II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

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 authorized in Commission Decision 89/58/EEC authorizing a maximum aid to this operation subject to certain conditions

(Only the English text is authentic)

(93/349/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 in accordance with the above Article to interested parties to submit their comments,

Whereas :

I

On 28 April 1992 the Commission initiated the procedure [1] provided for in Article 93 (2) in respect of measures taken by the United Kingdom Government over and above those authorized in Decision 89/58/EEC [2] (the '1988 Decision'). The Commission considered that these measures constituted State aid within the meaning of Article 92 (1) to British Aerospace (BAe) for its purchase of the Rover Group. The value of the measures was estimated at £ 44,4 million. The Commission considered, furthermore, that the aid measures were illegal in that they were in breach of the 1988 Decision and because they had not been notified to the Commission.

The measures taken by the United Kingdom Government cited in the opening of the procedure had been the subject of a Commission Decision of 17 July 1990 [3] (the '1990 Decision'). By a ruling of 4 February 1992 [4], the Court of Justice of the European Communities annulled the 1990 Decision in so far as that Decision required the United Kingdom Government to recover from BAe the State aid which the Commission considered these measures entailed. This Court ruling followed an appeal by BAe against the 1990 Decision. The Court found for BAe on procedural grounds, namely that in taking its 1990 Decision the Commission had failed to observe the procedural rules laid down in Article 93 (2). The Court did not pronounce on the substantive issues of the 1990 Decision.

By letter dated 13 July 1992, the United Kingdom Government confirmed that it had no observations on the letter of 28 April 1992 opening the present procedure. The Commission did receive observations from BAe on 18 June 1992. These observations are summarized in Part VIII below and considered in Part IX. They were communicated to the United Kingdom Government on 23 June 1992; the United Kingdom Government did not make any comments on them.

[1] OJ No C 122, 14. 5. 1992, p. 3.
[2] OJ No L 25, 28. 1. 1989, p. 92.
[3] OJ No C 21, 29. 1. 1991, p. 2.
[4] Case C-294/90, British Aerospace and Rover Group Holdings v. Commission, [1992] ECR I-493.

In the framework of the procedure already opened by the letter of 28 April 1992, the Commission, by letter dated 30 July 1992, drew the attention of the United Kingdom to the necessity, in the event that the aid measures in question were found to be incompatible with the common market, to require, at the appropriate time, i.e. when a final negative decision would be taken, recovery of interest on the principal amount in question to run from the effective date of payment of the aid, so as to neutralize all the undue advantages which would have accrued to BAe and Rover Group. On the same day, copies of this letter were transmitted both to BAe and Rover Group.

The United Kingdom Government replied to the Commission's letter of 28 April 1992 by a letter of 25 September 1992, the contents of which are summarized under Part X below. BAe replied to the Commission's letter of 30 July 1992 by a letter dated 26 August 1992, the contents of which are summarized under Part VIII (ix) to (xii) below. A copy of this letter was transmitted to the United Kingdom Government; the United Kingdom Government did not make any comment on this letter.

II

The 1988 Decision followed a notification by the United Kingdom Government of its proposal to provide new capital of £ 800 million to the Rover Group to write off debt in the context of its sale by the Government to BAe. The Decision describes in detail the background to the notification, the context of the sale to BAe, as well as the criteria and rationale underlying the Commission's Decision and the conditions imposed therein. The key elements of the Decision — which was never contested by the United Kingdom Government or any other party — relevant to the present Decision may be summarized as follows:

— the debt write-off of £ 800 million proposed by the United Kingdom Government exceeded the proposed £ 150 million acquisition price of the Rover Group by BAe and would have meant that the Government would have been selling the Rover Group for a negative price equivalent to £ 650 million; it would therefore have constituted State aid within the meaning of Article 92 (1),

— the Commission concluded that the net indebtedness of the Rover Group as at 30 June 1988 in fact amounted only to £ 569,2 million and not £ 801,1 million as maintained by the United Kingdom Government; this latter figure included £ 231,9 million working capital which could not be considered as financial debt,

— the Commission accepted that the acquisition price for the Rover Group of £ 150 million to be paid by BAe reflected fairly the real net worth of the company in the market,

— restructuring aid to Rover could be considered compatible with the common market under Article 92 (3) (c) in view of, *inter alia*, the provisions of the corporate plan for the Group over the period 1988 to 1992 and the commitment of the purchasers to implement in full the restructuring plan; such aid would, however, have to be subject to a series of strict conditions,

— the amount of such restructuring aid should, in the light of all the prevailing conditions including the cost of the restructuring plan, be limited to £ 469 million in order to satisfy the criterion of proportionality in relation to the problems it was seeking to resolve; any aid beyond this amount would not be compatible with the common market as it would place the Rover Group in a more favourable financial position than its Community competitors.

