2. **Dismisses the remaining claims in the action brought by the Government of the Federal Republic of Germany;**

3. **Orders the Commission to pay the costs.**

Mertens de Wilmars Koopmans Bahlmann

Galmot Pescatore Mackenzie Stuart O'Keeffe

Bosco Due Everling Kakouris

Delivered in open court in Luxembourg on 20 March 1984.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 25 JANUARY 1984

My Lords,

As is well known, the textile and clothing industries in the Community have been widely affected both by the recession and by the increase of relatively inexpensive products from third countries. Those industries are an important sector of the economy of the Kingdom of Belgium, and the Belgian Government has for some years been concerned to take steps to assist them. What it could do was obviously affected by the qualified prohibition on State aids, contained in Article 92 of the EEC Treaty and subject to the powers of supervision conferred by Article 93 of that Treaty on the Commission.

After a long series of discussions, the terms of a five-year plan for restruc-

turing the Belgian textile and clothing industries were authorized to be implemented for one year by the Commission by letter dated 18 November 1981.

The Federal Republic of Germany in the present proceedings asks the Court to annul that authorization under Article 173 of the Treaty. In the alternative, should it fail on its primary claim or only succeed on the basis that due procedures have not been followed, the Federal Republic seeks a declaration under Article 175 that the Commission was in breach of Articles 92 and 93 of the Treaty in that it failed to declare the plan incompatible with the common market after a proper examination.

The case raises an important procedural issue and, on the merits of the authorization actually given, has led the parties to an extensive examination of the economic, technical and social implications of the plan. It is convenient to take first the claim for annulment which, in my view rightly, is accepted by the Commission to be admissible, and to deal separately with the alternative claim which the Commission contends to be inadmissible.

The procedural argument, put broadly, is that the Commission was not entitled to authorize the plan in the circumstances of this case without setting in motion the procedure provided for in Article 93 (2) of the Treaty, which it is accepted that it did not do, and which the Commission says that it was not bound to do.

In summary those circumstances include the following events which, as I see it, are relevant indeed fundamental, to a decision on the procedural point.

By Royal Decree of 20 December 1977 (Moniteur Belge of 24 December 1977) a system of aids for the two industries was instituted. In March 1978 the Commission initiated the Article 93 (2) enquiry procedure, the aid not having been notified in advance, but after discussion between the Belgian government and the Commission, the former indicated that a new plan would be produced to take account of the modifications proposed by the Commission. That first procedure was then closed in March 1979 but reopened in April 1980, when the Government was asked to produce a detailed statement of its plan for an aid scheme. That statement was given on 28 July 1980 as confirmed on 11 August 1980 and treated as a notification of a proposed aid for the purposes of Article 93 (3) of the Treaty. Correspondence and meetings took place between the Commission and the Belgian Government and it seems clear that at any rate at one of the regular meetings of representatives of Member States, called by the Commission as part of its function of reviewing aids, the Belgian plan was discussed. At a meeting between the Belgian Government and the Commission on 22 July 1981, the Commission asked for the plan to be amended and these amendments were set out and accepted in a letter of the Belgian Government of 5 August 1981. They related to the financial structure of the aid to be given, the exclusion of the

relevant sectors of the textile and clothing industries from other forms of State aid, a discount on repayment of 1 % of the amount of investment for particular purposes, and to the prior notification to the Commission before aid was given for particular products such as ready-made clothes for men and stockings. The letter makes it plain that important changes were introduced and both the Commission and the German Government treat, in their pleadings, this letter as the notification of a new scheme of aid.

The Commission convened a meeting of Member States on 17 September, one of its regular series of multilateral meetings. The Belgian plan was one of the items on the agenda and a working paper summarizing the plan in its then state was circulated (Annex 17 to the Defence).

Later in September two further meetings were held between the Commission and the Belgian Government. On 1 October 1981 the Belgian Government indicated its agreement to a compromise on the aid plan worked out in these two meetings. In particular the government was prepared to increase the percentage of funds, necessary for the restructuring, to be raised by the industry from 25 to 30 in the ordinary case; it accepted reluctantly the Commission's objections to the repayment discount which, until then had been relied on as a critical part of the project, and agreed that prior application should be made in respect of aid to the group of products including men's ready-made clothes and stockings where enterprises employed more than 50 employees (rather than 150 as initially proposed).

