although the existence of that specific procedure in no way prevents the compatibility of an aid scheme in relation to Community rules other than those contained in Article 92 from being assessed under the procedure provided for in Article 169, the Commission must use the procedure laid down in Article 93 (2) if it wishes to establish that that scheme, as aid, is incompatible with the common market.

OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 5 December 1984 *

Mr President,
Members of the Court,

1. This action was brought by the Commission against the French Republic under Article 169 of the EEC Treaty. In certain respects the complaint made against the French Republic is undoubtedly innovatory. The Republic is alleged to have 'encouraged' a public body (the Caisse nationale de crédit agricole/National Agricultural Credit Fund/, hereinafter referred to as 'the Fund') to pay a grant to farmers in straightened economic circumstances and, therefore, to have failed to fulfil its obligations under Article 5 of the EEC Treaty, having regard to the aims of the Treaty in relation to competition and in particular Articles 92 *et seq.*

The facts are as follows. By a letter dated 29 December 1981, in accordance with Article 93 (3) of the EEC Treaty, the French Government informed the Commission of a number of agricultural support measures adopted following the 1981 Agricultural Conference. One of those measures provided for a 'solidarity grant' for farmers, for the purposes of which 1.5 thousand million francs were set aside. Reserves accumulated by the Fund over several financial years were to be used to finance the grant.

On the basis of that information, the Commission took the view that the grant was incompatible with the common market and, in particular, with the rules on State aid. Therefore, by a letter dated 10 March 1982 it initiated the procedure provided for in Article 93 (2) of the Treaty and gave notice to the French Government to submit its comments.

In its replies and in particular in the note attached to the letter of 26 March 1982, the Government claimed that the solidarity grant could not be regarded as State aid within the meaning of Article 92 (1) for two reasons. In the first place, the Fund's reserves had been generated by the management of private funds. Secondly, the decision to use such reserves to finance the grant was taken by the Fund's governing board, on which the State representatives are in a minority.

Those arguments led the Commission to classify the aid in question differently. It was no longer regarded as State aid in the strict sense, but as 'a measure having an effect equivalent to State aid'. The Commission considered that two factors supported that view. In the first place, it was clear that the public authorities had brought

* Translated from the Italian.

pressure to bear on the Fund to finance the grant out of its own reserves. Secondly, the grant was equivalent to State aid because its objectives and its effect were to promote French undertakings and production to the detriment of competition on the common market. Thus by 'encouraging' the Fund to pay the grant, the French Government had failed to comply with the obligation of cooperation laid down in Article 5 of the Treaty with regard to the objectives of the Treaty in relation to competition and, in particular, Articles 92 *et seq.*

At the same time the the classification of the grant as 'a measure having an effect equivalent to aid' led the Commission to take an important procedural step. It abandoned the procedure for contesting aid under Article 93 and, by a formal letter of notice of 14 September 1982, initiated the procedure for failure to fulfil obligations under the Treaty provided for in Article 169.

In its reply of 15 October 1982 the French Government denied the new charge and claimed that there was no concept of 'a measure having an effect equivalent to State aid' in Community law, that the French authorities had played no role whatsoever in the Fund's decision and that the objective of the measure was entirely social.

Those arguments did not convince the Commission, which drew up its reasoned opinion (25 May 1983) and requested the French Government to comply therewith within two months. The Commission also asked the French Government to give assurances that in future it would not put pressure on the Fund to grant aid to farmers. In reply France merely stated that it would inform the Fund of the Community point of view. The Commission therefore brought the matter before the Court of Justice within the meaning of the second paragraph of Article 169 by an application lodged on 23 December 1983.

2. In that summary of the facts one event in particular stands out, namely the Commission's change of opinion as to the nature of the French grant in the course of the procedure under Article 93. Clearly shaken by the French Government's objections, but nevertheless convinced that the contested aid was unlawful, the Commission believed that it had solved the problem by coining a new expression to define that aid: a measure having an effect equivalent to State aid incompatible with the common market. It is easy to see how the Commission reached that conclusion. I think it is possible to reconstruct their thought processes as follows: Article 92 *et seq.* expressly prohibits only State aid. That does not mean, however, that the Treaty may be construed as authorizing conduct on the part of the States which in formal terms cannot be described as aid, but which has the same effect as aid. It is therefore necessary to estabish that such conduct is prohibited by the general principles of the Treaty and that is not too difficult to do. It is sufficient to refer to Article 5 which requires States to abstain from 'any measure which could jeopardize the attainment of the objectives of . . . [the] Treaty.

