OPINION OF ADVOCATE GENERAL LÉGER

delivered on 14 January 2003 [1]

1. By order of 18 June 2002 the Court ordered the reopening of the oral procedure in the present case.

2. In the order the Court stated that the *Ferring* judgment [2] of 22 November 2001 had been delivered after submission of the parties' oral observations and could affect the answer to the questions referred by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) for a preliminary ruling. The Court also observed that the judgment in *Ferring* was discussed in my Opinion of 19 March 2002 in the present case and in the Opinion of Advocate General Jacobs in the *GEMO* case. [3]

3. The Court therefore arranged a further hearing to give the parties in the main proceedings, the Member States, the Commission and the Council an opportunity to state their position on the effect of the *Ferring* judgment. It asked them for their views on whether — and according to what criteria — a financial advantage granted by the authorities of a Member State to offset the cost of the public service obligations they impose on an undertaking must be classified as State aid within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC).

4. The question of the Community rules applicable to the financing of public services has been the subject of a number of statements of position at the political level. [4] It is also the subject of controversy

1 — Original language: French.

2 — Case C-53/00 *Ferring* [2001] ECR I-9067.

3 — Opinion of 30 April 2002 in Case C-126/01 *GEMO*, judgment of 20 November 2003, not published in the ECR.

4 — See in particular the Presidency conclusions of the Nice European Council (7-9 December 2000), point 47; the Presidency conclusions of the Laeken European Council (14-15 December 2001), point 26; the Presidency conclusions of the Barcelona European Council (15-16 March 2002), point 42; the Presidency conclusions of the Seville European Council (21-22 June 2002), point 54; the Communication from the Commission on services of general interest in Europe (OJ 2001 C 17, p. 4); the Commission's Report of 17 October 2001 to the Laeken European Council on services of general interest (COM (2001) 598 final); the Communication from the Commission on the application of State aid rules to public service broadcasting (OJ 2001 C 320, p. 5); the Report of the Commission of 16 June 2002 on the status of work on the guidelines for State aid and services of general economic interest (COM (2002) 280 final); and the Report of the Commission of 27 November 2002 on the state of play in the work on the guidelines for State aid and services of general economic interest (COM (2002) 636 final).

among the Advocates General of the Court [5] and in academic writing. [6] These different positions are well known, so that there is no need to repeat them. On the other hand, before supplementing my Opinion of 19 March 2002, I will give a brief account of the arguments put forward by the parties.

I — Arguments of the parties

5. In addition to the parties in the main proceedings, six Member States took part in the reopened oral procedure. These were the Federal Republic of Germany, the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands, the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland. The Commission also submitted observations. The Council did not appear.

6. The argument before the Court has made it possible to divide the parties into two distinct groups.

7. The first group consists of Altmark Trans GmbH, the Regierungspräsidium Magdeburg, the Federal Republic of Germany, the French Republic and the Kingdom of Spain. They propose that the Court should follow the compensation approach [7] adopted in *Ferring*. Under that approach, State financing of public services constitutes aid within the meaning of Article 92(1) of the Treaty only if, and to the extent that, the advantages conferred by the public authorities exceed the cost incurred in discharging public service obligations.

8. In support of their contention, they put forward essentially three series of argu-

5 — See the Opinion of Advocate General Tizzano in *Ferring*; my Opinion of 19 March 2002 in the present case, points 54 to 98; the Opinion of Advocate General Jacobs in *GEMO*, cited in note 3, points 87 to 132; and the Opinion of Advocate General Stix-Hackl in Joined Cases C-34/01 to C-38/01 *Enirisorse*, pending before the Court, points 138 to 165.

6 — For opinions expressed before the *Ferring* judgment, see Alexis, A., 'Services publics et aides d'État', *Revue du droit de l'Union européenne*, 2002/1, p. 63; Grespan, D., 'An example of the application of State aid rules in the utilities sector in Italy', *Competition Policy Newsletter*, No 3 — October 2002, p. 17; Gundel, J., 'Staatliche Ausgleichszahlungen für Dienstleistungen von allgemeinem wirtschaftlichem Interesse: Zum Verhältnis zwischen Artikel 86 Absatz 2 EGV und dem EG-Beihilfenrecht', *Recht der Internationalen Wirtschaft*, 3/2002, p. 222; Nettesheim, M., 'Europäische Beihilfeaufsicht und mitgliedstaatliche Daseinsvorsorge', *Europäisches Wirtschafts- und Steuerrecht*, 6/2002, p. 253; Nicolaides, P., 'Distortive effects of compensatory aid measures: a note on the economics of the Ferring judgment', *European Competition Law Review*, 2002, p. 313; Nicolaides, P., 'The new frontier in State aid control. An economic assessment of measures that compensate enterprises', *Intereconomics*, vol. 37, No 4, 2002, p. 190; and Rizza, C., 'The financial assistance granted by Member States to undertakings entrusted with the operation of a service of general economic interest: the implications of the forthcoming Altmark judgment for future State aid control policy', to appear in *The Columbia Journal of European Law*, 2003.

7 — To use the expression of Advocate General Jacobs in his Opinion in *GEMO*, cited in note 3, point 95.

ments, which may be summarised as follows: [8]

— according to the case-law, where the State purchases goods (for example, computers) or services (for example, cleaning services), there is aid only if, and to the extent that, the remuneration paid by the State exceeds the market price. The same principle should apply where the State acquires services which are made available directly to the collectivity (namely, public services);

— the concept of aid in Article 92(1) of the Treaty applies only to measures which provide a financial advantage for certain undertakings. A State measure which does no more than offset the cost of discharging public service obligations does not confer any real advantage on the recipient undertaking. It does not therefore constitute aid;

— under Article 93(3) of the EC Treaty (now Article 88(3) EC), the Member States are obliged to notify their plans to grant aid and to suspend payment of the aid until the Commission has given its authorisation. These obligations are liable to paralyse the functioning of services in the general interest in the Member States.

