# OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 16 December 1986 *

*Mr President,*
*Members of the Court,*

1. Court proceedings are a kind of barometer. It is interesting to observe the prevalence of particular subjects in any given period.

Community litigation is no exception to that rule. Recently the Court delivered a number of very important judgments in relation to fixed prices. Similarly, I now observe that many cases which have recently been decided or are at present pending concern dumping or State aid.

It is not fortuitous that they should occur together. Aid sometimes has repercussions on competition, and dumping always has. The contiguous provisions of the Treaty which are concerned with them are at present fertile ground for legal writers.

State aid in particular has been the object of considerable attention, but this is neither the time nor place to discuss the literature at length. Salient points are the necessary connection between Community and State aid, the contrary effects (sometimes positive and sometimes negative) of the latter and the need for greater transparency in the relevant procedure in order to allow undertakings which may be affected by State aid to approach the Commission in good time or to bring proceedings before the Court of Justice.

That issue of transparency, one aspect of which is the requirement of a statement of reasons, is central to the present case, subject to two important reservations: the contested decision is referred to the Court not because it grants but because it refuses national aid and the applicant is not an undertaking but the Member State concerned, namely the Federal Republic of Germany. There is a third special feature: I think this is the first action brought against a decision on regional aid schemes.

The Court must rule on the lawfulness of a Commission decision of 23 July 1984 on the North Rhine-Westphalia regional economic development programme, adopted under Article 93 (2) of the EEC Treaty. The Federal Republic of Germany seeks a declaration that that decision is void in so far as it holds that aid provided by North Rhine-Westphalia for firms in the labour market regions of Borken-Bocholt and Siegen under a programme for the improvement of the regional economic structure is, pursuant to Article 92, incompatible with the common market.

* Translated from the French.

The applicant relies on the four submissions set out in the Report for the Hearing. They may be grouped as follows:

(1) Failure to state reasons, or to state sufficient reasons. That is the main submission.

The applicant submits that the decision contains no particulars showing whether the conditions for applying Article 92 (1) are satisfied and does not specify the method and criteria on the basis of which the Commission refused to apply the exemptions contained in Article 92 (3) (a) and (c).

(2) A manifest error by the Commission in the exercise of its discretion;

(3) Misuse of power arising *inter alia* from breach of the principle of proportionality.

## I — Application of Article 92 (1) of the Treaty

2. In order to discuss the statement of reasons in relation to Article 92 (1) it is necessary first of all to consider the question of principle raised by the Commission's contention that regional aid is fundamentally incompatible with the common market. According to the Commission the Member States recognized in 1971 that *regional aid* was as a matter of principle incompatible with the common market.[1] It refers to the general nature of *regional aid schemes* and contends that it is neither necessary nor even possible to make legal assessments on the basis of specific circumstances.

1 — First Resolution of 20 October 1971 of the Representatives of the Governments of the Member States, meeting within the Council, on general systems of regional aid (Official Journal, English Special Edition (II), No IX, p. 57) following a Communication of 23 June 1971 from the Commission to the Council in relation to such systems (Journal Officiel, C 111 of 4.11.1971, p. 7).

It is on that basis that it defends the statement of reasons for the contested decision, which is worded as follows:

'The aid proposed under the North-Rhine Westphalia regional economic development programme distorts or threatens to distort competition within the meaning of Article 92 (1) of the Treaty by favouring certain undertakings or the production of certain goods and is likely to affect trade between Member States.

Article 92 (1) provides that aid having these features is in principle incompatible with the common market . . . '

The question thus arises whether such a statement of reasons, in the form of a paraphrase, may be regarded as satisfying the obligation contained in Article 190 of the EEC Treaty. For that purpose let us draw a distinction between regional aid *per se* and a scheme or programme of that kind of aid.