On this basis the Commission authorized a maximum State aid to the Rover Group of £ 469 million. This meant that the United Kingdom Government would, in effect, sell the company for a negative price of £ 319 million, i.e. the debt write-off of £ 469 million less the acquisition price of £ 150 million. This authorization was subject to six specific conditions:

— that there be no alteration in the proposed terms of sale of the Rover Group to BAe as notified,

— that the aid be used exclusively for the repayment of financial debts of the Rover Group,

— that no further aid be granted to Rover before the end of 1992, with the exception of a maximum regional grant of £ 78 million,

— that completion of the Rover corporate plan by the end of 1992 be carried out in accordance with the details communicated to the Commission,

— that repayment to the United Kingdom Government be effected no later than on the completion of the corporate plan of any underspending or overvaluation of the debt items as communicated to the Commission,

— that certain parliamentary assurances for the Rover Group be ended and that no further guarantees of subsequent obligations be incurred by the company.

III

The 1990 Decision was based on evidence that had emerged subsequent to the adoption of the 1988 Decision. This evidence indicated that, contrary to the terms of the 1990 Decision, the United Kingdom Government had altered the terms of sale of the Rover Group in such a way as to confer additional aid amounting to £ 44,4 million on BAe and the Rover Group. These matters are considered in Chapter IV below.

The 1990 Decision also reassessed the acquisition price paid by BAe for the Rover Group in the light of new relevant information which had become available and been supplied by the United Kingdom Government. This information included correspondence from other interested parties with the Department of Trade and Industry (DTI), advice to the Government on the conduct of the sale of the Rover Group, relevant correspondence with the United Kingdom tax authorities, financial statements for the Rover Group at 30 June 1988, and profit and cash flow forecasts which had been made earlier. The Commission concluded that, while the failure of the United Kingdom Government to supply this information to the Commission at the time of the 1988 Decision constituted a failure to cooperate, the information itself gave the Commission no reason to believe that the negative price of £ 319 million resulting from the 1988 Decision was not a fair price for both the seller and the purchaser in the light of, *inter alia*, the restructuring commitments and the obligation on BAe not to sell the core business of the Rover Group within five years. This obligation had had a significant discounting effect on the price.

IV

On 21 November 1989 a report by the controller and auditor general of the United Kingdom National Audit Office (NAO) was published together with a secret NAO memorandum attached thereto, which revealed that additional financial concessions had been made by the United Kingdom Government to BAe over and above those authorized in the 1988 Decision. The value of these concessions was put by the NAO at £ 38 million. The main conclusion of the NAO Report was that the acquisition price for the Rover Group fell short of the real value of the company. The memorandum also revealed the existence of side-letters to the contract, the identity of other candidate buyers and the existence of valuations of the Rover Group made by the merchant bank which advised the Government during the sale.

There then followed correspondence and meetings between the Commission and the United Kingdom authorities in the course of which the documentation referred to in the NAO memorandum together with further information and documentation were transmitted to the Commission. The following matters emerged which are the subject of this Decision:

(a) a grant of £ 9,5 million was made to BAe by the United Kingdom Government to cover part of the £ 13,6 million cost to BAe of purchasing Rover's minority shares.

The level of £ 9,5 million was chosen in order to remain below the £ 10 million threshold for parliamentary approval required by the Industrial Development Act 1982. This concession, and the reason for it, were communicated to the chairman of BAe by the Secretary of State for Trade and Industry by letter of 14 July 1988. According to the United Kingdom authorities, the Commission was orally informed at the time of the 1988 Decision of this concession;

(b) £ 1,5 million was paid by the United Kingdom Government to the Rover Group to cover advice costs incurred by the company as a result of the sale.

The United Kingdom authorities argued at the time that this sum represented the cost of legal and economic advice to the Rover Group linked to the sale and did not constitute an aid which would affect the competitive position of the Rover Group. This concession was communicated to the chairman of BAe by a letter from the Secretary of State for Trade and Industry dated 14 July 1988;

(c) the payment of the purchase price of £ 150 million for the Rover Group was deferred from 12 August 1988 to 30 March 1990 resulting, according to the United Kingdom authorities, in a net benefit to BAe of £ 22 million.