9. The second group consists of the Kingdom of Denmark, the Kingdom of the Netherlands and the United Kingdom. They propose that the Court should adopt the approach of Advocate General Jacobs in his Opinion in *GEMO* [9] ('the *quid pro quo* approach').

10. Under that approach, the Court would distinguish between two categories of situation. Where there was a direct and manifest link between the State financing and clearly defined public service obligations, the sums paid by the State would not constitute aid within the meaning of Article 92(1) of the Treaty. On the other hand, where there was no such link or the public service obligations were not clearly defined, the sums paid by the public authorities would constitute aid within the meaning of that provision.

11. The Commission for its part has not expressed a view on the point. It may be

8 — These arguments have already been summarised by Advocate General Jacobs in his Opinion in *GEMO*, cited in note 3, point 115.

9 — Cited in note 3, points 117 to 129.

noted, however, that in the *Ferring* [10] and *GEMO* [11] cases it came out in favour of the State aid approach. [12] Under that approach, State financing of public services constitutes aid within the meaning of Article 92(1) of the Treaty. That aid may, however, be justified on the basis of Article 90(2) of the EC Treaty (now Article 86(2) EC). [13]

II — Analysis

12. In my Opinion of 19 March 2002, I came down in favour of the State aid approach. It may be of use to state at the outset that the arguments put forward by the parties have not caused me to alter my position.

13. I will therefore confine myself to considering the new questions raised by the arguments of the parties. Those questions relate to:

— the criterion of the private investor in a market economy;

— the concept of 'advantage' in Article 92(1) of the Treaty;

— the procedural obligations laid down in Article 93(3) of the Treaty; and

— the *quid pro quo* approach.

14. I will not, on the other hand, return to the arguments I set out in my earlier Opinion. I therefore refer the Court to that Opinion.

A — *The criterion of the private investor in a market economy*

15. The first group of parties point out that, according to the case-law, not all State

10 — See the Opinion of Advocate General Tizzano, points 18, 74 and 75.

11 — See the Opinion of Advocate General Jacobs, point 107.

12 — To use the expression of Advocate General Jacobs in his Opinion in *GEMO*, cited in note 3 above, point 94.

13 — See Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraphs 164 to 178, and Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, paragraphs 76 to 84.

intervention constitutes aid within the meaning of Article 92(1) of the Treaty. Thus where the State purchases goods (for example, computers) or services (for example, cleaning services), there is aid only if, and to the extent that, the remuneration paid by the State exceeds the market price.

16. They consider that the same principle must apply in the field of public services. In their view, financing by the State must be classified as aid only if, and to the extent that, the advantages conferred by the public authorities exceed the cost of complying with the public service obligations (that is, the normal price of the services provided). [14]

17. The parties' argument amounts in substance to applying the criterion of the private investor in the field of State financing of public services.

18. As is well known, the criterion of the private operator [15] was originally developed by the Commission for determining whether investment by the State in the capital of an undertaking constitutes aid within the meaning of Article 92(1). [16] Under that criterion, the Commission considers that such an investment is not aid where the public authorities effect it under the same conditions as a private investor operating under normal market economy conditions. [17] The Court took up the criterion in its case-law [18] and then applied it to other kinds of State measures. To assess whether a measure contains an element of aid, the Court thus examines whether a private operator of comparable size to the public bodies would have carried out the operation in question under the same conditions.

19. Unlike the parties, I consider that this criterion cannot be applied to State financing of public services.

20. It appears from the case-law that in the field of State aid the Court distinguishes

14 — See also, to that effect, *Ferring*, paragraphs 26 and 27, and the Opinion of Advocate General Jacobs in *GEMO*, cited in note 3, points 121 to 123.

15 — I consider, along with some writers, that the expression 'private operator' is more appropriate than 'private investor'. It can cover not only investments in the strict sense but also the other kinds of State measures to which this criterion applies (see Keppenne, J.-P., *Guide des aides d'État en droit communautaire*, Bruylant, Brussels, 1999, point 44, note 93).

16 — See the communication of the Commission to the Member States concerning public authorities' holdings in company capital (*Bulletin EC* 9-1984, point 3.5.1).

17 — Commission Communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ 1993 C 307, p. 3, point 11).

18 — See in particular Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 14; Case C-142/87 *Belgium* v *Commission* ('*Tubemeuse*') [1990] ECR I-959, paragraph 26; and Case C-305/89 *Italy* v *Commission* ('*Alfa Romeo*') [1991] ECR I-1603, paragraph 19.

between two categories of situation: those where the intervention of the State is of an economic nature and those where it forms part of the exercise of public powers.

21. The Court applies the private operator criterion only in situations in the first category. These cover cases where the public authorities contribute capital to an undertaking, [19] grant a loan to certain undertakings, [20] provide a State guarantee, [21] sell goods or services on the market, [22] or grant facilities for the payment of social security contributions [23] or the repayment of wages. [24] In such situations the private operator criterion is material because the conduct of the State is capable of being adopted, at least in principle, by a private operator acting with a view to profit (an investor, a bank, a surety, an undertaking or a creditor). Application of that criterion is justified by the principle of equal treatment between the public and private sectors, [25] which requires that intervention by the State should not be subject to stricter rules than those applicable to private undertakings.

22. On the other hand, the criterion of the private operator is not material where the intervention by the State has no economic character. That is the case where the public authorities pay a subsidy directly to an undertaking, [26] grant an exemption from tax [27] or agree to a reduction in social security contributions. [28] In situations of this kind, the intervention by the State cannot be adopted by a private operator acting with a view to profit but falls within the exercise of public powers of the State (such as tax policy or social policy). The private operator criterion is therefore not material, since, by definition, there cannot be any breach of equal treatment between the public and private sectors. [29]

19 — Idem.

