OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 3 October 1990 *

Mr President,
Members of the Court,

1. In this action, brought pursuant to the second paragraph of Article 33 of the ECSC Treaty, the Wirtschaftsvereinigung Eisen- und Stahlindustrie (Iron and Steel Industry Association) requests the Court to annul Commission Decision SG(88) D/6179 of 26 May 1988, whereby the Commission refused to adopt the necessary measures to prevent distortion of competition alleged by the applicant to have arisen from the grant to the British Steel Corporation of more State aid than was necessary to restore it to viability. In the alternative, pursuant to the third paragraph of Article 35 of the ECSC Treaty the applicant seeks the annulment of the Commission's implied decision of rejection, should the Court hold that the letter of 26 May 1988 does not constitute a decision within the meaning of Article 33 of the Treaty.

2. To avoid having to return to the question, let me say right away that I consider that the letter in point is indeed a decision, inasmuch as it clearly adopts a position on the request submitted by the applicant and has 'definitive legal effects' [1] in respect of it. At the end of that letter it is stated specifically: 'The Commission does not believe that those factors are such as to warrant a demand for reimbursement of part of the aid granted.' It cannot, therefore, be regarded as anything other than a definitive refusal to adopt the measures requested by the applicant. In its written observations, moreover, the Commission regarded the letter in question as constituting a decision. There is consequently no need for me to examine the alternative claim.

3. The Commission has raised several preliminary objections of admissibility.

4. Although the way in which the application is formulated [2] suggests that only the grant of *unnecessary aid* is being challenged, the observations contained therein show that the applicant's intention is also to contest the grant of *aid which was not authorized* by the Commission. [3] In its pleadings concerning the objection of inadmissibility the Commission was therefore right to distinguish between the submission based on the grant of unnecessary aid and the submission based on the grant of unauthorized aid.

5. The Commission raises three objections to the first submission. It considers that in its challenge to the decision of 26 May 1988 the applicant is in fact attempting to question the validity of Decision 83/399/ECSC of 29 June 1983, [4] an action against which was dismissed by the Court, [5] or of the decisions of 10 February and 20 December 1984 and 24 December 1985

* Original language: French.

1 — On this point see the judgment in Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 11.

2 — Page 2 of the application.

3 — Pages 6 and 26 of the application.

4 — Commission Decision concerning the aids that the United Kingdom Government proposes to grant to the steel industry (OJ 1983 L 227, p. 36).

5 — Judgment in Case 214/83 *Federal Republic of Germany* v *Commission* [1985] ECR 3053.

releasing aid, which either are not measures against which an action may be brought or have in the meantime become immune from challenge. Finally, the Commission contends that it would be legally impossible to withdraw authorization to grant aid five years after the measure was adopted.

6. With regard to the second submission, the Commission points out that the applicant's letter of 30 March 1988 asking it to take action referred only to unnecessary aid. The reply to that request, that is to say the decision against which this action is directed, thus dealt with that complaint alone. The applicant first raised the question of unauthorized aid in a second letter of 20 May 1988. The reply to that further request was set out by the Commission in a letter of 25 July 1988. Since it does not refer to that second decision, says the Commission, the application is inadmissible in so far as it contests the grant of unauthorized aid.

7. It is clear that the first difficulty lies in determining the real subject-matter of the action. Formally, of course, the action is for the annulment of the Commission's decision of 26 May 1988, but it does not really explain what the applicant required of the Commission in its letter of 30 March 1988. The applicant has stated that it does not seek to impugn the 'framework decision', Decision 83/399, and, having also disclaimed any intention of challenging the decisions releasing aid, it has submitted a claim only in the alternative that the two later decisions releasing aid[6] should be annulled. The principal claim is therefore that the Commission should 'rectify' *ex post facto* the excessively favourable effects for the British Steel Corporation of the grant of aid. However the claim may be formulated, it would seem that the applicant is in fact claiming that those decisions releasing aid should be *withdrawn*, at least partially. Once the Commission has authorized the payment of aid to a company, any decision requiring the repayment of aid, even partial, can be analysed legally only as a *withdrawal*, that is to say, a reopening of the decisions releasing aid. The Commission is therefore right, in putting forward a third objection that withdrawal of those decisions is legally impossible, to present that argument as an objection of inadmissibility and not as a defence on the merits. It seems to me that we are faced with a situation very similar to that in which an applicant attempts, by way of an action for failure to act, to revive the time-limit for bringing an action for annulment. In its judgment in *Meroni*[7] the Court analysed a claim by steel undertakings that the High Authority should eliminate alleged discrimination between undertakings as seeking in fact the revocation of previous exemption decisions. The Court held the application to be inadmissible inasmuch as it sought the annulment of decisions with regard to which the time-limit for bringing an action had elapsed.

