exact amount of the aid to be authorized do not consist simply in the number of tonnes of production capacity having to be cut; there are other factors, too, which vary from one region of the Community to another, such as the restructuring effort made before 1980, the regional and social problems occasioned by the crisis in the steel industry, technical change and the adaptation of undertakings to suit market requirements.

2. The date for the notification of aid plans which is specified in Article 8 (1) of Decision No 2320/81 is such as to preclude the approval of any aid plan notified subsequent to it. Consequently, the Commission was not entitled to authorize aid if the plans to grant or alter the aid had not been notified to it by 30 September 1982.

3. The aid plans which, under Article 8 (1) of Decision No 2320/81, were to be notified to the Commission no later than 30 September 1982 were programmes which, within the framework of a restructuring plan, identified the type, the aim and the proposed use of the aid; it was not necessary, at that stage, for the exact amount of aid requiring authorization to have been determined. Consequently, the fact that the amount of aid finally approved by the Commission exceeded the amount notified on 30 September 1982 does not in itself constitute a breach of Article 8 (1), unless the increase which took place after that date had the effect of changing the nature of the proposed aid and, as a result, the plan which was implemented was no longer that which was notified.

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 23 May 1985 *

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Mr President,
Members of the Court,

I. Introduction

In this case, as the Court is aware, the Government of the Federal Republic of Germany (supported by the Wirtschaftsvereinigung Eisen- und Stahlindustrie [Iron and Steel Industry Association]) raises fundamental objections to the policy pursued by the Commission with regard to the iron and steel industry on the basis of the Second Aids Code. The German Government maintains that, in its decisions of 29 June 1983, addressed to the Belgian, French, Italian and United Kingdom Governments, the Commission in particular authorized aids substantially higher and required reductions in capacity substantially lower than those needed in order to bring about an expeditious and adequate adjustment in the production capacity of the European steel industry. It argues that, as a result, the Commission breached, *inter alia*, the principle of equality to the detriment of the German steel industry. It further

considers that the Commission also acted in breach of a number of substantive and procedural provisions of the Second Aids Code.

For a sound understanding of this important case I consider it necessary to commence with a summary of the facts and the course of the procedure (Section II), the conclusions of the parties (Section III) and the parties' submissions and arguments (Section IV). To that end I shall reproduce the Report for the Hearing with the addition of such explanations and additions, based chiefly on the oral proceedings, as I think necessary. In so far as the Court finds itself in agreement with not only the Report for the Hearing but also the said explanations and additions, I would suggest that the Court refer in its judgment to the appropriate part of this Opinion.

In Sections V and VI respectively I shall examine in greater detail the principal and secondary claims of the German Government. Section VII sets out a number of concluding remarks, followed by my final opinion.

II. Facts and procedure

II.1. *The general economic and legal background to the dispute: the crisis and the framework of Community law relating to national aids to the steel industry*

Since about 1973 the Community's steel industry has been in particularly difficult straits for a variety of reasons. These include the recession, which affects the whole range of economic activities not only in the Community but also throughout the world, the reduction in demand for steel products, the emergence on the market of new, highly competitive producers in non-member countries, the installation of new production capacity within the Community and, lastly, the utilization of often uneconomic or even obsolete production plant in some areas of the Community.

The combination of those factors has resulted in surplus capacity and falling prices and, as a result, falling receipts, which, in turn, has led to sales being made at a loss and to keen competition between the various steel manufacturers. Since the viability of many of those companies was under serious threat, all the Member States proceeded, in varying degrees, to grant aids in order to alleviate the crisis or offset its impact.

In view of this state of affairs, in late 1977 the Commission announced a series of measures with the aim of restructuring the industry. They included the framing, pursuant to the first paragraph of Article 95 of the ECSC Treaty, of a system of aids with a view to coordinating national subsidies at Community level. The aim of the system was to bring about a profound restructuring whilst ruling out potential distortions of competition contrary to the common interest (*Bulletin of the European Communities* No 12-1977, p. 8, and No 4-1978, p. 46).

With a view to having binding rules of that kind for the steel industry, the Commission, acting with the Council's approval, drew up by means of general Decision No 257/80/ECSC of 1 February 1980 (Official Journal, L 29, p. 5), Community rules for specific aids to the steel industry. As a result of Commission Decision No 2320/81/ECSC of 7 August 1981 (Official Journal, L 228, p. 14), also a general decision, that system of aids was replaced by an amended version (hereinafter referred to as the 'Second Aids Code'), Article 13 of which provides that it is to apply until 31 December 1985.

II.2. *The Second Aids Code*

According to the first two recitals in the preamble thereto, the Second Aids Code has two chief objectives: first, the progressive abolition of all forms of aid and, secondly, the restoration of the steel industry's competitiveness by means of restructuring, including reductions in capacity.

According to Article 1 of the Code, the Commission has to decide, using a uniform procedure, whether plans in respect of aids, which, under Article 8 (1), must be notified to the Commission no later than 30 September 1982, may be considered 'compatible with the orderly functioning of the common market'. If so, they constitute 'Community aid', a description which may be applied only if the aids fulfil the general conditions laid down in Article 2, according to which, for example, the recipient undertaking must be engaged in the implementation of a restructuring programme and the aids must not lead to payments after 31 December 1985. The aid plans must also satisfy the more detailed conditions laid down in Articles 3 to 7, the stringency of which differs according to the type of aid. A distinction is made for that purpose between investment aid (Article 3), aid for closures (Article 4), aid for continued operation (Article 5), emergency aid (Article 6) and aid for research and development (Article 7).

Under Article 8 (2) the Commission is to seek the views of the Member States on the 'more important aid plans' before adopting a position on them. The aids notified must be approved by the Commission no later than 1 July 1983 (Article 2 (1)). Article 12 provides that the time-limits laid down in Articles 2, 5, 6 and 8 (1) may be amended only with the 'unanimous assent' of the Council.

II.3. *The origin of the dispute: the Commission decisions of 29 June 1983*

On 29 June 1983 the Commission, acting pursuant to the Second Aids Code, issued separate decisions addressed to the German, Belgian, French, Greek, Irish, Italian, Luxembourg, Netherlands and United Kingdom Governments. In those nine decisions the Commission approved the grant in those Member States of all the types of aids referred to above with the exception of emergency aid: Article 6 of the Code provides that emergency aids may not be approved after 31 December 1981.

The Commission decisions of 29 June 1983 relate to a total of 21 900 million European Currency Units (ECU) in aid and involve cuts in production capacity in respect of hot-rolled products (for the whole 1980-85 period) of 26.7 million tonnes. According to explanations given at the hearing, the amount of aid for the whole 1980-85 period (to which the cuts in capacity relate) amounts to 33 000 million ECU.

According to the general objectives of its steel policy for 1980 to 1985 the Commission estimated that in 1985 the Community's surplus capacity in respect of hot-rolled products would be roughly 47.9 million tonnes. It appears, however, from the papers before the Court, that the Council, at an informal meeting held in Denmark on 17 and 18 September 1982,

authorized the Commission to restrict the cutbacks in capacity in connection with the restructuring to roughly 30 to 35 million tonnes, which, according to information furnished at the hearing, was intended to correspond to an average utilization rate of some 70%.

Although the applicant does not dispute those figures it does contest the uneven way in which the Commission distributed the burden of the restructuring by means of its decisions of 29 June 1983. Its action, which is brought under the first paragraph of Article 33 of the ECSC Treaty, seeks to have declared void only those decisions which are addressed to the Belgian, French, Italian and United Kingdom Governments. Those four decisions approve aids totalling 17 500 million ECU (as compared with 27 500 million ECU in aid for those Member States for the whole period 1980-85), provided that the Member States concerned reduce their production capacity by 18.7 million tonnes between 1980 and 1985. The applicant considers that the aids approved are too large in relation to the required reduction in capacity. It further considers that that imbalance favours steel producers in the four Member States concerned, who have already been highly subsidized for years.

II.4. *The subject-matter of the dispute*

In its *application*, the *applicant* seeks, by way of principal claim, a declaration that the four contested decisions are void and suggests that, in the event of the Court's making such a declaration, the Court itself should fix the principles and guidelines which the Commission should be obliged to follow when authorizing aids to the steel industry on the basis of Community law.

