OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 19 January 1988 *

Mr President,
Members of the Court,

A — Facts of the case

1. The two joined cases on which I propose to give my Opinion today are concerned with whether the Commission of the European Communities (the defendant) was entitled to prohibit the Kingdom of Belgium from granting investment aid to Glaverbel SA (the applicant in Case 72/87) through one of its regional bodies, the Exécutif régional wallon (Walloon Regional Executive), the applicant in Case 62/87.

2. During 1982 and 1983 Glaverbel SA carried out a programme of investments totalling BFR 1 200 million at its factory at Moustier in order to renovate a flat-glass production line, modernize another, and expand the production capacity of a line for pyrolytically coated glass. In order to assist those investments the Belgian State offered Glaverbel, subject to the prior approval of the European Economic Community, the grant of an interest subsidy, a further subsidy and an exemption from land tax pursuant to a Law of 17 July 1959, representing in all an equivalent net subsidy of 5.8% of the investments made. In November 1984 a definitive undertaking to grant the aid was given. In November 1985 the Belgian Government informed the Commission of its intention to grant those investment aids.

3. In the course of the procedure which was then opened to examine the aid, observations were submitted by the Belgian Government, the governments of two other Member States, an industry federation, a manufacturing group in the sector concerned and the assisted undertaking itself.

4. By a decision of 3 December 1986 [1] the Commission of the European Communities concluded that the proposed investment aid should not be granted. It maintained that the proposed aid would adversely affect trade between Member States and would distort competition. Thus, according to Article 92 (1) of the EEC Treaty such aid was fundamentally incompatible with the common market; the conditions for an exemption under Article 92 (2) and (3) thereof were, furthermore, not satisfied.

5. The Exécutif régional wallon, which is now the body responsible for promoting the regional economy in the Walloon region of Belgium, and Glaverbel SA itself, consider that decision illegal. As regards the substance, they complain that Article 92 (1) of the EEC Treaty was wrongly applied and the exemptions provided for in Article 92 (3) (b) and (c) were not applied; they also complain that the obligation under Article

* Translated from the German.

1 — Official Journal 1987, L 77, p. 47.

190 to state the reasons on which a decision is based has been disregarded in each case.

6. In addition, the Exécutif régional wallon submits that the Commission infringed its right to be given a fair hearing.

7. The *applicants* therefore claim that the defendant's decision of 3 December 1986 should be declared void and that the defendant should be ordered to pay the costs.

8. The *defendant* claims that the applications should be dismissed as unfounded and the applicants ordered to pay the costs.

9. The defendant considers its decision of 3 December 1986 to be lawful; it submitted some further observations to explain that decision.

10. I propose in the course of my Opinion to examine the disputed decision and various points of the parties' submissions. For the rest, reference should be had to the Report for the Hearing.

B — Discussion

I — *Admissibility*

11. *(1)* The admissibility of the application by Glaverbel SA cannot be disputed. As the prospective recipient of the contested aid the company is directly and individually affected by the defendant's decision for the purposes of the second paragraph of Article 173 of the EEC Treaty.

12. *(2)* In principle, the admissibility of the application of the Exécutif régional wallon cannot be called in question either. It, too, must be regarded as a legal person within the meaning of the second paragraph of Article 173 of the EEC Treaty. As the body now competent to grant the contested subsidy in Belgium, it is directly and individually affected as well.

13. However, that is not true of all the objections which it has raised. Although vested with sovereign powers, an organ of a Member State may not, even if it performs State functions, be regarded as a Member State for the purposes of the first paragraph of Article 173 of the EEC Treaty. Therefore, as a legal person within the meaning of the second paragraph of that article, it must show that it has an interest in bringing proceedings. [2] The legal interest of the Exécutif régional wallon is clearly not open to doubt as far as the substantive objections are concerned; however, as regards the objection that the right to a fair hearing was infringed by the Commission in the administrative procedure, the Exécutif régional wallon has not satisfied those requirements. The Commission's decision was not addressed to it, nor did it take part in the administrative procedure mentioned above, not even by submitting observations. Thus none of its rights can have been infringed in the administrative procedure. In this connection the question may be left open whether the Kingdom of Belgium, as the addressee of the decision, could have complained of any infringement of Glaverbel's right to a fair hearing; since the Exécutif régional wallon cannot in any event be regarded as a Member State for the purposes of the first paragraph of Article 173 of the EEC Treaty, the objection concerning infringement of the right to a fair hearing, which it alone has raised, cannot be considered admissible.

