, Jean Monnet Building, Kirchberg,

defendant,

supported by

KINGDOM OF THE NETHERLANDS

and by

FEDERAL REPUBLIC OF GERMANY

APPLICATION for a declaration, in pursuance of Article 173 of the EEC Treaty, that Commission Directive No 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (Official Journal L 195, p. 35), is void,

THE COURT

composed of: J. Mertens de Wilmars, President, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, A. Chloros and F. Grévisse, Judges,

Advocate General: G. Reischl
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — The directive

1. The transparency of financial relations between public authorities and public undertakings, which the Commission is seeking to promote by the directive in question, consists, according to *Article 1* of the directive, in showing clearly public funds made available to public undertakings, either directly or through the intermediary in particular or other public undertakings and the use to which the funds are actually put. By way of examples of "making available" *Article 3* quotes:

"(a) the setting off of operating losses;

(b) the provision of capital;

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

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

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

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

Article 5 requires the Member States to keep available for five years information concerning the financial relations in question and to supply such information to the Commission where it so requests.

For the purposes of the application of the directive *Article 2* defines as "public authorities" the State and other regional or local authorities and as "public undertakings" any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein or the rules which govern it. A dominant influence is to be presumed when the public authorities directly or indirectly in relation to an undertaking hold the major part of the undertaking's subscribed capital, control the majority of votes attaching to shares issued or can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

Article 4 exempts from the directive small undertakings or undertakings which supply services not liable to affect intra-Community trade, and undertakings in the water and energy areas, including in the case of nuclear energy the production and enrichment of uranium, the reprocessing of irradiated fuels and the preparation of materials containing plutonium. Transport, posts and telecommunications and credit institutions are also exempt.

The period for compliance with the directive expired on 31 December 1981.

2. In the third recital in the preamble to the directive the Commission emphasized its duty to ensure that Member States do not grant undertakings, public or private, aids incompatible with the common market. Whilst the second recital enunciates the principle of equal treatment of the two groups of undertakings, the fourth and fifth recitals state that the complexity of the financial relations between Member States and public undertakings tends to hinder the performance of that duty on the part of the Commission and that a fair and effective application of the aid rules in the Treaty to the two groups of undertakings requires financial relations to be made transparent. Having regard to the fact that, according to the seventh recital, Article 90 (1) of the Treaty places obligations on the Member States in respect of public undertakings, namely not to enact or maintain in force any measure contrary to the rules of the Treaty, and since, in pursuance of Article 90 (3) the Commission is required to ensure that these obligations are respected, the Commission has relied on Article 90 in order to adopt the directive in question.

II — The provisions of the Treaty

Chapter 1 of Title I of Part Three of the Treaty, which is entitled "Rules on Competition", is composed of three sections. The first section (Articles 85 to 90) concerns "Rules applying to undertakings", the second is of no relevance to this case and the third (Articles 92 to 94) concerns "Aids granted by States".

Article 90 provides as follows:

"1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this article and shall, where necessary, address appropriate directives or decisions to Member States."

Articles 93 and 94 provide as follows:

"Article 93

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 169 and 170, refer the matter to the Court of Justice direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 92 or from the regulations provided for in Article 94, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed

measures into effect until this procedure has resulted in a final decision.

Article 94

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

III — Written procedure

1. By applications lodged on 16, 18 and 19 September 1980 respectively, the Governments of the French Republic, the Italian Republic and the United Kingdom each brought an action under Article 173 of the EEC Treaty for a declaration that the aforesaid directive is void.

2. By orders made on 29 October 1980 and 4 February 1981 respectively the Court allowed the French Republic to intervene in support of the conclusions of the Italian Republic and the United Kingdom, and the Federal Republic of Germany and the Netherlands to intervene in support of the conclusions of the Commission.

3. By order of 9 December 1981 the Court decided to join the three cases for the purposes of the oral procedure and judgment.

4. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

IV — Conclusions of the parties

1. The *French, Italian* and *United Kingdom Governments* claim that the Court should:

(a) declare that Commission Directive No 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings is void;

(b) order the Commission to pay the costs. (The United Kingdom Government also asks that the Commission and the Netherlands Government be ordered to pay costs.)

2. The *French Government,* intervening, claims that the Court should:

(a) grant the applications of the Italian and United Kingdom Governments and declare the directive in question void;

(b) order the Commission to pay the costs, including the costs incurred by the French Government in this litigation.

3. The *Commission* contends that the Court should:

(a) dismiss the applications as unfounded;

(b) order the applicants to pay the costs.

4. The *Government of the Federal Republic of Germany,* intervening, contends that the Court should dismiss the applications.

5. The *Netherlands Government,* intervening, contends that the Court should:

(a) dismiss the applications;

(b) order the applicants to pay the costs.

V — Submissions and arguments of the parties

A — General arguments of the Commission

1. The *Commission* starts by referring to the various methods of financing public undertakings, namely the public issue of shares or bonds, the endowment of capital forming all or part of the starting capital, the replacement of lost capital or of a loan previously granted and even the renunciation of repayment of such a loan. It declares that although, on the one hand, the total amounts involved in such operations are generally made public in government declarations, in the State budget, in parliamentary documents or in press reports, on the other hand the distribution between different goals and the actual use of the funds are not — or not adequately — shown in the sources of information mentioned above, hence the lack of transparency within the total amounts.

As examples of such a lack of transparency it quotes the information at its disposal regarding the results of the Régie Renault and the Istituto per la Ricostruzione Industriale. Whilst the turnover and profits of the Régie Renault are published, it is not clear from its annual reports what return is made for the investment of the French State, whereas, for example, the dividends of Citroën and Peugeot are known.

As regards the Istituto per la Ricostruzione Industriale, the Commission states that it knows to what extent the endowments paid, the figures for which are also known to it, have been remunerated and the extent of the annual losses, but it claims that it is impossible for it to establish, on the basis of the published information alone, whether the losses are attributable to non-economic tasks imposed by the State or result from an operating loss for which the State is paying compensation.

2. The importance and complexity of the problem have led the Commission to consult the Member States, which have had opportunity to examine both the first and the final drafts of the directive and to comment upon them. As to the European Parliament, it has supported the Commission's initiative in its resolution on the eighth report on competition policy on the proposal of its Economic and Social Committee. Similarly, the Economic and Social Committee of the Community, during the 57th meeting of the section for industry, commerce, crafts and services has shown a favourable reaction to the Commission's plans.

3. The Commission's general conception of Article 90

According to the Commission, Article 222 of the Treaty leaves the Member States free to define the rules and procedures relating to their public sectors. Article 90 does not in fact call in question that freedom of action, but aims to ensure the correct application of the Treaty, having regard to the heterogeneity of the structures in the Member States, by prohibiting them in paragraph 1 from using the hold which they have over their public undertakings, whatever their role in the national economy, in such a way as to escape their obligations under Community law. This is the real meaning of the obligation

neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty.

It admits that, taken literally, the paragraph quoted seems to refer to infringements of other Treaty provisions as a precondition for the application of Article 90. However, this interpretation does not take sufficient account of the fact that that aricle refers back to the Treaty provisions as a whole, including Article 5, which lays down the duty of the Member States to cooperate.

The relations between public authorities and public undertakings are based upon legislative or budgetary provisions which are therefore "measures" within the meaning of Article 90 (1).

The very fact that a Member State fails, even if only by inaction, to create transparency in its financial relations, is to be regarded as a "measure" within the meaning of the Treaty and, according to the Commission, the lack of transparency is contrary to the rules contained in the Treaty.

Relying on the power conferred on it by Article 90 (3) to issue directives or decisions where necessary for the purposes of the application of paragraph 1, the Commission therefore considers that it is empowered not only to take action in the event of an actual or presumed infringement but also to specify the duties of Member States by means of a preventive action, by creating in this way a new specific duty, the infringement whereof may lead to a procedure based on Article 169 of the Treaty. Thus Article 90 allows steps to be taken in the field of public undertakings against administrative situations on the national level which are liable to compromise the role of the Commission as guardian of the Treaty.

