JUDGMENT OF THE COURT
6 JULY 1971[1]

Government of the Kingdom of the Netherlands v Commission of the European Communities

'Aids to the iron and steel industry'

Case 59/70

1. *Procedure — Failure to act on the part of the Commission — Raising the matter — Observance of reasonable period*
   (ECSC Treaty, Article 35)

2. *ECSC — General provisions — Obligations of Member States — Infringement of the Treaty by a Member State — Use by another Member State of the procedures laid down by the Treaty — Limitation in time*
   (ECSC Treaty, Article 86)

1. It follows from the common purpose of Articles 33 and 35 that the requirements of legal certainty and of the continuity of Community action underlying the time-limits for bringing procedings laid down in Article 33 must also be taken into account—having regard to the special difficulties which the silence of the competent authorities may involve for the interested parties—in the exercise of the rights conferred by Article 35. Where the Commission fails to act the interested parties are therefore bound to raise the matter with the Commission within a reasonable period. This is so *a fortiori* once it is clear that the Commission has decided to take no action.

2. The duty of cooperation imposed on Member States by Articles 86 must prompt a Member State which considers that a measure adopted by another Member State is contrary to the Treaty to resort to the procedures or means of legal action placed at its disposal by the Treaty in sufficient time to ensure that effective intervention is still possible and that the position of third parties is not needlessly called in issue.

In Case 59/70

GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS, represented by Professor W. Riphagen, Legal Adviser at the Ministry for Foreign Affairs at The Hague, acting as Agent, assisted by C. R. C. Wijckerheld Bisdom, Advocate at the Hoge Raad, with an address for service in Luxembourg at the Netherlands Embassy, 8 rue Pierre-d'Aspelt,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers, B. van der Esch and E. Zimmermann, acting as Agents, with an

1 — Language of the Case: Dutch.

address for service in Luxembourg at the Chambers of É. Reuter, Legal Adviser of the Commission, 4 boulevard Royal,

defendant,

Application for the annulment of the implied decision of the Commission refusing to adopt a reasoned decision within the meaning of Article 88 of the ECSC Treaty in relation to the Government of the French Republic, or at least to make a recommendation to that Government under Article 67;

THE COURT

composed of: R. Lecourt, President, A. M. Donner and A. Trabucchi, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars (Rapporteur), P. Pescatore and H. Kutscher, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedures may be summarized as follows:

1. By French Law No 65–1001 of 30 November 1965 (OJ 1965, p. 10594) the Plan for economic and social development for the years 1966–1970, known as the Vth Plan, was approved as a framework for the investment programmes for this period and as a guideline for economic expansion and social progress (Article 1 of the Law).

Annexed to the Vth Plan are various 'plans professionals' (plans for sectors of the economy) in which fuller details are given of the objectives and means of action necessary for the implementation of the Plan in a specific sector. The 'plan professionnel' for the French steel industry states:

'The increase in competition and the consequent fall in prices on all markets lie at the root of the difficulties experienced by the iron and steel undertakings in financing their investment programmes. Because of the worsening of their operating results they have been compelled to take up ever-increasing loans, so that their total indebtedness at the end of 1964 had risen to 68% of their annual turnover instead of the 45% sought for 1965 under the IVth Plan'.

The desired increase in the possibilities of self-financing through the efforts of the undertakings and the industry and by means of support measures by public authorities can—according to this plan—only be realized by a corresponding improvement in the conditions of competition of the French iron and steel industry

in relation to foreign iron and steel industries.

The aim of the Vth Plan is, therefore, 'to put the iron and steel industry in a position to compete on an international level under normal conditions of competition', which leads to an estimate of 2 million metric tons of crude steel as the standard for the positive balance of foreign trade.

2. In order to achieve this aim the French Government and the Chambre Syndicate de la Sidérurgie Française (Association of French Iron and Steel Masters) concluded on 20 July 1966 a General Agreement the purpose of which is: the joint formulation by the Government and the industry of a programme designed to achieve this aim through common action and of the means which each party shall use towards this end during the period of implementation of the Vth Plan'.

This programme contains two principal points: first, a number of technical, commercial, financial and even legal regroupings of named undertakings, and secondly, the implementation of a large number of investment projects which are already formulated at this stage.

The Agreement contains detailed provisions regarding the financing of this programme. Taking into account repayments of long and medium term loans, share holdings, an increase in the working assets necessitated by the planned increase in turnover, and higher dividends and taxes on the improved results expected in consequence of the capital expansions planned, the overall financial needs of the iron and steel industry for the years 1966 to 1970 are estimated at 11 275 million francs. The State declares itself ready to contribute towards the financing of the investment projects embarked upon up to a total of 2 700 million francs, by granting low-interest loans from the Fonds du développement économique et social (FDES: Economic and Social Development Fund) to the undertakings concerned on the following conditions: duration, 25 years; repayment over 20 years from the 6th year to the 25th year; interest: 3% during the first five years, afterwards 4%.