2 — See the judgment of 11 July 1984 in Case 222/83 *Municipality of Differdange and Others* v *Commission* [1984] ECR 2889, at p. 2896.

II — *Substance*

14. In examining the merits of the application I propose to follow the order in which the substantive objections are put forward and to consider at the same time the objection that the statement of reasons provided is inadequate with regard to Article 190 of the EEC Treaty, since in this instance the substantive and procedural objections are inseparable.

1. *Application of Article 92 (1) of the EEC Treaty — Existence of aid*

15. The plaintiffs begin by denying that any aid within the meaning of Article 92 (1) of the EEC Treaty is in evidence, since in relation to the output to be promoted the aid is insignificant and thus incapable of distorting competition or affecting trade between Member States.

16. It should first be noted that the proposed subsidy, amounting to 5.8% of the investment costs of BFR 1 200 million, would relieve the recipient of part of the investment costs which it would normally have to bear, to the extent of about BFR 70 million.[3] Even if it must be acknowledged that in the context of the rules on competition laid down in Article 85 of the EEC Treaty the Court of Justice has approved the Commission's practice of exempting from the prohibition laid down in Article 85 undertakings' restrictions on competition having no appreciable effect on competition or on trade between Member States, I do not consider it appropriate to transpose that trend to the prohibition on aid laid down in Article 92 of the Treaty. Neither the wording of the relevant provisions nor the previous decisions of the Court of Justice[4] indicate the existence of such an exception to the fundamental prohibition of aid. Since State aid upsets the undistorted competition envisaged by the EEC Treaty and since Member States are obliged by Article 5 thereof to facilitate the achievement of the Community's tasks, it is indeed justified for a more stringent criterion to be applied to the conduct of Member States than to that of undertakings. Moreover, in paragraphs (2) and (3) Article 92 contains a more refined system of exemptions than is provided for by, for example, Article 85 (3) of the Treaty: thus, under Article 92 (2), some forms of aid are fundamentally compatible with the common market and under Article 92 (3) (a), (b) and (c) some forms may be considered by the Commission to be compatible with the common market. In addition, the Council, acting on a proposal from the Commission, may, in accordance with Article 92 (3) (d), declare other forms of aid permissible, that is to say aid which is not in principle compatible with the substantive provisions of Article 92.

17. In view of those wide-ranging exemptions it cannot be assumed that there are still more, unwritten, derogations from the prohibition of aid. For those reasons the argument that it is only 'appreciable' impediments to competition and trade within the Community which are covered by Article 92 of the EEC Treaty cannot be accepted.

18. Likewise, the Commission Decision of 17 June 1975,[5] under which aid pursuant to the Belgian Law of 17 July 1959 may be granted only if 'individual significant cases' are notified in advance to the Commission, cannot be construed as meaning that the Commission attaches to the concept of

3 — That is about ECU 1.6 million at the exchange rate prevailing on 28 November 1986; see EC Bulletin 11/86, p. 144. The contested decision is dated 3 December 1986.

4 — See in particular the judgment of 17 September 1980 in Case 730/79 *Philip Morris Holland BV* v *Commission* [1980] ECR 2671.

5 — Official Journal 1975, L 177, p. 13.

