OPINION OF ADVOCATE GENERAL DARMON

delivered on 16 December 1992 *

Mr President,
Members of the Court,

1. The Kingdom of Belgium is seeking a declaration that two Commission decisions declaring that certain aids granted to shipyards in Belgium are incompatible with the common market [1] are void.

2. Owing to the economic difficulties, at times serious, arising since the beginning of the 1970s, the Member States wished to support the economic sectors under threat, in particular shipbuilding, in order to prevent the disappearance of traditional or strategic activities.

3. Although certain aids may sometimes have a damaging effect on competition by partitioning the market, others, on the other hand, may be essential for directing economic activity, supporting the restructuring of undertakings or encouraging the development of less-favoured regions.

4. Furthermore, the concept is to be found in the Treaty itself, which defines the framework within which State aids must come in order to ensure maximum transparency and thereby avoid distorting competition.

5. Article 92(1) of the Treaty states, as a principle, that any State aid is incompatible with the common market in so far as it affects trade between Member States or distorts or threatens to distort competition.

6. This general incompatibility is mitigated, however, by the derogations *per se* referred to in the paragraph 2 and those in paragraph 3 which allow the Community to authorize certain 'categories of aid as may be specified by decision of the Council'. [2] It is this provision which is at the centre of the present case.

7. On the basis of Article 92(3)(d) and Article 113, the Council acted swiftly to control State aids to shipbuilding and on 26 January 1987, following on from five previous directives, adopted Directive 87/167/EEC, [3] (hereinafter 'the Directive'), which, while accepting the principle of aids in order effectively to resist competition from outside the Community, is aimed at preserving their transparency in order, in particular, to avoid distortions of competition between Community shipyards.

* Original language: French.

1 — Commission Decision 90/627/EEC of 4 July 1990 on loans granted by the Belgian authorities to two shipowners for the purchase of a 34 000 m^3 LPG ship and two refrigerator ships (OJ 1990 L 338, p. 21) and Commission Decision 91/375/EEC of 13 March 1991 concerning credits granted by the Belgian authorities to various shipowners for the building of nine vessels — Aid No C 32/90 (ex NN 61/90) (OJ 1991 L 203, p. 105).

2 — Article 92(3)(d).

3 — OJ 1987 L 69, p. 55.

8. That Directive, which will be examined in greater detail, provides for:

— a ceiling applicable not only to production aid granted directly to shipyards [4] but also to aid to shipowners or to third parties which is available as aid for the building of ships [5] where it is actually used for shipbuilding in shipyards situated within the Community;

— a procedure for the prior notification and authorization, first, of aid schemes to be put into effect [6] and, secondly, of aid granted in individual cases where there is competition between various undertakings in different Member States for a particular contract. [7]

9. That Directive was supplemented by a Commission communication which, with effect from 1 January 1989, fixed the ceiling at 26% of the price for ships costing more than ECU 6 million and 16% for other ships. [8]

10. In 1948 the Kingdom of Belgium adopted a Law [9] designed to ensure the preservation and development of its shipping sector by granting, not to shipyards but to shipowning undertakings, aid in various forms (advances, loans on favourable terms and the like). This scheme was notified to the Commission.

11. When individual aids were granted in respect of orders for a number of ships from Belgian shipyards, however, the Commission initiated the procedure provided for in Article 93(2), taking the view that these aids might exceed the ceiling laid down in its communication.

12. The Commission carried out the inquiry provided for in that provision and found that the ceiling had been exceeded. It accordingly declared the aids incompatible with the common market by decisions of 4 July 1990 and 13 March 1991, [10] and asked the Belgian Government to reduce them to the ceiling rate.

13. It is on the legality of those two decisions that the Court is asked to decide. [11]

14. The Kingdom of Belgium contends, first, that the Commission ought to have distinguished between the aids granted according to their type (production aids, operating aids) and to have taken into consideration, when determining the ceiling, only the aids actually available as production aids. The ceiling would not have been exceeded if the Commission had done so, and furthermore its refusal to treat the aids separately is contrary to the Directive. It is also contrary to Article 169, since by prohibiting the operating aids the Commission is calling in

4 — Article 4(4).

5 — Article 3(1).

6 — Article 10(2)(a).

7 — Article 10(2)(c) and the second subparagraph of Article 4(5).

