JUDGMENT OF THE COURT
9 August 1994 *

In Case C-44/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour d'Appel de Bruxelles for a preliminary ruling in the proceedings pending before that court between

Namur-Les Assurances du Crédit SA

and

(1) Office National du Ducroire,

(2) The Belgian State,

on the interpretation of Articles 92 and 93 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Presidents of Chambers), C. N. Kak-

* Language of the case: French.

ouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse (Rapporteur), M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: C. O. Lenz,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Namur-Les Assurances du Crédit, the appellant in the main proceedings, by Pierre van Ommeslaghe, an advocate with a right of hearing before the Belgian Cour de Cassation,

— the Belgian State and the Office National du Ducroire, the respondent in the main proceedings, by, respectively, Jan Devadder, Director of Administration at the Ministry of Foreign Affairs, acting as Agent, and Georges van Hecke, an advocate with a right of hearing before the Cour de Cassation, and Bernard van de Walle de Ghelcke, of the Brussels Bar,

— the French Government, by Philippe Pouzoulet, Deputy Director for Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, and by Catherine de Salins, Adviser on Foreign Affairs, acting as Deputy Agent,

— the Netherlands Government, by A. Bos, Legal Adviser, acting as Agent,

— the Commission of the European Communities, by Antonino Abate, Principal Legal Adviser, and Ben Smulders, of its Legal Service, both acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Namur-Les Assurances du Crédit, the Belgian State and the Office National du Ducroire, the French Government, represented by Jean-Marc Belorgey, Head of Mission at the Foreign Affairs Directorate

at the Ministry of Foreign Affairs, acting as Agent, and the Commission at the hearing on 4 May 1994,

after hearing the Opinion of the Advocate General at the sitting on 22 June 1994,

gives the following

Judgment

1 By judgment of 5 February 1993, received at the Court on 16 February 1993, the Cour d'Appel de Bruxelles (Court of Appeal, Brussels) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 92 and 93.

2 The questions were raised in proceedings initially between Namur-Les Assurances du Crédit SA (hereinafter 'Namur AC') and Compagnie Belge d'Assurance Crédit SA (hereinafter 'COBAC'), on the one hand, and the Office National du Ducroire (hereinafter 'OND') and the Belgian State, on the other.

3 Under the Belgian Law of 31 August 1939 on the OND, that body, which is a public establishment responsible, in particular, for guaranteeing risks relating to foreign trade transactions, is accorded a number of advantages. These are: a State guarantee, formulated as a general principle, capital endowment of State income-producing bonds, the covering of its annual financial deficit by the State and exemption from the tax on insurance contracts and from corporation tax.

4 Since 1935, the OND and COBAC, the oldest private credit insurance undertaking in Belgium, have been linked by a re-insurance agreement under which the OND was to assume, by way of optional re-insurance, all or part of the commitments entered into by the company as primary insurer. That agreement, which did not place any particular restriction on the OND's field of activity, was subsequently replaced by a cooperation agreement which provided that only in exceptional circumstances was the public establishment to insure commercial risks relating to exports of goods and services to western Europe, which were normally to be assumed by COBAC. The cooperation agreement was terminated by the OND at the end of 1988 on the ground that it constituted market-sharing prohibited under Community competition rules and, in 1989, the public establishment entered the market for credit risk insurance in western Europe with the approval of its supervising ministers.

5 COBAC and Namur AC, another private undertaking operating on the same market, considered that, in view of the advantages accorded by the State to the OND, the enlargement of its field of activity was of such a nature as to distort competition. They therefore lodged a complaint with the Commission alleging infringement of Articles 92 and 93 of the Treaty. They also made an application to the national court seeking, in particular, on the basis of Article 93(3), suspension of the OND's activity as a credit insurer for exports to Member States until the adoption by the Commission of a decision on the compatibility of the aid accorded or the delivery of a judgment on the substance of their action against the OND and the Belgian State.

6 The President of the Tribunal de Première Instance de Bruxelles (Court of First Instance, Brussels), hearing the application for interim measures, considered that the aid in question was covered by Article 93(1) of the Treaty and held that, owing to that provision's lack of direct effect, he had no jurisdiction to try the case.