According to the United Kingdom authorities, this concession was due to difficulty in establishing with confidence the use of Rover's tax advantages by BAe. The United Kingdom authorities communicated their agreement to BAe's proposal to defer its payment in a letter dated 14 July 1988 from the Secretary of State for Trade and Industry to the Chairman of BAe. The benefit to BAe of the deferment was calculated on the assumption that in its absence BAe would have borrowed the £ 150 million, paying interest at base rate. However, the United Kingdom authorities took the view that the gross benefit of £ 33,4 million should be reduced by the additional tax payment which BAe would have paid on the higher profit due to the deferment of the payment.

V

The Commission has carried out a full reappraisal of the above matters and has concluded that each contains State aid within the meaning of Article 92 (1) and that this aid is incompatible with the common market.

Before considering each of the above concessions individually, the Commission would make one general observation: the key conclusion in the 1988 Decision concerning the State aid entailed in the sale of the Rover Group to BAe was that, as Rover — which had a positive book value — was being sold to BAe for a negative price following exclusive negotiations, the sale terms entailed by definition State aid from the seller to the buyer. Following from this, any and every subsequent revision to the terms of sale involving financial costs to be borne exclusively by the seller increases the negative price and constitutes new State aid.

As to the individual concessions:

(a) the £ 9,5 million grant paid to BAe constitutes aid within the meaning of Article 92 (1). This payment was financed, as the letter of 12 July 1988 from the Secretary of State for Trade and Industry to the chairman of BAe acknowledged, 'by means of a direct Industrial Development Act 1982 Section 8 grant to BAe'. In other words, it was financed under an approved aid scheme. Any such payment constitutes, by definition, a State aid. Moreover, by revising the terms of sale of Rover to BAe from those authorized by the Commission to confer a financial advantage exclusively on BAe, it added to the State aid entailed in those terms.

This aid did not form part of the notified terms of sale and constituted therefore an alteration of the proposed terms of sale contrary to the first condition of Article 1 of the 1988 Decision. The assertion of the United Kingdom Government that the Commission was informed of the concession is incorrect. Such a proposal was made by the Secretary of State for Trade and Industry to the Member of the Commission responsible for competition at the time, but was firmly rejected by the latter. In the letter of 12 July 1988 from the Department of Trade and Industry (DTI) to BAe the level of £ 9,5 million was recommended against the real cost level of £ 13,5 million because a grant of above £ 10 million would require parliamentary approval and would therefore bear a 'greater risk of challenge and thus repayment being required';

(b) the £ 1,5 million advice costs paid to Rover Group constitute aid to Rover Group within the meaning of Article 92 (1). This cost represents a normal transaction cost which should be taken into account in the final sales price. It conferred a financial advantage on Rover Group and, as with (a) above, added to the State aid authorized in the 1988 Decision;

(c) the deferment of the purchase price by 20 months resulting in a benefit of some £ 33,4 million to BAe constituted aid within the meaning of Article 92 (1). The date of payment of the purchase price for a company in a transaction such as BAe's purchase of the Rover Group is clearly one of the most material terms of the transaction. Group is clearly one of the most material terms of the transaction. As with (a) and (b) above, it conferred a financial advantage to BAe and added to the State aid authorized in the 1988 Decision.

On calculating the value to BAe of this 20-month deferment of payment of the purchase price, the Commission had earlier accepted, in drawing up the 1990 Decision, the methodology proposed by the United Kingdom authorities. This entailed basing the calculation on the notional interest which BAe would have had to pay on a loan of £ 150 million for 20 months on the assumption that BAe would have paid interest at the base rate when borrowing the £ 150 million on a short-term basis from a private bank. The resulting value is £ 33,4 million. The Commission accepts that BAe could have raised this finance in a variety of ways, e.g. from internal cash resources, from a long-term loan at more favourable terms, etc. In fact, BAe argues that it could and would have raised the necessary finance by way of a long-term bond issue over 25 years at 10,97 % interest cost to the issuer. This, it is claimed, would have cost £ 26,8 million during the first 20 months, and not £ 33,4 million as calculated by the United Kingdom Government. BAe's calculation assumes that three six-monthly interest payments would have fallen due for payment over the period in question. But it ignores all the other consequences of borrowing for 25 years to meet a 20-month liability, e.g. all the interest payments which would fall due for the remaining 280 months of the loan, the risk of interest and inflation rate changes. The Commission cannot accept that this contrived calculation methodology represents a reasonable measure of the value to BAe of the deferral for 20 months of a payment obligation. In any event, what BAe is really saying is that by virtue of the deferral conceded by the Government it postponed raising a 25-year loan. The value of this deferral has nothing to do with the actual terms on which such a loan would have been raised. The concession only deferred taking up the loan. Hence, the Commission can only perceive the value of the deferral as the notional interest which would accrue on a loan raised for this 20-month period. The proposal by the United Kingdom authorities for adopting the base rate for calculating this notional interest is the most logical and realistic approach as it represents the prime rate at which banks in the United Kingdom lend to their best customers on a short-term basis. Accordingly, the Commission concludes that the value of the State aid entailed in the deferral is £ 33,4 million.