8. In my view the intention of the application is consequently not to call in question the framework decision but solely to challenge the decisions releasing aid. Even if the Court does not agree with that analysis, it is in any case certain that the annulment of Decision 83/399 can no longer be sought, having regard not only to the Court's judgment of 3 October 1985,[8] which can be pleaded against the applicant since it intervened in that case, but also to the expiry of the time-limit of one month laid down in the third paragraph of Article 33 of the ECSC Treaty, that decision

6 — Observations on the objection of admissibility, p. 10.

7 — Joined Cases 21/61 to 26/61 [1962] ECR 73.

8 — Case 214/83, cited above in footnote 5.

having been published in the *Official Journal of the European Communities* of 19 August 1983.

9. The issue is therefore essentially whether the application is inadmissible inasmuch as it seeks to reopen the decisions releasing aid of 10 February and 20 December 1984 and 24 December 1985. The Commission, as I have said, considers that those decisions either are not measures against which an action may be brought or have become immune from challenge.

10. The first argument is not convincing. Let us recall the general structure of the ECSC aid system. Pursuant to Decision No 2320/81/ECSC,[9] known as the Second Aids Code, Decision 83/399 states that certain aid which the United Kingdom Government planned to grant to the British Steel Corporation is, subject to certain conditions, compatible with the common market. The amount of the planned aid is set out in the decision. The essential conditions relate to reduction in production capacity and the need to ensure that the viability of the undertaking is rapidly restored. According to Article 3 of the decision, 'none of the proposed aid shall be paid unless the Commission is satisfied that the undertaking concerned can return to financial viability by the end of 1985.' Similarly, Article 4 makes payment of aid subject to the Commission's being satisfied that reductions in production capacity have been achieved and that the undertaking fulfils its obligations in respect of production quotas. Finally, according to Article 5, aid for investment may be granted only if the Commission has delivered a favourable opinion pursuant to Article 54 of the ECSC Treaty.

9 — Commission Decision of 7 August 1981 establishing Community rules for aids to the steel industry (OJ 1981 L 228, p. 14).

11. The purpose of the decisions releasing aid was thus essentially to verify whether the conditions attached to the grant of the planned aid were satisfied and whether the United Kingdom Government could therefore make the relevant payments.

12. According to the case-law of the Court[10] — developed, it is true, with regard to Article 173 of the EEC Treaty but also applied to the ECSC Treaty[11] — in order to ascertain whether the measures challenged constitute measures which may be the subject of an action for annulment, it is necessary to examine whether those measures have:

'legal effects . . . which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position'.[12]

Thus in the *Krupp* judgment[13] the Court examined whether the statement of reasons given in the Commission's communications fixing production quotas were insufficient, thus accepting by implication that an action might lie against such communications.

13. The decisions releasing aid, inasmuch as they acknowledge that the recipient undertaking has carried out the measures on which the grant of aid was conditional and authorize payment of aid are therefore, in my view, 'legally binding'. Moreover, inasmuch as competing firms are thus regarded as qualifying for the planned aid,

10 — Judgments in Joined Cases 8/66 to 11/66 *Cimenteries CBR* v *Commission* [1967] ECR 75 and in Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42.

11 — See, for instance, the judgments in Joined Cases 23/63, 24/63 and 52/63 *Usines Henricot* v *High Authority* [1963] ECR 217 and in Case 54/65 *Forges de Châtillon* v *High Authority* [1966] ECR 185.

12 — Judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9.

