OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 31 March 1987 *

Mr President,
Members of the Court,

1. On 8 July 1985 the Commission of the European Communities adopted the decision setting up a prior communication and consultation procedure on migration policies in relation to non-member countries (C(85) 1089), notifying it to the Permanent Representatives of the Member States three days later. An amended version of that decision (C(85) 1089 Rev.) was forwarded to the French Permanent Representative on 18 July 1985 and it was published in its definitive version as Decision 85/381 in the *Official Journal of the European Communities* of 14 August 1985 (Official Journal, L 217, p. 25).

By applications received at the Court between 17 and 23 September 1985 the Federal Republic of Germany (Case 281/85), the French Republic (Case 283/85), the Kingdom of the Netherlands (Case 284/85), the Kingdom of Denmark (Case 285/85) and the United Kingdom of Great Britain and Northern Ireland (Case 287/85) requested the Court to declare that decision void. It should also be pointed out that by three orders of 19 February 1986 the Court authorized the Netherlands to intervene in support of the Federal Republic of Germany, the United Kingdom to intervene in support of the French Republic and the European Parliament to intervene in support of the Commission. Furthermore, by order of 9 July 1986 the Court (a) reserved for the final judgment its decision on the issue of admissibility raised by the Commission in Case 284/85 and (b) joined the five cases for the purposes of the oral procedure and the judgment. As a result, this Opinion refers to all the applications.

2. The contested decision is based on Article 118 of the EEC Treaty which, in the Commission's view, empowers it 'to promote cooperation between Member States in the field of social policy . . . and to organize appropriate consultations to this end' (seventh recital in the preamble). From the point of view of its content, the decision can be broken down into three groups of rules, all addressed to the Member States: Article 1, which subjects them to a series of duties to provide information; Article 3, which sets out the objectives of the consultation procedure in which the respective governments are required to participate; and Articles 2 and 4, which lay down the relevant procedural rules.

The information which the Member States must provide relates to their migration policies and hence covers the measures and agreements by which they have pursued (Article 1 (2)) and intend to pursue those policies. The Commission is, however, interested above all in measures in preparation. Indeed, Article 1 (1) requires the Member States to notify, in good time and at the latest at the moment they are made public: (a) draft measures with regard both to workers who are nationals of non-member countries and to members of their families relating to entry, residence and employment, including illegal entry, residence and employment, equality of treatment in living and working conditions, wages and economic rights, integration into

* Translated from the Italian.

the workforce, society and cultural life and their voluntary return to their countries of origin; (b) draft agreements specifically relating to those matters; (c) draft cooperation agreements which the Member States intend to negotiate or renegotiate with non-member countries in so far as those agreements include provisions relating to those matters; and (d) draft agreements which the Member States intend to negotiate or renegotiate with non-member countries relating to conditions of residence and employment of Community nationals working in non-member countries and members of their families.

The aims of the cooperation are of three types. In the first place, the cooperation is designed to facilitate the mutual exchange of information and the identification of problems of common interest and, in relation to those problems, to facilitate the adoption of a common position, particularly as regards international instruments relating to migration. The second aim is to ensure that the draft agreements and measures referred to in Article 1 are in conformity with, and do not compromise the results of, Community policies and actions, including development aid, in particular as regards Community labour-market policy. The third objective is to examine the possibility of Community or national measures aimed at harmonizing national legislation on foreigners, promoting the inclusion of a maximum of common provisions in bilateral agreements and improving the protection of Community nationals living or working in third countries.

As I have already mentioned, Articles 2 and 4 govern the procedural aspects of the cooperation. Article 2 (1) provides that if, within two weeks from the notification of information on draft agreements and/or national measures, a Member State so requests or if the Commission so decides on its own initiative, the Commission is to proceed with a consultation; the consultation is to take place within the next six weeks or, if a Member State pleads urgency, immediately. Likewise at the request of a Member State or on its own initiative, the Commission may, at any time, arrange a consultation, which I shall refer to as an 'extraordinary consultation'; such consultation must, however, relate to questions on which ordinary cooperation has not already taken place, or, if it has, where new aspects have been brought to light.

Under Article 4 consultation is to be arranged by the Commission, which is to chair meetings and provide the secretariat. However, the responsibilities of existing bodies, and in particular those of the advisory and technical committees on the free movement of workers as determined by Regulation No 1612/68 of the Council of 15 October 1968 (Official Journal, English Special Edition 1968 (II), p. 475), are unaffected thereby. Article 4 also provides that the Member States are to take all necessary steps to ensure the proper functioning of the consultation procedure and, where necessary, to safeguard the confidential nature of the information made available to them in that connection.

3. The centrepiece of the dispute is the interpretation of a primary rule: Article 118 of the EEC Treaty. Unlike the Commission, the applicant Member States maintain that that article confers no power on it in the area of migration policies with regard to non-member countries and, above all, that it does not justify the issue of binding acts. It will therefore be appropriate to commence our inquiry by considering that provision and in particular the criteria which have governed its application, the measures which have been based thereon and the practice

which the Commission has followed to date with regard to consultations with the Member States.

The content of Article 118, which appears in Chapter I ('Social provisions') of Title III ('Social policy'), is well known. Of its three paragraphs, the first sets out the aims which the legislature intended to achieve by means of its provisions. It states that 'without prejudice to the other provisions of [the EEC] ... Treaty, and in conformity with its general objectives, the Commission shall have the task of promoting close cooperation between Member States in the social field, particularly in matters relating to: employment; labour law and working conditions; basic and advanced vocational training; social security; prevention of occupational accidents and diseases; occupational hygiene; the right of association, and collective bargaining between employers and workers'.

The second paragraph indicates the instruments which the Commission is to use in achieving those aims. 'To this end', it reads, 'the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organizations'. The third paragraph lays down an important condition in the shape of an essential procedural requirement, providing that 'before delivering the opinions provided for in this article, the Commission shall consult the Economic and Social Committee'.

Having said that, it must be stated straight away that there has never been unanimity on the principles on the basis of which Article 118 must be applied — or, more practically, on the ways in which the Commission is to use the powers assigned to it by that provision. As from the early 1960s it became apparent that the Member States, or a large proportion of them, intended to restrict the Commission's use of its powers under Article 118 within the narrowest possible limits. Thus, the meetings which the Commission invited the competent social authorities of the Member States to attend in order to consider forms of mutual cooperation quickly ended in failure; more important, the governments expressed strong reservations about the Commission's right to adopt recommendations (1967) and, despite the fact that Article 118 mentions opinions expressly, to deliver opinions. It was pointed out that such opinions are delivered in connection with the exercise of a consultative function; as a result, they may not be prepared and disseminated in the absence of an express request from Member State governments.

A no less suspicious and uncompromising attitude emerged with regard to studies. Indeed, at meetings held on 24 May and 21 and 22 October 1963 the representatives of the Member States adopted a veritable code of conduct which the Commission was intended to observe. More specifically, it was agreed that (a) before drawing up studies of new social questions the Commission would have to submit its plan to the Council or to the governments and might proceed therewith only after it had obtained the unanimous approval of the governments; (b) without the prior agreement of the governments it was not entitled to draw conclusions from studies to serve as a basis for pursuing specific policies; (c) it might not utilize the findings reached by the 1962 conference on social security except with the participation of the governments and independent experts; and (d) the governments alone were authorized to decide on the involvement of the social partners, which was to be done on a case-by-case basis.

In contrast, the national representatives did not succeed in reaching agreement on which body should be responsible for identifying the subjects for investigation. However, it is indicative of their intentions that the doubts which they manifested were limited to whether the Council should be chosen or an intergovernmental meeting to be held under the auspices of the Council (see the report of Mr Nederhorst MEP on the implementation of the social provisions of Article 118, European Parliament 1965-66 Session Documents No 60, 14 June 1965, p. 9, and Heyning, 'Problèmes institutionnels posés par la mise en oeuvre d'une politique sociale au niveau communautaire', in *Revue du marché commun*, 1967, p. 198 *et seq.*).

Admittedly, more open statements were not lacking. In particular a memorandum on social policy drawn up by the Italian Government (1964) roundly criticized the 'restrictive interpretation' of Article 118 which had held sway until then. It stated that that construction of Article 118 had led to a blind alley by, on the one hand, reducing Community action to a few acts of scanty or no effectiveness and, on the other, by requiring the most important decisions to be taken by the paralysing procedure of conferences between government representatives. Yet there was nothing to prevent the 'normal system' of Community instruments from being used to attain the objectives of Article 118; neither could it be objected that under Article 118 the Commission had the task solely of promoting close cooperation between Member States, since the article also provided that that task must be carried out 'without prejudice to the other provisions of [the EEC] ... Treaty' (the text of the memorandum is annexed to the Nederhorst report, cited above, page 20).

