OPINION OF ADVOCATE GENERAL LENZ

delivered on 14 March 1995 *

A — Facts ..... I - 1654

B — Opinion ..... I - 1657

I. Admissibility ..... I - 1657

1. Admissibility of the application in so far as it is directed against the Commission's 1992 decision ..... I - 1657

(a) Impact of the first extension of the Community framework on the legal effects of the decision ..... I - 1658

(b) Legal effects of the 1992 decision on the basis of the presumption that Community acts are legally valid ..... I - 1661

(c) Application for a declaration that the decision is non-existent ..... I - 1663

(d) Legal effects of the decision as a result of making a choice between several possible decisions ..... I - 1663

2. Admissibility of the application in so far as it is directed against the first extension of the Community framework ..... I - 1664

(a) Article 184 of the EEC Treaty ..... I - 1665

(b) Non-existence of the decision ..... I - 1665

(c) Observations with regard to the application ..... I - 1665

II. Substance ..... I - 1666

1. Lack of competence on the part of the Commission ..... I - 1666

2. Infringement of essential procedural requirements ..... I - 1668

(a) Article 93(1) of the EEC Treaty ..... I - 1668

(b) Article 190 of the EEC Treaty ..... I - 1669

(c) First paragraph of Article 12 of the Commission's Rules of Procedure ... I - 1670

Costs ..... I - 1671

C — Conclusion ..... I - 1672

* Original language: German.

A — Facts

1. On 22 December 1988, the Commission adopted a Community framework on State aid to the motor vehicle industry. It provided for the prior notification of all significant aid, irrespective of its aim, and for the provision of annual reports on all aid payments. By a letter dated 31 December 1988, the Commission informed the Spanish Minister for Foreign Affairs of this and asked him to signify acceptance of the framework within one month. The Community framework was also published in the Official Journal. [1] In section 1, 'Necessity and scope of the measure', the Commission expressly stated that it had decided to take 'appropriate measures on the basis of Article 93(1) of the EEC Treaty'. In addition, it stated that the measures had been examined by the Member States' representatives at a meeting.

2. It was planned that the Community framework would enter into force on 1 January 1989 (section 2.5). As the Commission subsequently stated in footnote 2 to the extension of the Community framework, [2] its entry into force was delayed initially for six months. Spain and the Federal Republic of Germany did not approve the measure until January and May 1990 respectively.

3. Section 2.5 also stipulated the time for which the Community framework was to be valid. It provides that the measures are to be valid for two years, after which 'the Commission shall ... review the utility and the scope of the framework'.

4. In late 1990, after a lapse of two years, the Commission carried out the review provided for and notified the Member States of the outcome — once again in a letter: in view of the positive experience with the Community framework, it had come to the conclusion that it should be extended.

1 — 89/C 123/03 (OJ 1989 C 123, p. 3).

2 — 91/C 81/05 (OJ 1991 C 81, p. 4).

5. That initial extension of the Community framework was published in the Official Journal. [3] In that notice, too, the Commission states once again that the Community framework was introduced on the basis of Article 93(1) of the EEC Treaty.

6. Section 4 sets out the outcome of the review of the Community framework. Namely, 'the Commission believes it necessary to renew the framework on State aid to the motor vehicle industry in its present form'. [4] Otherwise, reference is made to only one amendment: the application of the Community framework was to be extended to cover the area of West Berlin and the former German Democratic Republic, which had since become part of the Community. This first extension also provides for a review after two years: 'After two years the framework shall be reviewed by the Commission. If modifications appear necessary (or the possible repeal of the framework) these shall be decided upon by the Commission following consultation with the Member States' (section 5).

7. With an eye to that further review, the Commission asked the Member States to attend a meeting in December 1992. In preparation for the meeting, a working paper was distributed to serve as the basis for discussion. The paper gave a brief account of the history of the Community framework and sketched out the situation in the motor vehicle industry in 1992. The paper also discussed, *inter alia*, whether the Community framework should be extended or repealed, the definition of the motor vehicle industry extended and the assessment criteria reviewed in order further to reinforce legal certainty.

8. At the meeting, the Director General of the Directorate General for Competition explained, in response to a question from the Spanish delegation, that the Community framework would not expire at the end of 1992 as the first extension has itself effected an extension for an indeterminate period. The Spanish delegation expressed doubts about this.

