OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 11 January 1994 *

Mr President,
Members of the Court,

A — Introduction

1. This reference for a preliminary ruling was made by the Tribunal Superior de Justicia de la Comunidad Valenciana. It raises questions concerning the interpretation and application of Article 90 of the EEC Treaty [1] in relation to the Community competition rules for undertakings and the rules on State aid.

2. The national court considers that the questions submitted are relevant in assessing the validity of a provision of a Member State exempting public credit institutions from taxation. The proceedings which gave rise to this reference, between Banco de Crédito Industrial SA which in the meantime has been taken over by Banco Exterior España SA, and the Ayuntamiento (local authority) of Valencia owe their origin to a notice of assessment to local authority tax for the financial years 1983 to 1986 in respect of property and premises used for commercial purposes.

3. The plaintiff in the main proceedings, Banco de Crédito Industrial SA, lodged an administrative objection to the imposition of the tax. It relied *inter alia* on the exemption from taxation for public credit institutions provided for by Article 29 of Law 13/71, [2] which reads:

'Public credit institutions shall be exempt from all taxes payable to the State, province, municipality and to other entities of public law, provided that they possess the status of taxpayers'.

4. The referring court states that the central issue in this case is the possible infringement of Article 90 (1), (2) and (3) of the EEC Treaty by Article 29 of Law 13/71 on the ground that the tax exemption which that

* Original language: German.

1 — Since 1 November 1993 the EEC Treaty has become the EC Treaty in accordance with the Treaty on European Union of 7 February 1992 (OJ 1992 C 191).

2 — Law 13/71 of 19 June 1971 on the Organization and Rules governing Official Credit, *BOE* of 21 June 1971.

provision grants to public credit institutions may constitute an abuse by one or more undertakings of a dominant position on the common market, or a substantial part thereof, and may thereby infringe the principle of free competition, or on the ground that any aid granted out of public funds which distorts, or is liable to distort, free competition by favouring certain undertakings or products is incompatible with the EEC Treaty. Subject to the limitations provided for in Article 90, public undertakings must observe the prohibition, laid down in Article 86, against the abuse of dominant positions. However, account must also be taken of the case of the undertaking not acting independently but as an official agent carrying out the economic policy of the government, in which case, having regard to Article 90 (2) — but only in respect of those functions — the rule in Article 86 would not appear to apply.

5. It is apparent from the reference made by the national court that the Banco de Crédito Industrial is a commercial limited company whose shares belong to the Instituto de Créditio Oficial (ICO). In the assessment of the national court, there is no doubt that a public institution whose shares are held by the ICO and whose rules and duties are laid down in, *inter alia*, Articles 6 and 87 of the Ley General Presupuestaria (General Budget Law) is a State company subject to commercial law, except in the areas in which the Ley General Presupuestaria applies. Article 6 (3) of the Law in question provides that bodies which are subject to public law as regards their annual performance, investments and financing are public-law bodies (and not companies).

6. The national court has referred the following questions to the Court of Justice:

'Should the exemption from taxes payable to the State, province, municipality and other entities of public law which Spanish law grants to public credit institutions provided that they possess the status of taxpayers (Article 29 of Law 13/71 of 19 June 1971 on the Organization of and Rules governing Official Credit) be regarded as incompatible with the principle of fair competition inasmuch as it permits abuse by one or more undertakings of a dominant position within the common market or a substantial part of it?

Should any kind of State aid granted from public funds which distorts or may distort competition by favouring certain undertakings or products be considered incompatible with the Treaty?

Is the exemption laid down by Article 29 of Law 13/71 of 19 June 1971 incompatible with Article 90 and, by extension, with Articles 7, 85 and 94 of the Treaty establishing

the European Economic Community of 25 March 1957, signed in Rome, and with Articles 2, 9, 35 and 51 of the Acts of Accession to the Treaty, signed in Madrid and Lisbon on 12 June 1985?'

7. The defendant in the main proceedings, the Spanish Government, the Greek Government and the Commission have submitted observations. The Court addressed a question to those parties.

8. The *defendant in the main proceedings*, the local authority of Valencia, takes the view that the reference is unnecessary. The assessments for the financial years 1983, 1984 and 1985 concerned a period which antedated Spain's accession to the EEC whilst the assessment for 1986 is lawful.

9. The *Government of the Kingdom of Spain* likewise points out that the questions submitted may be relevant only in relation to the assessment for the financial year 1986 since Spain was not a member of the European Community until that time. It also points out that the assessments for subsequent financial years have not been challenged and that the tax concessions granted by Law 13/71 were abolished with effect from 31 December 1989. [3]

10. On the question whether the tax exemption in question may be regarded as an abuse of a dominant position, the Spanish Government submits that, even if it is considered that the State controls the public credit institutions and that they are essentially under the same management which lays down a single line of conduct, it can hardly be assumed that the degree of their involvement in general banking market in 1986 was so great as to constitute a dominant position. At present, their market share is less than 15%. Moreover, it is hardly conceivable that the conduct of the public authorities in granting tax concessions is evidence of the existence of a dominant position enjoyed by the banks receiving those concessions or forms, from their viewpoint, the expression of an abuse of a dominant position.

11. In any event, the Spanish Government considers it more appropriate to examine the preliminary question with reference to the rules on State aid since the tax exemption benefits a number of undertakings in a specific economic sector. Account should be taken of the fact that a tax exemption which benefits only public banks may be capable of

3 — Law No 39/88 of 28 December 1988 *Ley de Haciendas Locales* (Law on municipality finances).

distorting competition and consequently be incompatible with the common market pursuant to Article 92 of the Treaty. Moreover, on this view, the functions of the entity exempt from tax and the fact that it performs those functions only should be taken into account. From that point of view, the tax exemption in question does not constitute aid incompatible with Article 92.

