

OPINION OF MR ADVOCATE GENERAL JACOBS  
delivered on 3 October 1991 \*

*My Lords,*

1. The background to these proceedings is the continuing reluctance of some Member States to comply with their obligations under the rules on State aid laid down in Articles 92 to 94 of the EEC Treaty. The case has been referred to the Court by the French Conseil d'État, which asks for a preliminary ruling on the consequences in the national courts where State aid is introduced in breach of the procedural requirements laid down by Article 93. In particular, the Conseil d'État seeks guidance 'on the question whether the last sentence of Article 93(3) of the Treaty . . . is to be interpreted as imposing on the authorities of the Member States an obligation which, if infringed, will affect the validity of the measures giving effect to the aid, regard being had *inter alia* to the supervening adoption by the Commission of a decision declaring the aid to be compatible with the common market'.

2. That question has arisen in the course of proceedings instituted by the Fédération Nationale du Commerce Extérieur des Produits Alimentaires and the Syndicat National des Négociants et Transformateurs de Saumon (hereinafter referred to collectively as 'the applicants') for the annulment of an inter-ministerial order of 15 April 1985. That order ('the contested order') entered into force on its publication on 20 April 1985 and gave effect to Decree

No 84-1297 of 31 December 1984, which imposed parafiscal charges for the benefit of the Comité Central des Pêches Maritimes (Central Committee for Sea-Fishing), local committees for sea-fishing and the Institut Français de Recherche pour l'Exploitation de la Mer (French Research Institute for the Use of Marine Resources). I will later set out, so far as is necessary, the background to these measures.

3. The applicants claim that the contested order was introduced in breach of the last sentence of Article 93(3) of the Treaty. Before considering the effect of that provision, it is appropriate to describe briefly the Treaty rules on aid and the procedure for enforcing those rules, in so far as these matters are relevant to the proceedings before the national court.

#### The Treaty rules on aid

4. The basic rule is laid down in Article 92(1) of the Treaty, which states: 'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

\* Original language: English.

Article 92(2) gives three categories of aid which, notwithstanding Article 92(1), are to be regarded as compatible with the common market. Article 92(3) lists four further types of aid which may be considered compatible with the common market.

5. The main responsibility for ensuring that Article 92 is observed lies with the Commission. Article 93(1) requires the Commission to 'keep under constant review all systems of aid' existing in the Member States. Under Article 93(2), the Commission, after giving notice to the parties concerned to submit their comments, may, if it finds that such aid is incompatible with the common market within the meaning of Article 92, adopt a decision requiring the State concerned to abolish or alter it within a specific period of time. If the State does not comply with the Commission's decision, the Commission may refer the matter directly to the Court.

6. Article 93(3) establishes a system for regulating plans to grant new aid and to alter existing aid. It provides as follows:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

7. In Case 120/73 *Lorenz v Germany* [1973] ECR 1471, paragraph 3, the Court held that:

'In stating that the Commission shall be informed of plans to grant new or alter existing aid "in sufficient time to enable it to submit its comments", the draftsmen of the Treaty have sought to provide this institution with sufficient time for consideration and investigation to form a *prima facie* opinion on the partial or complete conformity with the Treaty of the plans which have been notified to it.

It is only after being put in a position to form this opinion that the Commission is bound, if it considers the plan incompatible with the common market, to initiate without delay the contentious procedure, provided for in Article 93(2), by giving notice to the Member State to submit its comments.'

The Court went on to say that, while it was necessary for the Commission to be allowed sufficient time to form a preliminary view on the compatibility with the Treaty of plans which were notified to it, it had to define its position within a reasonable period since the Member State concerned might wish to act as a matter of urgency. By analogy with Articles 173 and 175 of the Treaty, the Court fixed that period at two months. If, on the expiry of that period, the Commission had not yet expressed a view, the Member State concerned could implement the plan provided it gave prior notice to the Commission. The Court added that if, at the end of the preliminary examination, the Commission concluded that the aid was compatible with the Treaty, it should inform the State concerned but that it was not obliged at that stage to adopt a

decision within the meaning of Article 189 of the Treaty. Such a decision was only required at the end of the contentious procedure laid down in Article 93(2).

8. The Court's decision in *Lorenz* was reiterated in a number of other judgments given on the same day: see Case 121/73 *Markmann v Germany* [1973] ECR 1495; Case 122/73 *Nordsee v Germany* [1973] ECR 1511; Case 141/73 *Lobrey v Germany* [1973] ECR 1527. Several of the points made in those decisions were subsequently reaffirmed in Case 84/82 *Germany v Commission* [1984] ECR 1451.

