

OPINION OF ADVOCATE GENERAL
LENZ

delivered on 27 May 1997 *

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A — Introduction

1. The present proceedings concern the appeal brought by the Commission against

the judgment delivered by the Court of First Instance on 28 September 1995 in Case T-95/94.¹ In that judgment the Court of First Instance annulled a Commission decision of 31 December 1993 on aid which

* Original language: German.

¹ — Case T-95/94 *Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs (Sytraval) and Brink's France v Commission* [1995] ECR II-2651.

the French post office (hereinafter 'the post office') had granted to an undertaking in its group.

2. The facts at the origin of the decision are described as follows in the contested judgment:

'1. Until 1987, the French post office (hereinafter "the post office") undertook, through its internal departments, the transportation of its own moneys and valuables. In 1986 the post office decided to carry on certain of its activities through the intermediary of commercial companies. On 16 December 1986 the Société Holding des Filiales de la Poste ("Sofipost"), controlled as to 99% by the French State, was accordingly set up.

2. On 16 April 1987 Sofipost formed Sécuripost SA ("Sécuripost"), which it controls as to 99.92%. The object of that company is the secure transportation of moneys, the provision of caretaking and protection services, and surveillance. The post office seconded over 220 officials to Sécuripost.

3. By private agreement dated 28 September 1987, the post office entrusted Sécuripost with the performance of the activities falling within the spheres referred to above, which it had previously carried on itself. Thereafter, Sécuripost was to widen its customer base and its range of activities.

4. On 30 September 1987 a framework agreement was concluded between the Minister of Posts and Telecommunications and Sécuripost.

5. At the end of 1987, Sofipost advanced the sum of FF 5 000 000 to Sécuripost. That loan was converted into capital during the first half of 1988.

6. On 1 January 1988 Sofipost increased the capital of Sécuripost by means, first, of the subscription of the net value of the money transportation business transferred by the post office to its subsidiary, estimated at FF 19 225 000, and, second, of a contribution in cash of FF 9 775 000.

7. During the course of 1989, Sofipost granted Sécuripost a second loan of FF 15 000 000, at an interest rate corresponding to half a percentage point over the bank base rate.²

3. On 4 September 1989 various French undertakings and associations of undertakings submitted to the Commission two requests for the initiation of a proceeding on the basis of Articles 85, 86 and 90 of the EC

2 — Judgment cited in footnote 1, paragraphs 1 to 7.

Treaty, on the one hand, and of Articles 92 and 93 of that Treaty, on the other. They included the *Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs* (Sytraval) and Brink's France SARL (hereinafter referred to jointly as 'the complainants').

4. The present proceedings only concern the request based on Articles 92 and 93 of the Treaty.

5. On 14 March 1990 the Commission invited the French Government to comment on the complaint. The French Government replied by letter of 3 May 1990.

6. On 28 June 1991 the Commission informed the complainants that their complaint raised 'a number of important points of principle calling, in this instance, for an in-depth examination by the relevant Commission departments'.

7. On 9 October 1991 the Commission again informed the complainants that the matter raised by them appeared 'particularly complex, necessitating extensive technical analysis of the voluminous documentation produced both by the complainants and by the French authorities ... It has not been possible to complete the inquiry into the matter

within the period indicated in [the Commission's] letter of 28 June 1991 because of the complexity of the case and the consequent need to arrive at a decision which takes account of the interests of all of the parties concerned'.³

8. On 5 February 1992 the Commission adopted a decision in which it stated that whilst its findings had revealed that 'Sécuripost certainly received support from the parent company and from the State when it was set up and started operating in the market, it cannot be said that there has been a grant of State aid within the meaning of Article 92(1) of the Treaty'. In that regard, the Commission informed the complainants, in particular, that 'the French authorities have formally denied the existence of any circumstances giving rise, *prima facie*, to aid falling within Article 92(1) — as evidenced, in so far as may be necessary, by the documentary evidence adduced in support'.⁴

9. On 13 April 1992 the complainants brought an action pursuant to Article 173 of the Treaty for the annulment of that decision. Those proceedings became devoid of purpose when the Commission withdrew its decision of 5 February 1992 on 22 June 1992.

³ — Judgment cited in footnote 1, paragraphs 9 to 12.

⁴ — Judgment cited in footnote 1, paragraph 13. The Court of First Instance described the measure in question as a 'decision rejecting the applicants' complaints' (*ibid.*).

10. On 24 July 1992 the complainants supplemented the complaint which they had made to the Commission.

11. On 21 January 1993 the Commission informed the complainants that it had entered the measures taken by the French Government with regard to Sécupost in the register of unnotified aids under No NN 5/93.

12. On 26 March 1993 the French Government authorised Sofipost to transfer Sécupost's property to the private sector. On 22 April 1993 the complainants submitted a further supplement to their complaint. The Commission informed the complainants on 5 May 1993 that it had decided to divide the investigation into the matter into two parts, dealing respectively with the situation before and after the privatisation.

13. On 11 October 1993 the complainants called on the Commission, pursuant to Article 175 of the Treaty, to adopt a decision in response to their complaint submitted on 4 September 1989.⁵

14. On 31 December 1993 the Commission — represented by its Member responsible for competition matters — sent the French

Government a brief letter informing it that it had decided to close the inquiry initiated following the abovementioned complaint, since according to the information at its disposal it was able to conclude that no State aid within the meaning of Article 92(1) of the Treaty existed. At the same time, however, the Commission pointed out that that decision did not extend to the measures taken since 1992 in the context of the privatisation of Sécupost.⁶

15. On the same day the Commission — again represented by its Member responsible for competition matters — sent the complainants a detailed letter setting out its position on the arguments which they had put forward and explaining that the investigation which it had carried out provided no grounds for concluding that in this case any State aid within the meaning of Article 92 of the Treaty existed. The complainants' claims to that effect had therefore to be rejected. The Commission therefore decided to close the investigation initiated following the complaint. At the same time, however, it pointed out that that decision did not extend to the measures taken since 1992 in the context of the privatisation of Sécupost.⁷

16. The complainants thereupon brought an action before the Court of First Instance, which, they claimed, should 'annul the

5 — Judgment cited in footnote 1, paragraphs 14 to 21.

6 — The Commission also pointed out that the investigation of the complaint alleging an infringement of Article 90 in conjunction with Article 86 of the Treaty was continuing.

7 — In this letter, too, the Commission went on to say that the decision was without prejudice to the complaint alleging an infringement of Article 90 in conjunction with Article 86 of the Treaty.

decision of the Commission of 31 December 1993, together with all its legal consequences'.⁸

Sécuripost, (2) advances made against orders placed by the post office with Sécuripost and (3) abnormal charges applied and guarantees provided to it by the post office.'⁹

17. The applicants relied on four pleas in support of their action:

'The first plea is based on infringement of Article 93(2) of the Treaty, in that the Commission wrongly decided, having regard to the circumstances of the case, not to initiate the procedure provided for by that provision. The second plea alleges breach of the applicants' right to a fair hearing, in that the Commission referred in its decision — which adversely affected the applicants — to documents which were not communicated to them, such as the observations of the French Government. The third plea alleges infringement of Article 190 of the EC Treaty, in that the Commission failed to respond in the contested decision to the objections raised by the applicants in their complaint concerning the grant of aid in the form of (1) the secondment to Sécuripost of administrative staff of the post office, (2) the placing at the disposal of Sécuripost of post office premises, (3) the supply of fuel and maintenance for vehicles on excessively favourable terms and (4) the loan of FF 15 000 000 granted by Sofipost to Sécuripost at a preferential rate. The fourth plea alleges the existence of manifest errors of assessment concerning (1) the way in which the decision dealt with the increase of FF 9 775 000 in the capital of

18. The Court of first Instance considered it appropriate, in the light of the documents in the case, 'focus its examination on the third and fourth pleas jointly, alleging infringement of Article 190 of the Treaty and manifest error of assessment'.¹⁰

19. In that regard, the Court considered that the contested measure was a decision 'rejecting the applicants' request for a declaration by the Commission that the French Republic had infringed Articles 92 and 93 of the Treaty by granting aid to Sécuripost'.¹¹

20. In examining the scope of the obligation to state the reasons laid down in Article 190 of the Treaty, the Court pointed out that the judicial review which such a statement of reasons must allow was not, in the present case, 'a review of the question whether there has been a manifest error of assessment, similar to a review of the exercise by the Commission of its exclusive power to examine the compatibility of national measures

8 — The actual wording of the form of order sought in the application, as stated in the contested judgment, cited in footnote 1 above, paragraph 28.