7 The case came before the Cour d'Appel de Bruxelles, which considered that its outcome depended on the interpretation of Articles 92 and 93 of the Treaty and referred the following questions to the Court for a preliminary ruling:

'(1) Must Article 93(3) of the Treaty be interpreted as meaning that the granting or alteration of aid includes a decision of a Member State to authorize, after the entry into force of the Treaty, a public establishment, which previously engaged only incidentally in credit insurance for exports to other Member States, to exercise that activity in future without restriction, so that the aid which was granted by that State to the establishment under legislation predating the entry into force of the Treaty now applies to the exercise of that activity as thus extended?

(2) Must Article 93 of the Treaty be interpreted as meaning that it is necessary to regard new aid as being subject to the rules governing existing aid if new aid, not having been notified to the Commission in accordance with Article 93(3), was the subject of a complaint to the Commission and the latter, after carrying out a preliminary examination of the aid and addressing to the Member State concerned a request for information concerning the aid in which it stated that, in the event of failure to reply or receipt of an unsatisfactory reply before the end of the period allowed, it would be obliged to initiate the procedure laid down by Article 93(2) of the Treaty (which request was satisfied), did not initiate the said procedure within a reasonable period?

(3) Must Article 92(1) of the Treaty be interpreted as meaning that the granting or alteration of aid includes conduct of a Member State consisting in:

(a) communicating, through ministerial delegates sitting on the board of directors of a public establishment having its own legal personality and in accor-

dance with the legislation governing that establishment, a general policy entailing enlargement of the scope of an aid;

(b) not opposing, through intervention by the ministerial delegates on the board of directors of the public establishment, a decision by the board entailing enlargement of the scope of an aid, in particular by not bringing about the annulment of that decision, when the legislation governing the public establishment permitted such annulment by the State after suspension of the decision taken by the ministerial delegates?'

8 After the Cour d'Appel de Bruxelles had made its reference to this Court it took formal note of COBAC's withdrawal from the proceedings. Namur AC stated its intention to continue the action alone.

9 In replying to the questions submitted by the national court in this case it will be necessary to recall, first, the structure of the provisions of Article 93 of the Treaty and the powers and responsibilities which they confer on the Commission, on the one hand, and on the Member States and their courts, on the other, having regard to the distinction between existing aid and new aid. It will then be necessary to examine together the first and third questions, by which the national court seeks to ascertain whether a Member State's decision to authorize enlargement of the field of activity of a public establishment receiving State aid or the conduct of that State such as described in the judgment making the reference, with regard to a decision taken to this effect by the public establishment, must be regarded as the granting or alteration of aid within the meaning of Article 93(3). Finally, it might be necessary to reply to the second question, concerning the issue whether new aid which has not been properly notified may still be treated as existing aid if the Commission, after being informed of the existence of the aid in a complaint, has not, after a preliminary examination, commenced the procedure laid down in Article 93(2) within a reasonable period.

The distinction between existing aid and new aid and the allocation of powers and responsibilities between the Commission, on the one hand, and the Member States and their courts, on the other

10 Article 93 of the Treaty, whose purpose is to enable the Commission to examine and keep under constant review aid granted by the States or through State resources, makes provision for separate procedures depending on whether the aid concerned is existing aid or new aid.

11 As far as existing aid is concerned, paragraph (1) of Article 93 gives the Commission the power, in cooperation with the Member States, to keep aid under constant review. As part of that review, the Commission proposes to the Member States any appropriate measures required by the progressive development or by the functioning of the common market. Paragraph (2) of the same article provides that, if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid is not compatible with the common market having regard to Article 92, or that such aid is being misused, it is to decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission (judgment in Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraph 23). As far as existing aid is concerned, therefore, the initiative lies with the Commission.

