1. The third paragraph of Article 33 of the ECSC Treaty does not prevent an applicant from lodging an application with the Court as soon as the contested decision has been adopted, without waiting for it to be notified or published. A second application which was lodged after publication of the contested decision and which involves the same parties and seeks the annulment of the same decision on the same grounds as the first must be dismissed as inadmissible.

2. For purposes of the second paragraph of Article 33 of the ECSC Treaty, an undertaking is 'concerned' by an individual decision of the Commission authorizing the grant of benefits to one or more undertakings which are in competition with it.

3. Since according to Article 39 of the ECSC Treaty an action brought before the Court does not have suspensory effect, the fact that the applicant has complied with the contested decision cannot deprive it of its interest in seeking a declaration that that decision is void.

4. Although the statement of the reasons on which a decision is based must enable the Court to review the decision's legality and provide the persons concerned with the information needed to determine whether or not the decision is well-founded, the statement of reasons required by Articles 5 and 15 of the ECSC Treaty depends on the circumstances of the case, in particular the content of the measure, the nature of the reasons relied upon and the interest which the addressees or other persons concerned by the measure for purposes of the second paragraph of Article 33 of the ECSC Treaty may have in obtaining an explanation.

5. Where the Commission has determined the reduction in the production capacity of the steel industry of a Member State to be required as a condition for the grant of State aid on the basis of a comparison between the capacity reduction required of all the steel undertakings in the Community and the reduction proposed by the Member State in question, an erroneous assessment of the size of that proposal, resulting in its artificial reduction, constitutes grounds for a declaration by the Court that the relevant provisions of the decision adopted on that basis are void.

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 5 June 1985

My Lords,

In these proceedings, brought pursuant to Article 33 of the ECSC Treaty ('the Treaty'), the applicant seeks the annulment of Commission Decision No 83/398 concerning the aids that the Netherlands Government proposed to grant to the steel industry (Official Journal 1983, L 227, p. 33) ('the Dutch Decision') and its counterpart concerning aids to the Italian steel industry, Commission Decision No 83/396 (Official Journal 1983, L 227, p. 24) ('the Italian Decision').

With a view to remedying the crisis in the steel industry the Commission adopted Decision No 257/80 establishing Community rules for specific aids to the steel industry (Official Journal 1980, L 29, p. 5). Under that Decision, which was based on Article 95 of the Treaty, aids to that industry were only to be put into effect with the prior approval of the Commission and subject to any conditions laid down by it.

At its meetings of 3, 26 and 27 March 1981 the Council passed resolutions to the effect that Decision No 257/80 should be replaced by a more stringent scheme based on broadly the same lines (Bulletin EC 1981-3, pp. 87-88). At its meeting of 24 June 1981, the Council reached agreement on a draft new code on aids which covered both specific and general aids (Bulletin EC 1981-6, pp. 17-19). That draft code subsequently became Commission Decision No 2320/81 (Official Journal 1981, L 228, p. 14). That Decision, which is based on Article 95 like its predecessor, is expressed to apply until 31 December 1985.

Subject to one exception not material to these proceedings, Decision No 2320/81 required all plans by the Member States to grant or alter aids to the steel industry to be notified to the Commission by 30 September 1982. Such plans could only be put into effect with the approval of the Commission and subject to any conditions laid down by it. The general criteria to be applied by the Commission are set out in Article 2. The salient features of that provision are that it requires aids to be linked to an overall reduction of production capacity of the recipient undertaking; and that it prohibits the payment of aids after 31 December 1985, with the exception of interest rebates and payments to honour guarantees on loans disbursed before that date. The following articles laid down detailed provisions relating specifically to investment aids, aid for closures, aid for continued operation, emergency aid and aid for research and development respectively.

Subsequently the Commission reached the conclusion that it was necessary to reduce capacity by 30 to 35 million tonnes by 1 July 1983. That view appears to have been shared by the Ministers of Industry, when they met informally at Elsinore in Denmark on 17 and 18 November 1982 (Bulletin EC 1982-11, p. 18).

