

Kingdom of Belgium
v
Commission of the European Communities

(State aid — Subscription of capital of
an undertaking — Right to a fair hearing)

Summary

1. *State aid — Concept — Aid in the form of loans or of subscriptions of capital — Form irrelevant as regards the application of Article 92 of the Treaty — Subscription of capital — Basis of assessment — Situation of the undertaking vis-à-vis the private capital markets*
(EEC Treaty, Art. 92)
2. *State aid — Effect on trade between Member States — Distortion of competition*
(EEC Treaty, Art. 92 (1))
3. *Community law — Principles — Right to be heard — Application to an administrative procedure initiated by the Commission — Scope*

1. The Treaty applies to aid granted by States or through State resources 'in any form whatsoever'. Accordingly, no distinction can be drawn between aid granted in the form of loans and aid granted in the form of a subscription of capital of an undertaking. Aid taking either form falls within the prohibition contained in Article 92 of the Treaty where the conditions set out therein are fulfilled.

An appropriate way of establishing whether a subscription of capital of an undertaking is a State aid is to determine to what extent the undertaking would be able to obtain the sums in question on the private capital markets. In the case of an undertaking whose capital is held by the public authorities, the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a

return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question.

2. Since the undertaking concerned exported about 40% of its output to other Member States, excess production capacity existed in the market in question and, in those circumstances, the aid granted to the undertaking had the effect of reducing its financial costs by comparison with those of its competitors, the Commission was entitled to conclude, in the absence of any information to the contrary, that the aid in question affected trade between Member States and distorted, or threatened to distort, competition within the meaning of Article 92 (1) of the Treaty.
3. Observance of the right to be heard is, in all proceedings initiated against a person

which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question. The principle of the right to be heard requires that the person against whom an administrative procedure has been initiated must have been afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law. Where the person concerned has not been afforded an opportunity to comment on documents containing information covered by business confidentiality, the Commission may not use that information in its decision.

OPINION OF MR ADVOCATE GENERAL LENZ

delivered on 16 April 1986 *

*Mr President,
Members of the Court,*

A — The key question in the case on which I am to deliver my Opinion today is whether the subscription of additional capital by State authorities to an industrial undertaking can be regarded as aid within the meaning of Article 92 of the EEC Treaty.

1. Meura SA, a mechanical engineering company, was founded in 1845 at Tournai

(Belgium). Until it was declared insolvent in January 1986 Meura SA chiefly produced equipment for the food industry, in particular tanks for the storage of beer. In addition, the undertaking manufactured steam generators and other engineering products.

(a) The undertaking, which had already been in difficulties since 1974, recorded a loss of BFR 95 million at the *end of 1978*. Since its bank, which had earlier granted it substantial overdrafts, refused to give it any further support the undertaking had to turn

* Translated from the German.