The Commission does not accept the approach adopted by the United Kingdom authorities in disclosing this aid that the 'gross' amount of the aid should be reduced by £ 11,4 million to take account of the fact that the financial charges occasioned by such a loan would have reduced BAe's profitability and consequently its tax liability (at a rate of 35 % corporation tax), thereby arriving at a 'net' figure of £ 22

million. An analogy can be made here with cases of considering the aid element entailed in loans at reduced or zero rates. In such cases the Commission's constant practice is to consider the full gross value of the reduction in interest rates as constituting the State aid element of the loan. Accordingly, the Commission adheres in the present case to its established practice of defining State aid in these circumstances as the gross value of the deferral. It considers, therefore, that the value of this State aid is to be put at £ 33,4 million.

The 1988 Decision established that the authorized aid to the Rover Group — and by extension unnotified aid to the same operation — distorts competition and affects trade between Member States and therefore constitutes State aid within the meaning of Article 92 (1). The fact that the actual recipient of most of the aid, BAe, is also engaged in a wide range of other commercial activities in the Community and worldwide does not alter this conclusion. From the moment of the sale of Rover to BAe, the latter was directly involved in trade in motor vehicles between Member States through its sole ownership of the continuing economic entity, the Rover Group.

VI

The aid, which falls outside the scope of the original notification of £ 800 million debt write-off to Rover Group, should have been notified to the Commission as provided for by Article 93 (3). Since the United Kingdom Government failed to notify its plans to grant these additional aids 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 breach of Article 93 (3).

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) 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

In considering whether the three State aid measures identified above are compatible with the common market or not, the Commission must take into account all the relevant elements, including the economic and market context already taken into account in the 1988 Decision as well as the conditions imposed in the Decision (see para. 20 of the Court's Judgement of 3 October 1991 in Case C-261/89, Italy v. Commission [2]). In this context, it must be remembered that both the object and the effect of the three additional aid measures conceded to BAe by the United Kingdom Government was to make more favourable to BAe the terms of acquisition of the Rover Group compared with the terms authorized by the Commission in the 1988 Decision as being compatible with the common market in the terms of Article 92 (3) (c) and as stipulated by the Commission. The Commission stipulated these terms as they represented the maximum aid that could be considered compatible under Article 92 (3) (c) in view of the commitments given in the restructuring plan 1988 to 1992. The implementation of this restructuring plan remains the basis against which the compatibility of the authorized aid of £ 469 million and the unauthorized aid of £ 44,4 million fall to be considered. However, the Commission has found no evidence of any change in circumstances or facts which would warrant it to revise the conclusion it arrived at in the 1988 Decision, that is, that £ 469 million was the maximum State aid to this operation which could be considered compatible with the common market. Moreover, no argument to this effect has been put forward either by the United Kingdom Government or BAe. Hence, it must be concluded that all the additional aid granted to BAe for its purchase of the Rover Group subsequent to the 1988 Decision is incompatible with the common market.

VIII

The observations submitted by BAe may be summarized as follows:

(i) the additional concessions to BAe granted by the United Kingdom Government ('the benefits') did not result in the sale of the Rover Group to BAe at an undervalue;

(ii) the benefits did not and could not have affected the conduct of the Rover Group's business after its sale to BAe and could not have distorted trade;

(iii) BAe and the Rover Group are innocent parties and acted throughout in good faith;

(iv) without the benefits BAe would not have bought the Rover Group and 'the realization of the Commission's objectives would have been prejudiced';

(v) recovery of the benefits would punish BAe and the Rover Group while unjustly enriching the United Kingdom Government;

[1] Capolongo v. Azienda Agricola Maya, [1973] ECR 611.

[2] [1991] ECR I-4437.

