by the Commission, together with proposals for suitable amendments. In such a case the Commission and the Member State must respect the principle underlying Article 5 of the Treaty, which imposes a duty of genuine cooperation on the Member States and Community institutions; accordingly, they must work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions, and in particular the provisions on aid.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 21 November 1985 *

Mr President,
Members of the Court,

A — The action on which I am giving my views today centres on the question whether the Kingdom of Belgium has failed to fulfil an obligation under the EEC Treaty by not complying with Commission Decision No 83/130/EEC of 16 February 1983 on aid granted by the Belgian Government to a firm manufacturing ceramic sanitary ware. [1]

1. Since 1979 a public regional holding company in Wallonia (Belgium) has been the main shareholder of Boch SA, a firm manufacturing ceramic sanitary ware. On 3 August 1981 the region decided to take a share amounting to BFR 475 million in a new capital issue. This investment of capital by a public body in an undertaking which had been operating at a heavy loss over a number of years and which consequently found itself in serious financial difficulties was designed to assist it in reconstituting its capital and reserves and to enable it to continue operating until a reconstruction plan for the ceramics industry had been formulated.

The Commission of the European Communities (the applicant in these proceedings) learnt of the arrangement and, in April and June 1982, approached the Government of the Kingdom of Belgium (the defendant) in order to remind it that under Article 93 (3) of the EEC Treaty it was required to give prior notice of aid measures. The applicant's telexes to that effect remained unanswered.

In September 1982 the applicant commenced the aid-review procedure under Article 93 (2) of the Treaty. It found that the defendant had granted the aid without following the procedure under Article 93 (3) of the Treaty (notification of the scheme to the applicant).

After completion of the aid-review procedure in accordance with Article 93 (2), the applicant issued the aforesaid decision of 16 February 1983, the main terms of which are as follows:

* Translated from the German.

1 — Official Journal 1983, L 91, p. 32.

'Article 1

The aid granted by the Belgian Government to a firm manufacturing ceramic sanitary ware is incompatible with the common market within the meaning of Article 92 of the EEC Treaty, and must therefore be withdrawn.

Article 2

Belgium shall inform the Commission within three months of the date of notification of this decision of the measures it has taken to comply therewith.'

In the preamble to the decision the applicant stated that the aid granted by the defendant was such as to affect trade between Member States and to distort competition within the meaning of Article 92 (1) of the EEC Treaty.

The applicant added that the prohibition on aid laid down in Article 92 (1) applied to injections of capital both by the central government itself and by other public agencies under the central government's authority. In the circumstances of this case a capital holding of BFR 475 million in an undertaking whose capital and reserves amounted to BFR 25.4 million constituted aid within the meaning of Article 92 (1).

The purpose of the aid, according to the decision, was to permit the maintenance of production capacity, and this was likely to strike a particularly grave blow at conditions of competition, since free market conditions would normally require the closure of the firm in question so that, in a situation in which the industry was faced with over-capacity, more efficient competitors could expand.

The decision further set out the reasons why the aid could not be regarded as compatible with the common market by virtue of Article 92 (3) of the Treaty. Lastly, the decision stated that developments in the ceramics industry showed that, particularly in view of the surplus capacity in the Community, to maintain production capacity through the grant of State aid would not be in the common interest.

The decision was not contested by the defendant within the two-month period laid down by the third paragraph of 173. It therefore became *unassailable.*

After expiry of that period the defendant contacted the applicant by a letter of 3 June 1983, in which it attacked the decision, asserting *inter alia* that the arrangement did not constitute aid requiring notification under Article 93 (3) of the Treaty. Moreover, the defendant claimed that the applicant had been wrong to conclude that the aid was not covered by the exemptions laid down in Article 92 (3), according to which certain types of aid may be considered compatible with the common market. Furthermore, Belgian domestic law did not permit compliance with the decision because the reduction of capital which would be entailed by a refund of capital invested could not be allowed to impinge on the rights of third parties.

In conclusion the defendant called on the applicant to explain what it meant when it stated that the aid had to be withdrawn and what consequences that entailed.

In its reply of 22 July 1983 the applicant allowed the defendant a further period of 15 days in which to inform it of the measures adopted in order to comply with the decision. The letter did not contain the explanations requested by the defendant but merely stated that the first priority was to fulfil the Community obligations.

In a further letter to the applicant of 5 September 1983 the defendant maintained its earlier position and made no mention of measures — whether adopted or projected — for giving effect to the applicant's decision.