On 29 June 1983 the Commission implemented Decision No 2320/81 by a series of decisions concerning all the Member States except Denmark. The majority of these decisions authorized the grant of the aids proposed by the Member State concerned on condition that capacity was reduced by certain specified amounts. The Dutch Decision bore the number C(83)950/8 and was notified to the Netherlands under cover of a letter dated 30 June 1983 addressed to the Dutch Minister of Foreign Affairs. This Decision made the grant of the aids proposed by the Dutch Government subject to a total reduction of capacity of 950 000 tonnes. Hoogovens is by far the largest of the two steel companies operating in the Netherlands, the other being Nedstaal, a wholly-owned subsidiary of Thyssen. It was therefore clear that Hoogovens would bear the brunt of this reduction.

By its application lodged with the Court on 8 August 1983 Hoogovens requested the Court to annul that Decision (Case 172/83). In the same action it also sought the total or partial annulment of the Italian Decision, which bore the number C(83)950/6 and was likewise notified to the Foreign Minister concerned under cover of a letter dated 30 June 1983. The basis for requesting the

latter relief is that, according to Hoogovens, the Italian steel industry has received more lenient treatment and Hoogovens has therefore suffered discrimination.

On 19 August 1983 the two contested Decisions were published in the *Official Journal*. The Dutch Decision became Decision No 83/398 while the Italian Decision became Decision No 83/396. Hoogovens thereupon lodged a second application with the Court on 6 October 1983 (Case 226/83). Apart from the fact that the second application does not refer to the two covering letters of 30 June 1983, the two applications are the same. By Order of 13 February 1985 the President of the Court joined the two cases for the purposes of the oral procedure and the judgment.

The present proceedings do not constitute an isolated assault on the series of Decisions adopted by the Commission on 29 June 1983. The applicants in Case 222/83 *Municipality of Differdange* v *Commission* [1984] ECR 2889 requested the Court to annul the Luxembourg Decision, but that action was declared inadmissible on grounds which do not arise in this case. Also, in Case 214/83 *Germany* v *Commission* (pending) the German Government seeks the annulment of the Belgian, French, Italian and United Kingdom Decisions.

In its defence in Case 172/83, the Commission conceded that the application in that case was admissible in so far as it sought the annulment of the Dutch Decision. The Commission expressly conceded that that Decision concerned Hoogovens and was individual in character, so that the requirements of Article 33 (2) were satisfied.

However, in its rejoinder the Commission pointed out that Hoogovens had in fact decided to reduce its capacity by one million tonnes by the end of 1985 in addition to the reduction of 150 000 tonnes which had already occurred with the closure of its Demka mill. Thus Hoogovens has chosen to reduce its capacity by more than the 950 000 tonnes required of the whole of the Netherlands in the Dutch Decision. Without raising a formal objection to admissibility, the Commission therefore questions whether the applicant retains an interest in the outcome of these proceedings.

At the hearing, Hoogovens did not contest the facts relied on by the Commission. It claimed that the reason why it had chosen to reduce its capacity by more than the amount required by the Commission was that a mill could not be 'half closed down'; a mill either continued to run at full capacity or it was closed down altogether. In any event, Hoogovens maintained that it still had an interest in obtaining judgment because it feared that the Commission would require further reductions of capacity in the future. Therefore it still needed a ruling on the legality of the contested Decisions in order to prepare for that eventuality.

To my mind Hoogovens' interest in obtaining a judgment in these proceedings is not extinguished by the facts relied on by the Commission. Since by virtue of Article 39 actions before the Court do not have suspensory effect, a party must comply with a decision concerning it pending final judgment, unless interim measures are ordered. Thus an applicant does not deprive himself of the right to continue annulment proceedings when he has taken steps which in fact satisfy the contested decision which he continues to challenge. The fact that Hoogovens has gone beyond what the Commission required is irrelevant, since it does not necessarily show that the Commission's calculations were correct. What is more, as Hoogovens has pointed out, it retains an interest for the future in obtaining a ruling in these proceedings.

In addition, in its defence the Commission has contested the admissibility of the application in Case 172/83 in two respects.

Firstly, the Commission maintains that Hoogovens is requesting the annulment not only of the two Decisions, but also of the Commission's covering letters to the Dutch and Italian authorities. Those letters do not, according to the Commission, constitute decisions for the purposes of the Treaty and cannot therefore be annulled. This argument is misconceived, because Hoogovens is not in fact seeking the annulment of the letters at all. It merely argues that the letters must be taken into account, notably for the purposes of elucidating the reasoning in the decisions. Consequently, the Commission's objection is not in point.