9 — Judgment cited in footnote 1 above, paragraph 31. The figures in brackets have been added in the interest of clarity.

10 — Judgment cited in footnote 1, paragraph 32.

11 — Judgment cited in footnote 1, paragraph 22. The wording is virtually identical to the wording in paragraph 1 of the operative part of the judgment.

already found to constitute State aid ... but a review of the interpretation and application of the concept of State aid referred to in Article 92 of the Treaty which the Commission has undertaken with a view to determining whether or not the national measures complained of by the applicants are to be classified as State aid'.¹²

21. Such review must also have regard to the context within which the decision was adopted. In that regard, the Court of First Instance emphasised four points. First, the Commission had needed over 51 months in which to deal with the complaint submitted on 4 September 1989. During that period the Commission had adopted two decisions (the decision of 5 February 1992 and the contested decision), at an interval of more than 22 months. Secondly, the Commission had stated in its correspondence with the complainants that their complaint raised a number of important points of principle calling for an in-depth examination and extensive technical analysis. Thirdly, it was established that the Commission had withdrawn its initial decision of 5 February 1992 following the complainants' action for its annulment, although that action merely repeated the various objections already put forward, without raising any new objections. Fourthly and finally, the Court of First Instance observed that the Commission had entered the measures complained of in the register of unnotified aids. Furthermore, in its letter of 31 December 1993 to the French Government the Commission expressed its regret that no advance notice had been given pursuant to Article 93(3) of the Treaty in relation to any of those measures. The Court of First Instance concluded that '[i]n the light of the foregoing findings, it is necessary

to examine whether, in the present case, the reasons set out in the contested decision are capable of supporting the contention that the measures complained of by the applicants did not constitute State aid within the meaning of Article 92 of the Treaty'.¹³

22. As regards (1) the administrative staff seconded by the post office, the Court of First Instance held that the Commission, in its decision, had completely failed to examine the special advantage criticised by the complainants arising from the fact that the officials in question might, where necessary, be reassigned to the department originally employing them without Sécuripost having to pay any compensation for redundancy or dismissal whatever. Moreover, the Commission had established that Sécuripost did not pay any contributions to unemployment insurance funds in respect of these employees, but had not provided the slightest explanation as to why that was not to be regarded as State aid. That constituted an infringement of Article 190.¹⁴

23. As regards (2) the placing of premises at Sécuripost's disposal, the Court of First Instance noted that the Commission had merely stated that the premises had not been placed at Sécuripost's disposal free of charge — as claimed in the complaint — but that Sécuripost had been required to pay rent. The Commission had provided no details regarding the amount of the rent, however, and had failed to compare it with what competitors had to pay in a comparable situation. That constituted a failure to state reasons.

¹² — Judgment cited in footnote 1, paragraph 54.

¹³ — Judgment cited in footnote 1, paragraphs 55 to 60.

¹⁴ — Judgment cited in footnote 1, paragraphs 62 and 63.

Furthermore, where the Commission decides to reject a complaint without allowing the complainant to comment, prior to the adoption of the definitive decision, on the information obtained in its investigation, 'it is under an automatic obligation to examine the objections which the complainant would certainly have raised if it had been given the opportunity of taking cognisance of that information'. Consequently, in this regard also, according to the Court of First Instance, the decision was inadequately reasoned.¹⁵

24. As regards (3) the supply of fuel, the Commission had, according to the Court of First Instance, been 'right' to rely in its decision on the explanations given by the French Government. However, the decision was inadequately reasoned as regards the maintenance of Sécupost's vehicles, since the Commission merely referred to the invoicing system applied in that regard, without examining 'whether or not the rates charged disclosed the existence of State aid'.¹⁶

25. As regards (4) the loans granted by Sofipost to Sécupost, the Court of First Instance found that the Commission had been 'right' to rely on the explanations given by the French Government in so far as the

loan of FF 5 000 000 was concerned.¹⁷ On the other hand, the reasons provided as regards the advance of FF 15 000 000 were inadequate, since the Commission had merely stated that that sum represented a commercial transaction. Even in such a case, however, an aid might exist.¹⁸

26. The Court of First Instance then pointed out that the complainants had criticised the Commission for having committed a manifest error of assessment as regards the prices charged by Sécupost to the post office. In that regard, the Commission, when making the abovementioned comparison between those prices and the prices which Sécupost charged to a third party, had confined itself to 1993, without attempting to justify or clarify its decision to do so. In the absence of any details regarding the corresponding rates for 1987 to 1992, the Court considered that it did not have at its disposal sufficient information to review the validity of the contested decision and that it was consequently necessary for it to raise of its own motion the lack of reasons.¹⁹

27. The Court of First Instance then referred to the difficulties which complainants frequently experience in gathering evidence in

15 — Judgment cited in footnote 1, paragraphs 64 to 66.

16 — Judgment cited in footnote 1, paragraphs 67 to 69.

17 — These findings are surprising since, according to the content of the application described by the Court of First Instance (paragraph 31 of the judgment; see paragraph 17 above) that part of the Commission's decision had not been contested.

18 — Judgment cited in footnote 1, paragraphs 70 to 72.

19 — Judgment cited in footnote 1, paragraph 73 to 75.

such cases. The circumstances of the case were such as to 'reinforce the Commission's obligation to furnish a statement of reasons'.²⁰

28. Finally, the Court of First Instance stated that the Commission's obligation to state reasons for its decisions may 'in certain circumstances require an exchange of views and arguments with the complainant, since, in order to justify to the requisite legal standard its assessment of the nature of a measure characterised by the complainant as State aid, the Commission needs to ascertain what view the complainant takes of the information gathered by it in the course of its inquiry ... In those circumstances, that obligation constitutes a necessary extension of the Commission's obligation to deal diligently and impartially with its inquiry into the matter by eliciting all such views as may be necessary'.²¹

29. The Court of First Instance concluded from those considerations that the contested decision must be annulled, since the reasons stated '[did] not bear out the conclusion that the measures complained of by the applicants did not constitute State aid within the meaning of Article 92 of the Treaty'.²²

30. The Commission lodged an appeal against that judgment, claiming that the

Court of Justice should set it aside and, in consequence of that, take all requisite legal steps and, in particular, refer the case back to the Court of First Instance for a decision on the merits and order the applicants to pay the costs.²³ The Netherlands, Germany and Spain have intervened in support of the appeal, as has France (which had already intervened before the Court of First Instance in support of the Commission). However, the applicants in the original proceedings have not taken part in the appeal procedure before the Court of Justice.

B — Legal assessment

I — Preliminary observation

31. In examining the appeal, it is necessary to take account of the fact that the Court of First Instance based the annulment of the Commission decision on a number of considerations. The appeal can therefore be allowed only if *all* those considerations prove to be defective in law and if the judgment of the Court of First Instance is not shown to be correct on other grounds.

²⁰ — Judgment cited in footnote 1, paragraph 77.

²¹ — Judgment cited in footnote 1, paragraph 78.

²² — Judgment cited in footnote 1, paragraph 80.

²³ — It should be pointed out here and now that this application for costs cannot be reconciled with the application in respect of the merits of the case. Article 222 of the Rules of Procedure provides that in appeal proceedings the Court is to make a decision as to costs only where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case.

II — *Community rules on State aid*

32. In the interest of a proper understanding of the problems raised by the present case, it is necessary to begin by briefly describing the rules of the Treaty applicable to State aid and in particular the role played by the Commission in that sphere. The Court of Justice recently examined those rules in its judgment in Case C-39/94²⁴ — which also concerned the post office —, where it held as follows:

'35 Article 91(2) of the Treaty provides that "[S]ave 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".