9. In addition, the Commission observed that the meeting did not constitute a consultation of the Member States pursuant to Article 93(1) of the EEC Treaty. Such a consultation would be carried out only if it should prove appropriate to modify the Community framework.

10. In February 1993, the Director General of the Directorate General for Competition made it known in a letter that in December 1992 the Commission had decided not to modify the Community framework. Again, it pointed out that the framework would not be extended either, as it had already been

3 — See footnote 2.

4 — The words 'in its present form' are missing from the French and the Spanish versions.

extended for an indeterminate period by the first extension.

11. That decision of the Commission was also published in the Official Journal. [5] In this case, too, the Commission states that the Community framework was adopted on the basis of Article 93(1) of the EEC Treaty. Later in the document, the following is expressly stated: 'In December 1990, the Commission decided to renew the framework without setting a time-limit on its application ...'. [6] The Commission reported as the conclusion of the meeting held to examine the Community framework that the majority of Member States had expressed their satisfaction with the Community framework and that they had decided that the framework would 'not be modified'. As far as the future was concerned, that framework would 'remain valid until a next review to be organized by the Commission'.

12. On 5 April 1993, Spain brought an action in the Court of Justice in which it claimed that the Court should:

(i) Declare non-existent or, if appropriate, annul the Commission's decision of 23 December 1992, notified by letter from the Director General for Competition of 3 February 1993, determining not to modify the Community framework on State aid to the motor vehicle industry and to extend its validity until the next review is carried out by the Commission and, in so far as that decision is based thereon, the modification of that framework effected by Decision 91/C 81/05 [7]; [8]

(ii) Order the Commission to pay the costs.

13. On 12 May 1993, the Commission entered an objection of inadmissibility and claimed that the Court should:

(i) Declare the action for annulment brought by the Kingdom of Spain inadmissible;

(ii) Order Spain to pay the costs.

The Court reserved its decision on this objection until the judgment on the merits.

5 — 93/C 36/06 (OJ 1993 C 36, p. 17).

6 — Translator's note: the German version reads: 'Ende 1990 beschloß die Kommission, den Gemeinschaftsrahmen praktisch unverändert zu verlängern. Bei dieser Verlängerung wurde für die Anwendung des Rahmens keine Frist gesetzt, ...'. [At the end of 1990, the Commission decided to extend the Community framework virtually unmodified. On the occasion of the extension, no time-limit was set for its application, ...] .

7 — OJ 1991 C 81, p. 4.

8 — This translation diverges from that published in the Official Journal (OJ 1993 C 139, p. 11).

B — Opinion

I. *Admissibility*

14. The defendant claims that the application is inadmissible.

1. Admissibility of the application in so far as it is directed against the Commission's 1992 decision

15. In so far as the Commission's 1992 decision extending the Community framework for an indeterminate period is contested, the defendant argues that that decision constitutes an act which merely confirmed a preceding decision. The Community framework had already been extended by the first extension for an indeterminate time and remained valid without a new Commission decision being necessary. The 1992 decision simply confirmed this existing legal situation. To that extent, it had no legal effects and cannot be contested under Article 173 of the EEC Treaty.

16. As the Court decided in its judgment of 31 March 1971 in *Commission* v *Council*, [9] all acts of the institutions which are intended to have legal effects are open to review by the Court. It is questionable whether the Commission's 1992 decision fulfils those requirements, given that, according to the defendant, legal effects were produced only by the first extension of the Community framework.

17. It is further questionable whether the applicant has a legitimate interest in bringing the action. If the 1992 decision were genuinely to have constituted only a confirmation of the first extension of the Community framework, it would not have altered the applicant's position. In other words, even if the 1992 decision were annulled, the applicant's legal position would not be altered.

18. It should therefore first be examined whether the 1992 decision produced legal effects and if so what effects. This turns, on the one hand, on what effects the first extension had on the period of validity of the Community framework. The applicant would like that question to be deferred until the examination of the substance, since, in its view, the 1992 decision had legal effects in any event. In its opinion, the Commission opted for one of several possible decisions open to it and consequently took a decision and produced legal effects. Yet that opinion must first be examined. Since the admissibil-

9 — Judgment of 31 March 1971 in Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraphs 38 to 42.

ity of the application turns on the outcome of that examination, consideration of this question cannot be deferred until the examination of the substance.