An even more rigorous approach was adopted by the European Parliament. In its resolution of 16 June 1965 it came down in favour of a 'broad' interpretation of Article 118 and of the other provisions of the Treaty 'which confer on the Commission a right of initiative and the task of coordination and authorize it to adopt social measures at Community level'. The Parliament suggested that as a result one must reject 'the argument propounded by the governments of some Member States according to which it is necessary that the governments be completely in agreement ... before the Commission ... can be authorized to study new social questions and make recommendations pursuant to Article 118' (*Journal Officiel* 1965, p. 2018).

Those statements gave rise to a very lively debate between the Council and the Parliament. On 19 December 1966 the Council, addressing the subject of studies, curtly confirmed the argument which the Member States had put forward three years before. The Parliament's response was vigorous. In a resolution of 1 February 1967 it protested 'against tendencies ... [to prefer] ... *ad hoc* bilateral or multilateral procedures rather than ... Community measures complying with the Treaties ... whose political and legal bases are to be found in the commitments ... subscribed by the Member States'. But the Council took no notice. Two Council programmes dated 29 February 1968 (Annex II to Doc. 1413 f 68 (Doc. 84) of 26 September 1968) and 27 July 1971 (Official Journal, C 23 of 8 March 1972, p. 20) again tackled the subject of studies and gave the Commission a role which, in certain respects, was even more limited and subordinate. In fact, it was given the right to participate in the choice of subject-matter for investigation; at the same time, however, the power to direct the execution of the research independently was

taken away from it. 'The progress of the work' — according to the 1971 document — 'should be examined *jointly* [and] *at regular intervals* in order to respect the unitary and coherent character of the programme' (my emphasis).

4. Hence there was dissension, but above all coldness, distrust and vigorous defence of national sovereignty, even in the face of exhortatory or fact-finding instruments. Yet still, analysis of the measures which have been based on Article 118 shows that, at least since the late 1960s, the Commission has not allowed itself to be completely closed into the cubbyhole earmarked for it by the Council and the Member States. Research, even high-quality research, has been carried out, and although, to my knowledge, no opinions have been issued some 10, if not more, recommendations have come out of the Berlaymont building. I grant that Article 118 does not mention recommendations, but it is clear from Article 155 that the Commission has the power to issue them from the expressions used therein ('on matters dealt with in [the EEC] ... Treaty ... if the Commission considers it necessary'), whose scope could not be broader. However, it must be borne in mind — and the importance of this remark will emerge later — that the recommendations which I have mentioned were *invariably* referred to the Economic and Social Committee for its opinion.

Surprisingly, the decision at issue is not the first of its kind that the Commission has adopted on the basis of Article 118. The Joint Committees on Social Problems in Sea-fishing and on Social Problems of Agricultural Workers were set up on 25 July 1974 by Decisions 74/441 and 74/442; nor can it be said, as we shall see more clearly in Section 7, that the Member States and the Council have reacted to the use of that mechanism with raised voices or even with raised eyebrows.

Let us turn to the consultations. These have been frequent and diverse: some requested by the governments and held in the form of *ad hoc* meetings between their 'social advisers' and Community officials; others, termed 'European Conferences', have been held with the involvement of representatives of the Member States, representatives of social groups and experts and have been devoted to the discussion of a number of major problems (social consequences of technical progress in 1960, social security in 1962); others still, described variously as seminars, colloquia, study days, and round tables, have been devoted to less important subjects (social housing in 1963, industrial medicine and social training in 1964). Mention must also be made of the written opinions which the Commission asks the committees provided for in the Treaty and the bipartite and tripartite groups set up by secondary legislation to issue. It is in this setting that the chapters of the annual report on the social situation in the Community which Article 122 of the EEC Treaty requires the Commission to submit to the Parliament are drawn up.

In the final analysis, this represents a considerable amount of activity. But, it must be admitted, in this context it is organized by the Commission in circumstances of definite subordinacy. According to some academic lawyers, it falls to the Member States to determine whether, how and when consultations are to take place and that the Commission may not lay down the subject-matter of the discussions or the rules of procedure (see Knolle, Article 118, in *AA. VV., EWG-Vertrag Kommentar*, 2nd Edition, Baden-Baden, 1974, p. 1515). And

practice seems to bear out this — albeit dubious — view. Indeed, it has been very rare for the Commission to call meetings or request opinions without first securing the agreement of the Council. One can mention simply by way of example the written consultations on the implementation of Article 118 (Ribas, 'La politique sociale des Communautées européennes', Paris, 1969, p. 47) and the round table on social policy in the transport sector, where the Council chose the subjects to be placed on the agenda and the national delegations laid down the detailed role of the government officials attending the proceedings (Eighth Review of the Council's Work, April-September 1963, p. 40).

5. The time has come to consider the facts of this dispute, which entails retracing the many stages in the process which has culminated in Decision 85/381 and the applications on which the Court is called to give a decision.

To my knowledge, the most distant antecedents of the present proceedings go back to 1974 or even to 1972. Indeed, in October 1972 the Heads of State or Government meeting in Paris called on the institutions to relaunch Community activity in the social field by providing for the necessary measures and resources. Fifteen months later, on 21 January 1974, the Council accepted that invitation by adopting a resolution (Official Journal 1974, C 13, p. 1) in which 'full and better employment at Community, national and regional levels' was stated to be an 'essential condition for an effective social policy' and an undertaking was given that the measures necessary to achieve that objective would be adopted by 1976. Those measures — and here is the nub — included an 'action programme' designed (a) to achieve equality of treatment for Community and non-Community workers 'in respect of living and working conditions, wages and economic rights', and (b) to 'promote consultation on immigration policies *vis-à-vis* third countries'.

Three episodes of some importance followed, involving the same institutions. Again in 1974 the Summit Conference of Heads of State or Government (Paris, 9 and 10 December) emphasized in Point 10 of the final communiqué the need for stage-by-stage harmonization of legislation affecting aliens. Two years later, a new Council resolution (9 February 1976, Official Journal, C 34, p. 2) took up once again the subject-matter of the document which I have just quoted, added a reference to the need jointly to combat illegal immigration of non-Community workers and ended by expressing the 'political resolve' to implement the promised measures while taking account of the responsibilities of the Community institutions concerned. Lastly, on 11 December 1978 the General Committee for Euro-Arab Dialogue meeting in Damascus adopted a 'Declaration on the principles governing the living and working conditions of migrant workers from the two regions'. It, too, guaranteed equal treatment in respect of economic rights and basic human rights (Twenty-sixth Review of the Council's Work, 1 January-31 December 1978, pp. 56 and 57).

At this point, the Commission enters on the scene; hitherto it appeared to have been interested in migration policies in a fairly marginal manner. The communication which it forwarded to the Council on 23 March 1979 (COM(79) 115 final)

accurately traces the relevant socio-economic background and pays attention to both strategic objectives and procedural details and constitutes one of the most important milestones in this affair. It must therefore be examined carefully.

The document begins with an acknowledgment which is also an act of prudence: to 'decide on the principles of consultation between the Member States and the Commission' is a matter for the Council (paragraph 2.10). But the tone of the document immediately becomes incisive. Such consultation is in fact indispensable. It is necessary because of — or, better, it constitutes a genuine 'corollary' to — the 'free movement of Community workers' (paragraph 3.2). The admission of foreigners, which is haphazard and ill-planned and often implemented illegally, seriously risks jeopardizing that policy. A series of measures should therefore be studied jointly with a view to adopting a coherent approach to the immigration of workers from non-member countries by safeguarding and strengthening the 'priority for Community nationals' in the Community labour market (paragraph 3.5). The communication goes on to say that the problem arises in a particularly acute form for United Kingdom, Irish and Danish workers during the transitional period. The problem is how to guarantee them priority over non-Community labour in access to the available vacancies; this is the first subject-matter for consultation, which should be arranged forthwith (paragraph 4.1).

As for the procedure to be applied to the meetings in which these topics were to be tackled, no new machinery appeared to be necessary. It was deemed sufficient to rely on Article 19 of Council Regulation No 1612/68, which was sufficiently flexible to cope with the sector of migration policies. Accordingly, the Commission was to report on the results of the Community arrangements for vacancy clearance, and the foreseeable developments in the state of the labour market, including the likelihood of Community workers accepting the available vacancies. Also, there was nothing to prevent *ad hoc* groups being set up with the participation of the social partners in order to deal with specific questions.