3. Let us dismiss straight away the contention that regional aid is *per se* contrary to the rules of the common market. There is no trace of such incompatibility either in the Treaty or in secondary legislation. On the contrary, the machinery set up by Articles 92 to 94 leaves it to the Council or the Commission, subject of course to review by the Court, to determine whether any aid or class of aid is compatible with the Treaty according to the criteria laid down in those provisions.

Thus the Court has held

'that the prohibition in Article 92 (1) is neither absolute nor unconditional since Article 92 (3) and Article 93 (2) give the Commission a wide discretion and the

Council extensive power to admit aids in derogation from the general prohibition in Article 92 (1).' [2]

That view is confirmed by the judgment in *Intermills*, [3] in which it was stated that 'the granting of aid ... cannot be regarded as being automatically contrary to the provisions of the Treaty' (paragraph 32); it is clear from the judgment that the Commission itself recognized as much.

4. The fact remains that the Treaty gives the Commission a wide discretion, reflected in the statement of reasons, the requirements to be satisfied by which

'depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the need for information of the undertakings to whom the measure is addressed ...'. [4]

The statement of reasons for aid to a particular undertaking will thus necessarily be more precise than that relating to aid to a sector, which in turn will be more detailed than that relating to a programme if that programme mentions only the region and does not make it possible in advance to determine the sectors or undertakings which are to benefit.

That is the position in the present case, as the defendant has not failed to stress. I think that in such a case we have to accept its argument that any scheme of regional aid satisfies at least the criterion of a threat of distortion of competition and trade.

The Resolution of the Representatives of the Governments of the Member States of 20 October 1971 and the 1971 and 1978 communications from the Commission to the Council, [5] which the parties have frequently cited, refer, in order to stress the need for Community action in that respect, to

'the lack of sectoral specificity [which] is a basic feature of most of the general systems of regional aid, due to the fact that regional aid is often granted to all industrial sectors without distinction' [6]

and the resulting difficulty in determining the effects of aid on competition and trade in the goods and services sectors.

Article 92 applies where costs which normally fall on undertakings are borne by the State, thus favouring such undertakings in relation to others. If undertakings which satisfy the criteria laid down by the regional aid programme have competitors in other Member States, as will most often be the case, then the grant of aid will give rise to a difference in production costs between competitors in the common market and, consequently, at least a potential effect on trade between Member States. The Court held in the *Philip Morris* case that

2 — Judgment of 22 March 1977 in Case 78/76 *Steinike and Weinlig* v *Federal Republic of Germany* [1977] ECR 595, paragraph 8 at p. 609.

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

4 — Judgment of 13 March 1985 in Joined Cases 296 and 318/82 *Kingdom of the Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19.

5 — See footnote 1 above and, for the Communication of 21 December 1978, Official Journal, C 31 of 3.2.1979.

6 — Point 8 of Annex A to the aforementioned First Resolution of 20 October 1971; see also point 10 of the 1978 Commission Communication.

'when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid.'[7]

I therefore think that although it cannot be said that regional aid is *per se* incompatible with the common market, the Commission may, in the case of *general programmes* of regional aid, presume that they are likely to distort or threaten to distort competition by favouring certain undertakings or production of certain goods. Their general nature in relation to both the sector and the undertakings which are to benefit meets the condition set out in Article 92 (1).

To adopt a classic legal distinction, this is a rebuttable presumption. Accordingly, if after notification of an aid scheme the Commission decides not to initiate the procedure,[8] it admits either of its own initiative or on the basis of evidence and information supplied by the Member State concerned that it considers the scheme in question to be compatible with the common market.

5. In the present case the Commission decided to initiate the review stage referred to in Article 93 (2), which entails giving notice to the parties concerned to submit their comments.

It may be observed that it took a similar decision with regard to all the framework plans drawn up from 1975 to 1982 at the federal level. With regard to the majority of the regional development programmes of the *Länder* it awaited the introduction in 1981 of new delimitation methods for classifying the assisted areas under the joint action programme in order to assess its role in relation to the programmes of the *Länder*.