3. In September 1966 the French Government informed the High Authority of its intention to take certain measures in favour of the iron and steel industry. After an investigation, the High Authority came to a provisional conclusion that the prohibition contained in Article 4 (c) was not applicable, and that there was no occasion for a recommendation to be made under Article 67. At the meeting of the Council of Ministers of 29 June 1967, it made its attitude known to the Member States. In view of the reservation then made by the Netherlands Govrenment, the matter was referred to the single Commission which had been set up in the meantime. Furthermore, by letter of 5 April 1968 the Netherlands Government requested the new single Commission to set out its attitude during a meeting of the Council. Moreover, during the whole of this period various written questions concerning the French aids were put to the Commission by members of the Assembly.

4. On 4 December 1968 the Commission finally set out its position in a letter addressed to the French Government and communicated to the Netherlands Government on 9 December 1968. It stated therein that there was no occasion either for the application of the prohibition in Article 4 (c) of the ECSC Treaty, or for the application of Article 67.

5. The Netherlands Government was not satisfied with this answer and by letter of 24 June 1970 it raised the matter with the Commission under Article 35 of the ECSC Treaty, requesting it *primarily* to take a decision within the meaning of Article 88 of the ECSC Treaty to the effect that the French Republic had failed to fulfil its obligations under Article 4 (c) of the ECSC Treaty, and, *alternatively*—in case the aid in question was regarded as 'action by a State' within the meaning of Article 67 of the ECSC Treaty—to make a recommendation to

the French Republic under the same Article 67.

6. Since the Commission's only reaction to this request was an acknowledgement dated 17 June 1970, by an application dated 12 October 1970 the Netherlands Government brought an action for failure to act seeking the annulment of the implied refusal to take a decision on the basis of Article 88, or alternatively, of the implied refusal to make a recommendation under Article 67(2).

Upon hearing the preliminary report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without holding any preparatory inquiry.

The parties presented oral argument at the hearing on 26 May 1971.

The Advocate-General delivered his opinion at the hearing on 10 June 1971.

II — Conclusions of the parties

The *applicant* claims that the Court should:

'— annul, on the ground of infringement of the Treaty or of any implementing provision thereof, the implied refusal of the Commission to take a decision, or, in the alternative, to make a recommendation, as requested by the Netherlands Government and more fully described at the beginninng of the application;

— order the Commission to bear the costs of the action.'

The *defendant* contends that the Court should:

'— declare the application inadmissible;

— in the alternative, dismiss it as unfounded;

— order the opposite party to bear the costs of the action.'

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — *Admissibility*

The Commission, the *defendant* in the action, puts forward two submissions of inadmissibility based, first, on the late submission of the application and, secondly, on the absence of any plea of misuse of powers.

1. The alleged late submission of the application

Although Article 35 of the ECSC Treaty specifies no period within which a matter must be referred to the Commission in order for it to take a decision or make a recommendation, the *defendant* considers, however, that by allowing more than eighteen months to pass between being fully informed of the Commission's final position (9 December 1968) and raising the matter with this institution (24 June 1970) the Netherlands Government allowed the reasonable period for bringing proceedings for failure to act to lapse.

Although the communication of 9 December does not in itself constitute an act which may be contested within the meaning of Article 33 of the EEC Treaty—as this Treaty does not provide for any decision finding that it is unnecessary to apply the prohibition contained in Article 4 or to make a recommendation under Article 67—nevertheless, to allow a period of eighteen months to pass before commencing the procedure laid down in Article 35 is likely to affect adversely, if not vested rights, at least the legitimate prospects which the French undertakings could base on the fact that the measures recommended by the Government met with the approval of the Community authorities. As these acts concern, in particular, loans and investments which determine economic and social relationships in entire regions, it is unacceptable for their legal

basis to be removed after a period of years. The Netherlands Government has acknowledged this to a certain extent, since it accepts that where the Commission is led to adopt a decision on the basis of Article 88 of the ECSC Treaty which records a State's failure to fulfil an obligation it is not necessarily bound to give its decision retroactive effect. The Commission adds that even if the applicant's point of view was correct reasonable time-limits for bringing proceedings would still be required for the purpose of legal certainty.

The obligation to cooperate imposed on the States by Article 86 compels them to bring before the Court within a reasonable period an application for failure to act on the basis of Article 35 of the ECSC Treaty when they consider such an application to be necessary.

Finanlly, the defendant observes that its argument is supported by the case-law of the Court, in particular by the judgment of 6 April 1962 (Cases 21 to 26/61, *Meroni* v *High Authority*, ECR [1962] 411).