12. In this regard, the Spanish Government points out that in the preamble to Law 13/71, which came into force in 1986, the public provision of credit is described as an indispensable function of the State whereby savings deposits are channelled into investments, which, from the point of view of the public interest, deserves particular attention. Article 1 defines the public provision of credit for the purposes of the Law as: 'All transactions carried out by the public credit institutions ...'. It follows from that provision that the public credit institutions may only effect transactions corresponding to the provision of public credit and that all their activities are covered directly by that Law.

13. In determining the principles governing the provision of public credit, Article 2 of the Law defines them as follows:

'(a) Giving priority to the objectives of the Economic and Social Development Plans and within the framework of this principle selecting lending business on the basis of the profitability of projects and having regard to the economic and social nature of the sectors'.

14. An examination of all the relevant provisions shows that the public credit institutions fulfil a function which meets the general interest — administering the public provision of credit — and that function alone. The tax exemptions in question cannot produce a distortion of competition going beyond the sphere of the public provision of credit owing to the limitation of this area of activity. Commercial and industrial loans and personal loans are reserved to the banking sector which is subject to competitive conditions. In the public provision of credit the general interest outweighs the objective of making a profit, which is demonstrated by the objects clause (Article 2) of the Statute of the Banco Crédito Industrial SA. Finally, the Spanish Government maintains that the tax exemption in question is not disproportionate.

15. The Spanish Government, referring to the Court judgment in Case C-202/88, [4] relies on Article 90 (2). It states that the purpose of that provision is to reconcile the Member States' interest in using certain undertakings, particularly those belonging to

4 — Judgment in Case C-202/88 *France* v *Commission* [1991] ECR I-1223.

the public sector, as an instrument of economic and social policy with the Community's interest in ensuring that the laws of competition are observed and that the unity of the common market is safeguarded. The Spanish Government proposes that the questions submitted to the Court should be answered as follows:

'The enjoyment by an entity charged exclusively with the administration of public credit of an exemption from a local tax on the use or enjoyment of any premises situated in a municipality in the pursuit of a general economic activity:

(1) does not constitute an abuse of a dominant position;

(2) does not constitute State aid incompatible with Article 92 of the EEC Treaty in so far as that exemption does not have the effect of distorting competition and its application is strictly limited to the sphere of the public provision of credit, without any profit-making purpose and without any effect on commercial or industrial credits granted as part of competitive banking business;

(3) if it is to be regarded as an abuse or as aid, a derogation may in any event be made from the applicable provisions in accordance with Article 90 (2) of the Treaty since the public provision of credit is a service of general economic interest and is stated to be such and serves as an instrument of the economic policy of the State in accordance with the objectives of the Treaties and since the exemption is a means by which the bodies administering public credit are better able to carry out their task, which is proportionate to the objective in view without affecting trade.'

16. The *Government of the Greek Republic* takes the view that the Banco de Crédito Industrial SA does not fulfil any of the criteria laid down by the case-law of the Court for identifying the existence of a dominant position. Consequently, there can be no abuse of such a position.

17. The Greek Government considers that any reduction in State revenue, and therefore any exemption from taxation granted by a State measure, constitutes a form of aid. The relaxation of the Treaty rules provided for in Article 90 (2) in favour of undertakings

entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly concerns not only the rules on competition but also the provisions on State aid. Aid which does not exceed the limits laid down in Article 90 is consequently lawful since Article 90 takes precedence over Article 92.

18. According to the Greek Government, public credit institutions are without any doubt undertakings entrusted by law or by other State act with a function of general economic interest consisting of the implementation of the State's economic policy, the safeguarding of the national currency policy and the maintenance of market equilibrium by means of a programme for planning and directing the economy. Consequently, the rules on competition and the provisions on State aid must be applicable to public credit institutions with the modifications which are necessary in order to enable their special functions to be fulfilled and safeguarded. In the view of the Greek Government, the temporary tax exemption granted to the Banco de Crédito Industrial SA did not constitute an infringement of Articles 85 to 94 of the EEC Treaty.

19. The Greek Government therefore proposes that the Court should answer the questions referred to it as follows:

'Considered in isolation, the exemption provided for in Article 29 of Law 13/71 of 19 June 1971 on the organization of and rules governing official credit cannot be regarded as infringing the principle of free competition where the undertaking granted an exemption does not occupy a dominant position on the common market or a substantial part thereof or does not abuse the position which it holds.

Subject to any contrary provision in the Treaty, any form of State aid granted from public funds which distorts or threatens to distort free competition by favouring certain undertakings or products must be considered to be incompatible with the Treaty. Consequently, the exemption provided for in Article 29 of Law 13/71 of 19 June 1971 does not constitute a breach of Articles 85 to 94 of the Treaty since it concerns a taxpayer — a public credit institution — which is charged with administering services of general economic interest within the meaning of Article 90 (2) of the EEC Treaty.'

20. The *Commission* first points out that the reference in the question to Articles 35 and 51 of the Acts relating to the accessions of the Kingdom of Spain and the Portuguese Republic bear no relation to the reasoning set out in the order for reference. The Commission therefore proposes that this part of the reference should not be answered. It also

suggests that the reference to Articles 7, 85 and 91 of the EEC Treaty should be disregarded on the ground that the main issue in the case is the compatibility of the tax exemption with Articles 86 and 92 of the EEC Treaty.