Secondly, the Commission contends that under Article 33 (2) of the Treaty the action is inadmissible in so far as it is directed against the Italian Decision. Yet it is well established that the concept of decisions which 'concern' the applicant within the meaning of that provision is wider than the requirement of 'direct and individual concern' in Article 173 (2)EEC. Thus, in Case 10/68 *Eridania* v *Commission* [1969] ECR 459 an action by an undertaking for the annulment of a decision conferring a benefit on a competitor was held to be inadmissible under the latter provision in the absence of 'specific circumstances', whereas the converse has been held with respect to Article 33 (2) of the Treaty (Joined Cases 24 and 34/58 *Chambre Syndicale de la Sidérurgie* v *High Authority* [1960] ECR 281 and Case 30/59 *De Gezamenlijke Steenkolenmijnen* v *High Authority* [1961] ECR 1.

There are in my view specific circumstances in the present case such as to render the request for the annulment of the Italian Decision admissible. The Dutch and Italian Decisions are part of a series of decisions adopted by the Commission at the same time. These decisions must be regarded as forming a single entity designed to reflect the Commission's coordinated approach to reducing capacity in the steel industry in the Community as a whole. It is true that, in answer to a written question from the Court, the Commission denied that the various decisions were linked to one another in any way. Instead, it claimed to have evaluated separately the reduction necessary in each Member State to make the industry of that Member State more competitive. Nevertheless, in view of the background and timing of the decisions, I find this unconvincing. It is to be noticed that in both Decision No 83/396 and No 83/398 the final paragraph of recital IV states that 'an overall reduction Community-wide of 30 to 35 million tonnes of capacity for hot-rolled products is necessary to restore a level of capacity utilization that is considered the minimum required to secure the viability of the Community steel industry under normal market conditions'. The third part of recital I to Decision No 2320/81 states that 'if restructuring is to be accomplished in a coherent, equitable and socially acceptable manner, it is desirable to establish a comprehensive Community aid system' which should 'ensure that all aids from which the steel industry may benefit are treated uniformly within a single procedural framework'. If the Commission did follow a different approach with respect to different Member States, then that is a matter which goes to the substance of the case and not to admissibility.

It seems to me that if an applicant attacks a decision which plainly does concern him, on the grounds that a decision relating to other producers in another Member State discriminates against him, it cannot be said that an attack on that second decision, forming part of a linked series of decisions taken to carry out a particular objective, is inadmissible.

This view is supported by a consideration of the consequences of annulling the Dutch Decision on the grounds of discrimination in favour of Italian producers, while holding the action inadmissible with respect to the Italian Decision. In those circumstances, as I see it, the Commission could not of its own motion revoke or amend the Italian Decision since that would encroach on acquired rights. Thus the Commission could only put an end to the discrimination concerned by increasing the capacity allowed for the Dutch steel industry. This would run counter to the objective of the entire operation, which was to reduce capacity.

I therefore take the view that the action in Case 172/83 is admissible in all the respects raised by the Commission.

In Case 226/83 Hoogovens does not refer to the covering letters and therefore the Commission has not repeated its objection on that point. The Commission's other objections to the admissibility of this case are the same as in Case 172/83. I would dismiss those arguments for the reasons already set out.

On the other hand, there is one matter which the Commission has not raised and that is the question of whether the application in Case 226/83 was inadmissible on the grounds of duplication. However, since this matter goes to the Court's jurisdiction, it is appropriate for the Court to raise it of its own motion.

Article 33 (3) of the ECSC Treaty reads as follows: 'The proceedings provided for in the first two paragraphs of this Article shall be instituted within one month of the notification or publication, as the case may be, of the decision or recommendation'. That is different from Article 173 (3) of the EEC Treaty which provides 'The proceedings provided for in this Article shall be instituted within two months of the publication of the measure or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be'.

I read Article 33 (3) of the Treaty as fixing the final date before which proceedings may be brought where there is a formal notification to the person who subsequently seeks to challenge the decision, or publication. It does not prevent proceedings being brought prior to publication if an applicant has knowledge of a decision addressed to a third person which has not yet been published but which he contends is of concern to him or which he considers involves a misuse of powers affecting him.