The applicant subsequently found that the defendant had not complied with the decision and had, without giving notice, granted the undertaking in question further aid to cover its losses. [2]

The applicant consequently brought the matter before the Court of Justice, pursuant to the second subparagraph of Article 93 (2).

2. The *applicant* claims that the Court should:

(1) Declare that, by not complying within the prescribed period with the Commission Decision of 16 February 1983 on aid granted by the Belgian Government to a firm manufacturing ceramic sanitary ware, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty;

(2) Order the Kingdom of Belgium to pay the costs.

The *defendant* contends that the Court should:

(1) Dismiss the application as unfounded;

(2) Order the applicant to pay the costs.

2 — One of those aids is the subject of Case 40/85 *Kingdom of Belgium* v *Commission*.

3. (a) The *applicant* observes that, in the course of the procedure under Article 93 (2) of the EEC Treaty, it established that the contested aid was incompatible with the common market within the meaning of Article 92. It was therefore obliged, in accordance with the first paragraph of Article 93 (2), to require the Kingdom of Belgium to abolish or alter the aid within a period to be determined by the Commission.

The applicant adds that under Article 189 of the EEC Treaty a decision is binding in its entirety upon those to whom it is addressed. By the date on which the action was brought the defendant had still not complied with the decision communicated to it by letter of 24 February 1983, and at no time had it indicated the slightest intention of doing so. It had on the contrary granted the undertaking in question further aid in 1983 without notifying the applicant.

Furthermore, a Member State to which the Commission has addressed a decision pursuant to Article 93 (2) of the Treaty is precluded from challenging the validity of such a decision in legal proceedings instituted by the Commission under the second subparagraph of Article 93 (2) of the Treaty if that State has allowed the period permitted under the third paragraph of Article 173 to elapse without contesting the legality of the decision in the manner prescribed by that provision.

The applicant observes that the defendant may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to observe obligations arising from Community decisions.

According to the applicant, the content of the defendant's obligations is entirely clear,

and the aid whose abolition is demanded by the Commission is readily identifiable since it involves a specific grant of BFR 475 million in the form of the acquisition of a holding in the capital of the undertaking in question by a public body.

(b) The *defendant* reaffirms that it was not in breach of its obligations under Article 93 (2) of the EEC Treaty by failing to give effect to Article 1 of the decision of 16 February 1983.

The reasons why it did not comply with the decision are the following:

The practice currently followed by the applicant as regards public participation makes it impossible, in the circumstances of this case, to give effect to the obligation imposed by Article 1 of the decision, namely to withdraw the alleged aid.

Despite repeated requests from the defendant, the applicant failed to supply the additional information needed to enable the defendant to establish what was meant by the obligation to withdraw the alleged aid.

The defendant points to the Second Report on Competition Policy, [3] in which for the first time the applicant stated its position on financialparticipation by public bodies. It is apparent from the report that Article 222 of the EEC Treaty does not in principle preclude State participation in undertakings. Admittedly, such participation may in certain cases constitute aid which is incompatible with the common market; that, however, does not mean that it may in itself be immediately and directly equated with aid. It is thus only in retrospect that the applicant can determine whether the participation had the same effect as aid. The Seventh Report on Competition Policy again refers to that stance on the part of the applicant. [4]

According to the defendant, in so far as it cannot be determined — except in retrospect — whether such a holding is compatible with Article 92 of the Treaty, the imposition of an obligation to redeem the holding when the profits of the undertaking are insufficient to finance such a redemption seriously prejudices the rights of innocent third parties. The capital of a company is regarded in all Member States as a security for creditors, and this means that any reduction of the capital necessarily requires the consent of the company's creditors and may only be effected from available profits. By compelling the defendant to withdraw from the company the applicant failed to take proper account of the special nature of the intervention of public bodies in cases in which that intervention takes the form of acquiring a capital holding in an undertaking.

According to the defendant, it is a fundamental principle of company law in all Member States that the share capital constitutes a security for creditors which serves to offset the limits placed on shareholders' liability, and must remain intact. That principle is confirmed by the Second Council Directive of 13 December 1976 'on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited

3 — ECSC, EEC and EAEC Commission: Second Report on Competition Policy (Annex to the 'Sixth General Report on the Activities of the European Communities') Brussels and Luxembourg, April 1973, paragraph 122 *et seq.*

4 — Seventh Report on Competition, paragraph 232.

liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent'. [5]

It is not, according to the defendant, a valid answer to say that Article 92 of the Treaty must take priority over the interests of the undertaking's creditors. If that were so, innocent third parties would be affected whose good faith is unimpeachable in the absence of a criterion enabling the illegality of participation by a public body to be determined in advance.