The *applicant* replies that if the Commission in fact failed to take a decision or make a recommendation when it was obliged to do so, it cannot be accepted that the efflux of time should prevent this matter being referred to the Court of Justice.

The fact that the Commission made known that it did not consider itself obliged to act cannot deprive the parties concerned of this right, since in giving this opinion the Commission did not adopt a measure against which an action could be brought and, moreover, could not have done so as Article 88 does not provide for the adoption of decisions approving the conduct of States (Judgment of the Court of Justice if 4 February 1959, Case 17/57, *Gezamenlijke Steenkolenmijnen* v *High Authority*, Rec. 1959, p. 9).

Moreover, the defendant cannot invoke respect for established situations in order to declare the application inadmissible. First, under the General Agreement applications for the loans had to be made before 31 December 1966, that is, before the Commission established its final attitude and before the Netherlands Government could institute proceedings under Article 35. Secondly, a judgment of the Court in the sense desired by the applicant would merely result in an obligation on the Commission to take a decision within the meaning of Article 88 of the ECSC Treaty, which would in no way affect the repercussions of such a decision on the loans already agreed.

Finally, the applicant considers, in the alternative, that the period which it allowed to elapse before making its request was in no way unreasonable.

2. The absence of any submission with regard to misuse of powers

The *defendant* refers to the distinction made in Article 35 between the Commission's failure to act in cases in which it is required to take a decision (first paragraph of Article 35) and in those in which it is empowered to do so (second paragraph of Article 35) and observes that both Article 88 and Article 67 concern action which it may, but is in no way bound, to take. It follows that in the case of a failure to act the second paragraph of Article 35 is applicable, with the result that the implied decision of refusal can only be contested by a submission of misuse of powers.

The application of Article 88 requires a certain margin of discretion.

As regards Article 67 (2), the wording of this provision and the nature of the economic evaluation necessary for its application imply the existence of a wide area of discretion on the part of the Commission: to decide on the exsitence of a serious disequilibrium necessarily implies an evaluation of the economic facts or circumstances within the meaning of the first paragraph of Article 33 of the ECSC Treaty.

The difference in wording between the second and third subparagraphs of paragraph (2), the first of which uses the

phrase 'may authorize' and the second the phrase 'shall make' is unimportant as in both cases the Commission enjoys a certain latitude in deciding whether the economic conditions referred to by these subparagraphs are satisfied.

The application is therefore inadmissible, since no misuse of powers has been alleged.

The *applicant* replies that the latitude allowed to the Commission under Article 88 is no reason to consider that the second paragraph of Article 35 is applicable to proceedings which seek to procure the implementation of Article 88 of the ECSC Treaty. Where the conditions referred to in the first paragraph of Article 88 are fulfilled the Commission is not only empowered, but is obliged to take a decision. For this reason it is the first rather than the second paragraph of Article 35 which applies in this instance (cf. Judgment of the Court of Justice of 23 April 1956, Joined Cases 7 and 9/54, *Groupement des Industries Sidérurgiques Luxembourgeoises* v *High Authority*, Rec., 1955/56, p. 53; Judgment of Court of Justice of 4 February 1969, Case 17/57, *Gezamenlijke Steenkolenmijnen* v *High Authority*, Rec. 1959, p. 9).

As regards the application of Article 67, the applicant observes that apart from the impression which may be gained from the wording of the first subparagraph of paragraph (2) of this provision regarding the freedom of the Commission to act or to refrain from acting, it must be remembered that the third subparagraph of paragraph (2) does not use—intentionally—the words 'may make' but specifies that the High Authority '*shall make*' a recommendation. The difference between the Commission's obligations in each of these two cases is easily explained. The second subparagraph is designed to neutralize the harmful effects suffered by the undertakings of the State responsible for the action in question, whereas the third subparagraph is intended to make good the harmful effects which the action of one State causes to the undertakings in the other Member States. This latter situation is particularly harmful to the Common Market and therefore obliges the Commission to intervene.

The applicant maintains that once the conditions for its intervention, both under Article 88 and the third subparagraph of Article 67 (2), are fulfilled, the Commission no longer has any discretion and is required to take action: no allegation need therefore be made of misuse of powers.

B — *The substance of the case*

1. Infringement of Article 4 (c)

The *applicant* alleges that the loans in question constitute an aid or subsidy by a State to the iron and steel industry and are therefore prohibited under Article 4 (c) of the ECSC Treaty, according to which subsidies or aids in any form whatsoever granted to the undertakings subject to the Treaty are incompatible with the Treaty.