In other words, Article 90 (3) is of a nature which is complementary as well as subsidiary to the power granted to the Commission. If a State measure relating to a public undertaking is itself contrary to the Treaty, the normal repressive rules apply. When the measures contrary to the rules of the Treaty may not be apprehended under those substantive and procedureal rules, the Commission has to resort to the power contained in Article 90 (3), and in the context of its role as guardian of the Treaty it has a specific power for the purposes of preventive actions to address appropriate directives or decisions to Member States.

B — Application of the French Republic (Case 188/80)

The applicant's arguments

1. Transparency

The *French Government* challenges the Commission's assumption that the financial relations between the State and public undertakings are not transparent. There is in France a legal separation in relation to the resources of undertakings between public undertakings and private undertakings on the one hand, and the State on the other: the financial dealings of the State with public undertakings are governed by legislative budgetary acts as well as annual accounts and reports. The need mentioned in Article 90 (3) does not, therefore, exist.

2. Lack of competence on the part of the Commission

(a) According to the French Government, the sole power to regulate the application of Articles 92 and 93 by acts

of general application is conferred on the Council by Article 94. Concurrent powers on the part of the Commission in this field could be recognized only if it were expressly provided for in the Treaty. Article 90 does not serve that purpose. It does not in any way constitute a derogation to the powers conferred on the Council by Article 94, since the latter is expressly mentioned by Article 90 (1), among the other articles with which the Member States must comply in relation to their public undertakings.

The power conferred on the Commission by Article 90 (3) to ensure the application of the provisions of Article 90 in conformity with its role as guardian of the Treaty, authorizes it to address injunctions to the Member States where necessary, that is to say, when the latter enact or maintain in force any measures contrary to the rules contained in Articles 85 to 94, in particular. Article 90 (3) therefore seeks to facilitate the application of those rules and not to enable the Commission to make rules generally governing the application to public undertakings of all the provisions of the Treaty.

The phrase "where necessary" also clearly shows the subsidiary nature of Article 90, as has furthermore been recognized in the Commission's pleadings. It is not permissible to add to it a further complementary power, not provided for anywhere in the Treaty, to set up a general preventive system the purpose of which is to inform the Commission and enable it to perform the task of guiding the Member States in their actions as to the objective set out. The directive goes a great deal further than the obligation regarding the provision of information defined in Article 5 of the Treaty; it establishes a substantive obligation to inform the Commission, the breach of which may lead to the procedure contained in Article 169. In addition, Article 5 may not be invoked for this purpose as, according to the case-law of the Court, it is to be interpreted strictly and its contents are defined by the Court in each individual case in view of the provisions at issue. Equally, the conferment on the Commission of powers of investigation and control set out in the Treaty requires the participation of the Council, by application of Article 213 of the Treaty if necessary.

(b) Furthermore, the directive is vitiated by a lack of competence in so far as it has added provisions to those contained in Articles 92 and 93 without any legal basis. According to those articles, the existing systems of aid as well as plans to grant aids communicated by the Member States must be examined to discover whether they are compatible with the Treaty or are capable of being misused, but the list of financial relations resulting from Article 1 in conjunction with Article 3 of the directive clearly goes beyond the limits of the concept of an aid within the meaning of the Treaty, and the Council itself has no power to extend the scope of Articles 92 and 93 on the basis of Article 94.

The same applies to the extension made by the directive to the obligations on Member States regarding the duty to provide certain financial and accounting information relating to public undertakings, on a national level and in a certain order, as well as the duty to set up machinery for systematic information

on all movements and the use of public resources when public undertakings are concerned.

3. The position of the public undertakings under the Treaty and discrimination against them

(a) The French Government emphasizes first that under Article 222 the Treaty does not affect the system of property ownership. Article 90 itself takes cognizance of the existence of various types of public and private undertakings and recognizes their legitimacy. Those two provisions, read together, lead to the conclusion that the Treaty recognizes the heterogeneity of the public sectors in the Member States and that recourse to a single criterion is precluded, subject to specific tasks and services in the public interest. By replacing those principles in the directive with concepts of control and dominant influence, the Commission has caused a serious distortion of Article 90 which is contrary to the Treaty.

(b) Furthermore, the directive introduces actual discrimination against public undertakings compared with private undertakings. Article 3 of the directive contains a list, albeit incomplete, of the movements of funds which enable the Commission to require that all the information concerning the financial organization and functioning of public undertakings shall be made available to it. Every detail of the normal state and working of undertakings is to become a matter of rigid control as soon as it relates to public undertakings. In that light, there is, moreover, a major contradiction: on the one hand, the directive claims, particulary in its preamble, that it establishes equal treatment between public and private undertakings; on the other, it treats as a special case movements of funds when they relate to public undertakings, whereas those same movements are considered to be normal and not subject to any control when they relate to private undertakings.

In addition to this, the French Government asserts, the information concerning financial relations is to be kept at the disposal of the Commission for five years, and as a result the financial commitments of public undertakings remain in a precarious position throughout that entire period. Next, it further criticizes the fact that the directive is based on a concept of a public undertaking which does not appear in the Treaty and places on public undertakings new constraints not experienced by private undertakings.

(c) The French Government further asserts that the Member States' participation in the preparation of the directive as alleged by the Commission was incomplete on the ground, *inter alia*, that there was no real examination of the work of national experts on the necessity for the directive, that is to say, the need to put an end to the alleged lack of transparency.

In this regard, the French Government challenges the relevance of the comparison made by the Commission between the distribution policies of Peugeot, Citroën and Renault. There is freedom of action in this area in accordance with the Treaty for public as well as private undertakings, and the arrangements for covering losses are a matter for the undertakings and its shareholders.

4. Fields of application of the EEC, ECSC and EAEC Treaties

In the alternative, the French Government claims that the directive is void on the ground that it applies by implication or expressly to the steel, coal and nuclear energy sectors.

The field of application of the directive seems to it to be wholly general, and the definition of public undertakings in Article 2, as well as the exemptions set out in Article 4, seem to it to imply that the provisions of the directive apply to all public undertakings, including those covered by the Treaties establishing the European Coal and Steel Community and the European Atomic Energy Authority.

That extension, which interferes with a series of express provisions of the ECSC and EAEC Treaties, is contrary to the rules which determine the fields of application of the three treaties, particularly Article 232 of the EEC Treaty.

Arguments of the Commission

1. Lack of competence on the part of the Commission

(a) In the *Commission's* view, the object of the directive in question is unconnected with the field of application of Articles 92 and 93 and is therefore outside the context of Article 94. The directive seeks neither to define an aid (Article 92) nor to interfere with the operation of the procedure for the control of aids nor to interpret it. Article 94 does not state that the Council shall make all regulations concerning aids, but only that it shall make the regulations for the application of Article 92 and 93. The difficulty which the Commission was seeking to overcome by means of the directive is the situation which arises when the Member States do not respect the obligation to keep the Commission informed. In order to institute the procedure for failure to fulfil an obligation under Article 169, which in any event does not seek to determine the compatibility of the aid with Article 92 but only to re-establish the proper functioning of the machinery contained in Article 93, the Commission must be aware of the existence of aids which have not been notified and which, particularly so far as public undertakings are concerned, may take hidden forms and may not appear anywhere in published documents. The directive is intended purely to make plain the financial context which enables the Commission to assess the impact of the actions planned and to supervise the proper notification of aids. It is therefore outside and, more accurately, in advance of the procedure contained in Article 93.

Moreover, it does not follow from the list of the financial relations to be made transparent that they must in themselves be considered to be aids within the meaning of Article 92. The sphere in which the directive requires transparency is much wider than that of aids.

It is an express result of the reference made in Article 90 (3) to the whole article and of the reference in Article 90 (1) to Articles 92 to 94 that questions concerning aids may be the object of the acts provided for in Article 90 (3). Furthermore, in its reply, the French Government recognized that Article 90 (3) seeks to facilitate the application of the rules relating to the control of aids.

