2. Indicate whether procedures are available in the UK concerning (i) the direct effect of Article 93(3), (ii) the enforcement of negative Commission decisions (actions instituted by Member States, by the beneficiary, by competitors), and (iii) the implementation of positive Commission decisions.

The procedures available in the UK to deal with these three situations are judicial review, writ actions brought by individuals and writ actions brought by the Government to recover illegally paid State aid.

2.1 Judicial Review

Judicial Review lies against any person or body which performs public duties or public functions such as the State and local authorities. A decision by a public authority in relation to State aid may be judicially reviewed by the High Court in England and Wales under Order 53 of the Rules of the Supreme Court. The challenge by way of judicial review is based on the ground that the action or inaction of the public authority is incompatible with Community law and therefore unlawful. In order to be able to apply for judicial review, the applicant must show a sufficient interest (or "locus") in the matter.

The remedies available in judicial review proceedings are declaration, certiorari, prohibition, mandamus, injunction and damages.

Declaration: this is the order usually sought in judicial review proceedings by an applicant challenging a public body on the basis that such bodies will act in accordance with declarations of the court without the need for more draconian measures such as certiorari or mandamus. The applicant seeks a declaration from the court that a measure adopted by a public authority is incompatible with Community law. For instance, the applicant could ask the court to declare that a particular measure infringes the obligation imposed on Member States in the last sentence of Article 93(3) where the measure has not been notified to the Commission or, if notified, where the Commission has not issued a final decision on the measure. Even where the Commission has issued a final decision approving an aid and a public authority then grants it, an applicant could seek a declaration that the Commission decision and subsequent action by the public authority are incompatible with Community law.

Certiorari: this is the appropriate order where the court concludes that a decision which has been made by a public authority should be set aside. Where the court quashes a decision in this way, it has power to remit the matter to the public authority concerned with a direction to reconsider it and to reach a decision in accordance with a judgment given by the court in the judicial review proceedings. Certiorari could be used to quash a decision already taken by a public authority to grant State aid without Commission

approval or before the Commission has reached a final decision on whether the aid is compatible with the Common Market. Indeed, an application for certiorari could be made to challenge the implementation by the Government of a positive Commission decision on State aid on the grounds that the Commission decision and therefore Government action are incompatible with Community law.

Prohibition: this is an order restraining a public authority from acting outside its powers. Thus, for example, where a public authority has not yet done so but is proposing to grant State aid contrary to a Commission decision that such aid is incompatible with the common market or is proposing to grant aid without informing the Commission of that proposal then the High Court can make an order of prohibition. Again, an order of prohibition could be sought to prevent the implementation by a public authority of a positive Commission decision approving an "aid".

Mandamus: this is an order requiring a person or body charged with a public duty to carry out that duty. The Rules of the Supreme Court state that an order of mandamus cannot be made against the Crown but can be made against an officer of the Crown who is obliged by statute to do some ministerial or administrative act which affects the rights or interests of the applicant. It is likely that, in the light of Factortame No. 2[1], an order for mandamus could be made against the Crown where the State has failed to implement a Commission decision to recover aid.

Injunction: an applicant can also seek an injunction within judicial review proceedings restraining a public authority from acting in a particular way. In the context of the judicial review proceedings in Factortame No.2, it was held that an interlocutory injunction could be granted preventing a minister of the Crown from implementing legislation alleged to be contrary to Community law, pending final determination of that issue. The Court of Justice of the European Communities ruled that where a national court is seized of a case involving issues of Community law and it is necessary to grant interim relief in order to ensure the full effectiveness of rights claimed under directly applicable Community law, any rule of national law preventing the grant of such interim relief must be set aside. The question whether interim relief should be granted is a matter for the national courts. The case therefore came back before the House of Lords for a decision on whether an injunction should be granted and, if so, in what terms. The House of Lords held:

(a) that the balance of convenience was likely to be the determining factor, because it was unlikely, in such cases, there would be an adequate remedy in damages available to either side;

(b) that generally, the court should not restrain a public authority from enforcing an

1 [1991] A.C. 603

apparently authentic law unless the court were satisfied, having regard to all the circumstances that the challenge to the validity of that law was, prima facie, so firmly based as to justify so exceptional a course being taken; but it was always a matter of discretion; and

(c) that, on the facts of the instant case, the applicants' challenge was, prima facie, a strong one, and the balance of convenience came down in favour of the grant of the interim injunction sought.