(a) Impact of the first extension of the Community framework on the legal effects of the decision

19. In its argument, the defendant relies primarily on the wording of the first extension in comparison with the original version of the Community framework:

Whilst section 2.5 of the original version of the Community framework provides that '[t]he appropriate measures shall be valid for two years', the fifth section of the first extension states only that '[a]fter two years the framework shall be reviewed by the Commission'. Provision is made for a Commission decision following consultation of the Member States only 'if modifications appear necessary'.

The defendant interprets this as meaning that, if no need for any modification of the Community framework emerged from its review, the Commission would not, and would not be required, to do anything. However, this would make sense only if the Community framework remained in existence without further Commission measures. Otherwise, it would be compelled to do something in any event.

20. If regard is had only to the wording of the fifth section of the first extension, there is something to be said in favour of the Community framework having unlimited duration.

21. It is not possible to concur with Spain's view to the effect that the original version of the Community framework put the Commission under a duty to fix a new time limit. There is nothing in the wording to which to attach such an interpretation. It is merely stated that the Commission is to review the scope of the Community framework. This does not preclude a review also of its scope *ratione temporis*. There is no reference to having to fix a new time limit after this review has been carried out.

22. The applicant further submits that the wording of the first extension is not as unambiguous as the defendant maintains it is. In particular, its application *ratione temporis* is not unambiguous. This can be seen from the fact that before modifications — including, in the applicant's view, temporal modifications — are effected, the Member States must be consulted. The applicant maintains that in any event it was necessary for the Commission to pronounce on the extension of the framework's temporal validity. In the absence of such a pronouncement or decision, the Community framework could not remain valid.

23. The applicant's doubts about the clarity of the wording of the first extension of the Community framework are justified. The fifth section of that extension cannot be regarded in isolation, but must be read in conjunction with the preceding section, which reads as follows:

'In view of these considerations the Commission believes it necessary to renew the framework on State aid to the motor vehicle industry *in its present form.* [10] *The only modification* [11] which the Commission has decided extends the prior notification obligation for the Federal Republic of Germany to Berlin (West) and the territory of the former GDR.' [12]

This can be interpreted only as meaning that the wording of the Community framework has not been changed. The measures remain in force and hence also the provision that they are to be valid for two years, unless it is taken that that provision was replaced by the provisions of the first extension. However, this would have required further particulars relating to the modification or repeal of that provision.

24. In any event, it appears from the wording of section 2.5 of the original Community framework that a new instrument had to be adopted no later than two years after its entry into force. However, if the new instrument contains no express provision with regard to the duration of its validity or to a repeal of the old two-year time limit, but in contrast expressly provides for the framework to continue to apply in its present form or mentions as the only modification the extension of its geographical scope, the two-year time limit remains in existence.

25. The Member States may possibly have decided differently at the meeting at which the extension was prepared. But that would not alter the continuance of the two-year time limit, since what counts is the objective interpretation of the wording. [13]

26. The defendant further argues that the first extension nevertheless conferred an indeterminate duration on the Community framework, on the ground that it was accepted by all the Member States — including Spain. Moreover, as provided in the Community framework, Spain continued to notify proposed aid and to send in annual reports.

10 — My emphasis. These words are missing from the French and Spanish versions of the first extension.

11 — My emphasis.

12 — See footnote 2.

13 — Judgment in Case C-313/90 *CIRFS* [1993] ECR I-1125.

27. Spain does not contest this, but argues that it accepted the first extension as a two-year extension and not as an extension for an unlimited time. The Member States did not have to reckon on such a radical change. It is at odds with legal certainty and the Member States' legitimate expectations. In any event, the fact that Spain continued to notify proposed aid cannot be regarded as signifying its agreement to an extension for more than two years.

28. Spain refers in this connection to my Opinion in Case C-313/90 *CIRFS*. [14] That case was concerned with whether the scope of a 'discipline' on aid laid down by the Commission could be limited by a Commission decision. The decision was notified to all the Member States, none of which contested it. In my view, that silence on the part of the Member States in the *CIRFS* case could not be taken to signify their consent, since they were not aware of the significance of their silence; in other words, the discipline on aid could not be altered by a unilateral act on the part of the Commission.