Hoogovens had knowledge of both the Decisions and the covering letters of 30 June 1983 and was able to annex them to the proceedings lodged at the Court on 8 August 1983. If, by analogy with the provisions of Article 33 (3) relating to the limitation period following publication or notification, Hoogovens had one month in which to bring proceedings (plus the appropriate delay for distance, here six days) from the date when it had knowledge of the Decision and letters, it has not been shown that Hoogovens brought proceedings outside that period.

I would accordingly accept that the first action was in time.

Since Hoogovens may have had doubts as to whether Article 33 (3) enabled it to bring

proceedings before publication of the Decisions, it is understandable why it should seek to protect its position by bringing the second action within the time fixed by that Article. On the other hand it does not seem to me that the second action, which merely covers the same ground as the first, should be accepted. It is a complete duplication of those matters and on that ground I would reject it as being inadmissible.

The applicant's *first* argument on the substance of the case is that the Dutch Decision is contrary to Article 15 in that it does not contain adequate reasoning to justify the requirement that 950 000 tonnes capacity be sacrificed as a counterpart for the receipt of the subsidies concerned.

The relevant passage of the Decision reads as follows:

'In line with the General Objectives for Steel, an overall reduction Community-wide of 30 to 35 million tonnes of capacity for hot-rolled products is necessary to restore a level of capacity utilization that is considered the minimum required to secure the viability of the Community steel industry under normal market conditions. It is necessary to ensure that this overall capacity reduction is distributed fairly. On this basis, after taking into consideration the restructuring effort to date and the aid granted prior to 1980, an extra effort must be accepted by the Netherlands steel industry. Accordingly, the Netherlands steel industry must reduce its capacity for hot-rolled products by 700 000 tonnes over and above the reduction of 250 000 tonnes proposed. It is necessary to set a deadline by which the additional closures required must be identified.'

Further light was shed on the criteria applied by the Commission in its covering letter of 30 June 1983 to the Dutch Minister of Foreign Affairs, which is annexed to Hoogovens' application. The Commission stated in that document that it had arrived at the figure of 950 000 tonnes on the basis of the following criteria: the need to attain the goal decided at Elsinore, the solidarity between the Member States required to achieve that goal, the need to ensure that undertakings are viable, the varying amount of aids granted by different Member States and the economic difficulties of regions in which undertakings receiving aids are situated.

Thus the Decision and the covering letter taken together set out in some detail the criteria applied by the Commission. As the Court said in Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, p. 766: 'The Commission has a duty to set out, in a concise but clear and relevant manner, the principal issues of law and fact upon which the decision is based, so that the reasoning which led the Commission to its decision may be understood ... However, the Commission is not required to discuss all the objections which might be raised against the decision ... nor may it be required to indicate its reasons for not adopting measures other than those contained in the decision, where the adoption of the other measures was a matter for its discretion.' Added to this is the fact that from the end of 1982 Hoogovens had frequent discussions with the Commission about the implementation of Decision No 2320/81 and was thus well aware of the Commission's thinking prior to the adoption of the Dutch Decision: see Case 13/72 *Netherlands* v *Commission* [1973] ECR 27, p. 39. In the circumstances, even though it would have been better if the Commission had given a more precise indication in the Decision as to how it arrived at the figure of 950 000 tonnes, it seems to me that the reasoning given is sufficient to comply with the requirements of Article 15 of the Treaty.

Also subsumed within the 'first argument' is the allegation that, by requiring the Dutch steel industry to make an excessive reduction in capacity, the Commission has infringed Hoogovens' property rights contrary to Article 1 of the First Protocol to the European Human Rights Convention. Yet it seems to me that this contention, which has not been developed by Hoogovens, is defeated by the very judgments on which it relies. In Case 154/78 *Valsabbia* v *Commission* [1980] ECR 907, p. 1010, the Court held that 'the ownership of property cannot be extended to protect commercial interests, the uncertainties of which are part of the very essence of economic activity'. Similarly in Case 258/81 *Metallurgiki Halyps* v *Commission* [1982] ECR 4261, p. 4280, it was held that 'the fact that the restrictions on production necessitated by the economic situation might affect the profitability or existence of certain undertakings cannot be considered to be an infringement of the right to property. The applicant may not claim respect for its right to property in order to evade the constraints imposed upon the entire European steel industry'. I would therefore reject this argument.

Secondly, Hoogovens maintains that the Commission was inconsistent in its use of the concept of 'maximum possible production'.