(vi) the benefits do not constitute State aid: a private investor in the position of the United Kingdom Government at the time of the sale would have agreed to the three concessions, particularly if he were anxious not to jeopardize the sale and had a social conscience as regards minority shareholders;

(vii) there is no evidence that the benefits had any effect on trade within the Community; it cannot be shown that they affected the behaviour of any of BAe's businesses after they were granted by the Government;

(viii) even if the benefits were to be regarded as State aid, they have not been correctly quantified for three reasons: *firstly,* the Commission should have apportioned them over the different BAe businesses; *secondly,* the Commission overestimated the value of the deferment of payment of the purchase price of the Rover Group by relying on the interest rate given to it by the United Kingdom Government for this purpose; *thirdly,* in any aid repayment order the Commission should allow for the incidence of taxation on the benefit to BAe of deferment of payment of the purchase price;

(ix) if the Commission's Decision of 1990 had not been unlawful, the recovery of interest would have been determined in accordance with the practice of the Commission prevailing in 1990, that is, from the date set for repayment of aid, as foreshadowed in the communication initiating the procedure pursuant to Article 93 (2). The Commission accordingly cannot rely on its own wrongdoing in failing to adopt a lawful decision in 1990, in order to worsen the position of BAe and the Rover Group by applying to them an administrative practice which it has adopted subsequently;

(x) it is a well-established principle in developed legal systems that changes, not only in law, but also in administrative practice should not have retrospective effect. In this connection, the Court of Justice's judgment in Case 344/85 (1) annulled a Commission decision for failure to follow a practice which prevailed at the material time but which had changed by the time of the contested decision;

(xi) the judgments of the Court of Justice cited in the letter of 30 July 1992 are not authority for the proposition that interest should always be charged from the date that unlawful State aid is granted. The Court made no such statement in either case. The Commission's decision at issue in the Court's judgment of 21 March 1990 (2) did not order the recovery of interest; the facts of Case C-354/90 (FNCEPA) (3) were even further removed from those of the present proceedings;

(xii) if it were to apply its new practice in connection with the deferment of payment, the Commission would be compounding the penalties imposed on BAe. In effect, BAe would be liable to penalties on penalties and the British Government would reap a large windfall reward from any finding that it had acted unlawfully. This is because a requirement to pay interest from the effective date of receipt of the aid would worsen BAe's position relative to that which would have been obtained if the British Government and BAe had not agreed that the payment of the purchase price for the Rover Group be deferred. In effect a new penalty would be added to those arising from the Commission's failure to take account, in calculating the notional interest on the deferment of the payment of the purchase price for the Rover Group, of the actual interest rates which BAe could have obtained in the money markets in 1988, and the differing incidence of United Kingdom taxation on the aid and its repayment.

These arguments are considered *seriatim* in the succeeding section.

IX

BAe argues (VIII (i)) that it is evident from the opening of the present Article 93 (2) procedure that 'The Commission almost certainly assumes that, because of the benefits, the British Government sold the Rover Group to BAe at an undervalue'. This is not true. The Commission has already made clear in its 1990 Decision that it re-examined the price paid by BAe for the Rover Group in the light of all the documentation that emerged subsequent to the 1988 Decision, but that it has concluded that the elements contained therein do not alter its original view that the £ 150 million cash acquisition price, or the £ 319 million negative price for which the Government sold the Rover Group when account is taken of the £ 469 million debt write-off, represented a fair price for both the buyer and the seller in view of all the conditions attached to the sale. To argue, as BAe does, that the Commission was erroneously misled by the United Kingdom Government into believing that BAe was willing to buy the Rover Group on the terms set out in the 1988 Decision is irrelevant. The Commission does not base its decisions on whether the terms of these decisions are acceptable to the parties concerned, but rather on ensuring that aid

(1) *Ferrière San Carlo SpA* v. *Commission,* [1987] ECR 4435.

(2) Case C-142/87, *Commission* v. *Belgium,* [1990] ECR 959.
(3) Judgment of 21 November 1991, [1991] ECR I-5505.

measures satisfy the Treaty criteria as regards their compatibility. In the present case, the 1988 Decision sets out the maximum amount of aid which could be considered compatible.

On the argument at VIII (ii), BAe maintains that there can be no causal nexus between the existence of the benefits and the conduct of the Rover Group's business. 'Once BAe had purchased the Rover Group, that amount was "water under the bridge"'. The Commission cannot accept that it should be under obligation to identify how an undertaking's commercial behaviour differed after receiving a State aid from what it would have been without such an aid. It would be manifestly absurd to impose such an obligation and would undermine the whole role of the Commission in the control of State aid in so far as such aid affects trade between the Member States. It is well established, in any event, that the award of aid to an undertaking trading in the Community, by virtue of its improving the financial position of the undertaking, affects intra-Community trade and gives rise to a distortion of competition.

