OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 8 November 1988 *

Mr President,
Members of the Court,

1. The two actions brought by Irish Cement Ltd — for a declaration that the Commission's failure to open a procedure under Article 93 (2) of the Treaty with regard to aid granted to Sean Quinn Quarries Ltd ('Quinn') constitutes a failure to act and for a declaration that the express refusal to open such a procedure is void — exhibit a number of complex procedural features. This is, no doubt, the result of combining actions brought under Articles 173 and 175 of the EEC Treaty with the procedure provided for in Article 93 in the matter of State aids.

2. After the hearing on 18 October 1988 which the Court devoted to the consideration of the question of the admissibility of the actions, it is clear that their admissibility depends on the answers given to two types of questions:

(i) Are the actions inadmissible because they attempt to contrive a means of legal redress against an earlier decision in respect of which the period for bringing proceedings has expired? [1]

(ii) In any event, are the 'classic' conditions laid down by Articles 173 and 175 satisfied, and in particular, as regards Article 175, the condition that the Commission must have been under an obligation to act?

Let me consider these questions in turn.

3. The first matter of concern, reflected in the Court's written questions to the parties, has to do in the first place with the question whether the Commission's reply of 14 May 1985 constitutes a challengeable act. Both the applicant and the Commission refuse to subscribe to that view. Moreover, the Commission expressly and separately objects to the admissibility of the action for failure to act, but on other grounds.

4. Turning to an examination of the 1985 'exchange of letters', the first point to be observed is that the letter of 17 April 1985 from the applicant's legal advisers is described in the letter itself as a 'formal complaint'. It complains of aid — of a higher level than that previously granted to the applicant — which the Northern Ireland Development Board was allegedly about to grant to Quinn. Mention is made of the distortions of competition to which the aid would give rise. Lastly, the applicant offers to provide the Commission with additional details of the potential damage to itself, provided that the confidentiality of that information is guaranteed.

* Translated from the French.

1 — See the judgment of 10 December 1969 in Case 18/68 *Eridania* v *Commission* [1969] ECR 459, and, in the context of the ECSC Treaty, the judgment of 4 April 1960 in Case 34/59 *Elz* v *Authority* [1960] ECR 101, and the judgment of 6 April 1962 in Joined Cases 21 and 26/61 *Meroni & Co* v *High Authority* [1962] ECR 73.

5. In its reply of 14 May 1985, the Commission stated that the systems of regional aid notified and applicable, whether in Ireland or in Northern Ireland, were within the ceilings which it had determined by establishing the principles against which it assessed the compatibility of regional aid systems with the common market. The Commission pointed out that it had not raised any objection under Articles 92 to 94 of the Treaty and that therefore the Member States concerned were free to decide, within the maxima notified, on the level of grant to award to a particular project. Thus, the Commission continued, the authorities in Northern Ireland were entitled to grant the aid at issue without further reference to the Commission, just as the Irish authorities had earlier been entitled to decide on the rate of the aid granted to the applicant. It added that whilst the application of such aid systems could give rise to distortions of competition in individual cases, they could be deemed to be compatible with the common market in accordance with Article 92 (3) in view of their overall contribution to the development of less favoured areas. After stating that the Northern Ireland Industrial Development Board was free to offer grants of up to 50%, the Commission concluded by saying that '*there would be little point in submitting details of the potential damage to your client*'.

6. It seems to me that for the purpose of analysing the nature of that letter there are two important factors:

(i) first, the statement given therein of the rules which the Commission considers to be applicable in the matter,

(ii) secondly, the application of those rules to the situation referred to by the complaint, inasmuch as the latitude available to the authorities in Northern Ireland is twice affirmed in the letter.

The latter finding is striking since it emanates from the institution charged with the very task of supervising those authorities' activities in the field of State aids.

7. However, can that letter be regarded as constituting a definitive expression of will, which characterizes an act open to challenge? One observation prevents me from being absolutely categoric about this. The expression '*there would be little point*' does not in truth seem to be completely 'closing the door'. An equivalent French rendering might be 'il n'y aurait guère d'intérêt'.