It claims that the Commission applied one criterion for determining Hoogovens' capacity in 1980, the reference year, and a different criterion for subsequent years. As regards 1980, the Commission ignored Hoogovens' theoretical capacity which could not be utilized because of a shortage of steel for producing hot-rolled products. This meant that its maximum possible production of hot-rolled products was evaluated at 5 400 kilo tonnes instead of 5 700 kilo tonnes. In 1981 the steel became available again in the quantities required so that Hoogovens' capacity increased suddenly to the latter figure. In 1984, another shortage of semi-finished products for producing hot-rolled products, namely slabs, was expected to occur but it was thought likely that this shortage would be removed by 1987. By reason of this shortage Hoogovens claims that its maximum possible production in these years must be taken to be reduced from 5 400 kilo tonnes to 4 900 kilo tonnes. Nevertheless, for the purposes of calculating the reduction in production capacity proposed by Hoogovens, the Commission considered that Hoogovens should be deemed to be operating as if there were no shortage of slabs.

Hoogovens therefore maintains that by applying two different criteria the Commission has underestimated the quantity which Hoogovens offered to sacrifice. This is evaluated in the Dutch Decision as 250 000 tonnes. It is common ground between the parties that of this the closure of the Demka mill accounts for 150 000 tonnes. On the other hand, Hoogovens contends that the remainder, which the Commission evaluated at 100 000 tonnes in fact represented 500 000 tonnes (the difference between 5 400 in 1980 and 4 900 kilo tonnes in 1985).

In its answer to the Court's written question on the point, the Commission has admitted having applied two different criteria. It claims that it was right to take account of the shortage in 1980 because that was a reference year. On the other hand, the shortage which was due to occur from 1984 to 1987 must be disregarded, because as from 1987 Hoogovens' dormant capacity would be used once again. The object of Decision No 2320/81 was to effect irreversible reductions in capacities so that purely temporary reductions could not be taken into account.

The Commission's position with regard to the shortage expected from 1984 to 1987 seems to me to be tenable. On the other hand, it does not seem to me that the Commission has established that it was right to apply a different criterion for 1980, the reference year. In the passage already quoted from the Dutch Decision the Commission used as its starting point for determining the reduction to be required of the Dutch steel industry its declared objective of reducing the capacity for hot-rolled products by 30 to 35 million tonnes throughout the Community. That statement is meaningless unless the same criteria are used for evaluating capacity over the years in question. In its answer to the Court's written question, the Commission maintained that it was right to apply a different criterion to 1980 precisely because it was a reference year. Yet I do not see how it can be right to apply two incompatible criteria simultaneously to the same operation. That approach was, as I see it, bound to lead to inconsistencies in determining capacity.

Furthermore, the Commission has sought to counter Hoogovens' argument by claiming to have attributed 380 000 tonnes' capacity to its WB1 works in 1980 over and above the figure estimated by M. Demarteau, an independent expert. In its written defence the Commission describes this as a concession which had not been granted to any other undertaking. Hoogovens claims that it was not a concession at all. It is not necessary to decide this point. Suffice it to say that no method of determining the capacity of the WB1 works could correct the error caused by calculating the capacity of Hoogovens' entire operations as from 1980 according to inconsistent criteria. I therefore regard the Commission's argument relating to the 380 000 tonnes as irrelevant. I take the same view about the 70 000 tonnes arising out of the exclusion of part of the possible transfer of coils for tin plate from plant WB2 to plant WB1 which the Commission also alleges was a concession.

Hoogovens also complains that the Commission refused to accept the offer it made in June 1983 to reduce the capacity of its SDW plant by 75 000 tonnes. In its defence the Commission gave as a reason for its refusal the fact that this would have involved an alteration in the 'product-mix' and it was not guaranteed to be irreversible. Hoogovens has not given any satisfactory answer to this reply by the Commission and I do not consider that the claim is made out.

Accordingly, the Commission has failed to evaluate the reduction of capacity proposed by Hoogovens according to consistent principles. It follows that the figure of 700 000 tonnes reduction required by the Dutch Decision in addition to that proposed by Hoogovens cannot stand. Decision No 83/398 should therefore be annulled, quite apart from any discrimination which Hoogovens alleges it has suffered in relation to undertakings in other Member States.