13 — Judgment in Joined Cases 275/80 and 24/81 [1981] ECR 2489, paragraphs 6 to 13.

that aid affects the applicant's interests. There is a distinct change in the applicant's legal situation since, if no action for annulment is brought, it will no longer be able to challenge an irreversible situation whereby the financial situation of its competitors is improved.

14. To take the contrary view that only the framework decision, Decision 83/399, may be the subject of an action for annulment would mean that the Commission's assessment with regard to whether the undertaking had carried out the measures — reduction of production capacity, compliance with quotas, efforts towards an early return to viability — on which payment of aid is conditional *was not subject to any judicial review.* That would appear quite contrary to the principles generally governing the Court's case-law. [14]

15. The Commission's second argument, concerning the expiry of the time-limit for bringing an action for annulment, is clearly more weighty. According to the Court's case-law on the third paragraph of Article 173 of the EEC Treaty, [15] which it applied in a case under the ECSC Treaty, *Dillinger Hüttenwerke,* [16]

'failing publication or notification, it is for a party who has knowledge of a decision concerning it to request the whole text thereof within a reasonable period'.

Subject to that proviso:

'the period for bringing an action can begin to run only from the moment when the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based in such a way as to enable it to exercise its right of action'. [17]

It should also be recalled that in the same judgment the Court stated, with regard to the second paragraph of Article 33 of the EEC Treaty, that:

'an undertaking is concerned within the meaning of that provision by a decision of the Commission enabling benefits to be conferred on one or more other competitor undertakings'. [18]

16. It cannot be denied that the applicant, an association of German steel undertakings, is concerned by the decisions releasing aid which authorize the payment of State aid to competing undertakings established in another region of the Community.

17. We must therefore turn to the question whether the period for bringing an action for annulment against those decisions has not already expired. A simple perusal of the British Steel Corporation's accounts, in particular those published on 8 July 1986, [19] would have revealed the existence of decisions releasing aid. The observations made in the proceedings [20] show, moreover,

14 — For example, the judgment in Case 222/84 *Johnston* [1986] ECR 1651; judgment in Case 222/86 *Heylens* [1987] ECR 4097.

15 — Judgment in Case 76/79 *Könecke* [1980] ECR 665; judgment in Case 59/84 *Tezi Textiel* [1986] ECR 887.

16 — Judgment in Case 236/86 [1988] ECR 3761.

17 — Ibid., paragraph 14.

18 — Ibid., paragraph 8.

19 — See the Commission's rejoinder, p. 9.

20 — In particular at pp. 13 to 16 of the application.

that the applicant was in possession of the UK undertaking's accounts. In any event the adoption of the Fourteenth and Fifteenth Commission Reports on Competition for the years 1984 and 1985 should have brought the fact that the Commission had adopted the decisions in question to the applicant's notice. The Office for Official Publications communicates those reports to all interested parties, and it is hard to imagine that a professional association as large as the applicant could neglect to inform itself or, if it did so, would seek to rely on its own neglect. Finally, the Wirtschaftsvereinigung Eisen- und Stahlindustrie has a representative on the ECSC Consultative Committee. On 6 August 1986 that committee received a copy of the Commission's Report on the Application of the Steel Aids Code 1984-85 (document COM(86) 235 final).[21] Although, according to the application, the applicant had sent a letter to the Commission on 28 April 1987,[22] that letter merely drew attention to the possible existence of unauthorized aid and did not criticize in any way the adoption of the decisions releasing aid. At no point during the exchange of letters between the applicant and the Commission which preceded the commencement, on 1 July 1988, of the present proceedings, was any request made to the Community authorities for the text of the decisions releasing aid. It therefore appears that the reasonable period within which the applicant should have asked to have the text of the decisions in question communicated to it 'in such a way as to enable it to exercise its right of action' was well past. Whereas in the *Tezi Textiel* case[23] the Court considered a period of 14 months to be reasonable, in *Netherlands* v *Commission*[24] a period of 18 months did not appear to the Court to be reasonable with regard to the commencement of proceedings under Article 35 of the ECSC Treaty. Inasmuch as the applicant must necessarily have become aware, in the course of 1986 at least, of the existence of the decisions releasing aid, a reasonable period would seem to have elapsed some time ago. The challenge to the validity of the decisions releasing aid is in consequence inadmissible.