On the argument at VIII (iii), the Commission considers that, quite apart from the particular circumstances of this case, it is not necessary to establish that an undertaking was not an innocent party or did not act in good faith in order to require repayment of illegal and incompatible State aid. (See, for example, Commission Decision 92/11/EEC (Toyota, United Kingdom) [1]). In fact, the evidence in the present case indicates that both the United Kingdom Government and BAe were fully aware of the potential problems as regards Article 92 which were entailed in the benefits conceded by the Government. The letter from the Secretary of State for Trade and Industry to the chairman of BAe of 12 July 1988 hardly bears out the claim that the United Kingdom Government and BAe were unaware of the likelihood that the concessions being negotiated at that time would raise serious problems for the Commission if they were detected. In his letter, the Secretary of State presented three possibilities of revising the notified terms of acquisition by deferring payment of the £ 150 million consideration in the following terms : 'On deferment of payment of the £ 150 million consideration, I can offer three possibilities, in ascending order of risk that the deferment will be picked up by the European Commission, in which case they might require repayment of the notional interest saved ... I am content to take whichever of these options you prefer'.

On the argument at VIII (iv), BAe suggested that repayment of the benefits by BAe would prejudice 'the Commission's objectives'. BAe wrongly imputes two objectives to the Commission in its evaluation of this case : *firstly,* that the Rover Group should not remain in public ownership but be sold to a private purchaser and ; *secondly,* that the Rover Group should be sold to BAe rather than to one of the Rover Group's competitors. These were not the objectives of the Commission. The Commission's objectives focused exclusively on ensuring that the criteria and objectives set out in Article 92 of the Treaty were respected. The case for privatizing the Rover Group was a matter for the United Kingdom Government. On the second point, a hypothetical sale of the Rover Group to a competitor might well, as BAe argues, have given rise to very different competition issues to those raised by the sale to BAe but these would not have fallen to be considered under Article 92.

On the arguments at VIII (v), the Commission cannot accept that, in considering the extent to which State aid measures are compatible with the common market, it must refrain from coming to a decision which would be unacceptable to the parties directly affected, or that it should ensure that the terms of its decision are such as to ensure that the project notified does go ahead. Contrary to what BAe argues, the Commission is not attempting to 're-make a bargain in favour of one party and to the gross detriment of the other party which had acted throughout in good faith'. The Commission based its original decision on the notified terms of the sale of the Rover Group. The revised terms of the sale were not notified to the Commission. On the contrary, they were deliberately concealed from it so much so that BAe cannot have a grievance against the Commission for the conclusions it reaches on those revised terms as they finally emerged from a NAO investigation. Similarly, the alleged injustice in the enrichment of the United Kingdom Government arising from repayment of the aid by BAe is irrelevant for the purposes of Article 92. Repayment of State aid unlawfully received has as its essential objective the restoration of the *status quo ante* and, concomitantly, the abolition of the distortion of competition.

On the argument at VIII (vi) above, BAe maintains that a private seller, placed in the position of the United Kingdom Government at the moment of sale, would, in fact, have accepted each of the three concessions given to BAe, and these do not therefore constitute State aid. BAe argues that the concessions were all granted pursuant to enforceable provisions in a binding contract between itself and the Government, that BAe gave valuable consideration in return (i.e. it went ahead with the purchase), and that each of the individual concessions represented a normal commercial transaction which a private seller in the United Kingdom Government's position might have been expected to agree to. The Commission, for its part, considers that whether or not the concessions were legally binding on the parties under domestic United Kingdom law is immaterial to consideration of their status as State aid. The Commission cannot be constrained in its consideration of State aid cases by the allegedly legally binding status of the transactions under examination, especially when these transactions have not been divulged to it in the first place.

[1] OJ No L 6, 11. 1. 1992, p. 36.

The Commission understands the motivation behind the parties in agreeing to these concessions, namely to avoid the full repercussions of the Commission's conclusions on the terms of acquisition of the Rover Group; this is evident from the letter of 6 July 1988 from the BAe chairman to the Secretary of State for Trade and Industry. It cannot be claimed, however, that BAe gave any valuable consideration for these concessions. The concessions represented a unilateral 'revised terms for the Rover Group acquisition' (letter of 6 July 1988) *vis-à-vis* the notified terms of acquisition, all at the exclusive expense of the United Kingdom Government. Even if one were to accept that a private seller would have acceded to these concessions demanded by the purchaser at the last moment as a 'normal practice', this does not alter the fact that they represent a very material change in the terms of the contract from that notified to the Commission. Given that the terms of the notified acquisition entailed a very significant amount of State aid in the first place, any revision of these terms giving unilateral financial concessions to BAe automatically constituted State aid. The State aid character of these concessions is further borne out by BAe's own arguments that without them the sale would not have gone ahead.