9. The role of the national courts in applying the Treaty rules on aid is an important but subsidiary one. The national courts have no jurisdiction to rule on the compatibility of aid with the common market for the purposes of Article 92. They may, however, 'have cause to interpret and apply the concept of aid contained in Article 92 in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 93(3) ought to have been subject to this procedure': see Case 78/76 *Steinike und Weinlig v Germany* [1977] ECR 595, paragraph 14. The issue of the jurisdiction of the national courts to apply the last sentence of Article 93(3) is raised by the referring court's question and is addressed below.

### **The background to the contested order**

10. In order to explain why the applicants seek to rely on the last sentence of Article

93(3), I must set out briefly the background to the contested order. For a number of years, the French Government was engaged in negotiations with the Commission over the compatibility with the Treaty of various types of aid granted to undertakings in the fisheries sector. By letter dated 15 June 1982, the Commission informed the French authorities that it had decided to extend an existing investigation under Article 93(2) of the Treaty to certain aspects of that aid and to open a new investigation in respect of certain other aspects. Then, early in 1984, the French authorities sent to the Commission a note on the organization, financing and activities of a body known as the Fonds d'Intervention et d'Organisation du Marché des Produits de la Pêche Maritime et des Cultures Maritimes ('FIOM'). The functions of FIOM included price support, directing production, undertaking commercial studies, and providing an allowance for fishermen who were unable to work because of the weather.

11. By letter of 27 July 1984, the Commission informed the French authorities that it had decided to commence a separate investigation under Article 93(2) into the activities of FIOM and gave the French Government a deadline for submitting its observations. The Commission was concerned about two aspects in particular of FIOM's activities. First, while the activities of FIOM were to a large extent designed to benefit French produce and French producers, FIOM was in part financed by a parafiscal charge levied on imports. Secondly, the Commission took the view that FIOM's market support activities were incompatible with the Community legislation on the common organization of the market in fishery products.

12. The French authorities subsequently informed the Commission of a number of alterations to the legislation relating to FIOM. In particular, the rate of tax applied to imports was henceforth to be lower than that applied to French produce and the proceeds of the tax were to be used to finance the promotion of sea food generally, regardless of its origin. Those changes were implemented by Decree No 84-1297 and by the contested order, the texts of which were sent to the Commission, via the French Permanent Representative to the Community, on 14 June 1985. By letter dated 25 October 1985, the Commission informed the French authorities that it was terminating the procedure instituted under Article 93(2) in respect of FIOM, with the exception of certain aspects of FIOM's activities which are not at issue in the proceedings before the referring court. That letter did not expressly state that the Commission considered the aspects in respect of which it was terminating the procedure compatible with the common market, but it seems to have been interpreted in that sense by the referring court. A decision finding the other aspects of FIOM's activities which were under investigation incompatible with the common market and requiring them to be abolished was adopted on 9 October 1985, although it was not published until 23 May 1986: see Decision 86/186, Official Journal 1986 L 136, p. 55.

13. For the sake of completeness, I should mention two procedural difficulties. I do so briefly because, in my view, they do not in the circumstances of this case need to be resolved. First, it has not been argued in these proceedings that the Commission's letter of 25 October 1985 was ineffective in the light of the Court's ruling in *Lorenz*, where it was held that an examination

instituted under Article 93(2) could only be terminated by the adoption of a decision within the meaning of Article 189 of the Treaty. Notwithstanding that ruling, the agent of the Commission explained at the hearing that formal decisions are only adopted when the Commission forms the view that the aid in question is incompatible with the common market or is only compatible with the common market if certain conditions are met. Both the referring court and the Commission, however, seem to regard the letter of 25 October 1985 as embodying a decision within the meaning of Article 189. The Commission finds support for that view in the judgment in Case 169/84 *Cofaz v Commission* [1986] ECR 391, where the Court accepted that a decision taken at a meeting of the Commission to terminate an investigation initiated under Article 93(2) and notified to the Member State concerned by letter was susceptible to review under Article 173 of the Treaty. Nevertheless, the question might arise whether in practice there need be any formal difference between notification at the end of the preliminary examination that aid conforms with the Treaty, which the Court held in *Lorenz* did not have to be in the form of a decision within the meaning of Article 189, and a decision taken at the end of the contentious procedure, which according to the Court does have to take that form. Since the validity of the Commission's letter has not been challenged, however, I am prepared, for the purposes of these proceedings, to accept the view of the referring court and of the Commission as correct.