I must admire the Commission's intellectual temerity, but I consider its argument somewhat tenuous. In particular, the reasoning behind the development of the concept of a 'measure having equivalent effect' in the Treaty militates against that view. As has been seen, the Commission considers that that concept may be applied outside the context of Articles 30 to 34, in which it is expressly provided for. However, in that context the concept fulfils a function — to implement greater freedom of trade than that which would be achieved by the abolition merely of normal protectionist measures: customs duties and quotas. That

function has no purpose in other contexts. That is true in particular in relation to aid. The wording of Article 92 ('... any aid granted by a Member State *or through State resources in any form whatsoever*... shall... be incompatible with the common market') is in fact much wider and more flexible than that of the provision prohibiting quantitative restrictions on imports. It was not therefore necessary to supplement it with a 'catch-all' provision covering any residual measures which are not justifiable on the basis of other provisions of the Treaty and which obstruct trade between the Member States.

Nor is it possible to extract such a catch-all rule from Article 5. As the Court has consistently held, that article imposes a general obligation on the Member States. However, the actual tenor of that obligation is determined, in particular fields, from other, more specific rules (see judgment of 8 June 1971 in Case 78/70, *Deutsche Grammophon* v *Metro* [1971] ECR 487, paragraph 5 of the decision). Article 5 is useful for interpreting the Treaty but it cannot be represented as a provision giving rise to specific duties for the States. In my own view, the position is different where such a provision is lacking or is not suitable for dealing with acts or practices which conflict with the objectives of the Treaty.

3. The comments which I have made hitherto lead logically to the conclusion that the action lodged on 23 December 1983 lacks foundation. Let us nevertheless examine a hypothetical situation. Let us assume that to avoid delay the Court reclassifies the conduct contested in the action and describes it as aid in the strict sense. In my view that is possible. A court may not go beyond the application, but it may attribute to a fact a legal label which is different to that given it by the applicant. In any event it is worth exploring the consequences of such reasoning.

Is it therefore possible to state that the grant in question falls within the concept of aid under Article 92? As has already been seen, the rule is directed against not only aid directly granted by the States, but also aid financed through 'State resources'. Let us see whether that is the case here. From the beginning of the procedure the French Government has sought to make it clear that the Fund's reserves were generated by the management of private funds and that public funds had in no way been used to contribute to the accumulation of such reserves. That claim does not seem to correspond to the facts as they appear from the note sent by that Government to the Commission on 13 March 1982.

That document shows that the reserves were constituted over a period of six years, between 1975 and 1980; they followed a curve which attained its peak in 1978 (more than one thousand million francs) and which, subsequently, fell off progressively. The fact is that until 1978 the Fund received tax concessions and it was not made subject to corporation tax (Article 23 of the Financial Law No 78-1240 of 29 December 1978 and Article 4 of the Financial Law No 81-1180 of 31 December 1981) — until 1979, and then only progressively. The connection between the two sets of facts is clear. Moreover, the minutes of the meeting which the governing board of the Fund held on 7 December 1981 contain the following statement: the reserves — it is clearly stated — were constituted 'during the financial years in which the Fund was not subject to tax or was only partly subject to tax'.

In my view therefore it is established that the solidarity grant was derived from 'State resources'. However, that is not all. The

French Government also claims that the Fund is independent from the public authorities and, in particular, that representatives of the State are in a minority on the governing board. That claim is, however, excessive; indeed it may even be inaccurate. According to the provision which governs the composition of that body (Article 2 of Decree No 74-732 of 19 August 1974), it is constituted of 11 members, of whom four are ex-officio, as representatives of the State and seven are elected by the full committee of the Fund from its own members. Since among those members (30 in all) 12 are appointed by decree, it is quite possible that other State representatives may ultimately sit on the governing board in addition to the four referred to above. They may even — the possibility cannot be excluded — constitute the majority.

