OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 28 April 1993 *

Mr President,
Members of the Court,

1. In this application Matra SA asks the Court, pursuant to Article 173 of the EEC Treaty, to annul the Commission's decision of 16 July 1991 (hereinafter 'the contested decision'), relating to the grant by Portugal of State aid to a joint venture designated as Newco set up by Ford of Europe Inc. (hereinafter 'Ford') and Volkswagen AG (hereinafter 'VW') for the production of multi-purpose vehicles [1] in Setúbal. In the contested decision, a copy of which was sent to Matra SA (hereinafter 'Matra') on 30 July 1991, the Commission stated that it raised no objections to the aid scheme proposed by Portugal.

Background to the case

2. By letters of 26 March and 16 April 1991, Portugal notified the Commission of the aid at issue in accordance with Article 93(3) of the EEC Treaty and point 2.2 of the Commission's notice on the Community framework on State aid to the motor vehicle industry (hereinafter 'the Community framework'). [2] The proposed aid was to amount in total to a maximum of ESC 97 440 million, or ECU 547 million, of which ECU 500 million was to be paid as direct aid within the framework of the Sistema de Incentivos de Base Regionale (SIBR), an already existing regional aid programme established by Portugal in cooperation with the Commission. [3] The remaining ECU 47 million would be given to Newco by Portugal in the form of a limited exemption from corporation tax for five years.

The total cost of the project benefiting from the aid was to be ESC 454 000 million or ECU 2 550 million. Portugal also planned a training programme at a total cost of ESC 36 000 million (ECU 202 million). It informed the Commission of the details of that training programme by letter of 31 May 1991.

By letters of 17 June 1991 to Commissioners Bangemann and Millan, Matra, a manufacturer of multi-purpose vehicles sold under the Espace name, expressed its concern at the aid proposed by Portugal. Matra asked the Commission to open a formal investigation in order to allow all the interested parties to submit their observations. On 26 June 1991 Matra sent a complaint to the Commission alleging infringements of Article 92 et seq. of the EEC Treaty by Portugal and of Article 85 of the EEC Treaty by Ford and

* Original language: Dutch.

1 — For a definition of 'multi-purpose vehicle', see the Notice (91/C 182/07) pursuant to Article 19(3) of Council Regulation No 17 concerning Notification No IV/33.814 — Ford/Volkswagen, OJ 1991 C 182, p. 8.

2 — Commission Notice 89/C 123/03, OJ 1989 C 123, p. 3.

3 — The contested decision contains the references to the Portuguese decree establishing the SIBR and the document by which the Commission approved the scheme.

VW. On the following day a meeting took place between representatives of the Commission and Matra, at which the reasons for Matra's concern were discussed. During the meeting the Commission also informed Matra why it did not intend to initiate the formal procedure under Article 93(2) of the Treaty.

On 3 July 1991 the Commission took the decision not to raise any objections to the aid proposed by Portugal. It informed the Portuguese Government of this by a letter of 16 July 1991. On 3 October 1991 a 'Summary of the Commission decision not to raise objections to the aid which the Portuguese Government plans to grant to the joint venture of Ford and Volkswagen to establish a multi-purpose vehicle plant in the Setúbal peninsula' was published in the Official Journal. [4]

3. Following the contested decision, there were further contacts between the Commission and Matra. In response to Matra's letter of 17 June 1991, the Commission replied on 17 July 1991 that 'substantive improvements' had been made to the original aid scheme, that Portugal had duly supplemented its notification at the Commission's request, and that in its opinion there was a fair balance between the interests of regional development and those of free competition. On 30 July, as I have already stated, the Commission sent Matra a copy of the contested decision. In a covering letter, the Commission stated *inter alia* that in its view the joint venture between Ford and VW met the necessary conditions for an exemption under Article 85(3) of the Treaty and that it had decided to initiate the procedure provided for in Article 19 of Regulation No 17, [5] so that interested third parties might be able to submit observations in this respect.

4. By application lodged at the Court Registry on 6 September 1991, Matra brought the present action for annulment. By order of 4 December 1991 the President of the Court dismissed Matra's application for the suspension of operation of the contested decision and the adoption of a number of interim measures. [6] By orders of 8 April 1992 the President of the Court gave Portugal, Ford and VW leave to intervene in the proceedings in support of the Commission, in accordance with Article 37 of the Protocol on the Statute of the Court of Justice and Article 93 of the Rules of Procedure. [7]

For further details of the facts of the case and the procedure, I refer to the Order of the President of 4 December 1991, cited above, and the Report for the Hearing.

5. The examination of the compatibility with Article 85 of the Treaty of the agreement

4 — The summary is published under the heading 'Authorization for State aid pursuant to Articles 92 and 93 of the EEC Treaty. Cases where the Commission raises no objections' (91/C 257/04), OJ 1991 C 257, p. 5.

5 — Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

6 — Order of the President of the Court in Case C-225/91 R *Matra* v *Commission* [1991] ECR I-5823.

7 — Orders of the President of the Court in Case C-225/91, not published in the ECR.

between Ford and VW to set up a joint venture led to the Commission's decision of 23 December 1992. [8] That decision declared, in accordance with Article 85(3) of the EEC Treaty, the provisions of Article 85(1) inapplicable in principle (Article 1). The exemption was, however, subject to a number of conditions and obligations (Article 2).

Since then Matra has also brought an application before the Court of First Instance for the annulment of that decision. [9]

Admissibility

6. Ford and Portugal challenge the admissibility of Matra's application for annulment. In their opinion, Matra is not directly and individually concerned by the contested decision, within the meaning of the second paragraph of Article 173 of the EEC Treaty. Matra and the Commission take the opposite view, while VW has not expressed any view on this point.

Under the second paragraph of Article 173 of the Treaty, any natural or legal person may, under the conditions set out in the first paragraph of that article, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former. [10]

7. Matra is the only party to submit that the contested decision is addressed to it. In support of that submission, it relies on the fact that the contested decision mentions it expressly, that the competent Commissioner sent it a copy of the decision, and that the letter of 30 July 1991 which accompanied that copy must be regarded as impliedly rejecting Matra's complaint of 26 June 1991.

I agree with Portugal and the Commission that both factors are not enough for it to be possible to regard Matra as an addressee. The contested decision, which was moreover in Portuguese, is clearly addressed exclusively to the Portuguese Minister of Foreign Affairs. The Commission's letter to Matra of 30 July 1991 also leaves no doubt on this point:

'As you will already know, the Commission decided on 3 July 1991 ... not to raise objections to the aid scheme notified for this investment. *For your information and for whatever purpose it may serve*, a copy of the decision sent to the Portuguese authorities is enclosed' (emphasis added).

8. Since it is evident that the contested decision is not addressed to Matra, the question arises whether it is of direct and individual concern to Matra. The parties, who have variously given affirmative and negative answers, base their arguments on the *Cofaz* judgment of 28 January 1986. [11]

In *Cofaz* the Court examined whether the 'parties concerned' within the meaning of

8 — Commission Decision 93/49/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.814 — Ford/Volkswagen) (OJ 1993 L 20, p. 14). See also Notice 91/C 182/07, cited in note 1 above.

9 — Case T-17/93, pending before the Court of First Instance.

10 — In the first case the act is addressed to the applicant as a result of its form, in the second case as a result of its nature.

11 — Case 169/84 *Cofaz* v *Commission* [1986] ECR 391.

Article 93(2) of the Treaty can bring an action for annulment against a decision by the Commission to terminate a formal inquiry procedure initiated under that provision. That case concerned an investigation which the Commission had initiated with respect to a tariff system applicable to natural gas in the Netherlands, *inter alia* following a complaint from French users of natural gas. At a certain time the Commission decided that the tariff system — which had meanwhile been adjusted — was compatible with the common market, so that it was appropriate to terminate the investigation procedure. The French users brought an action against that decision under the second paragraph of Article 173 of the Treaty. The question of the admissibility of the action was raised, and the Court held *inter alia*:

'The Court accepted as evidence that the measure in question was of concern to the undertaking, within the meaning of the second paragraph of Article 173 of the EEC Treaty, the fact that the undertaking was at the origin of the complaint which led to the opening of the investigation procedure, the fact that his views were heard during that procedure and the fact that the conduct of the procedure was largely determined by its observations.