8 — Information 89/C32/06 from the Commission on aid to shipbuilding (OJ 1989 C 32, p. 3).

9 — Law of 23 August 1948, *Moniteur Belge*, 11 September 1948, p. 7288.

10 — See above, note 1.

11 — It will be recalled that, by orders of the President of the Court:
— of 24 February 1992, the two actions were joined for the purposes of the oral procedure and the judgment;
— of 8 May 1991 (Order C-356/90 R [1991] ECR I-2423) the Kingdom of Belgium's application for interim relief in the form of the suspension of the operation of the first decision was dismissed.

question the Belgian legislation rather than the aids themselves.

15. Secondly, the Kingdom of Belgium claims that where the ceiling referred to in the Directive is exceeded this constitutes only a mere presumption that the aid granted is incompatible with the common market, which may be rebutted by evidence that it has not led to any overcapacity. In any event, since the Directive cannot derogate from the rules contained in the Treaty, the Commission ought to have considered whether the criteria for incompatibility set out in Article 92(1) were indeed met.

16. Lastly, there is an infringement of Articles 93(2) and 190 of the Treaty in so far as the Commission's decisions do not state the reasons on which they are based.

17. I shall examine the first submission in two parts, since it raises both a question of procedural law and a problem of interpretation of the Directive.

18. According to the Kingdom of Belgium, if the aids at issue are in breach of Article 3(1) and (2) of the Directive the incompatibility with the common market is the consequence of a breach of a Community rule by the Belgian Law, so that the Commission ought to have initiated the procedure on the basis of Article 169 of the Treaty.

19. The Court has already had occasion to analyse the relationship between Article 92 et seq. and other provisions of Community law whose origin lies in both the Treaty and secondary legislation.

20. Thus, in the judgment in *Iannelli* v *Meroni*, [12] the Court held that:

'Those aspects of aid which contravene specific provisions of the Treaty other than Articles 92 and 93 may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 93.

Nevertheless the position is different if it is possible when a system of aid is being analysed to separate those conditions or factors which, even though they form part of this system, may be regarded as not being necessary for the attainment of its object or for its proper functioning.' [13]

21. The existence of the procedure prescribed in Article 93(2) cannot therefore prevent the compatibility of an aid scheme in relation to Community rules other than those relating to State aids from being assessed under the procedure provided for in Article 169. [14]

22. It is also apparent from the judgment of the Court in *Commission* v *Italy* [15] that an aid scheme may form the subject of an action under Article 169 for infringement of Article

12 — Case 74/76 [1977] ECR 557.
13 — Paragraph 14.
14 — Case C-35/88 *Commission* v *Greece* [1990] ECR I-3125.
15 — Case 73/79 [1980] ECR 1533.

95 of the Treaty even though the procedure provided for in Article 93 has been initiated in respect of the scheme.

23. On the other hand, an aid within the meaning of Article 92 must necessarily be appraised under the procedure provided for in Article 93, which prevents the Commission from making use of the procedure provided for in Article 169. [16]

24. It is the description of the 'measure' introduced, therefore, which will determine whether it is appropriate to bring an action for failure to fulfil obligations within the meaning of Article 169 or to follow the procedure provided for in Article 93.

25. Thus in the *Commission* v *France* judgment cited above, the Court defined the scope of Article 93 very precisely as follows:

'... although the existence of that specific procedure (the procedure laid down in Article 93(2)) 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, however, 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.' [17]

26. In this case, the description 'aid' is indisputable and, moreover, is not disputed by the Kingdom of Belgium. Since the rules implementing the proposed aid cannot be separated from the aid itself, the Commission was right to follow the procedure provided for in Article 93.

27. As the benefits granted were, to use the expression of Advocate General Mancini in his Opinion in *Commission* v *France*, 'an aid and nothing other than an aid', [18] the compatibility of the aid granted by Belgium to the shipowners had to be assessed solely by means of the procedure provided for in Article 93.

