OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 11 November 1997 *

1. On 7 August 1995, the Federal Republic of Germany brought an action before the Court of Justice seeking annulment of Commission Decision 95/204/EC of 31 May 1995 implementing Article 20(2) of Council Directive 89/106/EEC on construction products [1] (hereinafter 'the contested decision'), and requesting that the Commission be ordered to pay the costs.

The contested decision contained measures concerning the procedure for attesting the conformity of various product families. The applicant claims that the measures infringe Directive 89/106/EEC on construction products, [2] as amended by Directive 93/68/EEC [3] (hereinafter 'Directive 89/106'), inasmuch as the decision by the Commission specifying the procedure for attesting the conformity of products fails to take account of a number of criteria laid down in Article 13(4) of Directive 89/106. The contested decision is therefore unlawful. It is further alleged that essential procedural requirements were infringed inasmuch as the Commission failed to comply with the time-limits for communicating the preparatory documents to the addressees, the contested decision was adopted in the absence of a favourable opinion from the Standing Committee on Construction (hereinafter 'the Committee') and the statement of reasons was inadequate.

Relevant legislation

2. Directive 89/106, also referred to as the 'construction products' directive, which was adopted by the Council in December 1988 and amended in 1993, seeks to remove barriers to the free movement of these products in the Community. The preamble to the directive states that there are requirements in the Member States relating, *inter alia*, to building safety, health, energy economy and protection of the environment that have a direct influence on the nature of construction products employed and are reflected in national product standards, technical approvals and other technical specifications and provisions which, by their disparity, hinder trade within the Community. The removal of technical barriers by means of essential requirements on safety and other aspects which are important for the general

* Original language: Spanish.

1 — OJ 1995 L 129, p. 23.

2 — Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJ 1989 L 40, p. 12).

3 — Council Directive 93/68/EEC of 22 July 1993 amending Directives 87/404/EEC (simple pressure vessels), 88/378/EEC (safety of toys), *89/106/EEC (construction products)*, 89/336/EEC (electromagnetic compatibility), 89/392/EEC (machinery), 89/686/EEC (personal protective equipment), 90/384/EEC (non-automatic weighing instruments), 90/385/EEC (active implantable medicinal devices), 90/396/EEC (appliances burning gaseous fuels), 91/263/EEC (telecommunications terminal equipment), 92/42/EEC (new hot-water boilers fired with liquid or gaseous fuels) and 73/23/EEC (electrical equipment designed for use within certain voltage limits) (OJ 1993 L 220, p.1), my italics.

well-being must be achieved, without, however, reducing the existing and justified levels of protection in the Member States. [4]

Under the provisions of the directive, construction products may be placed on the market in Member States only if they are fit for their intended use, that is to say they have such characteristics that the works in which they are to be incorporated, assembled, applied or installed can, if properly designed and built, satisfy the essential requirements set out as objectives in Annex I thereto. These essential requirements — which must be satisfied during an economically reasonable working life and which generally concern foreseeable reactions — are grouped under the following six headings: mechanical resistance and stability, safety in case of fire, hygiene, health and the environment, safety in use, protection against noise, energy economy and heat retention. To take account of differences *inter alia* in levels of protection that may prevail at national level, classes of performance may be established for each essential requirement in the interpretative documents and in the technical specifications.

'Harmonised standards' refers to the technical specifications adopted by the European Committee for Standardisation (CEN) or by the European Committee for Electrotechnical Standardisation (Cenelec), or by both jointly, on the basis of a mandate from the Commission and pursuant to Directive 83/189/EEC. [5]

The conformity of a product with the harmonised standards is checked by means of a procedure for attestation of conformity laid down in Article 13(3). Under Article 13(4), it is for the Commission to specify, after consulting the Committee, the procedure to be used for a given product or family of products on the basis of certain criteria set out in that paragraph.

Article 20(2) states that the provisions necessary for establishing the procedure for attesting conformity in mandates for standards are to be adopted in accordance with paragraphs 3 and 4 thereof: the representative of the Commission must submit to the Committee a draft of the measures to be adopted and the latter is to deliver an opinion within a time-limit laid down by the Chairman according to the urgency of the matter, by the majority laid down in Article 148(2) of the EC Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The measures can be adopted if

4 — Second, third and fourth recitals in the preamble.

5 — Council Directive of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8).

they are in accordance with the opinion. If they are not, the Commission must submit a proposal to the Council, which will act by qualified majority. If the Council has not acted within three months, the Commission can adopt the proposed measures.

3. The Committee adopted its rules of procedure in October 1989. Article 2 of the rules of procedure covers both the convening of meetings and the time-limits within which the working documents for each meeting should be received by the Permanent Representations of the Member States and their representatives on the Committee. Article 6 sets out the conditions to be met for a meeting of the Committee to be validly held and Article 9 contains rules relating to voting rights.

4. The decision contested by Germany was adopted by the Commission in May 1995 in order to determine the procedure for conformity attestation for certain products and product families: thermal insulating materials, doors, windows, shutters, gates and related products, membranes and precast normal, lightweight or autoclaved aerated concrete products. After determining the procedure, the European standards committees were asked to specify the system of attestation of conformity in the relevant harmonised standards. The contested decision contains three articles and three annexes, the contents of which are examined in more detail later.