The German Government on 2 October commented on the plan as known to it, stressing that in its view the plan would restrict the necessary structural adaptation of an industry in recession, that a 25 % participation by the industries concerned was too low, that nothing was known of the sums involved in years other than the first, but above all that the plan would give rise to considerable distortions of competition in the Community and lead to a loss of jobs in other Member States.

Comments on the plan were also sent by other Member States.

On 5 November another meeting was held between the Commission and the Belgian Government and on 18 November (Annex 24 of the Defence) the Commission accepted that the plan could be implemented for one year subject to the conditions therein set out. It is noteworthy that the Commission stated that it remained concerned about the effects of the plan on competition in the Community, a concern underlined by the attitude of other Member States at the 17 September meeting and in their subsequent notes to the Commission. It was only, it was said, after a particularly thorough review of the plan that the Commission had concluded that, with all the safeguards, the plan would not affect trade between Member States in a way which was contrary to the common interest. The Belgian Government was told that unless the conditions were

accepted in 8 days the Commission would open proceedings under Article 93 (2) of the Treaty.

On 4 December the German Federal Minister for the Economy made it clear to the Commissioner responsible for competition matters that the German Government opposed approval of the plan by the Commission. However, by letter of 9 December 1981 the Belgian Government accepted the conditions in the letter of 18 November and was told by the Commission by letter of 16 December that the plan could be put into effect as from 1 January 1982. Member States were told that the Commission had no objection to the plan subject to the conditions in the letter of 18 November.

It is plain from the substantial documentation provided to the Court, that the Commission had at various times serious reservations about the method and amount of the financing to be made available, about the sectors to be aided, the need for aid to undertakings in some sectors of the industry, the need to ensure that undertakings which were neither efficient nor profitable were kept going, and about the effect on competition. The German Government in particular made it plain that it was concerned about the effect of the plan on the German industry, both as to the volume of trade and as to potential unemployment. The Commission found it impossible to approve the plan without extensive and detailed inquiries into these matters.

It seems that the Commission, both in the letter of 18 November 1981 and in these proceedings regarded the relevant plan as that put forward in August 1980, as modified, rather than a new plan put forward on 5 August 1981. It is in my view right to proceed on that basis.

Was the Commission entitled to authorise the implementation of this plan without initiating the Article 93 (2) procedure?

The German Government contends that, when the Commission is informed of plans to grant or alter aid, it must carry out a cursory examination of the compatibility of the plan with the common market. This examination is based on Article 93 (3) and is restricted to a consideration of (1) whether the conditions for approval of the aid are fulfilled clearly and objectively and (2) whether a provisional evaluation of the arguments for and against the aid would result in its approval. Where the Commission has doubts about the compatibility of the plan with the common market or cannot exercise its powers of evaluation objectively and accurately without obtaining information from and hearing the views of other Member States and interested parties, it cannot approve the plan at this preliminary stage and must commence a full examination of the matter under Article 93 (2). In the present case, it is said, it was clear from the outset that the compatibility of the Belgian plan with the common market was in doubt. In consequence, the Commission should have proceeded under Article 93 (2). Instead, it made its decision at the end of the preliminary examination envisaged in

Article 93 (3) and deprived interested third parties of their right to be heard on the matter.

The Commission takes the view that Article 93 (3) does envisage a detailed examination of a proposed aid scheme. It relies in particular on the second sentence of this provision which states: "If it (the Commission) considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2". It follows from this that the Commission is under no obligation to consult the Member States or interested third parties before taking a decision finding a plan to be compatible with the common market, nor is there any right to be heard. In any event, the result of the investigation would have been the same, even if the Commission had acted under Article 93 (2), so the real question is whether its decision was wrong in substance, not whether it was tainted by a procedural defect.

The scheme of the two Articles of the Treaty, as I see it, is this:

(i) under Article 92 an aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, prohibited because it is incompatible with the common market unless

(a) it is such an aid as is specified in paragraph 2 of Article 92, when it is automatically permitted;

(b) it is specified by Decision of the Council under paragraph 3 (d) of Article 92 as being a compatible aid, when it is automatically permitted;

(c) it is an aid which falls within the definition of Article 92 (1), but which also falls within paragraph (a), (b) or (c) of Article 92 (3) *and* has been "considered" to be compatible with the common market; it is for the Commission, subject to the jurisdiction of the Court, to form the view whether such an aid is so compatible; the aid only ceases to be a prohibited aid when the Commission has done so.