'appreciable' effects, in connection with Article 92 of the EEC Treaty, as much importance as the applicants claim. That decision could refer only to the duty of the Kingdom of Belgium to provide information, without indicating the substantive criteria by which the lawfulness of aid is to be assessed. Notwithstanding all the powers vested in the Commission in procedures for the examination of aid, including its discretionary powers, those criteria are set out in Article 92 of the EEC Treaty and the Commission is not permitted to depart from them.

19. In any event, should it be decided, contrary to the opinion expressed above, to attach any material significance to the aforesaid decision, the aid at issue here would fall under the first indent of Article 2, read in conjunction with the second indent of Article 1, and would therefore have to be treated as 'appreciable'.

20. Since the defendant points out that the manufacturer which is to receive the aid exports about 50% of its flat-glass output to the other Member States and 20% to non-member countries and that the remaining 30% is sold or processed within the Benelux Economic Union, that is to say an area covering three Member States of the Community, it is indisputable that the manufacturer is engaged in intra-Community trade. If that manufacturer is relieved of investment costs which it would normally have had to bear and of which its unaided competitors are not relieved, it is perfectly obvious that its competitive position is thereby improved and that competition within the common market is thus distorted. In view of the volume of products exported by the manufacturer in question, it may further be supposed that trade within the Community is adversely affected. In that connection, it should be pointed out that the proposed recipient of the aid is in competition with other manufacturers, not only as regards the products covered by the specific investments in question but also as regards its entire range of products. It is thus irrelevant whether the specific product promoted by such investment competes with products of other manufacturers in the Community; the crucial question is whether a manufacturer's financial position as a whole is improved with the result that he could, for example, offer products not actually affected by the subsidy at more favourable prices than his competitors.

21. That initial conclusion is not shaken by the fact that the defendant made certain evaluations in this connection which were possibly not warranted by the facts of the case. The defendant has in fact explained that the difficulties in the flat-glass industry due to stagnant demand and under-utilization of capacity had had an adverse effect on the company finances and led to job cuts and plant closures. It also estimated that between 1982 and 1984 unused capacity in the Community of Ten in that sector ranged from about 10% to 16% of total capacity.

22. The statements about the utilization of capacity were not fundamentally attacked by the applicant, and certain divergences have to be accepted in view of the methods used for determining capacities. On the other hand, the defendant's view that a rate of capacity utilization of between 84% and 90% should be considered low is immaterial in this case; if those figures had represented a low rate of utilization, then the

defendant's decision would not be open to challenge; if, on the other hand, they represented a normal or even a high rate of utilization, this would only demonstrate that the granting of aid would be superfluous and that the defendant was therefore even more justified in refusing to allow it. Furthermore, the observations submitted by the applicant Glaverbel SA in the administrative procedure indicate that it, too, was obliged to close down certain areas of production. Indeed, the conduct of the assisted undertaking suggests that there was no need for aid, since it had already carried out the investments in question in 1982 and 1983 when the Belgian State had made certain promises regarding the assistance measure but no binding commitment on the part of the Belgian State and in particular no consent from the defendant had been forthcoming. The investment project could therefore have been carried out on the sole basis of market conditions, so that there was no need for State aid at all. If, however, the aid were granted now, it would only affect the future and improve the general financial position of the recipient undertaking but it could no longer be assigned to a specific use.

23. The defendant has thus rightly found the proposed Belgian measure to be an aid scheme, and has indeed given adequate reasons for doing so, especially if allowance is made for the fact that the parties were fully informed of the circumstances both of the undertaking itself and of the economic sector in question. The fact that the defendant may have included incorrect or even superfluous observations in its decision cannot adversely affect the validity of the decision, inasmuch as the factually correct part of the statement of reasons is sufficient to justify the decision. That is so in this case because the defendant has demonstrated that the projected aid fits the criteria laid down in Article 92 (1).

2. *Article 92 (3) (c) of the EEC Treaty*

24. The next objection relates to the fact that the defendant has not granted an exemption from the prohibition of aid on the basis of Article 92 (3) (c) and has not supplied a proper statement of the reasons for that refusal.