Admissibility of the application

5. As a preliminary observation, I would like to say that the application is admissible. Under the first paragraph of Article 173 of the Treaty, Member States may challenge in the courts the legality of any measure adopted by the Commission. [6] The Court has held that such an action is not affected by the positions taken by representatives of the applicant State in the body responsible for the adoption of the contested decision. [7]

Pleas

6. Germany claims that the contested decision is contrary to Directive 89/106 because essential procedural requirements were infringed and because it violates Article 13(4) of the directive. I shall examine the applicant's pleas in that order.

6 — Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 30. In that case the Court held that any Member State may, in support of an application for annulment, plead infringement by the Commission of Article 90(2) of the Treaty, even if the undertaking concerned is subject to the legislation of another Member State.

7 — Case 166/78 *Italy* v *Council* [1979] ECR 2575, paragraphs 5 and 6. In that case the Court held that the application by the Italian Republic for annulment of certain provisions of two Council regulations was admissible, regardless of the unqualified affirmative vote cast by the Italian representative when the texts were adopted by the Council and even though the Italian representative on the Management Committee for Cereals had done the same when certain implementing measures were subsequently considered.

A — *Infringement of essential procedural requirements: delay in communicating documents, absence of an opinion by the Committee and failure to state reasons*

On the delay in communicating documents

7. The applicant claims that the contested decision was adopted by the Commission in breach of the rules of procedure of the Committee, in particular paragraphs 6 and 7 of Article 2 thereof. The vote on the draft decision was on the agenda for the Committee meeting of 30 November 1994. However, not only were the documents to be discussed and voted on not received by the German Permanent Representation but the German version of the draft decision was sent by fax to the German members of the Committee on 11 November, a day late. The Commission's attention was drawn to this fact by letter of 29 November, in which the Head of the German Delegation on the Committee requested postponement of the vote for that reason. The applicant argues that those are infringements of essential procedural requirements which had a decisive influence on the attitude of the Federal Republic of Germany throughout the negotiations.

8. In its statement of defence, the Commission acknowledges the slight delay in sending the documents to the applicant, having sent them between 14.09 hrs and 14.23 hrs on 11 November. However, it argues that the English version of the documents was sent to all representatives on 10 November, that the latter had furthermore been in possession of the original draft decision since September 1994 and that the latter had been discussed at the twenty-seventh meeting of the Committee. It added that on 21 October 1994 the applicant had presented a counter-proposal drafted in German and English, which proved that it had detailed knowledge of the draft. The Commission argues that, in any event, the changes to the draft were small and of minor importance and therefore not sufficient to justify the applicant's claim that a half-day delay was capable of affecting its attitude at the time of the discussion and vote in the Committee.

With regard to the letter of 29 November 1994, the defendant argues that it was unreasonable for Germany to request postponement of a vote the day before the meeting, even though that is permitted under the Committee's rules of procedure. Moreover, if the delay really had caused the applicant such harm, it should have repeated its request at the meeting instead of approving the agenda without reservation, taking part in the discussions and voting, which led the Chairman of the Committee to believe that Germany had withdrawn its request. The defendant concludes with regard to the first plea that if there were procedural defects they were minor and in no way sufficient to justify annulment of the decision.

9. In the rejoinder, the applicant argues that the draft sent to it should have been in German and that the fact that the English text was sent to all representatives on 10 November is entirely irrelevant, especially in a case such as this where precise terminology was very important. It was only when the Commission had sent it the German text of the draft that was to be discussed that it was able to form a final opinion on the content, even though it had had relatively similar texts in that language before.

As for its request for postponement of the vote on the draft, the applicant maintains that it was made in due form as the Committee's rules of procedure do not specify a time-limit for exercising such a right. The request was repeated orally at the meeting on 30 November 1994, as evidenced by the sentence added to point 22 of the minutes of the twenty-eighth meeting when they were adopted; similarly, it did not approve the agenda either, and took part in the discussions with the other delegations because of its interest in the draft, not because it had withdrawn its request.

10. With regard to the sentence inserted into the minutes when they were adopted, the Commission states in the rejoinder that 'the fact that this sentence appears in the minutes does not necessarily mean that the German delegation ... refused to vote. In practice, subsequent additions of that kind which a delegation wishes to have included in the minutes are made by the Commission without examining their content since it would otherwise be impossible for the Commission and Member States to co-operate in a climate of trust.'

11. It has been established that the Commission did not send the Permanent Representation of Germany the text of the draft that was to be discussed and voted on, but that it did send the English version of the draft to the representatives of Member States on the Committee within the twenty-day time-limit. It has also been established that the German version was sent to the German representatives late and that the Commission did not postpone this agenda item to a later meeting, or postpone the date of the meeting in order to comply with the time-limit, despite the fact that Germany had duly requested it to do so.

The Commission's conduct was clearly in breach of the provisions of Article 2(6) and (7) of the rules of procedure of the Committee, which state that the draft provisions referred to in Article 20(2) of Directive 89/106 to be voted on must be sent to the Permanent Representatives of the Member States as well as to their representatives on the Committee not later than twenty days before the meeting is due to take place. If that time-limit is not met, the item on the

agenda must be postponed to a later meeting unless, at the request of a representative of a Member State, the meeting is postponed to a date within the time-limit.