6. As can readily be imagined the document summarized above brought a breath of fresh air into the harsh but stifling conflict which had been going on for years between the Member States, the Council and the Commission with regard to the criteria for applying Article 118. For instance, the report drawn up by the Committee of Permanent Representatives for the Council meeting of Labour and Social Affairs Ministers (Doc. SOC 266 of 15. 11. 1979) recognized the existence of a link between migration policies and the priority to be given to workers who are nationals of Member States, and proposed that that issue should form the subject of consultation. For anyone seeing dangers even in sociological and labour-law studies the progress was not inconsiderable; neither did some governments' reservations in the area of procedure succeed in completely offsetting it. In fact in that area nationalistic concerns regained the upper hand. For instance, France stated that the Advisory Committee set up under Regulation No 1612/68 was not an appropriate forum for discussing matters involving national sovereignty; as a result the Technical Committee was preferable but even so it should not involve itself in outlining Community negotiating positions. In any case, France and Germany warned, general terms of reference should not be given to the Commission; and the Danish delegation added that consultation should not lead to binding instruments.

The Commission responded to those caveats by stating that it viewed consultation as a

method of enabling it to make proposals, not to adopt measures. But the most precise — and perhaps the most accurate — form of words with regard to this matter was delivered by the Council in the conclusions to the Council meeting referred to above (Doc. PV/CONS 53 SOC 292 of 26. 11. 1979). Having emphasized that efforts should centre on questions regarding the priority to be given to workers from the Member States, questions regarding labour from third countries and questions arising for nationals of Member States working in non-member countries, the Council stated that, albeit 'without prejudice . . . to the powers of the institutions of the Communities', the aim of consultation was to 'facilitate the adoption' not of 'Community legal instruments' but of a 'common attitude of the Member States' (entry in the Council minutes concerning Point 7). It considered that the time was right for such an initiative and requested the Commission 'to prepare or organize [appropriate consultations], as the case may be'.

Six months later the Commission document bore new fruit: the Council resolution of 27 June 1980 on guidelines for a Community labour-market policy (Official Journal 1980, C 168, p. 1), which put the procedural questions on one side and once again put the emphasis on the substantive problems of consultation. In Section III it is stated that 'integration of the . . . market should be fostered within the framework of free movement of labour . . . particularly by effective implementation of the Sedoc system [European system for the international clearing of vacancies and applications for employment], taking account of the . . . priority to be afforded to . . . nationals of Member States and of the need to contain access to the Community labour market by labour from third countries, and by appropriate consultation on migration policies *vis-à-vis* third countries'. The style is laboured but the political emphasis of the message is clear. There is also a clear invitation to act, which, once again, is addressed to the Commission. The document ends by stating that the Commission should take the initiatives necessary to promote cooperation between Member States in the field of labour-market policy.

The Commission did not react immediately. Manifestly, it felt on the basis of its experiences in the 1960s and the unsatisfactory outcome of its previous attempts to pursue voluntary collaboration (*infra*, section 15) that genuinely effective action would again meet with insurmountable resistance; one might as well therefore continue to work at the matter by issuing severe diagnoses of the existing situation and making increasingly explicit proposals. It seems to me that the document of 9 September 1983, addressed to the Advisory Committee, was designed with that strategy in mind. It contains a pointed allusion to the agreements concluded by the Community with Turkey, Portugal, Yugoslavia and Maghreb countries which secure for immigrants from those countries a less advantageous status than is guaranteed Community nationals. But the most important passage in the document is where it considers the damage caused by the growing tendency for the Member States to act independently of each other. In recent years, the document states, numerous measures have been adopted by the Member States that have not been the subject of consultation and have had adverse repercussions on the situation in other Member States. The time has now come 'to institutionalize such consultation'.

However, in what way can this be achieved? The answer — and it is a crucial one — is to be found in the draft communication on guidelines for a Community policy on migration, which goes back to 13 March 1984 and was also sent to the committee set up by Article 24 of Regulation No 1612/68 (Doc. V/243/1/84-FR rev.). It is stated in Point 44 that it is now the proper time to provide an appropriate legal framework ensuring the participation of the Member States in the consultation procedure and imposing on them the same obligations *vis-à-vis* the Commission and the other Member States. In accordance with the Council's wishes that framework is designed to achieve simply the adoption of common positions and merely requires information and discussions on each and every one's problems in the sphere of measures relating to workers from non-member countries and members of their families. But the draft communication goes on to state that if the information and discussions are to be mandatory in nature it is essential to have a decision to put them into effect (Point 55).

The die was about to be cast and there will probably be surprise in some quarters at the lack of adverse reaction to the fact that it was now foreseeable that it would be thrown. In a document dated 22 June 1984 (Conclusions of the Council concerning a Community medium-term social action programme, Official Journal 1984, C 175, p. 1), the Council 'takes note' that the Commission is to submit proposals for 'developing cooperation between Member States on the control of migratory flows from third countries'. Then when the Commission presented it with a draft resolution stating the need to define 'a suitable framework' for consultation (Doc. COM(85) 48 final of 7 March 1985) the Council's response was couched in anodyne but not in negative terms. Thus once it had clarified that 'matters relating to the access, residence and employment of migrant workers from third countries fall under the jurisdiction of the governments of the Member States', it recognized that it was desirable to promote cooperation and consultation and noted 'the Commission's intention of drawing up an appropriate procedure to this end' (paragraph 3), calling on the Commission 'to submit the necessary proposals to it in this connection' (paragraph 7).

The resolution was approved on 13 June 1985, formally adopted at the meeting on 16 July and published on 26 July (Official Journal 1985, C 186, p. 3). But by that time the horse had already bolted, for on 8 July the Commission had issued the contested measure.

7. Now that I have concluded the account of the facts which led to the adoption of the contested decision, it seems to me that a question is called for. Why was this case brought? What brought before the Court a number of Member States which is scarcely less than the number required to bring the Council itself into the field? Logically, it must be concluded that there was no reason. On six occasions the Council stated that consultation is indispensable; twice it spurred the Commission on to implement it and, when the Commission decided to act, asked it on a further two occasions to inform the Council of its proposals. For their part, the Member States raised doubts, put forward suspicions, gave warnings; but they never said — either before 1985 or, even less, during the procedure — that they were unwilling to provide each other with information and take part in consultations.

It may perhaps be objected that the Member States are not criticizing the thing itself but the instrument and the materials — a decision and the constraints resulting therefrom — with which the thing has been made. This argument, too, is untenable. It is

sufficient in order to refute it to point out that the two 1974 decisions (*supra*, Section 4) were also based on Article 118 and yet not contested. On the other hand, if it is objected that those decisions dealt with less sensitive matters than the decision at issue in these proceedings, it is sufficient to cite other measures with which the legislative history of the Community is studded: measures which are also binding and are also intended to deal with matters of considerable importance or at least at the extreme limit of Community powers; measures, moreover, which are based not on a provision of the Treaty, but on the Treaty *simpliciter* or, worse, on Council resolutions and which, despite those characteristics, were accepted in silence or with general satisfaction.

There are at least 10 such acts and all of them are worthy of appearing in the much-needed chamber of legal horrors. The following Council regulations are based simply on 'the Treaty': No 1707/86 of 30 May 1986 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station (Official Journal 1986, L 146, p. 88); No 3302/86 of 27 October 1986 suspending imports of gold coins from the Republic of South Africa (Official Journal 1986, L 305, p. 11); and No 3599/85 of 17 December 1985 applying generalized tariff preferences for 1986 in respect of certain industrial products originating in developing countries (Official Journal 1985, L 352, p. 1). Then again, there are seven Council decisions based on various Council resolutions, three of which were issued by the Council itself (Council Decision of 16 September 1985 setting up an advisory committee on pharmaceutical training, Official Journal 1985, L 253, p. 43; Council Decision of 29 June 1984 dealing with structures and procedures for the management and coordination of Community research, development and demonstration activities, Official Journal 1984, L 177, p. 25; Council Decision of 28 October 1980, concerning fishery activities in waters under the sovereignty or jurisdiction of Member States, Official Journal 1980, L 298, p. 38) and four by the Commission. The latter set up committees on road transport (Decision of 18 November 1985, Official Journal, L 317, p. 33), on railways (Decision of 19 December 1984, Official Journal 1985, L 8, p. 26), on the control of pollution caused by the dumping of hydrocarbons discharged at sea (25 June 1980, Official Journal, L 118, p. 11) and on waste management (21 April 1976, Official Journal, L 115, p. 73).

