COMMISSION

COMMISSION DECISION

of 31 July 1991

concerning aid provided by the Derbyshire County Council to Toyota Motor Corporation, an undertaking producing motor vehicles

(Only the English text is authentic)

(92/11/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having given notice [1] in accordance with the above Article to interested parties to submit their comments,

Whereas :

I

On 18 April 1989 Toyota Motor Corporation (Toyota) and the United Kingdom Government announced that Toyota had decided to build a new plant to produce passenger cars on a 280-acre site at Burnaston, Derbyshire, United Kingdom. Production was envisaged to commence by the end of 1992 with an initial target of 100 000 vehicles a year rising eventually to 200 000 at which stage direct employment at the plant should amount to 3 000. Total investment was estimated at £ 400 million (ECU 570 million). The investment would proceed with no financial assistance from central government. The local authorities in Derbyshire had offered modest assistance towards a number of aspects of the project, such as site preparation and road access. It was made clear that, should such assistance be deemed notifiable to the Commission, the United Kingdom Government would take the necessary steps. On 26 April 1989 the United Kingdom authorities wrote to the Commission confirming this commitment on notification.

On 7 February 1990 the United Kingdom authorities wrote to the Commission informing it that discussions between Toyota and the Derbyshire County Council (DCC) on the provision of a package of local measures for the former were near finalization. These measures consisted of various infrastructure services outside the Toyota site and other services required to meet increased local needs arising from the Toyota investment. None of these measures, the United Kingdom authorities stated, contained anything which could be regarded as State aid as defined in Article 92 of the EEC Treaty.

About this period press reports appeared indicating that the site had increased in size from the initial 280 acres to 580 acres and had been sold to Toyota for less than its full market value. Most of these press reports drew in large part on the minutes of a meeting of the Policy Committee of the DCC held on 21 November 1989, which had also become available to the Commission. These minutes disclosed that the DCC had agreed a package of measures on the assembly and preparation of a site for the plant and on the sale to Toyota of a core 280-acre site as the company had originally requested as well as an additional contiguous site of 300 acres which Toyota had subsequently requested. The financial breakdown of this package was estimated by the DCC as follows :

— sale of 280 acres at £ 35 350 per acre :	£ 9,9 million
— sale of 300 acres at £ 28 000 per acre :	£ 8,4 million
Total	£ 18,3 million
— estimated cost of land assembly :	£ 13,4 million
— estimated net cost of access and service provision :	£ 4,9 million
Total	£ 18,3 million

[1] OJ No C 325, 28. 12. 1990.

The land sale prices purported to reflect the market value of such a large site 'with significant planning and other constraints' and to cover the associated cost of access and servicing. They also purported 'to meet the EEC requirement that such investments in the motor industry should not be subsidized.'

There followed a series of correspondence and a meeting between the Commission and the United Kingdom authorities designed to establish the relevant facts and figures pertaining to the project and the package of measures offered by the DCC. The Commission wrote to the United Kingdom authorities on 9 and 26 February 1990 noting recent press reports to the effect that the site sold to Toyota in Derbyshire had been underpriced, and requesting relevant information, in particular the report of Derbyshire District Valuer (1) on the sale as well as reports of the DCC on the matter, prior to a meeting.

The United Kingdom authorities wrote to the Commission on 26 February 1990 enclosing an information note on the package of measures being offered to Toyota by the DCC. According to this note the DCC was assembling a 580-acre site for on-sale to Toyota at a price of £ 18,3 million (ECU 26,1 million). Various infrastructure services would be provided free of charge to Toyota, almost entirely on site. The DCC's intention was as far as possible to break even on the transaction as a whole with the direct cost of land purchase and infrastructure provision being covered by income from the sale of the fully serviced site. The market value of the land needed to be considered in two stages: a 'core' site of 280 acres in public ownership and the remaining 300 acres in various, mainly private, ownerships which were being acquired compulsorily. The 'core' site had been valued by the vendor's valuer, the City Estates and Valuations officer in June 1989 at £ 12,6 million (ECU 18 million). This valuation had been discussed informally with the District Valuer, who had expressed himself content with the basis on which it had been established.

On 28 February the United Kingdom authorities wrote again to the Commission, noting that the District Valuer's opinion on the site valuation had been given orally and enclosing background correspondence from the DCC on the basis of the valuation. This correspondence argued that it was, in fact, more meaningful to consider the assembly and sale of the 580-acre site as a single whole rather than splitting it down into the 'core' 280-acre and 'expansion' 300-acre areas.