18. The following discussion is offered in the alternative, in the event that the Court should not share my opinion that the challenge to the decisions releasing aid is out of time.

19. It is somewhat difficult to ascertain the precise nature of the claims put forward both in the application and the reply. In my view, it must first be stressed that the doctrine of *res judicata* in relation to the Court's judgment of 3 October 1985 means that no claims identical to those put forward in the course of that case may be advanced in these proceedings, on pain of manifest inadmissibility. Secondly I shall examine the substantive arguments advanced in order to challenge the decisions releasing aid.

20. On the first point, the applicant's argument — relating, it will be recalled, to aid which was authorized but was not necessary — is based on the assertion that the British Steel Corporation was granted aid to no purpose, inasmuch as the undertaking could have recovered its viability without it. The aid is said to have enabled the British Steel Corporation to reduce its capital borrowings to a level substantially lower than the average of competing undertakings, thus leaving it with a reduced financial burden.[25] The lack of any appropriate relationship between the benefit

21 — See the Commission's rejoinder, pp. 9 and 10.

22 — See p. 13 of the application.

23 — Case 59/84 [1986] ECR 887, paragraph 11.

24 — Judgment in Case 59/70 [1971] ECR 639, paragraph 22.

25 — Page 6 of the application.

granted and the steps taken in return[26] is also criticized.

21. In this respect it would seem that the claim as thus formulated has already to some extent been examined and rejected by the Court in its judgment in Case 214/83.[27] In paragraph 21 of that judgment the claims put forward by the Federal Republic of Germany, supported by the applicant in the present proceedings, were summarized thus:

'In support of its principal claim, the applicant argues in the first place that the Second Aids Code has been infringed. It contends in particular that aid far in excess of that needed in order to achieve the required reductions in production capacity was approved in the case of steel undertakings in . . . the United Kingdom. Secondly, it argues that non-subsidized undertakings, in particular German undertakings, have suffered discrimination in so far as they have been required to make significantly greater cuts in production capacity in relation to authorized aid.'

The Court stated in reply that:

'although the Second Aids Code establishes a link between restructuring and the grant of aid, there is nothing in its provisions or in its preamble to suggest that an exact quantitative ratio was established or intended between the amount of the aid and the size of the required cuts in production capacity',[28]

and that:

'as for the complaint of unequal treatment, that would be justified only if the contested decisions had given rise to *different advantages* for steel undertakings placed in the same situation or to identical advantages for steel undertakings placed in appreciably different situations. However, it does not appear either from the written or from the oral proceedings before the Court that either of those cases applied in this instance. The Commission rightly emphasized the important differences in the situations of individual undertakings and the very varied conditions which must be met before individual undertakings can receive the authorized aid'.[29]

22. In consequence, the applicant's criticism in the present proceedings concerning the absence of an appropriate relationship between the benefit granted and the steps taken in return would seem to have been answered already in the judgment cited, where the Court refused to establish any precise quantitative relationship between the amount of aid and the reduction in production capacity.

23. Moreover, the argument to the effect that the British Steel Corporation could have been returned to viability without the aid provided for in Decision 83/399 is, while formulated differently, entirely identical to the argument based on unequal treatment. In the first case it was pleaded that the aid was in excess of the amount needed to accompany measures reducing production capacity and that that conferred *unjustified advantages* on the British undertaking; it is now claimed that that same aid *did in fact entail unjustified advantages* in relation to competing undertakings because

26 — Page 7 of the application.

27 — [1985] ECR 3053.

28 — Ibid., paragraph 33.

29 — Ibid., paragraph 36, my emphasis.

the British Steel Corporation was able to reduce considerably its financial costs. Unequal treatment or distortion of competition are here two aspects of the same criticism.[30] The Court has already held that in view of the situation of the steel undertakings in question, in particular the English and German undertakings, neither the conditions placed on the grant of aid to the British Steel Corporation nor the amount of that aid were contrary to the principle of equal treatment. It does not seem possible to me to reopen that assessment on the basis of an allegation that competition was distorted; such a claim would be inadmissible.

24. Let us now examine the arguments on the merits that might be advanced with any hope of success for the purpose of challenging the decisions releasing aid. Such arguments would appear to be based either on a breach of the obligations introduced by the 'framework decision', Decision 83/399, or on the absence of any need for aid.