It is thought that a perpetual injunction could also be ordered against the Crown in the light of Factortame No. 2. It is important to not that in certain circumstances the requirement for the applicant to give a cross undertaking in damages is a major disincentive to the seeking of an injunction.

Damages: the court also has power to award damages to an applicant on an application for judicial review provided that the applicant has included in the statement in support of his application for leave a claim for damages and the court is satisfied that if the claim had been made in an action begun by the applicant he could have been awarded damages. The claim for damages in an application for judicial review is not the creation of a new substantive right but must be one which could have been made in an action commenced by writ.

Procedure: in all judicial review cases the applicant must first make an application for leave to move for judicial review. The application for leave must be made in the prescribed form, Form 86A, which includes a statement of the relief sought and the grounds, and there must be a supporting affidavit. Unless the court otherwise directs, the application is made ex parte. The leave application is normally dealt with by a single judge without a hearing. If leave is granted, the applicant then institutes a substantive judicial review application by serving the prescribed form of originating process on all persons directly affected and lodging a copy of it with the Crown Office. An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.

2.2 Writ actions brought by individuals

In the light of the recent jurisprudence of the Court of Justice of the European Communities establishing firmly that Member States can be liable to individuals in damages for infringement of Community law obligations, it has been held by the English Court of Appeal in Secretary of State for Employment v Mann[2] that a Francovich claim for damages can be pursued in the High Court or in the County Court in the ordinary way if the conditions set out in R v Secretary of State for Transport, ex parte

2 judgment of 30 September 1996, [1997] ICR 209

Factortame[3] are met.

Thus, it is envisaged by the English courts that an individual could bring an action for damages against a public authority in a State aids case by writ in the High Court or by summons in the County Court. Indeed, where the primary relief sought is damages, a writ action may well be the preferred route for recovery even though judicial review is better established as a means for challenging the actions of public authorities which are incompatible with Commission decisions or Community rules concerning State aid.

2.3 Recovery of Illegal State aid by the Government

It is clear from Boussac[4] that Member States are only required to recover illegal aid after the Commission has carried out an investigation and established that the aid is illegal under Article 93(2). Where the EC Commission has issued a decision finding that certain benefits equivalent to State aid under Article 92(1) of the EC Treaty are illegal and requiring the Government to ensure that the aid is refunded, the practice appears to be for a writ to be issued in the High Court against the recipient of the illegal aid. The statement of claim accompanying the writ is founded upon the UK Government's duty to comply with the decision of the Commission and that duty affords the Government the right to seek recovery through the domestic courts for the whole of the illegal State aid. It is unclear whether pleadings founded on this basis disclose a cause of action in English law but in any event it is clear from the jurisprudence of the Court of Justice of the European Communities that the Government is under a duty to ensure that a suitable mechanism is in place which allows recovery of illegal aid even if this means changing its own laws.

3 [1996] 1CMLR 889
4 [1990] ECR307

3. List of UK Cases concerning the application of Articles 92 and/or 93 with a summary of each case

3.1 Re an application by Peninsula Securities Ltd for judicial review, the High Court of Justice in Northern Ireland, Queens Bench Division (Crown Side), judgment of 11 June 1998. (D)

Facts: The applicant owned a shopping centre in Londonderry, Northern Ireland and had received no grant or subsidy for the construction of the centre or the purchase of the land on which it stood.

The Department of the Environment for Northern Ireland adopted a development scheme for a semi-derelict site in Foyle Street, Londonderry which involved the construction of a rival shopping centre on the site. Joint venture, Foyleside, came forward to implement the development scheme and build the rival shopping centre.

The Department made an urban development grant of £ 7.5 million to Foyleside. Such grants have been the main urban regeneration measure for Londonderry since 1982 and their function is to stimulate private investment which either would not have been made or which would have led to development at a pace that was slower or on a scale or standard that was less than satisfactory. Foyleside had applied for an urban development grant and the Department had concluded that the projected cost of the development was £ 7.5 million greater than the market value of the completed development. £ 7.5 million was the minimum that would trigger the scheme and so a grant for that amount was made.

The Department transferred the land comprised in the development scheme to Foyleside for £ 1 (one pound). The Department spent £ 2.3 million in acquiring the land in the scheme area which it did not already own (43% of the total). The Department also carried out road and environmental improvement works near the development without charge to Foyleside.