The same conclusions apply to undertakings which have played a comparable role in the procedure in Article 93 of the EEC Treaty provided, however, that their position on the market is significantly affected by the aid which is the subject of the contested decision.' [12]

12 — *Cofaz* judgment, paragraphs 24 and 25.

After noting that the French users of natural gas had lodged a complaint against the Netherlands tariff system, that they had intervened in the procedure under Article 93(2), and that they had moreover shown that the contested decision could significantly affect their position on the market, the Court declared the application for annulment admissible.

9. I consider that Matra's application meets the conditions of admissibility laid down by the Court in the *Cofaz* judgment. On 26 June 1991 Matra sent the Commission a complaint against the aid notified by Portugal and intervened on several occasions during the procedure which led to the decision not to initiate the formal procedure provided for in Article 93(2), that being the decision contested here (see paragraph 2 above). Within a period of two months from the communication to it by the Commission of the contested decision, Matra brought the action for annulment which is the subject of this Opinion. [13] Taking all those points into account, I consider that the fact that the *Cofaz* case related to a decision by the Commission to terminate the formal investigation procedure, whereas the present case concerns the Commission's decision not to open that procedure, cannot give rise to a finding that Matra's application is inadmissible. [14]

13 — The decision was communicated, as stated above (see points 1 and 3 above), by a letter dated 30 July 1991. Matra's application was lodged at the Court Registry on 6 September 1991.

14 — In his Opinion in Case C-198/91 *Cook* v *Commission*, Advocate General Tesauro adopts a position which I can only agree with. He states, correctly in my view, that even persons who have suffered damage — such as the competitors of the recipient undertaking — who have *not* intervened during the informal procedure under Article 93(3), for example because they had no knowledge of the aid granted, must be entitled to bring proceedings against the Commission's decision not to initiate the procedure under Article 93(2).

Moreover, Matra has sufficiently shown that the contested decision could substantially affect its position on the market, in particular by observing that, in contrast to the competing undertakings, it produces multi-purpose vehicles only and its position on the market is thus exclusively dependent on the development of that segment of the market.

Contrary to Ford's arguments, it makes no difference in this respect that it is not Matra but Renault which distributes the 'Espace'. I am not convinced by Ford's assertion that because of the distribution agreement Matra bears no economic risk. Firstly, it is clear that only part of Matra's production is acquired by Renault on the terms fixed in advance. Secondly, the volume of the part of Matra's production bought by Renault will itself necessarily develop as a function of demand for the 'Espace' on the motor vehicle market. Production by Matra is thus indeed conditioned by economic factors.

10. I therefore conclude that, in the light of the decision in *Cofaz*, the action for annulment brought by Matra is admissible.

The Commission's substantive assessment of the aid granted by Portugal

11. In the second part of its application, Matra puts forward five pleas in law on the substance of the case. Like the Commission, I shall start by examining those pleas, as such an analysis should make it possible to form a clearer idea of the pleas by Matra based on procedural points.

In the first three pleas, Matra complains that the Commission committed manifest errors of assessment. Firstly, in the contested decision, it wrongly started from the assumption that there were few factors pointing to an imminent danger of overcapacity on the multi-purpose vehicle market (see point 13 et seq. below). Secondly, the assertion that because of the disadvantages of the location of the Setúbal factory, the Portuguese aid could not create any distortion of competition was manifestly erroneous (see point 16 et seq. below). Finally, the Commission was wrong to consider that the expenditure on infrastructure and training borne by Portugal in connection with the plan did not constitute aid (see point 27 et seq. below).

In the other two pleas, Matra submits that the Commission infringed various provisions of Community law. The fourth plea alleges an infringement of Article 92(3) of the Treaty, in that the Commission did not carry out an objective assessment of the Portuguese aid in the light of the exceptions set out in Article 92(3) of the Treaty, but restricted itself to analysing whether that aid was compatible with a general aid scheme for which Portugal had already received the Commission's approval (see point 30 et seq. below). I shall discuss that plea together with the second plea, with which it is logically linked. Finally, Matra complains of an abuse of power by the Commission, in that, when adopting the contested decision, it prejudged the outcome of the procedure under Article

85(3). I shall deal with that last plea in the next section of my Opinion (see point 48 below).

12. Before examining separately each of the pleas put forward, I consider it appropriate to note that Article 92(3) of the Treaty gives the Commission a wide discretion in assessing the compatibility of State aid with the common market. The Court's case-law on this point is unequivocal. [15] That means, with respect to judicial review of the contested decision, that it is not for the Court to assess whether the decisions adopted by the Commission under Article 92(3) of the Treaty are appropriate. The Court must only ascertain that those decisions are not so unacceptable or manifestly erroneous that they could not reasonably have been adopted. Furthermore, the Court has held that the Commission has to exercise its discretion, which involves assessments of an economic and social nature, within a Community context [16] and that when it is examining the compatibility of aid with the common market, it must take all the relevant factors into consideration. [17]

13. *First plea: excess capacity?* Matra quotes the following passage from the contested decision to show that the Commission made a manifestly erroneous assessment of the capacity of the European market for multi-purpose vehicles:

'While the proposed project at Setúbal will allow Ford and Volkswagen to achieve a considerable share of Community capacity in multi-purpose vehicles, there is little evidence to suggest that it will give rise to problems of overcapacity in the market segment in the foreseeable future, even allowing for the various other multi-purpose vehicle projects currently underway or at the planning stage.' [18]

The reference to that single — admittedly not very explicit — paragraph is not convincing. Firstly, it can be seen from the text of the contested decision as a whole that the Commission did indeed carry out a detailed assessment of the capacity of the market in question. In its decision the Commission draws attention first and foremost to the fact that the car market in western Europe is characterized by a noticeable fall in demand, with an annual growth rate unlikely to exceed 1 or 2% in the medium and long term. The Commission then sets out a number of factors which suggest to the majority of manufacturers and market analysts that the multi-purpose vehicle segment is likely to be the fastest growing sector in the western European car market. However, it then states that in that segment of the European market, supply will probably increase considerably from the mid-1990s, and then continues:

'Of course the analysts all have their own answers to the question whether the multi-purpose vehicle market can continue to expand, some even warning against a rash extrapolation of the rapid growth which has taken place in recent years in the United

15 — See the judgment in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, paragraph 8, recently confirmed *inter alia* by the judgment in Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 34.

16 — Ibid.

17 — Judgment in Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 20.

18 — Contested decision, p. 10.

States and the Community. Independent market analysts predict that demand for multi-purpose vehicles in western Europe will amount to approximately 300 000 units a year by the mid-1990s. Some manufacturers are less optimistic. The parties to the project in question, Ford and Volkswagen, expect demand to reach 300 000 units in 1994 and 500 000 by the turn of the century.' [19]

The sentence cited by Matra appears further on in the text, but is immediately followed by this qualification:

'The scale of the project and the share of Community capacity it entails confirm the need to ensure that the planned aid measures are justified on the basis of genuine regional development criteria, in accordance with the Community framework on State aids to the motor vehicle industry.' [20]

14. During the oral procedure before the Court it also became apparent that during the informal preliminary investigation the Commission had called upon independent United Kingdom experts with great experience of the motor vehicle industry. I see no reason why the study carried out by those experts should be less objective than the expert reports relied upon by Matra to demonstrate a manifest error of assessment on the part of the Commission. On the contrary, the fact that the Commission thus allowed itself to be guided by an external report confirms my opinion that when assessing the development of the European market in multi-purpose vehicles, it was not careless in exercising its discretion under Article 92(3).

Given that the Court's function is not to assess whether the Commission's decision is in fact appropriate, but merely to verify that that decision is not *manifestly erroneous*, I consider that Matra's arguments cannot be upheld.

15. In connection with the plea relating to overcapacity, Matra also expresses, in its written observations submitted to the Court, its fear that Ford and VW will in future have a dominant position on the multi-purpose vehicle market. For the reasons mentioned below and cited by the Commission, I consider that that fear is unfounded.