29. In the instant case, the Member States did not just remain silent, but accepted the extension of the Community framework. However, they were not aware of the significance which the Commission attaches to their conduct. Since it appears neither from the wording of the extension or from the Commission's letter of 31 December 1990 that the Community framework was to be extended for an indeterminate period, the Member States could have obtained no explanation of this. Consequently, as far as any extension of the Community framework for an indeterminate time was concerned, the Member States were silent. That silence is even less apt to be construed as consent than the Member States' silence in the *CIRFS* case, since in that case, even though they were aware of all the circumstances, the Member States were given no explanation. Consequently, the Member States' agreement in this case cannot be construed as agreement to an extension for an indeterminate period.

30. It remains to be considered whether the Commission may have been entitled to extend the Community framework for an indeterminate period by a unilateral act. In order to do this, it will be necessary to investigate the nature of the Community framework somewhat more precisely.

31. In the original version of the Community framework, the Commission states that it has introduced 'a framework ... in the form of appropriate measures on the basis of Article 93(1) of the EEC Treaty'. Accordingly, the provisions of the Community framework constitute 'appropriate measures' pursuant to Article 93(1) of the EEC Treaty. Such measures are initially only proposed by the

14 — Opinion in Case C-313/90 *CIRFS* [1993] ECR I-1148, section 130.

Commission. They are to be regarded as recommendations within the meaning of Article 189 of the EEC Treaty and are not binding. [15] Such measures do not become binding on the Member States until they have approved them. [16]

32. Moreover, the parties do not dispute the need for the approval of the Member States. The Commission itself refers several times to the fact that the Community framework did not become valid until it was approved by the Member States.

33. The position cannot be otherwise as regards the first extension of the Community framework, since the extension conferred validity on it for a further period (two years, as has been shown above). As far as its validity *ratione temporis* is concerned, the instrument first extending the Community framework does not differ at all from the first instrument. Indeed, nothing else was intended, since according to the wording of the first extension the intention was to extend the Community framework in its form at that time. Accordingly, the first extension had to be accepted by the Member States in order to become binding. This is borne out, *inter alia*, by the fact that the text again refers to Article 93(1) of the EEC Treaty, according to which the Member States must approve the measures proposed by the Commission. Moreover, it is expressly stated in the fourth section of the first extension of the Community framework that the Commission 'believe [d] it necessary to renew the framework'. What is involved is a proposal and not an instruction to effect the extension. Consequently, the first extension of the Community framework could become binding only as a result of the agreement of the Member States. The Commission alone could not, and did not intend to, act bindingly.

34. As a result, it is clear that the first extension prolonged the Community framework for only two years. Consequently, the second extension could not have been — as the defendant maintains — simply a confirmation of the first extension, since its validity expired after two years. Consequently, the second extension could very well have been intended to have legal effects, since it states that the Community framework is to remain valid until the next review, which conflicts with the actual legal position, as it has been determined above.

(b) Legal effects of the 1992 decision on the basis of the presumption that Community acts are legally valid

35. In the applicant's view, by its 1992 decision the Commission extended the

15 — Von Wallenberg in Grabitz/Hilf: *Kommentar zur Europäischen Union*, Vol. 1 (as at September 1994), Article 93, section 8.

16 — See my Opinion in Case C-313/90 *CIRFS*, cited in footnote 14, section 30.

Community framework for a indeterminate time by a unilateral legal act — and hence unlawfully. Whether such significance can be attributed to that decision is questionable having regard to that which the Commission actually wished to attain by means of its decision. It did not in fact intend to act with binding effect, since in its view the Community framework has had unlimited validity *ratione temporis* since the first extension. It sought by its decision to confirm once again that existing legal situation. This is possible by means of a declarative decision which re-confirms the binding nature of the existing legal position but itself effects no legal change. [17]

36. On grounds of legal certainty and protection of legitimate expectations, the view of the members of the institution when a legal act was adopted cannot be relied upon in order to assess that act. Instead, what is determinative is whether there is an objectively determinable intention to take a decision. [18]