The applicant challenged the Department's decision to:

- pay the £ 7.5 million urban development grant;

- incur site assembly costs and to transfer the land in the development scheme for £ 1; and

- execute road access and environmental improvement works next to the site without charge

on the grounds that:

- these measures constituted the granting of State aid to Foyleside which distorted competition by favouring Foyleside in breach of Article 92(1); and

- in breach of Article 93(3), the Commission had not been notified of the Department's plans to grant new aid.

Pursuant to the Commission's **Communication concerning co-operation between the Commission and national courts in the field of State aids** ([1995] OJ C 312/8), the courts wrote to the Commission seeking guidance. In its reply to the court, the Commission stated that the approval of the Single Regeneration Budget (a UK State aid [No N31/95] approved by the Commission on 4 May 1995) reflected the Commission's view that measures which are aimed at the construction of infrastructure for general public use and do not provide a subsidy to the final user are not State aid in the Article 92 and 93 sense. The Commission stated that it did not intend to prejudge an analysis on the effect on trade at the level of intermediaries as opposed to final users. The Commission drew a distinction between general infrastructure measures and aid favouring certain companies. If aid strengthened the intra-Community trade position of some undertakings compared with others, it would fall under Article 92(1).

Decision: the judge considered the wording of Article 92(1) and concluded that four cumulative criteria had to be met before it would apply: aid had to be granted by a Member State, the aid had to distort or threaten to distort competition, the distortion had to occur because an undertaking was favoured, there had to be a distortion (sic) of inter state trade.

The judge ruled that the first of these criteria was met - the urban development grant and the transfer of the land for the nominal figure of £ 1 did amount to the granting of State aid.

As for the distortion of competition, the judge found that the applicant had failed to demonstrate that the measures adopted had created such distortion. It was accepted by all parties that only a "small potential distortion" need to be shown. Rules on State aid were not subject to the same requirement of "appreciability" which must be present for Articles 85 and 86 to apply. The judge identified two possible markets on which the distortion might occur: that for the development of shopping centres and that for landlords of shopping centres. In the former market, the urban development grant and the site assembly costs did not confer an economic advantage on Foyleside. They merely ensured that development which might have happened elsewhere occurred at a particular site - they favoured a particular site, they did not improve Foyleside's competitive position. The judge said:

"... the measures taken by the Department may be said to have enabled the development to proceed and competition to take place with other shopping centres but that is not the same as bringing about a distortion of competition. As a prudent developer, Foyleside would not have proceeded with a development on a site [with a negative value of] *£ 7.5 million... The removal of the negative value does not give Foyleside a competitive edge; it merely places it in the position that it would have occupied had it* [been] *located on a site where it would not have been saddled with such an unacceptable encumbrance".*

The Judge rejected, for lack of evidence, the claim that Foyleside obtained any advantage over its competitors in its role as landlord.

As for the third criterion, the favouring of an undertaking, the judge relying on the judgment in **SFEI v La Poste** ([1996] All ER (EC) 685, 716 at paragraph 60) stated that a grant of aid should confer on an undertaking an economic advantage which it would not have enjoyed under normal market conditions. The judge held:

"... in normal market conditions, no sensible developer would contemplate constructing a shopping centre on that site. [The aid] *did not confer an economic advantage which would not have been available in normal market conditions. Without the measures, development of the site would not have been considered. An economic advantage could only be said to have accrued to the developer if it would have proceeded without the grant. There is no reason to believe it would have done so."*

The removal of a disabling negative value did not place Foyleside in a better position than competing shopping centres such as that of the applicant which the judge assumed had not suffered from negative value difficulties.

As for the road and environmental works, the judge thought it could not be the case that a state authority was forbidden to carry out road improvements for the benefit of the public lest any incidental benefit accrue to a developer.

As for the fourth and final criterion, trade between Member States, the judge found that trade between the Republic of Ireland and Northern Ireland had not been affected. The judge recognised that shoppers in the Republic had been attracted to the new shopping development at Foyleside but that alone did not establish that the pattern of cross border shopping had been affected or was liable to be affected. It might have been true that shoppers from the Republic were more likely to shop at Foyleside than at other shopping centres in Londonderry. However, the judge did not consider that such a change of shopping pattern **within Northern Ireland** could be said to affect trade **between Member States**. According to the judge:

"Article 92 is designed to maintain an equilibrium of competition between Member

States on a Community wide level. It is not designed to ensure that trade attracted from one Member State to another is distributed evenly between undertakings within the latter Member State".