36 That prohibition, as a matter of principle, of State aids is neither absolute nor unconditional since paragraph (3) in particular of Article 92 confers on the Commission a wide discretion to allow aid by way of derogation from the general prohibition laid down in paragraph (1) of that article. The determination in such cases of the question whether a

State aid is or is not compatible with the common market raises problems which presuppose the examination and appraisal of economic facts and conditions which may be both complex and liable to change rapidly (Case C-301/87 *France v Commission* [1990] ECR I-307, the "Boussac" case, paragraph 15).

37 That was the reason for which the Treaty provided in Article 93 for a special procedure under which the Commission would monitor aid schemes and keep them under constant review. With regard to new aid which Member States might be intending to grant, a preliminary procedure was established; if this procedure was not followed, the aid could not be regarded as having been properly granted. By virtue of the first sentence of Article 93(3) of the Treaty, the Commission is to be notified of plans to grant or alter aid before they are put into effect.

38 The Commission then conducts an initial review of the planned aid. If at the end of that review it considers a plan to be incompatible with the common market, it must without delay initiate the consultative examination procedure under Article 93(2). It follows from the last sentence of Article 93(3) that throughout the preliminary period the Member State concerned may not put the planned aid into effect. Where the consultative examination procedure is initiated, that prohibition continues until the Commission reaches a decision on the compatibility of the planned aid with the common market (see

24 — Case C-39/94 *SFEI and Others v La Poste and Others* [1996] ECR I-3547.

Case C-47/91 *Italy v Commission* [1991] ECR I-4145, paragraph 24). However, if the Commission has not responded within two months of notification, the Member State concerned may implement the plan after informing the Commission (Case 120/73 *Lorenz v Germany* [1973] ECR 1471, paragraph 4).²⁵

33. The Commission is required to initiate the procedure provided for in Article 93(2) not only where, following an initial examination, it considers that the aid is contrary to the Treaty, but as soon as it 'has serious difficulties in determining whether an aid is compatible with the common market. The Commission may restrict itself to the preliminary examination under Article 93(3) when taking a decision in favour of an aid only if it is able to satisfy itself after the preliminary examination that the aid is compatible with the Treaty. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to obtain all the requisite opinions and for that purpose to initiate the procedure provided for in Article 93(2)'.²⁶

34. The prohibition laid down in the third sentence of Article 93(3) has direct effect. That means that where an aid measure has

been implemented without having been notified to the Commission the persons concerned are able to rely on that provision before the national courts.²⁶ In such a case the national courts must guarantee to the persons concerned 'that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures'.²⁷

35. In that connection, a national court may be required to interpret the concept of aid referred to in Article 92 'in order to determine whether a State measure introduced without observance of the preliminary examination procedure provided for in Article 93(3) ought to have been subject to that procedure'. Although the Commission has exclusive competence — subject to review by the Court — to determine the compatibility of an aid with the common market, the same does not apply when it comes to answering the question whether an aid actually exists. In case of doubt the national court may consult the Commission to seek clarification of the question. Furthermore, the national court may or must, pursuant to Article 177 of the Treaty, refer a question to the Court for a preliminary ruling on the interpretation of Article 92.²⁸

²⁵ — Case C-198/91 *Cook v Commission* [1993] ECR I-2487, paragraph 29; cf. the earlier judgment in Case 84/82 *Germany v Commission* [1984] 1415, paragraph 13.

²⁶ — The same applies where an aid measure, although notified to the Commission, has already been implemented during the preliminary stage or — where the Commission has initiated a formal procedure — prior to the adoption of the final decision.

²⁷ — Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires et Syndicat National des Négociants et Transformateurs de Saumon v French State* [1991] ECR I-5505, paragraph 12.

²⁸ — See *SFEI and Others*, cited in footnote 24, paragraphs 49 to 51.

III — *The legal nature of the contested Commission decision*

36. As I have already mentioned, the Court of First Instance considered in its judgment that the contested measure was a decision rejecting a request for a declaration by the Commission that the French Republic had infringed Articles 92 and 93 of the Treaty by granting aid to Sécuropost.²⁹

37. That interpretation is criticised both by the Commission and by the Member States which have intervened in its support.

38. The Commission claims that the decision at issue in the present case was contained in its letter to the French Republic of 31 December 1993. The complainants were only informed that the decision had been adopted in the letter sent to them on the same day. Referring to the Opinion of Advocate General Tesouro in *Cook v Commission*,³⁰ the Commission considers that under the Article 93 procedure the only decision which it is empowered to take is a decision on the compatibility of the aid with the Treaty. There is no place, on the other hand, for an independent and separate decision rejecting a com-

plaint submitted by a competitor of the undertaking in receipt of the aid.

39. The French Government supports the Commission's view that the present case concerns a Commission decision addressed to it and not a decision rejecting the complainants' request. The Netherlands Government is of the opinion that under the scheme of the Treaty the only decisions possible are decisions which the Commission addresses to the Member States. The Spanish Government also considers that in this sphere only the Member State concerned may be regarded as the person to whom a Commission decision is addressed. The observations of the German Government — which does not expressly address that question — may also be taken to preclude the possibility of a decision being addressed to the complainants.

40. I shall begin by noting — as the Court of First Instance did in its judgment³¹ — that 'neither the Treaty nor Community legislation lays down the procedural system for dealing with complaints objecting to grants of State aid'. The Council has not yet made use of its power under Article 94 of the Treaty to 'make any appropriate regulations for the application of Articles 92 and 93'. In that regard, this area of the law is distinguished from that covered by Articles 85 and 86 of the Treaty. As we know, Regulation

29 — See paragraph 19 above.

30 — Opinion of 31 March 1993 in Case C-198/91, cited in footnote 25 ([1993] ECR I-2502, at I-2509 et seq.).

31 — Judgment cited in footnote 1, paragraph 50.

No 17 of the Council of 6 February 1962,³² on the application of Articles 85 and 86, provides in Article 3 that, as well as Member States, 'natural or legal persons who claim a legitimate interest' may also request the Commission to find that there is an infringement of Articles 85 and 86 and to require those concerned to bring such infringement to an end. If such a complaint is rejected by the Commission, that decision can be contested by the complainants by means of an action for annulment.³³

41. The absence of corresponding provisions does not of course mean that it would be impossible in the field of State aid to turn to the Commission by submitting a complaint to it. On the contrary, it unquestionably follows from the principle of proper administration that the Commission is required to examine all complaints submitted to it in respect of aid, whether real or supposed. If in the context of an initial examination pursuant to Article 93(3) the Commission reaches the conclusion that the aid is contrary to the Treaty or if it is unable to overcome all the difficulties in that regard, it is required — as I have already mentioned³⁴ — to initiate the formal procedure provided for in Article 93(2). In the context of that procedure the Commission must give the 'parties concerned' the opportunity to submit their comments. These 'parties concerned' include, as well as the undertakings in receipt of the aid, 'persons, undertakings or associations whose interests might be affected by

the grant of the aid, in particular competing undertakings and trade associations'.³⁵

42. If, on the other hand, the Commission forms the view that there is no need to initiate the procedure provided for in Article 93(2), the complainant is still not without protection. Where, without initiating the procedure under Article 93(2), the Commission finds, on the basis of Article 93(3), that an aid is compatible with the common market, that decision can, according to recent case-law, be challenged under Article 173 by the 'parties concerned' referred to in Article 93(2).³⁶ As this Court rightly explained in the grounds of its judgment, it is only in this way that those persons may secure compliance with the procedural guarantees conferred on them by Article 93(2).³⁷

43. These principles apply not only where the Commission refuses to initiate the procedure provided for in Article 93(2) on the ground that it has reached the conclusion that an aid was plainly compatible with the common market but also where it has already formed the opinion that no aid

32 — First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87).

33 — See, for example, Case C-282/95 P *Guérin Automobiles v Commission* [1997] ECR I-1503, paragraph 36.

34 — See paragraph 32 above.

35 — Case 323/82 *Intermills v Commission* [1984] ECR 3809, paragraph 16.

36 — See Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, paragraphs 26 and 27, and *Cook v Commission*, cited in footnote 25, paragraph 23.