There are then two possibilities:

(i) The Commission reaches a positive decision on the basis of Article 92 (2) and (3). That is not the case with regard to the two regions in issue.

(ii) The Commission reaches a negative decision. There is no *a priori* ground for requiring it to give a fuller statement of reasons concerning the application of Article 92 (1) than the statement that it is a programme of regional aid and reference to the presumption. A fuller statement of reasons is necessary only where the Member State has from the beginning or during the review stage put forward arguments seeking to show that the aid scheme is compatible with the Treaty. The more justification which the Member State puts forward in support of its plan the fuller must be the Commission's statement of reasons, and it is apparent that it is more difficult to give precise justification for programmed aid than for aid to a sector. That, however, is the responsibility of the Member State.

Accordingly, I consider that from the point of view of Article 92 (1) the statement of reasons in the contested decision is adequate. The reasoning set out in it can be understood by the addressees. In its correspondence with the Commission prior to the decision the applicant did not deny that regional aid, whether under the joint action programme or the regional development programmes of the *Länder*, is subject to

7 — Judgment of 17 September 1980 in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, at p. 2688, paragraph 11.

8 — Case 84/82 *Federal Republic of Germany* v *Commission* [1984] ECR 1451, at p. 1488, in particular paragraphs 11 to 13.

Article 92 (1). The dispute between the parties related only to the criteria and methods of assessment adopted by the Commission in determining the socio-economic situation of the regions at issue for the purpose of applying Article 92 (3).

In a subsequent decision dated 19 February 1986 and also addressed to the Federal Republic of Germany on 'aid under the . . . joint regional aid programme . . . in six labour market regions', which was produced at the hearing, the Commission observes *inter alia* that 'past experience indicates that some of the aided firms will be active in intra-Community trade'.

That is certainly the course to be followed, for it helps to achieve greater transparency. However, in the present case and in the absence of comment from the applicant during the review stage I do not think the Commission was obliged to expatiate further.

**II — Application of Article 92 (3)**

6. The main issue relates to the scope and implementation of Article 92 (3).

The Government of the Federal Republic of Germany and the Commission have argued at length about their respective powers in defining and classifying the regional development zones on the basis of indicators and threshold values.

The applicant argues that since Articles 92 and 93 of the Treaty refer to national measures and the principles of coordination of regional aid set only ceilings of aid intensity for various classes of zones at the Community level, the rights and obligations of Member States under Article 104 of the Treaty, including the pursuit of 'a regional policy aimed at removing regional disparities in a national context', cannot be restricted. [9] In consequence, it is solely at a national level and on the basis of indicators drawn up by the competent national authorities (criteria which are, moreover, more reliable and more comparable, especially in relation to the rate of unemployment) that the aid needs of the various regions of a Member State should be determined. The use of Community averages may be acceptable, in spite of methodological reservations with regard to the use of two relatively crude criteria of assessment adopted by the Commission (GDP per inhabitant in 1978 and average rate of unemployment for 1975, 1977 and 1979), as a criterion for allotting Community resources from the European Regional Development Fund, but not for assessing the regional policy requirements of a Member State, which cannot be assessed on the basis of values which are fixed 'in relation to the economic level of Community regions whose development is unsatisfactory'. [10]

That preoccupation was forcefully expressed by the German Government at the hearing: Community rules which may affect the implementation of national regional policies should not lead to a *levelling* downward

9 — Resolution of the Bundestag of the Federal Republic of Germany of 11 March 1982, referred to in the reply.

10 — Resolution of the German Planning Committee for Regional Economic Structures of 16 March 1983, cited in its reply by the applicant (p. 7).

which would exclude regions of the Federal Republic of Germany from the benefit of certain aid by reason of the economic situation in other Member States.

The Commission denies that it has ever had such intention or acted in that manner. It seeks to achieve the reduction of the most flagrant disparities and eliminate certain 'gulfs' between regions of the Community. In that respect it refers in particular to the fifth paragraph of the preamble to the Treaty, which records the desire of the Heads of State of the Member States

'to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less-favoured regions'.