At the time when the contested decision was adopted, the European market in multi-purpose vehicles was dominated *by Matra*, whose market share amounted to 58%. Four other manufacturers, with market shares varying from 7% to 13%, followed it at a considerable distance. Once the Newco project in Setúbal has started, and partly because of it, the situation will change. In the contested decision, however, three factors are mentioned which indicate that the implementation of the Newco project will not give Ford and VW a dominant position on the

19 — Contested decision, p. 6. Matra also considers, in its written observations, that demand can realistically be expected to reach 300 000 in 1994.

20 — Contested decision, p. 10. The Commission also notes, in the written observations submitted to the Court, that in that notice it merely stated that it would ensure that regional aid did not create 'substantial overcapacity' (see the heading 'regional aid' in point 3 of the framework). In a statement during the oral procedure before the Court, it refined its thinking, saying that a certain amount of overcapacity encouraged competition.

relevant market in multi-purpose vehicles. Firstly, production by Newco will start comparatively slowly. Thus in 1996, if all goes as planned, the plant will still manufacture 'only' 68 000 units, whereas it is estimated that total demand should then already exceed 300 000 units. Secondly, there will still be competition between Ford and VW with respect to the *sale* of their respective multi-purpose vehicles, which will moreover differ in their engines and internal and external finish. Finally, the majority of European manufacturers, together with some of their American and Japanese counterparts, will develop new multi-purpose vehicles, in cooperation with other manufacturers or independently, which will obstruct the appearance of dominant positions.

Those arguments put forward by the Commission appear to me to be convincing enough.

16. *Second and fourth pleas in law: incorrect assessment of the regional handicap and breach of Article 92(3)(a)?* According to Matra, when the Commission assessed the regional handicap of the Setúbal area, it committed two errors.

Firstly, it committed a manifest error of assessment in stating that:

'the net cost disadvantages to the promoters of locating the plant at Setúbal and the need to give an additional incentive to attract investment to this disadvantaged region justify the level and intensity of aid proposed and do not give the promoters any unfair competitive advantage in the market segment in question'. [21]

In Matra's opinion, the choice of Setúbal as the location for a motor vehicle factory is, on the contrary, attractive even without the Portuguese aid, in view of the low cost of the workforce and the presence in the region of various other undertakings in the motor vehicle sector. Moreover, the Commission gave not the slightest indication of the criteria it used to evaluate the regional handicap of the Setúbal area which is to be overcome by means of the aid. In any event, 'whatever the criterion chosen', the amount of aid approved by the Commission was grossly excessive, whatever the extent of the regional handicap to be overcome.

Secondly, when the Commission concluded that the Portuguese aid was lawful, it infringed Article 92(3)(a) of the Treaty. Instead of analysing that aid in the light of Article 92(3)(a) of the Treaty, the Commission, in order to decide whether the Portuguese aid was lawful, restricted itself to ascertaining whether the aid was consistent with the SIBR programme (see point 2 above). Matra considers that that approach is not permissible, since in its communication on State aid to the motor vehicle industry, the Commission stated that, precisely in that sector, it would ensure especially strict compliance with the competition rules laid down by the Treaty. In short, the Commission's conduct could

21 — Contested decision, p. 11.

'result in Member States being permitted to make payments which would improve the financial situation of the recipient undertaking although they were not necessary for the attainment of the objectives specified in Article 92(3)'. [22]

I shall take these two complaints together.

17. The examination of the question whether regional aid is compatible with Article 92(3)(a) of the Treaty must aim to ensure that the percentage of the investment which is financed by the aid does not exceed the additional cost for the investor resulting from the fact that he is investing in an area suffering from a 'regional handicap', meaning that the area is less developed than other areas of average development. The examination must therefore relate primarily not to the volume of regional aid but to its *intensity*. In other words, the question is not whether the amount of aid, in absolute figures, is too high, but whether that amount is excessive in relative terms, having regard to the regional imbalance to be compensated.

When a common method of assessing regional aid was drawn up in 1971, those factors were taken into consideration by both the Commission and the Council:

'The method is based on a single measurement criterion, namely the relative size of the aid in relation to the amount of the investment, this size being expressed as a percentage.' [23]

The Council and Commission subsequently developed a method which expresses the aid intensity ceilings in terms of 'gross grant equivalent' and 'net grant equivalent'. Those 'grant equivalents', which are expressed as percentages, indicate the relationship between the aid to be granted and the planned investment *relevant for that aid*. The difference between 'gross grant equivalent' and 'net grant equivalent' depends on the different levels of tax in the various Member States. The net grant equivalent corresponds to the aid which the beneficiary is actually left with 'after payment of taxes on profits, assuming that in its first year of operation the undertaking makes such profits that the maximum tax is chargeable'. [24]

18. In any event, it follows from the foregoing that it can hardly be deduced, *a priori* and 'whatever the criterion chosen', from the mere fact that in the present case Portugal intends to grant a large amount of aid, that that aid is not compatible with Community law.

I also regard as unfounded Matra's assertion that the Commission gave no indication as to the criteria it applied for calculating the

22 — Judgment in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 17. That paragraph, incidentally, also rightly notes the discretion given to the Commission by Article 92(3).

23 — See point 5 ('the common method of assessing aid') of the Annex to the 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 (OJ, English Special Edition, Second Series, IX, p. 57). The Resolution reproduces word for word the communication of the Commission and the Council on 'general schemes of regional aid' (JO 1971 C 111, p. 7).

24 — Ibid.

extent of the regional handicap of the Setúbal area which is to be overcome by means of the aid. The Commission regularly publishes in the Official Journal (most recently in August 1988) [25] communications describing in detail the criteria it applies for the assessment of regional aid. Matra could have found the desired assessment criteria there.

19. Moreover, Annex I to the communication of August 1988 to which I have just referred to contains a list drawn up by the Commission applying those criteria to the various regions of the Community. It is expressly stated there that the entire territory of Portugal falls within Article 92(3)(a) of the Treaty and that, in accordance with that article, that territory thus constitutes a region whose economic development must be facilitated, because living standards there are abnormally low and/or there is serious under-employment there.

Furthermore, the Commission explains in detail in the contested decision why living standards are so low and unemployment so high precisely in the area round Setúbal, why investment projects are especially welcome there, and what additional costs such projects entail for potential investors.

Portugal unreservedly supports the Commission's view. In its written observations submitted to the Court, Portugal convincingly explains that, even compared with the rest of the country, Setúbal is going through a particularly difficult period as regards the economy. [26] As to the presence in the region of other factories in the motor vehicle sector, Portugal states that these are production units on a very small scale originating in the protectionist system adopted after the Revolution which made the import of vehicles impossible. I would add that the argument that the location of a factory in Portugal, and more precisely in Setúbal, allows wage costs to be reduced is of little weight in itself, since the choice of such a location also means that the undertaking concerned has to cope with lower productivity, [27] technological backwardness and a lower level of training.

20. Two conclusions can, in my opinion, be drawn from the foregoing. Firstly, Matra's assertion that even without State aid the Setúbal site is just as attractive economically as other sites for the establishment of a motor vehicle factory would appear to be unfounded. However, it also follows from my analysis that, contrary to Matra's assertion in its fourth plea in law, the Commission *did not* restrict itself to ascertaining whether the Portuguese aid was compatible with the SIBR programme. On the contrary, the text of the contested decision itself shows that, separately from that investigation, the Commission examined whether the subsidy for a project to be carried out in Setúbal was

25 — Commission communication on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ 1988 C 212, p. 2).

26 — Thus the unemployment level there (20.6% of the working population) is twice as high as the national average.

27 — According to a report produced in 1989 by the Portuguese Ministry of Industry and Energy, quoted in Portugal's observations to the Court, productivity in that country is at a level between one-third and one-quarter of the Community average.

in itself justified, and why and to what extent that was the case. [28] It was precisely for that purpose, moreover, that the Commission on this point too called upon the outside consultants mentioned above, which again shows that it did not confine itself to a mere comparison of the planned aid with the figures and methods used in the SIBR programme.

21. That does not mean, however, that the Commission did not also examine whether the Portuguese aid was consistent with the SIBR programme. That makes sense: the Commission must ascertain whether the aid granted in a specific case falls within the general framework which it has agreed with the Member State in question.