(a) The applicant Government considers that the question whether the aid thus granted is peculiar to the ECSC sector, that is, it only concerns those undertakings producing coal and steel, must not be taken into account. The view that Article 4 only prohibits State aids which especially favour coal or steel undertakings is mistaken and the Commission puts forward no reason to support it. According to the case-law of the Court even a measure which is taken by a Member State in the exercise of the powers which are reserved to it and which involves the grant of a subsidy or an aid to the economy cannot be applied in the coal and steel sector unless such measure is authorised by the Commission (cf. Judgment of the Court of Justice of 23 February 1961, Case 30/59, *Gezamenlijke Steenkolenmijnen* v *High Authority*, Rec. 1960 p. 1; Judgment of the Court of Justice of 10 December 1969, Joined Cases 6 and 11/69, *Commission of the European*

Communities v *French Republic*, [1969] ECR 523).

The purpose of the second subparagraph of Article 67(2) is to confer on the Commission power to grant such an authorization, provided that the conditions laid down in the first subparagraph of Article 67(2) are satisfied. However, in the case of a violation of the express prohibition contained in Article 4(c) these provisions cannot serve to legitimize the measures of the Member States which provide aid to the coal and steel sector, when no serious disequilibrium of the conditions of competition has been provoked.

(b) The applicant adds that at all events —even supposing that the prohibition contained in Article 4(c) only refers to the special aids granted to industries in the sector concerned by the ECSC Treaty—the loans in question fall within the scope of this provision.

The loans granted by the FDES are selective, both as regards the economic sectors and the individual undertakings; the result of this selectivity is that the rates of interest accorded to the iron and steel industry were the lowest of all those accorded by the FDES.

Even if it is accepted that the aims of the Plan in the various industrial sectors are the same, the conclusion must inevitably be drawn that the manner of its implementation is peculiar to the iron and steel sector. The infringement of Article 4(c) is therefore clear.

The *defendant* replies as to (a) that the aids in question are granted within the context of the general exercise of the powers retained by the States which extends to all sectors of economic activity. Article 4 (c) only refers to the aids to the extent that they are granted to the coal and steel industry alone.

(i) The Commission bases its interpretation on the following arguments:

—Only the special charges are prohibited by Article 4(c). Logically, subsidies can only be prohibited under the same conditions.

— Article 67(3) draws a parallel between special benefits and special charges. The same parallel must be seen in Article 4(c).

— The ECSC Treaty only achieves partial integration, as the powers of the Member States in the sphere of general economic and industrial policy remain intact. This implies that the Member States may continue to take general measures in order to encourage economic and industrial development, on condition that they do not give particular benefit to the coal and steel sector.

The prohibition in Article 4(c) is intended to prevent the intervention in question from adversely affecting conditions of competition in this sector and not to prevent the Member States from taking general measures in their countries in order to encourage economic and industrial development.

(ii) There has been no grant of any special benefit unless the powers retained by the Member States had been exercised in a discriminatory manner, that is, unless the rates of interest or of payment of the loans in question were different from those applying to comparable situations in comparable industries.

On the other hand, the non-discriminatory exercise of the powers retained by the States in the spheres of economic, industrial, regional, fiscal or social policies cannot constitute one of the special measures referred to by Article 4(c) but must be considered in the light of the provisions of Article 67, which were specially designed in order to resolve the problems arising from partial integration.

(iii) The suggested interpretation of Article 4(c) is in accordance with that given by the Court of Justice in the judgments of 23 February 1961 (Case 30/59, *Gezamenlijke Steenkolenmijnen* v *High Authority*, Rec., 1961, p. 43) and

10 May 1960 (Joined Cases 27 to 29/58, *Givors* v *High Authority* (Rec., 1960, p. 526). It is not contradicted by the judgment of 10 December 1969 (Joined Cases 6 and 11/69, *Commission* v *French Republic*, [1969] ECR 523), in which the Court merely found that the criterion of the special measure does not appear in Article 67(2) of the ECSC Treaty.

(iv) The question of the relationship between Article 4(c) and Article 67 cannot be separated from the general approach to national aids as these are described in both the ECSC and the EEC Treaties.

The EEC Treaty is also based upon the principle that national aids are incompatible with the common market. A limited exception to this rule is possible in order to achieve certain of the objectives provided for in Articles 92 and 93 of the EEC Treaty. These objectives are all related to the exercise of the powers retained by the Member States. Although, in principle, where the ECSC Treaty governs all aspects of a question there is no reason to refer to the corresponding provisions of the EEC Treaty, it is nevertheless in the interests of the harmonious development of the Community to apply the two systems of aids in parallel in order to avoid distortions in competition. In view of the differences in these two systems such distortions are to be feared if the industries governed by the ECSC Treaty were, over a long period, put into an unfavourable position by the aids granted to all the other industries of the country in question. Without in any way denying the independence of each Treaty, the Commission considers that the best interpretation is that which shows the greatest respect for the functional unity of the Community.