The defendant further alleges that, despite its requests, the applicant supplied no further particulars as to the scope of the duty to withdraw the supposed aid. As the Court of Justice emphasized in its judgment of 12 July 1973 in Case 70/72, [6] decisions taken under Article 93 (2) of the Treaty can take full effect only on condition that the Commission indicates to the Member State concerned in what respect it considers the aid incompatible with the Treaty and therefore in need of abolition or alteration.

Since the applicant failed to specify the scope of the obligation in question, the defendant cannot be criticized for not having fulfilled it.

In its rejoinder and in the oral procedure the defendant stated that it in no way questioned the legality of the decision of 16 February 1983. It claimed merely that, on account of the difficulties in giving effect to the contested decision, it was impossible to comply with it.

According to the defendant, the logic of the system of supervision created by Article 92 of the Treaty demands that Member States shall know precisely, in advance, the circumstances in which plans to participate in companies must be notified in order that their compatibility with the Treaty may be assessed in good time. To date, however, the applicant has failed to lay down the criteria on the basis of which a Member State may determine the cases in which participation on the part of a public body is subject to the duty of prior notification under Article 93 (3) of the Treaty. As long as participation by public bodies continues to be reviewed for compatibility with Article 92 solely on the basis of an *ex post facto* assessment, the Commission cannot demand the subsequent withdrawal of a holding that is considered incompatible with Article 92 without interfering seriously with third-party rights, violating the principle of equality between shareholders, jeopardizing the interests of legal certainty and encountering insuperable difficulties in the implementation of the decision.

B — In setting out my views on this case I consider it appropriate to begin by clarifying the precise subject-matter of this dispute.

Since the defendant did not challenge the applicant's decision of 16 February 1983 within the period prescribed by the third paragraph of Article 173 of the Treaty, the decision became unassailable. It is clear from the previous decisions of the Court [7] that the defendant may not thereafter

5 — Official Journal 1977, L 26, p. 1.

6 — *Commission* v *Germany* [1973] ECR 813.

7 — See judgments of 15 November 1983 in Case 52/83 *Commission* v *French Republic* [1983] ECR 3707, and of 12 October 1978 in Case 156/77 *Commission* v *Kingdom of Belgium* [1978] ECR 1881.

challenge the legality of the applicant's decision. The defendant's submissions as to (a) whether the acquisition by a State of a holding in a company's capital constitutes aid; (b) whether the applicant should have been informed before the holding was acquired; and (c) whether such aid could have been regarded as compatible with the common market under Article 92 (3) of the Treaty, can no longer be considered in the present proceedings; the defendant's arguments on those points must therefore be disregarded.

All that remains to be considered is whether the applicant's decision was sufficiently specific to be complied with, and whether it was legally possible for the defendant to take the action required by the decision.

Of course, there are undoubtedly arguments which could be used to show that those two questions should have been raised by the defendant in legal proceedings for a review of the legality of the applicant's decision of 16 February 1983. However, in its judgments of 12 July 1973 in Case 70/72 and 15 November 1983 in Case 52/83, the Court of Justice considered whether the relevant Commission decisions were sufficiently specific even though, in each case, the decision had not been disputed by the defendant.

In his Opinion in Case 52/83, Mr Advocate General Mancini described the Court as having, in its judgment of 12 July 1973 in Case 70/72, treated the imprecision of the applicant's decision as providing 'exonerating circumstances' which dispensed the defendant from compliance therewith.

I, too, am familiar with the legal concept of a void administrative act, since that concept also exists in German administrative law. Unlike a merely unlawful administrative act, which must be challenged if it is not to be complied with, such an act need not be contested, because, being void, it is without legal effect.

Further to those considerations I do not, in any event, consider it inconceivable that a State should refuse to comply with an unassailable decision of a Community institution (such as this one) on the ground that it is not sufficiently specific to be complied with or requires action which is legally impossible. The result of that would be that void decisions of that nature would have no legal effect despite not having been contested within the two-month period provided by the third paragraph of Article 173 of the EEC Treaty.

1. *Is the decision of 16 February 1983 sufficiently specific?*

In the authentic language versions, Article 1 of the decision of 16 February 1983 reads as follows:

'L'aide en faveur d'une entreprise du secteur de la céramique accordée par le gouvernement belge est incompatible avec le marché commun au sens de l'article 92 du traité CEE et doit dès lors être supprimée.'