Let us return to the point. If the remarks that I have made are pertinent, in order to understand the reasons behind these proceedings there is no alternative but to leave the realm of logic and venture into the realm of psychology, if only in a down-to-earth way. The opposition of the Member States is due to three factors and, firstly, to the irritation aroused by unexpected and displeasing events. What I mean is this. The 1974 decisions and the documents produced from 1979 onwards were not such as to alter the image that the Commission had given of itself in the 1960s, above all because of the ground it yielded with regard to consultations and studies. The Member States were used to this deferential, yielding, at times faint-hearted image, to such an extent that the conviction grew up that a lot of jaw could be expected from the Commission but little or nothing in the way of action. The silence maintained by the Member States in the face of the document of 13 March 1984 (which provided that consultation was to take place in a legal framework to be created by means of a decision) is explicable — I believe — for those very reasons. Consequently,

the Member States must have been greatly surprised when they were faced with a measure and a full-bodied one at that. And great must have been their desire to bring the institution responsible for that measure back into line with a good judicial rap over the knuckles.

Then again there is an objective element. Whether we like it or not, the Member States are genuinely — or better, vitally — interested in preserving full control over the admission to their territory of workers from non-member countries, *inter alia* because of its obvious political and public-policy ramifications. Hence, their fear that in time this sector will come within the ambit of the Community is a genuine one. And it seems to me significant that they took the opportunity afforded by the Single European Act to bring things out into the open by securing themselves against incursions designed precisely to initiate a process of that kind. The declaration relating to Articles 13 and 19 of the new Treaty confirms 'the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism'.

Lastly, the Commission's errors also had some influence. I am not referring so much to the hurry, which was certainly not very seemly, in which it issued the contested measure. I consider, however, that the measure's excessive detail and, above all, the stress which it puts on non-Community workers and on agreements between Member States and non-member countries were not calculated to placate the irritations and fears which I have mentioned. Indeed it is permissible to conjecture that if the Commission had put its emphasis on the *Community's* labour market and on the need to increase employment among Community white- and blue-collar workers, it would perhaps have avoided the actions which are now before the Court yet without renouncing the objectives which it had in view. As the Commission itself pointed out in the document of 23 March 1979, migration policies constitute a 'corollary' to the policy laid down by Articles 48 to 51 of the Treaty; consultations on the problems posed by the implementation of those articles would therefore necessarily involve tackling measures aimed at non-Community nationals as well.

8. Before considering the submissions and arguments of the parties a number of problems of admissibility must be resolved and, to start with, the issue which I have mentioned in Section 1.

Let us consider the time-scale involved. The contested decision was notified to all the Permanent Representatives on 11 July 1985 and, as appears from the copy of the notice of receipt, it reached the Netherlands Permanent Representative at 3.10 p. m. on that day. The application of the Netherlands Government was forwarded by telex on 18 September 1985 and the original of the document reached the Court Registry two days later. However, the Commission points out that, in the case of the Netherlands, the period of time allowed for commencing proceedings was two months — calculated in accordance with Article 81 of the Rules of Procedure as from the day following notification — plus six days in order to take account of the distance between The Hague and Luxembourg pursuant to Annex II of the Rules of Procedure. Accordingly, the time-limit expired on 18 September, that is to say the day on which the Court Registry received the telex, but 48 hours before the original arrived. The Netherlands Government does not deny the facts. However, it argues (a) that Articles 37 and 38 of the Rules of Procedure do not prohibit the lodging of applications by telex, and (b) that it was obliged to use telex owing to the delay (29 August) with which

the Commission answered a request it made for explanations as to the method of application of the decision.

As is shown by the Court's recent judgment of 15 January 1987 in Case 152/85 *Misset* v *Council* [1987] ECR 223, the arguments of both parties are based on a mistaken assumption. In interpreting Articles 80 and 81 of the Rules of Procedure the Court held as follows: 'where ... the period of time allowed for commencing proceedings is expressed in calendar months, that period ... expires at the end of the day in the last month thereof which bears the same number as the day of the occurrence of the event which caused time to start running, that is to say the day of notification' (paragraph 8). If we apply this rule in the present case we find that the period of time prescribed in Article 173 of the Treaty for bringing proceedings for the annulment of the contested decision expired on 11 September. If we add the six days for which applicants residing in the Netherlands qualify we get the answer of midnight on 17 September. It follows that, even if it is assumed that an application sent in by telex is valid, the Netherlands application was out of time.

Yet not only the application of the Netherlands. If the rule in *Misset* is also applied to the other applications it turns out that the Federal Republic of Germany and France lodged their applications in time (Germany's application reached the Court on 17 September and the application of France, to which the correct text of the decision was notified a week later, on 24 September) but this is not true of the applications lodged by the United Kingdom and Denmark. In their case, as we know, the rules on distance provide for an extension of 10 days, as a result of which the Court should have received their respective applications by 21 September. Yet their applications were not lodged until 23 September.

In the light of those observations (a) I have no option but to assess the submissions and arguments of the Netherlands, but only because that State, intervening in support of Germany, incorporated the entire content of its own application in its observations made as intervener; (b) I shall have to take into account the arguments put forward by the United Kingdom only to the extent to which it repeated them in its intervention in support of France; (c) I shall be obliged not to consider the submissions and arguments put forward by Denmark, which had the misfortune (or the elegance) to play its hand only at its own table.

9. In the applicants' opinion Decision 85/381 is vitiated by three defects: lack of competence, infringement of the Treaty and, in the alternative, breach of essential procedural requirements. The first two charges are based on the interpretation given to Article 118 by France, Germany, the United Kingdom and the Netherlands, and, for that very reason, lend themselves to joint consideration. However, it must be borne in mind that the four Member States use the expression 'lack of competence' in a dual sense: that is to say, they claim that the decision in question is vitiated thereby (a) because it exceeds the extent of the powers which Article 118 confers on the Commission and (b) because it deals with fields which fall outside Article 118. Since these approaches involve very different problems we shall have to consider them separately.

Let us commence then by considering the first approach which, although it is to be found in all the applications, is considered in particular depth in the application of the Federal Republic of Germany. According to the Federal Government the first aspect which prevents Article 118 from being used to justify the adoption of a binding instrument is its wording. The first paragraph of the article gives the Commission the task of promoting close cooperation between Member States; and 'promoting' means favouring, encouraging,

initiating or prompting but certainly not requiring. The second paragraph is no less explicit. It is obvious that two of the instruments mentioned therein do not postulate (studies) or do not have the character of (opinions) an activity capable of imposing obligations. With respect to the consultations, however, the French and Italian versions use a verb — 'organiser', 'organizzare' — which may allude to legislation; but since the corresponding terms used in the German and English renderings ('vorbereiten', that is to say prepare, and 'arrange') have a meaning precluding any such allusion, its semantic scope must be limited to the performance of purely practical preparation activities.

But that is not all. The term 'decision' does not occur in Article 118. In itself, that need not necessarily play a determining role; however, it does assume such a rôle when it is borne in mind that the second paragraph provides for other instruments (studies, opinions and consultations) the list of which seems exhaustive or — in view of the opening sentence of the first paragraph of that article and in view of Article 155 — is at the most capable of extending to recommendations (see, in particular, the United Kingdom's observations). This is also suggested by the third paragraph of Article 118, which stipulates that before delivering opinions the Commission is to consult the Economic and Social Committee. It is in fact absurd that a non-binding measure should be subject to such a condition and not an instrument from which obligations arise; and if that observation is correct it must be inferred that the legislature did not have the slightest intention to empower the Commission to issue binding instruments.

There is more still. Crucial importance also attaches to the words which precede the aforementioned list in the second paragraph of Article 118. It states that the Commission 'shall act *in close contact* with Member States'. It is plain that the behaviour required of the Commission as a result makes sense only if it takes the form of an obligation: that is to say an obligation not to use the means made available to it (in this case not to arrange consultations) without not only informing the Council but also and above all obtaining the Council's consent. In short, the Commission is not entitled to carry out unilateral acts; and *a fortiori* it may not carry out unilateral acts involving obligatory effects.