12 As far as new aid is concerned, Article 93(3) provides that the Commission is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The Commission then proceeds to an initial examination of the planned aid. If, at the end of that examination, it considers that any such plan is not compatible with the common market having regard to Article 92, it is to initiate the contentious review procedure provided for in Article 93(2). In such a case, the last sentence of Article 93(3) prohibits the Member State concerned from putting the proposed measures into effect until the procedure has resulted in a final decision. New aid is therefore subject to preventive review by the Commission and in principle cannot be put into effect as long as that institution has not declared it compatible with the Treaty (judgment in Case C-47/91 *Italy* v *Commission*, cited above, paragraph 24). However, that last rule must be qualified by

the case-law of the Court, according to which, if the Commission, after being informed by a Member State of a plan to grant or alter aid, fails to initiate the contentious procedure, this State may, at the end of a period sufficient to enable a preliminary examination of the plan to be carried out, grant the proposed aid, provided that it has given prior notice to the Commission, and this aid will then be governed by the rules concerning existing aid (judgment in Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, paragraph 6).

13 It is clear from both the terms and purposes of those provisions that aid which existed before the entry into force of the Treaty and aid which could be properly put into effect under the conditions laid down in Article 93(3), including those arising from the interpretation of that article given by the Court in its judgment in the *Lorenz* case, is to be regarded as existing aid within the meaning of Article 93(1). On the other hand, measures to grant or alter aid, where the alterations may relate to existing aid or initial plans notified to the Commission, must be regarded as new aid subject to the obligation of notification laid down by Article 93(3) (see the judgment in Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* v *Inspecteurs der Vennootschapsbelasting, Amsterdam and Utrecht* [1984] ECR 3435, paragraph 17 and 18).

14 In this regard, the Commission and the national courts have different powers and responsibilities.

15 As far as the Commission is concerned, the Court has pointed out, in its judgment in Case 78/76 *Steinike & Weinlig* v *Germany* [1977] ECR 595, paragraph 9, that the intention of the Treaty, in providing through Article 93 for aid to be kept under constant review and supervised by the Commission, is for a finding that an aid may be incompatible with the common market to be made, subject to review by the Court, in an appropriate procedure which it is the Commission's responsibility to set in motion.

16 As far as the national courts are concerned, their involvement is due to the direct effect of the last sentence of Article 93(3) of the Treaty, which prohibits the Member State concerned, in the case of plans to grant or alter aid, from putting the proposed measures into effect before the procedure has resulted in a final Commission decision or the conditions laid down in the judgment in the *Lorenz* case have been met. Their involvement may cause the national courts 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 that procedure (judgment in *Steinike & Weinlig*, cited above, paragraph 14).

17 As the Court pointed out in its judgment in Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *France* [1991] ECR I-5505, paragraph 14, the principal and exclusive role conferred on the Commission by Articles 92 and 93 of the Treaty, which is to hold aid to be incompatible with the common market where this is appropriate, is fundamentally different from the role of national courts in safeguarding rights which individuals enjoy as a result of the direct effect of the prohibition laid down in the last sentence of Article 93(3) of the Treaty. When the national courts make a ruling in such a matter, they do not thereby decide on the compatibility of the aid with the common market, the final determination on that matter being the exclusive responsibility of the Commission, subject to review by the Court of Justice.

18 That being so, the only questions posed by the main proceedings relate to the choice of the appropriate review procedure, that is between the procedure laid down by Article 93(1) and that laid down by Article 93(3), and not to the compatibility or incompatibility of the contested measures with the common market. If those questions call for an interpretation of the concept of aid within the meaning of Article 92(1), that interpretation will be needed only in order to determine whether or not the measures described in the judgment making the reference are governed by the procedure laid down in Article 93(3).

The first and third questions

19 By its first question the national court seeks to ascertain whether a decision of a Member State to authorize enlargement of the field of activity of a public establishment benefiting from advantages accorded by that State under legislation predating the entry into force of the Treaty must, where those advantages apply to the pursuit of the new activity, be equated with the granting or alteration of aid and therefore be subject to the obligation of notification and the prohibition on putting aid into effect laid down by Article 93(3) of the Treaty.

20 Namur AC, the French Government, the Netherlands Government and the Commission submit that this question should be answered in the affirmative. They claim, essentially, that enlargement of the OND's field of activity cannot be taken to be a negligible alteration of aid already in existence since it enables that public establishment to become a competitor of private export credit insurance companies whilst maintaining the advantages which it enjoyed.

21 The Belgian Government and the OND, on the other hand, submit that the aid in question, introduced in 1939, is governed by the rules on existing aid laid down in Article 93(1) of the Treaty and that the alteration was not subject to the obligation of notification laid down in Article 93(3).