3.2 R v Customs and Excise Commissioners, ex parte Lunn Poly Limited and another, Queen's Bench Division (Divisional Court) [1998] STC 649, judgment of 2 April 1998 (B)

Facts: Lunn Poly Limited and Bishopsgate Insurance Limited sought judicial review of the differential rates of insurance premium tax imposed by sections 21 and 22 of the Finance Act 1997 on the grounds that they were incompatible with Community Law, including Treaty provisions on State aid, and could not lawfully be applied.

Insurance premium tax was introduced in the UK by the Finance Act 1994. Section 21 of the Finance Act 1997 amended the 1994 Act by replacing the previous uniform rate for insurance contracts (which included contracts of travel insurance) with two rates, a standard rate and a higher rate. The higher rate applied to a premium under a taxable insurance contract relating to travel risks if the contract was arranged through, inter alia, a tour operator or travel agent. Lunn Poly was a travel agent and part of the Thomson Travel Group which included a tour operator. Bishopsgate was a specialist travel insurer most of whose policies were sold through travel agents.

Lunn Poly and Bishopsgate claimed to be placed at a disadvantage by the differential rates of insurance premium tax and by the fact that they were subject to the higher rate. They sought a declaration that the statutory provisions giving effect to the differential rates of insurance premium tax were incompatible with Community Law and could not be applied lawfully. They claimed, amongst other things, that the differential rates of insurance premium tax ought to have been notified to the Commission under Article 93 of the EC Treaty on the grounds that they conferred a State aid, within the meaning of Article 92, on competing insurers and intermediaries offering travel insurance, who had no links with a tour operator or travel agent and were liable at the lower rate, and distorted or threatened to distort competition and affected trade between member states.

Decision: The divisional court of the Queen’s Bench Division of the High Court of England and Wales granted the declaration sought on the following grounds. The concept of State aid within the meaning of Article 92 was wide. Where a member state legislated for significantly differential tax rates to be applied to competitors in relation to the supply of the same commodity or service, the terms of Article 92(1) and the relevant jurisprudence made it clear that the measures amounted to a State aid.

Whether or not that involved a breach of Article 92(1) depended on whether the

introduction of the differential rates distorted or threatened to distort competition by favouring certain undertakings and whether it affected trade between member states.

On the available material in the instant cases it was highly probable that the introduction of the differential rates both distorted and threatened to distort competition by favouring those to whom the lower rate applied. Further, in determining whether such rates affect trade between member states, the relevant market was the Community travel insurance market and potential and indirect effects, whether or not appreciable, were relevant. The facts in the instant case pointed to the clear conclusion that the differential rates of insurance premium tax were bound to affect trade between member states. Accordingly, the differential rates of insurance premium tax constituted a State aid within the meaning of Article 92 of the EC Treaty and since the Commission had not been notified and had not given its approval as required by Article 93(3) of the EC Treaty the differential rates were therefore illegal. The declaratory relief claimed by the applicants was therefore granted.

3.3 R v Secretary of State for National Heritage and another, ex parte John Paul Getty Trust (Court of Appeal) 27 October 1994 (unreported) (D)

Facts: On 30 August 1994 the John Paul Getty Trust (the "Trust") applied for leave to seek judicial review of the decision of 9 August 1995 of the Secretary of State for National Heritage to defer for a further period of three months commencing on 5 August 1994 the decision on the application for the grant of an export licence in respect of the sculpture known as the Three Graces by Antonio Canova. The Trust sought, amongst other things, a declaration that a payment of £3.6 million by the National Heritage Memorial Fund (the "Fund") to the Victoria and Albert Museum and the loan by the Fund to the National Galleries of Scotland to enable them to buy the statue were or would be unlawful because contrary to Articles 92 and 93 of the EC Treaty.

This was an appeal against a refusal by the judge at first instance to allow the initial application for leave to move for judicial review. Accordingly it was sufficient for the Trust to be able to show that any one or more of the grounds relied on was arguable.

By an agreement of 23 September 1993 the Trust had agreed to buy the sculpture from a company called Fine Art for £7.6 million. The agreement provided for Fine Art to deliver the statue to the Trust in the United States and was conditional on the obtaining of an export licence. The agreement also provided that if a licence were refused or not granted within 18 months from 23 September 1993, the agreement would be null and void. On 24 September 1993, Fine Art made an application for an export licence.