21. The Commission finds, with reference to the transparency directive, [5] that the Banco de Crédito Industrial SA is a public undertaking within the meaning of Article 90 (1) of the EEC Treaty.

22. The tax exemption in question should therefore be examined with reference to Article 92 rather than Article 86. Whilst mere enjoyment of a financial advantage cannot constitute an abuse within the meaning of Article 86, the legality of granting such advantages is expressly regulated in Article 92 et seq. Since the Banco de Crédito Industrial SA operates on the market and is in competition with other banks which are subject to taxation, the aid might distort, or threaten to distort, competition and is therefore incompatible with the common market if trade between Member States is affected.

23. In assessing the effects of the measure on competition and intra-Community trade it must be borne in mind that in acceding to the Treaty Spain was granted a transition period until 31 December 1992 during which, by virtue of Article 378 of the Act of Accession and Annex XXXII, Chapter II, certain restrictions as referred to in Council Directive 77/780/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, [6] were allowed to continue to exist on the Spanish market for credit institutions.

24. On the question of a possible breach of Article 92 of the EEC Treaty, the Commission submits that, although a national court may apply to the Court of Justice to ask whether a certain measure may, by its nature, constitute State aid within the meaning of Article 92 (1), the question whether or not the conditions for the application of that provision are fulfilled must be examined in accordance with the procedure laid down for this purpose in Article 93 of the Treaty. It also points out that, by reason of the direct effect which the last sentence of Article 93 (3) of the Treaty has been recognized as having, an infringement of that provision by a Member State is a matter which may be relied upon before the national court. According to information before it, the mea-

5 — Commission Directive 80/723/EEC of 25 June 1980 (OJ 1980 L 195, p. 35).

6 — See OJ 1977 L 322, p. 30.

sure provided for in Article 29 of Law 13/71 has not been notified to it, either pursuant to Article 93 of the Treaty or as part of the aid schemes in force when Spain acceded to the European Communities.

25. The Commission proposes that the Court of Justice should answer the questions referred to it as follows:

'The mere granting of a financial advantage such as that provided for in Article 29 of Law 13/71 of 19 June 1971 on the organization and rules governing official credit does not constitute an infringement of Article 90 (1) in conjunction with Article 86 of the EEC Treaty.

An exemption from the establishment tax (impuesto de radicacíon) granted to a public bank may constitute State aid incompatible with the common market by virtue of Article 92 (1) of the EEC Treaty although determination of the existence of conditions to be fulfilled for the application of that provision must be carried out in accordance with the special procedure provided for this purpose in Article 93 of the EEC Treaty.'

26. All the parties replied to the Court's question concerning the consequences to be drawn as regards, in particular, the application of Articles 92 and 93 of the Treaty in the event that the granting of State aid is justified under Article 90 (2) of the Treaty and, in particular, whether a Member State which relies on that provision must comply with the procedure provided for in Article 93 and whether an individual may be allowed to rely directly on Article 90 (2) in conjunction with Article 92 before the national court. In the course of the legal analysis I will return to the answers given to those questions.

B — Opinion

Definition of the issues

27. In order to answer the preliminary questions, the matters in issue must be defined. As is rightly submitted by the defendant in the main proceedings and by the Spanish Government, only the assessment to municipality tax for 1986 can be relevant for the purposes of Community law. As regards periods prior to Spain's accession to the European Communities, Community law is not applicable. Another temporal limitation on the legal consequences of the answers to be given by the Court with regard to the facts of the main proceedings stems from the circumstance that, according to the explana-

tions of the Spanish Government, the tax assessments for 1987 have not been challenged and that the provisions regulating the tax exemption in question were repealed at the end of 1989.

28. As regards the legal provisions which are to be examined, the preliminary question is formulated in quite a general way. Referring to the wording of Article 90 (1) the national court inquires whether the tax rules in question may be in breach of Articles 90, 7 and 85 to 94 of the Treaty. However, the reasons stated in the order for reference suggest that only Article 90 in conjunction with Articles 86 and 92 are to be considered. The suggestion of a possible infringement of Articles 2, 9, 35 and 51 of the Act of Accession is also made in general terms. Articles 35 and 51 bear no relation to the reasons set out in the order for reference, as the Commission has rightly pointed out. Article 2 of the Act of Accession, on the other hand, obliges the acceding Member States to observe the 'acquis communautaire' by providing:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions of the Communities before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act'.

29. To that rule Article 9 of the Act of Accession allows certain exceptions, limited in time:

'The application of the original Treaties and acts adopted by the institution shall, as a transitional measure, be subject to the derogations provided for in this Act.'

30. Article 378 mentioned by the Commission is one of those transitional measures. Article 378 (1) reads as follows:

'The acts listed in Annex XXXII to this Act shall apply in respect of the new Member States under the conditions laid down in that Annex.'

31. Annex XXXII is mentioned, *inter alia*, in point II.1 of Directive 77/780/EEC [7] on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions as well as the exceptions for which it provides. Thus, the Kingdom of

7 — The First Council Directive of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ 1977 L 322, p. 30), as most recently amended by the Second Council Directive (89/646/EEC) of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ 1989 L 386, p. 1).

Spain was entitled, for example, to apply until the end of 1992 the criterion of 'economic need' in relation to payment conditions for credit institutions whose principal place of business is in one Member State and whose branches are in another Member State. Special provisions are also provided for with regard to the number of supplementary branches that are to be opened and the percentage of the resources taken up outside banking circles by the credit institutions mentioned. Those derogating rules provide *inter alia*:

'Throughout the period of the temporary derogations referred to above, the general or special facilities which result from Spanish legislative provisions or agreements existing before accession between Spain and one or more of the other Member States will be maintained and applied on a non-discriminatory basis with regard to all the other Member States ...'. [8]

32. Despite the very general way in which it is formulated, that derogation does not, in my view, have any significance for the question which the Court must answer since those derogating provisions refer to approval procedures (Articles 3 and 4 of Directive 77/780/EEC) which play no part in this case. Consequently, in reply to the questions submitted, reference must be made solely to the provisions of the Treaty.