(1) The District Valuer is a Government (Inland Revenue) employee with statutory functions to provide *inter alia* the valuations for various local authority purposes.

On the same date a meeting took place between the Commission and the United Kingdom authorities. The latter acknowledged that, because of budget overruns, the original DCC intention of breaking even on the whole transaction was now unlikely to be realized. The Commission requested further information in writing, including a copy of the original site sale agreement between the DCC and Toyota, evidence that the sale price of the site corresponded to an open market price, and written confirmation by the District Valuer of his opinion. On 10 May the United Kingdom authorities forwarded this information to the Commission.

Under the terms of the site sale agreement between the DCC and Toyota of 21 February 1990, Toyota would purchase the first 280 acres of the site from the DCC for £ 9 900 000 (ECU 14,1 million), equivalent to an average sale price per acre of £ 35 357, and will purchase as much of the remaining 300 acres of the same site as it requires for £ 28 000 per acre. Assuming that Toyota decided to purchase all of the remaining 300 acre site, this would bring the sale price of the remaining site to £ 8,4 million (ECU 12 million) and that of the total 580-acre site to £ 18,3 million (ECU 26,1 million).

The first 280 acres of the site had been formally valued by the Derby District Valuer at £ 12,6 million (ECU 18 million), equivalent to £ 45 000 per acre. This valuation assumed it was a vacant freehold site with services available at the site perimeter and was calculated at current market values, discounted to take account of the likely timescale before such infrastructure is completed. The District Valuer acknowledged that considerably smaller sites suitable for industrial development in this area can fetch from £ 200 000 to £ 250 000 per acre, but advised that a large discount factor should be applied to the value per acre of sales of very large sites. Account must also be taken, of course, of the particular characteristics of each individual site.

The Commission accepted the case for discounting sales prices when applying the evidence of small site transactions to very large site transactions, while noting the high discount of some 80 % applied in the present case. It noted, however, that the 280-acre site was sold to Toyota at an average price per acre of only £ 35 357 or 78,6 % of its average value of £ 45 000 according to the District Valuer, despite the legal obligation on the DCC and all local authorities to realize the best value from the sale of assets. The Commission was therefore of the view that £ 45 000 per acre should be the minimum sale price of the first 280 acres. On this basis the sale price of the first 280 acres should have been, as a minimum, £ 12,6 million, or £ 2,7 million more than the price charged to Toyota.

Accordingly the Commission decided on 25 July 1990 to initiate the procedure provided by Article 93 (2) of the EEC Treaty with respect to the terms of sale of the 580-acre site at Burnaston by the DCC to Toyota. These terms seemed to indicate the existence of State aid of at least £ 2,7 million in respect of the sale of the 280-acre element of the site. The Commission was not aware of any valuation by the District Valuer of the remaining 300 acres. The situation regarding the sale of these 300 acres needed to be clarified in the light of additional information to be provided by the United Kingdom authorities and depending on whether the operation should be treated as two separate sales or as the sale of a single site. If Toyota was enabled to buy the site at less than its full market value, the fact that it did not have to bear the full cost of such an acquisition under normal commercial conditions would constitute indirect aid within the meaning of Article 92 (1).

By letter dated 17 September 1990 the Commission gave the United Kingdom Government notice to submit its comments within one month and provide all information necessary for the appraisal of the case. In accordance with Article 93 (2) of the EEC Treaty, the other Member States and third parties were also given notice to submit their comments.

II

Within the framework of the Article 93 (2) procedure, the United Kingdom Government submitted comments by letters dated 16 October 1990, 1 February and 17 May 1991 and at meetings with the Commission services held on 19 March, 28 May and 20 June 1991. This last meeting was also attended by representatives of the Toyota Motor Company. The comments made by the company representatives were subsequently forwarded to the Commission by their legal representatives by letter dated 20 June 1991. Throughout these comments the United Kingdom Government maintained that the sale of the site to Toyota by the DCC contained no State aid.

No other Member State or interested party submitted comments under the procedure.