In its *reply*, the applicant has reformulated its principal claim so as to seek a declaration that the decisions at issue are partially void in so far as they find compatible with the common market aids which are not demonstrably essential in order to implement the restructuring planned by the four Member States concerned.

In its *rejoinder*, the *Commission* claims that the application should be dismissed as inadmissible inasmuch as it is based on the amended version of the principal claim, which, it maintains, is indeterminate in character.

I shall return to the applicant's claims again (in Section III).

II.5. *Procedure*

The application was lodged at the Court Registry on 22 September 1983.

By an application lodged at the Court Registry on 25 January 1984, the Wirtschaftsvereinigung Eisen- und Stahlindustrie — an association of German iron and steel undertakings whose object is to represent the joint interests of its members — requested permission to intervene in the proceedings in support of the applicant. The Court accepted that request by order of 29 February 1984.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the parties to answer certain written questions, which they did within the period allotted for that purpose.

III. Conclusions of the parties

The *applicant*, the *Government of the Federal Republic of Germany*, claims in its reply that the Court should:

(1) Declare void Commission Decisions 83/391/EEC, ECSC, 83/383/ECSC, 83/396/ECSC and 83/399/ECSC of 29 June 1983 in so far as they find compatible with the common market aids which are not demonstrably essential in order to implement the planned restructuring of the steel industry in the four Member States concerned; however, it is not certain from the German Government's answer to a question put by the Court whether it has withdrawn its principal claim as formulated in the application; it was stated at the hearing that the applicant adhered to its original principal claim and that the reformulated claim set out in the reply was made in the alternative only;

(2) Secondarily, declare those decisions void in so far as the amount of the aids which may be approved in the various Member States exceeds the amount of such aids which had been notified to the Commission no later than 30 September 1982;

(3) Order the defendant to pay the costs.

In the rejoinder, the *defendant*, the *Commission of the European Communities*, claims that the Court should:

(1) Dismiss the action as inadmissible or, in the alternative, as unfounded;

(2) Order the applicant to pay the costs.

IV. The submissions and arguments of the parties

IV.1. *Summary*

In its *reply*, the *applicant* states that it did not bring the action for a declaration of nullity in order to obtain a smaller reduction in production capacity or more aids for the German steel industry. Instead, its intention in bringing this action was to ensure that steel undertakings in Belgium, France, Italy and the United Kingdom received lesser aids and made greater cuts in their production capacity. Accordingly it asks, as its *principal claim*, for a declaration that the contested decisions are partially void, that is to say in so far as the Commission authorized aids which were not strictly necessary.

In support of that claim the applicant relies chiefly on a single argument, namely breach of the principle of equal treatment, since the Commission has manifestly favoured steel undertakings in the four Member States in question by authorizing aids far in excess of the level necessitated by the reductions which they were required to make in production capacity, whilst requiring the German steel industry to effect capacity reductions which were much higher than required by the aid measures authorized. The applicant complains, in particular, that, when it distributed the cuts in capacity, the Commission failed to take account both of the considerable amounts of aid which had already been paid to the undertakings concerned prior to the contested decisions and of the efforts at restructuring, undertaken long before 1980 and without any public aid, by undertakings, such as those in the Federal Republic of Germany, which receive little or no subsidies. In other words, when it issued the contested decision the Commission put different weights in the balance and used different standards of measurement.

In answer to a question put by the Court, the applicant stated that it was unable to say, in terms of individual undertakings and types of aid, to what extent the aids in question were to be regarded as excessive in relation to the capacity reductions required.

It considers in any event that the necessity for the aids in question has not been established in so far as the amount involved exceeds the aid received by the German steel industry per tonne of capacity reduced in the period 1980-85.

In order to bring out the alleged discriminatory nature of the contested decisions with regard to the German steel industry the applicant in its various pleadings has submitted figures summarized in the following table:

	Total aids authorized per Member State in 1980-85 (in millions of ECU) (total for all the Member States = 33 000 million ECU)	Total aids authorized in 1980-85 compared with basic capacity in 1980 (aids per tonne of basic capacity)	Total aids authorized in 1980-85 compared with the reduction in capacity implemented or agreed in that period (aid per tonne of reduction)	Aids authorized per Member State as a proportion of total aids authorized in 1980-85	Redution in capacity required per Member State (in millions of tonnes) and proportion of total reduction required (26.7 million tonnes)
Germany	4 314	DM 191	578 ECU	13.1 %	6.010 (22.5 %)
Belgium	3 887	DM 571	1 252 ECU	11.8 %	3.105 (11.6 %)
France	7 613	DM 667	1 433 ECU	23 %	5.311 (19.9 %)
United Kingdom	5 759	DM 593	282 ECU	17.4 %	4.500 (16.8 %)
Italy	10 270	DM 666	1 760 ECU	13.1 %	5.834 (21.8 %)

In the alternative, the applicant claims that the Court should declare the contested decisions partially void in so far as the amount of aid plans approved by the Commission exceeds the amount of aid plans notified no later than 30 September 1982 (the date by which, by virtue of Article 8 (1) of the Second Aids Code, all aid plans should have been notified to the Commission). It claims that there is a difference of roughly 7 500 million ECU between the total amount of aid plans approved by the contested decisions and the amount of aid plans notified to the Commission by 30 September 1982. It argues that the Commission had no power to approve aid plans notified after that (final) date. The applicant cites in support of that argument Article 12 (1) of the Aids Code, which provides, *inter alia*, that the time-limit laid down in Article 8 (1) may be amended only with the 'unanimous assent of the Council'. Furthermore, the applicant claims that the only notification which it had of that increase in aids was provided by the publication of the contested decisions. As a result, it was unable to express its views on that increase even though under Article 8 (2) of the Aids Code the Commission was under a duty to seek the views of the Member States on aid plans notified after 30 September 1982. Accordingly, the applicant considers that the contested decisions must be regarded as unlawful on the ground that the procedural rules — in particular those laid down in Article 8 (1) and (2) of the Code — were not observed.

After expressing doubts as to the admissibility of the application, the *Commission* essentially levels four arguments against those adduced by the applicant in

support of its *principal claim.* First, it contends that the Second Aids Code does not lay down a ceiling to the amounts of aid which may be authorized. Nor does it establish a uniform, quasi-mathematical ratio between the amount of aid authorized and the necessary capacity cuts. It goes on to argue that application of such a uniform ratio would conflict with the requirement for the Commission to consider, when appraising aid plans, various factors such as the extent of the restructuring efforts made, the intensity of aid, the structural problems of the region concerned and the like. In addition, it considers that the Second Aids Code aims, *inter alia,* at stopping national aid and not at the total eradication of surplus capacity within the Community. Furthermore, if heavily subsidized undertakings alone had to bear the whole burden of the intended restructuring (30 to 35 million tonnes according to the objective agreed in 1982), the regional and social impact of Community efforts would be incompatible with the general principles of the Second Aids Code. Lastly, the Commission maintains that the decisions of 29 June 1983 are based on a fair distribution of the burden of restructuring, since the most heavily subsidized undertakings have to make the biggest reductions in capacity. In that connection the Commission refers to the figures set out in the following table.

	Aids authorized by the decisions of 29 June 1983 (in millions of ECU)	Reductions in capacity required by the decisions of 29 June 1983 (in millions of tonnes)	Share of each Member State of the Community's total capacity in 1980	Share of each Member State after the reductions required by the decisions of 29 June 1983	Share of each Member State in the reduction in capacity (average reduction for the Community as a whole = 15.9 %)
Germany	3 614	1.1	31.6 %	33.1 %	11.3 %
Belgium	2 330	3.1	9.5 %	9.1 %	19.4 %
France	3 943	5.3	15.9 %	15.2 %	19.7 %
United Kingdom	2 674	4.5	13.5 %	12.9 %	19.7 %
Italy	8 609	5.8	21.5 %	21.4 %	16.1 %

At the hearing the applicant explained for the sake of clarity that the figure of 1.1 million tonnes given for Germany — unlike the figure of just over 6 million tonnes which it had given in the preceding table — related solely to the heavily subsidized German steel undertakings.