25. In respect of the first argument it is not disputed that the conditions concerning the reduction of production capacity and the possibility of the British undertaking's rapid return to full viability were satisfied. The sole criticism which the applicant appears to advance in this connection in its reply[31] is the allegation that the Commission authorized the payment of aid when the British Steel Corporation had not complied with its obligations in respect of production quotas. It is true, as is shown by Decision C(87) 2031 of 10 November 1987,[32] that the Commission imposed fines on the British Steel Corporation for having exceeded production quotas in the course of the first three quarters of 1985. Nevertheless the actual text of Article 7(1) of Decision 83/399 specifies that 'the Commission *may* order the suspension of aid payments if at any time it should find that: aid has been paid in disregard of the conditions attached to its authorization . . .' Thus suspension of the payment of aid is merely a supplementary sanction alongside fines imposed by the Commission. As the Commission rightly emphasizes in its written observations, it has a discretionary power to choose whether or not to have recourse to the provisions of that article. Consequently the application is bound to fail on this count.

26. With regard to the second argument, the questions to be examined are not only the point at which the Commission must assess whether aid is necessary, on which the parties disagree, but also the possible existence of an obligation to rectify *ex post facto* any distortions of competition which might have been caused by the grant of aid.

27. On the first point, the Commission considers that the question whether aid is necessary is assessed at the time of the framework decision and can no longer be verified when the decisions releasing aid are taken.

28. I do not share that view. In its judgment of 3 October 1985 in Case 214/83 the Court pointed out that:

'the Commission was under no circumstances entitled to authorize the granting of

30 — For a similar situation, see the judgment in Case 304/85 *Falck* [1987] ECR 871, paragraph 22.

31 — Pages 18 to 20.

32 — OJ 1987 C 321.

State aid which was not necessary to attain the objectives of the Treaty and would be likely to give rise to distortions of competition on the common market in steel'.[33]

Similarly, in the *Falck* judgment, the Court stated:

'the Commission cannot approve aid the grant of which may result in manifest discrimination'.[34]

29. It is true that in the judgment of 3 October 1985 it was the 1983 framework decision that was at issue and not the decisions releasing aid. However, although the framework decision does not expressly refer to the fact that the planned aid must be necessary, it seems to me that that requirement follows directly from Article 2(1), fourth indent, and Article 3(1), second indent, of the Second Aids Code, which require respectively that the aid in question should not entail distortions of competition and that the amount and intensity of aid should be limited to what is necessary for the restructuring effort involved. In consequence the amounts provided for in the framework decision might not be reached if the Commission found, in the course of the successive stages of its execution, that some of the planned aid was no longer essential.

30. Let us now examine the second point, concerning the Commission's obligation to take all measures necessary to avoid distortions of competition that subsequently come to light. The applicant does not specify what action it requires the Commission to take, but it seems to criticize it for failing to withdraw the decisions authorizing the grant of aid or to adopt a decision ordering its repayment. On this point the Commission objects that withdrawal of a decision authorizing the grant of aid is legally impossible.

31. The applicant bases its claim that the Commission is under an obligation of rectification on Articles 4(c) and 5 of the ECSC Treaty. Article 4(c) declares 'aids granted by States . . . in any form whatsoever' to be incompatible with the common market for coal and steel; Article 5 provides that 'the Community shall . . . ensure the establishment, maintenance and observance of normal competitive conditions'. Those articles are among the first six articles of the Treaty, making up Title One, entitled 'The European Coal and Steel Community'. As Article 95 states, Article 4 sets out the objectives of the Community.

32. Let me say forthwith that it does not appear to me possible to infer from those articles, which are general in nature, an obligation that is as precise as that now imputed to the Commission to correct *ex post facto* the excessively beneficial economic effects of aid which has been granted, so as to achieve some sort of 'equalization' among competing steel undertakings.

33. The third paragraph of recital I in the preamble to the Second Aids Code does, it is true, specify that the comprehensive system of Community aid for steelmaking 'should limit distortions of competition to a minimum'. That preoccupation is reflected in Article 2(1) of the same text, which states

33 — Paragraph 30.