14. Secondly, it is not entirely clear from the material before the Court whether all aspects of the aid in question in these proceedings should be regarded as having been notified to the Commission. The first

recital of the preamble to Decision 86/186 speaks of the French Government having 'notified the Commission . . . of its intention to grant certain aids to sea-fishing undertakings', but later the preamble states (see p. 60) that some aspects of FIOM's activities were only notified after the aids had been introduced and following a number of requests from the Commission. That statement reiterates a complaint made by the Commission in its letter of 27 July 1984, where it claimed that the information concerning FIOM supplied to it by the French authorities was incomplete, fragmented and overdue. Nevertheless, since the effect of the last sentence of Article 93(3) in circumstances such as those of the present case is the same whether or not the plan to grant aid was notified, I do not consider it necessary to pursue the matter.

#### The effect of the last sentence of Article 93(3)

15. It will be observed that the contested order, which gave effect to Decree No 84-1297, entered into force on 20 April 1985, well before the Commission sent its letter of 25 October 1985 terminating the procedure under Article 93(2). This means that France did not respect the obligation imposed on it by the last sentence of Article 93(3) to refrain from implementing those measures until that procedure had resulted in a final decision. The referring court seeks guidance on the consequences, if any, which flow from the breach of that obligation in cases where the Commission subsequently finds the measures in question compatible with the common market.

16. The answer to that question might, until recently, have been thought fairly clear. The Court stated at paragraph 8 of the judgment in *Lorenz* that:

'the prohibition on implementation referred to in the last sentence of Article 93(3) has a direct effect and gives rise to rights in favour of individuals, which national courts are bound to safeguard.

The immediately applicable nature of this prohibition extends to the whole of the period to which it applies.

Thus the direct effect of the prohibition extends to all aid which has been implemented without being notified and, in the event of notification, operates during the preliminary period, and where the Commission sets in motion the contentious procedure, up to the final decision.'

17. That aspect of the Court's ruling in *Lorenz* was foreshadowed in Case 6/64 *Costa v ENEL* [1964] ECR 585 and reiterated in *Steinike und Weinlig*, already cited. As I explained at paragraph 37 of my Opinion in Case C-301/87 *France v Commission* ('Boussac') [1990] ECR I-307, that line of cases in my view establishes that, in the event of an infringement of the prohibition contained in the last sentence of Article 93(3), whether because a new aid is implemented without having been notified, or because a notified aid is implemented prior to clearance by the Commission, the national courts, on application by any interested party, are required to give effect to that prohibition. This means that they

must hold any measures taken in defiance of the last sentence of Article 93(3) unlawful and grant all remedies necessary to ensure the effectiveness of the prohibition contained therein.

18. In this case, however, the French Government argues that the Court's judgment in the 'Boussac' case, the relevant parts of which were reiterated shortly afterwards in Case C-142/87 *Belgium v Commission* ('Tubemeuse') [1990] ECR I-959, has impliedly qualified its earlier case-law on the direct effect of the last sentence of Article 93(3). A similar view was taken by the Commissaire du Gouvernement in his Opinion presented to the referring court before the reference was made.

19. In 'Boussac', one of the claims made by the Commission was that it had the power to find that aid which had not been notified to it was for that reason alone unlawful, and that it was not entitled to consider the compatibility of such aid with the common market. The Court was not, however, prepared to accept that failure by a Member State to notify aid dispensed the Commission, once it became aware of it, from its duty to examine its compatibility with the common market.

20. The Court held that, where a Member State had granted or altered aid without prior notification, the Commission had the power, after giving the Member State concerned the opportunity to submit its

observations, to issue an interim decision requiring it to suspend payment of the aid pending the outcome of an examination and to provide the Commission with all the information necessary to enable the compatibility of the aid with the common market to be assessed. The Court added that the Commission had the same power 'in cases where it has been notified of aid but the Member State in question, instead of awaiting the outcome of the procedure provided for under Article 93(2) and (3) of the Treaty, has instead proceeded to put the aid into effect, contrary to the prohibition contained in Article 93(3)' (paragraph 20 of the judgment).

21. The Court's ruling means that the Commission is obliged to examine the compatibility with the common market of any plans to grant or alter aid of which it is aware, even if the Member State concerned has, in breach of the last sentence of Article 93(3), implemented them without waiting for clearance. The Commission has no power to declare aid unlawful solely for breach of that sentence.