As for the applicant's *claim in the alternative,* the Commission admits in its *rejoinder* that there was an increase in aid after 30 September 1982, on which it did not seek the Member States' views afresh. In answer to a written question put by the Court, it stated that the increase related to aids which had already been notified. In addition, the Commission considers that the real time-limit was 1 July 1983, after which, according to Article 2 (1) of the Code, no more aids may be approved. It argues that the only reason for its failing to seek the views of the Member States on increasing the aids in question was to keep within that time-limit. Lastly, the Commission argues that the applicant cannot claim that the

Commission is obliged to discuss the pros and cons of aid plans with the Member States: the object of Article 8 (2) is not that of securing the participation of the Member States in the decision-making process within the Commission.

The *Wirtschaftsvereinigung Eisen- und Stahlindustrie, intervener,* argues, in particular, that the aids at issue are excessive in relation to the required restructuring, and adopts, for the most part, the same stance as the applicant. In addition, however, it has provided the court with interesting figures in the annexes to its pleading.

IV.2. *Admissibility*

In the light of the applicant's amendment of its principal claim, the *Commission* observes in its *rejoinder* that it has no objection in principle to a 'quantitative amendment' of the application, provided that it has no effect on the compass of the action. In the event, that condition is not fulfilled since the applicant has omitted to state which parts of the contested decisions it is continuing to challenge in the present proceedings. Such a clarification was all the more necessary since the decisions embody numerous implementing provisions and differing conditions depending on both the type of aid involved and the recipient undertaking.

The Commission argues that the applicant is seeking to make the compass of its application depend on the outcome of the Court's examination of the legality of the contested decisions. It maintains that such a course of action must be regarded as fundamentally inadmissible. It contends in that connection that an application for a declaration of nullity is admissible only in so far as it defines the decision to be declared void — that is to say, the subject-matter of the proceedings — unconditionally, clearly and definitively.

In the Commission's view the amendment of the principal claim also makes the claim in the alternative inadmissible by depriving it of its role as a claim for a declaration of partial nullity. Moreover, it argues that the Court cannot be obliged, as a result of the application's being split up, to base a declaration that the contested decisions are partially void primarily on considerations of substantive law if the same result may be attained, in accordance with the claim in the alternative, by conducting a review of compliance with procedural rules.

At the hearing the Commission adduced a further argument as to the inadmissibility of the secondary claim on the ground that the latter is not actually a secondary claim but an alternative claim. It argues that whereas the principal claim is based on arguments of substantive law, the secondary claim relies solely on procedural arguments.

As a result, the Commission claims that the application is inadmissible as regards both the principal claim and the secondary claim. In the alternative, it suggests that the Court examine the contested decisions solely in the light of the alleged infringement of the procedural rules which the applicant has invoked in support of its secondary claim.

In answer to the questions put by the Court, the *applicant* states in the first place that the reframing of its principal claim certainly does not seek to restrict the scope of its application to the authorization by the Commission of a particular type of aid (namely, aid for continued operation). The amendment simply seeks to make it clear that the German Government does not consider all aid as unlawful and approves

the subsidies authorized in so far as there is no doubt that they are necessary for the implementation of the restructuring measures. The fact that it contests the aids in question principally on the ground that they are not commensurate with the required restructuring measures by no means signifies that it no longer wishes to avail itself of the arguments emphasizing that the aids are excessive in comparison with the aids authorized for the other Member States.

However, the disproportionate nature of the aid plans in question is, it maintains, most clearly illustrated by the discrimination resulting with regard to steel undertakings in other Member States. In that connection, the applicant states that the Commission has required the German steel industry to reduce capacity by 6.01 million tonnes as the counterpart for aids totalling 4 300 million ECU. That works out at some 720 ECU per tonne of reduction. However, since that amount is applied to German undertakings it is hard to see why other Member States are entitled to higher amounts of aid 'per tonne of reduction'. In other words, the applicant considers that the contested decisions ought to be declared void in so far as they authorize aids exceeding some 720 ECU per tonne of capacity reduction.

The applicant submits the following table in order to illustrate the results of applying that criterion to the contested decisions:

	Capacity reductions required from each Member State (in millions of tonnes) in 1980 to 1985	Total aids authorized per Member State in 1980 to 1985 (in millions of ECU)	Total aids per Member State (in millions of ECU) by applying the criterion of 720 ECU per tonne of reduction	Aids the necessity for which has not been established (in millions of ECU)
Belgium	3.105	3 887	2 236	1 651
France	5.311	7 613	3 824	3 789
United Kingdom	4.500	5 759	3 240	2 519
Italy	5.834	10 270	4 200	6 070

IV.3. *The principal claim*

The applicant's arguments

The *applicant* contends that the excessive and discriminatory nature of the aids at issue is further accentuated when the following circumstances are taken into account:

(a) the German steel undertakings had already taken pains well before 1980 to reduce their surplus capacity by their own efforts whilst other undertakings doubled or even tripled their capacity;

(b) instead of promptly adapting themselves to the new requirements of the steel market, the undertakings of the four Member States concerned retained unprofitable or obsolete plant thanks to years of public subsidies;

(c) in taking the contested decisions the Commission failed to take into consideration both the restructuring efforts made by the German steel industry prior to 1980 and the considerable aids previously granted to

the undertakings of the four Member States in question;

(d) the failure to take into consideration the previous efforts made by undertakings whose behaviour has, for years, been more consonant with the requirements of the common market than that of other undertakings is tantamount to legalizing, if not rewarding, the unlawful practice pursued in the field of aids by the four Member States concerned.

As for the figures submitted by the Commission, the applicant argues that they are by no means capable of rebutting its argument that the German steel industry has suffered discrimination. It maintains that the Commission's calculation is based, as far as the Federal Republic of Germany is concerned, simply on the reductions in capacity laid down in the decision of 29 June 1983. Yet those requirements concern only one undertaking (Arbed Saarstahl). In constrast, it argues that if account is taken of all the reductions which the German steel industry has been required to make between 1980 and 1985 (6.01 million tonnes), the results are completely different, as its calculations clearly demonstrate.

The legal basis for the principal claim as explained in the manner described in the reply is set out on pages 32 and 33 of the application and on pages 9 to 18 inclusive of the reply, namely that it is contrary to Articles 2 to 5 of the Second Aids Code to authorize restructuring aids which are not necessary or eligible for authorization in pursuance of those articles.

The Commission's arguments

In the *Commission's* view, the figures produced by the applicant, and notably those relating to the aids which the various undertakings received between 1980 and 1985 per tonne of capacity and tonne of reduction, are essentially correct.[1] However, it considers that those calculations by no means justify the conclusion that similar situations have been treated differently in this case. In the first place, it would be impossible to apply uniformly to all the Member States a single criterion governing the ratio between the aids still to be granted and the necessary cuts in capacity: the Second Aids Code does not relate the one to the other; on the contrary it requires the Commission, when assessing aid plans, to take various factors into account, such as the amount and intensity of the aids, the extent of the restructuring effort involved and regional and social problems, which differ from one Member State to another.

Furthermore, even though the Second Aids Code does aim to foster the restructuring of the steel market, which includes cuts in production capacity, the total elimination of surplus capacity is certainly not its prime aim. It is hard to conceive of only heavily subsidized undertakings having to bear the burden of restructuring: the Community's total capacity as regards hot-rolled products is 168 million tonnes, of which 76 million tonnes are produced by undertakings which qualify for aids. If those undertakings alone had to carry out the closures required by the restructuring (30 to 35 million tonnes), the steel industry in some regions of the Community would have been condemned to complete extinction.

1 — At the hearing the applicant produced a table drawn up in agreement with the Commission comparing its own and the Commission's figures on the grant of aids and reduction in capacity. That table, which forms part of the papers before the Court, substantially confirms the Commission's view.

The Commission further considers that the decisions of 29 June 1983, which involve a total reduction of 26.7 million tonnes, constitute only the first step towards the restructuring contemplated. However, at the present stage that figure is the utmost that the Community steel industry can bear regard being had to the political and social consequences of the restructuring. In order to illustrate the social dimension of the restructuring the Commission has submitted a balance-sheet of employment trends in the steel industry in the various Member States, from which it appears that some 300 000 steelworkers lost their jobs in the Community between 1973 and 1984 (Germany: 64 700; Belgium 22 800; France: 61 000; Italy: 2 600; United Kingdom: 132 500) (Annex 6 to the rejoinder).