At the hearing the Commission referred also to Article 130 A of the Single European Act, which speaks of 'reducing disparities between the various regions and the backwardness of the least-favoured regions'.

Its position, which is clearly expressed in its aforementioned Decision of 19 February 1986, is as follows: Article 104 of the Treaty confirms the responsibility of the Member States for pursuing a national economic policy, but such a policy cannot be divorced from the Community interest. The powers vested in the Commission by Articles 92 and 93 would be meaningless if Member States could avoid their obligations under the Treaty simply by claiming that their action was part of their economic policy. Consequently, Articles 92 and 93 override Article 104.

7. Without it being necessary to establish a strict order of precedence among those rules it may be observed that they are all to be found in the third part of the Treaty, relating to the 'Policy of the Community'. Title I contains its common rules, that is to say guiding principles. Article 104 is to be found in Title II concerned with the 'Economic policy' of the Community; the provisions of that title can thus be interpreted only by reference to the general principles previously set out. It is true that Article 104 states that each Member State is to pursue 'the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, while taking care to ensure a high level of employment and a stable level of prices', but it is immediately followed by provisions requiring the Member States to coordinate their economic policies and to provide for cooperation to that end, and the Commission and Council are entitled to make recommendations for the achievement of such cooperation (Article 105). In addition, Article 104, which is contained in Chapter 2, on the balance of payments, cannot have the scope claimed for it by the applicant so as to deprive the Commission in the present case of any power, in applying Article 92 (3), to fix indicators and threshold values in order to determine regions eligible for aid.

That is the interpretation, moreover, which the Court upheld in Case 95/81,[11] where it is stated that Article 104 must be appraised

11 — Judgment of 9 June 1982 in Case 95/81 *Commission* v *Italian Republic* [1982] ECR 2187, at paragraph 16.

'in the light of the system as a whole of the chapter on the balance of payments. Within the framework of that chapter Article 104 merely sets out the general objectives of the economic policy which the Member States must pursue, regard being had to their membership of the Community. It accordingly may not be invoked in order to derogate from the other provisions of the Treaty.'

The interrelationship of the various rules of the Treaty applicable in the present case clearly shows how fundamental the principle of free competition is to the policy of the Community. That is the basis of the prohibition of both agreements between undertakings and State aid in so far as they affect intra-Community trade or competition.

Those prohibitions must, however, be qualified. In the case of undertakings, the exemptions laid down in Article 85 (3) are subject to certain conditions and limits, essentially to the effect that a significant level of competition should be maintained.

In the case of regional aid, Article 92 (3) (a) and (c) introduce two derogations from freedom of competition, based on Community solidarity (taking into account national solidarity). This too is a principle which is fundamental to the Treaty, as is shown by the extract from its preamble quoted above.

The issue here is the necessary balance between free competition and solidarity. The importance of the latter depends upon the particular case; it is more likely to outweigh considerations of competition in the situations of crisis described in subparagraph (a) than in the cases provided for in subparagraph (c) relating to aid intended to assist the development of certain activities or certain economic regions.

Economic solidarity must, however, operate in an equitable manner with regard to all the Member States. That is why the criteria for its implementation, by means of Article 92 (3) (a) and (c), must be left to the judgment of the Community, that is to say in the present case the Commission.

Such a process has nothing to do with any notion of levelling downward. In my opinion, State aid intended to encourage the development of a region in which there is, for example, serious underemployment (Article 92 (3) (a)) cannot be regarded as incompatible with the common market *solely because* that region is situated in a State where the general level of development is considered to be high. There would have to be other reasons, perhaps based on the situation of the region by reference to certain indicators or threshold values drawn up, if necessary on a differentiated basis, *at a Community level.* As regards Article 92 (3) (c), the contested decision shows by the example, *inter alia,* of the labour market region of Aachen that aid may be granted on the basis of that provision even to regions situated in Member States with a high level of development.