III

By letter dated 16 October 1990 the United Kingdom Government replied to the Commission letter of 17 September 1990 on the initiation of the procedure. They argued that the transactions between the DCC and Toyota as outlined in earlier correspondance reflected the outcome of normal commercial negotiations and contained no element of State aid. Among the points made by the United Kingdom Government were the following :

— the transfer of the 580 acres should be considered as one single transaction covering the whole site. While Toyota had opened negotiations with the DCC in January 1989 on the sale of the 'core site' of 280 acres, within one month they had requested the DCC to investigate the possibility of assembling the whole site of 580 acres, before any discussions on price had commenced. By the summer of 1989 Toyota had made a firm decision to buy the whole site outright. Accordingly, from February 1990 onwards the DCC did not consider that only the 280-acre site would be developed but rather that Toyota would either require the total site, in which case the sale price would be determined across the 580 acres, or would take the 'core site' and the DCC would develop the remainder of the site for industrial or commercial purposes, in which case the £ 9,9 million (ECU 14,1 million) paid for the 'core site' would be justified by reference to the 'flagship' nature of Toyota's presence. In any event the £ 9,9 million figure was no more than a 'historic relic' of the earliest days of the negotiations and had no real significance. The site sale agreement had expressed the transaction in terms of separate tranches of land only because the Compulsory Purchase Orders (CPOs) issued to acquire the remaining 300 acres were open to challenge until end January 1990,

— the sale price of £ 18,3 million (ECU 26,1 million) reflected the DCC's intention of at least breaking even on the deal. The DCC had taken possession of the land by CPOs in March 1990 and transferred it to Toyota in June 1990. The total acquisition price to be paid by the DCC could not be determined until all claims for compensation for the CPOs had been processed. The best estimate was £ 13,4 million (ECU 9,1 million), comprising £ 11 million paid to Derby City Council for the transfer of the 'core' 280 acres and £ 2,4 million in compensation payments for the remaining 300 acres, reflecting largely their absence of development potential prior to Toyota's arrival because of lack of access and services,

— on the difference between the sale price to Toyota of the core 280 acres of £ 9,9 million and its valuation by the District Valuer at £ 12,6 million, several factors should be borne in mind. Land valuation is not an exact science particularly for a unique and exceptionally large site such as this one. The sale price reflected the outcome of a hard-fought commercial negotiation where Toyota was in a particularly strong bargaining position. Moreover, the District Valuer had not been aware of a number of constraints which would burden and add to the costs of developing the land but which the DCC had been aware of. In particular the gradient of the land, which required considerable earthworks to provide a level site, and the adverse ground conditions which would give rise to extensive piling prior to building works, would cost Toyota a total of £ 16 million.

By letter dated 20 December 1990 the Commission requested further information on certain aspects of the land transactions between the DCC and Toyota in advance of a bilateral meeting requested by the United Kingdom authorities. These included the regulatory provisions governing sales of assets by local authorities, evidence of comparable transactions elsewhere in the United Kingdom if available, trends in land prices, and evidence of other potential purchasers of the site at Burnaston.

By letter dated 1 February 1991 the United Kingdom Government replied to the Commission. They provided further background information on the site transfer to indicate that it should be considered as a single whole transaction covering the 580 acres. They also enclosed the relevant legal provision in the Local Government Act 1972 governing the criteria for the disposal of assets. This stipulates that local authorities are generally not allowed to dispose of land 'for a consideration less than the best that can reasonably be obtained'. Little conclusive evidence on comparable land transactions elsewhere in the United Kingdom or another potential purchaser of the site in question was available or forthcoming. The letter did point out that, in general, advice given to a local authority by a District Valuer was neither legally required nor legally binding.

At a meeting with representatives of the United Kingdom Government on 19 March 1991, the Commission stated that, in the light of the evidence and arguments presented in the most recent correspondence, they now accepted that the sale of the 580-acre site by the DCC to Toyota should be viewed as one single transaction. To establish whether this transaction contained elements of State aid, however, it was necessary to have a valuation carried out of this total site and the Commission requested the United Kingdom authorities to arrange accordingly. The Commission suggested, but did not insist, that the District Valuer appeared the obvious choice to carry out this exercise in the interests of consistency and in view of his statutory role. They also indicated the terms of reference they would wish to attach to the valuation. The United Kingdom representatives did not object to the suggestion that the District Valuer carry out the valuation, providing he was willing to do so, or to the proposed terms of reference.