22. In the view of the French Government, it follows from the Court's ruling in 'Boussac' that the national courts likewise have no jurisdiction to declare aid unlawful exclusively for breach of the last sentence of Article 93(3). That view is to some extent supported by the United Kingdom Government, which did not submit written observations in these proceedings but which was represented at the hearing. The United Kingdom reiterated the argument it advanced in 'Boussac', that a breach of the

last sentence of Article 93(3) does not automatically make aid unlawful, although it was prepared to recognize that national courts were entitled to grant interim relief in the event of such a breach to protect the position of third parties pending the outcome of the Commission's investigation.

23. I am unable to accept the argument that the Court's decision in 'Boussac' must be taken to have qualified its earlier case-law on the direct effect of the last sentence of Article 93(3). At paragraph 38 of my Opinion in 'Boussac', I ventured to suggest that, since national courts could declare aid unlawful for breach of the last sentence of Article 93(3), the Treaty must be interpreted as conferring on the Commission a similar power. The Court's decision to the effect that the Commission has no such power does not, in my view, have any bearing on the powers and duties of the national courts. The Commission is required to examine on the substance the compatibility of the proposed measure with the common market, while the national courts must ensure that the proposed measure is not implemented until that examination is complete.

24. In fact, the decision in 'Boussac' emphasizes not the parallel, but the distinction, between the position of the Commission and that of the national courts. The Commission is not absolved by a Member State's breach of Article 93(3) from examining the substance of the aid, an examination which is its principal responsibility. The national court is limited to applying procedural criteria, which are such as to make it possible for Article 93(3), last sentence, to have direct effect. Moreover, the two functions are, while distinct, never-

theless complementary, since the exercise by the national court of its power to declare unlawful measures which are not notified, or which are implemented prematurely, will help to ensure that Member States comply with their obligations and will facilitate the Commission's task of examining the substance of proposed aids. It is for this reason that the national courts are required to enforce the last sentence of Article 93(3) in circumstances where the Commission would be required to examine the compatibility of aid with the common market.

25. In my view, it is clear therefore that the Court's judgment in 'Boussac' has no bearing on its well established case-law concerning the direct effect of the last sentence of Article 93(3). Indeed, the judgment contains no suggestion that that case-law was intended to be qualified. On the contrary, the Court reiterated in that judgment its statement in Joined Cases 91 and 127/83 *Heineken Browwerijen v Inspecteurs der Vennootschapsbelasting* [1984] ECR 3435, paragraph 20, that 'the final sentence of Article 93(3) is the means of safeguarding the machinery for review laid down by that article, which, in turn, is essential for ensuring the proper functioning of the common market'.

26. Moreover, it would in my view be highly undesirable for any qualification of the Court's case-law on the direct effect of the last sentence of Article 93(3) to be introduced in the present case. As the Commission points out, the purpose of that sentence is to prevent the Member States from implementing plans to grant aid before the Commission has decided whether or not

they are compatible with the common market, a practice which, according to figures produced by the Commission in this case, remains unacceptably common. Because of the importance of the last sentence of Article 93(3) in securing compliance by the Member States with the Treaty rules on aid, the Court has emphasized that an interpretation of Article 93 is unacceptable if 'it would have the effect of depriving the provisions of Article 93(3) of their binding force and even that of encouraging their non-observance' (Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 8).

27. Thus, as the Court held in *Lorenz*, the direct effect of the prohibition laid down in the last sentence of that provision extends to all aid which has been implemented without being notified and operates, in the case of aid which has been notified, throughout the preliminary period and, where the Commission sets in motion the contentious procedure, up to the final decision. The national courts are required to draw the appropriate consequences from that fact and must therefore take any steps which appear necessary in the circumstances to nullify the effects of the breach of the last sentence of Article 93(3). Consequently, national courts may be required to declare legislation giving effect to the aid unlawful and to order the recovery of aid which has already been paid. Where the aid has been financed by charges imposed on undertakings, the national courts may be required to order that those charges be refunded.

the Commission finds the aid, although introduced unlawfully, nevertheless compatible in substance with the common market? In my view, the national court may still be required to declare measures adopted before that finding unlawful and to draw the necessary consequences. I would emphasize that, as the Commission points out, a decision taken by the Commission at the end of the contentious procedure does not have retroactive effect and cannot therefore cure procedural defects already affecting the validity of any national measure giving effect to the aid prematurely. This is in my view so whether or not the aid is found compatible with the common market, for the object of the last sentence of Article 93(3) is to prevent Member States from giving effect to plans to grant aid until the Commission has reached a decision. If a breach of that provision were devoid of consequences where the Commission ultimately found the aid compatible with the common market, Member States would have an incentive not to await the outcome of the Commission's investigation, since in that way aid could be introduced more quickly. Such an outcome would considerably weaken the procedure for enforcing the Treaty rules on aid and would confer an unfair advantage on undertakings which benefited from the aid. In principle, therefore, the national courts must ensure the recovery of all aid paid prematurely. If it is necessary to allow an undertaking to retain any aid paid prematurely, such aid being set off against aid payable subsequently under a plan found compatible with the common market, then an adjustment may have to be made to offset any competitive advantage that would otherwise accrue to the undertaking concerned by reason of the early payment.