28. Accordingly, I recommend the Court not to uphold this submission.

29. The Kingdom of Belgium also claims that the Commission incorrectly 'converted' the aids granted to the shipowners into grant equivalent in the context of the contracts concluded with the shipyards, even though the purpose of the aids is quite different, since they are not directly linked to those contracts but are intended solely to encourage shipowners to operate under the Belgian flag. Therefore, according to the applicant State, in so far as that aid, described as an operating aid, could be granted to any shipowner, even where the ship is built in another State, it ought to be deducted from the total amount of aid granted. [19]

30. If, as the applicant maintains, those aids do not contribute to shipbuilding within the meaning of the Directive, they do not fall within its scope, but come under the general scheme of Article 92 and, as such, ought to have been specifically notified to the Commission for approval.

16 — Case 290/83 *Commission* v *France* [1985] ECR 439.

17 — Paragraph 17.

18 — Opinion, at p. 444.

19 — Application in Case C-356/90, p. 7 of the French translation.

31. In the absence of any notification, it is therefore quite right that the full amount of the aids should be regarded as contributing towards shipbuilding and therefore falling within the scope of the Directive; it then falls to the Belgian Government to demonstrate that there is in fact no link of any kind between part of the aid granted and shipbuilding, and the relevance of that fact.

32. Consequently, it is appropriate to analyse both the purpose and the content of the Directive in order to determine the validity of the position of the Kingdom of Belgium.

33. The Directive is intended to introduce a coherent system which, in order to determine the amount of aid granted when a ship is built, takes into consideration not only the direct aids but also the indirect aids which the State may grant to its shipping industry. The *ratio legis* of the Directive is based not on the beneficiary of the aid granted but on the objective purpose of the aid.

34. Article 4 therefore provides that:

'1. Production aid in favour of shipbuilding and ship conversion may be considered compatible with the common market provided that the total amount of aid granted in support of any individual contract does not exceed, in grant equivalent, a common maximum ceiling expressed as a percentage of the contract value before aid, hereinafter referred to as the ceiling.

...

4. The ceiling shall apply not only to all forms of production ... granted directly to the yards but also to the aid covered by Article 3(2).

5. The combined effect of aid under the various aid schemes applied must in no case exceed the ceiling fixed according to paragraph 2 ...'.

35. Article 3(2), to which Article 4(4) refers, envisages all the forms of aid granted to shipowners or third parties 'where these aids are actually used for the building or conversion of ships in Community shipyards'.

36. It is therefore apparent from these articles that the ceiling below which a State aid may be compatible with the common market includes not only the aids directly granted to a shipbuilding undertaking for the construction of a ship but also those which, although *indirectly* granted to other economic operators, contribute towards the same operation.

37. That interpretation is justified not only by the words used but also by the practical effect which must be ascribed to that Directive.

38. Thus the seventh recital in the preamble to the Directive states that 'it is necessary, in order to avoid discrimination, to make all forms of operating aid subject to the common maximum ceiling, including loss compensation and such aid as is granted indirectly through third persons ...'.

39. If all the aids (direct and indirect) granted by Belgium to the shipyard undertakings concerned are taken into consideration, then they exceeded the ceiling fixed in the Commission's communication. The applicant State does not deny that that is so if that method of calculation is used.

40. It should also be pointed out that the Kingdom of Belgium misinterprets Article 3(2) where it contends that 'in so far as it is not *directly* linked to contracts and is not therefore *actually* used to place orders, operating aid must not be included in the amount of the aid even if the amount advanced, loaned or guaranteed to him (the shipowner in this case) is also intended for the development of his fleet'. [20]

41. It should be observed, in the first place, that an aid intended for the development of a fleet, provided that it is linked to the building of a ship, must, under the Directive, come within its scope.

42. In the second place, however, it should be noted that the Kingdom of Belgium's position consists in taking the word 'actually' to mean 'directly' and in claiming that, as regards operating aids, only those which are exclusively intended to 'place orders' ought to be taken into account in the calculation of the ceiling.

43. Such an interpretation is tantamount to requiring the Commission to investigate the State's true motivation when aid is granted to a shipowning company.

44. Not only does that interpretation by no means follow from the French version of the Directive, but it is also contradicted by the English version, in which the word 'actually' preserves a completely neutral connotation: 'The grant equivalent of these aids shall be subject in full to the rules set forth in Article 4 and the monitoring procedures laid down in Article 11, where these aids are *actually* used for the building or conversion of ships in Community shipyards'. [21]

45. Furthermore, the *rationale* of this measure is not concerned with the subjective intention of the State providing the aid but, it will be recalled, is based on the objective purpose of the aid granted.