On 16 February 1994, the Secretary of State for National Heritage announged that he was deferring a decision on the export licence for the Three Graces until 5 August

1994. The system whereby the consideration of applications for export licence is deferred has been in existence for many years and was instituted so that museums and art galleries in the UK could have an opportunity of trying to raise funds to purchase the work of art concerned and ensure that the work remained in the UK.

On 15 July 1994, the Victoria and Albert Museum announced that it had secured pledges amounting to £4.7 million (including £3.6 million from the Fund) and needed another £2.9 million to match the £7.6 million which the Trust had agreed to pay for the Three Graces. At about the same time, the Museum wrote to the Secretary of State for National Heritage asking for an extension of the deferral period for a further three months beyond 5 August 1994. Subsequently the National Galleries of Scotland agreed to join in a partnership with the Victoria and Albert Museum and to make a £1.1 million contribution towards the money required to purchase the Three Graces. On 9 August 1994 the Secretary of State for National Heritage decided to make a final deferral of up to three months.

One of the grounds advanced by the Trust to challenge Secretary of State's decision of 9 August was that sum of £3.6 million amounted to State aid and should have been notified to the Commission pursuant to Articles 92 and 93 of the EC Treaty. The Trust drew a distinction between "general grants in aid", such as the sum which is paid by the Government to enable the Victoria and Albert museum to operate, and specific grants such as that which was given by the Fund which was arguably State aid within the meanings of Articles 92 and 93.

The Court of Appeal noted that one of the types of discretionary aid which may be considered to be compatible with the common market is the type of aid set out in paragraph 3(d) of Article 92 which is aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

The Trust claimed that the £3.6 million provided by the Fund was unlawful and contrary to the EC Treaty because it had not been notified. The Trust claimed that the legality of that aid could only be determined by the Commission and national courts had a very limited role in this area in that they were constrained only to decide, first, whether there had been aid provided or an offer of aid made and, secondly, whether or not notification had been made in accordance with paragraph 3 of Article 93. Apart from that, any other questions under Articles 92 and 93 were matters for the Commission and not for the national courts.

Decision: The Court of Appeal was prepared to assume in favour of the Trust that the Trust had a sufficient interest to challenge the grant of un-notified aid. The Court was also prepared to assume in the Trust's favour that the Trust was an undertaking within the meaning of Article 92 of the EC Treaty. The question remained as to the role the

Court of Appeal could play in determining whether the payment of £3.6 million was State aid which ought to have been notified under Article 92. The Court held that there had to be a threshold which had to be crossed by any aid before it could be considered as State aid to which Article 92 applied. If it were not so, an impossible burden would be placed on the Commission to determine all these matters. The Court had to be in a position to consider whether the aid which it was proposed should be given was capable of affecting trade between member states. The contract in question between the Trust and Fine Art was a conditional contract. If the aid were given, the effect of it would be that the sale of the statue to a museum in California would be replaced by the sale of the statue to the Victoria and Albert Museum and Scottish National Galleries. In those circumstances it seemed impossible to argue that such aid was capable of affecting trade between member states. The Court thought that it was right that it should determine this point at that stage. The Court did not agree that this was an arguable point and therefore refused leave to move for judicial review.

3.4 Department of Trade and Industry v British Aerospace plc and Rover Group Holdings plc [1991] 1CMLR 165 (A)

Facts: In 1988 the Commission approved certain aid to British Aerospace to assist in the purchase of Rover from the UK Government. Following that decision, the British Government made available a further £44.4 million in aid which had not been approved by the Commission. By a second decision of 17 July 1990, the Commission declared that the £44.4 million in question amounted to State aid within the meaning of Article 92(1) and ordered the UK to obtain from British Aerospace repayment of the £44.4 million. The British Government duly instituted proceedings by writ in the High Court for recovery of the money. On 24 September 1990, British Aerospace and Rover brought proceedings in the Court of Justice of the European Communities under Article 173(2) for annulment of the Commission's decision of 17 July 1990 on the grounds that in taking this decision the Commission had failed to observe the procedural rules laid down in Article 93(2). British Aerospace and Rover also applied in the High Court for a stay of the recovery proceedings. The Court held that it was appropriate to exercise its inherent jurisdiction and grant a stay until delivery of judgment by the European Court.

In the report of the case relating to the stay of the High Court proceedings, the judge comments in passing upon the claim made by the DTI against British Aerospace and Rover. The report states that the Government's claim for repayment of the illegal State aid is founded upon the Government's duty to comply with the 1990 decision of the Commission and that it was also claimed that the duty imposed upon the Government by the Commission afforded the Government the right to seek recovery through the English courts for the entirety of the aid.