33. The questions referred to the Court expressly seek an examination of the compatibility of Article 29 of Law 13/71 with the provisions of Community law. According to the settled case-law of the Court, [9] it is not for the Court to rule upon the compatibility of a Member State's law with Community law. Where such questions have been submitted, the Court has, however, always interpreted Community law to the effect that in replying to the questions submitted it provides the referring court with the criteria it needs to examine the compatibility of the national law in question with Community law.

34. The national court wishes to ascertain whether a tax exemption for public credit institutions, such as that provided for in Article 29 of Law 13/71 may be maintained when it is possible that it is contrary to Article 86 in conjunction with Article 90 or to Article 92.

The possible breach of Article 90 (1) in conjunction with Article 86

35. In principle, the rules on competition are applicable to the banking sector, as is already clear from the judgment in the *Züchner*

8 — Annex XXXII, and 11.1 (b), fourth indent.

9 — See, for example, the judgment in Case 61/79 *Amministrazione delle Finanze dello Stato* v *Denkavit Italiana* [1980] ECR 1205, paragraph 12.

case. [10] Article 86 is addressed directly to undertakings, prohibiting them from abusing a dominant position on the common market or a substantial part thereof in so far as trade between Member States is capable of being affected. In the present case, however, it is a matter of assessing a legislative provision which constitutes a State measure. Article 90 (1) prohibits Member States from enacting or maintaining in force any measures which are contrary to, *inter alia*, Article 86. The Court has hitherto reviewed in a large number of cases [11] State measures on the prohibition laid down in Article 90 (1) with reference to Article 86.

36. It is ultimately for the national court [12] to determine whether the conditions for the application of Article 86 in conjunction with Article 90 are fulfilled. Both the national court and all the parties concerned assume that Banco de Crédito Industrial SA is a public undertaking within the meaning of Article 90 (1) since it is under State control. Consequently, for the further examination of the questions submitted in this case, it must be assumed that it is a public undertaking.

37. The undertaking must have a dominant position on the common market or on a substantial part thereof, the territory of a Member State being in principle considered to be a substantial part of the common market. [13] In order to determine whether an undertaking occupies a dominant position, it is first necessary to define the relevant market. [14] The banking sector in general must be taken into account as the relevant market as well as the public credit sector in particular. In the submission of the Spanish Government, it must be assumed that in 1986 the public credit institutions in Spain, and consequently the Banco de Crédito Industrial SA as well, carried on their business activity solely in the official credit sector and that they were therefore in only very limited competition with the private banks, if at all. It would therefore appear to be appropriate to have

10 — Judgment in Case 172/80 *Züchner* v *Bayerische Vereinsbank [1981] ECR 2021.*

11 — Judgments in Case 155/73 *Sacchi* [1974] ECR 409; Case 90/76 *Van Ameyde* v *UCI* [1977] ECR 1091; Case 13/77 *INNO* v *ATAB* [1977] ECR 2815; Case 30/87 *Bodson* v *Pompes Funèbres des Régions Libérées* [1988] ECR 2479; Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803; Case C-41/90 *Höfner and Elser* [1991] ECR 1979; Case C-260/89 *ERT* [1991] ECR I-2925; Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889; Case C-18/88 *GB-INNO-BM* [1991] ECR I-5941; Joined Cases C-271/90, C-281/90 and C-289/91 *Spain, Belgium and Italy* v *Commission* ([1992] ECR I-5833); Joined Cases C-46/90 and C-93/91 *Lagauche and Evrard* ([1993] ECR I-5267) and Case C-69/91 *Decoster* ([1993] ECR I-5335).

12 — Judgment in Case 90/76 *Van Ameyde* v *UCI* [1977] ECR 1091.

13 — Judgment in Case 7/82 *GVL* v *Commission* [1983] ECR 483, paragraph 44; judgment in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 28.

14 — Judgment in Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 10 et seq., and judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 21 et seq.

regard solely to official credit when defining the relevant market. However, one question which must be borne in mind in this regard is whether a 'market' exists at all within the meaning of the relevant provision, or whether the activities in question are activities which are carried out in the public interest.

38. According to the case-law of the Court, an undertaking has a dominant position where it holds a position of economic strength which enables it 'to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'. [15]

39. It does not seem likely that the bank in question occupied a position which corresponded to those criteria since, as was explained during the oral procedure, at the material time there was in Spain a number of public credit institutions whose functions were in each case slightly different. It is also unlikely that the tax exemption in question helped the bank in question to secure a dominant position.

40. If an undertaking does not have a dominant position within the meaning of the provision referred to, there is no scope for examining the abuse of such a dominant position. Consequently, the considerations set out below on the question of an abuse of a dominant position will be relevant only if the referring court holds that the position of the bank in question is a dominant one.

41. In principle, the starting point must be that it is the conduct of the undertaking in a dominant position which constitutes the criterion for deciding whether it is being abused. [16] Through the application of Article 90 (1), Member States are prohibited, 'by laws, regulations or administrative measures, [from putting] public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article 86'. [17] Consequently, a measure prohibited by Article 90 (1) need not necessarily promote an abuse actually committed but may also consist in an objective act such as, for example, the extension of a monopoly by

15 — See Case 27/76 *United Brands* v *Commission*, cited above, paragraphs 63 to 66; see also Case 85/76 *Hoffmann-La Roche* v *Commission*, cited above, paragraph 38.