46. Consequently, an analysis of the Directive presupposes that an aid granted to a shipowner will be taken into consideration in determining the amount of aid granted provided that it has a link with the order for a ship.

47. I see nothing in the wording of the Directive to indicate that the burden of proof is reversed in such a way that the Commission is required to demonstrate that an aid linked to an order for a ship has no causal relationship with the operation envisaged.

48. According to a general principle in such matters, it is for the applicant to prove that

20 — Application in Case C-356/90, p. 10 of the French translation.

21 — Emphasis added.

all the conditions to which the derogation is made subject are satisfied.

49. That follows clearly from the Court's judgment in *Philip Morris* v *Commission*: [22]

'It should be noted in this connection that the disputed decision explicitly states that the Netherlands Government has not been able to give nor has the Commission found any grounds establishing that the proposed aid meets the conditions laid down to enforce derogations pursuant to Article 92(3) of the EEC Treaty.' [23]

50. It should also be pointed out that the Kingdom of Belgium has not provided or attempted to provide proof, either during the administrative procedure or before the Court, that part of the aids granted to the shipowners was not connected with the building of the ships. The mere finding by the Commission that an aggregate amount of loans in excess of the ceiling for the production of a ship has been granted means, where proof of the absence of a link between part of the aid and the operation envisaged has not been furnished, that it may be considered that the aid was actually intended for the building of a ship.

51. Meanwhile, it will be recalled that the representative of the applicant State expressly accepted before the Court that even if the aid were split up into two distinct types the ceiling would have been exceeded.

52. One final observation on this point: where, as in this case, as the representative of the applicant State stressed before the Court in the oral procedure, the aids are intended for the *modernization* of the Belgian fleet, how is it possible not to perceive those aids, as the Commission has rightly done, as a benefit granted for the production of a ship? An aid of this type is closely associated with the order for ships from the Belgian shipyards and, consequently, must be taken into consideration in determining the ceiling.

53. As the Commission stated in its decision of 13 March 1991:

'... the fact that aid was granted to shipowners for vessels built in third countries, for whatever reason, does not justify subtracting the equivalent of such aid when aid is granted for vessels built in Belgium'. [24]

54. I therefore recommend the Court to reject this submission also.

55. The Kingdom of Belgium then claims that the fact that the ceiling is exceeded constitutes only a mere presumption of incompatibility which may be rebutted by proof that no overcapacity will be created by the grant of the part of the aid by which the ceiling is exceeded.

56. Such an interpretation is manifestly incorrect in so far as it consists in treating production aids in the same way as the other

22 — Case 730/79 [1980] ECR 2671.

23 — Paragraph 18.

24 — Recital VII, third paragraph.

measures of support for shipyards, such as investment aid or aid for closures. [25]

57. The latter categories of aid are not subject to any ceiling before a positive decision may be taken, since the Directive states that the sole condition for compatibility is that they are not 'likely to increase ... shipbuilding capacity'. [26]

58. On the other hand, the Directive contains no reference either in the preamble or in the body of the measure to overcapacity in relation to production aid.

59. Without repeating the wording of the preamble in full, I would point out that its seventh recital deals, first, as I have said, with production aid, the level of which 'should be attained by means of a common maximum ceiling' and, secondly, with restructuring aid, which 'it may be necessary to authorize ... to enable desirable structural changes to be carried out provided that they do not lead to increases in capacity'.

60. Accordingly, it is impossible to treat the various categories of aid in the same way without altering the nature of the system established by the Directive.

61. That is confirmed by the wording of the Directive. Apart from the ceiling, I have been unable to find in its provisions on aid for production any criterion for the assessment of the compatibility of aid, such as the absence of overcapacity.

62. On the other hand, it undeniably follows from the French text of Article 4(1) that such aids 'may' ('peuvent') be considered compatible 'provided that' ('à condition que') the ceiling fixed in the Directive is not exceeded.