Counsel for British Aerospace apparently told the High Court that British Aerospace

would be submitting that the Government's pleadings as framed disclosed no cause of action in English law and would invite the Court to strike them out.

Following the stay of the High Court proceedings, the European Court of Justice held on 4 February 1992 in case C-294/90[5], the Court of Justice of the European Communities annulled the 1990 decision insofar as that decision required the United Kingdom Government to recover from British Aerospace State aid of £44.4 million. The Court found for British Aerospace 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) of the EC Treaty which includes a hearing of the interested parties.

Subsequently, the Commission followed the procedure under Article 93(2) in respect of the Aid of £44.4 million and found that it was illegal State aid and required repayment. Repayment was made and the initial High Court proceedings for recovery brought by the Department of Trade and Industry were not continued.

3.5 R v Attorney General, ex parte ICI plc ([1987] 1 CMLR 72 (Court of Appeal)) (D)

Facts: This was an application for judicial review in which Imperial Chemical Industries Plc (ICI) sought a declaration that the UK Government, by enacting and by the manner in which it gave or proposed to give effect to Section 134 and Schedule 18 of the Finance Act 1982, was or was proposing to act unlawfully in contravention of Article 93(3) of the EEC Treaty (as it then was).

At the relevant time, Esso were building a large ethylene plant in Scotland. The costs of the project were being shared with Shell who would also share the output of the plant. The Esso/Shell ethylene plant would be in competition with ICI's ethylene production facilities and with BP's ethylene plant. There were no other UK ethylene producers. ICI used naphtha as a feedstock for its ethylene, BP used dry gas (predominantly methane and ethane) and the Esso/Shell plant was to use ethane as a feedstock for ethylene. It is cheaper to produce ethylene using ethane than it is to do so using naphtha.

Demand for ethylene declined rapidly with the result that there was excess ethylene supply capacity in Western Europe. In this context, ICI was concerned about the consequences of additional capacity from the Esso/Shell ethylene plant coming on stream. Moreover ICI would have been at a disadvantage vis-à-vis both BP and Esso/Shell because of the natural advantages of ethane. ICI complained that in addition the Government had added an additional advantage by providing for Esso, Shell and BP an artificially favourable fiscal regime. ICI maintained that the 1982 Finance Act required the ethane, which was to be used as the feedstock at BP's and Esso/Shell's

5 British Aerospace and Rover Group Holdings v Commission [1992] ECR I/493

plants, to be undervalued for petroleum revenue tax purposes or, if this was not what the Act required, the Revenue intended to undervalue the ethane nonetheless. The undervaluing of the ethane would have resulted in less petroleum revenue tax being paid, because the lower the value of the ethane the lower the profit and, therefore the smaller the amount of petroleum revenue tax payable. The 1982 Finance Act therefore resulted in an aid being conferred upon BP and Esso/Shell which should have been referred to the Commission under Article 93(3) of the EC Treaty before it was put into effect.

Judgment: The Court of Appeal held that it was clear that a fiscal measure such as the 1982 Finance Act could amount to a State aid. It was equally clear that if legislation provided for a valuation for fiscal purposes which reflected a true current arm's length valuation, such a provision would not normally amount to an aid, the reason being that a valuation on this basis did not confer any benefit and was in the normal course as it adopted the standard approach to valuation for fiscal purposes.

The Court of Appeal held that, on the facts, the provisions of the 1982 Act did not amount to the granting of an aid. The court also considered whether an aid would be granted if in administering the 1982 Act the Revenue either accepted a price formula which produced too low a value or applied the price formula so as to produce a below market price. The Court concluded that even if the Revenue were to benefit BP and Esso/Shell by adopting a wrong valuation this would not be a matter which could be remedied by reliance upon Article 93(3) because no aid would be involved. In expressing this view, the Court implied that it was empowered to decide whether or not a particular measure amounted to an aid and was not trespassing upon the proper province of the Commission. The Court quoted from Steinike[6], "a national court may have cause to interpret and apply the concept of aid contained in Article 92 in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 93(3) ought to have been subject to this procedure". However, the Court also held that a persistent misapplication or wrong valuation under the 1982 Act could have amounted to a State aid.

The court also held that if Article 93(3) had been infringed in a manner which gave ICI rights under the directly applicable final sentence, the court had no doubts that ICI had sufficient standing to bring proceedings on the basis of Article 93(3).

6 [1977] ECR595