20 — Case C-301/87 *France* v *Commission* ('*Boussac*') [1990] ECR I-307, paragraphs 38 to 41, and Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraphs 8 and 51.

21 — Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraphs 67 and 68.

22 — Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 28 to 30; Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 10; and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraphs 59 to 62.

23 — Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraphs 24 and 25.

24 — Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 46.

25 — Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 20; Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 15; and Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraph 70.

26 — Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 8.

27 — Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14; Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 16; and Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraphs 25 to 28.

28 — Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraphs 24 and 25, and Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 110.

29 — It will be noted that the criterion for identifying cases where the Court applies the private operator principle is the same as the criterion for defining an undertaking in the context of competition law (see, on this point, my Opinion in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, point 137 and the references cited, and Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 20).

23. It follows from the above that the private operator criterion does not apply to interventions by the State which fall within the exercise of public powers.

24. The Court expressly confirmed that principle in the *Spain* v *Commission* judgment of 14 September 1994. [30] It held that, for the purpose of applying the private operator criterion, 'a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority'. [31] The State's obligations as a public authority may not be taken into consideration for the purpose of applying the private investor criterion, [32] as otherwise unequal treatment of the public and private sectors would be introduced.

25. It is common ground that the financing of public services is an activity which typically falls within the exercise of public powers. It is for the public authorities to define the services which are to be made available to the collectivity. It is also for them to taken the necessary measures to ensure the functioning and financing of those services. It is, moreover, hard to imagine a private operator embarking on his own initiative on such financing activity.

26. Consequently, I consider that the private operator criterion cannot validly be applied to the financing of public services.

27. The argument of the parties is thus based on a wrong comparison. It is not correct to compare cases where the State purchases goods or services on its own account with those where it 'acquires' services which are made available directly to the collectivity (namely public services). In the former case, the State conducts itself in a way which a private operator may adopt with a view to profit; whereas, in the latter case, the State acts as a public authority. [33]

30 — Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103.

31 — Paragraph 22.

32 — Idem. For the application of this principle in the Commission's practice, see Commission Decision 94/1073/EC of 12 October 1994 concerning the grant of State aid by France to the Bull group in the form of a non-notified capital increase (OJ 1994 L 386, p. 1, point V); Commission Decision 96/631/EC of 17 July 1996 concerning State aid that the City of Mainz, a local authority of the Federal Republic of Germany, has granted to Grundstücksverwaltungsgesellschaft Fort Malakoff Mainz mbH & Co. KG, a subsidiary of Siemens AG/Siemens Nixdorf Informationssysteme AG (OJ 1996 L 283, p. 43, point IV); and Commission Decision 98/204/EC of 30 July 1997 conditionally approving aid granted by France to the GAN group (OJ 1998 L 78, p. 1, point 3.3).

33 — See also, to that effect, Alexis, A., cited in note 6, point B.3.5.a, and Triantafyllou, D., 'L'encadrement communautaire du financement du service public', *Revue trimestrielle de droit européen*, 1999, p. 21 (p. 31).

B — *The concept of 'advantage' in Article 92(1) of the Treaty*

28. The parties' second argument relates to the concept of 'advantage' in Article 92(1) of the Treaty.

29. The concept of aid in Article 92(1) of the Treaty applies to State measures which confer a financial advantage on certain undertakings and distort or threaten to distort competition. To assess whether a measure constitutes aid, it must therefore be determined whether the undertaking receives an economic advantage which it would not have obtained under normal market conditions. [34]

30. In the present case, the parties submit that a State measure which merely offsets the cost of public service obligations does not constitute aid. In so far as the performance of public service obligations involves additional costs, the effect of such a measure is merely to replace the recipient undertaking in a position comparable to that of its competitors. The measure thus does not provide the recipient undertaking with any 'real' advantage and is therefore not liable to distort competition. It merely constitutes consideration for the public service obligations. [35]

31. On this point, it will be seen that the parties' argument is based on a specific understanding of the concept of aid. They adopt what may be described as a 'net' definition of aid or the 'real' advantage theory.

32. In this approach, the advantages given by the public authorities are examined together with the obligations on the recipient of the aid. Public advantages thus constitute aid only if their amount exceeds the value of the commitments the recipient enters into.

33. That does not, however, correspond to the approach adopted by the authors of the Treaty in the field of State aid. The relevant provisions of the Treaty are based on a 'gross' theory of aid or the 'apparent' advantage theory.

34 — *SFEI and Others*, cited in note 22, paragraph 60; *Spain* v *Commission*, cited in note 24, paragraph 41; and *DM Transport*, cited in note 23, paragraph 22.

35 — See also, to that effect, *Ferring*, paragraphs 25 to 27.

34. Using this approach, the advantages given by the public authorities and what the recipient has to contribute in return must be examined separately. The existence of the contribution is of no relevance for determining whether the State measure constitutes aid within the meaning of Article 92(1). It comes into consideration only at a later stage of the analysis, for assessing whether the aid is compatible with the common market.

35. The 'gross' theory of aid thus occurs in several provisions of the Treaty, in particular in Article 92(2) and (3), and in Article 77 of the EC Treaty (now Article 73 EC).

36. Article 92(3) of the Treaty provides that aid may be regarded as compatible with the common market if it pursues certain objectives. Those objectives correspond essentially to those which the Treaties assign to the European Community or the European Union. [36] Examples are the strengthening of economic and social cohesion, the promotion of research and the protection of the environment.