12. It remains to be established whether those breaches of the Committee's rules of procedure are sufficiently serious to be regarded as infringements of essential procedural requirements within the meaning of the second paragraph of Article 173 of the Treaty, justifying annulment of the contested decision. To do so, it will be necessary to examine the purpose of the rules alleged to have been infringed and the possible impact of the infringement on the substance of the decision. [8]

13. Comparing the provisions in paragraphs 5 and 6 of Article 2 of the Committee's rules of procedure, I note that paragraph 5 imposes a time-limit of twenty days for the preparatory documents for a meeting and any other working documents to be sent to the Member States' representatives or alternates, with a copy to the Permanent Representation. In urgent cases, the Chairman may shorten this time-limit to a minimum of ten clear working days. However, the procedure laid down in paragraph 6 stipulates that draft provisions to be voted on by the Committee must be sent to the Permanent Representations of the Member States as well as to their representatives on the Committee not later than twenty days before the meeting is due to take place, no exceptions being permitted.

14. In my view, the difference between the two procedures is justified, as they fulfil different purposes. Paragraph 5 lays down the rules for sending preparatory documents for a meeting and working documents in general, while paragraph 6 establishes a stricter procedure for cases where the Committee has to vote on the adoption of certain provisions. Paragraph 7 sets out the consequences of failure to comply with the procedure in paragraph 6.

Paragraph 6 of Article 2 of the Committee's rules of procedure thus ensures that when a draft provision is to be discussed with a view to issuing an opinion the representations of Member States on the Committee have sufficient time to study it. If this were not so, there would be a risk — especially in instances involving standards such as those in the present case, which are highly complex and may affect different national sectors of administration — that the members of the Committee would not be able to assemble all the information required to vote in full knowledge of the facts. The fact that paragraph 7 provides for two solutions where the twenty-day time-limit is not met (the item may be placed on the agenda of a meeting at a later date or, if requested by a representative of a Member State, the date of the meeting may be postponed) confirms my opinion as to the importance of compliance with the time-limit in shaping the intentions of the Member States.

8 — Case T-123/95 *B.* v *Parliament* [1997] ECR-SC II-697, paragraph 32.

15. I would also state that this is not simply a case of there being a formal distinction between notices convening meetings in general and those convening meetings where there will be a vote on the adoption of certain provisions. There is another important difference, namely that where provisions such as those in issue, whose purpose is to define the conformity attestation procedure, are to be adopted the procedure that the Commission must follow to approve the draft depends on whether the Committee has delivered a favourable opinion.

16. When assessing the impact that this breach of procedure might have had on the content of the contested decision, I believe that it is irrelevant that the Commission sent the English version of the draft to the representatives of Germany on the Commission within the twenty-day time-limit. Article 3 of Council Regulation No 1 [9] requires that documents which the institutions send to a Member State be drafted in the language of that State. Compliance with that obligation assumes special importance in this case because under Article 19(2) of Directive 89/106 the two representatives of each Member State may be accompanied by experts. While the Commission may assume that officials from the Permanent Representation of Germany have good knowledge of English, I think that it would be going too far to presume the same for the two representatives of that country on the Committee, or indeed for the experts.

17. I also consider that it is irrelevant in this context that, as alleged by the Commission, the applicant had taken part in previous meetings during which the original draft decision had been discussed and that the changes made to the draft as a result of those discussions were small and of minor importance. In fact, the number and, above all, the extent of the changes could only be appreciated by the representatives on the Committee and by the experts once they had received the German version of the text to be discussed and voted on on 30 November 1994 and, as I said, this was received late. Even though the delay was minor, I believe that the applicant's claim that it was capable of affecting its attitude at the time of the discussion and vote in the Committee is well founded.

18. The applicant is also right in claiming that its request to have the meeting postponed was made in due form and that the Commission ought to have granted it. The rules of procedure do not specify a time-limit within which Member States must exercise this option. Moreover, the fact that Germany requested postponement on the day before the meeting is, in my view, sufficient indication that the delay in sending the text in German was clearly at that time making it difficult to prepare adequately for the meeting on the date it was due to take place. It is therefore unnecessary to ascertain whether

9 — Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59).

Germany orally repeated its request for postponement of the meeting or vote on 30 November 1994, especially since the only way to do so would be to consult the minutes of the meeting, in respect of which the Commission has stated that the sentence confirming this was added at Germany's request and that in practice subsequent additions of that kind which a delegation wishes to have included in the minutes are made without examining their content.

19. For the reasons I have given, I consider that the Commission's breach of the procedure laid down in Article 2(6) and (7) of the rules of procedure of the Committee must be considered to be an infringement of an essential procedural requirement within the meaning of the second paragraph of Article 173 of the Treaty.

On the absence of an opinion by the Committee

20. Germany claims that the contested decision was adopted in breach of Article 20(2) to (4) of Directive 89/106 inasmuch as the vote on the draft at the meeting on 30 November did not have the majority required by the third sentence of Article 20(3), which states that the opinion must be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. As no opinion was delivered, the Commission ought to have immediately submitted a proposal to the Council. Contrary to what is stated in the minutes, the Committee did not adopt any decision on the draft in question at the meeting on 30 November 1994. Some delegations did not give it their final approval and expressed reservations concerning the possibility of contracting authorities imposing a stricter procedure. The Netherlands Delegation expressed a reservation concerning the inclusion in the mandates of requirements relating to environmental protection. The Commission read out two declarations on those points and the Chairman gave the delegations time to review those issues before giving a final response. Point 41 of the minutes of the meeting states that the positive votes were to be confirmed within fourteen days of receipt of the text of the two declarations. Since the vote at the meeting did not have the required majority and the Committee's rules of procedure do not specify a written procedure for making decisions, the applicant considers that the contested decision was not validly adopted.