16 — Judgment in Case C-18/88 *GB-INNO-BM*, cited above, paragraph 20, and judgment in Case C-320/91 *Paul Corbeau* [1993] ECR I-2533, paragraph 10.

17 — Case C-18/88 *GB-INNO-BM*, cited above, paragraph 20.

a State measure. [18] However, the main proceedings do not concern a monopoly nor the extension of a dominant position by a State measure. [19] It is only if there is a measure which is prohibited under the combined provisions of Article 90 (1) and Article 86 that it would be necessary to consider the relationship between Article 90 (2) and those provisions.

42. Article 90 (2) allows limited departure from the competition rules for undertakings entrusted with providing services of general economic interest or having the character of a fiscal monopoly. Those undertakings are also subject to the provisions of the Treaty, in particular the rules on competition laid down therein, but only in so far as the application of those rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. However, that exception is limited in the sense that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community. 'In allowing derogations to be made from the general rules of the Treaty on certain conditions, that provision seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market.' [20]

43. As regards the relationship existing between Article 90 (1) in conjunction with Article 86 and Article 90 (2), it must be observed that the Court has always allowed Article 90 (2) to be relied upon where the application of Article 90 (1) in conjunction with Article 86 is concerned, even if such reliance never helped the party concerned, [21] either because the public undertakings concerned were not charged with that task by the State [22] or because it was not demonstrated that the undertaking's specific task was incompatible with the rules on competition. [23] Only exceptionally has the Court accepted that the conditions necessary for Article 90 (2) to apply were fulfilled. [24] The cases cited all came before the Court in the form of references for preliminary rulings and the Court held that it was for the national courts to determine whether the conditions laid down in Article 90 (2) were fulfilled. [25] Consequently, it may be assumed

18 — Case C-18/88 *GB-INNO-BM*, cited above, paragraphs 23 and 24.

19 — Case C-18/88 *GB-INNO-BM*, cited above, paragraphs 21 and 24.

20 — Judgment in Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 12.

21 — Judgment in Case 155/73 *Sacchi*, cited above; judgment in Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung Unlauteren Wettbewerbs*, cited above; Case C-41/90 *Höfner and Elser*, cited above; Case C-260/89 *ERT*, cited above; Case C-179/90 *Merci Convenzionali Porto di Genova*, cited above; Case C-18/88 *GB-INNO-BM*, cited above, and Case C-320/91 *Paul Corbeau*, cited above.

22 — Case 66/86 *Ahmed Saeed Flugreisen and Others*, cited above, paragraph 55.

23 — Case 155/73 *Sacchi*, cited above, paragraph 15; Case C-41/90 *Höfner and Elser*, cited above, paragraphs 24 and 25; Case C-260/89 *ERT*, cited above, paragraphs 33 and 38, and Case C-179/90 *Merci Convenzionali Porto di Genova*, cited above, paragraph 27.

24 — Case C-320/91 *Paul Corbeau*, cited above, paragraph 15, and Case C-18/88 *GB-INNO-BM*, cited above, paragraph 16.

25 — As was expressly held in the operative part of the judgment in Case C-320/91 *Paul Corbeau*, cited above. See also Case C-260/89 *ERT*, cited above, paragraph 34; Case 66/86 *Ahmed Saeed Flugreisen and Others*, cited above, paragraphs 55 to 57. The judgment in Case 127/73 *BRT* v *Sabam and Fonior* [1974] ECR 313, at paragraph 22, is also comparable.

that Article 90 (2) is directly applicable in the regulatory context of Article 90 in conjunction with Article 86.

44. The reply to be given to the first part of the question submitted by the national court must therefore be that, subject to a definitive assessment of the facts by the national court, the tax exemption in question does not have the characteristic elements of an abuse of a dominant position on the common market or a substantial part thereof by a public undertaking.

The possible infringement of Articles 92 and 93

45. In the second part of the questions, the national court wishes to know whether the tax exemption in question is to be regarded as aid incompatible with the common market, within the meaning of Article 92. The provisions of the Treaty and in particular the rules on competition, to which the section on State aid belongs, are also applicable to public undertakings in accordance with Article 90 (1). The point of departure for examining whether a case is one involving prohibited aid is, in this regard, different from that for examining the question whether a dominant position has been misused by the application of State measures because aid always appears directly, or sometimes only indirectly, [26] in the form of measures adopted by the State. The so-called Transparency Directive, [27] adopted by the Commission on the basis of Article 90 (3), reflects the specific situation of public undertakings in relation to the State and the possibility of disguising the grant of State aid. As is clear from the preamble to that directive and as the Court has stressed, the essential objective of the directive is 'to promote the effective application to public undertakings of the provisions contained in Articles 92 and 93 of the Treaty concerning State aids'. [28]

46. In principle, the concept of aid must be interpreted broadly and refers to all forms of reduced burdens on undertakings. However, the concept of aid extends further than the concept of a subsidy. [29] Consequently, a fiscal advantage is capable of constituting aid. [30]

26 — Judgment in Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 19; judgment in Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraph 16.

27 — Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35), as last amended by Commission Directive 93/84/EEC of 30 September 1993 (OJ 1993 L 254, p. 16).

28 — Judgment in Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545, paragraph 2.

29 — Judgment in Case 30/59 *De Gezamenlijke Steenkolenmijnen* v *High Authority* [1961] ECR 1, which concerned the ECSC Treaty but is also relevant to the concept of aid under Community law.