37 — *Cook v Commission*, cited in footnote 25, paragraph 23, and Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 17.

exists.³⁸ The Commission, too has taken this view in the present case.

44. In each of the abovementioned judgments the Court of Justice considered that the content of the Commission's decision consisted in the refusal to initiate the procedure provided for in Article 93(2).³⁹ In those judgments it also considered that the contested decision was addressed to the Member State concerned, not the complainant.⁴⁰ The Court of Justice therefore ascertained in each case whether the decision was of direct and individual concern to the complainant. The question therefore arises in the present case whether the finding of the Court of First Instance that the contested measure was a decision addressed to the complainants rejecting their complaint is compatible with that case-law.

45. To my mind that question must be answered in the affirmative. As regards, first of all, the form of words employed by the Court of First Instance, it should be observed that the Court of Justice expressed itself in very similar terms in *Irish Cement v Commission*, a case decided in 1988. That case, too, concerned a letter sent by the Commission to an undertaking which had complained of an aid granted to a competitor. The Court of Justice held, in that context, that '[c]onsequently, the letter of 14

May 1985 constitutes a decision by the Commission rejecting the complaint relating to the aid granted to Quinn'.⁴¹ In that judgment it observed that the objective of the complaint could only be the opening of the procedure provided for in Article 93(2).⁴²

In those circumstances, I do not regard the actual classification given to such a decision as being of great importance.

46. On the other hand, more weight should be given to the objection that the person to whom such a decision of the Commission is addressed can only be a Member State. It does in fact seem logical that in principle a decision of the Commission concerning an aid granted by a Member States should be addressed solely to that Member State. The same is true where, as in this case, the Commission acted on the basis of a complaint and reached the conclusion that it was unnecessary to initiate the formal procedure provided for in Article 93(2). Where the Commission adopts such a decision and informs the complainant by letter that it has done so, the complainant clearly cannot challenge the letter, but only the decision itself, and then only if the conditions set out in the fourth paragraph of Article 173 are met. That was the position in *Cook v Commission* and *Matra v Commission*.⁴³

38 — This view also forms the basis of the judgment of the Court of First Instance in Case T-471/93 *Tiercé Ladbroke v Commission* [1995] ECR II-2537.

39 — The Court expressly stated this in *CIRFS v Commission*, cited in footnote 36, paragraph 26.

40 — See, for example, *Cook v Commission*, cited in footnote 25, paragraph 15.

41 — Joined Cases 166/86 and 220/86 *Irish Cement v Commission* [1988] ECR 6473, paragraph 11.

42 — Judgment cited in footnote 41, paragraph 9.

43 — *Cook v Commission*, cited in footnote 25, paragraphs 8 and 13, and *Matra v Commission*, cited in footnote 37, paragraphs 5 and 6.

If one examines the other judgments of the Court of Justice concerning the possibility that such a decision could also be addressed to the complainant, it will be found that that possibility has indeed been raised. It cannot be said with absolute certainty, however, that the Court of Justice has thus far actually recognised such a possibility. This is also true as regards *Irish Cement v Commission*. In that case the action was not directed against the Commission decision 'rejecting the complaint' but against a subsequent letter which, in this Court's view, merely confirmed the decision (which in the meantime had become final). The Court of Justice therefore dismissed the action as inadmissible and expressly left open the question whether the 'decision' (if any) contained in the second letter was of 'direct and individual concern' to the applicant.⁴⁴ It is not certain, therefore, whether in this Court's view the decision contained in the first letter was actually addressed to the complainant. In a decision delivered some years later to which I have already referred, *CIRFS and Others v Commission*, this Court construed a similar letter from the Commission to the complainants as constituting communication of a decision addressed to the French Republic, whereby the Commission refused to initiate the procedure provided for in Article 93(2).⁴⁵

47. To my mind, however, the possibility of addressing such a decision directly to the complainant should not be precluded. The

wording of the Treaty does not compel the conclusion that a Commission decision not to initiate the procedure under Article 93(3) can only be addressed to the Member State which adopted the aid measure in question. In that regard I am unable to support the view expressed by Advocate General Tesaro in *Cook v Commission* that the Commission cannot react to a complaint 'until after deciding whether the aid is compatible and its reply cannot be anything more or less than the communication of the decision concerning the compatibility of the aid'.⁴⁶

48. It is true, admittedly, that the subject-matter of the procedure before the Commission is the legality of the conduct of the Member State.⁴⁷ It should be observed, however, that in cases such as this the Member State plays a very limited role in the procedure in comparison to that played by the complainant. The French Republic did not notify the measure at issue to the Commission and therefore also did not seek a decision from the Commission. It was the complainants who, by their complaint, caused the investigation to be launched. As I have already mentioned, recent case-law confers on a complainant who is one of the 'parties concerned' referred to in Article 93(2) the right to challenge by means of legal proceedings a Commission decision refusing to initiate the procedure provided for in that article. That means — as I have yet to show — that the Commission is under an obligation to state the reasons for its decision. Whether or not the Commission satisfied

44 — Judgment cited in footnote 41, paragraph 16.

45 — Judgment cited in footnote 36, paragraphs 26 and 28. The action was considered admissible, however, since the decision included therein was of direct and individual concern to at least one of the complainants (*ibid.*, paragraph 29 *et seq.*).

46 — Opinion cited in footnote 30, at [1993] ECR I-2510.

47 — I myself considered that factor decisive in my Opinion of 17 September 1992 in *CIRFS v Commission*, cited in footnote 36 ([1993] ECR I-1148, at I-1160).

that obligation in the present case is central to the arguments in the contested judgment. It should be pointed out here and now, however, that in its letter of 31 December 1993 to the complainants the Commission set out in detail the reasons for its decision, whereas it failed to do so in the letter which it sent to the French Republic on the same day.⁴⁸ On the assumption that in the present case the Commission decision was contained in its letter to the French Republic, it is difficult to escape the conclusion that the decision does not contain an adequate statement of reasons. If, on the other hand, the decision is contained in the Commission's letter to the complainants, then in my opinion there is nothing to indicate that (contrary to first impressions) the decision was a decision addressed to the French Republic. The letter to the complainants was not accompanied by a copy of the letter to the French Republic. As far as I can see, moreover, that letter was not even mentioned in the letter to the complainants. The submission that in the present case the complainants only received communication of a decision taken in another connection therefore strikes me as far-fetched. Such a construction rings false. Furthermore, the Commission has acknowledged the 'unfortunate presentation' of its decision in the present case.

49. What seems to me to be the most natural solution, therefore, is to interpret the Commission's letter as the Court of First Instance did. In my opinion the Commission must be recognised as having the power to address decisions of the type in issue here directly to the complainant. After all, it is essentially the complainant's arguments that the Commission analyses in such a decision. Further-

more, it is principally the complainant who is concerned by the decision, since, unlike the Member State concerned, it may have an interest in instituting court proceedings against it. This approach strikes me as having the advantage of practicality.

50. Should this approach be criticised on the ground that it fails to have proper regard to the interests of the Member State concerned, my answer would be that the Commission is *empowered*, but not *obliged*, to address such a decision to the complainant.⁴⁹ If, for example, the aid measure which is the subject of the complaint was notified by the Member State concerned, it seems to me, too, more normal for the Commission to address its decision to that State. It *could* have proceeded in this way also in the present case. If it did not do so, this does not seem to me to pose any problem.

51. Even if one were not disposed to concur in that approach, it should be pointed out that persons to whom such a decision addressed to a Member State is of direct and individual concern may challenge it and that the Commission has expressly (and quite rightly) recognised that the complainants

49 — This also makes it possible to prevent the danger that *any* complainant (including, for example, those in no way affected by an aid) will be granted a right of action against a corresponding decision of the Commission. Furthermore, it is also conceivable that the Commission's obligation to investigate complaints might be limited in that it would only be obliged to do so where the complainants were 'parties concerned' within the meaning of Article 93(2) of the Treaty.

48 — On the content of this letter, see paragraph 14 above.

satisfied these conditions. In those circumstances, it would seem to me wrong to seek to have the contested judgment set aside on the sole ground that it did not properly identify the content of the decision and the persons to whom it was addressed, when there could be no doubt as to the objective of the action.