As is obvious, the Federal Government continues, the Commission disagrees. In its opinion, Article 118, in like manner to Articles 75 and 113, confers certain tasks on it while leaving it free to choose the means by which it carries them out. But the Commission's analogy does not hold true, as can be seen, once again, from the wording of Article 118. The choice left to the Commission would relate to the method of arranging the consultations. However, the expression 'arranging consultations' ('die Vorbereitung von Beratungen') is governed by the preposition 'by' ('durch'); accordingly the activity of arranging consultations is itself a means in the same way that delivering opinions and making studies are means. And that implies that the Commission is indeed free; but it is free to use those means (as it did in the case of studies) or not to use them (as it did not in the case of opinions) — it is certainly not free to employ means for which the legislature did not make provision.

Neither can it be said that the choice of a binding instrument resulted, on the basis of the principle of 'effet utile', from the need to ensure effective consultations. Such consultations could also be effective even if carried out by way of forums (see the observations of the French Republic) in like

manner to the meetings held on the same subjects under the auspices of the Council of Europe, especially — the Netherlands adds — since in this case the sound functioning of the consultation is secured by the requirement to act bona fide which is imposed on the Member States by Article 5 of the Treaty. In any event, it is a fact that when powers are transferred from the Council to the Commission or from Member States to the Community teleological considerations and, in particular the principle of 'effet utile', are valid only in the last resort. Consequently, before it can issue a decision the Commission should have exhausted all the other means afforded by the law. Yet, the technical and advisory committees set up pursuant to Regulation 1612/68 were only consulted marginally on the issues intended to be tackled by the decision and the Member States received neither opinions nor recommendations.

Still according to the Federal Government, the findings to which literal and teleological analysis of Article 118 leads are borne out by a consideration of its position within the system of the Treaty. There is no doubt, for instance, that its provisions are connected with the programme outlined in Article 117 (improved working conditions and standard of living for workers and harmonization thereof while the improvement is being maintained) and should therefore be read in the light of the means by which, according to the second paragraph of Article 117, the relevant aims are to be implemented. Those means consist of: (a) the automatic functioning of the common market; (b) the 'procedures provided for in this Treaty', which presuppose provisions expressly conferring a power to impose obligations; and (c) the approximation of national laws — that is to say a task which, as is well known, devolves not on the Commission but on the Council.

However, Article 117 is just one piece in a mosaic. It is necessary to look at the whole design. It will then become clear that the Treaty as a whole treats the social sector as being the preserve of the Member States, from which it follows that, like all the other fundamental choices made in the Treaty, that choice may only be amended by use of the procedure provided for in Article 236. To erode that choice by adopting a broad interpretation of any particular provision and, in this case, of Article 118 signifies failure to observe the principle that each institution must act within the limits of the powers conferred on it. The result is that Article 4 and Article 155 itself are infringed. Article 155 is infringed in so far as it infers that the Commission may issue decisions only in exceptional cases and hence that it may not do so in the absence of powers conferred expressly by the Treaty or delegated by the Council.

The Commission's answer is that those observations lose relevance or are defeated altogether in view of the solely procedural content of the contested decision. But the objection is a weak one. Firstly, Article 189 makes no distinction between substantive and procedural instruments, and secondly, it is notorious that instruments are often procedural in form only. The Federal Government argues that the requirement set out in Article 1 (1) (to notify measures in preparation) affects the substantive interests of the Member States by jeopardizing possible requirements of secrecy or, in the case of agreements with non-member countries, the confidentiality necessary to ensure the successful outcome of the negotiations. Indeed the French Government maintains that the time-scale laid down for consultation (two weeks plus six weeks) may prevent urgent measures from being

taken in time. Lastly, the United Kingdom argues that since it will be impossible to issue proposed measures which are subject to the procedure until the procedure has been completed and the measures have been stated to be consistent with Community policies, those measures are dependent, at least *de facto*, on the Commission's approval.

Finally, the Federal Republic turns to academic writings, case-law and practice. It maintains that academic writers are virtually unanimous in finding that Article 118 does not authorize the Commission to take binding measures. As for the case-law of the Court, in its judgment of 15 June 1978 in the third *Defrenne* case (Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365, at paragraph 19), the Court emphasized that 'the provisions of Article 117 and 118 . . . are essentially in the nature of a programme'; in other words, the Court recognized the existence of a state of affairs which, in a system dominated by conferral of limited powers, implicitly leads to the same conclusion. Practice is more ambiguous and it is made so by the two measures which the Commission issued on 15 July 1974. However, it would be going too far to give those measures the authority of precedents; they do not provide for a Member State's collaboration with the committees which they set up and the only thing which they have in common with the contested decision in this case is the requirement of secrecy which is imposed on participants in the relevant meetings.

10. France and the United Kingdom stress above all the second ground for maintaining that Decision 85/381 is vitiated on the ground of lack of competence. In both governments' view, the field covered by that decision goes beyond the scope of Article 118, which does not deal with non-Community workers. Certainly, no one denies that there is a link between Community policies on employment and the phenomenon of migration to and from non-member countries; but the link is too tenuous and indirect to bring persons involved in those movements, with the single exception of nationals of countries associated with the Community, within the scope of the rules set out in Chapter 1 of Title III of the EEC Treaty. France in particular maintains that this fact is sufficient to prevent the Community legislature from being able to regulate their interests directly or by taking action in respect of the national measures covering those interests.

But other arguments militate in favour of that same conclusion. For example, as the United Kingdom observes, it is undeniable that the immigration policies of Member States are fashioned or determined by historical, cultural and social factors on which the Community has nothing to say. Furthermore, as the French Government points out, the admission of migrants from outside the Community may put at risk values, such as national security, that are protected by the Treaty itself in so far as it guarantees the Member States a right to remain silent (Article 223); even when it does not go so far it does involve a series of administrative activities (issue of visas, frontier checks) which fall wholly within the jurisdiction of the Member States. The Council itself recognized this eight days after the issue of the contested decision: 'matters relating to the access, residence and employment of migrant workers from third countries' — states the twelfth recital in the preamble to the resolution of 16 July 1985 — 'fall under the jurisdiction of the . . . Member States, without prejudice to Community agreements concluded with third countries'.

11. Let us now turn to the applicant's claim in the alternative — breach of essential procedural requirements. Here too the claim breaks down into two limbs: (a) failure to

consult the Economic and Social Committee; (b) insufficient statement of reasons. In turn, the second limb relies on: (b) (1) the substantively imprecise and intrinsically contradictory drafting of the decision; (b) (2) the fact that the Commission has not indicated its 'relevant legal basis'.

The arguments deployed in support of (a) are straightforward. Germany, especially, points out that the third paragraph of Article 118 requires the Commission to submit proposals for opinions to the Economic and Social Committee. For patently obvious reasons this formality does not apply to the arrangement of consultations. But it is clear that if the Commission arranges consultations by means of a decision those reasons no longer apply and the requirement to consult the Economic and Social Committee becomes if anything more compelling. As regards (b) (1) the Netherlands Government states that the decision is silent or imprecise with regard to numerous important details: for example, as to the nature of the measures to be notified, the manner of notification and the terms of the consultation. Those lacunae constitute failures to fulfil the duty to state reasons. Indeed, the duty to state reasons is not designed only to inform the addressees of a binding measure of the reasons why a duty is imposed upon them but also to give them intelligence of the extent of the action required of them.

The criticism made under heading (b) (2) warrants more intricate discussion. The applicants proceed from a postulate with which it is difficult not to agree: when the legislature gives a measure an unsuitable legal basis, the mere fact that the measure can be provided with another legal basis which is definitely correct proves that the statement of reasons is insufficient. But is there such a possibility? Obviously anyone opposed to the contested decision who answers this question in the affirmative exposes himself to certain risks: for example, to the risk of being accused of political if not procedural inconsistency or, worse, of coming to the aid of the Commission, which may be the losing party but is none the less resolved upon returning to the offensive. Nevertheless, France and Germany have done so.

According to the Government of the Federal Republic of Germany, the 'correct' provision is Article 5: in so far as that article requires the Member States to facilitate the work of the institutions, it seems tailormade to act as the basis for rules whose essential aim is to promote collaboration between the Member States and provides for the assistance of the Commission to that end. The line taken by France is more complex. The French Government draws a distinction between matters which fall within the area of Community powers and sectors which are outside the ambit of the Community. As regards matters within the jurisdiction of the Community, a measure such as the contested decision may well be based on Article 121, which authorizes the Council to assign to the Commission tasks in connection with the implementation of common measures, particularly as regards social security for migrant workers. As regards sectors outside the ambit of the Community, two approaches are possible — they could be left to cooperation between governments or the powers of the Community could be amplified by having recourse to a combination of Articles 118 and 235. It was the second approach that the Council was suggesting that the Commission should take when it asked it, in its resolution of 16 July 1985, to make 'proposals' (paragraph 7).