'De door de Belgische Regering verleende steun ten behoeve van een onderneming in de ceramische sector is onverenigbaar met de gemeenschappelijke markt in de zin van artikel 92 van het EEG-Verdrag en dient derhalve te worden opgeheven.'

The first paragraph of Article 93 (2) of the EEC Treaty provides as follows:

'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a

State or through State resources is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.'

In its decision of 16 February 1983 the applicant found that certain specificially identified aid was incompatible with the common market and ordered one of the two courses of action prescribed by the EEC Treaty. The particular measure which the applicant regards as a prohibited form of aid is unequivocally identified in the decision. Equally unequivocal is the course of action prescribed by the applicant, namely the withdrawal of the capital injected into the undertaking in breach of both the substantive and the procedural provisions on aid in the EEC Treaty.

The finding that the holding constitutes aid which is incompatible with the common market is part of the unassailable decision adopted by the applicant and may thus no longer be contested. Merely as a reminder, however, it should be pointed out that the Court of Justice, in its judgment of 14 November 1984 in Case 323/82,[8] confirmed that the acquisition of a holding in the capital of an undertaking may be regarded as aid. In paragraph 31 of the decision the Court held as follows:

'It is clear from the provisions cited that the Treaty applies to aid granted by a State through State resources "in any form whatsoever". It follows that no distinction can be drawn between aid granted in the form of loans and aid granted in the form of a holding acquired in the capital of an undertaking. Aid taking either form falls within the prohibition laid down in Article 92 where the conditions set out in that provision are fulfilled.'

It should also be remembered that the applicant is, at the very least, authorized to order that the illegal aid be reclaimed, and I would go so far as to say that it is obliged to do so. As long ago as 12 July 1973, in its judgment in Case 70/72 (cited earlier), the Court confirmed that principle and held, in paragraph 13 of the judgment, that:

'... The Commission is competent, when it has found that aid is incompatible with the common market, to decide that the State concerned must abolish or alter it. To be of practical effect, this abolition or modification may include an obligation to require repayment of aid granted in breach of the Treaty, so that in the absence of measures for recovery, the Commission may bring the matter before the Court.

...

Since the aim of the Treaty is to achieve the practical elimination of infringements and the consequences thereof, past and future, it is a matter for the Community authorities whose task it is to ensure that the requirements of the Treaty are observed to determine the extent to which the obligation of the Member State concerned may be specified in the reasoned opinions or decisions delivered under Articles 169 and 93 (2) respectively and in applications addressed to the Court.'

Since the defendant has also cited that judgment as support for its assertion that it is not required to comply with the applicant's decision, it should further be stated that the Commission Decision of 17 February 1971, which is the subject of that

8 — Judgment of 14 November 1984, Case 323/82 *Intermills SA v Commission* [1984] ECR 3809.

judgment, is not comparable with the Commission Decision of 16 February 1983.

Article 1 of the decision of 17 February 1971 regarding the subsidies granted under Article 32 of the Law on the Adaptation and Rationalization of the German Mining Industry and Mining Regions [9] required the Federal Republic of Germany to take without delay all necessary measures to put an end to the awarding of investment grants on a non-selective basis.

That decision was indeed ill-defined, in the sense that all *necessary measures* had to be taken to put an end to the awarding of investment grants *on a non-selective basis. The applicant had failed to explain* what measures had to be adopted and what was meant by the award of grants *on a non-selective basis.* For those reasons the Court in its judgment concluded that, in viewof the uncertainty over one of the essential points of the prohibition issued by the Commission, the German authorities could not be criticized for having taken account of the legitimate interests of investors — even in areas which later became ineligible for aid.

The circumstances of the present case, however, are quite different, because the particular measure which is to be revoked is clearly defined, and because the abolition of the aid can only mean the return to the investor of the capital unlawfully invested.

The fact that in other cases cited by the defendant the abolition of the aid took a different form does nothing to change that conclusion. In those other cases — unlike the present one — the defendant had negotiated an agreement with the applicant on the abolition arrangements.

The defendant's final submission is that the applicant merely required the aid to be abolished; it did not call for the closure of the undertaking which had received the aid. Since, however, the abolition of the aid would necessarily result in the closure of the undertaking, the defendant claims that the applicant cannot have been contemplating the return of the invested capital to the investor.

It is certainly corrrect that the applicant did not order the closure of the undertaking; indeed it was not authorized to do so.

The defendant's objection can therefore only be construed as meaning that the applicant was not aware of the economic consequences which the implementation of its decision would entail.