By letter dated 26 March 1991 the Commission wrote to the United Kingdom authorities confirming the request for a valuation of the 580-acres site, with the following terms of reference :

> 'The valuation should follow the assumptions and methodology adopted in the original valuation of the core element of the site in the absence of any compelling reason to depart from them. Specifically, the valuation should be based on values on the date of sale agreement, i.e. February 1990 and should assume that services are available up to the perimeter of the site and that vacant possession is given. It should ignore alleged disadvantages pertaining to the expansion element of 300 acres — e.g. access and lower development potential. However relevant these may be if this element of the site were being valued in isolation, they are irrelevant when the total 580 acres is considered as one single site being sold with full planning permission for industrial development. Finally I do not consider that the valuation should attempt to take account of the two "significant constraints" relating to the gradient of the land and adverse ground conditions you cite in your letter of 16 October 1990. In our experience these "constraints" are, in fact, a standard feature of large sites assembled for industrial development. The related piling costs are also a standard cost for greenfield motor assembly plants.'

Shortly afterwards the United Kingdom authorities informed the Commission authorities that the District Valuer was agreeable to carrying out the valuation.

By letter dated 17 May 1991 the United Kingdom authorities forwarded the report of the District Valuer to the Commission and requested an early meeting to discuss it.

In his report, the District Valuer describes in detail the site, its former uses, the planning permission granted on 9 August 1989 for the erection of a vehicle assembly and production plant together with the accompanying conditions and the sale agreement which had been made available to him. He then acknowledged the terms of reference for his valuation and described the nature of his valuation in the following terms :

> 'I wish to make clear therefore that my valuation is my assessment of the price at which the property might reasonably have been expected to be sold in the open market at the date of valuation assuming a willing seller and with the benefit of the terms of the agreement for sale and planning permission available.
>
> For the avoidance of doubt it reflects all the site characteristics and constraints that would have influenced the vendors and purchasers in normal commercial open market negotiations.'

On this basis the District Valuer concluded that the value of the site was £ 22,5 million. He added that extensive research on a national scale had revealed no comparable transactions of this size and little useful evidence.

At a meeting between the United Kingdom Government representatives and the Commission on 28 May 1991, the former argued that the District Valuer's report, while valid within its own terms, still did not establish that there was State aid to the project. There was no evidence of any intention on the part of Toyota to request or receive State aid. On a technical point, the United Kingdom representatives argued that the District Valuer should have been requested to base his valuation on land prices at April 1989 — when the terms of the sale were actually agreed — and not February 1990 — when the sale agreement was formally signed. Finally, even if there were State aid, the amount was so negligible that it would not affect trade between Member States.

At a further meeting on 20 June, also attended by representatives of Toyota, certain documents were handed over to the Commission; others were referred to and formally submitted by letter later the same day by Toyota's legal representatives. These latter documents included:

— the speaking note of the principal Toyota representative,

— a comparison of land costs in South Wales, Burnaston and Humberside,

— a wider comparison of prices of undeveloped industrial land examined by Toyota.

The other documents handed over by the United Kingdom representatives included:

— a copy of a letter dated 3 June 1991 from the District Valuer in response to a request from the Department of Trade and Industry to consider the effect choosing April 1989 as opposed to February 1990 as a valuation date might have had on this report. This letter stated that market conditions had in fact deteriorated over that period and stated the Valuer's 'firm conclusion that the value in April 1989 would not have been less than that which I reported at February 1990. In fact I would put the value the same at both dates.',

— copies of two reports dated 13 and 14 June 1991 made by a United Kingdom private property consultancy firm, following a request of 7 June by the DTI, acting on its own initiative; the first analysed the changes in land values during the period April 1989 to February 1990 in the Derby area and the second provided an alternative valuation of the 580 acres as of February 1990. The latter report, which draws in part on information provided for by DTI, valued the site at £ 19 million. The other study concluded that, excluding the Toyota effect, the growth in land values over the 10-month period would have been 18 %,

— tables of the range of industrial and warehouse land values as of 1 April 1989 and 1990 drawn from the Property Market Report by the Valuation Office.

During the meeting the United Kingdom representatives argued that land prices in general increased significantly between April 1989 and February 1990. Moreover, as land valuation is inevitably arbitrary and contains a subjective element, the parties should be more concerned with establishing a reasonable price range rather than a single absolute figure, particularly as the District Valuer himself had acknowledged that he had little or no point of reference for his valuation.

The Toyota representatives emphasized their publicly-stated intention from the outset to proceed with the project at Burnaston without requesting or receiving State aid from central government or local authorities. They outlined their strictly commercial approach to the consideration of alternative sites and their decision to choose the Burnaston site on the understanding that the price offered by the DCC represented its commercial value. They echoed the United Kingdom representatives' view that a range of site values rather than a single value would have been a more reasonable approach to the question of valuation.