22 In order to determine whether a decision authorizing enlargement of the field of activity of a public undertaking like the OND, which enjoys advantages granted by the State, may be regarded as the granting or alteration of aid within the meaning of Article 93(3), those advantages and the nature and scope of the decision in question must be examined in the light of the information provided in the judgment making the reference, as supplemented by the observations of the parties and the replies given to the questions put by the Court.

23 As was found in paragraph 3 of this judgment, the advantages which the OND enjoys were granted to it by legislation predating the entry into force of the Treaty. Under the Law of 31 August 1939, the OND operated under the guarantee of the State (Article 1), was endowed with State bonds (Article 5) and with income from those bonds (Article 7), had special reserves enabling the State to cover in particular its financial deficit (Article 18) and was exempt from taxes and charges on the same basis as the State (Article 23). Apart from adjustments not affecting the substance of those advantages, that legislation remained unchanged on 1 February 1989, the material date for the purposes of the main proceedings.

24 That legislation defined the purpose and areas of operation of the OND in very general terms. As initially worded, Article 3 of the Law stated simply that the purpose of the OND 'shall be to promote exports by the provision of guarantees for reducing the risks attaching to exports, especially credit risks'. As worded at the material time, the same Article 3 defined the OND's purpose 'as promoting foreign trade and Belgian investment abroad' and provided, in particular, that, in order to perform its task, it 'may provide guarantees for the purpose of reducing risks, especially credit risks, attaching to foreign trade operations ...'. The legislation contained no restriction, in terms of subject-matter or geographical area, on the OND's field of activity in export credit insurance.

25 Its field of activity was not later limited by law but by the effect of alterations made to the internal agreements concluded between the OND and COBAC. As was found in paragraph 4 of this judgment, the initial agreement binding those two parties was merely a re-insurance agreement but it was later replaced by a cooperation agreement providing, in particular, for the sharing of risks and markets. Under that later agreement, COBAC alone was entitled to insure the commercial risks attaching to export operations to the countries of western Europe and the OND operated on that European market only in order to cover certain risks hav-

ing particular characteristics. However, the two parties to the agreement could insure concurrently the commercial risks of exporting to the United States of America and Canada and the risks of carrying out certain international operations.

26 As from 1 February 1989, that limitation of the OND's field of activity was abolished following a decision taken by the public establishment with the agreement of its supervising ministers. More precisely, on 27 June 1988, the board of directors authorized the management of the OND to terminate the agreement made with COBAC and to adopt the measures needed to provide insurance directly on the European market. On 4 January 1989, after the proposal had been submitted to them by the OND on 10 August 1988, the supervising ministers asked for the planned provision of insurance of commercial risks in western Europe to be suspended until 1 February 1989. On that date, the same ministers approved the recommendations of a working group composed of members of their cabinets recommending the authorization of a progressive and prudent entry by the OND into this new market.

27 This change of position on the part of the OND and its supervisory authorities had the effect of widening the activities which, during a previous period whose length cannot be determined from the documents before the Court, had in fact been carried on by the public establishment. The national court accordingly asks, by its third question, whether conduct of a Member State consisting in promoting, through ministerial delegates sitting on the board of directors of a public establishment, a general policy entailing enlargement of the scope of an aid or not opposing such enlargement must be regarded as constituting the granting or alteration of aid.

28 As far as that question and the application of paragraphs (1) and (3) of Article 93 are concerned, the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under ear-

lier statutory provisions which remain unaltered. Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it.

29 The decision which entered into force on 1 February 1989 did not amend the legislation which accorded to the OND the advantages which it enjoyed, either in regard to the nature of those advantages or even in regard to the activities of the public establishment to which they applied, since the Law of 31 August 1939 set that establishment a very general aim of reducing the risks of providing credit for exports. It does not therefore affect the aid arrangements put in place by that legislation. Although that decision followed the termination of the cooperation agreement made with COBAC, there is no evidence to suggest that the existence and the terms of that agreement, which was binding only on the two contracting parties, the OND and COBAC, defined the extent of the advantages accorded by the Belgian State to the OND under the Law of 31 August 1939.