The *defendant* adds, as to (b), that as regards the special nature of the aids to the iron and steel industry, no evidence of this has been brought in this instance. A consideration of all the low-interest loans accorded by the FDES shows France to be following a systematic policy of modernizing and restructuring the whole of its economy. As soon as a sector of the economy merits the attention of the national authorities from the point of view of general economic and social development, it may receive credits. As no sector of activity is excluded *a priori* or in principle from the benefit of this system, no special aid exists within the meaning of Article 4(c).

The fact that the general measure does not concern every industrial sector at the same time and to the same extent is of no importance. A general measure, within the meaning of Article 67, does not change its character if it is applied selectively on the basis of appropriate criteria. Neither on the basis of the wording of Article 67 nor of the spirit of the ECSC Treaty must it be concluded that such a measure ceases to be general following this kind of selective application.

Therefore, in the light of the particular tasks which the iron and steel industry has to face, the required rate of interest of 4% must be regarded as comparable to the rate required in other branches of industry within the context of the Vth Plan. The rate of interest is fixed, first, on the basis of the economic situation and, secondly, on the basis of any loans which may have ben made by the FDES within the context of earlier plans.

The applicant replies, as to (a), that the defendant's interpretation of Article 4(c) is mistaken.

(i) The applicant's textual arguments based on the reference to special charges contained in Article 4(c) are not convincing: their special nature was essentially limited to those charges to which its full meaning applied, while in relation to these aids which are by their very nature, exceptional, this reference was superfluous.

As regards the parallel contained in Article 67(3) between the special nature of the charges and that of the benefits, the applicant maintains on the basis of the judgment of the Court of Justice in

Case 30/59 (Judgment of 23 February 1961, Case 30/59, *Gezamenlijke Steenkolenmijnen* v *Commission,* Rec. 1961, p. 1), that the meaning of the word 'special benefits' used therein is different from that of the aids referred to in Article 4(c).

(ii) It is correct to deduce from the fact that the ECSC only achieves partial integration that the Member States are free in the exercise of the powers they retain. The Commission's belief that these powers have remained intact is, however, mistaken. Although the measures adopted by the Member States in the exercise of the general powers which they have retained must always be assessed in the light of Article 67 of the Treaty, where they are capable of having appreciable repercussions on the condition of competition in the coal and steel industry, it is, on the other hand, on the basis of the principles of the common market itself and in particular Articles 2 to 5 of the Treaty rather than in the light of Article 67, that their validity must be assessed, not only when they have such repercussions but when they are clearly intended to change the conditions of competition and therefore concern 'directly the coal and steel producing undertakings, within the meaning given to this word by the case-law of the Court in his judgment in *Givors* (Joined Cases 27 to 29/58, Rec. 1960, p. 526).

As regards the question of determining what it is which directly concerns the industries governed by the ECSC Treaty, the applicant observes that the criterion put forward by the Commission—the non-discriminatory exercise of the powers retained by the Member States—is of no value in the case of action to grant a direct subsidy or aid to industry which thus concerns it directly. The mistaken nature of the criterion of the non-discriminatory exercise of the powers retained, advocated by the Commission, is easily demonstrated when practical applications of this criterion are made.

The Commission regards the French Vth Plan and the General Agreement attaching thereto as a non-discriminatory exercise of the powers retained which, for this reason, does not directly concern the steel industry.

According to the said General Agreement the precise aim of the measures in dispute is to improve the conditions of competition in the French steel industry in relation to those in the foreign industries, which demonstrates their discriminatory nature.

(iii) The harmonization which the Commission wishes to see between the ECSC Treaty and the EEC Treaty in matters of aid may not result in an infringement of the Treaty. Moreover, the defendant is disregarding the possibilities offered by the ECSC Treaty in Articles 37, 54, 56, 67 and 95 which enables a policy of subsidies to be followed in harmony with Articles 92 and 93 of the EEC Treaty, sunbject to review by the Communities. The High Authority has in fact taken advantage of this opportunity in preparing its decision on the Community scheme of intervention by the Member States in favour of the mining industry (Decision No 3/65, OJ 1965, p. 480).

The harmonization in question is in fact on another level: when a measure granting aid falls outside the scope of Articles 4 and 67 of the ECSC Treaty it is conceivable, supposing that it is covered by the reserved powers, that it may be examined in the light of Article 92 of the EEC Treaty, so that the States may have the same power of granting aids in the EEC sector as in the ECSC sector.

Furthermore, the applicant continues to maintain that even if Article 4(c) is interpreted in the sense suggested by the Commission the measures adopted by France are still subjected to the prohibition contained in this provision.

The Vth Plan merely constitutes the general framework within which a series of aids are carried out which are not applicable to every branch of industry but only to those which have been

allowed to benefit therefrom after a process of selection.