Subject to that observation, however, there is nothing to support the applicant's argument that regional aid should be excluded from the scope of the rule in the

*Philip Morris* case. In that judgment the Court clearly stated that:

(1) in general, Article 92 (3) 'unlike Article 92 (2), gives the Commission a discretion by providing that the aid which it specifies "may" be considered to be compatible with the common market' (paragraph 17);

(2) 'the Commission has a discretion the exercise of which involves economic and social assessments which must be made in a Community context' (paragraph 24);

(3) 'As far as concerns Article 92 (3) (c) . . . the compatibility with the Treaty of the aid in question must be determined in the context of the Community and not of a single Member State.' (Paragraph 26).

8. Having regard to those principles, we must now determine the rules for their application in the successive stages of the Commission's decision and review by the Court.

Whereas with regard to Article 92 (1) it is incumbent upon the Commission to demonstrate the incompatibility of State aid by showing that it distorts or threatens to distort competition and affects trade between Member States, with regard to the provisions of Article 92 (3) the burden of proof is reversed. To adopt the words of Mr Advocate General Capotorti in his Opinion in the *Philip Morris* case:

'The onus of proving the existence of the factual circumstances upon which the permissibility of an aid under Article 92 (3) depends is incumbent on the State making the application.' [12]

The Court endorsed that view in paragraph 18 of the judgment, stating 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.'

There is nothing, of course, to prevent the Commission from going beyond the information supplied to it and seeking additional facts to enable it to refine upon the statement of reasons for an adverse decision. That, however, is merely an option at its disposal.

Here, too, the extent of the obligation to state reasons depends on the justification put forward by the State and, in appropriate cases, by the undertaking or undertakings directly and individually concerned. Since there are no identifiable recipient undertakings in this case, only the justification put forward by the State had to be taken into account in the Commission's statement of the reasons for the decision.

It is within these limits, that, to adopt the words of the recent judgment in Case 40/85,

'the statement of reasons for a decision adversely affecting an undertaking must be such as to allow the Court to review its legality and to provide the undertaking concerned with the information necessary to enable it to ascertain whether or not the decision is well founded.' [13]

12 — Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, at p. 2702.

13 — Judgment of 10 July 1986 in Case 40/85 *Kingdom of Belgium* v *Commission* [1986] ECR 2263, at p. 2321, paragraph 21.

Review by the Court is itself confined to the legality of the decision. The Court cannot re-open the examination of the proposed aid in the light of material not put forward at the stage of the procedure which led to the contested decision.

9. In the light of those criteria, what is to be thought of the statement of reasons for the refusal to apply the exemption provided for in Article 92 (3) (a)?

The statement of reasons reads as follows:

'In its 1980 scrutiny of the North Rhine-Westphalia regional economic development programme the Commission decided that the situation in the *Land* by comparison with the rest of the Community was such that only the exception provided for in Article 92 (3) (c) was potentially applicable. As the situation had not changed in the meantime, in its scrutiny of the new programme the Commission was still only able to consider application of Article 92 (3) (c).'

Concise though it may be, that statement of reasons appears to me to be sufficient. The documents produced during these proceedings show that since 1981 the Commission had considered that it was not possible to speak of an abnormally low standard of living or serious underemployment within the meaning of Article 92 (3) (a)[14] in relation to the various regions of the Federal Republic of Germany. There is nothing in the letter sent to the Commission by the applicant on 21 July 1982 notifying it, pursuant to Article 93 (3), of the guidelines amending the *Land's* regional economic development programme or in the subsequent observations to support the view that the regional aid was permissible under Article 92 (3) (a). The Commission therefore did not need to go further in its statement of reasons.

10. The issue of Article 92 (3) (c) is more complex.

After stating that the exceptions allowed by Article 92 (3) (c), which must be construed narrowly, are intended to 'serve certain objectives in the Community interest rather than simply serving the interests of the aid recipient' the Commission describes in the following manner the method which underlies its decision.