(ii) the Commission, again subject to the jurisdiction of the Court, is charged with the task of reviewing both existing aids and plans to alter aids or to introduce new aids. As to the former, paragraph 2 of Article 93 requires the Commission to decide that the aid should be abolished or altered if, after giving notice to the parties to submit their comments, it finds that the aid is not compatible with the common market or is being misused. The Commission must also be informed of plans to grant new aids in sufficient time for it to submit its comments (Article 93 (3)). If it "considers that any such plan is not compatible with the common market, having regard to Article 92," it must "without delay initiate the procedure provided for in paragraph 2". Those measures are not to be put into effect until this procedure has resulted in a final decision.

(iii) Article 93 does not say what is to happen if the Commission does not

consider that the plan is not compatible with the common market, or if the Commission gives no answer within a reasonable time after notification.

(iv) The Court recognized in Case 120/73 *Lorenz* v *Germany* and Case 121/73 *Markmann KG* v *Germany* [1973] ECR 1471 and 1495 that for new aids there is thus a preliminary period to give the Commission sufficient time for consideration and investigation "to form a prima facie opinion on the partial or complete conformity with the Treaty" of proposed plans. If it considers the plan compatible, the Commission should notify the Member States but it is not obliged to issue a formal Decision. It is only if the Commission considers the plan to be incompatible, that it must initiate "the contentious procedure" under Article 93 (2). If the Commission does not decide either way in a reasonable period (two months being accepted as such a period) then in view of the importance to the economy of some aids being introduced without undue delay, the Member State may proceed to implement the aid which can then be reviewed as an existing aid, no assumption being made that it is compatible merely by the inaction of the Commission.

It is thus clear that the Commission is not precluded from making enquiries and receiving information during the preliminary period. It is not confined to looking at the plan and forming a cursory view on that alone. On the other hand it is required only to form a prima facie view outside any "contentious procedure".

If the Commission's prima facie view is that a plan is incompatible, the position is clear. The Article 93 (2) procedure must be initiated, and a final decision taken in it will conclusively uphold or reject the compatibility of the plan with the common market in whole or in part.

If the Commission's prima facie view is that a plan is not incompatible with the common market, and it so notifies a Member State, two results are possible. One is that the Member State is, thereupon, entitled to implement it. In other words, when implemented the plan is to be regarded as compatible with the common market. The alternative result is that there is no affirmative decision that the plan is compatible; the preliminary screening does no more than remove a prohibition on implementation, but leaves open the question as to compatibility which can only be decided conclusively if, subsequently, the Article 93 (2) procedure is opened. In other words, the new plan, not having been stopped in its tracks is subject to the same scrutiny as an existing aid and may be found incompatible regardless of subsequent developments.

In my view the former is the correct result and, once a plan has been authorized as not being incompatible, it is to be at the outset treated as granting an

aid compatible with the common market, subject, as I see it, to the effect of the plan in operation being looked at again for the future, if it appears to have become incompatible with the common market. The alternative result seems to me to produce an uncertainty which I do not think can have been intended.

The former result is, however, in one important respect, surprising. One of the objectives of Article 92 is to prevent Member States from granting aids which give their national industries an unfair competitive advantage over the enterprises in other Member States. Whether an aid should be granted in one Member State may thus be of critical concern to other Member States and their enterprises. It may be of more concern to another Member State (which I assume to be a party for the purposes of Article 93 (2), that an aid should be found compatible than that it should be found incompatible. One would therefore expect that the Member States would have been given the right to make their views known when the Commission proposed to accept an aid as being compatible.

This consideration lends in my view support to the result contended for by the Federal Republic. The power of the Commission to approve a plan for aid during the preliminary period (on a *prima facie* view) is a limited one and outside that limited area Member States have a right to be heard.

It is arguable that that power is limited to deciding issues under Article 92 (1) and (2) but not under Article 92 (3) which involves an assessment as to whether an aid, falling within Article 92 (1) and under one of the paragraphs of Article 92 (3) should be considered as compatible or not. That assessment, it can be said, is very likely to raise issues involving other Member States and other parties who ought to have the right to be heard. I do not consider that it is to be so limited; if it had been so intended the reference in Article 93 (3) would have been expressly restricted to Article 92 (1) and (2).