30 It is true that in some of the written observations submitted to the Court it is pointed out that before the adoption of the decision in question that public establishment did not carry on activities open to competition from private companies and that the aid which it received therefore applied exclusively to non-competitive activities. On the assumption that this factor may be material to the case even though the Law of 31 August 1939 set the OND a very general aim, it suffices to state that the agreement made between the OND and COBAC did, on the contrary, envisage some competition between those two bodies. As was found in paragraph 25 of this judgment, the OND and COBAC could insure concurrently the commercial risks of exporting to the United States of America and Canada and the risks of carrying out certain international operations. At the material time, therefore, the existing aid did not benefit only non-competitive activities.

31 Thus, even on the assumption that it is wholly attributable to the State, the decision which entered into force on 1 February 1989 cannot be regarded as constituting the granting or alteration of aid within the meaning of Article 93(3) of the Treaty.

32 To take the contrary view would in effect be tantamount to requiring the Member State concerned to notify to the Commission and submit for its preventive review not only new aid or alterations of aid properly so-called granted to an undertaking in receipt of existing aid but also all measures which affect the activity of the undertaking and which may have an impact on the functioning of the common market, on competition or simply on the actual amount, over a specific period, of aid which is available in principle but which necessarily varies in amount according to the undertaking's turnover. Ultimately, in the case of a public undertaking such as the OND, each new insurance operation which, according to the information provided at the hearing by the Belgian Government, must be submitted to the supervisory authorities, could thus be regarded as a measure to which the procedure laid down in Article 93(3) of the Treaty applies.

33 Such an interpretation, which does not correspond to either the letter or the purpose of Article 93(3), nor to the division of responsibility between the Commission and the Member States for which it provides, would give rise to legal uncertainty for undertakings and Member States, which would thus be obliged to notify in advance widely differing measures, which could not then be put into effect despite doubts as to whether they could be classified as new aid. As far as the facts of the present case are concerned, that legal uncertainty is highlighted by the attitude of the Commission itself. For the Commission is now arguing, in response to the first question, that the aid granted to the OND has been altered even though, having received a complaint about the existence and compatibility of that aid on 1 February 1989, it did not find it necessary to take a position on the matter after it had twice requested and obtained information from the Belgian Government in 1991.

34 In so far as the aid granted in the circumstances described in the judgment making the reference is governed by rules on aid existing before the entry into force of the Treaty, it must be kept under constant review as provided for in Article 93(1). That review, which the Commission is responsible for setting in motion, may prompt it to propose to the Member State concerned the appropriate measures needed for the functioning of the common market and, if necessary, to decide, after initiating

the procedure provided for in the second paragraph of the same article, to abolish or alter such aid as it considers to be incompatible with the common market.

35 The reply to the first and third questions must therefore be that Article 93(3) of the Treaty is to be interpreted as meaning that enlargement, in circumstances such as those described in the judgment making the reference, of the field of activity of a public establishment which is in receipt of aid granted by the State under legislation predating the entry into force of the Treaty cannot, where it does not affect the system of aid established by that legislation, be regarded as constituting the granting or alteration of aid which is subject to the obligation of prior notification and the prohibition on putting aid into effect laid down by that provision.

The second question

36 In view of the reply given to the first and third questions, it is not necessary to reply to the second question.

Costs

37 The costs incurred by the French and Netherlands Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Cour d'Appel de Bruxelles by judgment of 5 February 1993, hereby rules:

1. **Article 93(3) of the Treaty is to be interpreted as meaning that enlargement, in circumstances such as those described in the judgment making the reference, of the field of activity of a public establishment which is in receipt of aid granted by the State under legislation predating the entry into force of the Treaty cannot, where it does not affect the system of aid established by that legislation, be regarded as constituting the granting or alteration of aid which is subject to the obligation of prior notification and the prohibition on putting aid into effect laid down by that provision.**

2. **It is not necessary to reply to the second question referred by the national court.**

Due Mancini Moitinho de Almeida

Diez de Velasco Edward Kakouris

Joliet Schockweiler Rodríguez Iglesias

Grévisse Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 9 August 1994.

R. Grass O. Due

Registrar President