8. I am well aware of how futile an exercise it can be to decipher the meaning of such an expression when used in administrative correspondence. Litotes and euphemism are commonplace figures in this field. It is understandable therefore that in turning down the offer of additional information made by the applicant's solicitors it may have appeared necessary to employ understatement in order to avoid any lack of civility in expressing a refusal.

9. But at this juncture it is necessary to call to mind the terms used by the Court in its judgment in *Henricot*, when it stated:

'. . . it is necessary for the legal protection of all those affected that they should be able to

identify by its very form a decision which involves such serious legal consequences, in particular a compulsory time-limit for exercising the right of instituting proceedings against it. In particular, for a measure to amount to a decision, those to whom it is addressed must be enabled to recognize *clearly* that they are dealing with such a measure'.[2]

10. The Commission itself acknowledges the ambiguity of the expression in question. For my part, I find, in the light of the principles referred to above, that since that ambiguity cannot be excluded, the content of the letter in question cannot be regarded as an unequivocal and definitive expression of will.

11. I shall add a further observation in case the Court should consider that my analysis is inspired by an excess of scruple and take the view that the letter in question constitutes an act open to challenge. The 1986 procedures revealed that the aid to Quinn was granted on the basis of the standard capital grants scheme (SCGS) administered by the Department of Economic Development (DED). Yet both the applicant's initial complaint and the Commission's reply thereto referred to aid granted by the Northern Ireland Development Board, which administers another regional aid system, the selective financial assistance grant (SFA). Admittedly, it has become evident that the Commission's analysis was identical no matter which system was in question. But I am not convinced that the outcome of a precise legal analysis would be to attribute no weight whatever to that observation. In my view, such an analysis would stand in the way of the Court's declaring the two actions inadmissible simply on the basis of a finding that the letter of 14 May 1985 constituted a decision.

2 — Judgment of 5 December 1963 in Joined Cases 23, 24 and 52/63 [1963] ECR 217, at p. 224, emphasis added.

12. Let us now turn to the 'classic' examination of the conditions for the admissibility of the actions. First of all, it is necessary to make some comments on the fact that the action for failure to act was followed by an action for annulment directed against the letter of 14 July 1986 by which the Commission notified the applicant of its refusal to act.

13. In cases falling under the ECSC Treaty Mr Advocate General Mayras considered that in such a situation the action for annulment is inadmissible because it is brought against a measure which is necessarily confirmatory of the implied refusal resulting from the expiry of the period of two months from the date on which the institution was called upon to act.[3]

14. It does not seem to me that such a solution can be adopted in this case. The fiction of the implied decision of refusal was abandoned in Article 175 of the EEC Treaty, which is not a 'subsidiary aspect of the application for annulment'[4] like the action provided for in Article 35 of the ECSC Treaty. Without going further at this point into the theoretical question of the nature of the action under Article 175, I would simply observe that the purpose of such an action is manifestly to have the failure to act established, which distinguishes it from an action under Article 173 whose object is to obtain a declaration that the act in question is void. I therefore consider that in view of the manner in which the case presents itself from the procedural point of view the admissibility of each of the two applications needs to be considered separately.

3 — Opinion in Case 114/75 *National Carbonizing Company* v *Commission* (order of 2 March 1977 removing cases from the Register) [1977] ECR 381, in particular at p. 386.

4 — Opinion of Mr Advocate General Capotorti in Case 125/78 *GEMA* v *Commission* [1979] ECR 3193, at p. 3200.

15. It must next be observed that the applicant waited almost 11 months after the Commission's reply of 14 May 1985 before calling on it to act on 28 March 1986. In its case-law the Court affirmed the need for there to be a reasonable period [5] between the time when the applicant became cognizant of the abstention on the part of the institution in question and the time when it raises the matter with the institution under Article 35 of the ECSC Treaty. No matter what the theoretical differences may be between actions under Article 35 of the ECSC Treaty and actions under Article 175 of the EEC Treaty,

'the requirements of legal certainty and of the continuity of Community action' [6]

also lead to the conclusion that

'the exercise of the right to raise the matter with the Commission may not be delayed indefinitely'. [7]

16. In the *Netherlands* case, where the administration's failure to act was manifest, the Court took the view that the applicant Member State was entitled 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',

and the Court considered as a result that a period of 18 months was not reasonable.