By letter dated 11 July 1991 the United Kingdom authorities enclosed a further internal document prepared by Toyota on the transaction. They requested the Commission to take account of the evidence presented therein, particularly that relating to the prices offered to Toyota for alternative sites in the United Kingdom, while respecting the commercial confidentiality of some of the information. This document also repeated and developed some of the general arguments advanced earlier by the United Kingdom side that the transaction did not entail State aid. Among the points made are:

— as this could be the first case where the Commission takes a decision on State aid on a sale of public land, it should not be 'based upon only cursory investigation and insubstantial evidence',

— any valuation of the site should take account of all the relevant considerations and objectives of the parties, including the fact that Toyota were in a strong bargaining position *vis-à-vis* the DCC who were offering a large undeveloped site which could prove difficult to sell in the future and who were also conscious of the considerable non-financial benefits to the DCC if the sale went through,

— the alternative valuation commissioned by the United Kingdom authorities highlights certain shortcomings in the District Valuer's report, and adds to the case for adopting a price range of, for example £ 16 million to £ 24 million, rather than a fixed sum as the valuation.

IV

Toyota Motor Corporation is the largest motor-vehicle producer based in Japan. In 1990 total group sales worldwide amounted to 4,4 million units, and group net sales were valued at ECU 58,084 million. Imports of Toyota vehicles into the Community in the same year amounted to 351 000 units, representing 2,7 % of Community car registrations. The investment by the company in the Burnaston plant announced in 1989 continued a series of ventures designed to strengthen the company's ties with Europe. Toyota is, in its own words, 'committed to becoming a fully-accepted member of the European automobile industry'.

The passenger car market in Western Europe underwent a period of rapid growth in the late 1980s but the market, with the sole exception of Germany, has declined sharply in recent times and the short-term outlook remains difficult and uncertain. In the medium to long term, it would appear reasonable at this point to assume a return to an underlying annual growth rate of the order of 1 to 2 %.

V

In initiating the present procedure, the Commission stated that 'The question of the existence or not of State aid centres on whether the terms and conditions of sale of the site to Toyota by the DCC depart from normal commercial practice and criteria to such an extent as to constitute State aid in favour of Toyota within the meaning of Article 92 (1) of the EEC Treaty'. This remains the point of departure for consideration of the case. The Commission fully accepts that the United Kingdom Government did not itself intend that aid should be given to the project. The Commission has also accepted from the outset that there is no evidence to suggest that Toyota requested State aid or intended benefiting directly or indirectly from State aid through the terms of transfer of the site. However, this absence of intention on the part of Toyota does not mean that no State aid was entailed in the sale of the site by the DCC. It is also clear that the amount of aid involved is small in relation to the overall cost of the project and that Toyota would have gone ahead with the project in any event without the aid.

The DCC was obliged by domestic statute to sell the site to Toyota for the best consideration that could reasonably be obtained. In practice, according to the United Kingdom authorities, this should account for factors such as the nature and location of the land, planning and other development constraints and the market for land. This perspective is consistent with the Commission's point of view, that the behaviour of a public authority in disposing of an asset to a commercial interest, trading in the Community, should correspond to the rationale of a private vendor operating under normal market economy conditions analogous to the Commission's position on public authorities' holdings in company capital (1). In these conditions, a private vendor would examine the possibility of alternative purchase offers and sell the asset to the person making the highest offer. Where the vendor feels that because of special circumstances such as, say, the size of a site or the importance of planning conditions, alternative potential purchasers are not immediately available and where he has no reliable reference for market values for the asset, he would have the asset professionally valued, taking account of all the prevailing circumstances and non-price conditions of sale, prior to selling it. He would then seek the resulting valuation figure as the sale price from the purchaser.

In the case of the sale of the site at Burnaston, the DCC did not carry out any valuation of the site prior to offering it to Toyota in April 1989. The only valuation available to the DCC related to the core 280 acres of the site was carried out in June 1989, i.e. after the price offer to Toyota. As noted in the opening of the present procedure, this valuation exceeded the price sought from Toyota by £ 2,7 million and no attempt was made by the DCC to revise the sale price to take account of this difference. No valuation of the remainder of the site was carried out by the DCC on its own initiative.

