OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 10 JUNE 1971[1]

Mr President,
Members of the Court,

The proceedings before us today concern the application of the provisions concernings aids in the Treaty establishing the European Economic Community. I must make the following preliminary remarks on the facts.

Since the end of the war, quinquennial plans have been drawn up in France for the modernization and gearing of its economy. The Vth Plan, covering the years 1966 to 1970, concerned the reorganization of industrial structures. For this purpose loans were available on special terms (as regards rates of interests, duration and methods of repayment) through the Fonds du développement économique et social (FDES: Economic and Social Development Fund), that is, out of public funds (to be more precise: out of a special treasury account). The fact which interests us in the present case is that in a schedule to the Vth Plan the problems of the French iron and steel industry were dealt with in a 'plan professionnel'. This plan referred to the large debts of the French iron and steel industry and its resulting difficulties in financing its investment programmes. Its purpose is to rationalize and alter structures so as to re-establish competitive capacity on an international level, to contribute towards the maintenance of possibilities of employment and to consolidate the economic position of certain regions, in particular Lorraine. In order to attain these objectives, on 29 July 1966 the State and the Chambre Syndicale de la Sidérurgie Française concluded a General Agreement, the preamble of which makes express reference to the schedule to the Vth Plan devoted to the iron and steel industry and to which I have just referred. This Agreement provides for the rationalization and expansion of production (optimum use of existing capacities, the construction of plant of the maximum size, the fixing of manufacturing programmes, the shutting-down of certain plant and the reorganization of undertakings) and gives details of certain regrouping operations in the form of the formation of companies, contracts for the acquisition of shareholdings, mergers, the establishment of joint subsidiaries, etc. The agreement contains in particular a detailed investment programme (for example, for the construction of new coking plants and blast furnaces, the construction or enlargement of steel works, etc.). As regards the financing, the Agreement states that the cost of the investment projects is put at 4 500 million francs, to which must be added certain other expenses connected with the investments to be made by the undertakings, which brings the total figure for the financial needs to 11 275 million francs. These expenses must be bornne by the undertakings up to the amount of 5 090 million francs and the undertakings also agreed to increase capital. The State participation is provided for in the form of loans of a total of 2 700 million francs, to be granted by the FDES on special terms for repayment and special rates of interest, fixed at 3% for the first five years and at 4% for the remainder of the duration of the loans. The terms and conditions of these loans were to be drawn up in special agreements to be concluded with the undertakings concerned. It is also important to point out that another section of the General Agreement dealt with the question of maintaining employment. The Agreement pointed out that the improvement in the conditions of production was to bring about a reduction in the size of the work force and that it was

1 — Translated from the German.

therefore necessary to create new productive activities and new jobs in the regions concerned. On this point also the State and the iron and steel industry undertook to act jointly (for example, as regards aids to workers, compensation for dismissal, easier access to new jobs, retraining etc.). In this connexion details may be obtained from the very comprehensive Agreement (for example, the project for the creation by the undertaking of a special finance company).

As I have already said the necessary details of the investment programmes were fixed in special agreements concluded with the undertakings concerned, in which the General Agreement was stated as the compulsory frame of reference which must not be exceeded. The special agreements did not merely define in detail the investment and work programmes, indicating the sums necessary for the investments, the amount of the loans to be granted by the FDES and the special conditions attaching to them: they also set out the obligation to apply the General Agreement as regards the retraining of workers and the creation of new jobs. It appears that most of these individual agreements were concluded during the years 1967 and 1968 and that since then they have been implemented by the payment of credits.