30 — See, to this effect, the Commission's reply to a question asked by Mr Burgbacher, MEP (OJ 1963 125, page 2235) in which the Commission expressly included exemptions from taxes and charges in the list of potential aid.

47. Before the rules applicable in the matter of aid under Articles 92 and 93 are examined, the question arises, however, of the relationship between those provisions and Article 90 (2). If the limited exception from the competition rules for public undertakings entrusted with the provision of services of a general economic interest or having the character of a fiscal monopoly operates, it must be ascertained whether this circumstance makes examination of the rules on aid unnecessary or whether Article 90 (2) may only be relied upon in the context of the rules on aid, in particular the procedure for supervising aid.

48. The question of the direct applicability of Article 90 (2) is directly related to the question of the relationship between Articles 92 and 93 and Article 90 (2). If Article 90 (2) were to have primacy over Articles 92 and 93, it would be of fundamental importance for the undertaking concerned to know whether it could rely on that derogation before the national court.

49. In order to clarify these issues the Court asked the parties a question on the consequences, as regards in particular the application of Articles 92 and 93 of the EEC Treaty, which would ensue if the grant of State aid were to be justified under Article 90 (2) and in particular whether a Member State which relied on that provision would have to comply with the procedures provided for in Article 93 and whether an individual could rely directly on the combined provisions of Article 90 (2) and Article 92 before the national court. The parties' answers to those questions were essentially as follows.

50. The *Ayuntaminto de Valencia* took the view that the Banco de Crédito Industrial SA could not rely directly on Article 90 (2) in conjunction with Article 92 before the referring court.

51. The *Kingdom of Spain* submitted that the scheme of Article 90 (2) is quite different from the scheme of prior notification of State aid, as envisaged in Article 93 (2) and (3) of the Treaty. If it had been intended for the scheme of Article 93 to be applied to aid granted to undertakings within the meaning of Article 90 (2), it would have been sufficient to include the case dealt with by the last-mentioned provision in the cases covered by Article 92 (3). Moreover, Article 90 (3) creates a special procedure which enables the Commission to supervise the action of the Member States in this area. There is a fundamental difference between the procedure laid down in Article 90 (3) and Article 93. The Kingdom of Spain therefore takes the view that the procedure laid down in

Article 93 does not apply to State aid which is justifiable under Article 90 (2). An individual may not rely directly on Article 90 (2) in conjunction with Article 92 directly before the national court.

52. The *Government of the Greek Republic* also takes the view that Article 93 does not apply to aid to undertakings which is covered by Article 90 (2). To those undertakings the provisions of the EEC Treaty and in particular the rules on competition do not apply. Since it is a matter for the national court to assess whether the conditions for the application of Article 90 (2) are fulfilled, the recipient of aid is entitled to apply to the Court for a declaration that the aid in question does not therefore fall within the sphere of application of Articles 92 and 93 because the provisions of the Treaty do not apply in its case, in accordance with Article 90 (2).

53. The *Commission* first observes that the constant supervision of State aid envisaged in Article 93, for which it is solely responsible subject to review by the Court of Justice, includes the assessment of aid with reference to Article 90 (2) of the Treaty. A Member State may not rely on Article 90 (2) in order to escape the obligation, laid down in Article 93, to notify aid. The Commission then points out that the Court of Justice has allowed direct effect to be attributed to Article 90 (2) only in conjunction with the directly applicable provisions of the Treaty and in particular with Article 86. A national court may not therefore apply Article 90 (2) in conjunction with Article 92 since the last-mentioned provision is not directly applicable and since, before applying Article 90 (2), it must examine whether the aid contravenes Article 92. That examination falls within the exclusive competence of the Commission and must be carried out within the framework of the procedure provided for in Article 93. If the Commission's views do not coincide with those held by the Member State, then the Member State is at liberty to bring proceedings before the Court of Justice.

54. At first sight the case-law of the Court of Justice on the effects of Article 90 (2) does not appear to be uniform. It was in quite an early case, taking the form of a reference from a national court, that the Court of Justice had to consider the question whether Article 90 (2) could have direct effect. [31] The essential issue in that case was whether an individual could rely on Article 90 (2) in order to compel a (competing) *public undertaking to comply with the rules on competition*. With regard to this issue the Court stated:

'Article 90 (2) does not lay down an unconditional rule. Its application involves an appraisal of the requirements, on the one hand, of the particular task entrusted to the undertaking concerned and, on the other hand, the protection of the interests of the Community. This appraisal depends on the

31 — Judgment in Case 10/71 *Ministère Public Luxembourg* v *Müller* [1971] ECR 723.

objectives of general economic policy pursued by the States under the supervision of the Commission. Consequently, and without prejudice to the exercise by the Commission of the powers conferred by Article 90 (3), Article 90 (2) cannot at the present stage create individual rights which the national courts must protect.' [32]

55. In a later judgment, given in 1982, [33] the Court, taking its lead from the judgment in Case 10/71, [34] did not allow Article 90 to be applied in the context of the examination of the Treaty provisions on *freedom of movement*. The Court held that:

'... even if the approval granted by a Member State must be regarded as the grant of an exclusive right within the meaning of Article 90 (1) of the EEC Treaty, that would not exempt the Member State from the obligation to respect other provisions of Community law, particularly those relating to the free circulation of goods .... As regards Article 90 (2), the Court has already held that it cannot at this stage create individual rights which the national courts must protect (judgment of 14 July 1971 in Case 10/71 *Hein*).' [35]

56. In a comparable legal context the Court gave a ruling which, though less clear, was to the same effect, in the judgment it gave in Case 72/83. [36] With regard to the reliance placed on Article 90 (2), the Court stated:

'Article 90 (2) does not, however, exempt a Member State which has entrusted such an operation to an undertaking from the prohibition on adopting, in favour of that undertaking and with a view to protecting its activity, measures that restrict imports from other Member States contrary to Article 30 of the Treaty.' [37]

57. It is clear that in the judgments cited the Court of Justice did not accord to Article 90 (2) primacy over the provisions of the Treaty applicable in the matter of freedom of movement.