The Commission cannot accept that the break-even approach by the DCC to the package which it offered to Toyota, as evidenced by the minutes of the Policy Committee of the DCC of 21 November 1989 cited above and confirmed in subsequent correspondance with the United Kingdom authorities, corresponded to the behaviour of a commercial vendor. This approach was based explicitly on the estimated cost of assembling the land and of providing access and services to the site. The 'significant planning and other constraints' which, according to the DCC, characterized the site and influenced its market price did not apply to the purchasers, Toyota. The Commission cannot accept the proposition that a rough estimate of the cost of assembling mainly agricultural land and providing services to it as a valid substitute for the market price or the best that the DCC

(1) Bulletin EC 9-1984.

could have reasonably obtained, as it bore no relation to industrial land values (1).

In these circumstances, and given its acceptance that the site sale should be viewed as one single transaction, the Commission saw no alternative to having the total site valued with the same terms of reference as the original valuation carried out on the 280-acre element and comparing the resulting valuation with the price paid by Toyota in order to establish if the transaction entailed State aid. The United Kingdom authorities accepted this approach in March 1991 and did not query or object to the proposed terms of reference for the valuation or the suggestion that it be carried out by the District Valuer.

On the arguments put forward by the United Kingdom Government and Toyota subsequent to the District Valuer's report, the Commission would firstly make the general point that these arguments would have carried more conviction if they had been put forward prior to the United Kingdom authorities' accepting the terms of reference of the valuation requested by the Commission and the submission by the District Valuer of his report. On the particular argument that the valuation should have been based on April 1989 and not February 1990 prices, the District Valuer himself has confirmed that this would not have affected his conclusion. Moreover, the Commission does not find sufficient evidence in the study on land price movements during this period commissioned by the United Kingdom authorities to warrant querying this conclusion. On the argument that costs arising from alleged constraints relating to the gradient of the land and adverse ground conditions, the Commission is of the view that such costs are a common feature of large sites assembled for industrial development, in particular the related piling costs associated with greenfield motor assembly plants. They did not warrant special consideration by the District Valuer over and above the 'particular account of the topography' which his report already incorporates.

On the alternative valuations commissioned by the United Kingdom authorities on their own initiative subsequent to receiving the District Valuer's report and his letter confirming that a February 1990 price basis would make no difference to his conclusion, the Commission cannot agree to embark on a second-guessing exercise whereby one party wishes to substitute ex post a private valuer for an officialy-designated one in the absence of any compelling reason to do so. This would not be in the interests of equity and consistency in Commission decision making. Moreover the Commission does not consider that the contents of this confidential valuation justify the criticisms of the District Valuer's methodology subsequently made by Toyota.

The Commission can see no valid argument for attempting at this late stage to substitute a 'representative range of prices' for the single price which emerged from the District Valuer's report, in the absence of any earlier proposal to this effect or of any reasonable criteria for delimiting such a range. To attempt to introduce a range of values at this stage would only introduce an element of unwarranted arbitration and uncertainty and would run counter to the pursuit of fairness and objectivity which has been the Commission's goal in this whole procedure. The Commission would point out in this context that the valuation report commissioned independently by the United Kingdom authorities itself concluded with a precise single figure valuation and made no reference to a range within which a 'fair commercial value' may be.

Finally, the Commission has examined the confidential evidence produced by Toyota on alternative site offers, together with the evidence on industrial and warehouse land values from the Valuation Office forwarded by the United Kingdom authorities and has found that it does not detract from the conclusion that the transaction between the DCC and Toyota contained State aid of £ 4,2 million.

In these circumstances, the Commission concludes that the difference of £ 4,2 million between the District Valuer's valuation of the site of £ 22,5 million and the price paid by Toyota of £ 18,3 million represents State aid by the DCC to the company.

There is considerable intra-Community trade in passenger motor vehicles; amounting to 6 398 000 units in 1990, equivalent to ECU 48,292 million. the aid of £ 4,2 million granted by the DCC to Toyota will, therefore, affect intra-Community trade in cars and therefore threatens to distort competition in this market. Consequently, it constitutes State aid in favour of Toyota within the meaning of Article 92 (1) of the Treaty.

VI

This aid, which falls outside the scope of any approved scheme, should have been notified to the Commission as provided for by Article 93 (3) of the EEC Treaty. Moreover, the particular commercial activity involved comes within the parameters of the Community framework on State aid to the motor vehicle industry (2). This provides that 'As regards aid to be granted outside the scope of an approved aid scheme, any such project, whatever its cost

(1) As noted above, the calculations underlying this 'break-even' approach are now unlikely to be realized and there will be considerable cost overruns by the DCC on the provision of related services.