As such action has an effect on the conditions of competition it is clear that it is of significance for the ECSC Treaty. For this reason a meeting was held on 28 September 1966 at an administrative level at which the French Government submitted to the High Authority explanations of the 'plan professionnel'. Subsequently, on the basis of further information provided by that Government, the High Authority reached the provisional conclusion that the prohibition contained in Article 4(c) of the ECSC Treaty did not apply and also that there was no need to make a recommendation under Article 67 of that Treaty. It informed the Member States of this view during a meeting of the Council of Ministers held on 29 June 1967. However, on this occasion the High Authority encountered reservations on the part of the Netherlands Government. In a letter dated 5 April 1968 the Netherlands Government requested the Commission (which in the meantime had taken the place of the High Authority) to define its attitude further and also sought an exchange of views. The Commission considered itself in a position to explain its final attitude at the end of 1968. In a letter from the Commission to the French Government dated 4 December 1968 (a copy of which was sent to the Netherlands Government on 9 December 1968) it stated that the grant of credits at reduced rates of interest to the French steel industry did not represent a subsidy prohibited by Article 4(c) of the ECSC Treaty, since it did not constitute a 'special' aid. It must be observed, according to the Commission, that the special rates of interest laid down are provided for in favour of all those sectors of the economy which have been given priority in the French plans and it must be remembered that the iron and steel industries which benefit from the special credits bear special burdens in social matters. As regards Article 67 of the ECSC Treaty, the letter from the Commission stated that the conditions of application of paragraphs (2) and (3) thereof were not satisfied. The Commission maintains that since the essential burden of the financing is borne by the undertakings, and since the debts owed by the French iron and steel industry are particularly large and the undertakings are subject to burdens in social matters, the financial benefits allowed to these undertakings have only a limited effect on the cost price of their goods. Finally, the Commission pointed out that as the loans from the FDES are not limited to the iron and steel sector alone, it was impossible to claim that the iron and steel industry was given a special benefit within the meaning of Article 67(3).

However, this view did not convince the Netherlands Government. It regards the granting of loans to the French steel

industry on special terms which, at that time, could not be obtained in the general capital market as a violation of the prohibition on subsidies contained in the Treaty establishing the ECSC. For this reason on 24 June 1970 it addressed a letter to the Commission in which it requested that a decision be made under Article 88 of the ECSC Treaty, that is, that a statement be made that in granting the abovementioned credits the French Government has infringed the Treaty. In the alternative it requested that a recommendation be made to the French Government under Article 67 of that Treaty.

As the Commission did not comply with this request within the period of two months laid down in Article 35 of the ECSC Treaty, on 13 October 1970 the Netherlands Government lodged an application before the Court of Justice for failure to act.

As a result of this we must now consider the question whether the Commission's assessment of the measures adopted by the French Government is correct or whether, by reason of the infringement of Article 4(c) of the ECSC Treaty, a decision must be adopted under Article 88 or, at the least, a recommendation made to the French Government under Article 67 on the grounds that these measures had influenced the conditions of competition.

However, before I can begin a consideration of this question, which forms the basis of the action, I must deal with certain *problems of admissibility*, to which the Commission has referred.

1. I must first consider whether the Netherlands Government reacted *within the required time* to the view held by the Commission of the measures taken by the French Government and which it considered incorrect.

As regards this question it must be stated that two considerations may immediately be set aside as irrelevant:

— First, no question arises as to the observance of the period fixed in Article 35 of the ECSC Treaty (which, as you are aware, is three months). No problems arise on this point if one compares the date of the letter by which the matter was referred to the Commission (13 July 1970) with the date on which the application was lodged (13 October 1970), and if it is remembered that under our Rules of Procedure (Article 81(2) together with Annex II) a further period of six days is available to the Netherlands applicants on the ground of distance.

— Secondly, it could not be maintained that as the Netherlands Government had previously allowed the proper period for seeking the annulment of a measure to pass, it could no longer attempt to obtain a result which is equivalent to such annulment by means of an action for failure to act. The case-law of the Court has often stated that such a procedure is unacceptable (cf., for example, Joined Cases 21 to 26/61, *Meroni* v *High Authority*, [1962] ECR 78). The only 'action' of the Commission which may be taken into consideration is its explanation of its attitude to the measures adopted by the French Government contained in a letter of 4 December 1968, which—as has already been said—denied the need for any intervention on the basis of Articles 4(c) and 67 of the ECSC Treaty. However, such declaratory action cannot be regarded as capable of giving rise to proceedings before the Court. This is clearly shown (apart from the considerations put forward at the oral proceedings based on the formal criteria set out in General Decision No 22/60) by the judgment given in the similar Case 17/57 (*Gezamenlijke Steenkolenmijnen* v *High Authority*, Rec. 1958-1959, p. 19). In that case an exchange of views had taken place between the High Authority and a Member State (in this instance, the Federal Government) concerninng an assessment made in the light of Article 4(c) of the so-called miners' bonus. The outcome was that the High Authority declared that under certain conditions the bonus in question was compatible with the ECSC