The French Government considers that a particular problem arises with regard to the collection and checking of information.

Where such activities may not be carried out pursuant to expressly conferred powers (Article 90 (3) and Article 93 (3)), the Commission simply has to ask the Council for authorization to that end. Article 213 authorizes it to do so in so far as it provides that 'the Commission may, within the limits and under conditions laid down by the Council . . . collect any information and carry out any checks required for the performance of the tasks entrusted to it'.

12. At this point I should commence my examination of the applicants' main submissions; but in view of the clear need for an economical approach I should first establish whether the research carried out by France and the Federal Republic into an alternative 'basis' for the contested decision has come up with satisfactory results. If they were satisfactory we would have to conclude therefrom that the decision not only lacks a sufficient statement of reasons but also that the decision is, albeit by implication, vitiated by lack of competence.

However, that possibility can be ruled out and so the Member States which argued in its favour will at least be spared the more serious of the risks which I have mentioned above. As far as Article 5, in particular, is concerned the Commission has rightly stated that it is general in scope and must therefore yield to specific rules when — as in this case — such rules exist. Furthermore, Article 5 seems to suit 'vertical' measures (that is to say relations between the Commission and the Member States) considerably better than 'horizontal' activities, which are essentially involved in the case of the cooperation between governments dealt with in Article 118 and in the contested decision.

But neither do the provisions cited by France seem to be suitable. Let us consider first of all Article 121. Recourse can be had thereto where 'the implementation of common measures' is involved and such measures relate to 'social security for the migrant workers referred to in Articles 48 to 51'. However, the second condition refers to much more narrowly defined problems than those which are the subject of the contested decision and the first condition is manifestly inapplicable to that decision. In order to fulfil the first condition the substantive subject-matter affected by the 'common measures' would have to fall within the powers of the Community; however, the entry, residence and employment of workers from non-member countries are plainly areas restricted to the Member States.

Let us now turn to Article 213. There is no doubt that this article is the 'general' rule of the system as far as the collection and checking of information are concerned. What is doubtful, however, is whether the procedure provided for therein must be applied in all circumstances, including the most anomalous ones. Let us suppose — purely hypothetically — that the Council should turn a deaf ear to the Commission's requests: must the Commission forgo fulfilling the tasks entrusted to it by the Treaty if those tasks involve knowledge of information which only the governments are capable of providing? Obviously not. It follows, it seems to me, that it is a mistake to make a fetish out of Article 213: its procedures are important but not as important as the principle of efficiency of administrative action, which requires well-timed action at least in cases where the protection of a general interest is involved.

Lastly there is Article 235. In order to activate the machinery provided for in that

article it is necessary that the Treaty should not have provided the 'powers of action' necessary to attain one of the objectives of the Community. But — leaving aside the question whether the Commission has utilized the relevant powers properly — it is clear for everyone to see that the second paragraph of Article 118 provides the powers necessary to foster collaboration in the social sphere. I would therefore beg to conclude that the suggestion in question has a 1960s 'feel', that is to say it is reminiscent of a period in which there were continuous and persistent attempts made to disarm the Commission by transferring as much as possible of its powers to the Council.

13. Consequently, the match is to be played wholly on the ground chosen by the Commission. Let us tackle it by starting with the matters which I have considered in Section 10. Is it in fact true that the contested decision encroaches on a sector — the sector of migration policies — which is still restricted to the Member States?

The answer is in the negative. Even a summary reading of the rules making up the decision shows that the condition on which the validity of that charge depends is non-existent: none of its articles has a substantive content; in other words, none of them governs — directly or by harmonizing national systems — the matters listed in the first indent of Article 1 (1). It will perhaps be objected that, pursuant to Article 3 (c), 'the objectives of the consultation procedure . . . shall be *inter alia*: . . . (c) to examine the possibility of measures, which might be taken by the Community . . . in the field referred to in Article 1'. But that observation does not hold water. The provision in question is innocuous and not only because its effects are confined to the future or, as is shown by the use of the conditional tense, speculative. The determining factor is that the measures to which it refers may be adopted only in the form of directives or regulations pursuant to Article 100 or Article 235 — that is to say by the Council and by a unanimous vote.

Faced with these facts the arguments deployed by France and the United Kingdom remain without effect. Some are merely stating the obvious: it is patent, for example, that the duty to provide information laid down in the decision will be overridden, where the preconditions are fulfilled, by the right not to disclose information, which is laid down in the Treaty (Article 223). Other arguments put forward are extremely weak. Thus, to maintain that national measures could be subject to the procedure at issue only if their addressees were covered by the social provisions of the Treaty is tantamount to reversing the terms of the problem: if anything, it is the use of Article 118 which is justified on the grounds of the absence of Community rules on workers from non-member countries and, naturally, on the grounds of the need to operate within the framework of collaboration between the Member States. As for the argument that there is only a weak and indirect link between migration policies and Community labour-market policy, it is sufficient to observe that at least three Council resolutions take the opposite view (*supra*, Sections 5 and 6). However, I shall return to this point in greater detail later.

14. Consideration of the arguments by which the four Member States have maintained that the Commission lacks competence to issue binding measures under Article 118 is much more complex and tricky. What makes it so is the very wording of Article 118, which has been accurately described as creating 'a somewhat paradoxical situation' (Koopmans, 'The Law of

the European Community', in *AA. VV., A Commentary of the EEC Treaty*, New York, Volume III, 1976, p. 748). As we have seen, Article 118: (a) takes as its starting point the principle of national jurisdiction but says nothing about the role of the Council, even though its members consist of representatives of the Member States; (b) confers a specific task on the Commission but is silent with regard to the sole power — that of making rules — which would allow it fully to perform that task.

Having said that, I would add at once that, in my opinion, none of the arguments summarized in Section 9 is really on target. Some of those based on the wording of the provision make sense only in the light of a given version or versions of the Treaty. In the German and English versions, for instance, the prepositions 'durch' and 'by', respectively, do in fact govern the expressions 'Vorbereitung der Beratungen' and 'arranging consultations'. That is not so in the case of the Italian rendering, in which there is a conjunction ('e') interposed between 'mediante' and 'organizzando consultazioni' which precludes the link on which the Federal Republic's argument relies and therefore robs it of all plausibility (assuming, but not accepting, that it was in fact plausible anyway). Another rendering — but likewise unfavourable to the German argument — is to be found in the French version, where the phrase 'l''organisation des consultations' is governed by a separate preposition 'par' with another 'par' referring to 'studies' and 'avis'.

On the other hand, it is correct to say that 'promote' does not mean 'oblige', not even in French or Italian. But it is correct only in terms of dictionary definitions, for history and experience show that promotion may take many forms, certainly including that of law. Thus when Mr Agnelli says that he intends to promote the new Fiat Duna not even the most suspicious Maoist would attribute to him the desire to compel its purchase with the help of the judiciary and the police. But when President Roosevelt pledged himself to promote organized labour and, by that means, a better climate in American factories, listeners to his 'fireside chats' understood very well that what he was promising was the future *National Labor Relations Act.*

However, the point to which I would draw your attention is another one. Whatever the scope of the verb 'promote', the act of promoting is a 'task' of the Commission. But 'task' primarily means duty; and, if this is so, it seems obvious to me that the mandatory nature of the promoting is reflected in the nature of the result which it is intended to achieve, in the sense that it makes the result to be achieved binding too. Having regard to the logical pattern of the aims of the Treaty and of the means by which the Treaty pursues those aims, it is in fact inconceivable that an institution *should be under a duty* to obtain the cooperation of the Member States and that the latter should have a *right* to counter its efforts with a blank refusal. In short, collaboration is a duty. The matter has been put particularly clearly by a German jurist, although he gives a very cautious interpretation to Article 118: according to him, Article 118 subjects the Member States to an obligation which is derived from the content and aims of the Treaty itself. They cannot shirk that duty and even less contest the promoting activities of the Commission (Knolle, loc. cit.).

How, then, is consultation on migration policies to be fitted into this framework, which, I stress, is qualified by the presence of two concurring obligations? After having

been faintly sketched by the Commission in the defence and the rejoinder, the bond linking the subject-matter of the contested decision and the aims of the Treaty has come strongly to the fore in the course of the oral procedure. I consider that that bond constitutes an important key for resolving this problem and should therefore be explored with the utmost diligence.