The limitation is of a different kind. It seems to me that if the Commission is unable to say that the plan as presented is, on a *prima facie* view, clearly compatible with the common market, then the Article 93 (2) procedure must be initiated.

In the present case, whether the plan is treated as having been notified in August 1980 or as amended in August 1981, the Commission considered that, as it stood, it was not compatible with the common market. It required important changes to be made and imposed important conditions. It had serious doubts about a number of aspects of the plan, not least the effect on intra-Community trade. It knew that many features of the plan, particularly in regard to the effect on the German textile industry and its employees, were highly controversial. Moreover some of the changes introduced do not seem to have been communicated, e. g. to the Federal

Republic, before the letter of 18 November was accepted by the Belgian Government, and indeed the plan does not at any relevant stage seem to have been available either to the Commission or to the Member States, who were consulted about it on 17 September 1981, in a compendious form.

I do not accept the Commission's argument that the result would have been the same whether or not the Article 93 (2) procedure had been followed. It is impossible to assume in this case that no new matters could have been put before the Commission which might have affected its Decision, or that the Commission should say that it would in any event have paid no attention to them.

In my view, without in any way reflecting on the Commission's wide discretion to consider at the appropriate time whether a plan is or is not compatible, in all the circumstances of this case the plan for new aid, as it stood, whether treated as put forward in August 1980 or in August 1981, has been shown to have been considered by the Commission as being incompatible with the common market. In view of the serious matters in issue, and the changes required, the authorization could not and should not have been given in the way that it was. The Article 93 (2) procedure should have been initiated. The Commission's Decision should accordingly be annulled.

In the ordinary way the result of annulment might be that the Article 93 (2) procedure should be initiated in respect of the 1980 plan. That would in this case appear to be academic, since a new plan was notified in March 1982, and after a preliminary view that the plan was incompatible with the common market, the Commission, after hearing comments and carrying out an investigation, concluded that the proposed measures were not compatible with the common market unless certain conditions were fulfilled. The original plan was extended to 31 March 1983 but has apparently now come to an end.

If the authorization is to be annulled on this ground, it does not seem necessary for the Court to deal with the arguments on the merits since the plan has in any event been superseded. It is, however, necessary that I should do so.

The basic question was whether the plan comprised "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest". There were thus two matters to be decided, first whether these threshold criteria are satisfied, second whether the aid should be considered overall to be compatible with the common market. These were matters initially for the Commission which has a wide margin of discretion in the assessment of complex economic and social factors (Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595 and Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671 per Mr Advocate General Capotorti at p. 2701). The Court can, however, review the findings

of fact, to consider whether on the material before the Commission such findings were open to the Commission, and the Commission's decision on the law. Where it appears that there is abuse of power or manifest error, including a case where it is clear that the Commission has exercised its discretion in a way which is outside the purpose and intendment of the legislation, the Court may annul the Commission's Decision.

A preliminary point is taken that the Commission excluded from its consideration of the aid granted the provision of capital which should have been regarded as aid. A restructuring plan, to be approved, had to provide for the undertaking to obtain by its own efforts not less than 30 % (or in excepted cases 25 %) of the capital cost. Not more than 45 % was to come from injections of capital and not more than 30 % from loans at the usual market rates, subject to an interest rebate of 7 % for five years. The plan envisaged, it appears from a letter from the Belgian Government of 29 June 1981, that the injections of capital would be made by subscribing for shares in the undertakings concerned. The Commission has taken the view that the capital injections in this form were not a State aid. Its reasoning appears to be that State participation in an undertaking which is in difficulties or insolvent does constitute an aid. On the other hand, where the undertaking is financially, industrially and commercially viable and is only faced with temporary conversion problems, State participation does not constitute an aid. In the present case, it is said, the Belgian plan envisages the grant of aid to undertakings which are likely to be competitive in the long term and, therefore, State participation is to be considered a normal contribution to the capital of an undertaking, not an aid, since there is to be, or is intended to be, a return on the sum advanced.