63. Similarly, Article 1(d) provides in its second subparagraph that 'Such aid *may* be considered compatible with the common market *provided* that it complies with the criteria for derogation contained in this directive'. [27]

64. This concept of '*condition*' is also found in the English version of Article 4(1), which is worded as follows:

65. The use of the words 'provided that' therefore clearly demonstrates that only production aids equal to or lower than the ceiling may be declared compatible, while the Commission may, under that provision, declare an aid incompatible with the Treaty even where the amount is very small, especially where there is competition between yards in different Member States for a particular contract. [28]

25 — Chapter III of Directive 87/167/EEC: Restructuring aid.

26 — Article 6(1) of Directive 87/167/EEC.

27 — Emphasis added.

28 — The second subparagraph of Article 4(5).

66. In my view the Commission would also be justified if, in the exercise of its discretion, it were to consider an aid below the ceiling incompatible with the common market, in particular where its effects might be to affect trade within the Community to an extent which could not be justified by the objectives in view.

67. I consider that this is consistent not only with a purely literal analysis but also with a teleological examination of the measure.

68. The Directive was adopted on the basis of Article 92(3)(d), which allows the Council to determine certain categories of aid which may be declared compatible with the common market but which none the less does not empower it to extend the list of aids compatible *per se* in Article 92(2).

69. Since it constitutes a derogation from the principle laid down in Article 92(1), the scope of the Directive must, according to the case-law of the Court, be interpreted restrictively. [29]

70. The requirement that it must not exceed the ceiling is therefore an essential condition for the compatibility of a production aid with the Directive. Accordingly, it must be considered that the conditional nature of the declaration that an aid is incompatible does not relate to the requirement that the aid must comply with the ceiling, which it is always required to do. That is all the more apparent when the wording of the Directive is compared with that of the fifth directive (81/363/EEC), [30] which was repealed by the directive of 1987, and which contained no provision for a ceiling but which conferred a wide discretion on the Commission.

71. Article 6 of that directive provided that 'The Commission shall assess the maximum level of aid which may be granted for the application of the various aid schemes. Authorization to exceed this level may be given only as an exceptional measure, after the Commission has been notified.'

72. It is apparent upon examining those directives that the objective as regards shipbuilding is to achieve, in the medium term, if not a complete prohibition of aids, at least a progressive limitation of any national support policy. [31]

73. That is particularly evident in the seventh recital in the preamble to the fifth directive, which is worded as follows:

'production aid should be temporary and diminishing, so as to encourage the undertakings to make the necessary effort to become competitive, at least in time'.

74. The conclusion may therefore be drawn that a production aid may be compatible with the rules introduced by the Directive, *provided that* the total amount of the aid granted is at the most equal to the ceiling fixed in the Commission's communication.

29 — Paragraph 18 of the judgment in *Philip Morris* v *Commission*.

30 — Council Directive of 28 April 1981 on aid to shipbuilding (OJ 1981 L 137, p. 39).

31 — Article 4(2) of the sixth directive provides in the second subparagraph that 'the Commission shall pay particular regard to ensure that the aid for the building of small specialized vessels ... is kept at the lowest possible level ...'. Article 4(3) provides that 'The ceiling shall be reviewed every 12 months ... with the aim of progressively reducing the ceiling'.

75. It follows from the foregoing considerations that the part in excess of the ceiling, in so far as it does not fall within the scope of the Directive, ought to have been notified to the Commission so that it might be authorized.

76. In the light of the case-law of the Court, however, it would be wrong to conclude from that infringement of the rules introduced by Article 93(3) that the aids granted were unlawful in such a way as to exonerate the Commission from considering the substance of the aids in order to check their validity.

77. This leads me to examine the Kingdom of Belgium's final submission.

78. In *France* v *Commission* [32] the French Government had granted aids to Boussac Saint Frères SA without giving the Commission prior notification thereof. The Commission inferred that that infringement of the procedural rules set forth in Article 93 meant that the aids were automatically illegal and that there was therefore no need for it to consider the compatibility of the aids with the common market, while the applicant State contended that, notwithstanding that infringement, the aids ought to be the subject of a substantive examination.