Article 104 asks the Member States 'to ensure a high level of employment'. However, for the purposes of implementing that objective, the Treaty also sets aside a very large area for activity on the part of the Community. Naturally, I have in mind the financial assistance of the European Social Fund (Article 123) and the common vocational training policy (Article 128). But what I have in mind above all is the free movement of workers and the fundamental consequence which Article 48 (2) derives therefrom: 'The abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

That rule dominates the whole subject. It has, for example, been argued — and, it seems to me, correctly — that the very 'right to accept offers of employment actually made', which is guaranteed to Community nationals by Article 48 (3), must be read in the light of that rule; that is to say it authorizes anyone who intends to emigrate to another country to register on its employment registers in order to take advantage of the same job opportunities as are afforded to its nationals (Gaja, 'I lavoratori stranieri in Italia, Problemi giuridici dell'assunzione', in *AA. VV.*, Bologna, 1984, p. 124). However, for our purposes the most significant effect of the prohibition of discrimination is the effect in relation to workers from non-member countries. This effect can be defined as follows: with respect to workers from non-member States nationals of other Member States enjoy the precedence which is granted to nationals of the Member State of employment.

Consequently, the principle of the priority of Community workers can be inferred from the Treaty; but 10 years were to elapse before it could put down roots in secondary legislation. In the first regulation implementing Articles 48 to 51 (Regulation No 15 of 26 August 1961, *Journal Officiel*, No 57, p. 1073) traces of the principle are barely visible. Article 43 of that regulation *asks* the Member States to draw up their policies in the light of the conditions on markets of the other five Member States and hence to endeavour to have recourse to nationals from outside the Community only when they have placed, 'in available vacancies which are the subject of offers not made to named workers, workers from Member States with surplus labour'. This was followed by Regulation No 38/64 of 25 March 1964 (*Journal Officiel*, L 62, p. 965). Here the invitation became a requirement but its scope was curtailed. The governments had to take account of Community priority only when examining the Commission's annual report on the state of employment.

Community priority only became the subject of a genuine legal situation in Regulation No 1612/68. It is understood as being a right in the sixth recital, which links Community priority to the principle of non-discrimination, and it is defined as a right in Article 1 (2). What is more important, it is safeguarded as a right in Articles 15 and 16 by specific clearing machinery (SEDOC). At least once a month the Member States are to send to the European Coordination Office a return

showing by occupation and by region: (a) vacancies unfilled by manpower from the national labour market; (b) applicants for employment who are ready and able to accept employment in another country. Applications are to be submitted to employers 'with the same priority as that granted to national workers over nationals of non-member States' and it is stipulated that the Member State in question may offer vacancies to nationals of non-member States only if it considers that there are insufficient workers available who are Community nationals. The national employment services may turn to their counterparts in non-member countries 18 days after they have received applications from Community workers.

These provisions — let us be clear — must not be overestimated: it is obvious, for instance, that they are far from having the incisiveness of the provisions in force on the common commercial policy (for instance with regard to the management of quotas). But that is of little consequence. What does matter, in my view, is that under those provisions the principle of priority is given a certain role to play in the defence of the freedom laid down in Articles 48 to 51. And although that role does not call into question the Member States' jurisdiction as regards the access to employment of nationals of non-member countries, it is certainly opposed to the relevant powers being exercised in such a manner as adversely to affect Community workers' right to move within the Community (see also Gaja, op. cit., p. 135). It seems to me that in this context consultations on migration policies assume an importance of the first rank. It is sufficient to think of the effect that such consultation would have had on the content of a very recent measure which the Italian legislature adopted without checking for possible distorting effects with its European partners or with the Commission. I refer to Law No 943 of 30 December 1986 on the employment of non-Community workers and clandestine immigration (GURI No 8, 12. 1. 1987, p. 3).

15. We have therefore ascertained: (a) that the collaboration referred to in Article 118 is a duty; (b) that there is a very close link between consultations on migration policies and the free movement of labour. At this point it is appropriate to ask ourselves whether the Commission could have secured compliance with (a) and fully asserted (b) without having recourse to a binding act. Moreover, this inquiry must be made, for the Federal Government accuses the Commission of not having first taken advantage of the numerous and less doubtful resources afforded by the Treaty and secondary legislation, especially in view of the fact that the Council had urged it to use those resources in its resolution of 16 July 1985. In fact, there is a declaration annexed to that resolution in which it is said that 'cooperation and consultation between the Member States must include in the first place an improvement of the procedure on existing institutions . . . with regard to the free movement of workers'.

The charge is unfounded. The bodies to which the Council refers are primarily the advisory and technical committees set up by Articles 24 and 32 of Regulation No 1612/68. As we shall see shortly, the Commission has made very full use of the second of these. On the other hand, it is true that it has not utilized the first. But was it entitled to have recourse thereto? I doubt very much whether it was. The membership of the Advisory Committee in fact includes, alongside Commission officials and repre-

sentatives of the Member States, members representing trade unions and employers' associations. Consequently, its composition is not such as to permit calm and open debate every time the subject-matter on which consultations are being held calls for a modicum of confidentiality. It must be added — the argument is an argument *ad hominem* but it has a certain weight — that the government which, more than any other, has criticized the decision for not having taken due account of the need for confidentiality is the Government of the Federal Republic of Germany (*supra*, end of Section 9).

Then there are the mechanisms provided for in Articles 13, 14 and 19 of Regulation No 1612/68. But those, too, in my opinion, are not suitable for the type of procedure that the Commission had in mind to organize. Article 13, for instance, is directed at the central employment services of the Member States, whereas it is obvious that the only candidates for effective consultation are the governments, and Article 14 requires the Member States to provide statistical information, which, at best, is suitable for identifying foreseeable labour requirements. Article 19 is more interesting; in 1979 the Commission itself identified it as affording a possible procedural solution for its measure (*supra*, Section 5). It is more interesting and yet it is not much more useful. It enables (a) information to be obtained but only on the results of Community arrangements for vacancy clearance and on the number of placings of nationals of non-member States; and (b) consultations to be held, but only twice a year and on a limited range of topics, such as the report which the Commission draws up on the basis of information supplied by the Member States.

In any event, the weakness or inadequacy of those instruments did not prevent the Commission from asking or even persuading the governments to hold consultations on a voluntary basis. That experiment took place on the Technical Committee. It went ahead for no less than five years as from the beginning of 1980 and ended in complete failure. The Member States regarded the consultations in which the Commission invited them to take part as mere mutual information on measures already adopted and on their domestic effects. In other words, they applied to those consultations the criteria on the basis of which meetings are held on similar subjects under the auspices of international organizations such as the Council of Europe. The examples which the Commission's agent has given the Court could not be more eloquent.

The Council of Europe called, for May 1980, a Conference of the Twenty-one on migration policies and the Commission considered it expedient to ask the Member States to participate on the basis of a common approach. To that end it arranged a meeting for 20 February. Since Article 118 provides for the possibility of consultations on problems 'of concern to international organizations', the subject-matter on the agenda — the exchange of ideas with a view to coordinating the various positions — was certainly orthodox. However, the representative of the Federal Republic of Germany stated that it would be better to abstain from making any attempt to coordinate the approaches of the Member States and the French representative even challenged whether it was within the terms of reference of the Technical Committee to tackle problems of that kind (*supra*, Section 6).

At the meetings on 21 October 1980, 6 December 1983 and 22 January 1985 representatives of the governments refused to inform the committee about anything other than measures which were already in force or at least already decided upon. However, the most significant episode took place during a meeting held on 9 December 1982.

The French representative announced that his government had adopted a measure designed to expel from the country all foreigners in an irregular situation and the Belgian delegate asked him — quite correctly in my view, since Belgium might have been involved — on what frontiers the operation would take place. But the poor man received a brusque reply: the expulsion measures, stated the French official, would be carried out under police escort.

16. Is it possible, in the final analysis, to conclude that in 1985 the Commission had exhausted the arsenal of ordinary and non-binding instruments which it could dream up or which are made available to it by the law? To charge the Commission, as the Federal Republic does, with failing to have made a recommendation is in fact rather in the nature of a pretext. The significance and cogency of the documents of 23 March 1979 and 9 June 1983 are certainly no less than the potential significance and cogency of the instrument provided for in the second indent of Article 155; and where those documents had failed a recommendation pursuant to Article 155 certainly could not succeed.