On the argument at VIII (vii), the Commission's position on the effect of the aid measures on intra-Community trade is set out in the last paragraph of Part V.

On the argument at VIII (viii), the Commission has already addressed (in Part V) the question of why it is not necessary to relate or 'apportion' the aid measures to the different commercial activities of BAe. It has also explained the basis on which it has calculated the value of the State aid entailed in the deferment of payment of the sale price. The Commission does not consider that the tax incidence to BAe of this deferment, or indeed of any subsequent order to the Government for the recovery of the aid, should form part of that calculation. The modalities of national tax regimes in this context are a matter for the national authorities. It is not for the Commission to intervene or to take these modalities into account except where they are adapted to give particularly favourable treatment to individual undertakings and as a consequence are likely, *per se*, to contain State aid elements and thus have a direct effect on competition between undertakings in different Member States. This is not the case in the present instance. The Commission does take account of the tax incidence of aid measures when calculating the gross and net grant equivalent of individual aid measures as regards compatibility, but this does not detract from the fact that it is the gross amount which constitutes the aid.

In response to the arguments under VIII (ix), (x) and (xi), it is to be observed, in relation to the contention that BAe's position would now be worsened by an express requirement to recover interest, that the 1990 Decision simply ordered recovery of the total of £ 44,4 million in aid received but did not expressly order that interest on that principal amount was to be recovered. It cannot, however, be inferred from that Decision that no interest was to be recovered, that is to say that, had that Decision been implemented, no interest whatsoever would have been recoverable. In the economic logic of the Court's judgment of 21 March 1990 (in the so-called 'Tubemeuse' case, cited under VIII (xi) above) recovery of interest as well as recovery of the principal amount, is necessary so as to re-establish the previously existing situation (paragraph 66 of the judgment); otherwise an undue financial advantage, that is a supplementary aid within the meaning of Article 92 (1), would accrue to the recipient of unlawful aid which, as in the present case, could be increased by postponing the effective date of its repayment by contesting it in the Court of Justice. Moreover BAe and the Rover Group have, in the intervening period, been permitted to benefit from a financial advantage which, in the Commission's view, they should not have had in the first place. Finally, it is to be noted that the Court's judgment of 21 March 1990 was handed down before the Commission took its Decision of 17 July 1990 in this case and that that judgment is confirmatory of a consistent line of case-law on the purposes of and necessity for recovery of State aid granted unlawfully.

BAe maintains (VIII (ix)) that if the 1990 Decision had not been unlawful, the recovery of interest would have been determined in accordance with the practice prevailing in 1990, that is, from the date set for repayment of the aid by the Commission's letter dated 17 July 1990 notifying the United Kingdom authorities of its negative decision with repayment order for £ 44,4 million, in effect, 18 August 1990. This is correct: the Commission's constant practice at that time, in its decisions requiring recovery of State aid unlawfully paid, was to require recovery of such aid to be effected according to the provisions of national law including those governing interest for late payment for debts due to the State. In the United Kingdom the relevant rules on this point were (and still are) as follows:

(a) in proceedings before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest at such rate as the Court shall think fit or as the rules of Court may provide which may run from the date upon which the cause of action arose. [Section 35A of the Supreme Court Act 1981];

(b) a party must plead specifically any claim for interest under the abovementioned Section 35A [Supreme Court Rules, Order 18, Rule 8 (4)];

(c) such interest will run in any event from the date of judgment, when given, and is applicable to all debts due from or to the Crown [Section 24, sub-sections (1) and (2); Crown Proceedings Act 1947].

Subsequent to its 1990 Decision, that is, in March 1991, the Commission initiated a practice (notice of which was given to Member States) of requiring in its decisions on the recovery of State aid unlawfully paid that interest on the amount of the aid to be recovered run from the date of effective payment thereof. This practice was not, however, in existence when the 1990 Decision was taken : the Commission accordingly accepts the contention, advanced both by the United Kingdom authorities and BAe that this policy should not be applied retrospectively, in relation especially to the date from which interest should run in this case. It follows that the appropriate date is that applicable under the national rules obtaining at the material time, that is, at the time the 1990 Decision was taken. It follows also that the financial position of BAe and the Rover Group would not be worsened, compared with that obtaining in July 1990, by their being required to pay interest on the principal amount in question with effect from the date upon which that principal amount should, in the terms of the 1990 Decision, have been paid, that is, by 17 August 1990.