Hoogovens maintains in addition that the Commission was inconsistent in its method of evaluating capacity in another respect. According to Hoogovens, reversible reductions in capacity made by undertakings in other Member States were accepted by the Commission in calculating the sacrifices made in those countries. On the other hand, as has already been mentioned, the Commission followed the opposite approach with respect to Hoogovens. It is on these grounds that Hoogovens claims to have suffered discrimination.

Hoogovens claims that the Commission adopted this more generous view with respect to the Sollac works in France and the Port Talbot plant in the United Kingdom. However, the Commission stated in its rejoinder that at Sollac five furnaces with a joint capacity of 3.5 million tonnes were permanently dismantled and replaced by a single furnace with a capacity of 2.8 million tonnes. Thus the reduction in

capacity was irreversible. According to the Commission's rejoinder, the reduction in capacity at Port Talbot was also irreversible in nature. At that plant three furnaces were to be permanently dismantled and replaced by one new furnace. It was true that the new furnace had a higher capacity than the other three put together. Nevertheless, for technical reasons the production of the new mill had to be synchronized with that of the other mills; this meant that the new mill could not in fact work to full capacity. Hoogovens has failed to refute the Commission's assertions as regards either the Sollac or the Port Talbot works. Accordingly, Hoogovens' allegations with respect to these two plants have not been made out and must be dismissed.

However, its complaint of discrimination is directed primarily to the Italian steel industry. It is claimed that the Italian Decision is based on figures relating to the capacity of the Italian industry in 1980 which were higher than those drawn up at the time. The Italian industry, it is said, thereby obtained a 'present' of 1.9 million tonnes' capacity. Hoogovens seeks the total or partial annulment of the Italian Decision on these grounds.

In its written defence the Commission has openly admitted to having retroactively revised upwards the figures for 1980 both for Finsider and for the private Italian steel producers, but maintained that this revision was justified.

As regards Finsider, the revision related to that company's plant at Bagnoli near Naples. In 1979 the Commission had issued an authorization under Article 54 of the Treaty for the investment necessary for the construction of a new mill on that site. However, this was made conditional on the reduction of capacity elsewhere. Finsider apparently undertook to sacrifice over one million tonnes' production on that score. The Commission therefore states that it could not fairly require Finsider to make a second reduction in relation to the same investment.

The problem concerning the private sector appears to have been of a quite different nature. There are, it would seem, some 150 private steel undertakings in Italy, most of which are small. Many of these companies appear to have misunderstood the 2/61 questionnaire on the basis of which the Commission drew up the production of the various undertakings in the Community, and filled it in incorrectly. In these circumstances the Commission thought it right to alter the figures concerned retroactively.

The applicant contends that this course of action was unjustified in both cases. It has not, however, in my view, shown that either step taken by the Commission was unlawful or constituted discrimination against Hoogovens.

I would therefore dismiss the applicant's case in so far as it relates to the Italian Decision.

Thirdly, Hoogovens maintains that the Commission should have disregarded the aid of HFL 570 million referred to in the final indent of Article 1 of the Dutch Decision. This aid related to the termination in 1982 of the merger between Hoogovens and Hoesch of Dortmund. The merger had been created by the formation of ESTEL, which was jointly owned by Hoesch and by Koninklijke Nederlandsche Hoogovens en Staalfabrieken ('KNHS') in equal shares. Estel in turn owned the shares in Hoogovens Groep, the applicant in the present proceedings, and in a Hoesch subsidiary. In the dissolution the shares in ESTEL were bought back by each respective parent: KNHS bought the shares in Hoogovens Groep and Hoesch bought those in the Hoesch subsidiary. Henceforth ESTEL's sole activity was to settle outstanding debts. For some time prior to the ending of the merger Hoesch had been making a loss and this meant that after the

dissolution KNHS owed some HFL 570 million to Hoesch to cover losses incurred by the latter. Accordingly, the Dutch Government granted KNHS a loan of this amount, which could only be used to pay off this debt.

While accepting that the loan constituted an aid, Hoogovens maintains that, in view of its specific nature, the Commission should have disregarded it. To this the Commission replies that the debt in question was a consequence of Hoogovens' past actions, which Hoogovens now has to bear. I would accept the Commission's argument. The nature of the debts covered by the aid is somewhat unusual but, as the Commission points out, Hoogovens was in the same position with respect to this debt as any other undertaking which has to bear the consequences of its past actions.