Moreover, the aim and details of the measures differ according to the branch in question. As regards the iron and steel industry, one of the aims is the improvement of conditions of competition in the French iron and steel industry in relation to the iron and steel industries in other countries.

Under the Vth Plan the grant of aids to other sectors for the achievement of their own objectives and according to procedures which are in accordance with their needs does not change the special nature of the aids granted to the iron and steel industry.

Furthermore, it is irrelevant to compare the rates of interest at which loans are made to the French iron and steel industry with those made to the other industries: the question is not whether the steel industry receives more subsidies than another industry which also receives the benefit of loans, but rather whether it receives a subsidy which affects it directly. In case it may be useful, the applicant adds that the iron and steel industry to all intents and purposes enjoys special privileges.

In its rejoinder the *defendant* replies:

(a) As regards the nature of the aids prohibited under Article 4(c), only those which benefit principally the coal and steel industries may be regarded as prohibited.

(i) As regards the charges the Court has accepted in Case 30/59 (Judgment of 23 February 1961, Gezamenlijke Steenkolenmijnen, Rec. 1961, p. 55) that only independent charges—that is those which are not linked to the general economic policy of the States—are referred to in Article 4(c). It must be possible to accept this as regards the aids. If such aids form part of the general economic policy of the States cannot directly affect these industries (within the meaning of the case-law of the Court of Justice: Judgment of 10 May 1960, Joined Cases 27 to 29/58, *Givors* v *High Authority* (Rec. 1960, p. 526). In fact, the acceptance of the criterion based upon the special nature of the measure satisfies the general need not to limit the States' area of action to the point where it is no longer possible for them to take initiatives intended to ensure economic expansion without creating special advantages or disadvantages for the coal and steel sector.

The Netherlands Government, too, accepts that it is the Member States which are in the first place responsible for the balanced development of their national economies, and that this responsibility justifies State intervention which, by definition, is confined to the national sphere.

This applies particularly to those sectors of the economy which are of social and regional importance, such as the coal and steel producing industries. In this instance, as regards iron and steel, the French Government was dealing with an industry requiring large investments in order to renew its equipment at a time when little capital was available. Faced with social problems raised by this state of affairs, France adopted general reorganization measures from which the French iron and steel industry could not be excluded.

(ii) The action of the French Government cannot be described as discriminatory merely because it results in the French undertakings' being treated differently from foreign undertakings. This is an inevitable consequence of the fact that the powers retained only extend to the national industries.

(iii) The interpretation suggested by the Commission has the advantage of enabling the two Treaties to be coordinated. In fact, if all measures to aid the iron and steel industry were prohibited, the result might be that for regional and social reasons comparable measures must be taken on the basis of the EEC Treaty in favour of other industries in the same sector. Although the independence of the two Treaties must be respected, there are, however, from this point of view, certain aspects which cannot be neglect-

ed. The possibilities of interpretation must be applied in such a way that the Community does not come into conflict with itself, which would be the case if every measure to aid the coal steel sectors were regarded as a prohibited subsidy.

(iv) It is thus unnecessary to consider to what extent the general action taken by the French Government has been given concrete form in the Plan and the General Agreement: the low-interest loans form part of a general measure and, therefore fall outside the scope of Article 4(c).

(b) The Commission adds that, at all events the measures in dispute do not represent special aids and that the applicant only regards them as such by giving too restrictive an interpretation to the concept of 'general exercise of the powers retained'.

The fact that the measures which give concrete form to the general exercise of a retained power differ in terms of objective criteria in no way prevents such exercise being general in nature. The different credit terms from which the iron and steel industry has benefited are the result of a particular charge imposed on this industry and show no exceptional features in relation to the terms obtained by the other important sectors (cf Schedule I to the rejoinder).

2. Infringement of Article 67

The *applicant* alleges in the alternative that the loans in dispute must be considered—as the Commission accepts—as action by a State which is liable to have appreciable repercussions on conditions of competition in the coal and steel industry.

If, by substantially increasing differences in production costs otherwise than through changes in productivity, the action in question was liable to provoke a serious disequilibrium, the Commission would be bound under the third subparagraph of Article 67(2) to make a recommendation to the French Government.

However, it cannot be denied that the loans from the FDES provoke a serious disequilibrium in the conditions of competition: in fact, assuming a normal rate of interest to be 6.3/4%, the loans by the FDES which amount to a total of 2 700 million francs represent a subsidy of 27.6% of the new investments provided for in the 'plan professionnel' for the iron and steel industry. In these circumstances, the production costs are substantially altered and this alteration provokes the serious disequilibrium referred to by the Treaty.

The fact that the French iron and steel industry had incurred large debts and required some technological adjustment does not prevent the measure in question from provoking a serious disequilibrium in the conditions of competition.