Lastly, the Commission states that when appraising aid plans, it started from the principle that the greatest capacity cuts should be borne by undertakings with the least economic plant, which, at that time, received the most aid. It clearly emerges from the preamble to the decisions of 29 June 1983 that it also took account of the restructuring efforts undertaken prior to 1980. That was why the Commission required Arbed Saarstahl to make an additional reduction in capacity of only 400 000 tonnes in return for DM 1 200 million in aid. More generally, the Commission argues that application of the aforementioned principles resulted in the most highly subsidized undertakings having to cut capacity by almost 20 million tonnes whilst lightly subsidized or unsubsidized undertakings had to make closures amounting to only some 7 million tonnes. In those circumstances it cannot be claimed that the Commission favoured undertakings in the four Member States in question when it adopted the contested decisions. Such a claim becomes all the more doubtful when it is borne in mind that the contested decisions cause those Member States' share in the Community's total capacity to fall, whereas the shares of those Member States which subsidize their steel industry only slightly have risen. In that connection the Commission refers to the calculations set out above.

IV.4. *The secondary claim*

The applicant's arguments

The *applicant* supports its secondary claim by arguing by reference to a table appended to the application (Annex 20) that, by means of the contested decisions, the Commission authorized aid plans the total amount of which differs by some 7 500 million ECU from the total amount of aid plans notified by 30 September 1982, the date by which, according to Article 8 (1) of the Second Aids Code, all aid plans had to be notified to the Commission. The applicant observes that it was informed of the increase in aid only by the publication of the decisions at issue. It argues that, as a result, the Commission infringed the provisions of the Second Aids Code in two respects: first, by ignoring the date laid down in Article 8 (1), which, in view of Article 12 (1) of the Code, is to be considered a time-limit and, secondly, by failing, contrary to Article 8 (2), to put the Member States in a position to state their views on the aid plans notified after 30 September 1982.

The Commission's arguments

The *Commission* does not contest the accuracy of the figures cited by the applicant in support of its secondary claim. After admitting that the amounts of aid were increased and that it did not seek the Member States' views thereon, the Commission further explains that what was involved was an increase in the amount of aid plans which had already been notified by 30 September 1982 and not the authorization of new aid plans notified after that date. Furthermore, the legal significance to be ascribed to that date, the Commission argues, cannot be inferred from Article 12 (1) of the Code alone, but should be determined in the light of the object of Article 8 (1) and of the significance to be attached to that date, regarded in conjunction with the other dates laid down in the Code. In that connection, it considers that 30 September 1982 must be regarded as a purely procedural time-limit, exclusively intended to contribute to an effective policy on the part of the Commission and, in particular, to ensure that it had sufficient time to consider whether the aid plans were compatible with the common market. The real time-limit was, in the Commission's view, 1 July 1983, the last date on which, according to Article 2 (1) of the Code, aid might be granted.

Lastly, the Commission states that the only reason for which it did not seek the Member States' views on increasing the amounts of aid in question was in order to meet the time-limit of 1 July 1983. It argues that, since it was manifestly more important to take substantive decisions before that time-limit expired than to comply with mere procedural rules, its decision was justified.

Observations of the intervener

The *Wirtschaftsvereinigung Eisen- und Stahlindustrie, the intervener*, adopts, for the most part, a similar position to that of the applicant. In addition, it contends that, in view of the prohibition of aids embodied in Article 4 (c) of the ECSC Treaty, the Commission is empowered under Article 95 of the ECSC Treaty, and hence under the Second Aids Code, solely to authorize those subsidies which are absolutely necessary for the restructuring. In other words, authorization of aid plans by virtue of the Second Code is in principle not permissible where the Commission exceeds its limited power.

In this case, the Commission has, the intervener maintains, exceeded its power in two respects. In the first place, it authorized aids for continued operation enabling uneconomic plant to be retained, the total amount of which is three to five times greater than the amount of aids for closure and investment received by the Member States concerned. Furthermore, the Commission authorized the grant of aids to undertakings which will not be viable and competitive without State aids after 31 December 1985. Accordingly, even from the point of view of economic viability the aid plans at issue should not have been approved at the levels at which they were authorized in the contested decisions.

The intervener asked the Betriebswirtschaftliches Institut der Eisenhüttenindustrie [Business Research Institute of the Metal Industry] to work out, from the annual accounts for 1980 to 1982 of five heavily subsidized undertakings in the four Member States concerned and from other data, those undertakings' operating results from 1980 to 1982, the amount of aids which they received and the use to which the aids were put. The results of that exercise are appended to the intervener's observations as Annex 1, which itself includes five detailed appendices. The most important findings made therein concern the amount by which the aids granted from 1980 to 1982 exceeded the amount of aids approved by

the Commission in 1983 and the proportion of the aid which was used in the period in question to cover current losses (rather than for restructuring). This amounted in rough terms in three cases to 40%, in one case to 50% and in another to 60% of the total aids granted to the undertaking concerned. [2] The other annexes to the intervener's observations contain detailed figures on the longer period 1975-82 and conclude *inter alia* that 11 600 million ECU more aid was granted in that period than was needed in order to carry out the restructuring on time.

V. Consideration of the Case

V.1. *General remarks*

For the purposes of the assessment of the case I consider that I should set out the following remarks before conducting a detailed analysis. The first observation which may be made in the light of the objective laid down by the Council in 1982 of a 30-to-35-million-tonne reduction in the Community's total capacity is that, if the minimum requirements laid down in the decisions of 29 June 1983 are met, the target of 30 million tonnes will be attained to the extent of almost 90%. The restructuring programmes subsequently submitted by the Member States concerned result in the minimum objective's being attained to the extent of some 70%. It appears from the Commission communication of 14 November 1984 to the Council, which was produced at the hearing, that three Member States in their restructuring plans have subsequently exceeded the minimum requirements laid down in the decisions by a total of 1.7 million tonnes. According to the communication, the Commission expects that the objective of a 30-million-tonne cut in capacity will be achieved or even exceeded before 1 January 1986. It considers that the objective of a 35-million-tonne reduction may be attained subsequently by a process of 'natural' adjustment (that is to say without aids).

Comparison with Table 2 in Annex 2 to the observations submitted by the Wirtschaftsvereinigung underscores the importance of those performance figures. According to the table, from 1975 to 1979 inclusive (that is, before the First Aids Code) the four Member States concerned cut their production capacity by some 12 million tonnes only, and from 1980 to 1982 inclusive (that is following the First Aids Code, but before the Second Aids Code brought in the supplementary objective of 30 to 35 million tonnes) they decreased it by only 9.5 million tonnes. As the Dutch saying runs 'the last loads are the heaviest to bear', and what has been achieved to date by way of capacity reductions pursuant to the Second Aids Code is by no means unsatisfactory, although it is still manifestly insufficient to restore a reasonable balance between supply and demand. Restructuring measures as extensive as those needed in this sector inevitably entail substantial cutbacks in personnel. According to the tables produced, some 200 000 persons have lost their jobs as a result in three of the four Member States concerned between 1974 and 1982 alone. Restructuring on such a scale as this inevitably produces great social and political pressures, especially in regions

2 — According to the answer given by the Commission to a question put by me at the hearing, aids for continued operation as a proportion of the total amount of aid authorized from 1980 to 1985 roughly amount to one-third for Germany, a half for France and the United Kingdom, 70 % for Italy and as much as 80 % for Belgium. Accordingly, aids for continued operation as a fraction of total authorized aids appear as a rule to have increased considerably after 1982

where there are no alternative sources of employment. Consequently the outcome of the restructuring operation as a whole, which is now becoming apparent, may be viewed as an impressive achievement in itself.