The Treaty does not define the word "aid", Article 92 (1) refers to "any aid granted by a Member State or through State resources in any form whatsoever". In *Steinike und Weinlig* v *Germany* the Court used the expression "gratuitous advantage" (see para. 22) but this was an allusion to the phraseology of the question referred by the national court (in Case 173/73 *Commission* v *Italy* [1974] ECR 709 supra, at para. 13 (para. 26 of the French version), the Court referred simply to "benefits"). In Case 61/79 *Amministrazione dello Finanzo dello Stato* v *Denkavit* [1980] ECR 1205, at paragraph 31, the Court held that Article 92 (1) "refers to the decisions of Member States by which the latter, in pursuit of their own economic and social objectives, give by unilateral and autonomous decisions, undertakings or other persons resources or procure for them advantages intended to encourage the attainment of the economic or social objectives sought". In relation to the concept of subsidies or aids mentioned in Article 4 (c) of the ECSC Treaty, the Court held, in Case 30/59 *Steenkolenmijnen* v *High Authority* [1961] ECR 1 at p. 19, that "A subsidy is normally defined as a payment in cash or

in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is a very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help".

On the basis of the last two cases, it is possible to argue that any form of assistance given by a Member State or through State resources in order to attain a specific objective constitutes an aid within the meaning of Article 92 (1) even if it is not gratuitous. It is not, in my view, necessary for present purposes to go so far. At the very least, assistance constitutes an aid if the recipient obtains a benefit which he would not have received in the normal course. A loan at a rate of interest below normal commercial rates is an obvious example. So, however, may be the provision of capital under normal market conditions but on a scale not normally available in the capital market. Whatever may be the position where shares in an undertaking are purchased by a Member State or through State resources by means of a normal commercial transaction, the capital injections envisaged in the Belgian plan, in my view, fall within the scope of Article 92 (1). The fact that, in theory, this financial support was to be made available only to viable undertakings and that dividends might be paid in respect of the shares subscribed do not, it seems to me, necessarily prevent it from being an aid. The amount to be provided was calculated by reference to the cost of the scheme and, although, in general terms, it was to be paid over in the form of a subscription to an increase in share capital, it was to be repaid, at a date to be fixed, by a reduction in share capital or by purchase of the shares. The shares would be retained, it seems, only if the repayment could not be made. The predominant consideration in making these arrangements appears to have been the desire to find a convenient mechanism for placing at the disposal of undertakings the financial means for their restructuring. It cannot be said that the scheme did no more than make available risk capital for investment motives. In these circumstances, in my view, this part of the Belgian plan did constitute an aid within the meaning of Article 92 (1). It is not possible to say that if the Commission had taken this view rather than the view it took it would have made no difference to its assessment. It was a substantial part of the plan. It follows, in my view, that the decision proceeded on a wrong basis and for that reason alone should be annulled.

The next question relates to the qualifying conditions in Article 92 (3) (c). Since the Belgian plan relates to the textile and clothing industries and not to particular areas of Belgium, it is

necessary to consider whether the plan is an "aid to facilitate the development of certain economic activities". Here the test is whether the aid could have the effect of facilitating the development rather than whether it was merely expressed to be intended to do so. The aid must, as the judgment in the *Philip Morris* case recognized, be essential for development to take place even if it is not the full amount of the money needed. It must also ensure that there is an improvement in the way in which the economic activity is carried out, an improvement which may include pruning, as well as modernizing or expanding an industry. Merely to keep alive an ailing company in a period of recession is not "facilitating development".

In the present case, counsel for the German Government has raised five points concerning compliance with the basic conditions for applying Article 92 (3) (c): (1) the Belgian plan merely preserves the status quo (2) aid is not necessary (3) the Belgian plan does not ensure that it applies only to undertakings which are competitive in the long term (4) the plan does not provide that the aid granted is reduced progressively (5) the plan envisages a level of State participation which is so high that it will simply keep in being the existing structure of Belgian industry.

On the first point it is said that it is "extremely doubtful" if the Belgian plan favours structural change because its object is in fact to limit job losses in the textile and clothing industries. The plan does not include measures to reduce excess capacity or create jobs in other areas. The Commission has relied in part on the fact that the plan was based on a report drawn up in June 1980 by McKinsey & Co. This report, it is said, envisaged the adaptation of production to trends on the international market, the modernization of machinery, the introduction of new technology, diversification and greater efforts at innovation. It is not, in my view, necessary to refer to this report in any detail because the crucial factor is not what it said but what the Belgian Government did.