Treaty and declined to issue a decision under Article 88 thereof. When informed of this attitude an association of undertakings in the Netherlands sought to bring an application for its annulment before the Court, but the latter declared that the application was inadmissible. The decisive factor, in the Court's view, was that in such cases there is only room for a decision under Article 88 and that, if the High Authority considers that there is no infringement of the Treaty it can (according to the terms of the judgment) 'do no more than abstain from taking further measures. It is not empowered under Article 88 of the Treaty to adopt decisions approving measures taken by the Member States'. The same conclusion applies in this case; that is to say, it must be recognized that there is no prior measure capable of being contested and that in principle, therefore, it was perfectly possible for the applicant to institute proceedings under Article 35 of the Treaty.

The Commission's principal objection to the admissibility of the application is in fact based upon another ground. It believes it necessary to consider the question whether the right to begin proceedings under Article 35, in other words *to raise the matter with the Commission,* must be exercised within a reasonable period. The Commission maintains that this period began to run from the moment when if defined its final position and communicated it to the individuals or bodies who have an interest in its modification. At the very least this ought to apply to cases in which it is necessary to consider measures *adopted by the Member States* and where the proceedings seek to lead the Commission to find that such measures are incompatible with the Treaty. The Commission declares that it cannot be said in the present case that proceedings were brought within a reasonable period since, after being informed of the attitude of the Commission, the Netherlands Government allowed almost eighteen months to pass before lodging an application under Article 35. It maintains that you should therefore declare this application inadmissible.

As you are aware, it is not the first time that such considerations have been put forward. The Commission has pointed out that I have referred to them in my opinion in Case 34/58 (Rec. 1960, p. 630), without adopting any final attitude on the question. There is as yet no case-law to support the Commission's argument. Although application 34/58 was dismissed, it was for different reasons. Returning now to these reflections on the problem raised, I now have serious doubts as to the justification for the Commission's attitude. The idea of establishing by means of *case-law* (as the Treaty is silent on this point) a limitation period for raising matters with the administration above all conflicts with the administration above all conflicts with the basic principle of legal certainty, particularly as neither by means of analogy nor on the basis of comparative law is it possible to ascertain with certainty what period may be regarded as reasonable. In this case, therefore, I am inclined to adopt your reasoning in the judgment in Case 41/69 ([1970] ECR 661) in relation to the problem of the time-barring of actions relating to infringements under the law on cartels. On that occasion, as we know, you stated that the requirement of legal certainty demanded that periods of limitation of this type be fixed in advance by the legislature. Where no such period exists (as is the case with Article 35 of the ECSC Treaty which does not lay down any period within which the matter must be raised with the executive bodies), it is important that one of the parties should not be able to refer to the fact that a certain period of time has elapsed in order to prevent the other party from defending his rights.

It would be vain to object in this instance that, in the meantime, the French Government's measures which gave rise to this application have already been implemented (in that the loans have

been granted, certain expenses have been incurred, obligations accepted and fulfilled) and that, therefore, those concerned must be able to assume that the legal basis of the measures adopted will no longer be questioned after a certain period of time has passed. In this connexion let me point out, first, that as a result of the conclusion of individual agreements the measures in dispute were implemented during 1967-1968, that is, *before* the Commission adopted its final view. It is, therefore, not because they *relied on* the uncontestable nature of the Commission's attitude that the parties undertook to implement these measures: in fact, the Commission's attitude did not form the *basis* of the measures taken by the French Government. Moreover, it must be observed that when an application is lodged for the adoption of a decision under Article 88 or a recommendation under Article 67 of the ECSC Treaty, this application does not necessarily seek the *retroactive* abolition of the national measures to which the applicant is actually referring (in this instance the repayment of the loans which have been granted). Even if such retroactive effect is excluded, that is, even if there is no question of retroactively affecting French interests, an applicant, and in particular a Member State, may quite possibly have an interest in bringing proceedings for failure to act in cases of this type (for example with regard to similar cases which may arise in the future).