25. The first point to be made about this objection is that the defendant was right to proceed on the principle that in order to ensure the proper functioning of the common market and the attainment of the goals laid down in Article 3 (f) of the EEC Treaty, the exemptions from Article 92 (1) thereof must be construed restrictively in any examination of a provision regarding aid or an individual aid scheme. Adhering to that fundamental view the defendant stated that the renovation of a 'float line', which must be carried out every six to nine years, must in principle be considered a replacement investment, the cost of which is an element of the operating costs. It was perfectly normal and in the interests of the producer itself that it should use the most modern and economic techniques and materials in order to reduce its running costs. Consequently, aid for the periodic renovation of a float line did not satisfy the requirements of the development of a sector of the economy; it would necessarily affect trading conditions adversely, and to an extent contrary to the common interest within the meaning of Article 92 (3) (c) of the EEC Treaty.

26. In assessing whether those arguments offer sufficient support for the refusal to grant an exemption from the general prohibition of aid it should first be noted that consent to an exemption of that kind lies within the Commission's discretion.

That is so even though, once it has been established that the case falls within the scope of Article 92 (1) of the EEC Treaty, consideration must be given to the question whether the exemptions under Article 92 (3) thereof may apply.[6]

27. The exercise of that discretion is subject only to limited review by the Court. If the conditions set out in Article 92 (3) of the EEC Treaty are satisfied, the Commission may declare the aid compatible with the common market; there is, however, no legal right to the grant of the exemption. That is clear from the fundamental prohibition of aid laid down in Article 92 (1) of the Treaty.

28. The defendant's argument that the costs of the periodically necessary renovation of a flat-glass plant, being an investment in the replacement of a capital asset, in principle form part of an undertaking's operating costs is indisputable; periodic renovation using the most modern and productive techniques and materials must be regarded as a perfectly normal economic procedure. Such investment is normally carried out without State intervention; this rules out the possibility of regarding the projected State subsidy as facilitating the development of an economic sector.[7]

29. Since the defendant has thus set out the grounds on which it considers that one of the two cumulative conditions in Article 92 (3) (c) of the EEC Treaty is not fulfilled, it no longer had to examine the second criterion. None the less, in a manner which is perhaps not fully understandable on first reading, the defendant examined whether the aid would adversely affect trading conditions to an extent contrary to the common interest. Since that examination was unnecessary, as mentioned above, then, even if some of the defendant's arguments were incorrect, the legality of the refusal to grant an exemption would not thereby be impaired.

30. Since the applicant Glaverbel itself submitted in the administrative procedure that in the past numerous plants producing flat glass have had to be closed down and since it is also indisputable that even after those closures the remaining surplus capacity within the Community still amounted to between 10% and 16%, the defendant's view that the proposed aid would adversely affect trading conditions to an extent contrary to the common interest, even if the investments did entail technical innovations, cannot be rebutted. Since the intended recipient of the aid exports a large proportion of its total output, the subsidy alters trading conditions in relation to the situation which would prevail if no aid was granted; in view of the fact that capacity in this industrial sector[8] of the Community is still only partially utilized, even after the closure of numerous plants, a unilateral aid measure of a single State cannot be in the common interest because the inevitable consequence would be that other undertakings in other Member States would have to receive comparable aid in order to maintain their competitive position *vis-à-vis* the assisted undertaking. Here again, there is no need for a detailed examination of the

6 — See the judgment of 14 October 1987 in Case 248/84 *Federal Republic of Germany* v *Commission* [1987] ECR 4013.

7 — See the judgment in Case 730/79, quoted above, at paragraph 23 *et seq.*

8 — See the statistics set out in the statement of the GEPVP in the last column of the table on page 4 and the second column of the first table on page 6. These point to a surplus capacity of 20 to 25% between the saleable capacity and the actual sales.

extent to which the assisted product competes with other products since, as was shown above, regard must be had to the general financial situation of the assisted undertaking, which would undoubtedly be eased by the proposed aid.