When the Commission approved the SIBR programme, it agreed that for the Setúbal region the aid intensity could reach a *maximum* of 75% gross grant equivalent or 60% net grant equivalent. The fact that in the present case the aid notified by Portugal amounted to only 33.5% gross grant equivalent and 27.1% net grant equivalent confirmed the Commission's view that the regional handicap of the Setúbal area had not been overcompensated.

Nevertheless, Matra persists in claiming that the Commission is unable to give even an approximate figure for the structural handicap which is said to justify the aid at issue. [29]

22. Firstly, in this connection, it must be pointed out there is nothing to show that the Commission acted in disregard of the *general* policy defined by it, as expressed in the section on aid ceilings in the published communication on the application of Article 92(3)(a) to regional aid, cited above. [30] It is there stated (point 5):

'... It has therefore been decided to fix 75% net grant equivalent as the ceiling on aid intensity which will apply in 92(3)(a) areas.

... Whilst all 92(3)(a) regions have severe regional problems relative to a Community standard, significant disparities in living standards and underemployment may exist between regions inside the same Member State.

Consequently, the Commission will use its discretionary power to require a regional differentiation in aid intensity below 75% NGE. As such the relevant ceiling of aid intensity for a regional aid system will be the maximum notified by the Member State to the Commission in accordance with Article 93(3) and approved by the Commission when making its subsequent decision under Articles 92 and 93.'

28 — See the analysis in point 16 et seq., from which it can also been seen that the Commission's decision is based on a study of the extent of the regional handicap and the suitability of the planned aid for overcoming that handicap.

29 — Reply, p. 2.

30 — See note 25 above.

Entirely in line with that communication, the net grant equivalent was fixed in the SIBR programme agreed with Portugal at less than 75%, more precisely, as stated above (point 21), at 60%.

23. The question which now arises is whether the Commission was correct in assuming that the limit of 60% net grant equivalent, agreed with Portugal in the context of the SIBR programme, was not exceeded in the present case. For that purpose it must first be determined what proportion of the planned investment of ECU 2 550 million could be taken into account for the grant of aid (see point 17 above). The relevant criteria were defined by the Commission and Portugal in the SIBR programme and are referred to in the contested decision:

'The components of the total cost of the scheme which are not considered to be eligible for State aid are the purchase of the land, operating capital, the costs of training and starting up, the payment of interest and, in so far as they do not follow solely from the decision to establish the factory at Setúbal, the costs of the technical development of the product and the manufacturing process. Of the latter costs of technical development, only 42% of the total has been considered as eligible.' [31]

The Commission accordingly considered as eligible for the grant of aid only the following investment items (in millions of ECU): plant (425), machinery and equipment (967) and, to a limited extent, technical development of the product and manufacturing process (276), [32] giving a total of ECU 1 668 million, a figure which is not disputed by Matra.

24. Secondly, it must now be ascertained whether the aid granted for the Newco project corresponding to the above investment items is indeed below the limit of 60% net grant equivalent defined by the SIBR.

As I have stated (point 2 above), the planned aid amounts to ECU 547 million, of which ECU 500 million is direct aid paid under the SIBR programme, the remaining ECU 47 million being given in the form of a limited exemption from corporation tax for five years, cumulative with the SIBR aid. [33]

It is apparent from the contested decision and from the information supplied in the

31 — Contested decision, p. 5.

32 — In the defence the Commission conveys the impression that, in order to resolve the regional handicap, 'operating aid' should also be authorized. In the reply Matra correctly points out that in its communication on State aid to the motor vehicle industry, the Commission itself states that such aid ought to be prohibited, even in disadvantaged regions. In this respect, however, it is not the Commission's defence but the contested decision which is authoritative. Nowhere does the contested decision authorize operating aid. On the contrary, according to the decision, it is only the 'technical development of the product and the manufacturing process' which is eligible for the grant of aid, in other words, not the actual manufacture of the multi-purpose vehicles.

33 — The aid granted under the SIBR programme is cumulative, to a limited extent, with aid of a fiscal nature. The aids thus cumulated may not, however, exceed 75% net grant equivalent. See on this point Document SEC(88) 1979 of 13 December 1988, unpublished, but produced by the Commission at the Court's request. Although the failure to publish such documents is not unlawful, their publication might lead to greater transparency.

rejoinder that the Commission carefully checked whether Portugal had granted Ford and VW, in addition to the aid notified, indirect aid in some other shape. It found — and this is not disputed by Matra — that Ford and VW had acquired the land for the factory at the current market price of ECU 3.5 per square metre. It also established that, for the reasons explained below (point 27 et seq.), the financing of the infrastructure works and training programme by Portugal did not constitute aid. Those factors led it to the conclusion that the aid for the Newco scheme represented — in relation to the maximum amount of ECU 1 660 million eligible for the grant of aid — a gross grant equivalent of 33.5% [34] and a net grant equivalent of 27.1%, well below the limits provided for in the SIBR of 75% and 60% respectively. [35] I would add that even if, as Matra claims (see point 27 below), the financing by Portugal of the infrastructure work and training programme (in the amount of ECU 9 million and ECU 202 million respectively) should be regarded as aid, the total amount of aid granted would then increase from ECU 547 million to ECU 758 million. Even in that case the limits of 75% and 60% determined by the SIBR would be far from being exceeded.

25. It follows from the above that the Commission ascertained, in my view, with the required thoroughness and in line with the general approach followed by the Community in such matters, whether the aid notified by Portugal was necessary for overcoming the regional handicap of the area in question, and that, consequently, it did not misuse its discretion under Article 92(3). On the contrary, the Commission complied with the general principle that aid can be regarded as falling within the exceptions laid down in Article 92(3) only if the Commission is in a position to establish that without that aid market forces would not on their own induce the recipient undertakings to conduct themselves in such a way as so contribute to attaining one of the objects specified in that provision. It was precisely in the *Philip Morris* judgment, cited by Matra, that the Court approved the use of that general principle. [36]

26. I therefore conclude that these two pleas put forward by Matra are also unfounded.

27. *Third plea in law: was the financial assistance for the infrastructure works and training programme inappropriately classified?* In this plea in law, Matra complains that the Commission committed a third manifest error of assessment by not classifying as aid the planned financing by Portugal of the infrastructure work and training programme

34 — ECU 547 million is only 32.8% of ECU 1 668 million, as the Commission itself notes in the contested decision. However, the Commission used a figure of 33.5% gross grant equivalent. No explanation has been given for the slight difference between those two percentages.

35 — Given that the fiscal aid, amounting to ECU 47 million, may be granted on top of that granted under the SIBR, which is limited to 75% and 60% respectively (see note 33 above), the margin between the rules determined by the SIBR and the aid granted to the Newco scheme is even greater than appears at first sight.

36 — *Philip Morris*, paragraphs 16-17 and 25-26.

at Setúbal. Matra relies here on the *Denkavit* judgment of 27 March 1980, in which the Court explained that:

'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'

are to be regarded as aid within the meaning of Article 92(1). [37]

28. In the contested decision, the Commission explained why it had reached the conclusion that the infrastructure work planned by Portugal did not constitute aid. It established that all the work to be carried out on the site of the factory would be financed by Ford and VW and that the work to be carried out away from that site would be accessible to all users to the same extent. Services normally paid for, for example, water supply, would continue in future to be supplied to Newco, just as to other users, under normal market conditions.

I adopt the Commission's view that the carrying out of infrastructure work cannot be regarded as aid if the infrastructure provided is available to all and, if it is normally paid for, its use is charged to the users at normal market prices. In that case there is no 'benefit' for the potential users. It is inevitable that to begin with the infrastructure will essentially be used by Newco. However, that will change if, as is hoped, the development of the region in question can be accelerated.

29. The same principles apply to the training programme to be financed by Portugal. However, this point is more delicate. Portugal has undertaken to train Newco's (prospective) employees without the cost of that training being charged to that company. The contested decision gives the following description of the training envisaged:

'The measures in question are intensive courses of preparation for production, intended to allow the future employees to acquire the various basic technical qualifications required for this type of project; many of these courses do not yet exist in Portugal. Their aim is to improve considerably the level of qualification of the workforce and to develop new employment possibilities.' [38]

Moreover, it is apparent from the contested decision that training is to take place at the actual Newco site (but in a separate building, whose construction costs will be borne jointly by the Portuguese Government and Newco).