37. It must now be considered whether, on an objective view, the second extension of the Community framework, as published in the Official Journal, can be regarded as exhibiting an intention on the part of the Commission to furnish the Community framework with validity for an indeterminate time. In the first section, it is stated that the Community framework had already obtained unlimited duration as a result of the first extension. It could be concluded from this that the decision at issue was not intended to extend the Community framework, precisely because it was unnecessary to do so. By concluding by stating that it had decided not to modify the Community framework, at the same time it expressed the intention to allow the Community framework to remain in force unmodified. Although in the Commission's view this had no legal effects, it does, however, create the impression that the Community framework continues to remain valid. There is nothing in the wording of the second extension to suggest that the Commission is mistaken in considering that the Community framework had already attained unlimited validity as a result of the first extension. Since acts of the Community institutions are in principle presumed to be lawful, they accordingly produce legal effects even if they are tainted by irregularities. [19] What that means in this case is that the Member States are still under a duty to effect the prior notification of proposed aid to the Commission and to draw up an annual report on all aid granted. Accordingly, the legal act of the Commission under consideration produces the same legal effects as an express extension of the Community framework for an indeterminate time. It must therefore be treated in an action from annulment as such a decision effecting an extension, since for reasons of legal certainty and the protection of legitimate expectations it must be possible for Member States to eliminate an act of the Commission whose substance contradicts the true legal position.

17 — Grabitz, in Grabitz (*loc. cit.*), Article 189, section 65.
18 — See footnote 16.
19 — Judgment in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2629, paragraph 48, at I-2646.

38. Moreover, the Commission does not expressly challenge the view that the legal act under consideration may be regarded as a decision effecting an extension. However, in its contention, the Member States still had to approve the extension.

39. As has been shown above, the decision of December 1992 extending the Community framework may be challenged in judicial review proceedings under Article 173 of the EEC Treaty.

(c) Application for a declaration that the decision is non-existent

40. The applicant argues that the Commission's decision should be regarded as being non-existent. It maintains that this is contingent on the act's being tainted by especially grave and obvious irregularities. If this is so, it cannot be tolerated by the Community legal order and cannot have any legal effects — not even provisional ones. [20] It such a case, it is permissible to regard the act as non-existent. This can also be asserted in an action. [21] This is what Spain has done in claiming that the decision should be declared non-existent or, if appropriate, void.

41. Such a grave, obvious irregularity must be recognizable from reading the act. [22] No such irregularity is apparent in the decision of December 1992 under consideration. There is no indication in the wording that the first extension did not extend the Community framework for an indefinite period. Consequently, the decision in question is not tainted by obvious, grave irregularities and hence is not non-existent. Non-existence of legal acts must be confined to quite exceptional cases.

(d) Legal effects of the decision as a result of making a choice between several possible decisions

42. Next, it must be considered whether, as the applicant maintains, the 1992 decision has legal effects in any event, because it embodies a choice made between several possible measures. The Commission had the

20 — Judgment in Case C-137/92 P *Commission* v *BASF and Others*, cited above, paragraph 49 at I-2647.

21 — Judgment in Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1036, paragraph 10.

22 — *Consorzio Cooperative d'Abruzzo* v *Commission*, cited in footnote 21, paragraph 10 et seq.

possibility of abolishing the Community framework, modifying it, extended it for an indefinite period or setting a new time-limit. *Inter alia* because it decided to leave the Community framework in being unmodified, it made a choice between different possibilities and hence produced legal effects. [23]

43. In the present case, the Commission did not genuinely have a choice between several possibilities. First, it only had the task of reviewing whether it was necessary to modify the Community framework. It was to notify the outcome of that review. However, that notification was not intended to have any legal effects. The legal effects were not to occur unless it was in fact decided to modify the Community framework. For instance, if, after completing its review, the Commission had reached the conclusion that it was necessary to modify the Community framework and it had made this known, that would not have altered the existing legal situation in any way. Even notification from the Commission to the effect that it had decided to modify the Community framework would not have entailed any alteration of the legal position, because it would not yet have made it known how it intended to modify the framework. According to the provisions of the first extension, it would have first had to consult the Member States. The applicant's view that the decision of December 1992 had legal effects in any event, on the ground that it constituted a choice between various possible measures, cannot therefore be upheld.

44. Since, however, the decision did produce legal effects as a result of the presumption that Community acts are valid (as has been shown above), it is open to challenge under Article 173 of the EEC Treaty. The application is therefore admissible in so far the applicant claims that the Court should declare the 1992 Commission decision void.

2. Admissibility of the application in so far as it is directed against the first extension of the Community framework

45. The Commission maintains that, as far as the complaint is directed against the first decision extending the Community framework, the application is inadmissible on the ground that it is time-barred under the third paragraph of Article 173 of the EEC Treaty.

23 — Judgment in Case C-312/90 *Cenemesa* [1992] ECR I-4117.

(a) Article 184 of the EEC Treaty

46. The applicant argues that the application is still admissible after the expiry of the period prescribed for bringing an action. Since this case turns on the validity of the first extension, its nullity can be asserted under Article 184.