However, those consequences had been perfectly apparent to the applicant, as may be inferred from the preamble to its decision. There, the applicant makes the following statement:

'The purpose of the aid is to permit the maintenance of production capacity and this is likely to strike a particularly grave blow at conditions of competition since *free market conditions would normally require the closure of the firm in question* so that, in a situation in which the industry is faced with over-capacity, more efficient competitors could expand.'

The principle that, in an economic situation characterized by over-capacity, those under-

9 — Journal Officiel L 57, p. 19.

takings which cannot survive in free-market conditions and cannot legitimately qualify for aid must, if need be, close down is precisely what underlies the EEC Treaty's general prohibition on aid.

In conclusion, I am of the opinion that it is not possible to uphold the defendant's objection that the applicant's decision of 16 February 1983 was not sufficiently specific and thus could not be complied with.

2. *Was it legally impossible to give effect to the decision of 16 February 1983?*

The defendant has submitted that it would be legally impossible to withdraw the State's capital holding in the undertaking in question by securing repayment of the capital to its investor. That is — it argues — precluded by the provisions of both domestic (Belgian) and Community law. Under both systems, distributions to shareholders may be made only from an undertaking's profits, of which there are none in this case.

The first observation to be made on that argument is that the introduction of capital into the undertaking was not only a procedural infringement of Article 93 (3) of the EEC Treaty but also a substantive infringement of Article 92 thereof.

Under Article 93 (3) even the proposal to grant the aid should have been notified to the applicant, and the proposal should not have been put into effect before the applicant had issued a final decision. The defendant was in breach of both obligations, with the result that the capital was introduced illegally.

Moreover, the aid was illegal on substantive grounds, because it was not compatible with the common market within the meaning of Article 92 of the Treaty. As has been explained on several occasions, that point is established by the unassailable Commission Decision of 16 February 1983.

As far as the recovery of the aid is concerned, the defendant invokes the Second Council Directive of 13 December 1976. [10]

The defendant's line of argument does not carry conviction, however. It is true that the directive — particularly Articles 15 *et seq.* and 32 *et seq.* thereof — contains provisions for the protection of creditors of public limited liability companies. Thus, Article 15 prohibits distributions to shareholders if net assets would thereby fall below the amount of the subscribed capital. Under Article 32, in the event of a reduction in capital creditors must receive security for claims which have not fallen due, and no payment may be made to shareholders until the creditors have obtained satisfaction.

Those two provisions are undoubtedly based on the principle that the share capital of a public limited liability company has to serve as security for the creditors of the company, and therefore may not be reduced to their detriment. That rule does not, however, operate in the present case.

Article 15 governs distributions to shareholders, which may be paid only out of company profits. Since the undertaking concerned unquestionably has no profits at its disposal, there is no possibility of repaying the illegal capital holding by way of a distribution.

10 — Second Council Directive No 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (Official Journal 1977, L 26, p. 1).

Article 32 cannot operate either, because the provisions on the reduction of capital can only refer to lawfully subscribed capital. However, since the present case concerns the recovery of capital *unlawfully* introduced, those provisions cannot operate in favour of the creditors of the company, because they are not entitled to demand the retention of unlawfully subscribed share capital as a security for their claims on the company.

The Second Council Directive admits of no other interpretation. A contrary interpretation would *cast doubt on the validity of the directive*, because it would then run counter to the provisions of Articles 92 and 93 of the EEC Treaty; Community institutions are prohibited from issuing rules of law which contradict the Treaty provisions or even impair their practical efficacy.

The defendant may not therefore plead the Second Council Directive of 13 December 1976 in order to evade the obligations incumbent upon it under Articles 92 and 93 of the Treaty.

The same is true of the submission that domestic law does not allow the aid to be recovered. In successive judgments the Court of Justice has held that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations arising under Community law. [11]

The general plea of protecting 'innocent third parties' — that is, the creditors of the undertaking — is equally unconvincing. The notion of protection may not be adduced in order to justify *ex post facto* an aid schemeadopted in breach of Community law. Should third parties have been harmed by the unlawful conduct of the Belgian authorities, they should be referred to the national courts and to the national provisions governing the liability of public bodies for unlawful acts.

C — I therefore propose that the Court should decide as follows:

(1) By not complying with Commission Decision No 83/130/EEC of 16 February 1983 on aid granted by the Belgian Government to a firm manufacturing ceramic sanitary ware, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty.

(2) The Kingdom of Belgium is ordered to pay the costs.

11 — See, for example, the judgment of 28 March 1985, Case 215/83 *Commission* v *Kingdom of Belgium* [1985] ECR 1045.