(2) OJ NO C 123, 18. 5. 1989, p. 3.

and aid intensity, is of course subject without exception to the obligation of notification pursuant to Article 93 (3) of the EEC Treaty.'

Since the United Kingdom Government failed to notify the aid in this case in advance, the Commission was unable to state its views on the measures before they were implemented. Thus, the aid is illegal in that it was awarded in violation of Article 93 (3) of the Treaty.

In this respect, it has to be recalled that — in view of the imperative character of the rules of procedure as laid down in Article 93 (3) of the EEC Treaty which also are of importance as regards public order, and whose direct effect the Court of Justice has recognized in its ruling of 19 June 1973 in Case 77/72 [1] — the illegality of the aid at issue here cannot be remedied *a posteriori*.

VII

Article 92 (3) of the Treaty lists aid which may be compatible with the common market. Compatibility with the Treaty must be determined in the context of the Community as a whole and not of a single Member State. In order to safeguard the proper functioning of the common market and taking into account the principles of Article 3 (f), the exceptions from the principle of Article 92 (1) as set out in Article 92 (3) must be construed narrowly when an aid scheme or any individual aid award is scrutinized. In particular, they may be applied only when the Commission is satisfied that the free play of market forces alone, without the aid, would not induce the prospective aid recipient to adopt a course of action contributing to the attainment of one of the said objectives.

With regard to the exceptions provided for in Article 92 (3) (a) and (c) for aids that promote or facilitate the development of certain areas, in the present case, Burnaston, which is located in Derbyshire, is not situated in a region eligible for State aid pursuant to Article 92 (3) (a) or (c).

As to the exceptions provided for in Article 92 (3) (b), the facts of the case provide no grounds whatsoever for considering that the aid in question is intended to promote a project of common European interest or to remedy a serious disturbance in the United Kingdom economy. Furthermore, the United Kingdom Government has not presented any such arguments to justify the aid in question.

With regard to the exception provided for in paragraph 3 (c) of Article 92 of the EEC Treaty in favour of 'aid to facilitate the development of certain economic activities', the Commission may accept certain aid in the motor-vehicle industry as compatible with the common market if it fulfils one of the positive criteria for appreciation of aid cases — other than regional aid — cited in the guidelines to the Community framework on State aid to that sector. These concern aid with the following objectives: rescue and restructuring aid, innovation or fundamental rationalization, research and development, environmental protection, basic vocational training. None of these objectives are applicable to the aid and project in question, nor has the United Kingdom Government claimed otherwise.

VIII

In cases of aid incompatible with the common market, the Commission — marking use of a possibility given to it by Article 93 (2) of the Treaty and by the Court of Justice in its judgment of 12 July 1973 in Case 70/72 [2], confirmed in the judgment of 24 February 1987 in Case 310/85 [3] — can require Member States to recover from recipients the aid granted. To this end, it is necessary that the United Kingdom authorities recover within two months the incompatible aid awarded to Toyota by the Derbyshire County Council, such recovery to be realized according to the provisions of national law including those referring to the late repayment charges on obligations to the State in the event that repayment takes place later than decided by the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The aid in the form of a subsidy amounting to £ 4,2 million to Toyota Motor Corporation entailed in the sale to that company of the 580-acre site at Burnaston by the Derbyshire County Council in February 1990 is illegal as it was provided in violation of the provisions of Article 93 (3) of the EEC Treaty. Moreover it is incompatible with the common market within the meaning of Article 92 of the Treaty.

Article 2

The United Kingdom Government is hereby required to ensure that this aid is withdrawn by means of a refund of £ 4,2 million by Toyota to the Derbyshire County Council within two months from the notification of this Decision. This refund amount shall be increased by the

[1] [1973] ECR, p. 611.

[2] [1973] ECR, p. 813.
[3] [1987] ECR, p. 901.

interest advantage from which the company might unlawfully benefit in the event of the refund taking place later than the two months indicated above.

Article 3

The United Kingdom Government shall inform the Commission within two months from the notification of this Decision of the measures taken to comply herewith.

Article 4

This Decision is addressed to the United Kingdom.

Done at Brussels, 31 July 1991.

For the Commission

Leon BRITTAN

Vice-President