58. As far as the effects of Article 90 (2) in the regulatory context of *Article 90 (1) in conjunction with Article 86* are concerned, it has already been explained, [38] that the Court of Justice has, potentially at least, accepted that Article 90 (2) is directly applicable in this context. Article 90 (2) was always referred to within the context of the review

32 — Case 10/71 *Ministère Public Luxembourg* v *Müller*, cited above, paragraphs 13 to 16 at page 730.

33 — Judgment in Case 172/82 *Fabricants Raffineurs d'Huile de Graissage* v *Inter-Huiles* [1983] ECR 555.

34 — See footnote 32.

35 — Case 172/82 *Fabricants Raffineurs d'Huile de Graissage* v *Inter-Huiles*, cited above, paragraph 15 at page 566.

36 — Judgment in Case 72/83 *Campus Oil Limited* v *Minister for Industry and Energy* [1984] ECR 2727.

37 — See Case 72/83, cited above, paragraph 19 at page 2747.

38 — See paragraph 42 et seq.

with regard to Article 90 (1) and 86, so that Article 90 (2) cannot be considered to take precedence.

59. On the relationship between *Article 90 (2)* and *Articles 92 and 93* there is very little case-law of the Court. Case 52/76, [39] which came before the Court by way of a reference for a preliminary ruling, concerned the classification of aid granted to an undertaking which possibly fulfilled the conditions of Article 90 (2). Owing to the lack of sufficient factual information from the referring court, the Court of Justice found that it was unable to rule upon the nature of the undertaking or on the legal consequences which ensued. However, the sequence followed by the Court in its examination [40] gives an indication that the special rule applicable to public undertakings must operate in the context of the examination of the aid and is not a matter to be examined at the outset.

60. A finding made by the Court of Justice in its judgment in the *Steinike and Weinlig* case [41] is somewhat clearer. In answer to the question whether the expression 'undertakings' in Article 92 of the Treaty meant only private businesses or also covered non-profit-making institutions governed by public law, the Court replied:

'Save for the reservation in Article 90 (2) of the Treaty, Article 92 covers all private and public undertakings ...'.

61. Unfortunately, that statement does not enable an unambiguous reply to be given to the question concerning the relationship between those provisions, since the statement is itself susceptible of interpretation. However, 'reservation' could be understood as meaning that such a reservation operates within the context of the examination of another provision.

62. The conclusion which may be drawn from the survey of the case-law on Article 90 (2) carried out above is that the question concerning the effects of Article 90 (2) cannot be answered in the abstract but that it is necessary to examine in each case all the rules in the context of which Article 90 (2) must apply.

63. Since the present case concerns the application of Article 90 (2) in the context of, or in relation to, Articles 92 and 93, it is necessary to examine the purpose and characteristics of the Community rules on aid. Arti-

39 — Judgment in Case 52/76 *Benedetti* v *Munari* [1977] ECR 163.

40 — First, in paragraphs 17 to 19, there is the examination of the question whether aid exists, and then, in paragraphs 20 to 22 an examination of the question whether the undertaking concerned was a public undertaking.

41 — Judgment in Case 78/66 *Steinike and Weinlig* v *Federal Republic of Germany* [1977] ECR 595, paragraph 18.

cle 92 (1) lays down the basic rule that State aid which distorts or threatens to distort competition is incompatible with the common market in so far as it affects trade between Member States.

64. Exceptions to that rule are laid down in paragraphs (2) and (3) in the sense that the criteria for identifying aid compatible with the common market are laid down in paragraph (2) and the criteria for identifying aid which *may be considered* to be compatible with the common market are laid down in paragraph (3). One of the characteristics of Article 92 is that it is *not* directly applicable, either as a prohibition of aid pursuant to paragraph (1) [42] or as a derogation pursuant to paragraph (2). It is not for the national courts to determine whether aid is compatible with the common market, this being the exclusive responsibility of the Commission, subject to the supervision of the Court of Justice. [43]

65. Competence and procedure in the matter of the examination of State aid by the Commission are governed by Article 93. There is a fundamental difference in this regard, depending on whether the aid concerned has already been granted or is new aid. The Court of Justice has accepted direct applicability, and thus the jurisdiction of national courts to review such applicability, only with regard to the concept of aid [44] and the prohibition laid down in the third sentence of Article 93 (3). [45] It follows that the Commission's prerogatives in the matter of the supervision of aid are not affected.

66. In the scheme of types of aid compatible and incompatible with the common market, Article 90 (2) could, by its nature, be included amongst the exceptions described in Article 92 (2) and (3). The question whether particular circumstances may be brought under paragraph (2) or paragraph (3) depends on the degree of discretion which the Commission has in making its assessment. Finally, it is not necessary to determine which of those derogating rules is closest to Article 90 (2) since they are both applied under the supervision of the Commission.

67. The comparability of the legal structure of Article 90 (2) and Article 92 is, in my

42 — Judgment in Case 77/72 *Capolongo* v *Maya* [1973] ECR 611, paragraphs 4 to 6.

43 — Judgment in Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *French State* [1991] ECR I-5505, paragraph 14.