21. The view of the Commission on this subject, based on the minutes of the meeting, is that the required majority did vote in favour of adopting the draft and that, while it is true that four delegations expressed a 'reservation pending examination', this has no effect on the agreement that they expressed on 30 November 1994. It explains that, as some delegations had voiced their

doubts on that day as to the relationship between Directive 89/106, the directive on public contracts [10] and the directive on dangerous substances, [11] in order to provide an immediate response the Commission, represented by Directorate-General III, read out two declarations, with the proviso that the final texts still had to be discussed with Directorate-General XV and with the Legal Service before they were notified to Member States. Six States approved the draft unreservedly and a further four also voted for it, but subject to the reservation that they would confirm their vote after receiving the final version of the declarations, which they did.

The Commission further states that although a written procedure for adopting deliberations is not expressly provided for in the Committee's rules of procedure they do not prohibit it, and such a procedure, which is now part of the range of procedures used by the Commission [12] and by the Council, [13] has been systematically incorporated into the rules of procedure adopted by recently-created committees in accordance with the 'Comitology Decision'. [14] In any case, those present at the meeting agreed to proceed thus; the applicant's disagreement was only expressed in the letters of 22 December 1994 and 19 January 1995 and, while it is true that there is a reference to that effect in point 41 of the minutes, the sentence was apparently added at the time of adoption of the minutes without Germany having made any reference to it or request in that respect on the day of the meeting.

Finally, the Commission argues that even if no decision was adopted on 30 November 1994 or under the subsequent written procedure the failure was remedied on 29 May 1995 by the adoption of the minutes, to which were annexed the final versions of the Commission's declarations, and that it was irrelevant in that respect that the adoption of the contested decision was not mentioned in the agenda for the twenty-ninth meeting because it was the definitive record of the result of a vote that had commenced on 30 November, when that item was on the agenda.

22. I agree with the applicant that when the draft decision was put to the vote on 30 November 1994, it did not achieve the majority required under Article 20(3) of Directive 89/106. In fact, according to the

10 — I assume that it is referring to Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

11 — I assume that it is referring to Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ, English Special Edition 1967, p. 234), as amended at various times and adapted over the years in line with technical progress.

12 — Article 10 of the Rules of Procedure of the Commission of 17 February 1993 (OJ 1993 L 230, p. 15) permits the Commission to make decisions by written procedure, provided that certain conditions are met. The text of the fourth paragraph of that article was amended by the Commission Decision of 8 March 1995 amending the rules of procedure (OJ 1995 L 97, p. 82).

13 — Article 8 of the Rules of Procedure of the Council of 6 December 1993 (OJ 1993 L 304, p. 1) lays down the circumstances and conditions in which the Council can take decisions by a written vote.

14 — Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197, p. 33).

minutes — and none of the parties contests this — the Chairman recorded the following result regarding the delegations' views on giving an opinion on the draft decision:

'I. Yes, and would later give opinion on the content of the two declarations: I, E, DK, P, UK, L.

II. Yes, subject to a reservation on the examination of the two declarations to be made by the Commission: F, GR, IRL, NL.

III. No: D, B (with certain nuances).

For the new Member States, AU was towards group III with SWE and FIN in group I.'

23. The Commission argues that the voting was valid, primarily because it was simply a case of confirming the positive vote *a posteriori*, and alternatively because the procedure followed was partially written, a method not prohibited by the Committee's rules of procedure and often used by the Council and Commission.

24. In November 1994, the majority required to adopt the decision was 54 votes. According to my calculations, there were 15 votes against and 38 for. There were also 23 votes in favour subject to the outcome of examination of the two declarations to be made by the Commission. It is clear that whether there was a majority in favour of adopting the draft decision and, consequently, whether the draft was in fact approved depends on how those latter votes are to be counted.

25. Unlike the Commission, I do not think that it is possible to consider as final the favourable vote by the four Member States who reserved the right to confirm their vote after having examined the two declarations read out by the Commission at the meeting, the final content of which still had to be discussed with Directorate-General XV and with the Legal Service. This was not simply a case of making the vote conditional upon receiving the text of the declarations; the reservation clearly referred to examining the content, which would very probably have to be amended. It was therefore possible that at least one of these delegations would no longer be willing to confirm its vote once the final text had been examined. On that basis, it is my view that the required majority of votes in favour of adopting the draft was not achieved at the meeting called for that purpose on 30 November 1994.

26. Should the procedure followed after the meeting, described by the Commission as 'partially written', nevertheless be regarded

as valid because the four Member States ultimately confirmed their initial vote?

27. I believe that the reply must still be no, for various reasons that I will explain below.

First, the provisions governing voting within the Committee seem to indicate that the vote should be held at the meeting, and not after or outside it. Article 6 of the Committee's rules of procedure, which deals with the quorum required at meetings, states that at least seven Member States must be represented. [15] However, in the case of opinions, it refers to Article 9, under which the quorum is to be calculated using the weighting laid down in Article 148 of the Treaty; only the *representatives or alternates* designated by Member States *are entitled to vote* and a *Member State may, where necessary, represent only one other Member State*. In my view, all those provisions point to the interpretation that I propose. [16]

Second, the Committee's rules of procedure do not provide for voting by the so-called written procedure. Admittedly, the rules of procedure of the Council and Commission provide for a procedure of this type for the adoption of agreements by those collegiate bodies, and the procedure laid down in Article 20(3) and (4) of the directive is the same as Procedure III, variant a), of the Comitology Decision. However, neither the Comitology Decision adopted in 1987 nor Directive 89/106 mentions the written procedure as a method of adopting agreements by the committees set up under those texts, and the Committee's rules of procedure, adopted in 1989, do not refer to any other internal rules which might also be applicable, specifying a procedure of this type.