However, as against that positive outcome of the Commission's action, it must be observed that the amount of aid plans which the Commission authorized up to 29 June 1983 in order to achieve that positive outcome is exceptionally high. In that connection the Court may wish to take special note, in particular, of the fact that, of a total of some 27 500 million ECU approved for the four Member States concerned over the period 1980-85, roughly 50%, 50%, 70% and 80% respectively were accounted for by aids for continued operation. That aids for continued operation account for such a large proportion of the total aid authorized also goes a long way towards explaining why, on aggregate, the amount of aid per tonne of capacity cut was much greater in those four Member States than in the Federal Republic of Germany. If I may anticipate my more detailed examination of the parties' arguments on that point, there appears to be no doubt that, even assuming that the minimum-price rules were complied with, aids for continued operation on that scale enabled losses to be covered to a large extent, and so considerably distorted competition to the detriment of steel producers receiving lesser aid or none at all. Consequently, I shall later pay special attention to the legal significance of those distortions of competition in the light, once again, of the parties' arguments and of the relevant provisions of the Second Aids Code. When I examine the case in more detail it will also become clear that the Commission's action was manifestly in conflict with the wording and the intention of essential procedural rules laid down in the Code.

Lastly, I consider that, for the assessment of the facts of this case, account must be taken of the relationship between Commission policy on the grant of aids and its policy on quotas. It appears from the successive decisions which the Commission adopted pursuant to Article 58 of the ECSC Treaty that, by taking account of, *inter alia*, voluntary restructuring measures, by arranging for tolerances where limits were exceeded and by adapting quotas to a limited degree in the light of increases or decreases in production (resulting from, *inter alia*, assignment of quotas), the Commission progressively injected a measure of flexibility into the quota arrangements. In contrast, Article 14 (d) and (e) of the 1983 decision and Article 7 of the 1984 decision confirm the limited character of the changes in market share which might thus be brought about to the advantage of undertakings in a strong competitive position. Accordingly, for the duration of the crisis, the essential aim of the quota rules remains that of maintaining the various undertakings' relative market shares constant as regards products subject to the rules. Clearly, the extensive freezing of market shares and the rights derived therefrom by the undertakings concerned have not eased the Commission's task of putting an end to aid plans which are designed to maintain these market shares and have the effect of distorting competition. Nor does the quota system assist in achieving the conditions to which the authorization of aids is subject, namely restructuring and, in particular, the reduction of production capacity. It was not until the 1983 decision that it became possible to reduce quotas, on the ground that aid had been unlawfully obtained. Presumably it was in order to avoid any change in trade flows caused by measures distorting competition that the 1984 decision introduced supervision of traditional trade flows.

The supervision system introduced thereby — which is hard to reconcile with the free movement of goods — confirms the link, which the applicant rightly emphasizes, between the free movement of goods and free competition undistorted by aids. The risk inherent in that type of supervision system that intra-Community trade will tend to be effectively impeded if aids for continued operation in particular continue to be granted underscores the need to restore balance on the steel market with the utmost rapidity. That can only be done by completing the restructuring operation and, at the same time, abolishing all aid plans in accordance with the Aids Code. Consequently it appears that the key to resolving the steel crisis lies in implementing the Second Aids Code. The quota system amounts only to a provisional holding measure, which is in principle of a damagingly rigid nature.

V.2. *The admissibility of the application*

I consider that the objection of inadmissibility — relating both to the principal claim and the secondary claim — which the Commission has raised in the rejoinder and explained in more detail at the hearing should be dismissed.

The Commission considers that, in some respects, the principal claim — even in its initial version — raises problems of admissibility, and that, especially as regards the revised version set out in the reply, it is not sufficiently specific.

The Commission argues that the action to have the contested decisions declared void in so far as they find compatible with the common market aid measures which have not been shown to be essential for implementing the restructuring measures in the four Member States in question does not state sufficiently plainly and specifically to what extent it is sought to have the decisions declared void. In my view, that argument should be rejected, not only on the ground that at a later stage in the proceedings the applicant did in fact define its claim precisely (see the table at the end of Section IV.2 of this opinion), but above all because the extremely summary statement in the contested decisions of the grounds on which the approval (subject to certain conditions) of the very large aids notified was based did not make it possible for other Member States to verify their legality in accordance with the requirements which the Court has consistently laid down with regard to the reasons to be given for such decisions relating to aid plans, and hence for the claim to be formulated in more specific terms. Indeed, in the light of the Court's previous decisions with regard to the requirements which the statement of the reasons on which a measure is based must fulfil, the Commission may consider itself fortunate that the applicant deliberately did not ask for the decisions to be declared void on the ground that the statement given was insufficient. It advisedly worded its application so as to enable the Commission to set out in the course of the proceedings the reasons on which the contested decisions were based and thus to permit the applicant and the Court to check their legality from the point of view of substantive law. Accordingly, the definition of the claim by the formula 'which are not demonstrably essential in order to implement the planned restructuring' must, in my view, be deemed sufficient to specify the purport of the principal claim (in the version set out in the reply).

According to its submissions made at the hearing, the Commission considers, *inter alia*, that the applicant's secondary claim is inadmissible on the ground that it is not a secondary claim but an alternative claim. Whilst the principal claim is based on substantive grounds, the secondary claim is based in particular on the procedural

ground that Article 8 (1) of the Second Aids Code has been infringed. The Commission argues that, as a result, there is no such relationship of subordination between the principal claim and the secondary claim as is required by the term 'secondary'.

I have been unable to find either in the Rules of Procedure or in the case-law of the Court a requirement that there should be such a relationship of subordination between a principal and a secondary claim. Generally the scope of the latter will be not as extensive as that of the principal claim. In view of the subsequent amendment of the principal claim, that is also true in this case. According to Creifelds' authoritative Rechtswörterbuch [legal dictionary] (1981 edition) a secondary claim (Hilfsantrag), such as we are concerned with here, cannot generally be required to fulfil any other condition than that of being put forward in case the principal claim (or part thereof) is unsuccessful. That condition is manifestly satisfied here. Moreover, cases regularly occur in the European Court Reports in which the principal claim is based solely or mainly on substantive arguments and the secondary claim solely or mainly on procedural arguments, or vice versa. To my knowledge, the Court has never upheld objections made on that basis to the admissibility of an application. Consequently, the objection that the secondary claim is inadmissible should also be dismissed.

V.3. *Appreciation of the principal claim*

V.3.1. *The main argument* relied on by the applicant in support of its principal claim that all or part of the contested decisions should be declared void is that they conflict with the principle of equal treatment (application pages 25 to 30 and rejoinder pages 18 and 19 and 23 to 27). The aim of that argument is expressed very succintly by the figures, which I have already mentioned, illustrating the principal claim as it is set out in the reply. The applicant contends that the Commission should have required the four Member States concerned to observe the same ratio between the total amount of aid plans authorized for each Member State and the total net reduction in capacity as it had required of the Federal Republic of Germany (720 ECU of aid per tonne of reduction).

If the Federal Government's argument had been the inadequacy of the statement of the reasons on which the decisions were based, that is to say that a more detailed statement of reasons should have been given for approving a multiple of that amount of aid in the case of the Member States in question, I should have understood it. But, as I have already observed, the applicant deliberately chose not to base its application on that argument.

From the point of view of substantive law, that principal argument should be dismissed, since the applicant has failed to show that which objectively speaking cannot be presumed in the absence of further evidence, namely that the restructuring problems existing in the four Member States concerned are comparable to those in the Federal Republic. As far as investment aid (and, in particular, aid for the purposes of modernization) is concerned, the amount of aid required is bound to depend on the degree to which the existing plant and production structures of the undertakings concerned are obsolete or uneconomic. As regards aid for closures, the amount of aid requested pursuant to Article 4 of the Second Aids Code is bound to depend, *inter alia*, on the number of employees affected and the speed with which their dismissal or early retirement can reasonably be required, regard being had to local circumstances. Furthermore, those aids will depend on the size of contracts in particular for the supply of raw materials, termination of which will entail the payment of compensation. Finally, those aids will depend on the amount of expenditure incurred for the redevelopment of the site, the buildings and/or infrastructures of a closed steel plant for alter-

native industrial use and on the time which must be considered reasonable to that end in view of local conditions. In the case of aids for continued operation, their extent naturally depends on the one hand on the difference between market prices and each individual undertaking's costs and on the other on the minimum duration and extent of the restructuring measures which will enable profitability to be restored.