IV — *Breach of the obligation to state reasons laid down in Article 190 of the Treaty*

52. The Court of First Instance itself stated that its judgment dealt with only two of the applicants' pleas, alleging, respectively, infringement of Article 190 of the Treaty and manifest error of assessment by the Commission. The French Government has rightly observed, however, that the Court of First Instance eventually annulled the decision solely on the ground of infringement of Article 190.⁵⁰ In that regard, the Court of First Instance held, first, that the Commission's reasons were inadequate. It also considered that the Commission had infringed Article 190 by failing to take certain measures (namely to examine the complaints which the complainants had not raised but which they certainly would have raised in certain circumstances, and to give them the opportunity to express their views). I shall deal with these two aspects separately.

⁵⁰ — On this question, see paragraph 26 above. In that regard, it should be observed that in the part of its judgment where it examines the complainants' complaint alleging a manifest error of assessment the Court of First Instance raises of its own motion the question of an infringement of Article 190 and declares the corresponding part of the decision unlawful for *that* reason.

1. *Scope of the obligation to state reasons*

53. In a recent judgment the Court defined the scope of the obligations under Article 190 as follows:

'It is settled case-law that the statement of reasons required by Article 190 of the Treaty must show clearly and unequivocally the reasoning of the institution which enacted the measure so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its power of review. It is not necessary, however, for details of all relevant factual and legal aspects to be given, in so far as the question whether the statement of the grounds for a decision meets the requirements of Article 190 of the Treaty must be answered with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.'⁵¹

The Court of First Instance also started from this principle in its judgment.⁵²

54. The Netherlands Government, which interprets the contested measure as a

⁵¹ — Case C-22/94 *The Irish Farmers Association and Others* [1997] ECR I-1809, paragraph 39.

⁵² — Judgment cited in footnote 1, paragraph 52.

decision addressed to the French Republic, has pointed out in its observations that the definition of the scope of the obligation to state reasons should also take account of the interests of third parties (as those of the complainants in the present case). I must agree.⁵³ As I have already mentioned, a decision of the Commission not to initiate the procedure provided for in Article 93(2) may be challenged by the 'parties concerned' referred to in that provision.⁵⁴ The persons concerned cannot properly exercise that right, however, unless they are '[informed] of the justification for the measure adopted'. The Commission must therefore be considered to be under a duty to state the reasons on which such decisions are based, pursuant to Article 190. The German Government's opinion to the contrary, namely that such an obligation to state reasons is not to be inferred from Article 190 or from Article 93, cannot in my view be reconciled with recent case-law (with which the German Government fails to deal in its observations). Nor, for the same reason, am I able to support the opinion put forward by the Netherlands Government to the effect that, since the Commission is not under a duty, pursuant to Article 93(3), to hear the complainants (a point to which I shall return), it is also not under a duty to provide the reasons for rejecting arguments which were none the less submitted.

The fact that the Commission, for the purpose of the reasons on which its decision was

based, was accordingly required to have regard to the complainants' interests is in my opinion even more relevant to the question, which I have already discussed, as to the persons to whom the decision was addressed.

55. It was therefore indeed for the Court of First Instance to 'verify whether, in the present case, the contested decision discloses in a clear and unequivocal manner the reasoning which led the Commission to conclude that the measures complained of by the applicants did not constitute State aid within the meaning of Article 92 of the Treaty, in such a way as to make the complainants aware of the reasons for the rejection of their complaint and thus enable them to defend their rights and the Court to exercise its power of review'.⁵⁵

56. As I have already mentioned, the Court of First Instance further observed in its judgment that the judicial review which such a statement of reasons must allow was not a review of the assessment of measures already found to constitute State aid. It was, rather, a review of the interpretation and application of the concept of State aid.⁵⁶ In that regard, too, I agree with the Court of First Instance. The French Government is quite right to point out that the answer to the question whether State aid exists in a particular case may also present difficulties. Judicial review must therefore focus on whether or not establishing the existence of aid involves complex technical or economic evaluations. The Court of Justice has also acknowledged, in *SFEI and Others*, that the examination of

53 — See the earlier judgment in Joined Cases 296/82 and 318/82 *Netherlands and Leeward Paperwarefabriek v Commission* [1985] ECR 809, paragraph 19 (where the Court considered that, apart from the interest of the person to whom a measure was addressed, the interest of 'other persons to whom it is of direct and individual concern within the meaning of the second paragraph of Article 173 of the Treaty' was also deserving of protection).

54 — See paragraph 42 above.

55 — Judgment cited in footnote 1, paragraph 53.

56 — See paragraph 20 above.

the question of the existence of aid presupposes an 'economic analysis' taking into account all the relevant factors.⁵⁷ That is certainly true. None the less, I consider that the margin of discretion is considerably narrower here than when determining whether an aid is compatible with the common market, if only because the interpretation of the concept of 'aid', unlike the latter question, does not fall within the exclusive competence of the Commission.⁵⁸ That question does not need to be resolved here, as it is of no relevance to the present case. Should preference be given to the view which I have rejected, it would in any event be necessary to reach the conclusion that the statement of the reasons for the Commission's decision is even more important. As the Court of Justice held in *Germany v Council*, the '*Bremer Vulkan*' case⁵⁹ — which also concerned the classification of certain measures as aid — the requirement to state reasons must be assessed according to the circumstances of the case. According to the Court, it followed that the Commission 'had to take account of all the circumstances and all the relevant factors of the case'.⁶⁰

57. As regards the extent of the statement of reasons which the Commission was required to provide in the present case, it should admittedly be observed that the decision was taken on the basis of the informal examina-

tion carried out pursuant to Article 93(3). The Commission could not therefore be expected to analyse in its decision *all* the circumstances relevant to the present case in its decision.⁶¹ It must, on the other hand, be expected to examine and assess the arguments put forward by the complainants.

58. A number of the Member States which intervened in the proceedings claimed that, in the light of the case-law of the Court of Justice, in particular the *Lorenz* judgment,⁶² the Commission, in carrying out its preliminary examination, had only a short time in which to examine a proposal to grant aid. That fact must have an impact on the extent of the statement of reasons. That consideration is of no relevance to the present case, however. On the one hand, more than four years elapsed in this case before the contested decision was taken, and on the other hand — and this is the decisive factor — the case-law in question (and the short period of time resulting from it) is *not* applicable where a Member State has implemented planned measures without first notifying them to the Commission.⁶³ That was the position in the present case.

59. None the less, even though the statement of reasons to be provided by the Commission must therefore be subject to rigorous requirements, it appears to me that the

57 — Judgment cited in footnote 24, paragraph 61.

58 — Nor am I convinced by *Tiercé Ladbroke v Commission* (cited in footnote 38), to which the French Government refers and whence it follows (paragraph 55) that both examinations should be subject to the same criteria.

59 — Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others v Commission* [1996] ECR I-5151.

60 — Judgment cited in footnote 59, paragraphs 31 and 32.

61 — Therefore also those, for example, which would require further investigation on its part.

62 — See paragraph 32 *in fine*, above.

63 — This was established in *SFEI and Others*, cited in footnote 24, paragraph 48.

complaint raised by all the interveners in the present proceedings, namely that the Court of First Instance went far beyond what was reasonable in this context and, in essence, examined not the question whether there was an adequate statement of reasons but the question as to whether those reasons were factually correct, is to a considerable extent justified.

(1) Secondment of administrative staff

60. As regards the staff seconded to Sécuri-post by the post office, it is established, in the light of the findings of the Court of First Instance, that in their complaint the complainants had also criticised the fact that, should the need arise, Sécuri-post could dispense with the services of these employees without having to pay compensation for redundancy or dismissal. The Court of First Instance pointed out in its judgment that the Commission had admitted failing to examine that complaint in its decision. That finding is not challenged by the Commission or by the other parties to the proceedings before the Court.