Thus, the Commission could not have avoided the duty to make a recommendation to the French Government within the meaning of the third subparagraph of Article 67(2).

After recalling that it considers the application to be inadmissible on this point, the *defendant* maintains that it is at all events unfounded. It observes in this respect that the conditions laid down by Article 67(2) are not in fact satisfied:

— The effect of the loans was not to increase differences in production costs, but to reduce them. In fact, the production costs of the French iron and steel industry are among the highest in the Community. The loans therefore reduced the differences in cost.

  It is only possible to speak of an increase in the differences in production costs in relation to the iron and steel industry of one other Member State.

— Furthermore, the question whether a possible increase may be called substantial depends on the actual relief which the loans afforded to the undertakings in their new investments. In this instance, in the light of the fact that the financial burden of the investments represents a rather small

part of the aggregate production costs, such relief could nont bring about a substantial increase in differences in production costs. Finally the obligation to re-structure undertaken by the undertakings in return for the loans also prevented these benefits from having substantial effects.

— The risk of serious disequilibrium is longer a threat as a result of the considerable debts owed by the French iron and steel industry and the fact that in other States the new investments are not always wholly the responsibility of the industries.

In case it should be considered relevant the defendant adds that Article 67(3) is also inapplicable in that the loans do not constitute a special benefit, but remain within the limits of the rates applied in the other sectors of the French economy which are considered to be a matter of priority.

Finally, the defendant observes that it calculates the amount of the aids to be 17% of the new investment.

The *applicant* replies that in order to decide whether there is a reduction or an increase in the differences in production costs it is not, as the Commission considers, the total production costs which must be compared but rather those elements of such costs which are artificially affected by the action of the State. This interpretation is to be drawn from Article 67(3) which clearly cannot refer to differences between aggregate production costs, as it provides for a comparison to be made between undertakings of entirely different types.

If this interpretation were accepted it could not be disputed that the differences in the costs of financing have increased (as is clear from Schedule I to the reply setting out the figures for the rates of interest applied in the EEC from 1966 to 1970).

Moreover, even if the increase in costs had to be assessed by comparing the total production costs, it is shown—as the Commission has itself admitted—that the alleged reduction did not take place in relation to all the States. Thus it was in any case necessary to consider the position in the light of Article 67(2).

The Commission considers itself powerless to intervene under the third subparagraph of Article 67(2) as long as by means of the powers which they have retained, the Member States bring the production costs in their industries to the level of the lowest costs in the Community: such an attitude is contrary to the foundations of the common market.

As regards the substantial nature of the aid in dispute, the applicant puts forward calculations and assessments which show the costs of financing to have been reduced by more than 25%. The Commission cannot deny the substantial nature of this aid by referring to alleged obligations binding upon the iron and steel industry (in this connexion the applicant refers to the Judgment of the Court of Justice of 23 February 1961, Case 30/59, *Gezamenlijke Steenkolenmijnen* v *High Authority*, Rec. 1961, p. 55).

Finally, the applicant maintains that the disequilibrium caused was serious: a slight reduction in costs is in itself likely to bring about a sizeable increase in the profit margins and the modernization allowed was also successful in reducing the costs to a large extent. The debts owed by the industry cannot be taken into consideration in assessing the disequilibrium caused, as to do so would be to violate the principle that the Community shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity. The fact that in other States aids, whether overt or covert, are granted is not established by the defendant which demonstrates, moreover, by its tolerance of these aids the dangerous course on which it has embarked.

The *defendant* replies that the differences to be compared are those between

the total production costs. This interpretation is in accordance with the *ratio* of Article 67 the purpose of which is to make possible a general reaction against the clear and considerable consequences of a general use of the powers retained. It is not contradicted by Article 67(3) which also presupposes a comparison of the effects on the total costs of certain special benefits or charges which by definition only concern certain elements in these costs. It also observes that in the light of the conditions which the Treaty attaches to intervention by a State, it had to take into consideration all the factors which exercise an influence on competition within the common market. Moreover, the facts show that the result of the criticized intervention on the part of the French Government was not to provoke disequilibrium within the common market (as is shown in Schedule II to the rejoinder which analyses the French share in the production of the ECSC).

As regards the 'size' of the aid granted the Commission continues to put forward the figure of 17% which takes into account the time factor in the value of the benefit awarded.

Grounds of judgment

1 The application seeks the annulment of the Commission's implied decision of refusal arising from its failure to comply with the request submitted by the Netherlands Government on 24 June 1970 which sought, primarily, a decision under Article 88 of the ECSC Treaty declaring that by granting low-interest loans to the French iron and steel industry under the Vth Plan for Economic and Social Development, the French Government failed to fulfil its obligations under the said Treaty and requesting it, in the alternative, to make a recommendation to that Government as provided for in Article 67 of the Treaty.