28. I also consider it irrelevant whether or not the delegations agreed to follow such a procedure on this occasion. As the Committee's rules of procedure were adopted at the time by the Member States, I consider that they are all bound by them to the same degree and that no exceptions to those provisions can be made in the absence of a formal amendment thereto. That interpretation is based on the one given by the Court in respect of the Council's obligation to comply with its own rules of procedure, in a case concerning the possible infringement of an essential procedural requirement where a directive was adopted by the written procedure despite the opposition of two States to that method, and the Council's rules of procedure required the consent of all members before such a procedure could be used. The Court held that 'the Council is ... under a duty to comply with the procedural rule which it itself laid down in Article 6(1) of its Rules of Procedure. It cannot depart from

15 — This is laid down in the version of the rules of procedure in force in November 1994.

16 — My italics.

that rule, even on the basis of a larger majority than is laid down for the adoption or amendment of the Rules of Procedure, unless it formally amends those rules'. [17]

29. That ruling removes the need for me to examine whether all the delegations agreed to proceed in such a manner or whether the German Delegation expressed its opposition on the actual day of the meeting; there is in fact a difference of opinion between the parties on this point that it is impossible to settle by referring to the minutes of the meeting, the obstacle being again the Commission's statement that the relevant sentence was added to the minutes at the request of Germany and that it did not correspond to the facts.

30. Finally, I will examine the Commission's argument that even if the decision was not adopted on 30 November 1994 or under a written procedure the unanimous adoption on 29 May 1995 of the minutes of the meeting held on 30 November of the previous year must have dispelled any uncertainty about the vote on the draft.

I must say that I consider this argument less likely to succeed than the previous ones, given the low credibility that can be attached to the minutes of these meetings in the light of the Commission's explanations about their drafting and approval. In any event, there are two reasons for rejecting the Commission's argument on this point. First, if the opinion was not adopted on 30 November 1994 and it was not possible to use the written procedure, the vote ought to have taken place at the meeting where it appeared on the agenda, which was not the case at the meeting held on 29 May 1995; second, if the Commission claims that the final adoption of the draft occurred on the latter date, then it should state how and when the three Member States that acceded in the meantime voted.

31. For those reasons, I consider that the plea of absence of an opinion by the Committee is also well founded.

On the failure to state reasons

32. The applicant claims that the contested decision is void for breach of the duty to state reasons laid down in Article 190 of the Treaty. The applicant considers that despite being an addressee of the decision and having participated in its preparation, it is unable to ascertain how the Commission took into consideration each of the essential characteristics of the products. Its claim is based on the following grounds: first, as the contested decision was the first to be adopted in its field, no comparisons with previous decisions can be made to clarify the

17 — Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 48.

reasons for the decision; second, as a statement of reasons for the decision the Commission merely reproduced the text of Directive 89/106, which was not sufficient to meet the requirements laid down by Article 190 of the Treaty; third, the Commission did not explain to Member States why it had not included some of the essential requirements listed in Annex I of Directive 89/106. Finally, the Commission also failed to explain why the initial type-testing of the product had to be limited to checking certain properties.

33. The Commission contends that, although brief, the reasoning is adequate given the nature of the measure and the context in which it was adopted, and that any attempt to provide a more detailed statement of reasons would have been swamped by technical details concerning products and product families. The essential element of the decision lay in the choice between the two procedures for attesting the conformity of a product and was contained in Articles 1 and 2 of the decision, combined with Annexes 1 and 2, while Article 3 played only a secondary role. The Commission also states that the Member States were closely involved in the drafting of the measure and were aware of the considerations on which it was based, which was a further justification for the brevity of the reasons.

34. Article 190 of the Treaty provides that the regulations, directives and decisions of the Council and Commission must state the reasons on which they are based and refer to any proposals or opinions that were required to be obtained under the Treaty. However, it does not indicate the scope or limits of the duty to state reasons; these are to be found in the decisions of the Court.

35. It is settled case-law that 'the statement of reasons required by Article 190 of the Treaty must show clearly and unequivocally the reasoning of the institution which enacted the measure so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review. It is not necessary, however, for details of all relevant factual and legal aspects to be given, in so far as the question whether the statement of the grounds for a decision meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question'. [18] The Court has also observed that 'the statement of the reasons on which regulations are based is not required to specify the often very numerous and complex matters of fact or of law dealt with in the regulations, provided that the latter fall within the general scheme of the body of measures of which they form part. Consequently, if the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution.' [19]

18 — Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16, Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081, paragraphs 48 and 49, and Case C-285/94 *Italy* v *Commission* [1997] ECR I-3519, paragraph 48.

19 — Case 250/84 *Eridania* [1986] ECR 117, paragraph 38.

36. The fact that the applicant Member State was involved in drawing up the contested decision has sometimes been considered by the Court to be sufficient reason to reject the plea of failure to state reasons. This can be illustrated by various judgments in which the Court held that '... it is not necessary ... for details of all relevant factual and legal aspects to be given, in so far as the question whether the statement of the grounds for a decision meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question ... This is *a fortiori* the case where the Member States have been closely associated with the process of drafting the contested measure and are thus aware of the reasons underlying that measure'. [20]

The opposing viewpoint can be illustrated by an example drawn from a 1983 judgment in which the Court held that '... by imposing upon the Commission the obligation to state reasons for its decisions, Article 190 is not taking mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights, to the Court of exercising its power of review, and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty. Thus it is not sufficient that the Member States, as addressees of the decision, are aware of the reasons as a result of their participation in the preliminary procedure and that the applicant, the person directly and individually concerned, is able to deduce these reasons by comparing the decision in question with similar earlier decisions. It is further necessary that the applicant should be enabled in practice to defend its rights and the Court should be able effectively to exercise its power of review on the basis of the statement of reasons.' [21]

37. It is true, as the Commission concedes, that the statement of reasons for the contested decision is brief. It is therefore necessary to see whether, having regard to the context and to the legal rules governing the matter in question, the reasons clearly and unequivocally reflect the reasoning of the Commission, which enacted the contested decision, and enable the persons concerned to know the justification for the measure and the Court to exercise its power of review.