28. What, then, is the position where, before the national court reaches a decision,

29. It is in my view clear that a Commission decision accepting a plan to grant aid as



compatible with the common market cannot be said to create a legitimate expectation that any aid already paid out is lawful. The Commission published a communication in the Official Journal in 1983 (Official Journal 1983 C 318, p. 3) warning potential recipients of aid that it might have to be refunded if it were found to have been granted illegally. Moreover, the Court held in Case C-5/89 *Commission v Germany* [1990] ECR I-3437, that, in view of the importance of the role played by the Commission under Article 93 of the Treaty, the recipients of aid can in principle only have a legitimate expectation that the aid is lawful if the procedural requirements of that article have been satisfied. The Court pointed out that a prudent economic operator would normally be in a position to ensure that those requirements had been met.

30. The Court did not rule out the possibility that a recipient of aid paid out illegally might in some cases be able to rely on a legitimate expectation that the aid was lawful and so to resist recovery. The Court made it clear, however, that this would only be possible in exceptional circumstances. Responsibility for examining the substance of such a claim was cast on the national courts, who may seek guidance on the matter under Article 177 of the Treaty.

31. The Court added that a Member State which had granted aid in breach of the procedural requirements of Article 93 could not itself invoke any legitimate expectations the recipients might have to justify failing to implement a Commission decision ordering the aid to be recovered, since this would

enable the national authorities to rely on their own illegal conduct in order to frustrate the effectiveness of Commission decisions adopted pursuant to the Treaty rules on aid (see also Case C-303/88 *Italy v Commission*, judgment of 21 March 1991, [1991] ECR I-1433). It follows in my view that a Member State cannot point to the alleged legitimate expectations of recipients in resisting an order made by a national court that aid paid out prematurely be recovered.

32. I accept that where, as in the present case, the Commission ultimately concludes that the plan in question is compatible with the common market, some inconvenience and delay may be caused if a national court declares that the aid was unlawful in the meantime for breach of the last sentence of Article 93(3). It is also true that, as the Court acknowledged in *Lorenz*, aid cases often involve sectors where the need to intervene is of an urgent nature if the desired effect of the proposed measures is to be achieved. Nevertheless, the way for Member States to keep inconvenience and delay to a minimum is for them to refrain from giving effect to plans to grant or alter aid before they have been cleared by the Commission.

33. I do not, however, accept the argument put forward by the Commission that, if a Member State wishes to reintroduce aid found unlawful by a national court for breach of the last sentence of Article 93(3) but considered by the Commission to be compatible with the common market on the

substance, it must make a fresh notification. It is not the plan to grant aid which the national court finds unlawful in such circumstances, but the national measures giving effect to the plan prematurely. Thus, the decision of the national court does not affect the validity of the plan itself. Once the Commission has decided that the plan is compatible with the common market, the Member State concerned may therefore implement it without more ado. The argument of the Commission, if upheld, would lead to unnecessary procedural complexity. Moreover, if it were concluded

that the effect of a decision of a national court quashing a domestic measure for breach of the last sentence of Article 93(3) was to render null and void the plan to which that measure purported to give effect, it might be argued that such a decision relieved the Commission of its duty to consider the compatibility of the plan with the common market where the decision of the national court was reached before the Commission had concluded its investigation. Such a conclusion, which might be difficult to resist, would in my view be inconsistent with the Court's decision in 'Boussac'.

## Conclusion

34. I am therefore of the opinion that the question referred by the Conseil d'État should be answered as follows:

- (1) The last sentence of Article 93(3) of the EEC Treaty must be interpreted as meaning that a Member State may not give effect to a plan to grant or alter aid before the Commission has formed a view, either at the end of the preliminary period or at the end of the contentious procedure where that procedure is instituted, on the compatibility of the aid with the common market. That sentence confers rights on individuals which the national courts are bound to protect.
- (2) Accordingly, national courts must declare illegal any measures introduced by a Member State in breach of the last sentence of Article 93(3) and must draw all the appropriate consequences from such illegality.
- (3) The illegality attaching to any measure introduced by a Member State in breach of the last sentence of Article 93(3) is not cured by a subsequent finding by the Commission that the aid in question is compatible with the common market.