2 The defendant challenges the admissibility of the application and points out that a letter dated 4 December 1968, communicated to the applicant on 9 December, informed the French Government of the grounds on which it considered Article 4(c) of the Treaty inapplicable and took the view that no recommendation under Article 67 was necessary.

3 It contends that since the applicant allowed eighteen months to elapse between the date on which it was informed of the Commission's attitude and the date on which it raised the matter with the Commission, the application is out of time.

4 The French Government informed the High Authority in September 1966 of its intention to adopt the measures set out in the said Plan in favour of the iron and steel industry.

5 At the meeting of the Council on 29 June 1967 the High Authority informed the Member States that according to its preliminary investigation the pro-

hibition in Article 4(c) was inapplicable and that no recommendation under Article 67 was necessary.

6 By a letter signed by its President and dated 4 December 1968 the defendant informed the French Government that, whilst in its view Article 4(c) of the Treaty prohibits State aids which confer a special advantage on undertakings in the coal and steel sector, on the basis of its findings and the information furnished by that Government this did not apply to the loans in question since the rate of interest thereon conferred no special advantage on the iron and steel sector alone.

7 The Commission also pointed out that on the other hand the measures in question were liable to have repercussions on conditions of competition within thet meaning of Article 67(1) of the Treaty.

8 In the Commission's view, however, these measures did not fulfil the other conditions laid down in Article 67(2) and (3), so that no recommendation was necessary under that article.

9 On 9 December 1968 the defendant informed the Netherlands Government in writing that after an examination of the measures adopted by the French Government in favour of the iron and steel industry it had informed that Government of the view which it took of the matter.

10 This communication was attached to the letter of 4 December 1968.

11 The admissibility of the application must be considered in the light of these circumstances.

12 Article 35, which is intended to extend the power to review the legality of the conduct of the Commission to those cases where this institution refrains from taking a decision or from making a recommendation, affords an opportunity to institute proceedings before the Court on the basis of the fiction of an impiled decision of refusal arising on the expiry of a period of two months' in cases where the Commission is required or empowered by a provision of the Treaty to take a decision or make a recommendation but refrains from doing so.

13 On the expiry of this period of inaction, the interested party has a further period of one month to institute proceedings before the Court.

14 However, the Treaty does not provide for any specific periods for the exercise of the right to raise the matter with the Commission under the first and second paragraphs of Article 35.

[15] It follows, however, from the common purpose of Articles 33 and 35 that the requirements of legal certainty and of the continuity of Community action underlying the time-limits laid down for bringing proceedings under Article 33 must also be taken into account—having regard to the special difficulties which the silence of the competent authorities may involve for the interested parties—in the exercise of the rights conferred by Article 35.

[16] These requirements may not lead to such contradictory consequences as the duty to act within a short period in the first case and the absence of any limitation in time in the second.

[17] This view finds support in the system of time-limits in Article 35, which allows the Commission two months in which to define its position, and the interested party one month in which to institute proceedings before the Court.

[18] Thus it is implicit in the system of Articles 33 and 35 that the exercise of the right to raise the matter with the Commission may not be delayed indefinitely.

[19] If the interested parties are thus bound to observe a reasonable time-limit where the Commission remains silent, this is so *a fortiori* once it is clear that the Commission has decided to take no action.

[20] In the present case the communication to the Netherlands Government on 9 December 1968 of the letter addressed to the French Government on the 4 December 1968 could leave no doubt as to the Commission's attitude on the substance of the problem raised, especially since, at the applicant's reqeust, it had been discussed by the Council and the Netherlands Minister for Economic Affairs had again brought his Government's anxiety to the notice of the Commission in a letter dated 5 April 1968.

[21] Furthermore, the duty of cooperation imposed on Member States by Article 86 must prompt a Member State which considers a system of aids to be contrary to the Treaty to resort to the procedures or means of legal action placed at its disposal by the Treaty in sufficient time to ensure that effective intervention is still possible and that the position of third parties is not needlessly called in issue.

[22] In view of these circumstances, a period of eighteen months between the communication of 9 December 1968 and the request addressed to the Commission on 24 June 1970 in order to initiate the procedure provided for in Article 35 cannot be regarded as reasonable and was all the more unjustifi-

able in that the character of the communication of 9 December 1968 was in no way new or unexpected.

[23] Therefore on 24 June 1970 the Netherlands Government was no longer in a position to take advantage of Article 35 of the Treaty.

[24] The application must be dismissed as inadmissible.

Costs

[25] Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs.

The applicant has failed in its submissions.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Coal and Steel Community, especially Articles 4, 33, 35, 67 and 88;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby :

1. **Dismisses the application as inadmissible;**
2. **Orders the applicant to pay the costs.**

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 6 July 1971.

A. Van Houtte
Registrar

R. Lecourt
President