None of the documents before the Court gives any detailed information on the forms of restructuring which could be approved or on the criteria to be applied by two bodies given power to review plans, the Institut du Textile et de la Confection de Belgique and the Société Nationale pour la Restructuration de l'Industrie de la Confection et du Textile ("ITCB", "SNCT"). Even so, the Commission was, in my opinion, entitled to come to the view that the anticipated effect of the plan was to enable the "development" of the Belgian textile and clothing industry, within the meaning of Article 92 (3) (c). Since the actual effect of the plan would depend very much on how the ITCB and the SNCT acted, it was prudent of the Commission to have approved the plan for only one year and kept its operation under constant review.

Although the essential objects of the plan were stated to be to arrest a decline in production and to limit job losses, the plan did envisage that the Belgian textile and clothing industry's share of production in the Community would drop overall and some jobs would disappear. It was, however, anticipated that the job losses resulting from the restructuring measures taken in order to increase productivity would be less than those which would result if no action at all were taken. In the circumstances, and in view of the fact that the precise form of the restructuring to be undertaken was left to the ITCB and the SNCT to approve in individual cases, it seems to me to be too sweeping a statement to say that the plan did not favour structural change at all.

The second point raised by counsel for the German Government is that the difficulties confronting Belgian industry are no greater than those facing the textile and clothing industries in other Member States. Belgium still has a foreign trade surplus in textile and clothing products and the level of investment per job is barely less than in Germany. Certain highly competitive areas of Belgian industry are not excluded from the plan. These factors, it is said, indicate that there is no necessity for any aid to the Belgian textile and clothing industry. At the hearing, it was said that most of the difficulties facing Belgian industry have disappeared, as a result of the gradual depreciation of the Belgian currency and the plan was already an anachronism when it was implemented in 1982.

The plan does not tie the grant of aid to measures to preserve job losses alone. A reduction in job losses if it arose was a desirable benefit, but not the essential object of the plan which was to restructure the industry. At the hearing Counsel for the German Government said that a Belgian trade association had complained that the plan was being applied according to political and regional criteria. Whether this is so or not, and there is no evidence of it before the Court, it is not a relevant factor in this case. The lawfulness of the Commission's assessment is to be determined by reference to the circumstances in existence at the time the assessment was made, not by subsequent events.

The Commission approved the Belgian aid scheme on the basis that the grant of aid to undertakings operating in several specified sectors of the textile and clothing industry and employing more than 50 persons would be subjected to prior notification to the Commission (men's ready to wear, women's tights and stockings, combed wool spinning, carpets, velvet and plush, bouclé and chenille fabrics, bouclé cotton towelling). The reason for this was that, in the sectors in question, there were either serious problems concerning competition and overcapacity in the Community or Belgian industry was highly competitive

and exports exceeded imports. Counsel for the Commission explained that, even if a particular sector of the textile and clothing industry could be said to be relatively competitive at the Community level, this did not mean that every undertaking operating in that sector was in a strong position. The Commission's intention was to take account of the situation of each undertaking in the sectors in question. In this way it could take into account the special risks of distorting competition arising from the grant of aid to these sectors while at the same time avoid the discrimination against certain undertakings which would have arisen had the grant of aid been prohibited entirely.

However, when it came to the aid scheme submitted in March 1982, the Commission required that several of these sectors be excluded entirely from the scheme and that, so far as others were concerned, prior notification of the grant of aid should be given only where the beneficiary was an undertaking employing more than 150 persons. The Commission's change in approach is said to have been prompted by developments that had taken place since its first assessment was made. On that basis, the Commission cannot be accused of inconsistency though I am not wholly convinced by the explanation given. There is, however, a more fundamental objection to the Commission's acceptance, in 1984, of the inclusion of these sectors in the aid scheme.

It seems to follow from the Commission's explanation of the position, as it appeared to it in 1981, that the grant of aid to the sectors in question was not considered to be compatible with the common market. The real object of allowing these sectors to be included in the scheme was to enable aid to be granted to an unspecified number of undertakings in a weaker position than the sector, taken as a whole, in order to avoid discrimination.

In my view the Commission could not properly consider the grant of aid in such circumstances to be compatible with the common market for the following reasons. To begin with, Article 92 (3) (c) refers to aid which facilitates the development of economic "activities". It does not refer to the development of "undertakings". In consequence, it is the overall position in a given sector which should be taken into consideration, not the position of a few undertakings operating within that sector. Secondly, aid is not necessarily compatible with the common market if its only object is to avoid supposed discrimination. Article 92 (3) sets out the criteria which are to be applied. The avoidance of discrimination is not among them. Accordingly, to the extent that aid was approved for these products of the industry, the Commission erred, and even if the whole Decision did not fall to be annulled, it should, in my view, be set aside to this extent.