Finally, I believe that it is also impossible to put forward in this connexion the view that the Netherlands Government had accepted the attitude of the Commission and that it had therefore *forfeited* its right to institute proceedings. The mere passage of a certain period of time is not sufficient to bring about such forfeiture; for the party concerned to be deprived of his right to lodge an application he must have behaved in such a way that it can be clearly concluded that he does not intend to bring proceedings before the court. It is therefore not sufficient to refer to the mere fact that the Netherlands Government took no action after receiving the letter in which the Commission declared that it was disposed to discuss the problem further. Moreover, it is particularly important to recall that during a meeting held on 7 May 1969 the Netherlands Government clearly appeared to differ from the point of view of the Commission.

To sum up, it thus appears that the passage of time cannot constitute a reason for declaring the present proceedings inadmissible.

2. The Commission's second objection to the admissibility of the application deals with the reasons which are given for it. In this connexion the Commission alleges that as regards the decisions to be adopted under Article 88 of the ECSC Treaty (and the application concerns principally the adoption of such a decision), it has a certain measure of discretion. It maintains therefore that applications intended to record its failure to adopt such a decision must be based on the second paragraph of Article 35, which amounts to saying that a misuse of powers must be alleged. It concludes that as the applicant has not alleged any such misuse of powers, its application cannot be regarded as admissible.

It is correct to say that as regards applications for failure to act, Article 35 of the Treaty distinguishes between those cases which the Commission is '*required*' to adopt a decision and those in which it is '*empowered*' to do so and that, in the latter case, an allegation of misuse of powers must be made, although in the former it is sufficient to put forward the more usual grounds. However, when we ask which of these two categories governs the adoption of a decision under Article 88 I believe that it must be the first, that is to say, the first paragraph of Article 35. This is shown clearly by the text of Article 88, which is worded as follows: 'If the High Authority' (at present, the Commission) 'considers that

a State has failed to fulfil an obligation under this Treaty, it *shall record* this failure in a reasoned decision . . .'. This formulation means, in effect, that the Commission is under an obligation and that, therefore, it has no discretionary power to record a failure or not as it thinks fit. In my opinion this is the decisive element and not the fact that the Commission has a certain *latitude* in deciding whether the conditions necessary to take action under Article 88 are fulfilled.

Only by means of this interpretation can the exact meaning of the distinction in Article 35 between the opportunities for bringing proceedings provided for therein be appreciated: the present case demonstrates this. The essential question which it raises is whether we are dealing with a prohibited subsidy. In other words, the action only concerns the interpretation of the concept of subsidy and its application to a specific set of facts. However, it is, therefore, clear that the Commission cannot be accused of misuse of powers, that is, it cannot be alleged that this institution has not correctly exercised one of its discretionary powers. It therefore appears that the objection which the Commission bases on the second paragraph of Article 35 of the Treaty in order to refute the main conclusions of the application is not valid.

Moreover, let me say at once that the same applies to the corresponding objection raised by the Commission in relation to the applicant's alternative conclusions for the adoption of a recommendation under the third paragraph of Article 67(2) of the Treaty. This provision also uses terms which indicate that the Commission is under an obligation and that it has no discretionary power. This is quite understandable, as the purpose of this provision is to implement the prohibition on discrimination in relation to the undertakings within the *other* Member States. If this is not so as regards the second subparagraph of Article 67(2) this is explained by the fact that the only matter which must be considered in the light of this subparagraph is the position of the undertakings within the Member States whose action is in question. It therefore appears that the provisions of the second paragraph of Article 35 cannot be invoked to establish the inadmissibility of the alternative conclusions of the Netherlands Government. Moreover, I am also unable to accept the Commission's view that the application of Article 67 requires an evaluation of the general economic situation, which could only be reviewed by the Court under the conditions laid down in Article 33. The defendannt considers this to mean that its actions cannot be called into question except on the grounds of misuse of powers on a clear failure to observe the provisions of the Treaty. In fact, the Commission's view of the facts is not correct as regards all the concepts set out in Article 67; it is only valid as regards certain of them (for example, the Commission is mistaken over the question of the increase in differences in production costs). Furthermore, let me observe that it is merely a problem of defining the court's powers of review rather than a question of the exercise of a discretionary power within the meaning of Article 35. This amounts to saying that, seen in its true light, the problem raised comes within the consideration of the substance of the case and that the application cannot be regarded as inadmissible on the sole ground that the abovementioned two grounds have not been pleaded.