The Commission is prepared to admit that its powers under Article 90 are limited to monitoring observance of the rules of the Treaty, and that it is not entitled to amend the substantive provisions. On the other hand, it is

entitled to issue the prescribed instruments necessary to ensure that the Member States comply with those rules. It may plainly be seen from the choice offered by Article 90 (3) between the use of a decision and that of a directive that those instruments may be not only repressive but also preventive in character.

(b) It follows from the above-mentioned considerations that the directive must not be interpreted as meaning that all the financial relations to be made transparent must be characterized as aids. Although the obligation to achieve transparency is a new obligation, it does not add any legal effect to the provisions of Articles 92 and 93 of the Treaty.

2. The position of public undertakings under the Treaty and discrimination against them

(a) In order to delimit the field covered by the duty to achieve transparency, it is essential to define the concept of a public undertaking. The heterogeneity of the public sectors means that there is no common concept of a public undertaking in the Member States. Since Article 90 is intended to prevent the objective of the rules of the Treaty from being thwarted as a result of the special influence of the Member States over their public undertakings, it is necessary to include among public undertakings those whose behaviour on the market is capable of being controlled by the State, either because it is the owner or major shareholder or because it has a financial interest enabling it to take control. The French Government's argument is mistaken because it confuses the more general concept of public undertaking contained in Article 90 (1) with the more specific concept contained in Article 90 (2).

(b) In this regard, the Commission points out first that the obligations contained in the directive are the responsibility of the Member States, who hardly need to pass on their obligations to the public undertakings provided that they exercise adequate control over them. If moreover the States administer in the normal way their financial involvement in undertakings, the directive should not in the ordinary course of events give rise to new demands on them. But even if the directive imposes new obligations on public undertakings, there is no discrimination against them because the private sector and the public sector are not in the same situation, in so far as State aids to private undertakings are normally transparent whereas this is not the case for public undertakings.

The obligation to keep information at the disposal of the Commission for five years does not create a precarious situation.

Article 5 is not to be interpreted as meaning that it replaces the procedure for the examination of aids set out in Article 93.

3. Fields of application of the EEC, ECSC and EAEC Treaties

The Commission did not state in the directive itself that it does not apply to ECSC undertakings because such application is precluded by Article 232 of the EEC Treaty in conjunction with the provisions on aids contained in the ECSC Treaty. On the other hand, it was necessary to state the extent to which the directive applies to undertakings in the nuclear sector because, since the EAEC

Treaty does not contain any provisions on aids, Articles 92 and 93 of the EEC Treaty, and hence the directive, are applicable to that sector.

C — *Application of the Italian Republic (Case 189/80)*

The applicant's arguments

1. The general conception of Article 90

(a) The *Italian Government* submits that the power given to the Commission by Article 90 is a supervisory power which, in order to be set in motion, requires specific and concrete national measures, enacted or maintained in force with the aim of enabling public undertakings to act in a manner contrary to the Treaty rules. Therefore that power may not be exercised in a repressive way. The Commission's opinion to the effect that the alleged lack of transparency, itself denied by the Italian Government, plainly constitutes a measure contrary to Article 90, is not correct. Article 90 may not be invoked to confer on the Commission a general legislative power to define, even for the purposes of prevention, the obligations to be met by the Member States with a view to achieving the aim laid down in Article 90 (1). The same applies to the Member States' obligation to cooperate, set out in Article 5 of the Treaty. Article 90 does not mention Article 5, which lays down an obligation the tenor of which in each particular case depends on the provisions of the Treaty or the rules which emerge from its general framework, and therefore not on the particular acts of the Commission. Article 5 does not make the Commission the organ with the power to define in a preventive, general and abstract manner the precise content of the obligation to cooperate.

(b) With regard to the Commission's reference to the preparatory documents, the Italian Government emphasizes that certain Member States, among them Italy, expressed their opposition to the directive from the stage of the preliminary draft, by challenging *inter alia* Article 90 as a sufficient legal basis.

2. Infringement and wrongful application of Articles 90 and 92 to 94; lack of competence and misuse of power

(a) According to the Italian Government, it is clear from the pleadings of the Commission that the purpose of the directive in question is to obtain access to information, with a view to the more effective application to public undertakings of the rules relating to State aids. Since the system of notification has proved inadequate in relation to public undertakings, the Commission has completed the procedure laid down in relation to aids by adding to the obligation to communicate information an obligation to exhibit transparency, with the result that the obligation imposed by the directive is thus directly attached to that imposed by Article 93 (3), whatever the financial relations listed in the directive, which, however, also covers provisions not related to the sphere of aids. The main purpose of the directive is to make it possible for compliance with the obligation concerning notification to be monitored. The Commission therefore adopted appropriate provisions with a view to the application of Articles 92 and 93, thus exercising a competence

expressly reserved to the Council by Article 94. The lack of competence on the part of the Commission is therefore evident, as well as the misuse of powers, in so far as the Commission exercised the power contained in Article 90 in order to render the procedure applicable to aids possible with regard to public undertakings.

(b) At the same time, the directive creates uncertainty with regard to the procedural safeguards contained in Article 93.

3. Infringement and wrongful application of Article 90; lack of powers and breach of the principle of proportionality

(a) Even if Article 90 empowers the Commission to take measures relating to State aids, it follows from the careful wording of that article that the Commission may not thereby impose new general preventive measures relating to transparency and information, or define in a binding manner the concept of public authorities and public undertakings.

(b) The directive is vitiated by disproportionality, in so far as the Commission could obtain the desired result either by exercising the powers conferred upon it by Article 93 or by having recourse to Article 213.

Again, the obligations imposed by Article 5 of the directive are disproportionate to the objective which the Commission intended to achieve by means of the directive; that is to say the possible determination of isolated cases of aids which have not been notified and are incompatible with the Treaty.

4. Infringement of Article 222 and breach of the principle of non-discrimination

(a) Article 222 of the Treaty rules out the possibility of treatment differentiated according to the public or private nature of the property. With regard to public undertakings, the directive involves a thorough and complete control of capital, financing and movements of capital, while public undertakings are in addition subjected to a preventive procedure which, during the preventive phase, deprives them of all the safeguards of concerted examination, examination in which arguments may be put forward, and application to the Council, laid down in Article 93 (2).

(b) There is also a breach of the principle of non-discrimination, in so far as Article 4 of the directive exempts several public undertakings without giving any reasons. Although it is possible to exempt an undertaking on account of its lesser importance, Article 90 does not permit a sectional exemption not based on the absence of competition within the Community in the sector, without the risk of an infringement of paragraph 1, which applies to all public undertakings.

The Commission's argument

1. The general conception of Article 90

Whilst repeating its above-mentioned arguments, the *Commission* states that the limited notion of the scope of Article 90, adopted by the applicant, may not be accepted. Even if the obligations of the Member States under Article 90 (1) are reduced to a simple obligation not to take any action, which the Commission does not accept, Article 90 (3) authorizes

the Commission to adopt measures, that is to say, directives or decisions, equally imposing, for example, an obligation to amend a given legal provision, to create new obligations or to provide for new controls.

2. Infringement and wrongful application of Articles 90 and 92 to 94; lack of competence and misuse of powers

Taking account of the arguments which it has already put forward, the Commission takes the view that the submission based on its lack of competence is not valid. The Commission admits that its powers under Article (90) (3) may not be used to alter the substantive rules with which the Member States must comply, but it emphasizes once again that even if its task is confined to ensuring that the rules of the Treaty are observed, it may adopt preventive or instrumental measures in order to be better able to assess the exact nature and scope of the financial relations between the Member States and their public undertakings. It was necessary to adopt definitions of public authorities and public undertakings in order to delimit the sphere to which the obligation to exhibit transparency applies.

Since the procedure relating to State aids already applies by virtue of Article 90 (1), it is not a misuse of powers to put the Commission in a position to fulfil its supervisory task by means of the contested directive.