37. The Commission considered from the outset that, for aid to be compatible with the common market, the recipient must contribute something in return. [37] This contribution must intervene to compensate the distortion of competition caused by the grant of aid. [38] It is intended to ensure that the recipient acts in a way liable to contribute to the realisation of the objectives set out in Article 93(3) of the Treaty. The Commission considers that to authorise aid without requiring the contribution would amount to accepting distortions of competition without this being justified by the Community interest. [39]

38. The Commission's approach was expressly accepted by the Court in *Philip Morris* v *Commission*. [40] The Court held that, to be able to authorise aid under Article 92(3) of the Treaty, the Commission may require proof that the aid is necessary to ensure that the recipient undertakings act in such a way as to contribute to the

36 — See Evans, A., *European Community Law of State Aid*, Clarendon Press, Oxford, 1997, pp. 107 and 108.

37 — See *Ist Report on Competition Policy*, 1972, point 132; Commission Decision 79/743/EEC of 27 July 1979 on proposed Netherlands Government assistance to increase the production capacity of a cigarette manufacturer (OJ 1979 L 217, p. 17, point III); and *Xth Report on Competition Policy*, 1980, point 213.

38 — Keppenne, J.-P., cited in note 15, point 495.

39 — See *inter alia* Commission Decision 88/318/EEC of 2 March 1988 on Law No 64 of 1 March 1986 on aid to the Mezzogiorno (OJ 1988 L 143, p. 37, point IV.2); Commission Decision 93/133/EEC of 4 November 1992 concerning aid granted by the Spanish Government to the Merco company (agricultural processing industry) (OJ 1993 L 55, p. 54, point VIII); and Commission Decision 93/155/EEC of 20 January 1993 concerning an aid measure proposed by the German authorities (Rhineland-Palatinate) for the distillation of wine (OJ 1993 L 61, p. 55, point IV).

40 — Case 730/79 [1980] ECR 2671, paragraphs 16 and 17.

realisation of the objectives referred to in that provision.

39. In its practice the Commission therefore looks to see whether there is a contribution on the part of the recipient of the aid which can justify the grant of aid. [41] The contribution may take several forms. [42]

40. In some cases the activity aided may be seen at once to be a sufficient contribution, since it falls within the framework of a Community objective. In that case the contribution takes the form of an investment, such as the construction of a factory or a programme of research or training. In other cases the contribution is a condition for the approval of aid and takes a different form, such as a reduction of production capacity which contributes to solving a problem of overcapacity at Community level. In any event, the Commission requires a link, direct or indirect, between the aid and the operations which form the contribution. [43] It also requires the contribution provided by the recipient to be proportionate to the size of the aid paid out. [44]

41. It follows that, to be eligible for authorisation under Article 92(3) of the Treaty, aid must involve a contribution from the recipient, so that there is no net advantage for him in practice.

42. Contrary to the submissions of the parties, the existence of this contribution does not affect the interpretation of the concept of aid.

43. In the context of Article 92(1), the aid does not correspond to the difference between the public advantages and the value of the commitments entered into by the recipient. [45] The aid corresponds solely to the amount of the public advantages.

41 — See, *inter alia*, Commission Decision 81/626/EEC of 10 July 1981 on a scheme of aid by the Belgian Government in respect of certain investments carried out by a Belgian undertaking to modernise its butyl rubber production plant (OJ 1981 L 229, p. 12, point V); Commission Decision 83/468/EEC of 27 April 1983 under Article 93(2) of the EEC Treaty, on a proposal to grant aid to an undertaking in the textile and clothing sector (undertaking No 111) (OJ 1983 L 253, p. 18, point III); Commission Decision 93/154/EEC of 12 January 1993 concerning an AIMA national programme on aid which Italy plans to grant for the private storage of carrots (OJ 1993 L 61, p. 52, point VI); and Commission Decision 97/611/EEC of 2 April 1997 on aid to the sheepmeat industry (promotional aid) (OJ 1997 L 248, p. 20, point VI).

42 — Keppenne, J.-P., cited in note 15, point 495.

43 — Commission Decision 89/43/EEC of 26 July 1988 on aids granted by the Italian Government to ENI-Lanerossi (OJ 1989 L 16, p. 52, point VII).

44 — Commission Decision 95/547/EC of 26 July 1995 giving conditional approval to the aid granted by France to the bank Crédit Lyonnais (OJ 1995 L 308, p. 92, point 7.1), and Commission Notice pursuant to Article 93(2) of the EC Treaty to other Member States and other parties concerned regarding aid which France has decided to grant to the bank Crédit Lyonnais (OJ 1996 C 390, p. 7, point 5.3, penultimate and final paragraphs).

45 — See also, to that effect, Case C-251/97 *France* v *Commission* [1999] ECR I-6639, paragraphs 17 to 20 and 38 to 48.

What the recipient contributes in return comes in only at a further stage of the analysis, to assess the compatibility of the aid with the common market.

44. An identical understanding of the concept of aid may be found in the provisions of the Treaty concerning land transport. Article 77 of the Treaty provides that '[a]ids shall be compatible with this Treaty... if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service'.

45. That provision shows that, in the field of State financing of public services, the authors of the Treaty likewise adopted a 'gross' concept of aid. For them, the existence and amount of aid must be assessed solely by reference to the 'financing entering' [46] the undertaking. What the recipient agrees to in return — that is, the public service obligations — has no effect on the interpretation of the concept of aid. It merely constitutes a criterion for assessing the compatibility of the aid from the point of view of the derogating provisions of the Treaty.

46. In view of the above factors, I consider that the Court cannot follow the compensation approach adopted in *Ferring*. Such an interpretation would amount to depriving of their effect all the derogating provisions of the Treaty concerning State aid. It amounts in fact to examining the compatibility of aid within the framework of Article 92(1) of the Treaty. [47]

47. Another solution might consist in restricting the compensation approach to the field of public services only. Two distinct concepts of aid would thus exist side by side in the Treaty. The view would be taken that:

— in the field of aid generally, the Treaty provisions are based on a 'gross' concept of aid, but

— in the field of public services (other than land transport), the Treaty provisions are based on a 'net' concept of aid.