30. In the contested decision the Commission summarizes the factors which nevertheless prompted its decision not to classify as

37 — Case 61/79 *Amministrazione delle Finanze dello Stato* v *Denkavit Italiana* [1980] ECR 1205, paragraph 31. On the basis of the definition it applied, the Court held that the duty of the fiscal authorities of a Member State to repay taxes which were incompatible with Community law *did not constitute* aid.

38 — Contested decision, p. 8.

aid the sums invested by Portugal in training activities. The management of the 'training centre for the motor vehicle sector' to be established is to be completely independent of that of the factory, and the centre is to be open to other motor vehicle manufacturers. Moreover, the Portuguese authorities stated that after 1993 the training programme would not be adapted in any way to the specific needs of Newco, so that Ford and VW would not be privileged compared with other manufacturers and would moreover themselves have to provide for supplementary technical training. [39] Finally, again according to the contested decision, similar training centres co-financed by the private sector also exist in other important sectors of the Portuguese economy.

31. The Commission took its decision after weighing the arguments for and against. Especially in a field such as professional training, where the human and qualitative aspects are at least as important as the economic and financial aspects and where, because of the usual turnover of employees, the training provided will not benefit Newco exclusively, the Court's review must be 'marginal' (see point 12 above). On this point, even more so than in the matter of the financing of the infrastructure work, it is not for the Court to assess the actual expediency of the Commission's decision.

In my view, it is apparent from the contested decision that all the relevant factors for its assessment were properly considered by the Commission and the advantages and disadvantages properly balanced. The Commission's approach does not therefore appear to be vitiated, on this point either, by a manifest error of assessment, and in my opinion the Commission remained within the bounds of its discretion under Article 92(3).

The procedure followed by the Commission

32. In the first part of its application, Matra raises five pleas in law relating to the procedure followed by the Commission. Firstly, the Commission is said to have infringed Article 93 of the Treaty by deciding that there was no need to open the formal inquiry procedure provided for in Article 93(2), even though there were serious difficulties in assessing whether the Portuguese aid was compatible with Community law (see point 33 et seq. below). Secondly, the Commission infringed the Treaty be severing its examination of whether the Newco project was compatible with the Treaty rules on State aid from its examination of whether that plan was compatible with the rules on competition in Article 85 et seq. of the Treaty (see point 48 et seq. below).

In its third plea, Matra submits that the Commission infringed Article 190 of the Treaty by providing an inadequate statement of reasons for the contested decision (see point 55 et seq. below). Finally, the fourth and fifth pleas relate to failure to observe the rights of the defence (see point 57 below) and breach of the general principle of sound administration (see point 61 below).

39 — Contested decision, p. 8: '[the training centre for the motor vehicle sector] will not constitute the only solution to the need for training in that plant' and 'a training programme will also be carried out in other Ford plants and other Portuguese training centres'.

33. *First plea in law: failure to initiate the formal inquiry procedure.* Between the informal inquiry procedure under Article 93(3) of the Treaty and the formal procedure under Article 93(2) of the Treaty there are fundamental differences. Advocate General Tesauro has recently made a detailed analysis of those differences in his Opinion in *William Cook* v *Commission*, [40] an analysis with which I entirely agree.

34. The informal procedure under Article 93(3) is intended, the Court has held, to 'allow the Commission to form a prima facie opinion on the partial or complete conformity with the Treaty of the aid schemes notified to it'. [41] That procedure is characterized to begin with by its *lack of transparency*. It does not require the Commission to make public the aid schemes notified to it [42] or to give notice to the parties concerned to submit their comments. [43] A second characteristic, the *limited opportunity for third parties to intervene*, follows logically from that lack of transparency. Only third parties who, like Matra, have been informed of the notification of aid schemes by an unofficial channel are in a position to submit observations. Finally, the informal procedure is characterized by its *short duration*. The Court has held that it cannot in principle last for more than two months from the time when the notification is complete. After that period, the Member State can pay the aid, after giving prior notice to the Commission. [44]

35. If the Commission finds, during the informal procedure, that the aid notified is *prima facie* (that is to say, without a more detailed examination being necessary) compatible with Community law, it must inform the Member State concerned of this. [45] A summary of the decision to 'raise no objections' to the aid is published, albeit often belatedly, [46] in the C Series of the Official Journal. As a result of the lack of transparency of the informal procedure, parties who are liable to suffer damage as a result of the aid may learn about it for the first time from that publication.

36. If, on the other hand, following the informal investigation it has carried out, the Commission is *not* convinced that the aid notified is compatible with the common market, it must, in accordance with Article 93(3) of the Treaty, 'without delay' initiate the formal procedure provided for in Article 93(2). Compared with the informal procedure described above, the formal procedure, which is meant to enable the Commission to clarify cases which do not prima facie appear clear to it, is more transparent and more thorough and gives third parties a greater opportunity to intervene. As a result, it also generally takes longer than the informal procedure.

40 — See note 14 above.

41 — See Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 11, with references to other judgments.

42 — Joined Cases 91 and 127/83 *Heineken Brouwerijen* [1984] ECR 3435, paragraph 15.

43 — *Germany* v *Commission*, paragraph 13.

44 — See Case 120/73 *Gebrüder Lorenz* v *Germany* [1973] ECR 1471, paragraph 4.

45 — *Germany* v *Commission*, paragraph 12.

46 — In the present case, the decision, adopted on 16 July 1991, was not published until 3 October 1991 (see note 4 above).

The formal procedure starts with a communication published in the Official Journal giving notice to the parties concerned [47] to submit their comments. [48] In this way the rights of the defence are respected and the Commission — which does not have powers of investigation of its own in matters of State aid — has as much relevant information as possible:

'... the other Member States and the sectors concerned [are guaranteed] an opportunity to make their views known and ... the Commission [is allowed] to be fully informed of all the facts of the case before taking its decision ...'. [49]

37. Since the informal procedure under Article 93(3) and the formal procedure under Article 93(2) each have their own purpose and specific features, it is of the greatest importance that the two procedures are not misused.

If the Commission wrongly decides *not to initiate* the formal procedure under Article 93(2), there is a danger that the rights of potentially interested parties will be infringed and important factors neglected.

If, on the other hand, the Commission decides to *initiate* the formal procedure although, as subsequently appears, that decision is not justified, the position is not satisfactory either. Given that no aid can be paid until the formal investigation is concluded, the resulting delay adversely affects the interests of the recipient undertaking and/or the Member State which intends to grant the aid. In this respect, the Court, in two judgments of 30 June 1992, held applications for annulment, brought against a Commission decision to initiate the procedure under Article 93(2), to be admissible. The Court stated *inter alia* that:

'a decision finding that the aid is compatible with the Treaty or proceedings brought against a Commission decision finding it incompatible *would not make it possible to remove the irreversible consequences of a delay in paying the aid* as a result of compliance with the prohibition in the last sentence of Article 93(3)' (emphasis added). [50]

38. The choice which the Commission has to make, to initiate or not to initiate the formal procedure under Article 93(2), is thus not a simple one and is not devoid of consequences. Since the Council has not yet made use of its power under Article 94 of the EEC Treaty to adopt implementing regulations for Articles 92 and 93, it is for the Court to provide the necessary clarification. [51]

47 — The parties concerned include 'the persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations'. Article 93(2) is thus addressed to 'an indeterminate group of persons': Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16.

48 — See Article 93(2) of the Treaty. Individual notice does not have to be given to particular persons: *Intermills* v *Commission*, paragraph 17.

49 — *Germany* v *Commission*, paragraph 13. See also *Intermills* v *Commission*, paragraph 17.

50 — Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraph 22, and Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraph 28.

51 — *Germany* v *Commission*, paragraph 10.