In addition the Fund is technically a 'public institution of an industrial and commercial nature'. According to Article 1 of Decree No 53-707 of 9 August 1953, in organizations of that type the decisions of the governing board concerning the 'appropriations of profits' do not become definitive until they have been approved jointly by the Minister for Financial Affairs and by the other ministers concerned (in the case of the Fund, the Minister for Agriculture). Finally — and this is clearly of no little importance — pursuant to Decree No 60-223 of 7 March 1960, the Minister for Economic Affairs delegated the economic and financial control of the Fund to a government commissioner appointed to work under the Minister's authority.

That is sufficient, in my view, to conclude that the Fund does not enjoy the autonomy claimed by the French Government, or, at least, that it did not enjoy that autonomy in the case in question. In that case, on the contrary, its function was only that of a *relay* of the State or, if it is preferred, of a vehicle which the State uses in order to intervene in support of French agriculture.

4. It is therefore quite clear that the solidarity grant is aid within the meaning of Article 92. Does it follow that France can be challenged on that basis within the context of this action? To answer that question it must first be established whether, in bringing the action under Article 169, the Commission has complied with the procedural rules imposed by the Treaty in respect of aid. The answer to that question must be that it has not.

The Court has on several occasions dealt with the relationship which exists between Article 92 *et seq.* and the infringement of other primary or secondary rules, and has also drawn important conclusions therefrom as regards the type of action brought. In particular, in its judgment of 22 March 1977 (Case 74/76, *Iannelli* v *Meroni* [1977] ECR 557) it distinguished two possibilities. The first is whether an aspect or an element of the aid which is assumed to be contrary to the various rules of Articles 92 to 93, is so closely linked to the aid or, rather to the objective thereof, as to make impossible a separate evaluation. The second possibility is where it is possible to separate conditions or characteristics within the aid scheme which, although part of that scheme, do not appear necessary for its operation. In the first case the infringement can be assessed only within the context of the procedure under Article 93. In the second it may also be reviewed under the procedure provided for in Article 169 (or by means of a reference for a preliminary ruling if the rule infringed has direct effect — though that aspect is irrelevant here).

The Court has retained that distinction in a number of judgments. One example will

suffice. In considering a measure implemented by means of discriminatory taxation which could at the same time be regarded as aid, the Court held that an action could be brought under Article 169 against a State for practices which constitute an infringement of Article 95 (judgment of 21 May 1980, in Case 73/79, *Commission* v *Italy* [1980] ECR 1533).

Is that the position in this case? I think not. In my view the position of this grant is even more clear than that defined in the first possibility described in the judgment in *Iannelli* because, however closely it is examined, there seems to be no part of it which could be isolated and found to be contrary to a different and specific rule of the Treaty. If what I have said under point 3 is correct, *the grant is an aid and nothing other than an aid.* To adopt the wording of that judgment, therefore its compatibility with the common market must 'of necessity be determined in the light of the procedure prescribed in Article 93'. That means that the action brought by the Commission on the basis of Article 169 must be declared inadmissible.

There is moreover another factor which militates in support of that conclusion and to which the Court has frequently made allusion in its decisions (see judgments of 25 June 1970, Case 47/69, *France* v *Commission* [1970] ECR 487; 11 December 1973, Case 120/73, *Lorenz* v *Germany* [1973] ECR 1471; 2 July 1974, Case 173/73, *Italian Republic* v *Commission* [1974] ECR 709). I refer to the special nature of the procedure under Article 93 in relation to that of Article 169. Article 93 lays down a specific procedure under which the States are protected more thoroughly than under the ordinary procedure provided for in Article 169. Thus they are entitled to an economic assessment of the aid measure. They may obtain a special derogation from the Council for aid which does not comply with the requirements of Article 92 (2) and (3). They can contest the Commission's decision, which is itself a pre-condition for the action under Article 93.

Finally, to allow the Commission to challenge under Article 169 a measure contrary to the prohibition contained in Article 92 would amount to attributing to it the power to choose between the different actions and the Court has held that that is not permissible. At the same time it would amount to depriving the States of the substantive and procedural guarantees on which they should be entitled to reply.

5. For the above-mentioned reasons I propose that the Court declare the action brought on 23 December 1983 by the Commission of the European Communities against the French Republic inadmissible. As the Commission has been unsuccessful in its claims, it must be ordered to pay the costs.