More generally, the Commission was also right to draw attention to the fact that neither the preamble nor any provision of the Aids Code sets out a specific quantitative criterion as to the amount of aids or the relationship between that amount and the size of the requisite reductions in capacity. In my view, it is obvious, as the Commission rightly maintains, that the policy pursued by the Government of the Federal Republic of Germany in this regard in its own country can scarcely be viewed as setting the standard for the other Member States. Furthermore, as I have already mentioned, in its defence the Commission showed by means of figures, which the applicant did not contest, that the latter was wrong to complain that the Commission had required undertakings which were not in receipt of aids to make the same cuts in capacity as undertakings receiving aids. Moreover, the arguments set out by the Commission in its defence, which I have already mentioned, sufficiently refute the complaint that it failed to take account of 'Vorleistungen' (closures carried out before 1980). In that connection, the Commission rightly pointed out at the hearing that where there is a structural fall in demand in a market economy undertakings not in receipt of aids may also be expected to adapt their capacity to demand. Such adaptations of capacity have also occurred in other sectors, such as the man-made fibres industry. They are not so much a sacrifice made in the general interest as action taken in the interest of the undertakings themselves. Nor is it possible therefore to speak in this context of cases which differ from each other in critical respects being treated alike. Lastly, the Commission argued, in particular at the hearing, on the basis of uncontested figures that the policy which it has pursued in this field has caused neither Germany's percentage share of the Community's total production capacity nor Germany's share of the total Community market to decline. I have already stated that in view of the substance and effects of the quota system it is also hard to envisage an appreciable reduction or increase taking place in any national market share as long as the crisis measures continue to apply. Both in combination and individually the crisis measures are designed to give steel undertakings in all Member States equal opportunities to operate profitably again in 1986 without aids. The applicant has failed to show that the Commission has deviated from that aim as regards its policy on aid plans.

V.3.2. Specific arguments put forward by the applicant

I consider that specific arguments put forward by the applicant on the aforementioned pages of the application and the reply in support of its main argument have been refuted by the Commission to such an extent as to make further discussion of them unnecessary. Nevertheless, closer attention should be paid to those arguments deployed by the applicant in support of its principal claim in which it maintains that certain provisions of the Second Aids Code have been infringed:

(a) On page 32 of the application (and, in more detail, on pages 9 to 11 of the reply), the applicant first argues that the

fourth indent of Article 2 (1) of the Second Aids Code has been infringed. That provision requires that 'the aids in question do not entail distortions of competition and do not affect trading conditions to an extent contrary to the common interest'. It follows from the limitation embodied in the latter part of that provision and from the passage relating thereto in the third recital in the preamble that, in contrast to what the application claims, the provision does not set out to preclude *all* distortions of competition caused by aid plans but simply to minimize such distortions. As a result, the applicant's first argument must be rejected. What is much more important is whether the aid measures authorized by the Commission (assuming that they have the effect of distorting competition) are necessary for the purpose of implementing the relevant restructuring programmes.

(b) Accordingly the more important complaint is that which is made on page 33 of the application and developed in detail on pages 9, 13, 14 and 16 of the reply and by the applicant and the intervener at the hearing, namely that the Commission, in breach of the first indent of Article 2 (1), authorized in respect of individual undertakings aid plans of various types, including aids for continued operation, which were not necessary for implementing in the case of the recipient undertaking a 'systematic and specific restructuring programme covering the different aspects of restructuring . . . , which programme is capable of restoring its competitiveness and of making it financially viable without aid under normal market conditions' (quotation taken from the first indent of Article 2 (1) of the Aids Code). As regards that complaint, in the first place I agree with the Commission's view that, contrary to the claims made by the applicant and, above all, by the intervener, the Code does *not* require the Commission to start out by fixing the requisite reduction in capacity for each undertaking and approving the otherwise necessary restructuring programme and only subsequently to authorize the aids which are manifestly necessary for that purpose. It is not contrary to Article 2 of the Aids Code but, in contrast, consonant with the division of responsibilities as between the Commission, the Member States and the undertakings that the Commission should take the opposite approach and make the authorization of the aids which a given Member State considers to be necessary subject, *inter alia*, to the approval of specific restructuring programmes as defined in the said Article 2 and to an assurance that the programmes will be implemented promptly. It is common ground that such specific restructuring programmes had still not been submitted in their entirety to the Commission when it issued the contested decisions. It was for that reason that the Commission made the approval of the complete aid programmes subject to decisions releasing the aids, which, in turn, are only given after notification of specific restructuring programmes within the meaning of Article 2 of the Aids Code. As a result, the Commission could not, in my view, have more appropriately fulfilled its obligations under the first indent of Article 2 (1). Nor do I consider that compliance with the provision in question in stages in that way conflicts with the wording or intention of the provision.

(c) More attention must be given to the applicant's and the intervener's charge that Article 5 of the Code was infringed

in so far as the Commission authorized thousands of millions of ECU in aids for continued operation which were designed to cover losses, were not necessary for the implementation of restructuring programmes and, moreover, were contrary to Article 5 of the Code (application, pages 33 and 34, reply, pages 16 to 18, and explanations provided at the hearing). In so far as the explanations given at the hearing related to emergency aid within the meaning of Article 6 of the Code, they are irrelevant as regards an appreciation of both the principal claim and the secondary claim. The decisions in question do not and could not relate to such emergency aids, since no such aids may be authorized after 31 December 1981. Consequently, the applicant and the intervener were right to direct most of their objections at the hearing against the authorized aids for continued operation and the alleged infringements of Article 5 of the Aids Code in that respect. However, since those infringements — in so far as they were in fact infringements, which remains to be seen — are inseparably linked with the infringement of essential procedural requirements as alleged in the secondary claim, they may be discussed only in that connection.

V.3.3. Conclusion

To summarize my appraisal of the applicant's principal claim and its supporting arguments. I consider that that claim is unfounded and should therefore be dismissed. That finding applies equally to the claim as initially formulated and to the version as amended by the reply.

VI. Appreciation of the secondary claim

VI.1. *Introduction*

In its secondary claim, the applicant claims that the Court should declare void the four decisions at issue in so far as the amount of the aids which may be approved in the various Member States exceeds the amount of such aids which had been notified to the Commission no later than 30 September 1982. The secondary claim is based on the alleged infringement of Article 8 (1) (in conjunction with Article 12) and Article 8 (2) of the Second Aids Code.

It is clear from the documents before the Court, and is acknowledged by the Commission too, that it was not until after 30 September 1982 that the four Member States in question notified to the Commission 'plans to grant or alter aids as referred to in Articles 3 to 7', totalling 7 500 million ECU, which is contrary to the second sentence of Article 8 (1) of the Second Aids Code. It is also common ground that the relevant additions and amendments to projects which had been notified before 30 September 1982 by Belgium, France and the Italian Republic were themselves not notified until 28 or 29 June 1983.

According to its answer to written Question 1 (c) put by the Court, the Commission went as far as to grant all the Member States an extension until 31 January 1984 for the submission of the specific restructuring plans linked to the aid proposals. Lastly, the Commission admits that, contrary to Article 8 (2) of the Code, it did not consult the Member States on the abovementioned additions or amendments to previously notified proposals before issuing the contested decisions.

As I have already observed, the manifest infringements of Articles 2 and 5 of the Second Aids Code as regards aids for continued operation are inextricably linked with the abovementioned infringements of Article 8 (1) and (2). As the Commission

has already acknowledged in its aforementioned answer to Question 1 (c) put by the Court, owing to the delay with which the notifications were made it was unable to adhere to the requirement of progressive reduction which is laid down in the third indent of Article 2 (1) for all kinds of aid and specifically set out in the second indent of Article 5 (1) as regards aids for continued operation. At the close of the hearing the Commission once again expressly admitted, in answer to a question put by me that the failure to comply with the requirement laid down in Article 5 for a progressive reduction (maximum duration two years; progressive reduction at least once each year) was the result of allowing the time-limit for notification to be exceeded as mentioned above. Consequently the assessment of the applicant's claims, in particular as regards the Commission's policy with respect to aids for continued operation, is inextricably linked to the assessment of the infringements of Article 8 (1) and (2) alleged in support of the secondary claim. On the one hand, the Commission defends its failure to observe the requirement of progressive reduction *inter alia* on the ground of the acceptance of the admitted overstepping of the time-limit. On the other hand, assessment of the seriousness of that infringement of a substantive provision of the Aids Code is important for assessing the significance of the infringements of Article 8 (1) and (2). I shall therefore begin by considering the applicant's most important complaints about the Commission's policy with respect to aids for continued operation.