47. Article 184 mentions that possibility only for regulations. Its significance lies in the fact that a party which is not entitled under Article 173 to bring court proceedings against a regulation is protected against the application of an unlawful regulation. [24] Not only regulations may be challenged under Article 184, but also acts of Community institutions which have the same effects as a regulation. [25] Since Article 184 may never be used to circumvent the limitation period laid down in Article 173, it merely enables a party to take proceedings against acts which would otherwise not be open to challenge under Article 173.

48. However, that is not so in this case, as the applicant did have the possibility of bringing proceedings against the first extension of the Community framework.

49. It was even requested to agree to the first extension and, by refusing its consent, could have prevented the decision from becoming binding. There is therefore no need to contest the extension after the expiry of the limitation period. [26] Consequently, the complaint brought against the first decision extending the framework is inadmissible for being out of time.

(b) Non-existence of the decision

50. Again, the applicant argues that the act is non-existent. However, since the first extension does not exhibit any grave, obvious irregularity, it cannot be taken that the act is non-existent.

(c) Observations with regard to the application

51. Lastly, there remains the applicant's argument to the effect that it wishes to chal-

24 — Judgment in Joined Cases 31 and 33/62 *Wöhrmann* v *Commission* [1962] ECR 501, at 507.

25 — Grabitz, in Grabitz (*loc. cit.*), Article 184, section 15.

26 — Grabitz, in Grabitz (*loc. cit.*), Article 184, section 15 et seq.

lenge the first extension only if it authorized the Commission to extend the Community framework indefinitely by a unilateral act. However, this does not emerge from the application. There it is simply stated that the first extension is contested in so far as it constitutes the basis for the 1992 decision. The first extension is, however, the basis for the 1992 decision. To that extent, it cannot be inferred from the application that it is sought to contest the 1990 decision only in certain circumstances.

52. Consequently, it can be held as a result of the appraisal of admissibility that the application brought by the Kingdom of Spain is inadmissible in so far as it seeks to have the Commission's 1992 decision declared non-existent and is therefore directed against the first extension of the Community framework.

It is admissible only in so far as seeks to have the Commission's 1992 decision declared void.

II. *Substance*

53. My consideration of the substance will be confined to the application in so far as it is directed against the 1992 decision and claims that the Court should declare it void.

54. As has already been examined in discussing the question of admissibility, the decision of December 1992 is to be regarded as an extension for an indeterminate period. Whether the Commission was competent to take such a decision by means of a unilateral act is questionable. In any event, the Member States did not consent thereto. Since the decision was intended only to constitute a confirmation of the first extension, no provision was made for confirmation by the Member States. In other words, the extension can be valid only if it was possible for the Commission to effectuate the extension without the Member States' consent. A possible legal form for this is a decision under Article 155 of the EEC Treaty.

1. Lack of competence on the part of the Commission

55. The applicant submits that the Commission was not entitled to extend the Community framework for an unlimited time on the basis of its decision alone. Consequently, it raises one of the grounds for bringing an action mentioned in Article 173 of the EEC Treaty.

56. As has already been explained in the course of the examination of the question of admissibility, the Member States' consent was necessary both in order to introduce the Community framework and for the purposes of its first extension. In this connection, it

should be pointed out once again that the original version of the Community framework expressly mentions Article 93(1) of the EEC Treaty and that it appears from the wording of the first extension that the Commission merely sought to put forward a proposal which had to be accepted by the Member States. I shall now consider whether this is also true of the 1992 decision.

57. In any event, the wording does not preclude this measure's being categorized as a decision within the meaning of Article 155 of the EEC Treaty. In the last section, the Commission states that it has 'decided' not to make any modification. There is no longer any question of the Member States' having been consulted or given their agreement prior to the decision. The basis for the act was the first extension of the Community framework. There it is provided that the Commission is first to review the framework. If no modification is necessary, there is no need for the Member States' consent. The Commission is to examine whether modifications are needed. If it should be of the opinion that a modification is necessary, it will consult the Member States before taking any decision. Otherwise, it is entitled to decide that no modification will be made. But in the 1992 decision it decided much more. It extended the Community framework for an indefinite period. It is questionable whether the Commission was entitled to take such a far-reaching decision. In order to clarify this, it is necessary once again to consider the wording of the first extension of the Community framework, which was accepted by the Member States, and hence also by Spain. It contains the following words:

'If modifications appear necessary ... these shall be decided upon by the Commission following consultation with the Member States'.