3. Breach of the principle of proportionality

(a) According to the Commission, the aim which the directive was intended to achieve cannot be achieved by resorting to Article 93 or Article 213. The precondition for the application of Article 93 is that notification should be made by a Member State, and it is precisely in order to ensure that that machinery should work well that the directive was adopted. Moreover, respect for the obligations imposed by the directive will prevent the Member States from availing themselves of the excuse that they are unable to reconstruct their financial relations with the public undertakings after a lapse of several years. As for Article 213, it does not apply to information which is already at the disposal of the Member States.

(b) Furthermore, the obligations imposed by the directive are not disproportionate. The directive requires of the Member States the minimum necessary to achieve the intended objectives and requires information to be provided only subsequently and at the Commission's request and not automatically or systematically.

4. Infringement of Article 222 and breach of the principle of non-discrimination

(a) There is no discrimination between public undertakings and private undertakings, since the latter are not subject to the Commission's supervision. The different treatment which is based on the different nature of the financial relations between Member States on the one hand, and public or private undertakings on the other, is intended to re-establish a balance in their respective positions and does not impose any obligations on undertakings, but rather on Member States.

(b) The Commission alleges that the exemption of certain public sectors from the application of the directive is adequately explained in the preamble to the directive and is based on the fact that those sectors are already subject to provisions ensuring an adequate transparency and are not capable of appreciably affecting trade between Member States. The Commission further emphasizes that those sectors are exempted from the field of application of the directive only provisionally and that if the ground put forward in relation to non-discrimination were accepted this could lead only to the directive's being declared void in part, which would result in the extension of its field of application.

D — Application of the United Kingdom (Case 190/80)

The applicant's arguments

1. Field of application of Article 90 (3)

According to the United Kingdom Government, a reading of Articles 85 to 90, which must be read as a whole, shows that the primary function of Article 90 is in any event to make it clear that the rules applying to undertakings apply also, subject to Article 90 (2), to public undertakings.

As for Articles 85 and 86, their wording limits their field of application to undertakings, so that Article 90 assumes an important role for them, it being designed to prevent the Member States from using public undertakings to subvert the rules contained in Articles 85 and 86 and through Article 90 (3) to enable the Commission to take action in respect of infringements. With regard to State aids, on the other hand, Article 93 confers wide powers on the Commission, with the result that Article 90 is of lesser importance in this connection.

The Commission is empowered to act where an infringement of the rules on competition by a public undertaking results, not simply from the conduct of that undertaking itself, but rather from a measure enacted, or maintained in force, by a Member State. In this regard there is an analogy with Article 93 (2), which empowers the Commission, if it finds that a particular aid is not compatible with the common market, to take a decision addressed to the Member State concerned requiring it to abolish or alter such aid. Similarly, Article 90 (3) empowers the Commission to act where it considers that a particular national measure infringes Article 90 and, where necessary, to address a directive or decision to the Member State concerned, requiring the abolition or amendment of that measure.

This analysis leads to the conclusion that Article 90 (3) is concerned with the function of the Commission as "guardian of the Treaty" but does not confer any general law-making powers on the Commission.

2. General law-making powers

The *United Kingdom Government* distinguishes between two types of directives: those which contain general legislative provisions and may be compared with regulations, and those which lay down specific provisions addressed to one or more Member States and are analogous to decisions.

The Commission's powers under Article 90 (3) fall within the latter group, for the three reasons which are set out below.

(a) From a linguistic point of view, the conferment of general law-making powers results in the use of the phrase "shall issue", whereas the wording used in this case, that is to say, "shall address", is similar to that in the second paragraph of Article 97, whereby "the Commission shall address appropriate directives or decisions to the State concerned".

(b) Starting from the terms of Article 155, the United Kingdom Government submits that apart from its role as "guardian of the Treaty", the Commission may exercise only the powers conferred on it by the Council or the power to adopt subsidiary measures. Apart from the exception in Article 48 (3) (d), which refers to "implementing regulations", the Commission is not empowered to adopt regulations or, apart from very limited and transitory exceptions, to issue directives.

(c) If the Commission's interpretation of Article 90 (3) were accepted, this would mean that such a legislative power might be exercised without any of the usual procedural safeguards, that is to say, the consultation of the European Parliament and the Economic and Social Committee, whereas the regulations or directives to give effect to the principles in Articles 85 and 86 or to those in Articles 92 and 93, which do not apply to public undertakings, are to be adopted under Article 87 (1) or Article 94 respectively by the Council on a proposal from the Commission and after consultation of the Parliament. Public undertakings would therefore be liable to be subject to an entirely different regime from that applying to private undertakings, and this would be contrary to the principle of equal treatment which is recognized in the preamble to the directive itself. Moreover, since Article 90 (1) extends to all the rules contained in the Treaty, the Commission would be endowed, in the case of public undertakings, with a potentially unlimited legislative competence.

Clearly such an interpretation would lead to a serious distortion of the balance of the powers of the institutions.

3. Law-making power in relation to State aids

Article 90 (3) does not confer any law-making powers in relation to State aids.

It is clear from the preamble to the directive that its concern is with State aids. Under Article 94, legislative competence in the matter of State aids is conferred on the Council. As competence conferred expressly on one institution may not be exercised by another, the directive is not within the Commission's competence under Article 90 (3).

If the Commission were to consider that it required information going beyond the field of State aids to enable it to exercise its responsibilities under Article 90 (3), an adequate basis could have been found elsewhere, even without resort to Article 235, in Article 213, which provides that:

"The Commission may, within the limits and under the conditions laid down by the Council in accordance with the provisions of this Treaty, collect any information and carry out any checks required for the performance of the tasks entrusted to it."

The Commission's arguments

1. Field of application and function of Article 90 (3)

The Commission states that the adoption of the directive belongs to its role as guardian of the Treaty. Under Article 90 (3) it has the power to take preventive action, facilitating its insight into national public sectors. Although Article 93 confers considerable powers on the Commission, they are of no avail in the absence of notification, and, in view of the complexity of the financial relations between public authorities and public undertakings, the risk that Article 90 (1) will not be properly observed suffices to trigger the competence of the Commission to watch over the application of the provisions of this article and thus to issue the contested directive under Article 90 (3).

2. General law-making power

(a) The Commission rejects the distinction drawn by the United Kingdom Government between general directives or law-making directives on the one hand and specific directives on the other, and it submits that Article 189 knows one kind of directives — those always having a law-making character — laying down rules addressed to the Member States. According to the Commission, the question is not one of laying down some doctrinaire boundary line between different types of directives, but rather whether or not it has exceeded or misused its powers under Article 90.

The contested directive imposes only an auxiliary obligation by giving auxiliary rules, in order to help the Commission to exercise effectively its duty to ensure that the Member States do not evade the rules on aids through the intermediary of public undertakings. For the performance of that function, there are no indications in the Treaty that the Commission is restricted to a purely repressive role, that is to say that it may take action only *ex post facto.* The general power of supervision of Article 155 is given greater precision by Article 90 (3) and there is nothing to prevent the Commission from taking precautionary measures in order to exercise its guardianship effectively and to ensure that the provisions of Article 90 are properly applied and thus that the machinery provided for in Article 93 works well.

(b) The Commission further emphasizes the fact that Article 90 is sufficient as a legal basis for the contested directive. It states that Article 5 was brought into the argument only because it confirms the correctness of the interpretation of Article 90 (1), in so far as the Member States must not only abstain from any measure which could jeopardize the attainment of the objectives of the Treaty, but must also put an end to situations which create risks for those objectives.