31. As regards the applicants' further objection that the defendant in its decision ignored the fact that the proposed aid envisaged a restructuring of the undertaking, it must be conceded that the term 'restructuring' does not appear in the decision. But the same is true of the documents which the Kingdom of Belgium and the applicant Glaverbel SA submitted to the Commission. In substance, however, the defendant's statements concerning the technological innovations associated with the investment deal in part with the question of restructuring. It should also be pointed out that, according to the applicant Glaverbel, the measures for restructuring the undertaking were essentially completed by 1983 and predated the investment which was to be promoted by the contested aid.

32. The defendant was therefore justified in rejecting the request for an exemption from the general prohibition of aid and it has given adequate reasons for doing so. Consequently, this objection of the applicants cannot be upheld.

3. *Article 92 (3) (b) of the EEC Treaty*

33. A further objection made by the applicants is that the defendant did not comply with its obligation under Article 190 of the EEC Treaty to provide a statement of reasons when it declared that the aid was manifestly not intended to promote the execution of an important project of common European interest.

34. With regard to this undoubtedly terse statement of reasons the defendant submitted in the procedure before the Court that a project could be designated as being of common European interest if it was one of the European transnational programmes and was supported jointly by the various governments acting in concert or formed part of a campaign agreed between the Member States. The renovation or modernization of one of the 25 flat-glass production lines in the Community could not be regarded as a project of that nature.

35. The Court has consistently held that the statement of reasons for a decision adversely affecting an undertaking must be such as to allow the Court to review its legality and to provide the undertaking concerned with the information necessary to enable it to ascertain whether or not the decision is well founded.[9]

36. In principle, the obligation to provide reasons for a decision must depend on the context in which that decision is adopted and on the parties' submissions in the administrative procedure. It is not necessary for the Commission, in adopting a decision about which the parties are fully informed, to go into every conceivable detail,[10] even if that detail has not been touched on in the administrative procedure.

37. Such are the circumstances of the present case. In the administrative procedure neither the Belgian Government nor SA Glaverbel pleaded that 'an important project

9 — See in particular the judgments of 10 July 1986 in Cases 234/84 and 40/85 *Kingdom of Belgium* v *Commission* [1986] ECR 2263 and [1986] ECR 2321.

10 — See, most recently, the judgment of 17 November 1987 in Joined Cases 142 and 156/84 *BAT and Others* v *Commission* [1987] ECR 4487, at paragraph 72.

of common European interest' was involved. It was merely suggested that the investment served to strengthen the position of the Community on export markets and to ensure its independence with regard to imports.

38. If, according to Article 3 (b) of the EEC Treaty, the principles of the Community include the establishment of a common commercial policy towards non-member countries and, according to Article 110 of the Treaty, the common commercial policy serves *inter alia* to contribute to the harmonious development of world trade, then it does indeed seem clear that the attempt to achieve self-sufficiency and to conquer world markets cannot be treated as an important project of common European interest. A more extensive statement of reasons was not in fact required.

39. Glaverbel's collaboration in the development of 'cellules voltaïques' as part of the Esprit programme[9] likewise does not justify a different assessment. Naturally, that programme as a whole may be regarded as 'an important project of common European interest'. But that does not automatically apply to each of the 220 Esprit projects which the Commission has selected, of which 201 are being pursued.[12] The applicants themselves should have explained why this particular project should be of 'common European interest', and how, if at all, it could be identified with investments carried out in 1982 and 1983. They have not done so.

40. In view of the apodictic brevity of the applicant's reference, the equally apodictic rejection by the defendant is not open to criticism.

C — Opinion

41. Accordingly, I propose that the Court should dismiss the applications and order the applicants to pay the costs.

9 — Council Decision of 28 February 1984 concerning a European programme for research and development in information technologies (Esprit, Official Journal L 67, 9.3.1984, p. 54).

12 — See the *Twentieth General Report on the Activities of the European Communities*, 1986, p. 176, paragraph 403.