44 — Joined Cases C-72/91 and C-73/91 *Sloman Neptun*, cited above, paragraph 12; Case C-189/91 *Kirsammer-Hack*, cited above, paragraph 14.

45 — Judgment in Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471.

view, borne out by what the Court stated in its judgment in Case 41/83: [46]

'It must further be observed that the application of Article 90 (2) of the Treaty is not left to the discretion of the Member State, which has entrusted an undertaking with the operation of a service of general economic interest. Article 90 (3) assigns to the Commission the task of monitoring such matters, under the supervision of the Court.' [47]

68. In this assessment process account must be taken of the interest of the Member States in using certain undertakings as instruments of economic or fiscal policy and the interest of the Community in maintaining the unity of the common market. [48] That balancing process may be carried out in the context of the supervision of aid. In the judgment which it gave in Joined Cases C-48/90 and C-66/90 [49] the Court gave its views on the comparable nature of the supervisory procedure under Article 90 (3) and Article 93 from both the formal and substantive point of view. It stated:

'In addition, the powers which the Commission may exercise in respect of Member States by means of decisions under Article 90 (3) of the Treaty are to be compared with the powers, conferred upon it by Article 93 of the Treaty, to find that a State aid which distorts or threatens to distort competition is not compatible with the common market.

In both cases the Commission is empowered to take action, not with regard to the undertaking which has been enabled to obstruct the rules of competition, but with regard to the Member State which is responsible for the impairment of competition.' [50]

69. The Court goes on to state that Article 90 (3) enables the Commission 'to make an assessment, by way of decision, of the compatibility with the Treaty of the measures enacted or maintained in force by

46 — Judgment in Case 41/83 *Italy* v *Commission* [1985] ECR 873.

47 — See Case 41/83 *Italy* v *Commission*, cited above, paragraph 30 at page 888.

48 — See Case C-202/88 *France* v *Commission*, cited above, paragraph 12.

49 — Judgment in Joined Cases C-48/90 and C-66/90 *Kingdom of the Netherlands and Others* v *Commission* [1992] ECR I-565.

50 — See Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission*, cited above, paragraphs 31 and 32.

States as regards the undertakings referred to in Article 90 (1).' [51]

70. The examination provided for in Article 90 (2) as part of the supervision of aid could also take place without affecting the Member States' rights of defence. A decision in an aid-reviewing procedure may be challenged pursuant to Article 173, just as a decision taken pursuant to Article 90 (3).

71. In conclusion, I take the view that, in the context of the relationship between Article 90 (2) and Articles 92 and 93, Article 90 (2) may not be relied on at the outset, particularly since the application of Article 90 (2) sets the framework for the review of Community-law criteria for the safeguarding of Community interests.

72. The procedure for examining the compatibility of aid by Member States with Community law differs according to whether it is a matter of existing aid or of new aid.

73. In the case of existing aid, the Commission, in cooperation with the Member States, keeps under constant review all systems of existing aid in accordance with Articles 93 (1) and (2). If the Commission finds that aid arrangements are incompatible with the common market, it allows the Member State concerned a period within which to amend or abolish those arrangements. [52] If the Member State does not comply with that decision, the Commission, or any Member State concerned, may apply directly to the Court of Justice.

74. However, before existing aid is amended or new aid introduced, it is for the Member State, in accordance with Article 93 (3), to notify the planned measure to the Commission. Once that duty is fulfilled, the procedure then gets under way or certain legal consequences ensue. Aid not notified to the Commission is in all circumstances formally contrary to Community law, which does not, however, entitle the Commission to declare the aid to be unlawful without first considering whether it is compatible with the common market. [53]

75. The essential difference between existing aid and the introduction or amendment of aid is that in the case of existing aid it is for the Commission to take the initiative whereas, where new aid is introduced, it is

51 — Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission*, cited above, paragraph 34.

52 — Case 78/76 *Steinike and Weinlig*, cited above, paragraph 9.

53 — Judgment in Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *French State*, cited above, paragraph 13.

for the Member State, as a matter of law, to take the steps provided for.

76. All aid which existed in the original Member States when the Community was brought into being by the Treaty of Rome, all aid which existed at the time of their accession in the Member States which joined later and, finally, all national aid arrangements which were introduced in conformity with Community law are all to be regarded as existing aid. Consequently, as far as the relevant rules in these proceedings are concerned, they constitute existing aid, which means that if the aid was not compatible with the common market the Commission should have taken action.

77. In the present case, the Commission submitted to the Spanish Government a question formulated in general terms concerning existing aid. In response, the Spanish Government drew up a list of Laws on which, however, the Law on the tax exemption for the bank called at that time the Banco de Crédito Industrial SA did not appear. The Spanish Government took the view that the questions arising in connection with the tax exemption, which were bound up with Articles 90 and 93, were too complex to be resolved in that simple procedure.

78. The Commission does not contend that the Spanish Government intentionally made no mention of the tax exemption in question, thereby infringing Article 93 (1) in conjunction with Article 5 or a corresponding legal duty existing at the stage of the accession negotiations.

79. The tax exemption rules in question are therefore to be regarded as existing aid whose compatibility with Community law has not yet been examined by the Commission pursuant to Article 93 (1).

C — Conclusion

80. In view of the foregoing considerations, I propose that the preliminary question should be answered as follows:

1. A tax exemption, such as that provided for by Article 29 of Law 13/71, does not — subject to final fact-finding by the national court — have the charac-

teristic elements of an abuse of a dominant position on the common market brought about by a State measure;

2. Such a tax exemption must be assessed with reference to the provisions of Community law on existing State aid.