VI.2. *Appreciation of the complaints concerning aids for continued operation*

The applicant's complaints concern in the first place the amount of the aids for continued operation authorized by the Commission. As appears from the details given in Section IV.4 of my Opinion (observations of the intervener) it does in fact appear that that type of aid as a proportion of total authorized aids has increased to a further significant extent since 1982 (its share has even risen in absolute terms according to the documents before the Court). That is manifestly contrary to the letter and the intention of the third indent of Article 2 (1) and the second indent of Article 5 (1) of the Code.

A second important complaint made by the applicant is that those aids for continued operation distort competition. The applicant rightly observed at the hearing in that connection that the fact that the undertakings concerned comply with the minimum price rules by no means guarantees that no sales are made at below production cost. The Commission's communication of 11 November 1984 to the Council, which was produced at the hearing, expressly admits that, in a number of cases, aids for continued operation were and remained necessary in order to cover losses. By enabling undertakings to sell at a loss on a grand scale in this way the Commission has certainly also allowed the terms of competition to be distorted and unprofitable undertakings to retain market shares on a grand scale. The applicant correctly claimed at the hearing that the following steps were necessary in order to limit these distortions of competition to the minimum, as is required by the third recital in the preamble to the Code:

(a) plans for aids for continued operation, pursuant to the first indent of Article 5 (1), should have been coupled with specific restructuring programmes, whereas in fact, not even on 1 January 1985, had all the final restructuring programmes been submitted, and yet that did not prevent the adoption of decisions for the release of aids for continued operation;

(b) the Commission decisions (or the subsequent decisions releasing the aids) should have laid down strict conditions regarding the relationship between the

aids authorized for continued operation and their size and the amount of time strictly necessary for implementing the restructuring plans; that requirement also clearly emerges from the third indent of Article 5 (1); however, in fact the Commission in its release decisions freed the requested aids for continued operation unconditionally, even though smaller amounts of aid or aids granted for a shorter period would have sufficed for the implementation of the restructuring plans; consequently, the policy pursued by the Commission rendered restructuring less urgent and distorted competition to a greater extent than was strictly necessary.

(c) aids for continued operation should have been authorized only for the time which was objectively necessary for the restructuring.

The only really plausible explanation given by the Commission as to the departures from the wording and the intention of Article 5 (1) of the Code which have been established [3] is the lack of time with which it was confronted owing to the fact that it allowed the time-limit laid down in Article 8 (1) to be exceeded. The question whether that *explanation* is an adequate *defence* therefore depends on the importance which attaches to a failure to observe that time-limit, which I shall now examine.

VI.3. *Appreciation of the alleged failure to observe Article 8 (1)*

As far as the alleged failure to observe Article 8 (1) is concerned, the Commission's first argument was that the time-limit laid down in that article is not critical. It argued at the hearing that Article 8 (1) is a mere procedural time-limit 'which is intended to ensure that the Commission is informed, in sufficient time before 1 July 1983, of all aid plans to enable it to decide on those plans within the allotted time-limits' (for example, that laid down by the second indent of Article 5 (1)). Secondly, the Commission contended that under Article 12 of the Code the Council's agreement is required only where there is a general amendment of the time-limit set out in Article 8 (1). In the Commission's view, Article 12 does not rule out acceptance of the failures to observe the time-limit in the cases in point, since they were of an individual and exceptional nature.

In my view, that defence cannot justify the Commission's having acted as it did. Even if the Commission's argument is accepted, namely that the time-limit for notification laid down in Article 8 (1) is not critical in the sense that even the slightest overstepping of the time-limit makes it impossible to approve aid plans notified too late, that time-limit must be stricter than the Commission claims. First, it follows from Article 8 (2) of the Code that notification must take place in sufficient time for the Commission to seek the Member States' views on the more important aid plans notified to it before it adopts a position on them. Secondly, it follows from the second indent of Article 5 (1), not only that notification must be made in time for the time-limits laid down therein still to be complied with when the Commission adopts its position, but also that notification must take place in sufficient time for the requirement of the progressive reduction of aid, which is specifically laid down in Article 5 (1), to be observed. As I have

3 — The applicant's complaint that the Commission's policy also took social considerations into account is in itself, I consider, unfounded in the light of Article 5 (2) and the third recital in the preamble. However, that does not warrant a departure from the conditions which are expressly laid down in Article 5 (1).

already stated, the Commission has admitted that because it permitted the time-limit to be exceeded the requirement of the progressive reduction of aid could not be complied with in the contested decisions.

The Commission's argument that Article 12 of the Aids Code need not be applied in this case should also be rejected. First, the Commission cannot contend that the time-limit was exceeded in only a few individual instances. On the contrary, the cases in which the time-limit was exceeded involved the bulk of the Member States' planned aid measures. Secondly, the second sentence of the second indent of Article 5 (1) manifestly affords no legal foundation for extending in individual cases the time-limit laid down by Article 8 (1). For the sake of the completeness of this assessment of the Commission's main contentions, I would add that its argument at the hearing to the effect that the major amendments notified after 30 September 1982 and relating to plans notified before that date should be considered merely adjustments to previously notified plans must also be rejected. The requirement of notification laid down in Article 8 (1) expressly applies also to plans to alter aids falling within Articles 2 to 7 of the Code.

I therefore consider that the Commission's defence to the charge that it authorized on its own initiative substantial failures to observe the time-limit for notification laid down in Article 8 (1) of the Second Aids Code must be rejected. For the reasons stated, those proven failures to observe the time-limit must also be viewed as major procedural flaws and the application must therefore be held to be well founded as far as that point is concerned.

VI.4. *Appreciation of the alleged failure to comply with Article 8 (2)*

The Commission admits that the infringement of Article 8 (2), with which it is also charged by the applicant, is factually correct. Nor does the Commission deny that the aid plans in question constituted 'more important aid plans' within the meaning of Article 8 (2). In justification of its failure to consult the Member States on those aid plans it states essentially that it was the consequence of balancing the need for a prompt substantive decision against the need to comply with the duty of consultation.

That defence must also be rejected. It disregards the essential importance of the abovementioned procedural rule, the significance of which is comparable to that of the first subparagraph of Article 93 (2) of the EEC Treaty. The applicant has rightly pointed out that in Case 84/82 (judgment of 20 March 1984, *Federal Republic of Germany* v *Commission* [1984] ECR 1451) both the Court and Advocate General Sir Gordon Slynn in the Opinion which preceded the judgment considered that the infringement of that procedural rule was so important that it should lead to a declaration that the decision concerned was void.

The Commission's argument that it had to balance the need for the prompt adoption of a substantive decision against the need to comply with the duty of consultation must also be rejected. That argument only underscores the seriousness of the Commission's alleged infringement of Article 8 (1) of the Code. It was because of that infringement that the Commission found itself in the impasse described. In view of the unlawful nature of the failure to observe Article 8 (1), the Commission therefore cannot rely on the impasse which came into being because of its own fault.

Moreover, neglect of the duty of consultation is particularly serious in the case of plans involving the grant of considerable amounts of aid for continued operation. The other Member States are naturally better informed than the Commission of the detrimental effects on their industry of the distortions of competition to which such aids give rise. I have already dwelt on the effect of this form of aid in distorting competition. However, in that connection, the applicant has also referred, correctly, to the judgment of the Court of 15 January 1985 in Case 250/83 (*Finsider* v *Commission* [1985] ECR 142). The second sentences of the seventh and ninth paragraphs of that judgment in particular are quite clear in that regard. They emphasize that that form of aid has the most injurious effects on competitive relationships when furthest removed from the essential objective of restructuring and may delay the attainment of that ultimate aim.