17. Is it possible to transpose the like reasoning to a private applicant? There appears to me to be no objection to this in principle. In this case — and without reverting to the legal analysis of the reply of 14 May 1985 — I would remark that that letter was evidence at the very least that the Commission did not contemplate acting.

18. The applicant has repeatedly made plain its desire that its application should be given special, or even urgent, treatment. I cannot but compare that insistence with the period of nigh on a year before the matter was raised with the Commission. I shall not go so far as to suggest that this emphasis on urgency was dictated by considerations other than just a desire for a rapid resolution of the dispute, such as for example a concern adroitly to deflect attention from the lateness with which the matter was raised with the Commission . . .

19. However, I would observe that the field of State aids is a complex one where the most diligent undertaking may experience some difficulty in rapidly finding the 'silver thread' of the applicable rules and systems. [8] Evidence of this is provided in this case by the initial uncertainties as to the system under which the aid had been granted to Quinn and the Commission's mistake in providing the Court with a document relating to regional aids in the United Kingdom which, in fact, did not concern Northern Ireland . . . Consequently, I con-

5 — Judgment of 6 July 1971 in Case 59/70 *Netherlands* v *Commission [1971] ECR 639. See also the Opinion of Mr Advocate General Roemer in Joined Cases 24 and 34/58 Chambre syndicale de la sidérurgie de l'Est de la France* v *High Authority* [1960] ECR 281.

6 — Case 59/70, cited above.

7 — Ibid.

8 — It is, moreover, worth mentioning the lack of 'transparency' and 'openness' from which this area seems to suffer. See in particular Despina Schina: *State aids under the EEC Treaty*, ESC Publishing Ltd, Oxford, 1987, especially pp. 175 and 177 where the author states that 'The Commission could do a great deal to improve the transparency and efficiency of its procedure relating to the control exercised on State aids'.

sider that the circumstances of the case are insufficient to make it evident that an excessive period of time was involved.

20. In his Opinion in *Cofaz*,[9] Mr Advocate General VerLoren van Themaat stated that that case did not raise the question as to whether an interested third party could bring an action for failure to act in order to seek the opening of the procedure provided for in Article 93 (2). It must be said that this is the first time that the Court has been confronted with that problem.[10]

21. I would point out to begin with that the matter was duly brought before the Court so far as observance of the procedural time-limits applicable under Article 175 is concerned.

22. I agree with the Court's Advocates General[11] who considered that the existence of an obligation to act constitutes a pre-condition for the admissibility of an action under Article 175. In this case, it therefore falls to be determined whether there is a *duty* on the part of the Commission to open the procedure provided for in Article 93 (2) by giving notice to the parties concerned to submit their observations. The Commission submits that the application is inadmissible. Its position is essentially as follows. Individual aid granted pursuant to an existing system of regional aid cannot be the subject of a procedure under Article 93 (2). On the one hand, in the case of existing aid, recourse must first be had to the procedure provided for in Article 93 (1), namely constant review. Constant review consists of a dialogue between the Commission and the Member States alone, from which individuals are excluded. Secondly, and in any event, the effects of the procedure provided for in Article 93 (2) can relate only to alterations of the system in relation to the future and not to a specific aid granted under an existing system. Otherwise there would be conflict with the principles of legal certainty and legitimate expectation.

23. The applicant, which at the hearing itself described its position as 'radical', maintains that any individual aid granted pursuant to an existing aid system constitutes new aid which is subject to notification. Consequently, where there is aid of the type granted to Quinn and there may be 'some incompatibility' with the common market, there is an obligation to open the procedure provided for in Article 93 (2).

24. Before proceeding to analyse the various arguments put to the Court, it is necessary in my view to recall to mind the mechanism established by Article 93. In order to do so I shall recall to mind what was said by Mr Advocate General Mayras:[12]

9 — Judgment of 28 January 1986 in Case 169/84 [1986] ECR 391.