At the end of this rather long consideration of the problems of admissibility, it therefore appears that there is no obstacle to an examination of the substance of the case.

The substance of the case

1. As you are aware the applicant's chief complaint is that the Commission wrongfully failed to adopt a decision under Article 88 of the ECSC Treaty and to

record that by granting special credits to the French iron and steel industry the French Government had violated the prohibition on subsidies set out in Article 4(c) of that Treaty. The essential difference between the parties therefore concerns this prohibition and the manner in which it must be defined.

(a) As regards the concept of the subsidy, your case-law is of assistance (let us recall the definition of this term given by Case 30/59 (Rec. 1961, p. 39): 'a benefit in money or in kind which is granted for the support of an undertaking, other than consideration given by the purchaser or the consumer for the goods which it produces or the services which it performs'. Moreover, there is no question that this definition covers the grant of credits at reduced rates of interest. Thus, the central point of the discussion is whether Article 4(c) simply prohibits any subsidizing of the coal and steel industry; or whether it only refers to those benefits which are *specially* or at least *principally* conferred on that industry. As you are aware, the Commission supports the second alternative, while for its part, the applicant stresses that the 'special nature' criterion is not relevant to the application of Article 4(c) and that, on the contrary, it is only necessary to determine whether the object of the preferential measure adopted is to subsidize the coal and steel industry through the grant of direct aids, whether it is intended to affect the conditions of competition existing in this industry and whether it directly affects the undertakings concerned.

It is true that, in favour of its view, the applicant may put forward an argument based on the fact that the text of Article 4(c) refers to *'special'* charges, but not to *special* subsidies and that, in other words, it only lays down the special nature criterion in relation to the charges imposed by the States. However, the importance of this conclusion should not be exaggerated as it has long been established that as regards the ECSC Treaty (as, moreover, as regards all the Community documents), such textual arguments must be considered cautiously (this was pointed out by Steindorff[1] in particular in relation to the problems which concern us here). It is therefore necessary to widen the basis of examination of this question and to attempt, by means of a systematic interpretation, to unearth the decisive factors therefrom.

To do this, it is necessary to consider Article 67 of the said Treaty which also refers to measures adopted by States which have appreciable repercussions on conditions of competition in the coal and steel industries but which is less radical than the prohibition in Article 4 in that it provides, in this regard, for the special measure constituted by the adoption of recommendations. Let me observe, first, that an argument can also be put forward on the basis of the text of Article 67, one, however, which runs counter to the applicant's view, in that paragraph (3) of that article refers in the same phrase to special charges and special benefits. The Commission rightly concludes therefrom that these terms complement each other and it seeks to extend this idea to the interpretation of Article 4(c). However, much more important than these textual comparisons is the question of the problem raised by the deliberate distinction between, first, the prohibition in Article 4(c) and secondly, the provisions of Article 67. You are aware that this problem is one which the interpreters of the ECSC Treaty were quick to seek to solve. In order to resolve it properly it must first be observed that the ECSC Treaty has only brought about partial integration and that the Member States have largely reserved their sovereign rights. In particular, these States retain responsibility for their general economic policy, as is clearly shown by the very wide terms used in Article 26. When the Member

1 — Wirtschaft und Wettbewerb, 1957, p. 641.