58. The term 'modifications' is to be construed as including temporal changes and, *a fortiori*, the extension of a Community framework from one which was originally of limited duration to one which is valid for an indeterminate time.

59. The Commission submits that it is possible that the decision as to the duration of the Community framework was delegated to it. However, such a decision does not become effective until the Member States have consented thereto.

60. The question is whether the consultation of the Member States provided for in the text is to be categorized as a prior enquiry or as a requirement for prior consent.

61. The wording is not clear. The Member States are to be consulted. That may mean that they only are to be given the opportunity of making known their views. Yet what is involved is a Community framework pursuant to Article 93(1) of the EEC Treaty. It might follow from this that the agreement of the Member States is necessary for all measures which are decided upon in connection with the Community framework. The practical procedure, too, has not altered in comparison with the original version. It is the Commission which reviews the Community framework. If it considers that a modification is necessary, it is to consult the Member States. The precondition for this is, once again, that the Commission should propose a specific modification. That procedure is no different from the procedure provided for in the original version of the Community framework. Although no reference is made to agreement on the part of the Member States, such agreement is nevertheless necessary. It must be mentioned above all that the requirement for the Member States' consent is undisputed as between the parties. It must be concluded from all this that the 1992 decision could also become binding only by obtaining the consent of the Member States.

62. Such consent could have been given, however, during the prior meeting of the Member States. This cannot be assumed, since both parties were of the opinion that subsequent consent was necessary. Consequently, it is certain that none of the pronouncements made at the prior meeting were intended to constitute consent to the extension of the Community framework and cannot be assessed as such. Moreover, at that meeting Spain already had expressed doubts about the continuing validity of the Community framework. As has already been shown in the course of considering the question of admissibility, the Member States should have intimated at that prior meeting that the Community framework was to be extended for an indefinite period.

63. It follows that there was no consent on the part of the Member States. As a result, the Commission was not entitled to effect that extension for an indefinite period.

2. Infringement of essential procedural requirements

(a) Article 93(1) of the EEC Treaty

64. Consequently, as the applicant maintains, the procedure laid down in Article 93(1) of the EEC Treaty was not complied with as required. However, contrary to that which Spain maintains, the act was not made non-existent as a result. As has already been considered with regard to the question of admissibility, the act was not tainted by any

obvious, grave irregularity. Nevertheless, a further ground for bringing proceedings under Article 173, namely infringement of essential procedural requirements, is present.

(b) Article 190 of the EEC Treaty

65. In addition, the applicant claims that Article 190 has been infringed. The basis for the decision of December 1992 is not apparent. The decision itself mentions Article 93(1) of the EEC Treaty and the first extension of the Community framework as bases. In the applicant's opinion, Article 93(1) of the EEC Treaty cannot constitute its basis, since the necessary preconditions therefore are not satisfied.

66. What is important, however, is that the decision mentions a legal basis. Consequently, the decision 'states the reasons on which it is based' [27] and satisfies the requirements of Article 190 as far as mentioning the legal basis is concerned. If this is based on an erroneous legal view on the part of the Commission, it does not have any adverse effect in this respect. [28]

27 — Article 190 of the EEC Treaty.

28 — Grabitz, in Grabitz (*loc. cit.*), Article 190, section 6; judgment in Case 2/56 *Geitling* v *High Authority* [1957 and 1958] ECR 1, at 15 and 16.

67. The applicant further submits that Article 190 of the EEC Treaty has been infringed in so far as the Commission decision *does not adequately state the reasons on which it is based.*

68. The Commission argues that a statement of reasons is not necessary, since the decision in question is a non-binding act, requiring the Member States' consent. Despite this, it further submits that the letter by which Spain was informed about the Commission decision, together with the working paper distributed in preparation for the meeting in December 1992, constitutes a sufficient statement of reasons.

69. In this context, regard must also be had to the fact that the Commission decision was published in the Official Journal.

70. The text of the decision published in the Official Journal sets out quite briefly the background to the Community framework and enumerates the provisions of the first extension. Mention is also made of the meeting held in December 1992 to consider the Community framework and of the outcome of that meeting. It also is made clear that the Commission decision was the result of that examination. In the Court's view, the requirement to state reasons is satisfied if the

principal issues of law and fact are set out. [29] The reasoning which led to the adoption of the act must be able to be logically reconstructed.