It was therefore against a background of frustration, made all the more bitter by the fact that those responsible for it, the Member States, from their standpoint in the Council, increasingly urged the Commission to act, that one must assess the decision to institutionalize consultation by means of a measure capable of having binding effects. And that assessment can but absolve the Commission. Moreover, this is the position taken by the Court's case-law, that is to say those cases which authorize the interpretation of provisions in such a way as to make them applicable in practice and to infer therefrom the maximum possible effectiveness. In saying this, however, I am not thinking of the few judgments which used the classic test of Chief Justice Marshall in *McCulloch* v *Maryland* (17 US (4 Wheat. 316, 421, 1819)), in order to provide the Community with powers not expressly conferred on it by the Treaties. Why this is so is obvious. In this case reliance on the principle of effectiveness does not signify invoking the theory of implied powers; it means merely — as the Court has done on more than one occasion — giving a broad interpretation to an 'enumerated power'.

I am repeating concepts on which I have already dwelt at length. Article 118 does not raise a problem of competence. The power to promote close cooperation between Member States could not have been conferred upon the Commission more clearly. It is not sufficient: cooperation — the provision gives us to understand — is an obligation for the States, which may not oppose and may not even avoid the initiatives taken by the Commission, but, on the contrary, are under a duty to facilitate them. Consequently, what Article 118 lacks — and this makes it what Ulpian would have termed a *lex imperfecta* — is something different, that is to say express mention of an instrument making that obligation enforceable in practice (even including making it subject to sanctions) and specifying by what means it should be carried out.

It seems to me, on the basis of what has been said so far, that to fill that lacuna is not an abuse nor even a particularly bold or risky decision. On the contrary, if it is agreed that 'promoting' and 'organizing' may imply legislating; if it is taken into consideration that the main objective, the *primum et porro unum* of the contested decision, is to avoid conflicts arising between the migration policies of the Member States and one of the four 'great freedoms'; and moreover, if account is

taken of the scant success of the attempts made to attain that objective in a non-binding context there will be no difficulty in agreeing that to interpret Article 118 as if it contained the instrument to which I was referring is to some extent essential. It is the only way of unblocking the 'paradoxical situation' to which the provision gives rise, allowing it to reveal all its potential effectiveness or, more basically than that, to be applied reasonably.

17. Once this conclusion is reached the remaining arguments put forward by the applicants in support of the principal submission lose most of their interest. Nevertheless, I consider that I must make a few brief observations also in regard to them even though I shall deal with them pell-mell.

The Federal Republic of Germany and the United Kingdom, it will be recalled, argued that the list of means in Article 118 is absolute and that to claim other means or different ways of asserting them conflicts with Article 4. In reality, 30 years' uncontested practice proves that that list is not 'exhaustive' but only illustrative: I refer to the long line of recommendations which the Commission has based on Article 118 and, naturally, to the two decisions of 1974 (see also Knolle, loc. cit.). On the other hand, it appears to me that in the present context the reference to Article 4 is not relevant. That provision lists the Community institutions and provides that each institution must act within the limits of the tasks conferred upon it; but it provides no information capable of casting light — whereas this is precisely what is needed — on the means or powers corresponding to those tasks.

The arguments based on the judgment in the third *Defrenne* case and on the opening words of the second paragraph of Article 118 ('the Commission shall act in close contact with Member States') seem to me to be equally weak. As far as the first point is concerned, it should be pointed out that the judgment in question is concerned with the interpretation of Article 119 and the statements relating to Article 118 are contained in a brief *obiter dictum.* Moreover, in stating that Article 118 is '*essentially* in the nature of a programme' the Court did not basically rule out the possibility that it might contain provisions applicable here and now. As to the opening words of the second paragraph of the article, in my view the conclusion inferred therefrom by the Federal Republic — the Commission is not entitled to perform unilateral acts — is completely unfounded. If anything, the origin of the provision proves the contrary. In point of fact, it emerged from a compromise in which the following proposal of the heads of delegation was rejected: 'La Commission peut demander au Conseil de procéder à des échanges de vue des différents gouvernements au sujet des problèmes sociaux . . . ' [The Commission may ask the Council to arrange exchanges of view between the various governments on the subject of social problems] (Neri and Sperl, *Traité instituant la Communauté économique européenne, etc.*, Luxembourg 1960, p. 297 *et seq.*).

I would add a few words on the criticism that the decision pays insufficient attention to the requirements of confidentiality and urgency. In my opinion, confidentiality is already sufficiently protected by Article 214, which requires the officials and other servants of the Community not to disclose information of the kind covered by the obligation of professional secrecy; furthermore, the provisions which the Federal Republic considers to be a threat to confidentiality are contained without appreciable variations in all other rules introducing consultation procedures (see Article 4 (2) of Council Decision 74/393/EEC of 22 July 1974, Official Journal 1974, L 208, p. 23). The second requirement arises rarely in the case of migration policies and, in any event, the contested act takes this into account in so far as it stipulates that, once two weeks have

passed from the date of notification of the draft measure, the consultation will take place as soon as the government concerned so requests. Accordingly, it will be for the government concerned to submit the draft as early as possible and, in any event, in good time.

18. Let us turn to the alternative submission. As I already mentioned, it is made up of two criticisms, the second of which — insufficient statement of reasons — I have largely dealt with in Section 12. All that remains to consider in that connection then is the charge brought by the Netherlands with regard to the wording of the decision. The Netherlands Government alleges that the decision has too many lacunae and is too imprecise and too contradictory to enable its addressees accurately to determine the extent of the obligations to which they are subject.

That observation is without foundation. In the first place, I have many doubts whether the flaw complained of constitutes a genuine infringement of essential procedural requirements. I would add that, in my view, the decision suffers, if anything, from an excess of detail and from being over-meticulous, and that it is this very feature which was partly responsible for its having been perceived by the Member States as an intolerable threat to their sovereignty (see Section 7 above). In any event, I would point out to those who may disagree with my assessment that the Court has stated with regard to the validity of a measure also contested on the grounds of an alleged infringment of Article 190 that, 'even if it is assumed that the passages ... [of the decision] were not drawn up with the accuracy to be desired, this fact has neither prevented the applicants nor the Court from grasping ... [its] extent' (judgment of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 118).

Finally, I shall deal with the criticism based on the failure to consult the Economic and Social Committee. Although I am sorry to see a provision which I consider to be indispensable and, in every other respect, correct slip up on a classical banana skin, I consider this charge to be founded. The Federal Republic of Germany is certainly right when it states that the reasons for which consultation was stipulated in the case of opinions are even more compelling where the Commission has recourse to an instrument which is capable of having mandatory effects. To stress the fact that Article 118 is silent in that regard is, in other words, an argument without any value. If I may put the matter in another way: to interpret the first two paragraphs of Article 118 on the basis of a principle as bold as the principle of effectiveness and then to hide behind the stalest literal reading when interpreting the third paragraph is neither consistent nor elegant.

The documents before the Court do not tell us why the Commission failed to seek the opinion of the Economic and Social Committee. The fact that in the past it has submitted all its recommendations — on which Article 118 is also silent (Section 4 *supra*) — leads us to put the Commission's lapse in this case down to the haste which characterized the final stages of the preparation of the decision. But that does not make the lapse less unjustifiable. The formalities laid down in Article 118 and other similar provisions of the Treaty are anything but trivial. An Italian jurist has observed that they were laid down 'in order to guarantee respect for the balance of powers struck in the Treaties, by enabling bodies expressing the various interests to participate in the formulation of the

instrument concerned' (Tizzano, *La Corte di Giustizia delle Communità Europee*, I, Naples 1967, p. 334 *et seq.*); furthermore the Court has stated that their aims include ensuring that the measures to which they apply are formulated 'with all due care and prudence' (judgment of 21 March 1955 in Case 6/54 *Netherlands* v *High Authority* [1955] ECR 103).

In my opinion, this case fully confirms the correctness of those remarks. Indeed, it is probable that had the views been sought of a composite body like the Economic and Social Committee the Commission would have corrected its decision by rounding off its rough edges or perhaps by altering its structure so as to give more emphasis to the protection of Community priority; it is also not improbable, as I have already stated, that such efforts would have avoided the present actions and the resultant freeze on the consultations provided for in the decision.

19. In the light of the foregoing I propose that the Court should:

(a) declare inadmissible the applications submitted by the Kingdom of the Netherlands (Case 284/85), by the Kingdom of Denmark (Case 285/85) and by the United Kingdom of Great Britain and Northern Ireland (Case 287/85) on the ground that they are out of time; and

(b) uphold the applications brought by the Federal Republic of Germany (Case 281/85) and the French Republic (Case 283/85) for the annulment of Commission Decision 85/381 of 8 July 1985 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries, on the ground of a breach of essential procedural requirements.

As regards the costs, I consider that it would be fair to order each of the parties, including the interveners, to bear their own costs, in view of the complexity and novelty of the issues involved.