Similarly, I would dismiss Hoogovens' suggestion that the aid should not have been taken into account because it was granted to KNHS and Hoogovens itself therefore derived no direct benefit from it. Since KNHS is purely a holding company with no activities of its own, it is clear that Hoogovens as its wholly-owned subsidiary gained at least an indirect benefit from the aid.

Next, the applicant maintains that the Commission erred in the Dutch Decision in describing the loan of HFL 570 million as an aid for continued operation within the meaning of Article 5 of Decision No 2320/81. Yet, there can be no doubt that that Decision is intended to include all aids to the steel industry of whatever nature. The opening sentence of Article 1 (1) states this in the following, absolutely categorical terms: 'All aids to the steel industry, whether specific or non-specific, financed by Member States or through State resources in any form whatsoever may be considered Community aids and therefore compatible with the orderly functioning of the common market only if they respect the general rules set out in Article 2 and satisfy the provisions of Articles 3 to 7.' Hoogovens has confined itself to a bald assertion that the loan in question does not constitute an aid for continued operation, without stating which of the other categories of aid set out in the Decision is applicable. Moreover, it is by no means clear that the aid falls within any of these other categories. Nor can any weight be attached to the applicant's submission that the loan did not form part of a restructuring programme as required by the first indent of Article 5 (1) of Decision No 2320/81. If anything, that argument is harmful to Hoogovens' case since it suggests that, should the loan be caught by Article 5, it could not be 'considered compatible with the orderly functioning of the common market'. I would therefore dismiss this argument as well.

Alternatively, Hoogovens claims that since the Commission considered the loan to be an aid to Hoogovens for continued operation, it should have attributed to Hoogovens the reduction of capacity effected by Hoesch in relation to the sum concerned. The Commission replies that this could only be done with the consent of Hoesch and the German Government. Neither in its written reply nor at the hearing has Hoogovens sought to refute the Commission's assertion. Nor has it adverted to this particular argument again. I am not satisfied by Hoogovens that this argument is valid.

Fourthly, Hoogovens claims that Article 7 of the Dutch Decision imposes sanctions which are not provided for by Decision No 2320/81. Article 7 provides that the Commission may order the suspension of aid payments if the aid has been paid in

disregard of the conditions attached to its authorization in the Dutch Decision itself; or if the six-monthly reports supplied to the Commission give reason to doubt that the undertaking concerned will return to financial viability by the end of 1985; or if the aided undertaking has breached its obligations under the Treaty, particularly those governing the system of production quotas established under Article 58 and the rules on pricing. Since Decision No 2320/81 is expressed to be based on Article 95 (1) and (2) of the Treaty, Hoogovens contends that Article 7 of the Dutch Decision infringes Article 95 (2). That provision stipulates: 'Any decision so taken or recommendation so made shall determine what penalties, if any, may be imposed'. According to Hoogovens, the only provision for penalties in Decision No 2320/81 is to be found in Article 8 (3) which relates to aids which are incompatible with that Decision and does not constitute a legal basis for Article 7 of the Dutch Decision.

The Commission claims that the suspension of payments as provided for by Article 7 of the Dutch Decision is not a penalty within the meaning of Article 95 (2). Even if it does constitute a penalty, the legal basis for it is to be found in Article 8 (1) of Decision No 2320/81 which provides in particular that: 'The Member State concerned shall put its proposed measures into effect only with the approval of and subject to any conditions laid down by the Commission'.

In my view the term 'penalty' in Article 95 of the Treaty does not merely apply to fines, as the use of the word 'sanction' in the French text shows. Nevertheless, whether or not the suspension of aid payments constitutes a penalty, it is clearly covered by Article 8 (1) of Decision No 2320/81 as the Commission argues. It is simply a consequence of the conditional nature of the authorization to grant the aid. This conclusion is not undermined by the fact that under Article 7 aids may be suspended for the breach of obligations under the Treaty arising outside Decision No 2320/81.

I therefore take the view that Hoogovens' argument on this point fails.

In the circumstances I am of the opinion that Decision No 83/398 should be annulled in Case 172/83 and that Case 226/83 should be declared inadmissible. The Commission should in my view pay Hoogovens' costs in Case 172/83. In Case 226/83 each side should bear its own costs.