States act in the exercise of the powers they have retainend, which in principle are not affected by the Treaty, then it is at least necessary to provide for the possibility of remedying certain repercussions which such action may have on the areas of activity governed by the ECSC Treaty. It is to this that the provisions of Article 67 refer. As regards in particular the repercussions in the form of the grant of benefits and subsidies of the measures adopted by the Member States and the question of how they must be assessed in the light of either Article 67 or Article 4 of the Treaty, it is true that the specialists in this subject soon formed an almost unanimous opinion which coincides with the Commission's present argument. The Commission is right to refer in this connexion to the 'Rapport présenté au nom du Conseil économique' ('Report submitted on behalf of the Economic Council') which states: 'Il ne pourrait y avoir aide au sens de l'article 4, que si les conditions d'intérêt ou de remboursement présentaient un caractère discriminatoire, c'est-à-dire si elles étaient différentes des conditions pratiquées dans des situations comparables pour des industries comparables. Il en serait ainsi si les charbonnages ou la sidérurgie obtenaient des prêts à des taux d'intérêt sensiblement plus bas que ceux offerts à d'autres industries lourdes telles que la Société nationale des Chemins de fer français par exemple'. ('There could be no aid within the meaning of Article 4 unless the rates of interest or terms of repayment were discriminatory in nature, that is, unless they were different from those which applied in comparable situations in comparable industries. This would be the case if the coal or steel industries obtained loans at considerably lower rates of interest than those offered to other heavy industries, such as, for example, the Société nationale des Chemins de fer Français'.) Reuter[1] expresses the same view when he considers that the general measures, that is, the benefits which derive from the general legislation, must be considered in the light of Article 67 of the Treaty, whereas Article 4(c) only applies to special subsidies which concern the coal and steel industry alone. This is also the opinion of Steindorff[2] Jerusalem[3] Hochbaum[4] and Kopensteiner[5]. As I therefore considered the question to have been settled to this effect, I unhesitatingly based my opinion in Joined Cases 6 and 11/69 ([1969] ECR 550) upon it. No argument has been put forward in the present case to question the accuracy of this distinction. In fact, it appears that as subsidies constitute a popular instrument of economic, social and industrial policy it is unreasonable to withdraw the coal and steel industries entirely entirely from the beneficial action which results for them from the measures taken by the Member States within the context of their general economic legislation and to consider that an unconditional prohibition exists on subsidies to these industries. I believe that the authors of the Treaty cannot have intended to give absolute effect to the prohibition on subsidies in Article 4(c) even as against the general measures adopted by the Member States (in so far as they concern the coal and steel industry) without providing for any means of authorizing such subsidies and giving as the only solution to such an unsatisfactory situation the application of either Article 37 or the first paragraph of Article 95, provisions which involve a cumbersome procedure (unanimous assent of the Council after the Consultative Committee has been consulted) and are linked to the existence of certain conditions which only occur in times of difficulty (funda-

1 — La Communauté du charbon et de l'acier, p. 194 *et seq.*
2 — Sonderlasten und Subventionen im Gemeinsamen Markt der EGKS, Wirtschaft und Wettbewerb, 1957, pp. 638 to 640.
3 — Das Recht der Montanunion, p. 108.
4 — Das Diskriminierungs- und Subventionsverbot in der EGKS und EWG, p. 126.
5 — Das Subventionsverbot im Vertrag über die EGKS, pp. 155, 166.

mental and persistent disturbances in the economy). Finally, let me point out that this system would also damage the harmonious development of the Communities, since the provisions concerning aids in the EEC Treaty also provide for important exceptions to the prohibition on subsidies, and do so taking account of the powers retained by the Member States. Although it is clear that this latter argument is not conclusive, the Commission was right to consider it useful in this connexion.

To sum up, therefore, it is clear that if we are to avoid the existence of a serious lacuna in the Member State's exercise of their powers connected with general economic policy (a point which, in an analysis of Article 67 and the problem of special charges, was also stressed in Case 30/59 (Rec. 1961, pp. 41, 43-4)), it must be accepted that Article 4(c) only applies to the subsidies granted specially to the coal and steel industry and that on the other hand Article 67 is alone relevant in cases where this industry benefits from preferential measures which form part of general arrangements.

(b) Having thus clearly established the principles, I must determine whether the aid measures adopted by the French Government may be regarded as a part of a general policy of an economic, industrial, regional and social nature or whether they must be treated as a special subsidy to the iron and steel industry. As you are aware, the applicant maintains that it is, at all events, a special subsidy. It observes that, as regards the investment programme, the French economic plan only constitutes a framework which must be supplemented by more specific measures. In this connexion I have shown that the French State acted selectively. The credits granted on these favourable terms were limited to privileged sectors, according to the applicant. In particular, it maintains that the rate of interest granted to the iron and steel industries is one of the lowest in force. The applicant concludes that the fact that the measures in question are connected with the general economic plan drawn up by the French Republic does not prevent them constituting a special benefit accorded to the iron and steel industry.