61. During the proceedings before the Court of First Instance the Commission observed that in the present case this was merely a 'secondary aspect' of a complaint regarding the payment by the State of the remuneration of the staff of Sécuri-post. The Court of First Instance considered that explanation inadequate, since in its view the Commission was required to answer each of the complaints, 'if only by referring where appropriate to the *de minimis* rule'. It therefore considered that in that regard the decision did

not contain an adequate statement of reasons.⁶⁴

62. To my mind that is correct. If the requirement to state reasons in Article 190 is intended to enable the Community courts to review the legality of the decision, the Commission must be regarded as being required to comment expressly on all the points in the complaint.⁶⁵ Nor does that mean that the requirements laid down in Article 190 must be extended beyond their proper scope. If an aspect of a complaint appears to be secondary or less important, one is entitled to expect the Commission to explain, albeit summarily, that this is the case. That was not done. The statement of reasons subsequently provided by the Commission during the proceedings before the Court of First Instance cannot make good that defect.

63. Purely in the interest of completeness, it should be pointed out that this of course does not mean that the Commission must expressly answer *all* the points in a complaint. If a criticism appears to be manifestly beside the point or irrelevant it would be going too far to expect the Commission to answer it in any event. That is certainly not the case in the present situation, however. The possibility of dispensing with the

⁶⁴ — Judgment cited in footnote 1, paragraphs 61 and 62.

⁶⁵ — The question whether the Court of First Instance, in *Tiercé Ladbrooke v Commission*, cited in footnote 38, accepted a less rigorous criterion on this point (*ibid.*, paragraphs 31 to 34) may be left open. It does not appear that in the decision forming the subject of that judgment the Commission completely failed to deal with a point in the complaint.

services of certain employees without incurring heavy burdens is not a circumstance such as may be regarded as manifestly irrelevant to the question of the existence of an aid.

64. The situation is different as regards the complainants' objection that Sécuropost was not required to pay contributions to the unemployment insurance funds in respect of those employees. On that point, the Commission stated in its decision that such contributions did not need to be paid since their employment was guaranteed by their status as officials. The validity of that reasoning seems dubious. It should be pointed out, however, that Article 190 of the Treaty merely requires the Commission to explain the reasons on which a decision is based. It does not follow from Article 190 that those reasons must also be *accurate*. Examination of the *material accuracy* of a decision must be distinguished from the question as to whether that decision is adequately reasoned. The obligation to state the reasons on which a decision is based must in fact — as I have already stated repeatedly — make it possible to ascertain its material accuracy and cannot therefore be the same thing. In that regard, the assessment of the Court of First Instance is incorrect in law.

(2) Placing of premises at Sécuropost's disposal

65. As regards the placing of premises at Sécuropost's disposal by the post office, the complainants had maintained in their

complaint that Sécuropost was not required to pay any consideration. The Commission relied in its decision on the fact that Sécuropost was required to pay rent. The Court of First Instance held that the Commission had omitted to ascertain the amount of the rent paid by Sécuropost and to compare it with the rent which its competitors were required to pay in a comparable situation. The Court of First Instance considered that this constituted a defect in reasoning.⁶⁶

66. I am unable to endorse that assessment. In its decision the Commission provided the reasons for which it did not consider that the objection in question was established. That statement of reasons makes it possible to review the question whether the Commission's view was correct. It is quite clear that the obligation to pay rent precludes the argument that the premises were made available free of charge.

67. It is equally clear, of course, that the mere fact that Sécuropost was required to pay rent is not enough to preclude the possibility that the provision of the premises in question might include an element of aid. That might be the case if the rent was lower than that which its competitors were required to pay. However, *that* possibility was not raised by the complainants in their complaint. Of course, the question arises whether it was enough for the Commission to establish that rent was charged or whether, on the other hand, it should have examined more closely the amount of the rent paid by Sécuropost.

⁶⁶ — Judgment cited in footnote 1, paragraphs 64 to 66.

That, however, is an obligation arising (possibly) from Article 93 and the procedure provided for therein. It does not, on the other hand, concern the breach of the obligation to state reasons laid down in Article 190.⁶⁷ On this point, too, the assessment by the Court of First Instance is incorrect in law.

68. It must be recognised, however, that in *Germany and Others v Commission*, the '*Bremer Vulkan*' judgment, cited above, the Court of Justice also appears to have adopted an approach similar to that adopted by the Court of First Instance in the present case. In that case the Commission had adopted a decision establishing the existence of an aid contrary to the Treaty. The objective of the procedure was essentially to evaluate certain shares. The Commission considered in its decision that it was necessary to rely solely on the stock market price, since the value of shares is determined by the market. The Court of Justice, on the other hand, considered that the Commission should also have taken account of other factors (for example the 'intrinsic' value of the undertaking concerned). Since it had not done so, the Court of Justice found that '[o]n this point ... the contested act lacks an adequate statement of reasons'.⁶⁸ It cannot be denied that in that case, too, judicial review centred essentially on the material accuracy of the decision and not on the requirement to state reasons as such.

(3) Maintenance of vehicles

69. The precise content of the objection raised by the applicants in their complaint relating to the maintenance of vehicles is not apparent from the judgment of the Court of First Instance.⁶⁹ According to the Commission's position, as stated in the judgment, the complainants had objected that Sécupost's vehicles were maintained by the Service Nationale des Ateliers et Garages des PTT (national workshops and garages department of the post office, hereinafter 'SNAG'). In that regard, the Commission pointed out in its decision that SNAG invoiced Sécupost for all the services provided and for that purpose used an invoicing system similar to that used by private garages. The Court of First Instance considered that the Commission had failed to answer the complainants' objection, since it had not examined whether or not the rates charged disclosed the existence of State aid.⁷⁰

70. On this point, too, I take the view — as does, for example, the Netherlands Government — that the Court of First Instance reviewed not the observance of Article 190 but rather the material accuracy of the reasons put forward by the Commission. In that regard, reference should be made to the observations which I made when discussing the making available of premises.⁷¹

67 — On this point, see also paragraph 78 et seq., below.

68 — Judgment cited in footnote 59, paragraphs 28 to 37.

69 — See paragraph 36 of the judgment cited in footnote 1; see also paragraph 42 thereof.

70 — Judgment cited in footnote 1, paragraphs 67 and 69.

71 — See paragraphs 66 to 68 above.

(4) Loan of FF 15 000 000

71. As regards the loan of FF 15 000 000 to Sécüripost, the Commission stated in its decision that the rate of interest applied was equal to half a percentage point over the bank base rate. It inferred from this that the complainants' objection should be rejected, since the loan represented a commercial transaction. The Court considered that 'the fact that the transaction was of a commercial nature is not in itself sufficient to show that it does not amount to State aid within the meaning of Article 92 of the Treaty, since such a transaction may none the less be effected at a rate which gives Sécüripost a special advantage by comparison with its competitors'. In that regard, the decision was inadequately reasoned.⁷²

72. On this point, too, the Court of First Instance did not in my opinion review compliance with Article 190 but the material accuracy of the decision. The Commission stated the reasons which had led it to conclude that the loan in issue did not represent an aid. Whether or not these reasons were accurate is another matter. If, for example, the complainants were in a position to show that the rates normally applied on the market for such a loan were in reality substantially higher than those charged to Sécüripost the statement of reasons provided by the Commission in its decision would be invalid. However, this is not a question of the obliga-

tion to state reasons, but a question of the material validity of the reasons.

(5) Prices charged by Sécüripost to the post office

73. The complainants maintained in their complaint that the agreements concluded between the post office and Sécüripost, particularly those relating to money transportation, had provided for a rate substantially higher than that normally charged in that sector. In its decision the Commission undertook a comparison between the rates charged by Sécüripost to the post office and those charged to Casino shops. The Court of First Instance observed in its judgment that the Commission based its comparison solely on information relating to 1993, without attempting to justify or clarify its decision to do so. In the absence of any details regarding the years 1987 to 1992, the Court of First Instance considered that 'it [did] not have at its disposal the requisite information enabling it to review the validity of the contested decision'. According to the Court of First Instance, the decision contained inadequate reasons in that respect and the Court was required to raise this matter of its own motion.