48. I believe, however, that such a solution risks creating serious problems in terms of legal certainty. Some State measures will be capable of falling under both concepts at the same time. That applies to financial

46 — To use the expression of Triantafyllou, D., cited in note 33, p. 32.

47 — See also, on this point, my Opinion of 19 March 2002 in the present case, paragraphs 76 to 85.

advantages granted by the Member States to public broadcasting services. [48]

49. On the one hand, those advantages are intended to promote culture within the meaning of Article 92(3)(d) of the Treaty. By virtue of Article 92 of the Treaty and the 'gross' definition of aid, they will thus constitute aid which must be notified to the Commission and may be declared compatible with the common market. On the other hand, those same advantages are also intended to offset the cost of the public service obligations imposed on broadcasting institutions. By virtue of the compensation approach and the 'net' definition of aid, they will thus not be able to be categorised as aid within the meaning of Article 92(1) of the Treaty.

50. It follows that, for measures of that kind, those concerned will all no longer be in a position to know whether the Treaty rules are applicable.

51. Member States will not be able to identify the measures which must be notified to the Commission. Nor will undertakings know whether they can rely on the lawfulness of the State financing. National courts too will have difficulty in knowing whether to apply the Court's case-law on the direct effect of Article 93(3) of the Treaty. The Commission, finally, will not be able to determine with certainty whether it can start a procedure against an instance of State financing.

52. In view of these various factors, I therefore consider that the State aid approach is much more appropriate for analysing State financing of public services. Like Articles 77 and 92 of the Treaty, this approach is based on a 'gross' definition of aid. It thus makes it possible to ensure the coherence of the Treaty provisions concerning State aid and to preserve the effect of the derogating provisions (namely Article 77, Article 90(2) and Article 92(2) and (3) of the Treaty).

C — *The procedural obligations in Article 93(3) of the Treaty*

53. The third argument of the parties relates to the procedural obligations laid down in Article 93(3) of the Treaty.

48 — The importance of this field is illustrated by the Protocol on the system of public broadcasting in the Member States, annexed to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (OJ 1997 C 340, p. 109).

54. Before analysing this argument, a short summary of certain aspects of the Community procedure for reviewing aid will be of use.

55. It is common ground that the Commission has exclusive competence to examine the compatibility of aid with the common market under Articles 92 and 93 of the Treaty. [49] That competence is justified by the fact that examining the compatibility of aid involves assessments of an economic and social nature which must be made in a Community context. [50] It is also justified by the fact that aid constitutes a sensitive area both for those concerned and for the functioning of the common market. The authors of the Treaty did not therefore wish to entrust the Member States with the function of assessing whether an aid presents risk for the common market. They entrusted that assessment to the European institution responsible for representing the Community interest. [51]

56. In *Banco Exterior de España* [52] the Court expressly held that the Commission's power extends to aid to undertakings entrusted with public service functions for the purposes of Article 90(2) of the Treaty. It follows that national courts do not have jurisdiction to apply Article 90(2) in the field of aid. [53] Only the Commission may authorise an aid under that provision.

57. Under Article 93(3) of the Treaty, the Member States are obliged to notify their plans for introducing or altering aids (obligation to notify). They cannot implement those plans without the prior authorisation of the Commission (obligation to suspend). According to settled case-law, [54] these procedural obligations constitute the safeguard of the aid review machinery, which in turn is essential for ensuring the functioning of the common market.

58. In *France* v *Commission* [55] the Court held that the notification and suspension obligations apply to aid to undertakings

49 — Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraphs 9 and 10.

50 — See, *inter alia*, *Philip Morris* v *Commission*, cited in note 40, paragraph 24; *Deufil* v *Commission*, cited in note 26, paragraph 18; *Boussac*, cited in note 20, paragraph 49; *Tubemeuse*, cited in note 18, paragraph 56; and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 24.

51 — Waelbroeck, M., and Frignani, A., *Commentaire J. Megret, Le droit de la CE, volume 4, Concurrence*, Éditions de l'université de Bruxelles, Brussels, 1997, 2nd ed., point 308.

52 — Cited in note 27, paragraph 17.

53 — By contrast, they retain jurisdiction to apply that provision in the other fields of the Treaty, such as competition law or the freedom to provide services (see, *inter alia*, Case 66/86 *Ahmed Saeed Flugreisen and Others* [1989] ECR 803, paragraphs 55 to 57; Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 34; Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 20; and Case C-393/92 *Almelo and Others* [1994] ECR I-1477, paragraph 50.

54 — See, for example, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 25.

55 — Case C-332/98 [2000] ECR I-4833, paragraphs 27 to 32.

entrusted with the operation of services of general interest within the meaning of Article 90(2) of the Treaty. It follows that aid granted to public services in breach of those obligations constitutes 'illegal' aid.

59. At Community level, this means that the Commission can instruct the State to suspend the payment of aid or provisionally recover the aid until it reaches a decision on compatibility. [56] At national level, this means that a court may (1) order recovery of the aid, (2) declare unlawful the act instituting the aid and the implementing measures, and (3) order the competent authorities to make good any damage which may have been caused by the immediate payment of aid. [57]

60. In the present case, the parties submit that the procedural obligations laid down in Article 93(3) of the Treaty are liable to paralyse the functioning of public services in the Member States. They state that the procedure for examining aid is relatively long and that, for certain kinds of public services, it is difficult or even impossible to wait for the Commission's authorisation. They also state that, because of the number of measures concerned, the procedural obligations are liable to paralyse action by the Commission in the field of State aid.