38. Two procedures for attestation of conformity are laid down in Article 13(3) of Directive 89/106. In one, the manufacturer ensures that its products conform to the relevant technical specifications, while in the other an approved certification body is also involved. The procedure to be applied is chosen by the Commission on the basis of certain criteria listed in Article 13(4), which include the importance of the part played by the product with respect to the essential requirements, in particular those relating to health and safety. The essential requirements

20 — Case C-54/91 *Germany* v *Commission* [1993] ECR I-3399, paragraphs 11 and 12, and Case C-478/93, cited in footnote 18, paragraphs 49 and 50.

21 — Case 294/81 *Control Data Belgium* v *Commission* [1983] ECR 911, paragraphs 14 and 15.

are described in Annex I. The Commission also specifies the procedure for attestation of conformity of construction products in the mandates that it gives to the European standardisation bodies.

39. The contested decision is in fact the first to have been adopted by the Commission for the purpose of specifying the conformity attestation procedure applicable to certain families of construction products. [22] Leaving aside the preamble, which simply cites the texts of certain articles of Directive 89/106, the decision contains three articles and three annexes. Article 1 states that the attestation of conformity of the products set out in Annex 1 is by means of a procedure whereby the manufacturer alone is responsible for a factory production control system ensuring that the product is in conformity with the relevant technical specifications, whilst Article 2 states that the attestation of conformity of the products set out in Annex 2 is by means of a procedure whereby, in addition to a factory production control system operated by the manufacturer, an approved certification body is involved in assessment and surveillance of production control or of the product itself. Annexes 1 and 2 essentially contain lists of the products concerned.

Article 3 states that the conformity attestation procedure set out in Annex 3 is given in the mandates for standards. Annex 3 defines a total of eleven product families, devoting two sections to each. In the first section, CEN and Cenelec are requested to specify, for each product and use indicated, the system of attestation of conformity that is assigned to it in the relevant harmonised standards. The second section contains two paragraphs. The first (2.1) lays down certain conditions to be applied by CEN in the specifications of the conformity attestation system. The second (2.2) contains instructions addressed to the approved body whereby that body must, in the case of certain systems, restrict itself in the initial type-testing of the product to checking certain characteristics, these being different for each product family.

40. I believe that in the light of the context and the relevant legal rules the statement of reasons in the preamble to the contested

22 — It is far from being the last: since then, the Commission has published to date no less than 18 other decisions, all concerning the procedure for attesting the conformity of construction products pursuant to Article 20(2) of Directive 89/106. These are Decisions 95/467/EC on chimney stacks, gypsum products and structural bearings (OJ 1995 L 268, p. 29); 96/577/EC on fixed fire-fighting systems (OJ 1996 L 254, p. 44); 96/578/EC on sanitary appliances (OJ 1996 L 254, p. 49); 96/579/EC on circulation fixtures (OJ 1996 L 254, p. 52); 96/580/EC on curtain walling (OJ 1996 L 254, p. 56); 96/581/EC on geotextiles (OJ 1996 L 254, p. 59); 96/582/EC on structural sealant glazing systems and metal anchors for concrete (OJ 1996 L 254, p. 62); 97/161/EC on metal anchors for use in concrete for fixing lightweight systems (OJ 1997 L 62, p. 41); 97/176/EC on structural timber products (OJ 1997 L 73, p. 19); 97/177/EC on metal injection anchors for use in masonry (OJ 1997 L 73, p. 24); 97/462/EC on wood-based panels (OJ 1997 L 198, p. 27); 97/463/EC on plastic anchors for use in concrete and masonry (OJ 1997 L 198, p. 31); 97/464/EC on waste water engineering products (OJ 1997 L 198, p. 33); 97/555/EC on cements, building limes and other hydraulic binders (OJ 1997 L 229, p. 9); 97/556/EC on external thermal insulation composite systems/kits with rendering (OJ 1997 L 229, p. 14); 97/597/EC on reinforcing and prestressing steel for concrete (OJ 1997 L 240, p. 4); 97/638/EC on fasteners for structural timber (OJ 1997 L 268, p. 36); and 97/740/EC on masonry and related products (OJ 1997 L 299, p. 42).

decision may be regarded as adequate in respect of both its provisions and Annexes 1, 2 and 3, points 1 and 2.1. However, in the case of point 2.2 of Annex 3, the contested decision gives no reasons and no indication at all why the Commission decided that, when performing the initial type-testing of the product, which is a method of checking compliance common to all certification systems, the approved body must restrict itself to checking certain characteristics of the product only, to the exclusion of others.

41. I am quite ready to agree that it would be unreasonable to require specific reasons for each of the decisions of a technical nature adopted in the contested measure. However, I consider that the absence of even the slightest indication of the reasons which led the Commission to impose this restriction prevents those concerned from knowing the justification for the measure and leaves the Court unable to exercise its power of review.