On the basis of the principles of coordination of regional aid adopted by the Member States in the First Council Resolution of 20 October 1971 the Commission considers that it must 'take account both of the social and economic situation in the regions concerned *in comparison with the rest of the Community* and of any serious disparities existing *between regions of the same country.*' In order to do so it states that it first of all saw 'how the areas stood in a *Community context* by comparing GDP and unemployment in the designated areas with the *Community averages*' and then 'examined whether there were any *disparities* between the areas and *other areas in the country* which might warrant the grant of regional aid.' For that purpose it took a series of indicators covering, in particular, 'income and the level of economic activity, unemployment, labour supply, migration and infrastructure provision.' Finally, it investigated 'whether the aid to the areas could be said to be

14 — Annex to the letter dated 6 November 1981 from the Commission to the government of the Federal Republic of Germany.

compatible with the common market on account of special structural problems, such as a one-sided industrial structure or restructuring in the steel industry' (my emphasis).

Up to that point the statement of reasons cannot, I think, be criticized. I have already said that the Commission is responsible for the common interest. It must have a wide discretion to reconcile the principles of free competition and Community solidarity and therefore to determine the method to be pursued and the criteria for its implementation. Moreover, the method used, that is to say comparing GDP and unemployment in the areas concerned with the Community averages and then ranking regional aid needs in accordance with the disparities between the various areas of the country on the basis of economic indicators, always taking care to approach the matter from a Community standpoint, seems to me consistent with the objective pursued.

11. Let us now consider its *application* to the labour market regions of Borken-Bocholt and Siegen.

With regard to the latter, the Commission stated that according to the German Government it was likely to lose 20% of its jobs in the steel industry, that is to say 2 300 jobs, and 1 600 jobs in sectors dependent on the steel industry; with the exception of 1981 there was net outward migration and unemployment had risen considerably and had been above the federal average since 1981.

In support of its decision to disallow the aid the Commission objected that in Siegen the long-term unemployment rate from 1979 to 1983 and the rate in 1983 was only slightly above the national average and that as regards the steel industry, even on the worst assumption, the rate of unemployment would still be less than 30% above the national average. Even bearing in mind the recent pattern of net outward migration, the situation did not justify application of an exception from the principle in Article 92 (1).

In view of the Commission's wide discretion, that statement of reasons, which fully answers the claims made by the Federal Republic of Germany, must be regarded as satisfactory.

I do not think the same is true of the decision in relation to the Borken-Bocholt labour market region. The information supplied by the applicant in that respect concerned not only the recorded and foreseeable increase in unemployment but also GDP, which it said was 17% below the national average. The statement of the reasons for the decision deals only with the first indicator and does not refer to the second at all. It is therefore insufficient, and the contested decision must therefore be declared void in that respect on the ground that it is unlawful.

**III — Other submissions**

12. The last two submissions, manifest error of assessment and misuse of powers, remain to be considered.

The arguments put forward in that respect: no appreciable alteration of the previous

situation by the scheme contemplated, no appreciable effect of the proposed aid, no complaints from other Member States or competing undertakings, lack of findings of fact and infringement of the principle of proportionality can easily be refuted in view of what I have said in regard to the statement of reasons.

They are invalid once it is accepted that the grounds of incompatibility in Article 92 (1) were met and that, having regard to the Commission's discretion and the fact that the onus of proof was on the applicant, the statement of reasons in the contested decision was adequate in relation to the Siegen region.

My opinion is therefore that the Commission decision of 23 July 1984 should be declared void in so far as it declares the aid proposed which the *Land* North Rhine-Westphalia proposes to grant to undertakings in the labour market region of Borken-Bocholt, in the circumstances set out in Article 1 of the contested decision, to be incompatible with the common market within the meaning of Article 92 of the EEC Treaty. I propose that the remainder of the claim by the Federal Republic of Germany should be dismissed and that the parties should bear their own costs.