74. If one examines the corresponding passage in the Commission decision, it will be seen that the method employed in comparing the prices is not at first sight very easy to understand. It should be pointed out, however, that the Court of First Instance does

⁷² — Judgment cited in footnote 1, paragraph 72.

not criticise the contested decision for being inadequately reasoned in *that* regard.⁷³ The fact remains that the Commission relied exclusively on the figures relating to 1993.

75. The view might be taken that the Commission therefore dealt with the objection in question only for 1993 but otherwise failed to respond to it. There would thus be no statement of reasons for the years 1987 to 1992 to indicate why the Commission concluded that no State aid existed during that period. Such an approach is not without merit. To my mind, however, a different interpretation is to be preferred. If the Commission based its conclusion on the 1993 figures to which it referred in its decision, it must be inferred that it considered those figures to be decisive. In other words, the Commission apparently believed that the figures relating to 1993 were representative of the entire period to be considered. Whether that was in fact the case, however, is a question of the material accuracy of the decision and not the statement of reasons on which it was based. On this point, too, the criticisms made by the Commission and the other parties to the proceedings are therefore well founded.⁷⁴

73 — That would appear to be due to the fact that the complainants declared during the proceedings at first instance that they were now able to grasp the calculations, as a result of the explanations given by the Commission in its defence, but that they none the less maintained their complaint (alleging a manifest error of assessment), particularly as regards the year chosen by the Commission (judgment cited in footnote 1, paragraph 46).

74 — In *Germany and Others v Commission*, the 'Bremer Vulkan' case, to which I have already referred on a number of occasions (see footnote 59), the Commission also appeared not to have stated the reasons for choosing the relevant time for the evaluation of the aid measure (the provision of a guarantee by the *Land* Bremen). The Court of Justice held, however, that the Commission had 'clearly' chosen this point in time because that was the time when the competent authority had carried out 'the final assessment of the factors and circumstances on the basis of which it gave the guarantee. On this point the contested act contains an adequate statement of reasons' (*ibid.*, paragraph 30).

76. I shall merely observe as an incidental point that the fact, emphasised by the Court of First Instance, that in this part of its decision the Commission merely repeated the explanations given by the French Government strikes me as irrelevant in this context. All that is required here is to ascertain whether sufficient reasons were given. That is the case in my opinion. The fact that the Commission did not prepare the reasons itself, but took them over from the French Government, is of no importance, since it is clear that the Commission adopted those explanations.

77. It should be observed, however, that the difference in prices for 1993 established by the comparison was higher than 10%. According to the findings of the Court of First Instance — which are binding on the Court of Justice in its appellate capacity — the prices paid to Sécuropost by the post office also showed a steady fall, but in 1993 were still more than 10% higher than those paid by comparable customers. That means that the price differences to which the complainants refer for the previous years were even greater. Nor, according to the Court of First Instance, did the Commission deny that those price differences existed during the years 1987 to 1992.⁷⁵ Having regard to those circumstances, the Commission could not, in my opinion, conclude solely on the basis of the figures for 1993 that no State aid had existed. That, on this point, constitutes a (manifest) error of assessment, as the complainants also alleged in the proceedings

75 — Judgment cited in footnote 1, paragraph 74.

before the Court of First Instance. Since the decision of the Court of First Instance therefore appears to be materially well founded in that regard, in spite of the error which that Court committed — the decision discloses a (manifest) error of assessment rather than a lack of reasons — the appeal cannot succeed.⁷⁶

2. *Procedural aspects*

78. The Court of First Instance considered that where the Commission decides not to initiate the procedure provided for in Article 93(2) of the Treaty but has not first given the complainant the opportunity to comment on the results of the investigation it is 'under an automatic obligation to examine the objections which the complainant would certainly have raised if it had been given the opportunity of taking cognisance of that information'.⁷⁷

79. The Netherlands Government has pointed out the difficulties which such an approach entails. It would in fact be extremely difficult for the Commission to carry out the task assigned to it by the Court of First Instance. That is so in particular where the Commission has only a limited

time in which to carry out the preliminary examination provided for in Article 93(3).⁷⁸

80. In my view, however, there is no need to go further into that question. As the French Government has rightly pointed out, that question concerns the scope of the obligations which Article 93 and the procedure laid down therein impose on the Commission. On the pretext of reviewing compliance with Article 190 the Court of First Instance, according to that Government, reviewed compliance with a new procedural rule postulated by the Court itself. I must subscribe to that point of view. The obligation to state reasons which is laid down in Article 190 certainly does not imply an obligation to answer arguments which have not been put forward. The corresponding criticisms of the parties to the proceedings are therefore well founded.

81. The Court of First Instance also put forward the proposition that the obligation to state reasons in Article 190 might in certain circumstances require the Commission to allow a complainant to make his views known during the Article 93(3) stage and to undertake an exchange of views and arguments ('un débat contradictoire').⁷⁹

82. It is impossible to see precisely what status should be attributed to this consideration

⁷⁶ — See, for example, Case C-320/92 P *Finsider v Commission* [1994] ECR I-5697, paragraph 37.

⁷⁷ — Judgment cited in footnote 1, paragraph 66. See also paragraph 72 of the judgment, which refers to paragraph 66.

⁷⁸ — On this point, see paragraph 58 above.

⁷⁹ — Judgment cited in footnote 1, paragraph 78.

in the context of the reasons given by the Court of First Instance. The introduction to the paragraph in question includes a word ('moreover') which may lead to the conclusion that it is more in the nature of an incidental consideration. If it were in fact a non-essential ground, the criticisms relating to it could of course not result in the judgment being set aside and would therefore be ineffectual.⁸⁰ Since the conclusion reached by the Court of First Instance, which is set out in paragraph 80 of the judgment, follows almost immediately after this passage, however, and refers to *all* of the foregoing, it must no doubt be accepted that that reasoning of the Court of First Instance is not a merely ancillary consideration.

83. As regards the substance, it is quite obvious here, too, that the Court of First Instance cannot base itself in that regard on Article 190, but goes far beyond the requirements of that provision. It essentially implies that this is so where it states that the obligation which it postulates 'constitutes a necessary extension of the Commission's obligation to deal diligently and impartially with its inquiry into the matter by eliciting all such views as may be necessary'.⁸¹ Thus what is examined is not whether the Commission has properly provided the reasons for its decision but whether it has complied with its procedural obligations.

84. Since on this point (too) the Court of First Instance based its decision solely on an

infringement of Article 190, it would not normally be necessary to consider whether the proposition which it expounds at this point may none the less be considered correct for other reasons. I consider that such an examination is advisable in the present case, however. On the one hand, all the parties to the appeal proceedings have gone into that question in considerable detail. On the other hand, it should be observed that the Court of First Instance itself clearly wished, through this firmly expounded proposition, to provoke a debate and to give a new direction to the case-law.

85. To speak of a new direction is justified, therefore, because according to the case-law thus far an *obligation* to hear the persons affected by an aid measure exists *only* in the context of the procedure provided for in *paragraph (2)* of Article 93. As an instance of that case-law, it will suffice to quote the findings of the Court of Justice to that effect in *Matra v Commission*:

'As the Court has already held ... the preliminary stage of the procedure for reviewing aid under Article 93(3) of the Treaty, which is intended merely to allow the Commission to form a *prima facie* opinion on the partial or complete conformity of the aid in question, must be distinguished from the examination under Article 93(2) of the Treaty. It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an

80 — See, for example, Case C-395/95 P *Geotronics v Commission* [1997] ECR I-2271, paragraph 23.

81 — Judgment cited in footnote 1, paragraph 78, *in fine*.

obligation on the Commission to give the parties concerned notice to submit their comments.’⁸²

‘The Treaty does not, on the other hand, lay down any such obligation where the Commission is able lawfully to restrict itself to finding that aid is compatible in the preliminary stage provided for by Article 93(3) of the Treaty.’⁸³

The Court of First Instance itself confirmed that case-law again in a recent decision.⁸⁴

86. As all the parties to the appeal proceedings have rightly observed, the Court of First Instance failed to have sufficient regard in its judgment to this fundamental distinction between the two stages of the examination.⁸⁵ Admittedly, the Treaty does not prohibit the Commission from hearing the views of an interested party at the stage of the preliminary examination procedure provided for in Article 93(3) or from passing on to such a party — while observing the legitimate requirements of confidentiality — the com-

ments sent to it by the Member State concerned, as the Commission, according to the Court of First Instance, has already done in certain cases.⁸⁶ The Commission should be left to decide, in the normal framework of its discretion, whether or not it wishes to make use of that possibility. An *obligation* to hear the comments of the parties concerned, however, only exists in the procedure provided for in Article 93(2).