In the context of this debate two points may be accepted straight away. The first is that, as has been observed by Koppensteiner in particular, (loc. cit., pp. 158, 160), even in the case of general measures which require further definition it is not impossible for the manner of adoption of the implementing measures to satisfy the criterion of special nature and to justify the application of Article 4(c). Secondly, there is no doubt that the French economic plan in question, which was ratified by Law No 65-1001 of 30 November 1965[1], could not be applied as it stood but required the adoption of more specific measures in the form of agreements with the various sectors of industry.

However, as regards the question whether the applicant's conclusion that we are dealing with special measures in favour of the French iron and steel industry is correct, serious doubts exist. It cannot be denied that French economic policy for the period from 1966 to 1970 was set out mainly in the quinquennial plan in question in this instance. It is this plan which fixed the objectives and the framework of the measures to be adopted. The plan thus forms the basis of the implementing measures, which are closely dependent upon it and also derive their validity from it. It is, therefore, clearly wrong to evaluate these measures by considering them in isolation, since they may be assumed to be the expression of a coherent policy, of the government which participates in the same way in each special agreement. In other words, the plan constitutes an essential context which justifies regarding all the specific

1 — Official Journal of the French Republic of 1 December 1965.

implementing measure as interdependent.

Considered from this angle, I can only acknowledge that the Agreement concluded with the iron and steel industry is intended to contribute to the implementation of a wider project, that of supervising the balanced development of the economy and of promoting industrial and regional policy (the latter being strongly influenced by social considerations). It is basically these general aims which determine the adoption of the particular agreement in question here and it is difficult to see how it can be said that the iron and steel industry is referred to as such and that the French Government has sought to give it special support on the basis of its needs.

Moreover, the necessary general analysis also shows that the iron and steel industry did not *alone* benefit from the special credit terms. A table which has been produced by the Commission shows that there are other areas of economic activity which greatly benefited from special credits on the implementation of the Vth Plan. In particular, we learn that three other sectors have benefited from rates of interest which are as low (or even lower) than those granted to the iron and steel industry, that the duration of the loans granted to the latter is comparable to that which has been adopted in four other sectors and that there are three sectors other than iron and steel which have also benefited from a clause postponing the payment of interest or deferring repayment of the loan. Moreover, it must be noted that in analysing all the measures which have been taken and in determining whether there have been any discriminatory departures from the general policy (in other words, special measures), it is also necessary to take account of the continuity between the successive plans and the benefits accorded during the earlier years within the context of them. Finally, it is important to take into consideration the particular situation in which the iron and steel industry, with its special difficulties as regards the aim of modernization and economic and social development, found itself, and in particular to consider the social burdens which were imposed on it by the Plan. Far from being open to confusion with the theory of compensation which the Court rejected in Case 30/59, this method only assists in correctly clarifying the question whether, in the main, the various sectors of the national economy have been put in an equal *material* position and whether it is, therefore, impossible for one of them to have benefited from special treatment.

If we take all these factors into account, it appears that both on the basis of the objective repercussions of the measures of aid examined and the purpose for which they were adopted it can be maintained that the special agreement concluded with the iron and steel industry partakes of the general nature of the measures taken within the context of the Vth Plan and cannot be regarded as amounting to the grant of a special benefit. The Commission thus rightly declined to apply Article 4(c) and the Netherlands Government is wrong to request it to take a decision under Article 88 in order to record that the French Government had infringed the provisions of the said Article 4(c).

2. Having established this point I must still examine the alternative conclusions put forward by the applicant. As you are aware, the applicant refers in these to Article 67 of the ECSC Treaty and alleges that the Commission failed, at least in pursuance of that provision, to make a *recommendation* to the French Government. Under the third (sic)[1] subparagraph of Article 67(2) (which is the provision referred to by the Netherlands Government), a recommendation may be made in cases where the action of a Member State is liable, 'by substantially increasing differences in production costs otherwise than through changes in pro-

1 — Translator's note: presumably the first subparagraph is meant.

ductivity, to provoke a serious disequilibrium' and where such action is having harmful effects on the coal or steel undertakings within the jurisdiction of other Member States. This quotation of the terms used in Article 67 is sufficient to show that the application of this text in part implies an 'evaluation of the situation, resulting from economic facts or circumstances' which, according to Article 33 of the Treaty, the Court may not undertake in detail. Thus, the review by the Court may only concern the question whether, on the whole, the Commission's evaluation of the economic facts and circumstances may be regarded as in accordance with reality and logic, or whether its attitude appears to be vitiated by serious errors. With this reservation I shall begin to consider the final group of problems raised by the application brought by the Netherlands Government.