10 — The order of 11 July 1979 in Case 59/79 *Fédération nationale des producteurs de vins de table et vins de pays* v *Commission* [1979] ECR 2425, related to an action for failure to act brought with a view to obtaining a *decision* that an aid was *incompatible with the common market* and the action was brought by an applicant who had submitted observations in connection with a procedure which had already been opened under Article 93 (2); see also R. Joliet: *Le droit institutionnel des Communautés européennes — Le contentieux*, Liège, 1981, p. 160, who considers that individuals may not bring an action for failure to act in order to obtain a decision under Article 93 (2).

11 — See the Opinion of Mr Advocate General Roemer in Case 18/68 *Eridania*, cited above: 'What is important . . . is that by its failure to act a Community institution has infringed the Treaty. It follows from this that such institution must have had an *obligation* to act, a mere possibility within the framework of a discretion not being sufficient in the present case'; and the Opinion of Mr Advocate General Gand in Case 6/70 *Borromeo Arese* [1970] ECR 815, especially at p. 822; see also the Opinion of Sir Gordon Slynn in Case 246/81 *Lord Bethell* [1982] ECR 2277, especially at p. 2296. As far as academic writing is concerned, see in particular E. Reuter: 'Le recours en carence de l'article 175 du traité dans la jurisprudence de la Cour de justice des Communautés européennes', *Cahiers du droit européen*, 1972, p. 159, especially at p. 173.

12 — Opinion in Case 70/72 *Commission* v *Germany* [1973] ECR 813, at pp. 834 to 836.

'In this respect Article 93 of the Treaty distinguishes between two entirely different situations:

(i) The first paragraph deals with *systems of aid existing* in Member States in respect of which the Commission has the power to review and make proposals and also the power to give directives and take decisions, ratified if necessary by the Court of Justice. Having reviewed such a system of aid after full consultation with the Member State concerned, the Commission can in fact in the first place suggest to that State the measures made necessary by the progressive development or the functioning of the common market. These are, within the meaning of Article 189, last paragraph, of the Treaty, "simple recommendations" which are not binding upon the party to whom they are addressed.

(ii) The second paragraph of Article 93 goes much further. If the Commission has any reason to think that an existing system of aid could be incompatible with the common market, in other words if it is confronted with a "suspect" system of aid, it must adopt a *procedure* which begins with a notice addressed to the Member States and also to the other parties concerned, and therefore to the natural and legal persons affected in any way by the system of aid, with the object of permitting such persons to submit their comments.

If, after examining these comments, the Commission finds that the aid is incompatible with the common market, it has the power to decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. This decision is enforceable . . .

It follows, therefore, from the system created by Article 93 (2) concerning existing aid that, if the Commission has the power to decide whether certain aid is incompatible with the common market, its decision only takes effect *in the future.* Moreover, in accordance with a general principle of law commonly recognized by Member States and this Court, it cannot have retroactive effect. Such a decision creates rights and is not declaratory. It is from this decision, and from this alone, that the prohibition of aid or the obligation to alter it is derived.

To interpret Article 93 in any other way would mean ignoring the rights acquired by third parties, would destroy all legal certainty and would lead in the end to insuperable difficulties in the application of the article.

The position is quite different if the Commission is considering a scheme for new aid or for the alteration of existing aid. In fact, a scheme cannot give rise to any subjective right. It has therefore been thought to be possible, in such a case to confer on the Commission the exceptionally wide power to oppose the implementation of projected measures, if it considers that they are incompatible with the common market within the meaning of Article 92.'

25. I would point out that, with regard to the 'transition' from one category to another,

'if, after notification of a positive decision by the Commission the [new] aid in question is implemented it becomes as an "existing aid" and as such is subject to the constant review provided for in Article 93 (1)'.[13]

13 — Judgment of 20 March 1984 in Case 84/82 *Germany* v *Commission* [1984] ECR 1451, at p. 1488, paragraph 12.

Lastly, alterations of 'existing aid' fall to be classified as 'new aid' within the meaning of Article 93 (3).

26. Let us summarize the general scheme of Article 93:

(i) in the case of a system of existing aid, a decision taken under Article 93 (2) can relate only to the future, [14]

(ii) in the case of new aid, the suspensory effect means that there can be no implementation which might give rise to restitution until such time as the aid becomes existing aid by being approved by the Commission or because a reasonable time has lapsed without any reaction on its part.