61. The Court previously had occasion to consider arguments of this type in the *France* v *Commission* case cited above. In that case the French Government submitted that the obligation to suspend produces serious risks for the continuity of public services. [58] The Court expressly rejected that argument, pointing out that the procedural obligations are the safeguard of the machinery for the review of aid in Community law. [59]

62. In any event, I consider that the fears expressed by the parties are unfounded. In my view, the procedural obligations are not liable to disturb the functioning of public services, for several reasons.

63. First, the procedural obligations do not apply to all State measures. They apply only to measures which satisfy the criteria

56 — Article 11 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

57 — For a more detailed description of these consequences, see my Opinion in Case C-197/99 P *Belgium* v *Commission*, pending before the Court, point 74 and the references cited.

58 — Paragraphs 27 to 30.

59 — Ibid., paragraphs 31 and 32. See also the reasons stated by Advocate General La Pergola in this case, points 22 to 24 of his Opinion.

of Article 92(1) of the Treaty. In practice, this means that in certain essential fields State financing of public services is not caught by the procedural obligations. This applies *inter alia* to the following measures: [60]

— measures financing activities which are not of an economic nature: [61] this is the case of activities within the exercise of public powers of the State (such as security, justice, foreign relations, etc.), [62] compulsory social security schemes, [63] the field of compulsory education, [64] and other fields within the essential functions of the State;

— measures not liable to affect trade between Member States: this is the case of the financing of certain local or regional public services (such as swimming pools, leisure centres, crèches, cultural centres or hospitals). [65] This also applies where the amount of aid does not exceed the threshold of EUR 100 000 fixed by the Commission in its regulation on *de minimis* aid. [66]

64. Second, for measures coming under Article 92(1) of the Treaty, the Commission is subject to certain time-limits.

65. Thus the Commission is obliged to carry out a preliminary examination of the aid within two months of its notification. [67] This time-limit is strict and cannot be extended by the Commission unilaterally. [68] If no decision has been taken by the expiry of the time-limit, the Member State concerned may implement the aid, subject to informing the Commission beforehand. [69] In that case the aid is deemed to have been authorised. [70] It

60 — See also, on this point, Alexis, A., cited in note 6, point A.

61 — To fall within the prohibition laid down in Article 92(1) of the Treaty, State measures must of course favour certain undertakings or certain economic activities.

62 — Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 30, and Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, paragraphs 22 and 23.

63 — Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 18, and Case C-218/00 *Cisal* [2002] ECR I-691, paragraph 46.

64 — Commission Decision 2001/C 333/03 of 25 April 2001, authorisation for State aid pursuant to Articles 87 and 88 of the EC Treaty (public grants to professional sports clubs) (OJ 2001 C 333, p. 6). The text of the decision is available on the internet at http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industrie/n118-00.pdf.

65 — See Commission press release IP/00/1509 of 21 December 2000.

66 — Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ 2001 L 10, p. 30). Under Article 1(a) of the regulation, however, it does not apply to the transport sector.

67 — See Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 4, and Article 4(5) of Regulation No 659/1999.

68 — Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraphs 73 to 76.

69 — *Lorenz*, cited in note 67, paragraph 4, and Article 4(6) of Regulation No 659/1999.

70 — Article 4(6) of Regulation No 659/1999.

comes under the rules for existing aid [71] and may thus continue to be paid as long as the Commission does not find that it is incompatible with the common market. [72]

66. The parties appear to consider that even a period of two months might be too long for certain types of public services. Even assuming that this may be so, [73] certain mechanisms make it possible to take account of such exceptional situations.

67. Article 5 of the EC Treaty (now Article 10 EC) imposes a duty of sincere cooperation between the Community institutions and the Member States. [74] By virtue of that provision, the authorities of the Member State and the Commission might thus be induced to give priority treatment to a case of particular urgency or find some other appropriate solution.

68. Third, it should be remembered that under Article 93(3) of the Treaty the Member States can notify aid schemes to the Commission. Aid schemes are national provisions under which, without further implementing measures being required, individual aid awards may be made to undertakings defined in a general and abstract manner. [75]

69. The advantage of this machinery is that Member States obtain a single approval from the Commission on the basis of the general characteristics of the scheme. Member States thus avoid the obligation of subsequently notifying each individual case in which the scheme is applied. In its report for the Laeken European Council, [76] the Commission expressly accepted that the Member States can notify 'compensation schemes' in the field of financing of public services.

70. Fourth, under Article 94 of the EC Treaty (now Article 89 EC), the Council may adopt regulations for exemptions by category in the field of State aid. The Council may also authorise the Commission to adopt such regulations. [77]

71 — Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraph 18.

72 — *Banco Exterior de España*, cited in note 27, paragraph 20. Similarly, where the Commission opens the formal examination procedure, its final decision must be taken within 18 months from the opening of the procedure. On the expiry of that time-limit the Member State may require the Commission to take its decision on the basis of the information available to it (see Article 7(6) and (7) of Regulation No 659/1999).

73 — It appears that, when the authorities of a Member State organise a public service in a particular sector (for example, distribution of mail, an air link or a railway service), the periods needed for organising the service are generally compatible with the time-limits imposed on the Commission for the examination of aid.

74 — Order in Case C-2/88 Imm. *Zwartveld and Others* [1990] ECR I-3365, paragraph 17.

75 — Article 1(d) of Regulation No 659/1999.

76 — Cited in note 4, point 26.

77 — See, for example, Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 1998 L 142, p. 1).

71. Regulations for exemption by category define the conditions under which certain categories of aid are to be regarded as compatible with the common market. Their main advantage lies in the fact that aid granted in accordance with the provisions of those regulations is exempted from the obligation to notify under Article 93(3) of the Treaty. Member States can therefore implement their aid plans without waiting for individual authorisation from the Commission.