3. Law-making powers in relation to State aids

The Commission rejects the United Kingdom Government's argument to the effect that the directive impinges upon the exclusive competence of the Council. Only the provisions defining the notion of an aid, or an aid compatible with the Treaty, or elaborating the procedure of supervision of aids starting with the notification by a Member State, are included in the scope of a regulation based on Article 94. In the absence of spontaneous notification by the Member States, the Commission could institute a procedure under Article 169 for failure to keep it informed. Such a procedure is outside the special procedure of Articles 92 and 93; it is the same with the contested directive, which seeks to provide the Commission with knowledge of aids which have not been notified. The adoption of the directive is, moreover, necessary because the Commission neither has nor wishes to have the staff necessary to scrutinize the countless possible sources of information.

If the directive is concerned with State aids, it is because Article 90 (3) charges the Commission with a duty to ensure that the particular relationships between Member States and their public undertakings do not result in infringements of Treaty rules, particularly the rules on State aids. The institutional balance is therefore not altered, inasmuch as the Commission does not go so far as to adopt rules on the application of Articles 92 and 93.

Under Article 5 of the Treaty, the Commission has a general right, not subject to the permission of the Council, to obtain relevant information in so far as there is an obligation on the Member States. Article 90, which refers to all the rules in the Treaty, may even be regarded as a *"lex specialis"* in relation to Article 5 and therefore constitutes the correct legal basis for establishing transparency without its being necessary to have recourse to Article 235.

Article 213 is not relevant either, since the principal function of that article is to lay down rules for obtaining information from undertakings and individuals which or who are not subject to the duties contained in Article 5, whereas the directive imposes duties only on Member States.

E — Intervention of the Federal Republic of Germany

1. Whilst it accepts that the Member States are free to retain or alter their property structures and that, in order to avoid competition's being distorted, public as well as private undertakings must in principle be subject to the same rules, the *Federal Government* finds justification for the obligations specifically mentioned in Article 90 in the risk that, on the one hand, the Member States may use their special influence on public undertakings so as to cause the latter to act in a manner which is not compatible with the Treaty and, on the other, the undertakings may have competitive advantages over private undertakings as a result of their special relationship with public authorities, without such advantages being recognizable from outside. After referring to a series of examples relating to different fields in the Member States, the Federal Government supports the Commission's view that there is a lack of transparency. Even public documents, such as State budgets and

accounts of undertakings, are far from being sufficient to enable the financial relations in question to be ascertained for the purposes of review under Article 92 to 94. The Federal Government further emphasizes that it would be unreasonable to expect the Commission to obtain all those documents itself and examine them in order to discover possible infringements, in view of the fact that Article 5 of the Treaty lays down the obligation on the Member States to assist the Commission in the achievement of its tasks.

2. In view of the differences existing between the public sectors of the Member States and their legal concepts, the concept of a public undertaking must be interpreted independently under Community law. In this regard, the Federal Government states that for the purposes of Article 90 (1), the question whether an undertaking is a public undertaking does not depend on its public function or the tasks entrusted to it, but exclusively on whether or not the public authority has a dominant influence over it.

3. Also in relation to the interpretation of Article 90, the Federal Government submits that the concept of a measure within the meaning of that article must be interpreted broadly, in such a way as to include not only positive measures but equally failure to act, either to prevent public undertakings from taking action or maintaining a situation contrary to the Treaty, or, with reference to the obligations *inter alia* arising from Article 5 of the Treaty, to make the financial relations between the Member States and public undertakings transparent. In that connection, the maintenance itself of obscurity, involving the risk of an infringement of the Treaty, constitutes a measure contrary to the rules contained in the Treaty, within the meaning of Article 90 (1). Therefore the contested directive was properly based on Article 90 (3) by the Commission.

4. However, even assuming that the directive directly concerns the review of aids provided for in Articles 92 to 94 and that it is not to be seen, as the Federal Government believes, in the context of a preliminary procedure set up as a result of the lack of transparency and providing for the availability of the information necessary for a review to be undertaken in an individual case, the directive is nevertheless covered by the field of application of Article 90.

Although it is correct that the Treaty does not deal with the connection between Article 90 (3) and Article 94, the Council's competence may not exceed the field of application of Articles 92 and 93, because under Article 94 the Council may only make regulations for the application of Articles 92 and 93 and in particular determine the categories of aid exempted from this procedure. Article 92 does not contain any definition of the concept of an aid; the latter is therefore determined by primary Community law and is subject only to the interpretation of the Court and not to a restrictive definition of the Council provided by means of a regulation under Article 94.

Assuming that certain aids from Member States to public undertakings are not notified to the Commission for the purposes of review under Article 93, those aids are prohibited and the Commission is obliged to take action against them. However, Article 93 is silent on the way in which the Commission may obtain knowledge of aids which have not been notified and

take steps against such aids. Under these circumstances, to institute the review procedure set out in Article 93 (2) would have the effect of depriving the provisions of paragraph 3 of their binding force and even of encouraging their non-observance.

Therefore the Council may not enact any provisions for such cases, even in adopting a regulation under Article 94, with the result that its powers under that article do not preclude the adoption of directives by the Commission under Article 90 (3).

In such cases, the Commission may not be compelled to use the more complicated procedure under Article 169, which, on the other hand, requires no additional legal foundation, but it may take a decision that the aid was granted in disregard of Article 93 (3) and must be abolished or altered. There neither is nor has been in the past any requirement of the prior adoption of a Council regulation, setting out the procedure to be followed.

Furthermore, the contested directive is concerned with the preliminary stage, that is to say, the Commission's power to acquire the information necessary to be able to determine possible infringements of the Treaty.

5. The scope of that power may not be limited to purely repressive actions. Without accepting the distinction, which it considers artificial, between general law-making directives and specific administrative directives, and also without accepting that the Commission has only implementing powers, the Federal Government confines itself to pointing out that in a series of cases the Treaty gives the Commission primary powers to adopt directives of a general nature which do not require the power to be conferred previously by the Council. By way of example, it refers in this regard to the adoption by the Commission of Directive No 70/50/EEC of 22 December 1969, based on the provisions of Article 33 (7) on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (Official Journal, English Special Edition 1970 (I), p. 17), which deals not only with the procedure and timetable for such abolition.

The directive contested here does not go so far. Its sole aim is to create conditions enabling the financial relations between Member States and their public undertakings to be reviewed. The question as to whether those relations constitute aids which are incompatible with the Treaty is ultimately to be decided by the Court and may be determined only in the context of the procedure contained in Articles 92 and 93 for which the Council may adopt regulations under Article 94.

The directive moreover does not go further than is necessary. In the event of the same or similar infringements taking place in several Member States, the Federal Government understands the United Kingdom's Reply as meaning that a Commission directive under Article 90 (3) seeking to put an end to such infringements, would not be an unacceptable legislative act. On that view the Commission could require Member States to notify it of all aids to public undertakings; in such a directive, the Commission could legitimately define all the factors capable, in its opinion, of constituting aids for which a review is necessary under Article 93. By comparison to such an alternative, the contested directive merely describes the

factual circumstances in which aids which are incompatible with the Treaty will probably or possibly exist.

6. The Federal Government takes the view that the directive does not contain any discrimination against public undertakings, first because it imposes obligations only on States and because it does not define any category of aids which are capable of being incompatible with the Treaty. If the view of the French Government, to the effect that financial relations are already transparent, is accepted, and taking account of the fact that professional secrecy is ensured to the same extent as in the cases where the Commission undertakes a review of individual cases, the keeping of records cannot constitute discrimination. Lastly, only unjustified unequal treatment of the same factual situations may be regarded as discrimination. The differences between the provision of funds for public undertakings and those for private undertakings are so significant that it is impossible to regard them as the same factual situations.

7. The argument to the effect that the Commission may also obtain the desired information on the basis and indeed only on the basis of a Council regulation adopted under Article 213, may not be accepted. The possibility of resorting to Article 213, as would be the case only in relation to third parties and not Member States, does not rule out the possibility that Article 90 (3) itself confers on the Commission the powers necessary to obtain the information necessary to obtain the information essential for the performance of the task which is imposed on it by the same provision. In order to accomplish that task, the Commission might require the Member States and undertakings concerned to furnish information in individual cases under Articles 90 (3) and 93, without any need for a special regulation. The fact that the Commission sets forth its requirement in the form of a directive of a general nature may not make any difference.