79. The Court adopted a solution which enabled those two conflicting interpretations to be reconciled.

80. The Court considers that where the aid has not been notified or where it has been applied before being authorized by the Commission, the Commission may issue a decision requiring the State in question to suspend the payment of the aid and to provide the Commission with information in order that it may assess the compatibility of the aid with the common market. [33]

81. The Court also envisages a number of possible situations: either

— the State complies with that order and the Commission is obliged to examine the compatibility of the aid with the common market; [34] or

— the State fails to provide that information and the Commission may immediately terminate the procedure and decide whether or not the aid is compatible with the common market; [35] or

— the State fails to suspend the payment of the aid, in which case the Commission, 'while carrying out the examination on the substance of the matter', may bring the matter before the Court 'for a declaration that such payment amounts to an infringement of the Treaty'. [36]

82. It follows that the infringement by a Member State of Article 93 (by failing to notify the aid) does not automatically mean that the aid is incompatible with the common market within the meaning of Article 92 (because it affects trade between the Member States or distorts competition): that must be proved by the Commission, which may none the less bring an action under Article 169 for failure to fulfil obligations by infringing Article 93.

32 — Case C-301/87 [1990] ECR I-307.

33 — Paragraph 19.
34 — Paragraph 21.
35 — Paragraph 22.
36 — Paragraph 23.

83. It will be recalled that

'... the Commission may avail itself of the procedure under Article 169 of the Treaty when it seeks a finding by the Court that a Member State is in breach of Article 93(3) of the Treaty'. [37]

84. It is only where a State refuses to forward certain documents 'demanded' by the Commission, therefore, that the Commission may terminate the examination of the substance of the aid relying on those portions of the evidence available to it.

85. In this case, as soon as the Commission became aware of the amount of the aids granted, it initiated the procedure provided for in Article 93(2). It did so without serving notice on the Member State concerned to produce the evidence on which the compatibility of the aid granted might be determined.

86. It is therefore possible to state that although the Commission expresses itself clearly in the statement of the reasons on which both decisions are based as regards the progress of the procedure of the preliminary inquiry and the determination of the calculation and the amount of the aids granted, on the other hand it does not examine the effect on trade between Member States and the distortion of competition arising from the fact that the aids were excessive.

87. Article 1 of the Decision of 4 July 1990 states that 'The loans ... are incompatible with the common market' and Article 1 of the Decision of 13 March 1990 states that 'The credits ... are incompatible with the common market as they do not comply with Articles 3(2) and 4(1), (2), (3) and (4) of Directive 87/167/EEC'.

88. That extremely laconic 'justification' for its finding that the aid is incompatible with the Treaty may no doubt be explained by the Commission's presumption that the aid, whose grant equivalent is higher than the ceiling, falls within the general prohibition in Article 92(1) and shows 'all the characteristics of a prohibited aid, including the condition that it affects trade between Member States'. [38]

89. It is therefore necessary to enquire into the relationship between the Directive and Article 92 et seq. of the Treaty.

90. Where an aid does not fall within the scope of the Directive, it does not follow that it is automatically incompatible with the common market pursuant to Article 92 et seq. of the Treaty.

91. That interpretation is supported by the judgment in *Italy* v *Commission*, [39] the facts of which are, briefly, as follows.

92. The Council had, by Regulation (EEC) No 822/87, set up a system of aids for grape

37 — Case C-61/90 *Commission* v *Greece* [1992] ECR I-2407, paragraph 25.

38 — Commission's rejoinder in Case C-180/91, p. 3 of the French translation.

39 — Case C-89/89 [1990] ECR I-3891.

must within the framework of the common organization of the market in wine and wine products. The Commission had, also by means of a regulation, fixed the amount of the Community aid which might be granted. Italy had taken the view that that amount was insufficient and, by a decree-law, had introduced an additional national aid.

93. In that case, the Commission had examined the impact of the additional national aid on the market, even though it considered that

'the aid for producers of must and the fixing of a maximum selling price for must constituted measures contrary to Regulation No 822/87. Since that regulation formed a complete and comprehensive system, it left Member States no power to take any complementary measures.' [40]

94. Here I quote two paragraphs of the Court's judgment.

'In this regard it must first be observed that, *according to the appraisal set out in the contested decision*, the aid in question gives a special advantage in particular to Italian producers of grape must ... Such a measure may therefore distort competition ... [41]

Secondly, *according to the figures given in the contested decision* for wine production in Italy ... the disputed aid is capable of affecting intra-Community trade in grape must and wine.' [42]

95. In that case, therefore, the Commission, notwithstanding the existence of the Council Regulation, had examined the compatibility of the national aid in relation to Article 92(1) and (3) and had stated the reasons on which its decision was based.