72. On this point, the Laeken European Council had already asked the Commission to set up a 'policy framework' for aid for public services. [78] In addition, the Barcelona [79] and Seville [80] European Councils expressly raised the possibility of the Commission submitting a regulation for exemption by category in that field. The Commission replied that it would start by setting up a Community framework, but would adopt an exemption regulation in so far as that was justified. [81] The Commission said that it would be able to draw up that framework in the course of 2002. [82] However, it suspended work pending the delivery of the Court's judgment in the present case. [83]

73. It follows that, should the Court decide to adopt the State aid approach in the present case, the Commission and the Council ought to be in a position to adopt a regulation for exemption by category within an acceptable period of time. In that case, State measures intended to offset the cost of public service obligations would quite simply be exempted from the obligation to notify. The Member States would then be able to put their financing plans into practice without waiting for an individual exemption from the Commission. The situation would thus be the same as that which has been applied since 1969 in the field of public land transport services. [84]

74. Having regard to all the above factors, I consider that the fears expressed by the parties are unfounded. In my opinion, the State aid approach is not liable to upset the functioning of public services in the Member States, nor to paralyse action by the Commission in the field of State aid.

78 — Presidency conclusions, cited in note 4, point 26.

79 — Presidency conclusions, cited in note 4, point 42.

80 — Presidency conclusions, cited in note 4, point 54.

81 — Commission's report on services of general interest for the Laeken European Council, cited in note 4, points 28 and 29.

82 — Ibid., point 28.

83 — Commission report of 16 June 2002 on the status of work on the guidelines for State aid and services of general economic interest, cited in note 4, points 10 and 16, and Commission report of 27 November 2002 on the state of play in the work on the guidelines for State aid and services of general economic interest, cited in note 4, point 3.

84 — See Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969(I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1).

D — *The quid pro quo approach*

75. The second group of parties propose that the Court adopt the *quid pro quo* approach developed by Advocate General Jacobs in his Opinion in the *GEMO* case. [85]

76. Under that approach, the Court would distinguish between two categories of situation. The first category would comprise cases in which there is a direct and manifest link between the State financing and clearly defined public service obligations. In those cases the sums paid by the State to the recipient undertaking constitute not aid within the meaning of Article 92(1) of the Treaty but the consideration for the public service obligations assumed by the undertaking.

77. Conversely, the second category of situation would cover cases where there is no direct and manifest link between the State financing and the public service obligations, as well as cases where those obligations are not clearly defined. In those cases the sums paid by the public authorities constitute aid which as such is subject to the procedural obligations laid down in Article 93(3) of the Treaty.

85 — Cited in note 3, points 117 to 129.

78. For my part, I consider that this approach raises essentially two series of difficulties.

79. First, the *quid pro quo* approach appears difficult to reconcile with the Court's case-law on State aid.

80. According to settled case-law, the Court considers that, to determine whether a State measure constitutes aid, only the effects of the measure are to be taken into consideration. [86]

81. The other elements characterising the measure are not relevant at the stage of determining the existence of aid. This applies to the form in which the aid is granted, [87] the legal status of the measure in national law, [88] the fact that the measure is part of an aid scheme, [89] the reasons for the

86 — See, *inter alia*, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 27; *Deufil* v *Commission*, cited in note 26, paragraph 8; Case C-56/93 *Belgium* v *Commission*, cited in note 22, paragraph 79; Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 20; and Case C-5/01 *Belgium* v *Commission* [2002] ECR I-11991, paragraphs 45 and 46.

87 — Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 31; Case C-142/87 *Belgium* v *Commission*, cited in note 18, paragraph 13; and Case 40/85 *Belgium* v *Commission* [1986] ECR I-2321, paragraph 12.

88 — Commission Decision 93/349/EEC of 9 March 1993 concerning aid provided by the United Kingdom Government to British Aerospace for its purchase of Rover Group Holdings over and above those authorised in Commission Decision 89/58/EEC authorising a maximum aid to this operation subject to certain conditions (OJ 1993 L 143, p. 7, point IX).

89 — *Cityflyer Express* v *Commission*, cited in note 20, paragraph 94.

measure, [90] the objectives of the measure [91] and the intentions of the public authorities and the recipient undertaking. [92] These elements are of no relevance because they are not liable to affect competition. They may, on the other hand, become relevant at a later stage of the analysis, in order to assess the compatibility of the aid from the point of view of the derogating provisions of the Treaty. [93]

82. The *quid pro quo* approach amounts to introducing such elements into the actual definition of aid.

83. The first criterion suggested consists in examining whether there is a 'direct and manifest link' between the State funding and the public service obligations. In practice, this amounts to requiring the existence of a public service contract awarded after a public procurement procedure. [94] Similarly, the second criterion suggested consists in examining whether the public service obligations are 'clearly defined'. In practice, this amounts to verifying that there are laws, regulations or contractual provisions which specify the nature and content of the undertaking's obligations. [95]

84. In those circumstances, the *quid pro quo* approach departs from the Court's case-law on State aid. It amounts to defining aid no longer by reference solely to the effects of the measure, but by reference to criteria of a purely formal or procedural nature. At theoretical level, it means that the same measure may be classified as aid or 'non-aid' depending on whether a contract (of public service) or a legal instrument (defining the public service obligations) exists, although it produces identical effects on competition.

85. Second, the *quid pro quo* approach does not appear to be capable of guaranteeing a sufficient degree of legal certainty.

86. The principal criterion underlying this approach is defined in a vague and imprecise fashion. It is clear that this is deliberate and is intended to provide the flexibility needed to comprehend a wide range of

90 — See the judgments cited in note 86.

91 — Idem.