It did so in particular in the *Germany* v *Commission* judgment of 20 March 1984. [52] That judgment concerned an application brought by Germany for annulment of a decision by the Commission not to raise any objections — and hence *not* to initiate the formal procedure under Article 93(2) of the Treaty — to an aid scheme for the restructuring of the Belgian textile industry. The Court laid down the following principle (paragraph 13):

'[The formal procedure under Article 93(2)] is essential whenever the Commission has serious difficulties in determining whether a plan to grant aid is compatible with the common market. It follows that the Commission may restrict itself to the preliminary examination under Article 93(3) when taking a decision in favour of a plan to grant aid only if it is convinced after the preliminary examination that the plan is compatible with the Treaty. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether the plan is compatible with the common market, the Commission is under a duty to obtain all the requisite opinions and for that purpose to initiate the procedure provided for in Article 93(2).'

39. The Court went on to apply that principle to the specific facts of the case. It was shown that the Commission had originally considered the Belgian aid to be unacceptable and had subsequently declared it compatible with Community law only after extensive negotiations and substantial amendments to the plan notified. Furthermore, precisely because of those negotiations, 16 months had elapsed between the notification and the favourable decision, a period which 'well exceed [ed] the period normally required for a preliminary examination under Article 93(3)' (paragraph 15). Finally, it was apparent that the Commission had declared the amended aid programme compatible with the common market only subject to compliance with certain conditions, since it remained 'very concerned about the effects which application of the plan [might] have on competition within the Community' (paragraph 16).

The Court held that in those circumstances the Commission should have initiated the formal procedure under Article 93(2).

40. Matra submits that the factors on the basis of which the Court reached its decision in that case are also present in this case. I now propose (point 41 et seq. below) to examine whether that is indeed the case. I shall then consider (point 46 et seq. below) whether there may perhaps be other factors in the present case which might lead the Court to decide that the Commission should have initiated the formal procedure under Article 93(2).

41. In Matra's view, the Portuguese authorities had already officially submitted the aid plan for Newco to the Commission in November 1990, nine months before the contested decision was adopted. Moreover, precisely as in *Germany* v *Commission*, substantial amendments had been made to the

52 — See note 41 above.

original plans. In his letter to Matra, Commissioner Bangemann referred to 'substantial improvements' (see point 3 above). Finally, the Commission had authorized the Portuguese aid only subject to conditions and with reluctance. That the contested decision gave only conditional approval follows, according to Matra, from the conditions attached to it with respect to the availability to third parties of the infrastructure and training. The Commission's misgivings are apparent from the obligation imposed on Newco to submit an annual report to the Commission.

Matra's argument that the facts of *Germany* v *Commission* are analogous to those of the present case fails to convince me, for the following reasons.

42. The Portuguese notification took place by a letter of 26 March 1991, which was supplemented by a letter of 16 April 1991; additional information on the training programme was given in a letter of 31 May 1991. The contested decision is dated 16 July 1991. Depending on whether or not the letter of 31 May 1991 is regarded as completion of the notification, the Commission thus either complied precisely with, or slightly exceeded (which could be explained by Matra's repeated interventions in the procedure), the maximum period of two months laid down by the Court (see point 34 above). In any case there is no comparison with the period of sixteen months which the Commission needed to come to a decision in the *Germany* v *Commission* case.

43. It makes no difference in this respect that there was a preliminary draft scheme and that informal contacts between Portugal and the Commission took place from November 1990. Firstly, notification of an aid scheme is preceded, by definition, by a draft scheme and, secondly, Matra has not produced any evidence which could disprove the assertion by both the Commission and Portugal that mutual contact before notification was restricted to

'an oral request by the Portuguese authorities to be informed of the assessment criteria applied by the Commission to aid of this type and on the information which the Commission required in order to make a decision with respect to Article 92'. [53]

Moreover, the Commission rightly observes in the defence that the duty of genuine cooperation imposed on the Member States and Community institutions [54] obliged Portugal to provide the information requested.

44. It appears that neither before nor after notification were there any detailed negotiations of the type at issue in *Germany* v *Commission*. A comparison of the letters of 26 March 1991 and 16 April 1991 (see point 2 above) shows that the Portuguese amendments to the scheme originally notified consist of details and supplementary information rather than substantial changes. [55] Furthermore, comparison of those two letters with

53 — Defence, p. 24.

54 — See the judgment in Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 16.

55 — That is not contradicted by Commissioner Bangemann's letter. The 'substantive improvements' mentioned refer, in my view, to the additional information and details I have just referred to, which were intended to define the extent of the planned aid more clearly.

the aid scheme eventually approved shows that the total amount of aid to be granted remained unchanged since notification. Matra's assertion that that amount was reduced by 'over ECU 100 million' following negotiations is not supported by the documents before the Court.

Matra is likewise unable to substantiate its assertion that in the contested decision the Commission imposed conditions on Portugal relating to the use of the infrastructure by, and the availability of the training programmes to, third parties. No such condition appears in the contested decision. It is merely stated there that 'the Portuguese authorities have undertaken' [56] to guarantee that the infrastructure works will be accessible unreservedly, which is self-evident.

45. Matra considers that its argument, namely that the Commission has serious doubts as to the compatibility of the Portuguese aid with Community law, is supported by the following passage in the contested decision:

'Moreover, although the Commission has concluded that the projects relating to infrastructure and training are not State aids ..., it requests the Portuguese Government to report to it annually on those matters, and on the implementation of the scheme and the State aid measures. The first report should reach it by the end of June 1992 at the latest.'

56 — Contested decision, p. 8.

That passage demonstrates, on the contrary, that the Commission does *not* have any doubts as to the compatibility of the Portuguese aid with Community law. By requesting Portugal to draw up a report each year, the Commission merely indicates that — as it confirmed at the hearing — it will continue to ensure that Portugal complies strictly with the agreed conditions for grant of the aid. The Commission is not only entitled, but obliged to have 'doubts' of that sort. It must continue to pay attention to the manner in which an aid scheme it has approved is implemented.

46. I therefore conclude that the factors which led the Court to annul the Commission's decision at issue in *Germany* v *Commission* are not present in this case.

The possibility remains, however, that other factors might justify such an annulment. In that respect, Matra draws attention to the large amount of aid which Portugal intends to grant (see point 47 below) and the close link between the present case and the procedure initiated by the Commission under Article 85 of the Treaty, in which it decided formally to involve third parties (see point 48 below). Moreover, Matra again emphasizes the risk of excess capacity and Newco's threatened dominant position. I have already dealt with those two arguments (see points 13 to 15 above).

47. In Matra's view, the Commission must have had 'serious difficulty' in assessing the

compatibility of the aid with Community law, if only because of the large amount of that aid. I cannot agree with that point of view.

While it may be assumed that large-scale aid projects must be the subject of particularly detailed examination by the Commission, [57] the size of the planned aid or of a recipient undertaking is not necessarily decisive for the assessment of whether that aid is permissible. What is important is not so much the amount of aid in itself, but its impact on intra-Community trade. That impact, however, is not determined by the amount of aid alone, but also by factors such as the scale of the market in question and the number of undertakings present on that market. [58]

The Court would ignore that principle, which it applies itself, [59] if it obliged the Commission to initiate the formal procedure under Article 93(2) of the Treaty whenever the aid schemes to be assessed reached a certain level. I am of the opinion, moreover, that it would be for the Council (under Article 94 of the Treaty), not the Court, to impose such an obligation on the Commission by means of a general measure.

48. *Second plea in law: connection between Article 85 et seq. and Article 92 et seq. of the Treaty.* In a second plea, which is essentially an extension of the first plea, Matra raises the question of the connection between two branches of European competition law in the broad sense, namely the law on State aid (Article 92 et seq. of the Treaty) and the law on agreements, decisions and restrictive practices (Article 85 et seq. of the Treaty). Although Matra acknowledges that the Court has not yet specifically dealt with this problem, it nevertheless considers that it follows from the Court's case-law that in a case, some aspects of which concern State aid and other competition, the Commission must ensure that there is some connection between those two branches of the law. More precisely, Matra considers that the Commission could not dissociate the procedure under Article 93 of the Treaty and the procedure under Regulation No 17. [60]

49. Matra bases that position on an analysis of three judgments of the Court. Firstly, it cites the passage from *Germany* v *Commission* which I have referred to in point 34 above. It follows from that passage that in the informal preliminary inquiry under Article 93(3) the Commission must ascertain whether the aid notified is compatible 'with the Treaty' as a whole, in other words, including Article 85 et seq.