27. In the light of that analysis alone the applicant's argument appears erroneous. It consists, as I have already said, in maintaining that any individual measure constitutes a new aid which is therefore subject to notification and in regard to which the Commission is under a duty to open the procedure provided for in Article 93 (2) if the aid exhibits some incompatibility with the common market. But what else can be meant by the principle that a decision under Article 93 (2) that a system of existing aid is incompatible with the common market can refer only to the future, other than that individual measures implementing that system which were granted before that decision was adopted cannot be called into question? And the distinction drawn by the applicant between the existing system and individual measures cannot be accepted in so far as it treats the latter as 'new aid' within the meaning of Article 93.

28. I shall simply mention in this connection the Court's judgment in *Lorenz* [15] which resolved the question as to the circumstances in which a new system of regional aid, notified to the Commission under Article 93 (3), could become an existing system of aid where the Commission remained silent. The Court considered that after the lapse of a reasonable time and subject to the giving of notice to the Commission, the Member State might *'grant the proposed aid'*, which would then be subject, as existing aid, to the provisions of the first two paragraphs of Article 93. The Court's decision therefore is particularly clear: an existing system functions, is put into effect, without there being any necessity for recourse to the procedure provided for in Article 93 (3) for the purposes of adopting the measures for implementing that system.

29. The latter constitute the implementation of the existing system. There is no question of a policy of 'authorizations *en bloc*', as the applicant maintains. What is concerned is the logical consequence of the fact that regional aid systems *crystallize* under the provisions of Article 93 (1) of the Treaty.

30. The review carried out by the Commission under that provision enables an evaluation of the functioning of the system to be carried out together with the Member States and, if necessary, to propose alterations. If the Member State in question refuses to make the alterations, they may be imposed by having recourse to Article 93 (2), but, I would emphasize, only in

14 — Opinion of Mr Advocate General Mayras, cited above; Opinion of Mr Advocate General Warner in Case 173/73 *Italy* v *Commission* [1974] ECR 709, at p. 724: 'It is particularly to be observed that the power of the Commission to decide that the State concerned is to abolish or alter an existing aid can be exercised only for the future. It cannot have any retroactive or declaratory effect'; Opinion of Mr Advocate General Reischl in Case 120/73 *Lorenz* (judgment of 11 December 1973 [1973] ECR 1471).

15 — Case 120/73, cited above.

relation to the future functioning of the system. Lastly, in so far as it is designed to reinforce the general rules applied in this field, the exceptional preventive supervision of 'significant cases'[16] is also intended to ensure that the objective of the regime — that is to say, striking a balance between the 'minus' as regards competition as a result of the aid and the 'plus' as regards industrialization and development — is respected, even where there is a particularly high degree of financial intensity.

31. Let me be specific: Irish Cement's analysis, albeit ingenious, is based on an interpretative and literal reading of Article 93 of the Treaty which disregards both the internal logic of that provision and the scope of the concept of existing aid within the meaning of Article 93 (1).

32. Indeed the applicant has perceived one of the consequences of its argument: why approve regional systems if the States had in any event to notify all implementing measures? In order to forestall that question, Irish Cement cannot however claim to eliminate it by suggesting that approval of the system would enable the State to 'plan' the aid and have 'good chances' of seeing the individual measures approved. In other words, the approval of a system would be devoid of any legal consequence. Let me take the applicant's suggestions to their ultimate conclusion: there would not even be any need to notify new regional aid systems because individual measures would in any event have to be notified.

33. Quite obviously the objective of the Irish Cement's insistence in maintaining that individual aids must be notified is not to see the Court adopt a strange interpretation of Article 93. The first obstacle to the opening of a procedure under Article 93 (2) with respect to an individual aid such as that granted to Quinn stems from the guarantees of 'certainty' attaching to the functioning of an existing aid. And in order to surmount that obstacle it is necessary to have recourse to the applicant's reasoning whose ultimate objective is, by positing a requirement that each individual measure must be notified, to prevent legal certainty from being relied on against it in the particular case.