92 — Commission Decision 92/11/EEC of 31 July 1991 concerning aid provided by the Derbyshire County Council to Toyota Motor Corporation, an undertaking producing motor vehicles (OJ 1992 L 6, p. 36, point V).

93 — Thus certain categories of aid are compatible with the common market only if they take a particular form (see, for example, Commission notice 97/C 238/02 on Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1997 C 283, p. 2, point 3.1, first indent)).

94 — See the Opinion of Advocate General Jacobs in *GEMO*, cited in note 3, point 119.

95 — Ibid., point 120.

situations. [96] Nevertheless, it is extremely difficult to know what is covered by the expression 'direct and manifest link'. Moreover, apart from the case of a public service contract concluded after an award procedure, none of the parties was able to provide a single specific example of this kind of link between State financing and public service obligations. [97]

87. In those circumstances, the expression 'direct and manifest link' — and hence the very concept of State aid — will be likely to receive widely differing interpretations. These interpretations may also vary according to the cultural (or even personal) attitudes of the various bodies responsible for applying the Treaty rules on State aid.

88. At practical level, such a divergence of interpretation may have considerable repercussions.

89. Member States will no longer be able to identify with precision the measures which must be notified to the Commission. [98] Nor will undertakings know whether they can rely on the lawfulness of the State financing. National courts too will have difficulty in knowing whether to apply the Court's case-law on the direct effect of Article 93(3) of the Treaty. The Commission, finally, will no longer be able to determine with certainty whether it can start a procedure against an instance of State financing.

90. In short, the only way to define the term 'direct and manifest link' will be on a case-by-case basis. It will necessarily have to be refined by the Court in the course of the cases brought before it. That is not a satisfactory outcome either for the political institutions of the Union or for the Court itself.

91. First, one of the main concerns expressed by the European Councils of Nice, [99] Laeken [100] and Barcelona [101] is to ensure increased legal certainty in the field of the application of the law on aid to services in the general interest. Again, it is known that the Commission has suspended its work in this field until the Court gives

96 — See the Opinion of Advocate General Jacobs in *GEMO*, cited in note 3 above, point 129, and the Opinion of Advocate General Stix-Hackl in *Enirisorse*, cited in note 5, point 157.

97 — In fact, the sole concrete and 'operational' criterion which can be set in the context of the *quid pro quo* approach is the requirement of a public service contract concluded after an award procedure. The various parties concur, however, in admitting that such a requirement is disproportionate (see also the Opinion of Advocate General Jacobs in *GEMO*, cited in note 3, point 129, and the Opinion of Advocate General Stix-Hackl in *Enirisorse*, cited in note 5, point 157). Furthermore, it must be noted that, in its present state, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) does not apply to public service concessions. It is therefore difficult to lay down such a judge-made requirement in the context of the Treaty provisions concerning State aid.

98 — Member States might even be tempted to rely on the *quid pro quo* approach to justify a failure to notify financing measures to the Commission (see, to that effect, Rizza, C., cited in note 6, p. 11).

99 — Presidency conclusions, cited in note 4, point 47 and Annex II.

100 — Presidency conclusions, cited in note 4, point 26.

101 — Presidency conclusions, cited in note 4, point 42.

judgment in the present case. [102] So it will not be adequate to adopt a solution which necessarily has to be defined casuistically by judicial decisions. In my opinion, it is essential to adopt a clear and precise position, so as to allow the institutions to define Community policy in the field of State financing of public services, and thus to ensure the legal certainty which is needed in such a sensitive field.

92. Second, a case-by-case solution will inevitably have the effect of placing national courts in a position of 'dependence' as against the Court. As the concept of a 'direct and manifest link' (or any other similar expression) will have to be defined more precisely in the case-law, national courts will necessarily have to use the preliminary ruling procedure to interpret the concept of aid. Such an outcome appears hard to reconcile with the purpose of the procedure set up by Article 177 of the EC Treaty (now Article 234 EC). [103] In any event, there is a risk that it will lead to an unnecessary growth in the number of references to the Court for preliminary rulings.

93. The State aid approach, for its part, makes it possible to avoid these drawbacks.

94. As I have said, this approach consists in considering that the financial advantages granted by the authorities of a Member State to offset the cost of the public service obligations they impose on an undertaking constitute aid within the meaning of Article 92(1) of the Treaty. In that it sets out a clear and precise principle, this approach enables all those concerned (public authorities, private operators, national courts, Community institutions) to identify with precision the measures which fall within the scope of the Treaty rules on State aid.

95. Moreover, the principles which underlie the State aid approach can be stated by the Court in a single judgment. This approach is not therefore likely to entail an increased number of references to the Court for preliminary rulings.

96. In view of the above factors, the State aid approach makes it possible to ensure increased legal certainty and transparency in the field of State financing of public services.

102 — Commission report of 16 June 2002 on the status of work on the guidelines for State aid and services of general economic interest, cited in note 4, points 10 and 16, and Commission report of 27 November 2002 on the state of play in the work on the guidelines for State aid and services of general economic interest, cited in note 4, point 3.

103 — See, on this point, the Opinion of Advocate General Jacobs in Case C-136/00 *Danner* [2002] ECR I-8147.

III — Conclusion

97. Having regard to all the above considerations, and to those which I set out in my earlier Opinion, I therefore propose that the Court rule as follows:

(1) Financial advantages granted by the authorities of a Member State to offset the cost of the public service obligations they impose on an undertaking constitute State aid within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC).

(2) Measures instituting the advantages referred to in point 1 above are subject to the notification and suspension obligations laid down in Article 93(3) of the EC Treaty (now Article 88(3) EC).

(3) Article 90(2) of the EC Treaty (now Article 86(2) EC) must be interpreted as not having direct effect in the field of State aid.