Subject to that, this second point seems to turn on whether development was necessary rather than whether State intervention was justified. That seems to

me to go to the overall exercise of discretion rather than to the question whether Article 92 (3) (c) was satisfied.

The third point raised is that, while the plan is supposed to be based on the "back the winners" principle, i.e. only potentially competitive undertakings should be supported, the blanket nature of the plan and the absence of any guidelines relating to restructuring go against this and make it impossible for the Commission to ensure that only competitive undertakings receive aid. The Commission takes the view that the "back the winners" principle follows from the requirement that the aid "facilitate" development. It points out that, under the plan, financial support is not given indiscriminately but selectively, on the basis of a restructuring scheme presented by the undertaking seeking aid. The Belgian Government had emphasized that aid would be granted only to undertakings which could be economically viable and profit-making as a result of restructuring. Further details of what it meant by this were given in an annex to a note dated 10 September 1981 which was intended to serve as the basis for a presentation to be made by the Belgian delegation to the multilateral meeting held on 17 September.

"Backing the winners" is at least as difficult in this context as on the turf. Even so, the Commission was, in my view, right to conclude that an aid can only be said to facilitate development within the meaning of Article 92 (3) (c), if the beneficiaries of it are at least potentially competitive. The grant of aid to undertakings which are not economically viable in the long term cannot lead to the development of the economic activities in which they are engaged. In the present case, the Commission was entitled to expect that the effect of the Belgian plan would be to support potentially competitive industries. I am not satisfied that the system adopted for monitoring the application of the plan is one which the Commission could not approve.

The fourth point is that, in order to ensure that financial aid restores the competitive capacity of an undertaking, the level of aid should be reduced progressively but no provision to this effect is contained in the Belgian plan. The Commission agrees that aids of the type in question must be temporary and granted on a decreasing scale because, otherwise, they simply finance the operating of an undertaking, not its restructuring. The Commission did not consider it necessary to insist on a decreasing scale because it approved the plan for only one year. The decreasing scale of an aid, it is said, is not of great importance where the aid programme is so limited in time. In addition, the Commission takes the view that the form of the aid implied that it was on a decreasing scale.

Apart from the fact that the value of the interest rebate would decrease in the course of time as the principal is repaid, there is no indication that, under the Belgian plan, aid was granted on a decreasing scale. The fact that part of the aid was by way of contribution of

share capital makes it difficult to provide for a decreasing support unless provision is made for share capital to be repaid at fixed stages which does not seem to have been done in this case. On the other hand it does not seem to me that a decreasing scale is an essential condition of a short-term approval. When the plan was reviewed for the remaining four years, different considerations would apply. I do not consider that the Commission erred in principle in the decision it took on this point.

The fifth point is that, where State aid is too great, there is a danger that undertakings benefiting from it will not make decisions on a purely commercial basis and that the aid will simply preserve the status quo. In consequence, it is essential that the greater part of the financing of any restructuring should be borne by the undertaking itself if investments are to be made on the basis of responsible management decisions. The Commission agrees that, so far as possible, undertakings must adapt themselves to the economic situation by their own means. As a result, the "intensity" of an aid must be limited to what is strictly necessary in order to facilitate development. There is some dispute between the parties concerning the correct method of calculating the intensity of the Belgian plan. It is not, in my opinion, necessary to go into this question. The issue dividing the parties cannot be resolved on a simple "yes/no" basis. Whether or not the intensity of an aid is excessive is a question of degree and it is therefore a matter which falls within the Commission's discretion.

Under Article 92 (3) the aid must not adversely affect trading conditions "to an extent" contrary to the common interest. In Case 47/69 *France* v *Commission* [1970] ECR 487 the Court appears to have taken the view that this requires an inquiry only as to whether trading conditions are so affected, but does not require the adverse effect contrary to the common interest to be balanced against the beneficial effects of the proposed aid.