34. However, it must be emphasized that the consequences of the fact that a system of aid is an existing system are so important that great strictness must be applied to the notification of alterations. It is not contested in this regard that the SCGS existed prior to the accession of the United Kingdom and, as such, constitutes an existing system. However, as far as its 'evolution' is concerned, the French version of the Commission's pleadings and the annexes thereto may give rise to considerable perplexity. Whilst it is made clear that the 1982 Order was not notified in that it did not affect the substance of the system, it is stated in the French translation of the letter from the United Kingdom Permanent Representation that the Order 'a renforcé' (strengthened) the existing system. But the original English version uses the term 'consolidated'. By consulting the *Concise Law Dictionary* I have been able to ascertain that 'consolidated' meant 'codified' in legal language and not 'strengthened'. This being

16 — This is to be compared with situations where the application of an 'aids code' enables a requirement to be laid down that all planned aids must be notified, irrespective of the legal framework within which they are proposed. In such a case, the 'new aid' procedure provided for in Article 93 (3) and (2) is applicable even if the proposed aid comes under an existing system. But there one is dealing with exceptions *ratione materiae* to the principles which I have described.

so, it is possible moreover to agree that an alteration (consolidation 'with amendment') consisting in the administrative improvement of the system — the view taken of the 1982 Order by the Commission and the United Kingdom — need not be notified provided that it in no way accentuates the intensity of the system. [17]

35. As far as the alterations effected in 1985 are concerned, it must be observed that they were notified — albeit after their adoption — to the Commission, which made no objection under Articles 92 to 94. Lastly, the 1983 amendment was, admittedly, not notified, but the order in question merely set a lower ceiling on the permissible expenditure under the system in question.

36. Consequently, if the Court adopts my analysis and considers that in the case of an individual aid measure granted under an existing system and complying therewith the Commission *may not* open the procedure set out in Article 93 (2) of the Treaty, it will obviously conclude that there can be no question of a duty to act and will hold that the action is inadmissible. In my view, the obligation which the Commission is required to fulfil in this case is to verify that the individual aid complies with the requirements of the existing system, as it did moreover in this instance. If the individual measure did not fall under the system, the applicant would be entitled to claim that it was *illegal* before the national courts in accordance with a consistent line of decisions in which the Court has held that the procedural criteria established by the last sentence of Article 93 (3) have direct effect. [18]

37. There remains the question of the admissibility of the action for annulment. In view of the conclusions which I have reached to the effect that the Commission may not initiate a procedure under Article 93 (2) with respect to an individual measure adopted to implement an existing system of regional aid and consistent therewith, it must be observed that, however anxious I may be to respect the principle that full argument from both parties must be allowed, those conclusions would largely predetermine the terms of the discussion with regard to the substance of the case.

38. That is a discussion which in my view must not take place since I do not consider that the Court can hold the action for annulment to be admissible in view of the *nature* of the decision referred to it. It is a negative measure, a refusal. According to the Court's case-law in such a case an action brought against a decision of refusal is admissible only in so far as a positive decision would itself have been open to challenge. That solution finds its sanction in a long series of decisions, of which the judgments in the cases *De Gezamenlijke Steenkolenmijnen in Limburg*, [19] *Lütticke* [20] and *Nordgetreide* [21] must be singled out for mention. It emerges clearly from that case-law that

'it is an established principle that a decision containing a refusal may only be the subject of an application if the positive act which the authority refuses to take might itself be contested'. [22]

39. In this case, the positive act would have been the giving of the notice provided for in

17 — See the Opinion of Mr Advocate General Warner in Case 177/78 *Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161, who considered that 'negligible' alterations need not be notified.

18 — Judgment of 15 July 1964 in Case 6/64 *Costa* v *ENEL* [1964] ECR 585, especially at p. 596; *Lorenz*, cited above; judgment of 19 June 1973 in Case 77/72 *Capolongo* [1973] ECR 611; judgment of 11 December 1973 in Case 121/73 *Markmann* [1973] ECR 1495.

19 — Judgment of 23 February 1961 in Case 30/59 [1961] ECR 1.