96. Consequently, the Commission cannot validly maintain in this case that the aid falls within the prohibition in Article 92(1) without first ascertaining that the conditions set out in that provision were satisfied and that there were no grounds for a derogation under paragraph 3.

97. The Directive is in fact simply a measure adopted in pursuance of Article 92(3)(d) and it must be implemented in a manner which complies with the other provisions of the Treaty.

98. Thus in *Deufil* v *Commission*, [43] in considering an 'aid code', the Court referred to the principle of the hierarchy of rules. While the Directive, unlike the aid code, has binding effect, it may not however justify disregarding Article 92 by failing to apply it in part.

99. In paragraph 22 of *Deufil* the Court held:

40 — Paragraph 5 of the Report for the Hearing, at p. I-3894.
41 — Paragraph 14, emphasis added.
42 — Paragraph 15, emphasis added.
43 — Case 310/85 [1987] ECR 901.

'The aid code constitutes guidelines setting out the course of conduct which the Commission intends to follow and with which it asks the Member States to comply in regard to aid to the synthetic yarns and fibres sector. It does not derogate from the provisions of Articles 92 and 93 of the Treaty, nor could it do so.'

100. In this case the Commission did not carry out an examination of the substance of the aid but simply declared them incompatible with the common market on the sole ground that they exceeded the ceiling and therefore declared them contrary to the Treaty on the ground that they were contrary to the Directive.

101. It follows that the Commission failed to state the reasons in relation to the effect on trade within the Community and the distortion of competition.

102. The Commission simply stated that the aids were either 'incompatible with the common market' [44] or 'incompatible with the common market as they do not comply with ... Directive 87/167/EEC', [45] without mentioning, except merely by stating that the ceiling had been exceeded, the distortion of competition and the effect on trade within the Community.

103. As the Court stated in *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*: [46]

'Even if in certain cases the very circumstances in which aid is granted are sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision. In this case it has failed to do so since the contested decision does not contain the slightest information concerning the situation of the relevant market, the place of Leeuwarder in that market, the pattern of trade between Member States in the products in question or the undertaking's exports.' [47]

104. Similarly, the conditions of Article 92(1) could not be satisfied by the simple reference, in Recital III to the decision of 13 March 1991, to the position of the Netherlands authorities without any justification by the Commission of its own analysis in the light of Article 92.

105. It is indisputable that the statement of the reasons on which a decision is based is intended to allow the Court to carry out its judicial review of the legality of the rules which the decision lays down, as the Court stated in *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*: [48]

'However, the decision does not contain a statement of reasons with regard to the assessment of the other criteria laid down in Article 92(1), namely the requirement that the aid in question affects trade between Member States and distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.' [49]

44 — Commission Decision of 4 July 1990, Article 1.
45 — Commission Decision of 13 March 1991, Article 1.
46 — Joined Cases 296/82 and 318/82 [1985] ECR 809.
47 — Paragraph 24.
48 — Judgment cited above.
49 — Paragraph 22.

On those grounds the Court annulled the decision referred to it.

106. Lastly, the Commission's claim that the aid could never be prohibited if its compatibility in relation to Article 92(1) had to be examined is unconvincing.

107. The two conditions set out in Article 92(1) and mentioned above are given a very broad interpretation in the case-law of the Court. It is sufficient in that regard to refer to Case C-142/87 *Belgium* v *Commission*: [50]

'According to the judgments of 17 September 1980 in Case 730/79 *Philip Morris* ... and of 11 November 1987 in Case 259/85 *France* v *Commission* ... the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected.' [51]

108. In the same way, as regards derogations which may be relied upon by the Member States, notwithstanding the fact that they fall within the Commission's discretion, the conditions governing them are given a very restricted interpretation. In that regard I refer to the aforesaid judgment of the Court in *Philip Morris*:

'It should be borne in mind that the Commission has a discretion the exercise of which involves economic and social assessments which must be made in a Community context.' [52]

109. Accordingly, I conclude that:

(1) both the contested decisions should be annulled;

(2) the Commission should be ordered to pay the costs, including those in respect of the proceedings for interim relief.

50 — [1990] ECR I-959.

51 — Paragraph 43.

52 — Paragraph 24.