I therefore consider that the applicant's claim that Article 8 (2) has been infringed is also well-founded. As in the case of the infringement of Article 8 (1), I consider this infringement to constitute such an important procedural defect that it justifies a declaration that the contested decisions are partially void, as is sought by the applicant in its secondary claim.

VI.5. *Opinion as regards the secondary claim*

To conclude my assessment of the secondary claim and of the two submissions made in support of it, I consider that that claim is well founded and should result in a declaration that the four contested decisions are void, as the applicant seeks, in so far as the amount of the aids which may be approved under those decisions in the Member States concerned exceeds the amount of the plans for the grant of such aids which had been notified to the Commission no later than 30 September 1982.

By virtue of Article 34 of the ECSC Treaty, if the Court declares a decision void, it must refer the matter back to the Commission. Unlike the provisions of the second paragraph of Article 174 of the EEC Treaty with regard to regulations, Article 34 of the ECSC Treaty does not empower the Court to state, where, as in this case, decisions are involved, which of the effects of the decisions which have been declared void are to be considered definitive. Article 34 itself determines the legal consequences of such a declaration. I shall now in my final remarks consider the problems which arise in that connection, after which I shall give my formal Opinion on the case.

VII. Final remarks and opinion

VII.1. *Final remarks*

As regards the legal consequences of a declaration that decisions, such as those in this case, are void, Article 34 of the ECSC Treaty provides that where the Court refers a matter back to the Commission the latter 'shall take the necessary steps to comply with the judgment. If direct and special harm is suffered by an undertaking or group of undertakings by reason of a decision or recommendation held by the Court to involve a fault of such a nature as to render the Community liable, the High Authority shall, using the powers conferred upon it by this Treaty, take steps to ensure equitable redress for the harm resulting directly from the decision or recommendation declared void and, where necessary, pay appropriate damages'. The second paragraph of Article 34 goes on to provide as follows: 'If the High Authority fails to take within a reasonable time the necessary steps to comply with the judgment, proceedings for damages may be instituted before the Court'. Hence the second paragraph of

Article 34 refers to the possibility of bringing actions for damages under Article 40 of the ECSC Treaty. However, that article is expressly stated to be without prejudice to the first paragraph of Article 34 (quoted above), which, as a result, is independent in character and remains applicable where, as in this case, damages are not sought.

At the hearing the applicant expressly stated that it was concerned that the Commission should take a firmer attitude towards the four Member States in question during the final phase of the implementation of the Aids Code. That should entail greater reductions in capacity and less aid in the Member States in question. Moreover, both the applicant and the Wirtschaftsvereinigung Eisen- und Stahlindustrie, which supported its claims, sought on several occasions in the course of the proceedings to show — in my view with a measure of success — that German steel undertakings had suffered special harm as a direct result of the contested decisions. I consider that to be true in particular of the failure to observe the requirement relating to the progressive reduction of aids which is defined as regards aids for continued operation in Article 5. As has been established, the failure to observe that requirement was the inevitable consequence of the unlawful departure from Article 8 (1) and (2) of the Second Aids Code. In my estimation, that is not true of the derogations granted by the Commission from the two-year period laid down in the second indent of Article 5 (1). It became apparent during the proceedings and was confirmed, in particular, at the hearing that on 25 July 1983 at the Council the Member States unanimously approved the derogation from the two-year period in question pursuant to the second sentence of that provision. As a result the Commission was entitled to proceed to adopt its decisions releasing the aids.

In view of the special circumstances involved, which, albeit not justifying the infringements of Article 8 of the Second Aids Code which have been established, do not make them comprehensible, I am not sure whether a complaint can be made against the Commission — although I would not preclude that possibility — which, pursuant to the third sentence of Article 34 of the ECSC Treaty, might justify the Court's declaring that the decisions to be declared void involve 'a fault of such a nature as to render the Community liable'. Accordingly I propose that the Court should deliberately leave that question open in its judgment. In my view, it is also important to take that approach in order not to prejudge any actions which undertakings which have suffered damage might subsequently bring under Article 40 of the ECSC Treaty, when possible parallels between the third sentence of Article 34 of the ECSC Treaty and the Court's decisions with regard to liability for legislative measures under the second paragraph of Article 215 of the EEC Treaty might also come up for discussion. In the present proceedings, insufficient facts have been adduced in that regard to enable the Court to reach a definitive decision thereon.

If the Court follows my recommendations with regard to that point, the legal consequences of declaring the decisions void will be governed primarily by the second sentence of Article 34 of the ECSC Treaty. Since the failures to observe the time-limit for notification laid down in Article 8 (1) of the Second Aids Code, which the Commission accepted on its own initiative, are not susceptible of redress as such, application of the second sentence of Article 34 of the ECSC Treaty should lead the Commission to re-submit the relevant aid plans to the Member States for their views. Then, the Commission will have to assess in the light thereof whether it ought to require a further reduction in the aids for continued operation in the Member States in question

or a greater reduction in production capacity or other supplementary restructuring measures. Section 12 and other passages of the Commission's communication of 14 November 1984 to the Council, which was produced at the hearing, suggest to me that such legal consequences must be regarded as still attainable. It will thus also be possible to ensure that the main objective of the Aids Code, that is to say restoration of the viability of most of the steel undertakings in the Member States in question, will be achieved by 1 January 1986 without its being necessary to grant further aids thereafter. The Commission expressly confirmed once again at the close of the hearing that the aim was to put a complete end to specific aids after 1 January 1986. Nevertheless, in the Commission's view some undertakings will still have to continue to make adjustments by their own efforts in order to return to profitability.

The consequences of the infringement of the requirement for progressive reduction of aids for continued operation, specifically set out in Article 5 of the Second Aids Code (which was, as I have pointed out, the inevitable outcome of allowing the notification date to be unlawfully exceeded), presumably will no longer be susceptible of complete redress after the Court's judgment by a progressive reduction of the outstanding aids for continued operation. In the light of, *inter alia*, Article 40 of the ECSC Treaty and pursuant to the second sentence of Article 34, the Commission may therefore also have to contemplate other measures 'to ensure equitable redress for the harm resulting directly from the decision . . . declared void', to quote once again from the third sentence of Article 34. It is possible to envisage, *inter alia*, measures being taken in the context of the quota system, provided that it is continued in one form or another in 1986.

In view of the short time still remaining before 1986 and, in addition, the brief periods newly proposed, as described by the Commission at the hearing and subject to Council approval, for the notification and authorization of aid plans and for the extension of time-limits for aids for continued operation, clearly the sooner the Court's judgment is delivered the more practical impact it will have. According to press reports, the relevant amendment to the Aids Code was approved on 27 March. Amending Decision No 1018/85/ECSC was published in Official Journal L 110 on 23 April 1985 (page 5). On the basis of a detailed recital the time-limit laid down in the fifth indent of Article 2 (1) is replaced by 1 August 1985, that laid down in the second indent of Article 5 (1) by 31 December 1985 and that laid down in Article 8 (1) by 31 May 1985.

As far as the costs are concerned, I propose that, in addition to its own costs, the Commission should be ordered to pay half the costs incurred by the applicant and the intervener if the Court agrees with my finding that the applicant's secondary claim should prevail.

VII.2. *Opinion*

In conclusion I propose that the Court should:

(1) Declare void Commission Decisions 83/391/EEC, ECSC, 83/393/ECSC, 83/396/ECSC and 83/399/ECSC of 29 June 1983 (Official Journal L 277) authorizing the Governments of Belgium, the French Republic, the Italian

Republic and the United Kingdom to grant aids to certain producers of iron and steel, in so far as the amount of aids which may be granted pursuant to those decisions exceeds the amount of the aid plans which had been notified to the Commission by 30 September 1982;

(2) Remit the case to the Commission under Article 34 of the ECSC Treaty;

(3) Include in the statement of the reasons on which the judgment is based, in accordance with the more detailed explanation given in this Opinion, a brief reference to the legal consequences of the abovementioned declaration;

(4) Dismiss the applicant's other claims as unfounded;

(5) Order the Commission to pay its own costs together with half of the costs incurred by the applicant and by the Wirtschaftsvereinigung Eisen- und Stahlindustrie, intervening in support of the applicant.