42. For those reasons I consider that the plea of failure to state reasons is also well founded.

43. The fact that the contested decision is flawed by these substantive procedural defects is sufficient to justify its annulment. However, for the sake of completeness, and in case the Court does not endorse my assessment, I will now examine the plea of breach of Community law.

B — *Infringement of Article 13(4) of Directive 89/106*

44. The applicant argues that when the Commission chooses the procedure for attestation of conformity it must also indicate the characteristics of the product that must be checked during the initial type-testing carried out by an approved body. When the procedure to be followed is specified, the relevant essential requirements must be set out in the Commission's decision, according to their importance for the procedure. The contested decision contains only an incomplete list of the relevant characteristics of the product, however. The Commission did not specify what other procedure would be used to examine the essential requirements excluded from the decision, as well as the important characteristics of the product. To sum up, the allegations by the German Government against the Commission are, first, that when specifying the initial type-testing conditions, only some aspects of health protection were included in the decision, whereas they appear in Article 13(4)(a) of Directive 89/106, and, second, that the essential requirement concerning health and protection of the environment was not taken into account at all for some product families and only selectively and incompletely for others.

45. The Commission argues that the applicant has misunderstood the relationship between the mandates for standards and the procedures for attestation of conformity, as

well as the factors to be taken into account when implementing these procedures. The mandates that the Commission has to give to European standards bodies specify the characteristics of the product for which harmonised standards are to be developed in order to ensure that it is fit for its intended purpose, such fitness having to be measured against the yardstick of the essential requirements. In contrast, the procedures for attestation of conformity focus on the importance of the part played by the product in relation to the essential requirements and hence the choice between various control procedures. The defendant claims that it would be impossible in practice to subject each of a product's properties to a complicated control procedure, especially since paragraph 2 of Article 13(4) of Directive 89/106 requires the principle of proportionality to be applied, by stating that in each case the least onerous procedure consistent with safety is to be chosen.

46. In the reply, the applicant argues that the principle of proportionality only applies to the choice of procedure, but not to the content, that is to say, the characteristics to be checked and the implementation of the procedures as such.

47. The Commission reiterated in the rejoinder that it had taken into account all the essential requirements as well as the importance of the part played by the product with respect to meeting those requirements. The proof of this was that, as the products were thermal insulating materials, the least dangerous materials were subject to the least onerous conformity attestation procedure while the materials that could pose a fire hazard were subject to the procedure involving additional checks by a certification body. As for the principle of proportionality, the Commission argues that it applies throughout Community law, and consequently also applies as regards the organisation of the control procedure.

48. Under Article 13(4) of Directive 89/106, it is for the Commission to choose the procedure for attesting the conformity of a product, in other words to decide whether the manufacturer alone will ensure that products conform to the relevant technical specifications or whether an approved certification body should also be involved. This it does after consulting the Committee and on the basis of the following criteria: the importance of the part played by the product with respect to the essential requirements, in particular those relating to health and safety; the nature of the product; the effect of the variability of the product's characteristics on its serviceability; the susceptibility to defects in the product manufacture. On all these points, the Commission must take account of the provisions set out in Annex III.

49. In the contested decision, the Commission drew up two lists of products and product families in fact (Annexes 1 and 2), indicating which of the aforementioned procedures was to be used for the attestation of conformity. In Annex 3 it then requests

CEN/Cenelec to specify, for the product and intended use in each case, the system of attestation of conformity in the relevant harmonised standards.

50. To better illustrate the way in which the contested decision is structured, I will take the example of thermal insulating materials. Those that belong to class A, B or C, [23] for which the reaction to fire performance [24] *is not susceptible to change during the production process*, [25] as well as those that belong to class D, E or F, appear in the list in Annex 1, meaning that, for the attestation of conformity, the manufacturer alone is responsible for the factory production control system ensuring that the product conforms to the technical specifications. In contrast, products in class A, B or C, for which the reaction to fire performance *is susceptible to change during the production process*, appear in Annex 2; consequently, the attestation of conformity of these products will, in addition to a factory production control system operated by the manufacturer, involve an approved certification body to assist in assessment and surveillance of production control or of the product itself.

51. In point 1 of Annex 3 of the contested decision, CEN and/or Cenelec are requested to specify the system of attestation of conformity in the relevant harmonised standards for all factory-made and *in situ* formed thermal insulating products, whatever their intended use. The thermal insulating materials mentioned in Annex 2, those for which the reaction to fire performance may change during the production process, remain subject to conformity attestation system No 1, which is the most complex and which corresponds to the system laid down in Annex III, point 2(i), of Directive 89/106, without the further testing of samples taken at the factory. In practice, this means that the attestation of conformity of the product in this case is specified by an approved body on the following basis:

(a) Tasks for the manufacturer:

(1) factory production control;

(2) and further testing of samples taken at the factory by the manufacturer in accordance with a prescribed test plan.

23 — Commission Decision 94/611/EEC of 9 September 1994 (OJ 1994 L 241, p. 25) sets out in the annex thereto the following classes of reaction to fire performance for building products: A, no contribution to fire; B, very limited contribution to fire; C, limited contribution to fire; D, acceptable contribution to fire; E, acceptable contribution to fire, and F, no performance determined.

24 — Both Annex 1 and Annex 2 state in a footnote that the reaction to fire is assessed with regard to classes and levels fixed by Commission Decision 94/611/EEC, cited in the foregoing footnote, and according to the terms expressed in Annex 3.

25 — My italics.