The German Government's case is that, because the clothing and textile industries in all the Member States are suffering from stagnation in demand, the Belgian plan will give an artificial and unjustified competitive advantage to Belgian industry, to the detriment of the textile and clothing industries in the other Member States which do not benefit from aids. This will result in the preservation of jobs in Belgium at the expense of other Member States and will simply shift the economic problem of the textile and clothing industry from one Member State to another. At the hearing it was said, in 1983, that 1 400 more jobs in the German textile and clothing industry had been lost than was anticipated. The information before the Court is, however, insufficient to attribute this directly to the Belgian plan. The German Government is also concerned that there may be a proliferation of national aid schemes in the textile and clothing sector.

The Commission's defence is that the restructuring of the textile and clothing industry is very important for the common interest and the Belgian plan, in

the form approved by the Commission and restricted as it was to a period of only one year, makes an effective contribution to a restructuring of Belgian industry and therefore serves the common interest. The Commission, nonetheless, subjected its approval of the plan to various conditions which were intended to ensure that trading conditions were not altered to an extent contrary to the common interest: (1) forms of aid other than those envisaged in the plan were not to be applied (2) the production of synthetic fibres and yarn was excluded (3) aid granted to certain sectors was subjected to prior examination and approval by the Commission.

There are passages in the letter of 18 November 1981 which seem to indicate that the Commission did balance the adverse effects of the plan on the common interest against the benefits to the Belgian economy, even though in the end it was satisfied that trading conditions were not adversely affected to an extent contrary to the common interest. This would not necessarily vitiate the Commission's decision if the plan, as approved, was not in fact such as to be contrary to the common interest.

In brief, the argument put forward on behalf of the German Government is that an aid plan adopted by a Member State in order to facilitate the development of a particular sector of industry is contrary to the common interest because (1) it gives that sector of national industry a competitive advantage; (2) it increases the economic problems of industry in other Member States and (3) it encourages other Member States to adopt similar aid plans. The last point is a general one which if right would virtually make it impossible for any aid to be approved under Article 92 (3) (c). The specific criticisms of the plan made by the German Government relate substantially to the extent of the financial aid made available and the absence of adequate means of controlling the operation of the plan. So far as the first point is concerned, the Commission's assessment of the scale of the aid plan was erroneous because it, in my view wrongly, excluded from consideration the capital injections provided for on the ground that they did not constitute "aid". I do not, however, consider the Commission's alleged failure to ensure adequate control of the operation of the plan to be a factor that goes to the compatibility of the plan itself with the common interest. It is a matter that falls within the exercise by the Commission of its discretion both to consider a plan to be compatible with the common market and to keep it under constant review.

It must be said in addition that many points of detail have been canvassed which seem to me to be essentially for the Commission rather than for the Court.

In conclusion, it is my opinion that, quite apart from any defect of procedure, the Commission's decision to consider the Belgian plan to be compatible with the common market under Article 92 (3) (c) should be annulled because the Commission misinterpreted Article 92 (1) in

regard to the capital injections to be made under the plan. Alternatively that part of the approval relating to the specific sectors mentioned above should be set aside. Apart from these points I am not satisfied that any further misuse of powers or manifest error has been shown in the way the Commission exercised its overall discretion.

It remains to consider the German Government's alternative claim based on Article 175. According to this provision, proceedings can be brought if (1) the defendant institution has been called on to act and (2) it has not defined its position within two months. In the present case, it is said that the Commission was called on to act in the course of the meeting which took place on 4 December 1981 between the Federal Minister for the Economy and the Commissioner responsible for competition matters. It is admitted on behalf of the German Government that no express invitation to act was made at this meeting: it is diplomactic practice to couch invitations to act in veiled terms. In my opinion this is sufficient to reject the claim as inadmissible. Whether or not an invitation to act must be made in writing, as has been suggested (e.g. Bebr. Development of Judicial Control of the European Communities, at p. 166, and Schermers, Judicial Protection in the European Communities, third Edition, at para. 333), and as I consider in general should be the rule, it must be made sufficiently clearly so that the defendant institution is made aware that it is being called on to act within the meaning of Article 175. On the basis of the German Government's own pleading, it cannot be said that this was the case. In any event, by letter dated 7 January 1982, the Commission informed the German Government of the position it had adopted with regard to the Belgian plan. The second condition for bringing proceedings under Article 175 was not, therefore, fulfilled. In consequence, this claim must be rejected. The German Government was still able to protect its legal position by bringing an action for annulment, which it did.

Nevertheless, for the reasons I have given, it is my opinion that the Commission's decision should be annulled and that the Commission should be ordered to pay the costs.