It refers, secondly, to *Commission* v *Italy*, [61] which concerned a tax imposed by Italy on white sugar. The Commission regarded that tax as a discriminatory charge prohibited by

57 — It can be seen from the first part of this Opinion that the Commission did indeed carry out a detailed examination in this case.

58 — See also point 17 above, where I have already observed that it is not the volume but the intensity of regional aid which must determine its conformity with Community law.

59 — It is settled law that the comparatively small amount of aid or size of a recipient undertaking does not exclude the possibility of trade between Member States being adversely affected; see the judgment in Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 27.

60 — See note 5 above.

61 — Case 73/79 *Commission* v *Italy* [1980] ECR 1533, paragraph 11.

Article 95 of the EEC Treaty and brought proceedings against Italy under Article 169 of the EEC Treaty. Italy argued, however, that the application under Article 169 was inadmissible since the Commission had already initiated a procedure against that tax under Articles 92 and 93 of the Treaty. The Court dismissed that argument. Two paragraphs of the judgment, which show the Court's reasoning, are of special interest here:

'Comparison between, on the one hand, Articles 92 and 93 of the Treaty and the first paragraph of Article 95, on the other, shows that those provisions pursue the same objective which is to ensure that the two categories of intervention on the part of a Member State, namely the grant of aids on the one hand and the imposition of discriminatory taxation on the other, do not distort the conditions of competition within the common market' (paragraph 8).

'It must further be observed that whilst the procedure provided for in Articles 92 and 93 leaves a wide discretion to the Commission, and in certain conditions to the Council, to come to a decision regarding the compatibility of a system of aids granted by States with the requirements of the common market it is clear from the general plan of the Treaty that that procedure must never produce a result which is contrary to the specific provisions of the Treaty concerning, for example, internal taxation' (paragraph 11).

Finally, in *Iannelli* v *Meroni* the Court essentially held that it is not for the national court, but for the Commission (subject to review by the Court) to determine that an aid is incompatible with Community law. The Court also held that obstacles of a fiscal nature and aid do not fall as such within the prohibition in Article 30. The following passages from the judgment are of interest for the present case:

'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 ...' (paragraph 14).

'The fact that the inevitable consequence of the aid itself is often protection and therefore some partitioning of the market in question, as far as concerns the production of undertakings which do not derive any benefit from it, cannot imply that the aid produces restrictive effects which exceed what is necessary to enable it to attain the objectives permitted by the Treaty' (paragraph 15).

50. I agree with Matra that it follows from those judgments that the Court considers it important that regard is had to the connection between Treaty provisions which pursue the same objective, even if they are to be applied by different bodies according to different procedures. Both Article 85 et seq. and Article 92 et seq. of the Treaty aim to prevent distortion of the conditions of competition within the common market. The only possible conclusion to be drawn therefrom is thus that when the Commission ascertains whether the aid notified is compatible with Article 92 et seq. of the Treaty, it

must at the same time verify whether that aid entails a breach of Article 85 et seq. If we depart from that overall approach, there is a danger of inconsistency.

51. In Matra's view, by declaring the Portuguese aid to be compatible with Community law without having first also analysed the competition law aspects of that aid, the Commission *ipso facto* prejudged its assessment of the question whether those aspects had been complied with:

'In the light of the Court's case-law referred to above ... it was necessary for the Commission in each case to examine all the economic and legal factors ... before reaching a conclusion relating to either provision. The chronology of the procedure and the very wording of the decision show that that was not the case ... a mere reading of the decision demonstrates sufficiently that ... the "private" competition law aspect was completely ignored by the Commission.' [62]

The dissociation of the aid procedure and the competition procedure has given rise, according to Matra, to a number of inconsistencies. Thus third parties were able to make observations on the aspects of the present case relating to the rules on competition, whereas they were not able to do so on the aspects relating to the rules on State aid. Moreover, the exemption under Article 85(3) was made subject to certain conditions, including a restriction of its duration to ten years, whereas the Commission made no such condition when approving the aid programme. Finally, the inconsistent way in which the Commission dealt with this case as a whole allowed Ford and VW to present the facts in different, sometimes even contradictory terms, depending on whether the aid procedure or the competition procedure was being followed.

52. Although, as I have said, I agree with the principle advocated by Matra, namely that the review of State aid with reference to the provisions on aid and with reference to the provisions on competition must be coordinated, I cannot agree with the way in which Matra applies that principle to the present case. It appears to me that in the present case the Commission adequately coordinated its investigation under Article 85(3) and that under Article 93.

That is apparent to begin with from the contested decision itself. The decision mentions the complaint brought by Matra and its fear that Ford and VW would in future have a dominant position on the multi-purpose vehicle market. Further on in the contested decision, the Commission states:

'When the Commission examines such aid proposals, it balances the regional development benefits ... against the possible disadvantages for the sector as a whole (for example, the creation of substantial overcapacity), in order to ensure that *all* material factors of

62 — Application, pp. 19-20.

Community interest are taken into consideration' (emphasis added). [63]

The chronology of events also shows that the Commission carried out a coordinated investigation. The communication made in accordance with Article 19(3) of Regulation No 17 (see note 1 above), where the Commission states that it intends to grant an exemption under Article 85(3), was published as early as 13 July 1991, in other words, before the contested decision was adopted. Moreover, both in its letter to Matra of 30 July 1991 (see point 3 above) and in the summary of its decision not to object to the Portuguese aid (see point 2 and note 4 above), the Commission expressly indicated its intention to apply Article 85(3).

Finally, I would note that I have already concluded above (points 13-15) that when it drew up the contested decision, the Commission carried out a sufficiently thorough analysis with respect to the risk of distortion of competition within the common market. The examination of the question whether the Portuguese aid was compatible with Community law on State aid was thus, in my view, *not* dissociated from the examination of the question whether that aid was compatible with the rules on competition.

53. The 'inconsistencies' which, according to Matra, arise from an uncoordinated examination of the State aid law and competition law aspects of the aid notified do not strike me as genuine. Thus it is only logical that while the duration of the exemption granted under Article 85(3) for the agreement by Ford and VW to set up a joint venture was limited to ten years, such a restriction was not expressly provided for in the case of the approval of the Portuguese aid programme. The last instalment of that aid is in fact to be paid on 30 December 1994, after which the programme will end.

The assertion that Ford and VW presented the facts in different, even contradictory manner in the procedures under competition law and State aid law is also unfounded. A mere comparison of the contested decision with both the communication under Regulation No 17 and the decision of 23 December 1992 granting an exemption under Article 85(3) is enough to demonstrate that the Commission based itself on identical facts for the assessment of both the State aid aspects and the competition law aspects of the case. There is nothing in the file to indicate that Ford and VW might have given contradictory accounts of the facts; in any event, even if they did do so, that had no discernible effect.

Finally, there is the fact that the Commission, with a view to the application of Article 85(3), formally requested the third parties to submit their observations, but did not do so in the procedure under Article 93(2). That

63 — Contested decision, p. 10.

'inconsistency' cannot, however, be attributed to the Commission, but follows from the fundamental procedural differences between State aid cases and competition cases. If the Commission, following an informal preliminary inquiry under Article 93(3), decides that an aid is compatible with Community law, it is not obliged to initiate the formal procedure under Article 93(2). Indeed, it *cannot* initiate it without good reason (point 37 above). In accordance with Article 19(3) of Regulation No 17, on the other hand, the Commission *must* formally invite third parties to submit their observations if, following an informal preliminary inquiry, it concludes that an exemption under Article 85(3) is justified. The Commission cannot be criticized for the fact that two similar decisions, taken following an informal preliminary investigation, give rise to such divergent consequences from a procedural point of view.

54. Matra suggests that the Court should oblige the Commission to reserve its favourable decision under Article 93(3) until the formal procedure under Article 19(3) of Regulation No 17 has been completed. That suggestion conflicts with the settled case-law of the Court to the effect that the informal procedure under Article 93(3) of the Treaty must be as short as possible (see point 34 above).