8. In relation to the intervention of the Federal Government, the *French Government* observes that it may be concluded therefrom that the contested directive in general terms concerns the application of Articles 92 and 93, which are within the competence of the Council. The French Government has never submitted that the Council may under Article 94 define the concept of aid and the criteria governing compatibility with the Treaty, but only that it is for the Council to define in particular the procedural provisions in Articles 92 and 93, as it has done in certain sectorial directives, for aids to the shipbuidling industry, for example.

The French Government is prepared to accept that a reinforcement of control over aids, consisting of a full application of Articles 92 and 93, necessitates complete information on State aids, but it states that it is unable to agree with the Federal Government's submission to the effect that the Commission is less well informed in this regard as to public undertakings and that the provision of funds for the latter exhibits such considerable differences that private undertakings are not in the same situation.

9. In relation to the intervention of the Federal Government, the *United Kingdom Government* emphasizes that the real problem is not the treatment of public undertakings but rather the maintenance of the institutional balance within the Community.

Article 5 of the Treaty, which was not taken as the legal basis for the adoption of the directive, is not of any particular significance with regard to the specific duty expressly laid down by Article 90 (1), prohibiting the Member States from enacting or maintaining in force any measures contrary to the Treaty. The intervener's contention to the effect that a measure may fall within Article 90 (1) irrespective of whether it is contrary to the Treaty contradicts the express terms of that article, which show clearly that only a specific measure may infringe Article 90 (1), and not inaction.

According to the United Kingdom Government, in the sphere of State aids Article 93 (1) empowers the Commission to keep under constant review all systems of aid in Member States. The requirement of cooperation, read with Article 5, would enable the Commission to ask for information if it suspected that an aid had been granted but not notified: if the information was provided, the Commission could examine the measure in question; if not, it could proceed under Article 169. The Commission could, in addition, put forward proposals for legislation under Article 94.

The contested directive may not be regarded as a simple request for information, presented in a generalized form, and the provision for information, which may lead to the discovery of infringements of the Treaty, to be required does not imply that there is a power under Article 90 (3) to adopt new substantive rules imposing new obligations on the Member States. The interpretation given to Article 213 by the intervening party leads to the paradoxical result that under that article the Council has no power to authorize the Commission to obtain the necessary information, whereas under Article 90 (3), which contains no provisions whatever to that effect, the Commission has the power to adopt a general directive having the same effect.

F — Intervention of the Netherlands

1. The *Netherlands Government* does not go so far as to say that in the absence of the directive, the Member States are in breach of the obligations devolving on them under the Treaty if the financial relations between the public authorities and public undertakings are obscure. However, it shares the Commission's view that the lack of transparency in these relations often makes it difficult to examine how far they accord with the rules of the Treaty.

2. To the question whether, in referring as to its material content to other provisions of the Treaty, Article 90 (1) also has an independent meaning, the Netherlands Government replies in the affirmative. The fact that such a special provision was included militates, in its opinion, against such a provision being given a purely subsidiary function. Most of the other provisions of the Treaty are based on the premise that there is a clear separation between the public authorities and the private sector. Where relations do not in fact correspond with that premise, as is the case with public undertakings, the content and scope of a large number of prohibitions and obligations under the Treaty become less clear, thus making their application considerably more difficult or even impossible. This is exactly the case of the application of Articles 85, 86 and 92. The function of Article 90 (1) is to confirm that in such

situations the other provisions of the Treaty are appliable without exception and Article 90 (3) then empowers the Commission to put in more precise terms the obligations referred to in paragraph (1), in so far as that is necessary, and to establish the more detailed rules in order to achieve the aims of Articles 92 and 93, for example. Such powers of the Commission may also be found in Articles 37 (7) and 97.

Article 90 contains nothing to preclude that power from being applied as a preventive measure; it is particularly important that paragraph (3) provides the Commission with the means which may be used without its being or becoming necessary to apply Article 169, which presupposes that there are clear obligations which have not been complied with, as may well not necessarily be the case as regards the situations covered by Article 90.

3. According to the Netherlands Government, the important question is whether the aim of making relations between public authorities and public undertakings transparent must be achieved by a measure adopted under Article 94 or whether the Commission is empowered to achieve it by Article 90.

For the application of Articles 92 to 94 it is necessary that the Commission should know of or suspect the existence of a national measure in the nature of an aid. The Netherlands Government supports the Commission's view on this point, to the effect that it is precisely the fact that there is insufficient knowledge and detailed information about the relations between Member States and their public undertakings which prevents the Commission from carrying out its task under Article 93. It is by no means certain that such relations must be treated as aids *per se*, and it is only in the case of measures to be regarded *a priori* as aids that more detailed rules should be based on Article 94, in order to provide the Commission with the necessary information.

It would therefore be wrong in law to base the subject-matter of the directive on Article 94, since the wide obligation to supply information would go beyond the ambit of that article.

4. Furthermore, since, like Article 37, Article 90 contains particular provisions on public undertakings and provides that the special forms of relations between them and public authorities may pose a problem with regard to the application of the articles in question, it would be wrong to talk of discrimination on the part of the Commission against public undertakings.

5. With regard to the intervention of the Netherlands Government, the *United Kingdom Government* shares the view that the substantive content of Article 90 is that public undertakings are subject to the same obligations as private undertakings in relation to the observance of the provisions of the Treaty. Article 90 (3) empowers the Commission to ensure the observance of those obligations, but that does not give to Article 90 any independent meaning in the sense that there may be any further requirement of Member States other than the straightforward observance of the rules laid down by the Treaty. It is not possible to distinguish any implicit powers to put the obligations referred to in Article 90 (1) in more precise terms; furthermore, the contested directive does not state what the existing rules are, but rather creates new obligations. Even the specific power, devolving on the Commission under the

Treaty, to supervise the application of particular provisions does not include in addition the power to make rules to facilitate their application. If the Council does not have the power under Article 94 to adopt the contested directive, because the wide obligation to supply information goes beyond the ambit of that article, *a fortiori* the Commission may not have that power by virtue of Article 90.

VI — Oral procedure

At the sitting on 19 January 1981 oral argument was presented by the following: G. Guillaume, acting as Agent, for the French Government, I. M. Braguglia, Avvocato dello Stato, acting as Agent for the Italian Government, Lord Mackay of Clashfern QC, for the United Kingdom, as applicants; B. Van der Esch, G. Marenco, S. Fabro and P. J. Kuyper, Members of the Commission's Legal Department, acting as Agents, for the Commission as defendant; and Professor W. Riphagen, acting as Agent, for the Netherlands Government, and A. Deringer, Rechtsanwalt at the Oberlandesgericht Köln [Higher Regional Court, Cologne], acting as Agent, for the Federal Republic of Germany, as interveners.

The Advocate General delivered his opinion at the sitting on 4 May 1982.

Decision

1 By applications lodged at the Court Registry on 16, 18 and 19 September 1980 respectively, the French Republic, the Italian Republic and the United Kingdom brought three actions under the first paragraph of Article 173 of the EEC Treaty for a declaration that Commission Directive No 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (Official Journal 1980 L 195, p. 35) is void. The Federal Republic of Germany and the Kingdom of the Netherlands intervened in support of the conclusions of the Commission.

2 The directive, which was adopted on the basis of Article 90 (3) of the Treaty, requires the Member States to keep available for five years information concerning public funds made available by public authorities to public undertakings and also concerning the use to which those funds are actually put by those undertakings. It is clear from the preamble to the directive that its essential objective is to promote the effective application to public undertakings of the provisions contained in Articles 92 and 93 of the Treaty

concerning State aids. Moreover, the preamble emphasizes the principle of equal treatment of public and private undertakings as well as the need for transparency of financial relations between the former and the Member States because of the complexity of those relations.