In this connection it should be recalled, that following on the 1990 Decision, the United Kingdom Government signified to the Commission its intention of complying with the terms of that Decision and to this effect proceedings were issued in the High Court against both BAe and the Rover Group : against the former for recovery of the sum of £ 42,9 million and against the latter for recovery of the sum of £ 1,5 million. In each case the plaintiff (DTI) claimed in the originating writs of summons, '... interest pursuant to Section 35A of the Supreme Court Act 1981 ... at such rate as to the Court may seem just for the period from 18 August 1990 until the date of the issue of the writ herein and for the period from the date herein until judgment or sooner payment'. Accordingly, the rate at which the abovementioned interest is to be fixed fails to be determined by the United Kingdom authorities in accordance with the law and practice usually followed, at the material time, in the matter of recovery of State debts of a similar or (as the case may be) identical nature in the United Kingdom.

In answer to the argument summarized under VIII (xii), it should be sufficient to recall that the Commission, in response to the observations made by the parties, does not now seek to require interest to run from the effective date of receipt of the aid in question but only from the date upon which the principal amounts should have been paid under the 1990 Decision had not that Decision been found, by the Court, to be vitiated by a procedural defect. It is to be observed, too, that in rectifying, by the present Decision, this procedural defect, all the parties concerned have been afforded the opportunity of putting their observations to the Commission and in this way both BAe and the Rover Group have obtained the benefit of the judgment of 4 February 1992 of the Court of Justice (referred to in the second paragraph, under I, above). In any event the arguments put forward under this heading repose upon a misconception in that BAe confuses the quantification of the principal amount of one of the aid measures (£ 33,4 million, representing deferment of payment of the purchase price for the Rover Group) with the interest to be paid on that principal, once quantified. Both are mistakenly referred to as 'penalties'. The Commission has already addressed the question of quantification of this principal amount (at paragraph (c) under V and at (viii) above) and persists in its view that the method used brings about a fair result. It is not therefore a 'penalty'. Nor is it a 'penalty' to require that interest be paid on the principal amount so quantified for otherwise an undue financial advantage would accrue to BAe and the Rover Group.

X

In its letter of 25 September 1992 to the Commission the United Kingdom Government reaffirms its intention to abide by and implement any new Commission decision ordering recovery of £ 44,4 million in aid which accompanied the sale of the Rover Group in 1988 but on the understanding that interest would run only from a specified date after publication of any such decision. The Commission's proposal in its letter of 30 July 1992 would, it is urged, effectively punish BAe and the Rover Group for having sucessfully challenged the 1990 Decision and this cannot be perceived as fair and reasonable. Finally, it would render more difficult the United Kingdom Government's task in securing repayment of the aid from BAe and the Rover Group.

The substantive and legal elements of the observations of the United Kingdom Government are addressed above. As regards the considerations of equity and fairness it must be observed that to allow the recipient of unlawful State aid to obtain the financial advantage resulting from retention of the aid over a significant period is, apart from being unlawful, also inequitable in particular *vis-à-vis* competitors who have not benefited from any unjustifiable State aid in a sensitive industrial sector.

XI

In cases of aid incompatible with the common market, the Commission — making use of a possibility given to it by Article 93 (2) of the EEC Treaty and by the Court of Justice in its judgment of 12 July 1973 in Case 70/72 [1], confirmed in its judgment of 24 February 1987 in Case 310/85 [2] — can require Member States to recover from recipients the aid granted. To this end, it is necessary that the United Kingdom authorities recover forthwith the £ 44,4 million incompatible aid awarded to British Aerospace and the Rover Group by the United Kingdom Government, to be realized according to the provisions of national law governing recovery of State debts prevailing at the material time,

[1] *Commission* v. *Germany*, [1973] ECR 813.
[2] *Deufil* v. *Commission*, [1987] ECR 901.

HAS ADOPTED THIS DECISION:

Article 1

The additional State aid measures granted by the United Kingdom Government to British Aerospace for its purchase of the Rover Group over and above those authorized in Decision 89/58/EEC and amounting to £ 44,4 million are illegal as they were provided in breach of Article 93 (3) of the EEC Treaty. They are also incompatible with the common market within the meaning of Article 92 (1) of the Treaty.

Article 2

The United Kingdom Government is hereby required to ensure that the aid referred to in Article 1 is withdrawn by means of a refund of £ 44,4 million by British Aerospace and the Rover Group to the said Government. This amount shall be increased by the interest advantage from which British Aerospace and the Rover Group have benefitted, which interest shall be calculated to run respectively from 18 August 1990 and at a rate to be determined in accordance with the rules of United Kingdom national law governing the recovery of State debts prevailing on 18 August 1990.

Article 3

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

Article 4

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 9 March 1993.

For the Commission

Karel VAN MIERT

Member of the Commission