(b) Tasks for the approved body:

(3) initial type-testing of the product;

(4) initial inspection of factory and of factory production control;

(5) continuous surveillance, assessment and approval of factory production control.

52. For the purposes of specifying the conformity attestation system, the thermal insulating products appearing in Annex 1 are in turn divided into two classes according to their reaction to fire.

Thus, those that belong to class A, B or C are subject to conformity attestation system No 3, which is the one laid down in Annex III, point 2(ii), second possibility, in other words the declaration of conformity of the product by the manufacturer is made on the basis of:

(1) initial type-testing of the product by an approved laboratory,

(2) and factory production control,

whilst the products in classes D, E and F are subject to conformity attestation system No 4, which is the least complex and corresponds to the one in Annex III, point 2(ii), third possibility. In this system, the declaration of conformity of the product by the manufacturer is made on the basis of:

(1) initial type-testing by the manufacturer;

(2) and factory production control.

53. In point 2.1, the Commission lays down the conditions to be applied by CEN in specifying the system of attestation of conformity: the specification for the system should be such that it can be implemented even where performance does not need to be determined for a certain characteristic because at least one Member State has no legal requirement at all for such characteristics. In those cases, the checking of such a characteristic must not be imposed on the manufacturer if he does not wish to declare the performance of the product in that respect.

54. In point 2.2, it is stated that for products coming under system 1 and system 3 the task

of the approved body as regards the initial type-testing of the product is limited to the following characteristics:

Euroclasses characteristics for reaction to fire, as set out in Decision 94/611. [26]

55. In its application, the German Government provides a list for thermal insulating materials setting out, on the basis of data appearing in the document Construct 94/125, the other essential requirements that appear in Annex I of Directive 89/106 and the characteristics of the product which it considers are necessary but which have not been taken into account by the Commission for the initial type-testing, namely:

(a) regarding the essential requirement 'energy economy and heat retention': temperature resistance; water vapour permeability; compressive strength; resistance to bending and corrodent emission level;

(b) regarding the essential requirement 'protection against noise': sound absorption index and soundproofing index;

(c) regarding the essential requirement 'hygiene, health and the environment': water permeability and dangerous substances emission level.

56. I partly agree with the Commission when it argues that a clear distinction should be made between, on the one hand, the choice of the procedure for attestation of conformity of a product, for which account should be taken of the criteria laid down in Article 13(4) of the Directive — and this in my view is what it did, by classifying the products and product families in Annexes 1 and 2 of the contested decision — and, on the other hand, something as different as the request to European standards bodies to specify the systems of attestation of conformity in the relevant harmonised standards for certain products and uses, as the Commission did in Annex 3 of the contested decision.

57. To return to my example of thermal insulating products, I see that whether the attestation of conformity is to be issued by the manufacturer alone or with the involvement of an approved certification body depends in the case of products in classes A, B and C [27] on whether the reaction to fire may change during the production process; in the first case, the products appear in Annex 2; in the second case, they are included in Annex 1; in contrast, classes D, E

26 — Cited in footnote 23.

27 — Corresponding respectively to the product classes 'no contribution to fire', 'very limited contribution to fire' and 'limited contribution to fire'.

and F [28] only appear in Annex 1, in other words the attestation of conformity is the sole responsibility of the manufacturer.

Moreover, although class A, B and C products, whose reaction to fire is not liable to vary during production, and class D, E and F products all appear in Annex 1, the request by the Commission to the European standards bodies to specify the systems of attestation of conformity requires that the first group be subject to system 3, involving more stringent testing of products than for products in the second group, to which system 4 is applied.

58. These findings lead me to infer that, both for the family of products that I have given as an example and for the other product families subject to the provisions of the contested decision, the Commission has specified the procedure for attestation of conformity, in the provisions of Articles 1 and 2, combined with Annexes 1 and 2, taking account of the importance of the part played by the product with respect to the essential requirements, in particular those relating to health and safety, the nature of the product, the effect of the variability of the product's characteristics on its serviceability and the susceptibility to defects in the product manufacture.

28 — Corresponding respectively to products with an 'acceptable contribution to fire', 'acceptable reaction to fire' and 'no performance determined'.

59. However, as regards Annex 3, I have to agree with the German Government when it claims that there are other characteristics of the products that have not been taken into account for the initial type-testing, and that it is not possible to discover from the text of the decision, nor to deduce from the context in which it was adopted, why the Commission decided to limit the checking by the approved body to certain characteristics, to the exclusion of other properties of the product.

60. In view of the fact that the initial type-testing of the product constitutes a method of control of conformity under Annex III of Directive 89/106 for all the conformity attestation systems, I consider that once the Commission had determined the procedure for attestation of conformity for these product families — at which time I consider it took into account the criteria laid down in Article 13(4) — it could not, without infringing that article, abandon some of those criteria when it came to lay down the requirements to be met by the CEN when specifying the systems of conformity attestation, by stipulating that, during the initial type-testing, the approved body had to restrict itself to checking only some of the product characteristics.

61. This being so, and without there being any need in my view to consider the relevance of the principle of proportionality, I consider that the plea of breach of Article 13(4) is, in respect of Annex 3 of the contested decision, also well founded.

Conclusion

On those grounds, I propose that the Court of Justice:

(1) annul Commission Decision 95/204/EC of 31 May 1995 implementing Article 20(2) of Council Directive 89/106/EEC on construction products;

(2) order the Commission to pay the costs, pursuant to Article 69(2), first paragraph, of the Rules of Procedure, since the applicant has succeeded in its submissions.