3 Although they differ on certain points, the submissions relied upon by the applicant governments may be summarized substantially as follows:

1. lack of competence on the part of the Commission;

2. absence of necessity and breach of the principle of proportionality;

3. discrimination against public undertakings;

4. infringement of Articles 90, 92 and 93, inasmuch as the directive defines the concepts of public undertaking and State aid;

5. failure to respect the rules defining the scope of the EEC, ECSC and EAEC Treaties;

6. failure to state the reasons on which the directive is based and to respect the principle of equality in relation to the exemptions provided for by the directive.

First submission (Commission's lack of competence)

4 According to the United Kingdom, by adopting the contested directive the Commission committed a breach of the very principles which govern the division of powers and responsibilities between the Community institutions. It is clear from the Treaty provisions governing the institutions that all original law-making power is vested in the Council, whilst the Commission has only powers of surveillance and implementation. That division of powers is confirmed by the specific enabling rules in the Treaty, virtually all of which reserve to the Council the power to adopt regulations and directives. The same division of responsibilities is to be found in particular in the rules on competition. Those provisions themselves confer functions of surveillance on the Commission, whereas it can legislate only within the limits of a specific and express power delegated to it by a measure of the Council.

5 Again according to the United Kingdom, the provisions of the Treaty which exceptionally confer on the Commission the power to issue directives must be interpreted in the light of the foregoing considerations. Commission directives are not of the same nature as those adopted by the Council. Whereas the latter may contain general legislative provisions which may, where appropriate, impose new obligations on Member States, the aim of the former is merely to deal with a specific situation in one or more Member States. As for Article 90 (3), such a limited aim is suggested by the very wording of the provision, which states that the Commission is to "address" appropriate directives or decisions to Member States.

6 There is, however, no basis for that argument in the Treaty provisions governing the institutions. According to Article 4, the Commission is to participate in carrying out the tasks entrusted to the Community on the same basis as the other institutions, each acting withing the limits of the powers conferred upon it by the Treaty. Article 155 provides, in terms which are almost identical to those used in Article 145 to describe the same function of the Council, that the Commission is to have its own power of decision in the manner provided for in the Treaty. Moreover, the provisions of the chapter which lays down general rules concerning the effects and content of measures adopted by the institutions, in particular those of Article 189, do not make the distinction drawn by the United Kingdom between directives which have general application and others which lay down only specific measures. According to the first paragraph of that article, the Commission, just as the Council, has the power to issue directives in accordance with the provisions of the Treaty. It follows that the limits of the powers conferred on the Commission by a specific provision of the Treaty are to be inferred not from a general principle, but from an interpretation of the particular wording of the provision in question, in this case Article 90, analysed in the light of its purpose and its place in the scheme of the Treaty.

7 In that regard, it is not possible to draw any conclusions from the fact that most of the other specific provisions of the Treaty which provide a power to adopt general measures confer that power on the Council, acting on a proposal from the Commission. Nor can any distinction be drawn between provisions providing for the adoption of directives according to whether they use the word "issue" or "address". According to Article 189, the directives as well as decisions, both of the Council and of the Commission, are addressed

to parties which, in so far as directives are concerned, are necessarily Member States. In the case of a provision providing for the adoption of both directives and decisions addressed to Member States, the word "address" therefore simply constitutes the most appropriate common expression.

8 In support of the submission concerning the Commission's lack of competence, the three applicant governments claim that the rules contained in the contested directive could have been adopted by the Council. As the purpose of the directive is to enable the Commission to ensure that the Member States respect the obligation to notify it in accordance with Article 93 (3) of any plans to grant or alter State aid, and as Article 94 confers on the Council the power in particular to determine the conditions in which that paragraph is to apply, the rules in question fall within the competence of that institution by virtue of that article. In any event, such rules fall within the powers of the Council by virtue of Article 213 or, alternatively, Article 235. Since this is therefore a sphere in which the Council is competent, it is not possible, according to the applicant governments, to acknowledge that the Commission has concurrent powers under other provisions of the Treaty.

9 The Commission, supported by the Federal Republic of Germany, insists that the directive covers measures which are in advance of the procedure provided for in Article 93 and that for that reason Article 94 is inapplicable. It also contends that Article 213 does not concern information which is at the disposal of the Member States and which they must supply to the Commission upon request pursuant to their general obligation to cooperate laid down in Article 5. Article 235 is also inapplicable, since it presupposes that there is no other power of action. The Netherlands Government, for its part, emphasizes especially the specific character and importance of Article 90 as an independent provision.

10 The arguments put forward by the applicant governments relating to Articles 213 and 235 must be rejected. Indeed, Article 213, which is to be found in the part of the Treaty concerning general and final provisions, does not affect the powers which are conferred upon the Commission by particular provisions of the Treaty. Article 235 cannot, for the reason given by the Commission, be considered to be applicable in this case.

11 On the other hand, in order to assess the argument relating to Article 94, it is necessary to compare the provisions of that article with those of Article 90 in the light of the objectives and purposes of the two articles.

12 In that regard, it should be noted that the two provisions have different objectives. Article 94 is one of a set of provisions which regulate the sphere of aids granted by States, regardless of the form and recipients of such aids. On the other hand, Article 90 concerns only undertakings for whose actions States must take special responsibility by reason of the influence which they may exert over such actions. It emphasizes that such undertakings are subject to all the rules laid down in the Treaty, subject to the provisions contained in paragraph 2; it requires the Member States to respect those rules in their relations with those undertakings and in that regard imposes on the Commission a duty of surveillance which may, where necessary, be performed by the adoption of directives and decisions addressed to Member States.

13 In addition to that difference in their objectives, there is a difference in the conditions laid down for the exercise of the powers conferred on the Council and Commission by the two provisions. Article 94 authorizes the Council to make any appropriate regulations for the application of Articles 92 and 93. On the other hand, the power conferred on the Commission by Article 90 (3) is limited to the directives and decisions which are necessary to perform effectively the duty of surveillance imposed upon it by that paragraph.

14 In comparison with the Council's power under Article 94, that which is conferred upon the Commission ty Article 90 (3) thus operates in a specific field of application and under conditions defined by reference to the particular objective of that article. It follows that the Commission's power to issue the contested directive depends on the needs inherent in its duty of surveillance provided for in Article 90 and that the possibility that rules might be laid down by the Council, by virtue of its general power under Article 94, containing provisions impinging upon the specific sphere of aids granted to public undertakings does not preclude the exercise of that power by the Commission.

15 It follows from all those considerations that the first submission relied upon by the applicant governments must be rejected.

Second submission (absence of necessity)

16 The French and Italian Governments deny that the rules contained in the directive are necessary to enable the Commission effectively to perform the task of surveillance conferred upon it by Article 90. They consider that there is total legal separation between the State and public undertakings in relation to finance. The funds made available to public undertakings by public authorities appear in legislative budgetary measures as well as in annual accounts and reports of undertakings. In a democratic society information is available concerning the State's relations with public undertakings which is at least as complete as that concerning its relations with private undertakings and much more detailed than that concerning relations between private undertakings.

17 The Commission refers to the fourth and fifth recitals in the preamble to the directive, which state that the complexity of the financial relations between national public authorities and public undertakings tends to hinder the performance of the Commission's duty of surveillance and that 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. During the oral procedure, the Commission and the Federal Republic of Germany cited examples to show that those relations were not sufficiently transparent to enable the Commission to establish whether or not State aids had been granted to public undertakings.

18 In view of the diverse forms of public undertakings in the various Member States and the ramifications of their activities, it is inevitable that their financial relations with public authorities should themselves be very diverse, often complex and therefore difficult to supervise, even with the assistance of the sources of published information to which the applicant governments have referred. In those circumstances there is an undeniable need for the

Commission to seek additional information on those relations by establishing common criteria for all the Member States and for all the undertakings in question. So far as the precise determination of those criteria is concerned, the applicant governments have not established that the Commission has exceeded the limits of the discretion conferred upon it by Article 90 (3).