20 — Judgment of 1 March 1966 in Case 48/65 [1966] ECR 19, at p. 27.

21 — Judgment of 8 March 1972 in Case 42/71 [1972] ECR 105.

22 — Opinion of Mr Advocate General Gand in Case 48/65 *Lütticke* [1966] ECR 19, at p. 31.

Article 93 (2). There is no doubt that an action for annulment cannot be brought against that measure, since it is a preparatory measure designed to supplement the Commission's information [23] with a view to the final decision on the compatibility of the aid with the common market. It is in the context of an action brought against that decision that the Court examines any irregularities in the 'giving of notice'. [24]

40. Admittedly, the Court's case-law on admissibility in the case of an action brought against a negative act, which is based on the solution which should be adopted in respect of the positive act, has not met with the approval of all commentators. [25] It is pointed out in that regard that a refusal or failure to act may produce definitive legal effects characteristic of a challengeable act when the positive act would have no such effects. A significant example, it must be admitted, is afforded by the proposal for a directive since in the event of a refusal or failure to adopt it the Council is definitively prevented from deciding on it.

41. Nevertheless, there is no escaping the fact that according to the case-law of the Court cited above a negative act can be challenged only to the extent that the positive act could have been challenged. Unless it changes its mind on such a clearly affirmed solution, the Court will declare that the action for annulment is also inadmissible.

42. I would add that, having regard to the case-law of the Court, the nature of the measure in question would constitute an additional reason for holding the action for failure to act inadmissible. The admissibility of an action for failure to act is determined in the light of the nature of the act whose adoption is sought. [26] Moreover, the Court considers that for the purpose of appraising the admissibility of actions for failure to act and for annulment the concept of the 'act' which can give rise to an action is identical. [27] Consequently, those principles should lead the Court to consider that if the refusal to initiate the procedure under Article 93 (2) does not constitute an act open to challenge, Irish Cement should equally not be entitled to bring an action against the Commission for failing to initiate that procedure.

23 — In my view it is here that the difficulty lies in transposing to this case the solution adopted in the Court's judgment of 4 October 1983 in Case 191/82 *Fediol* [(1983] ECR 2913. In that case the Court held admissible an action brought against a decision *closing* the stage of preliminary investigation in the initiation and course of which complainants have 'specific rights'. That is not so in this case. In the context of Article 93 (2) the possibility of submitting observations to the Commission exists but it is couched 'in general terms ... [and] does not provide any further details' (judgment of 28 January 1986 in Case 169/84 *Cofaz* [1986] ECR 391, paragraph 25). Moreover, it is merely hypothetical and arises after the procedure has opened. I would point out in this connection that in the judgment of 15 March 1967 in Joined Cases 8 to 11/66 *Cimenteries* [1967] ECR 75, the Court characterized a notification made under Article 15 of Regulation No 17 as 'the culmination of a special procedure which is distinct from the procedure ... under which a decision on the substance of the case can [subsequently] be taken' (at p. 92). Once again that is not the case here.

24 — Judgment of 14 November 1984 in Case 323/82 *Intermills* [1984] ECR 3809.

25 — Vandersanden and Barav: *Contentieux communautaire*, pp. 145 and 146 and 229 and 230; Kovar: *Jurisclasseur de droit international*, 1980, Vol. 161 C, p. 8, point 24.

26 — *Borromeo Arese*, cited above, [1970] ECR 815. This solution has given rise to reservations identical to those described with regard to negative acts; it is pointed out in this connection too that a failure to act may have definitive legal effects which the positive act would not have (see references and authors cited in note 22).

27 — Judgment of 18 November 1970 in Case 15/70 *Chevalley* [1970] ECR 975, at p. 979, paragraph 6.

43. Article 69 (3) of the Rules of Procedure provides that where the circumstances are exceptional, the Court may order the parties to bear their own costs. In the judgment in *Holz & Willemsen*[28] the Court applied that provision on the ground that

'the applicant has had sufficient reason to refer the matter in question to the Court'.

It would not be unreasonable to consider that to be the case here.

28 — Judgment of 2 July 1974 in Case 153/73 [1974] ECR 675.