87. This distinction between the two stages of the procedure is also correct in this context. The preliminary examination procedure is designed to allow the Commission to form a (provisional) opinion, within a short time, as to whether an aid measure is or is not compatible with the Treaty. If the Commission were placed under a duty, in this context, to consult the parties concerned, or indeed to undertake an exchange of views and arguments with them, that objective would be defeated. The practicability of the preliminary examination procedure — and in particular its completion in a short time — would then be called in question.

88. The judgment of the Court of First Instance is clearly based on the intention to protect the interests of the complainants and other parties concerned (within the meaning of Article 93(2)) by requiring the Commission to hear them ‘in certain circumstances’ at the stage of the preliminary examination procedure. The Court of First Instance also very rightly observes, in that context, that complainants generally encounter great difficulties in such a situation in gathering the

82 — Judgment cited in footnote 37, paragraph 16.

83 — Judgment cited in footnote 37, paragraph 53.

84 — See judgment of the Court of First Instance (Third Chamber, Extended Composition) of 22 October 1996 in Case T-266/94 *Foreningen af Jernskibs-og Maskinbyggerier i Danmark, Skibsværftsforeningen and Others v Commission* [1996] ECR II-1399, paragraph 257. In the present case the contested judgment was delivered by the Court of First Instance (Fourth Chamber, Extended Composition).

85 — See, in the same sense, P. J. Slot: ‘De concurrentie waakt. Het aanvechten van steunmaatregelen’, in *NJB* 1996, p. 797, at p. 800.

86 — Judgment cited in footnote 1, paragraph 79.

evidence necessary to support their complaint. The Court's intention to protect these persons is therefore perfectly legitimate. In my opinion, however, the new obligation which the Court of First Instance places on the Commission is not necessary in order to attain that objective.

obtain all the requisite opinions and for that purpose to initiate the procedure provided for in Article 93(2).'⁸⁷

In that regard, it is for the Commission 'to determine, subject to review by the Court, on the basis of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the aid warrant the initiation of that procedure'.⁸⁸

89. The recent case-law of the Court of Justice already provides a means of guaranteeing the rights of the parties concerned in a way which is as simple as it is effective. In that regard, the Court of Justice stated in *Cook v Commission*:

'As the Court pointed out in its abovementioned judgment in *Germany v Commission* (at paragraph 13), the procedure under Article 93(2) is essential whenever the Commission has serious difficulties in determining whether an aid is compatible with the common market. The Commission may restrict itself to the preliminary examination under Article 93(3) when taking a decision in favour of an aid only if it is able to satisfy itself after the preliminary examination that the aid is compatible with the Treaty. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to

90. If the Commission is therefore considered to be required in such a situation to initiate the procedure provided for in Article 93(2), which requires consultation with the parties concerned, the rights of that category of persons will be sufficiently taken into account. Where at the close of the preliminary examination the Commission still has doubts as to the compatibility of an aid measure with the Treaty it is required to initiate the procedure provided for in Article 93(2). Where, on the other hand, it has become convinced that the measure is compatible with the Treaty, it may decide not to initiate that procedure. In that case it must naturally set out its reasons in order to enable the parties concerned to challenge the decision, where appropriate, before the Community courts.

87 — Judgment cited in footnote 25, paragraph 29 (as regards the *Germany v Commission* judgment to which the Court refers, see paragraph 25 above); see, in the same sense, Case T-49/93 *SIDE v Commission* [1995] ECR II-2501, paragraph 58.

88 — Judgment cited in footnote 25, paragraph 30; see, in the same sense, *SIDE v Commission*, cited in footnote 87, paragraph 59.

91. That approach also avoids certain inconsistencies concerning the procedural regime to which the view of the Court of First Instance would inevitably lead. The French Government has rightly observed that, in the context of the procedure provided for in Article 93(2), it is considered sufficient, for the purpose of consultation, that the Commission should invite the parties concerned, by an announcement in the Official Journal, to submit their comments, whereas the Court of First Instance requires, in the context of the preliminary examination procedure, that the Commission should communicate to the complainant in person the explanations provided by the Member State concerned, in order to receive the complainant's comments. More important still is the fact, pointed out by the Commission, that it is impossible to see what in the view of the Court of First Instance constitutes the difference between circumstances which justify initiating the procedure provided for in Article 93(2) and those which require the Commission to undertake an exchange of views and arguments with the complainant in the context of Article 93(3).

92. As regards the present proceedings, it should be observed that the complainants, by their first plea, claimed that the Commission had been wrong to decide not to initiate the procedure provided for in Article 93(2).⁸⁹ Having regard to the circumstances of the case as described by the Court of First Instance, it appears to me that there is no doubt that this plea was well founded. The explanations provided by the Commission during the procedure clearly disclosed that it had encountered 'serious difficulties' in the course of its examination. Accordingly, it

was not entitled to extend the preliminary stage until those difficulties appeared to it to have been overcome, but was required to initiate the procedure provided for in Article 93(2). Furthermore, even having regard to the fact that the complainants subsequently supplemented their initial complaint and that the Commission adopted an initial decision on 5 February 1992, which was withdrawn shortly afterwards, the time which it needed to take cannot be regarded as reasonable for a *preliminary examination* procedure. I should have found it more convincing if the Court of First Instance had based the annulment of the Commission decision on this plea rather than granting complainants a new procedural right based on Article 190.⁹⁰

V — Other aspects

93. The Netherlands Government has claimed in its observations that the Court of First Instance itself failed to provide adequate reasons for its judgment, so that the judgment should also be set aside for that reason. In that regard, the Netherlands Government refers to the question of the admissibility of the action and also to the finding of the Court of First Instance that the circumstances of the case 'reinforce the Commission's obligation to furnish a statement of reasons'. As I have already expressed my views on these aspects in their respective contexts,⁹¹ there is no need to examine this objection separately.

⁸⁹ — See paragraph 17 above.

⁹⁰ — See, in the same sense, V. Sottili: 'Partecipazione ai procedimenti comunitari di controllo nel settore della concorrenza', in *Foro Amministrativo* 1996, p. 2812 et seq., at p. 2824.

⁹¹ — See paragraphs 36 to 51 (in particular paragraph 51) and paragraphs 90 and 92.

VI — *Summary*

94. To sum up, it may therefore be found that the majority of the objections to the grounds on which the Court of First Instance annulled the Commission's decision must be upheld, in so far as it is thereby alleged that the corresponding considerations of the Court of First Instance find no basis in Article 190 of the Treaty. It follows that the contested judgment is vitiated by errors of law. In my view, however, the Court of First Instance rightly found that the Commission had failed to provide reasons in connection with the secondment of administrative staff to Sécupost.⁹² As regards the prices which Sécupost charged the post office, what is established is not a failure to provide reasons but a (manifest) error of assessment affecting the Commission decision.⁹³ Since these two points are sufficient to render the Commission decision

defective and to justify the judgment of the Court of First Instance annulling it, the appeal — despite the fact that a large number of the pleas raised in it are well founded — cannot, in the result, be upheld.

95. The decision as to costs follows from the first paragraph of Article 122 and Article 69 of the Rules of Procedure of the Court of Justice. Since the Commission's appeal is unfounded, but the applicants at first instance have not taken part in the appeal proceedings and have therefore not asked for costs, Article 69(2) is not applicable. In my view, in such a situation — which is quite unusual — the Commission must be ordered to bear its own costs, in accordance with the legal principle expressed in the third subparagraph of Article 69(5). The Member States which have intervened in the proceedings must bear their own costs, pursuant to Article 69(4).

Conclusion

96. I therefore propose that the Court dismiss the appeal and order the parties to bear their own costs.

⁹² — See paragraphs 60 to 63 above.

⁹³ — See paragraph 77 above.