19 It follows that the submission concerning the absence of necessity must be rejected. The same applies to the criticism made of the Commission, in particular by the Italian Government, relating to the lack of proportionality.

Third submission (discrimination against public undertakings as compared with private undertakings)

20 The French and Italian Governments claim that it is clear both from Article 222 and from Article 90 that public and private undertakings must be treated equally. The effect of the directive is to place the former in a less favourable position than the latter, especially in so far as it imposes on public undertakings special obligations, in particular in relation to accounts, which are not required of private undertakings.

21 In that regard, it should be borne in mind that the principle of equality, to which the governments refer in connection with the relationship between public and private undertakings in general, presupposes that the two are in comparable situations. Within the limits laid down by the applicable legislation, private undertakings determine their industrial and commercial strategy by taking into account in particular requirements of profitability. Decisions of public undertakings, on the other hand, may be affected by factors of a different kind within the framework of the pursuit of objectives of public interest by public authorities which may exercise an influence over those decisions. The economic and financial consequences of the impact of such factors lead to the establishment between those undertakings and public authorities of financial relations of a special kind which differ from those

existing between public authorities and private undertakings. As the directive concerns precisely those special financial relations, the submission relating to discrimination cannot be accepted.

Fourth submission (infringement of Articles 90, 92 and 93, inasmuch as the directive defines the concepts of public undertaking and State aid)

22 The French and Italian Governments maintain that Articles 2 and 3 of the directive amplify the provisions of Articles 90, 92 and 93 of the Treaty without any legal foundation, inasmuch as they define the concept of public undertaking and determine the financial relations which, in the Commission's opinion, may constitute State aids.

23 Those criticisms are not justified. In relation to the definition contained in Article 3 of the financial relations which are subject to the rules contained in the directive, it is sufficient to state that that is not an attempt by the Commission to define the concept of aid which appears in Articles 92 and 93 of the Treaty, but only a statement of the financial transactions of which the Commission considers that it must be informed in order to check whether a Member State has granted aids to the undertakings in question, without complying with its obligation to notify the Commission under Article 93 (3). As was stated above in relation to the second submission, it has not been established that the Commission has thereby exceeded the limits of the discretion conferred upon it by Article 90 (3).

24 In relation to the provisions of Article 2, which defines the concept of public undertaking "for the purpose of this directive", it should be emphasized that the object of those provisions is not to define that concept as it appears in Article 90 of the Treaty, but to establish the necessary criteria to delimit the group of undertakings whose financial relations with the public authorities are to be subject to the duty laid down by the directive to supply information. In order to assess that delimitation, which is moreover indispensable in order to make known to the Member States the extent of their obligations under the directive, it is therefore necessary to compare the criteria laid down with the considerations on which the duty of surveillance imposed on the Commission by Article 90 is based.

25 According to Article 2 of the directive, the expression "public undertakings" means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence. According to the second paragraph, such influence is to be presumed when the public authorities directly or indirectly hold the major part of the undertakings's subscribed capital, control the majority of the votes, or can appoint more than half of the members of its administrative, managerial or supervisory body.

26 As the Court has already stated, the reason for the inclusion in the Treaty of the provisions of Article 90 is precisely the influence which the public authorities are able to exert over the commercial decisions of public undertakings. That influence may be exerted on the basis of financial participation or of rules governing the management of the undertaking. By choosing the same criteria to determine the financial relations on which it must be able to obtain information in order to perform its duty of surveillance under Article 90 (3), the Commission has remained within the limits of the discretion conferred upon it by that provision.

27 It follows that the fourth submission must also be rejected.

Fifth submission (failure to respect the rules defining the scope of the EEC, ECSC and EAEC Treaties)

28 The French Government emphasizes that the definition of public undertakings which appears in Article 2 of the directive is totally general in character and that the exemption laid down in Article 4 concerning the energy sector, including in the case of nuclear energy the production and enrichment of uranium, the reprocessing of irradiated fuels and the preparation of materials containing plutonium, implies that, subject to that reservation, the directive applies to public undertakings covered by the ECSC and EAEC Treaties. Since a measure of secondary law adopted within the framework of the EEC Treaty cannot regulate a matter covered by positive

rules in the other Treaties, the French Government claims in the alternative that the directive should be declared void in so far as it covers undertakings within the purview of the ECSC and EAEC Treaties.

29 The Commission admits that, under Article 232 (1) of the EEC Treaty and by reason of the rules contained in the ECSC Treaty concerning aids granted to undertakings covered by that Treaty, the directive cannot apply to such undertakings. In relation to undertakings in the nuclear sector, it contends that the EAEC Treaty does not contain any provisions on State aids. Consequently, Articles 92 and 93 of the EEC Treaty and hence the directive are applicable to undertakings within that sector, subject to the exceptions expressly provided for in Article 4 of the directive.

30 According to Article 232 (1) of the EEC Treaty, the provisions of the Treaty are not to affect the provisions of the Treaty establishing the European Coal and Steel Community, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down by that Treaty for the functioning of the common market in coal and steel.

31 As Article 90 (3) does in fact concern the powers of the institutions and as the contested directive imposes obligations on Member States in the sphere of aids, on which the ECSC Treaty itself contains rules affecting Member States and undertakings operating on the market in coal and steel, it follows directly from Article 232 of the EEC Treaty that the contested directive cannot apply to relations with such undertakings. For that reason, the directive is not vitiated by any illegality on that point, although it would undoubtedly have been preferable in the interest of legal clarity if the exclusion of those undertakings had been apparent from the actual terms of the directive.

32 On the other hand, so far as the relationship with the EAEC Treaty is concerned, Article 232 (2) of the EEC Treaty states merely that the provisions of the latter are not to derogate from those of the former. The French Government has not established that the provisions of the directive derogate from the provisions of the EAEC Treaty. It follows that that submission cannot be accepted.

Sixth submission (failure to state the reasons on which the directive is based and to respect the principle of equality in relation to the exemptions under the directive)

33 Article 4 of the directive excludes from its scope, apart from the energy sector, public undertakings whose turnover excluding taxes has not reached a total of 40 million European units of account during the two preceding financial years, undertakings which supply services without affecting trade between Member States to an appreciable extent and undertakings in the areas of water, transport, posts and telecommunications and credit.

34 In the Italian Government's opinion, those exemptions involve discrimination in respect of which the reasons are not stated. It takes the view that exemptions according to sector may be permitted only in the absence of competition within the Community in the sector in question.

35 Apart from the fact that that submission tends, if anything, to widen the scope of the directive, it is unfounded. Indeed, the 12th recital in the preamble to the directive states that activities which stand outside the sphere of competition or which are already covered by specific Community measures which ensure adequate transparency should be excluded, as well as public undertakings belonging to sectors of activity for which distinct provision should be made and those whose business is not conducted on such a scale as to justify the administrative burden of ensuring transparency. All of those considerations, at least one of which applies to each of the sectors excluded by Article 4 of the directive, contain sufficiently objective criteria to justify an exemption from the scope of the directive.

36 It must therefore be concluded that the applications made by the three governments have not revealed any factors capable of justifying a declaration that the contested directive is void, even in part. The applications should therefore be dismissed.

Costs

37 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading.

38 Since the three applicant governments have failed in their submissions, they must be ordered to pay the costs. The same applies to the French Government in its capacity as intervener in Cases 189 and 190/80.

39 Of the governments which intervened in support of the Commission's conclusions, only the Netherlands Government contended that the applicants should be ordered to pay the costs. It is therefore appropriate to order the French Republic, the Italian Republic and the United Kingdom to bear, in addition to their own costs, those of the Commission and the Kingdom of the Netherlands.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications;**

2. **Orders the French Republic, the Italian Republic and the United Kingdom to bear, in addition to their own costs, those of the Commission and the Kingdom of the Netherlands.**

Mertens de Wilmars Touffait Due Pescatore Mackenzie Stuart
O'Keeffe Koopmans Chloros Grévisse

Delivered in open court in Luxembourg on 6 July 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President