I agree, however, with another suggestion by Matra, namely that if its decision on the State aid law aspects of a case precedes that on the competition law aspects of that case, the Commission must expressly make the first decision dependent on the decision still to be taken. In the present case, however, that has no consequences. As the Commission rightly observes, an aid scheme is approved only for the implementation of a clearly defined investment programme. If it subsequently turns out that that programme is (wholly or partly) incapable of being carried out, for example because of an adverse final decision as regards exemption under Article 85(3), the aid becomes devoid of purpose to that extent. As Matra itself points out, moreover, in such a case any aid paid out must be reimbursed. In other words, recipient undertakings who apply the aid they have received before the exemption is granted do so at their own risk.

55. *Third plea in law: failure to state adequate reasons for the contested decision.* Matra claims that the Commission infringed Article 190 of the EEC Treaty by failing to state adequate reasons for the contested decision. In particular, it failed to give a precise definition of the relevant market, while other factors (*inter alia* an analysis of the financial impact of the aid, the investment and the regional handicap) were absent altogether from the contested decision. That inadequate statement of reasons impaired Matra's rights of the defence and made it impossible for the Court to assess whether the contested decision was appropriate. The Commission thus disregarded the settled case-law of the Court. [64]

64 — Matra refers to the judgment in Case 296/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19 et seq.

From the earlier part of this Opinion (points 13 et seq. above) it can be seen clearly enough that the contested decision did in fact contain a detailed analysis of the components and impact of the Portuguese aid and also of the planned investments and the regional handicap. In refuting Matra's arguments on this point, I constantly referred to and quoted from the contested decision to demonstrate that the latter does indeed allow the Court to review the Commission's exercise of its discretion. In my view, the Commission thus complied with the conditions, laid down by the Court and cited by Matra, for a proper statement of reasons:

'... Article 190 is not taking mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty. To attain these objectives, it is sufficient for the decision to set out, in a concise but clear and relevant manner, the principal issues of law and of fact upon which it is based and which are necessary in order that the reasoning which has led the Commission to its decision may be understood.' [65]

56. As regards the definition of the relevant market, it suffices to observe that in the contested decision the Commission expressly refers to the 'motor vehicle sector' (or 'market') on the one hand and the 'multi-purpose vehicle segment' on the other hand. [66] Matra too, in its written and oral observations to the Court, has always proceeded from the assumption that the multi-purpose vehicle market, as a segment of the motor vehicle market as a whole, is the relevant market in this case. [67] Matra was thus evidently scarcely troubled by the 'confusing' terminology the Commission is said to have used.

Matra's third plea relating to the procedure thus also appears to me to be unfounded.

57. *Fourth plea in law: infringement of the rights of the defence.* By refusing to initiate the *inter partes* procedure under Article 93(2) of the EEC Treaty, the Commission is said to have prevented Matra from putting forward its point of view in an adequate manner. In so doing the Commission, in Matra's view, breached the general principle, laid down by the Court, that

'when any administrative body adopts a measure which is liable gravely to prejudice the interests of an individual it is bound to put him in a position to express his point of view'. [68]

Matra correctly deduces from the *Transocean* judgment that that general principle also applies in competition matters. In that

65 — Case 24/62 *Germany* v *Commission* [1963] ECR 63, p. 69.

66 — Contested decision, pp. 2 and 6.

67 — Thus Matra argues that its application is admissible 'by observing that, unlike its competitors, it manufactures only multi-purpose vehicles, and its market position thus depends exclusively on the development of that market segment' (point 9 above).

68 — Case 121/76 *Moli* v *Commission* [1977] ECR 1971, paragraph 20.

judgment the Court referred, in connection with a conditional exemption under Article 85(3), to

'the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known'. [69]

58. I stated above (point 7) that, in my view, Matra was not a person affected or a person to whom a decision was addressed, within the meaning of those decisions. [70] I agree with Matra that if the Commission *wrongly* decides not to initiate the procedure under Article 93(2), that quasi-automatically constitutes a breach of the rights of the defence of the third parties affected. In that event a procedure which is not transparent and gives third parties only a restricted opportunity to intervene (see point 34 above) is wrongly chosen. In *Germany* v *Commission* the Court stated on this point:

'Although it is true that the Commission kept the other Member States informed through multilateral meetings of the negotiations with the Belgian Government, it is clear from the argument before the Court that those consultations did not offer those concerned or the Commission itself the same guarantees and advantages which the formal consultations provided for in Article 93(2) offer' (paragraph 18).

However, it follows from this Opinion that there are sufficient reasons for assuming that in the present case the Commission did *not*, in the exercise of its wide discretion, wrongly decide to refrain from initiating the formal procedure under Article 93(2).

59. It is, however, above all the particular circumstances of the present case which lead me to the conclusion that the Commission did indeed respect Matra's rights of the defence. It follows from the account of the facts at the beginning of this Opinion, which is not disputed by the parties (see point 2 above), that, before the informal procedure under Article 93(3) had ended, Matra intervened at least twice (by letter of 17 June 1991 to the relevant Commissioners and by a complaint lodged with the Commission on 26 June 1991). The Commission replied to those interventions not only in writing (by a letter of 17 July 1991) but also orally (at a meeting with Matra on 27 June 1991). It must be observed that even if it decides to initiate the procedure under Article 93(2), the Commission is not obliged to hold such oral discussions.

The contested decision expressly mentions Matra's complaint, and lists and analyses the principal factors in that complaint. The Commission states, moreover, without being contradicted by Matra on this point, that before adopting the contested decision, it already had before it all the numerous and

69 — Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, paragraph 15.

70 — Since the Commission's inquiry was not directed against Matra, its procedural rights are, according to the Court's case-law, less far-reaching than those of an undertaking which is the object of an investigation; see Joined Cases 142 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 20: 'the procedural rights of the complainants are not as far-reaching as the right to a fair hearing of the companies which are the object of the Commission's investigation'.

voluminous documents which Matra annexed to its complaint.

60. The reduced access to the case-file which the Commission allowed Matra during the informal procedure is an inevitable consequence of the fact that that procedure is not *inter partes*. [71] According to the documents produced to the Court, however, that reduced access did not demonstrably prejudice Matra. [72]

In any event, it follows from the circumstances noted in point 59 above that, at least as far as Matra is concerned, the procedure followed by the Commission was indeed transparent and offered that company an adequate number of opportunities to intervene. [73] I therefore conclude that there was no infringement of Matra's rights of the defence, with the result that the fourth plea in law must also be rejected.

61. *Fifth plea: breach of the general principle of sound administration.* In support of this plea, Matra again submits that the Commission did not take account of its objections, refused to conduct a detailed investigation into the state of the multi-purpose vehicle market and, by the contested decision, prejudged the outcome of the investigation under Article 85(3) of the Treaty. I have already dismissed those assertations as unfounded. I therefore conclude that they are not sufficient to demonstrate any breach of the general principle of sound administration.

62. In conclusion, I propose that the Court decide as follows:

(1) The application for annulment is admissible, but unfounded.

(2) Matra is ordered to pay the costs.

71 — In competition cases, even if a formal procedure is initiated, that does not mean that the entire case file is communicated to third parties. Thus documents containing business secrets cannot in any circumstances be made public; see the judgments in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 26 et seq., and *BAT and Reynolds*, paragraph 21.

72 — At the hearing the Commission, on the other hand, asserted that Matra in one way or other had always had access even to the most confidential documents of the Commission. It gave as an example the reports which were drawn up at Setúbal in October 1992 and whose contents found their way into the press.

73 — That does not answer the question whether the rights of the defence were respected with regard to other third parties. Since Matra is the only manufacturer in Europe producing multi-purposes vehicles exclusively (see point 9 above) and, moreover, has a dominant position in that market segment (see point 15 above), the question does not really arise. To guarantee the rights of the defence even for interested parties who are not aware of the informal procedure initiated under Article 93(3) of the EEC Treaty, it is necessary, as Advocate General Tesauro recommends, to extend the conditions of admissibility for the benefit of those parties (see note 14 above).