71. That is so in this case. The principal issues which led to the Commission's decision are set out. It can be seen that the basis for the decision was the meeting of the Member States in order to examine the Community framework in the course of which the Member States expressed their satisfaction with it.

72. It should further be noted that representatives of Spain took part in the meeting of December 1992. It may therefore be assumed that Spain was aware of the arguments and reasons in favour of the Commission decision. In addition, a working paper containing comprehensive information was distributed in preparation for that meeting. There is therefore no doubt that Spain was made cognizant of all the circumstances. Indeed, the fact that Spain was informed in the stage leading up to the decision diminishes the extent of the Commission's duty to state reasons. [30]

29 — Judgment in Case 24/62 *Germany* v *Commission* (case on wine for distillation) [1963] ECR 63, at 69.

30 — Schmidt, in Von der Groeben/Thiesing/Ehlermann: *Kommentar zum EWG-Vertrag*, 4th edition 1991, Vol. 4, Article 190, section 12, and judgment in Case 13/72 *Netherlands* v *Commission* [1973] ECR 27, paragraphs 11 and 12.

(c) First paragraph of Article 12 of the Commission's Rules of Procedure

73. What the applicant is alleging above all in its complaint relating to substantive defects is that the Commission decision was not notified in the requisite form. It was notified of it only by a letter from the Commission. The letter alone, however, did not enable it to determine whether the minimum formal requirements had been fulfilled and hence it argues that the act is legally non-existent. In particular, it was not able to tell whether the requirements of Article 12 of the Commission's Rules of Procedure had been fulfilled. Only the date and the content of the decision are apparent from the letter; it cannot be determined whether the content of the decision corresponds to that which the Commission decided.

74. In response, the Commission argues that the applicant's submissions are not sufficient and not adequately substantiated in order for it to argue that the Commission has infringed Article 12 of its Rules of Procedure.

75. The first paragraph of Article 12 of the Commission's Rules of Procedure, which the applicant invokes, provides for the authentication of acts. In the version applicable at the

material time, it provides that formal decisions adopted by the Commission at a meeting or by written procedure must be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary. That provision constitutes an essential procedural requirement within the meaning of Article 173 of the EEC Treaty. [31] The authentication of acts provided for therein is designed to enable it to be verified in the event of a dispute that the texts notified or published correspond precisely to the text actually adopted by the Commission. In this case, the applicant is not alleging that no authentication was effected, but that the Commission's letter in which it notified its decision provided no information as to whether authentication was carried out and the content of the letter corresponded to the Commission decision or as to whether there was any possibility of checking this (by means of authentication). However, such a possibility also does not normally exist. The decision is served on the addressee, who must assume that the text corresponds to that adopted by the Commission. It cannot be ascertained from the text notified whether that is indeed the case.

76. In the instant case, there is no evidence whatsoever from the Commission's letter or from the decision published in the Official Journal to suggest that the published text does not correspond to the text adopted by the Commission. Yet the applicant must adduce such evidence in order to be able to allege that there has been an infringement of Article 12. Such an infringement was considered by the Court — and found to exist — in a case in which it was clear merely from the typographical appearance of text served that passages had been added after the event. [32]

77. There are no such indicia in this case and indeed the applicant has not made any claim to that effect. Consequently, it has not made out a sufficient case for an infringement of essential procedural requirements within the meaning of Article 173 of the EEC Treaty.

78. Since, however, it has been shown that other causes of action under Article 173 are present, the Commission's decision is unlawful. It should therefore be declared void pursuant to Article 174 of the EEC Treaty.

Costs

Since the applicant has been successful in the major part of its submissions, the defendant should be ordered to pay the costs under the first subparagraph of Article 69(2) of the Rules of Procedure.

31 — Judgment in Case C-137/92 P *Commission* v *BASF and Others*, cited in footnote 19, paragraphs 74 and 76.

32 — Judgment in Case C-137/92 P *Commission* v *BASF and Others*, cited in footnote 19, paragraphs 57 and 77 et seq.

C — Conclusion

79. I propose that the Court should:

(1) Annul the Commission's decision of December 1992 extending the Community framework on State aid to the motor vehicle industry;

(2) Dismiss the remainder of the application as inadmissible;

(3) Order the Commission to pay the costs.