However, I have first to consider a purely legal question, that is, the meaning of the phrase 'differences in production costs' or more precisely whether every factor and every circumstance must be taken into account (which is the Commission's view) or whether, in a situation such as the present which concerns aids to investment, only the costs of *financing* need be taken into account; this point of view is put forward by the applicant who refers in support to the level of the rates of interest on the general capital market in the Member States.

There does not appear to be any great difficulty in replying to this question if we consider the wording of Article 67 and its structure. In fact, the mere use of the word 'costs' in the plural is itself significant. The Commission rightly concludes from this that every cost factor must be taken into consideration. Moreover, this is suggested by the purpose of Article 67, which is clearly intended to enable the Commission to set in motion a *general* reaction to the consequences of the exercise of the powers of the Member States on the conditions of competition. Furthermore, let me point out that the adoption of this interpretation does not increase the difficulties of applying Article 67 (3) (which is drafted in the same terms, but requires a comparison to be made with other sectors of industry). Article 67(3) refers to special benefits and special charges, that is, to cost factors whose special nature may be established with certainty, even in the context of a global comparison. It can therefore be noted *a priori* that the examination which must be held in the context of Article 67 need not be as rigorous as the applicant believes.

Secondly, no challenge has been made to the Commission's statement that during the period in question there was evidence that the level of production costs in the French iron and steel industry had exceeded that reached by these costs in all other Member States (with the exception of Italy) and that every forecast showed that this position would not change. The Commission maintains, therefore, that this case must be regarded as dealing principally with a *reduction* and not with an *increase* in the differences in production costs and that, even in comparison with Italy, it is not clear that an increase has taken place. This is certainly an important factor as regards the application of Article 67(2). Moreover (assuming that this case concerns an increase in the differences in production costs), there still had to be a *substantial* increase. The applicant attempted to demonstrate this by means of a calculation which showed that more than 52% of the investments to the steel industry made within the context of the Vth Plan must be regarded as aid. However, the Commission was able to reply to this allegation by observing, first, that the figure put forward by the Netherlands Government must be rectified on the basis of the value of the aid at the time of the grant, which reduced it to a figure representing only 17% of the new investments, and by pointing out (which is even more important) that the financial burden of the investments only repre-

sents a small small part of the production costs of the iron and steel industry. If, however, all the circumstances are taken into account (which appears to be necessary and is certainly not excluded by the judgment in Case 30/59), in particular the very large debts owed by the French iron and steel industry (on which point without being contradicted, the Commission has provided precise details for 1965 and 1966, and information concerning the debts owed by the iron and steel industries in the other Member States), as well as the special burdens which have been imposed on the undertakings in social matters (reorganization, retraining, creation of new jobs), it can be said, even though a final figure cannot be given for the effect of these social burdens, that taking everything into account the Commission was not wrong to maintain that the net benefit received by the undertakings did not lead to *substantial* increase in the differences in production costs within the meaning of Article 67.

This also shows that a negative answer must be given to the question whether a 'serious disequilibrium' could be expected. In this respect it may be pointed out—as the Commission has done—not only that to reduce the burdens on new investments the other Member States have also taken certain measures which appear to have been referred to during the meeting on 7 May 1969 but that in addition, the accuracy of the Commission's assessment of all the factors is also shown, first, by the development in Community production during the years 1966 to 1969, as set out in Schedule 2 to the reply and, secondly, by the development in exports from the French iron and steel industry to the other Member States and third countries, to which reference was made at the oral proceedings.

At the end of this limited examination of the question, the only one possible in a legal action concerning complex economic problems, I can only conclude that the Commission was right to consider it unnecessary to make a recommendation to the French Government under the third subparagraph of Article 67(2) of the ECSC Treaty, and therefore that the applicant's alternative conclusions must also be dismissed as unfounded.

Summary

My opinion is therefore as follows:

Contrary to the view held by the Commission the admissibility of the application cannot be questioned. However, the conclusions contained therein must all be dismissed as unfounded. It is therefore for the applicant to pay the costs.