34 — Case 304/85 *Falck* [1987] ECR 871, paragraph 27.

that 'aids granted to the steel industry may be considered compatible with the orderly functioning of the common market provided that: ... the aids in question do not entail distortions of competition and do not affect trading conditions to an extent contrary to the common interest'. However, compliance with that condition must be assessed by the Commission *at the time when it takes decisions* on applications for aid and examines in particular the amount and intensity of planned aid, as is clear from Article 2(2) and (3), without prejudice to the verification of the aid's necessity which the Commission must undertake when adopting the decisions to release it.

34. Similarly, although Article 9 of the Second Aids Code obliges Member States to supply the Commission twice a year with 'reports on aids disbursed in the course of the preceding six months, on the uses made of such aids and on the results achieved during the same period as regards restructuring' and Article 10 requires the Commission regularly to prepare reports for the Council and for the information of the European Parliament, a reading of the second paragraph of recital II shows that these measures are intended to provide 'appropriate monitoring procedures ... to make sure that aids are not so applied that they will inhibit the restoration of normal market conditions and, in particular, of price levels which will enable the industry to function economically without aid as soon as possible'. In other words, the monitoring mechanism introduced in the Second Aids Code is aimed essentially at supervising the effectiveness of the reductions in production capacity required in order to check the fall in prices and permit a return to satisfactory price levels. There is no question of monitoring whether the original assessment of the amount of aid necessary to restore an undertaking rapidly to viability may subsequently prove to be too generous. Decision No 1018/85/ECSC,[35] known as the 'Third Aids Code', moreover, simply amends the time-limits laid down in Decision No 2320/81 in order to allow for payment of supplementary aid.

35. Moreover, although the Court includes among the conditions which aid, to be lawful, must satisfy the requirement that the aid should be necessary to achieve Community objectives, it is only *at the time of authorization* that the Commission must assess whether that requirement is met. Thus in its judgment of 3 October 1985 in Case 214/83 the Court stated:

'the Commission was under no circumstances entitled to *authorize* the granting of State aid which was not necessary to attain the objectives of the Treaty and would be likely to give rise to distortions of competition on the common market in steel'.[36]

In the *Falck* judgment the Court also held that:

'although any aid measure is likely to favour one undertaking in relation to another, the Commission *cannot approve* aid the grant of which may result in manifest discrimination ... In such a case the grant of aid would involve distortion of competition to an extent contrary to the common interest'.[37]

35 — Commission Decision of 19 April 1985 amending Decision No 2320/81 establishing Community rules for aids to the steel industry (OJ 1985 L 110, p. 5).

36 — [1985] ECR 3053, paragraph 30, my emphasis.

37 — Case 304/85 [1987] ECR 871, paragraph 27, my emphasis.

The Court has never suggested that legally paid aid could be challenged on the basis of a general obligation on the part of the Commission to verify that aid, although considered necessary when it was authorized, did not cause distortions of competition, such an assessment having been confirmed when the decisions releasing aid were taken. On the contrary, paragraph 27 of the *Falck* judgment, cited above, would appear to indicate that the result of granting aid may be to benefit one undertaking at the expense of another.

36. Any *ex post facto* rectification would, moreover, run into serious difficulties as regards the assessment of the causal link between the aid granted and the new economic prosperity of the recipient undertaking. How could the various factors which might have helped to restore an undertaking to viability be separated from each other: for instance, recovery in the economy, managerial discipline, changes in exchange rates, the accuracy of estimates of the medium-term prospects when the aid plan was drawn up?

37. It would undermine not only the principles of legal certainty and the protection of legitimate expectations, on which the recipients of the aid in question are entitled to rely, but also the credit of the undertaking granted aid and the confidence of investors or its partners if, five years after a lawfully granted aid was paid, the undertaking could be ordered to repay it. The Court has already taken such requirements into consideration, declaring in *Netherlands* v *Commission* that:

'the duty of cooperation imposed on Member States by Article 86 must prompt a Member State which considers a system of aids to be contrary to the Treaty to resort to the procedures or means of legal action placed at its disposal by the Treaty *in sufficient time to ensure that effective intervention is still possible and that the position of third parties is not needlessly called in issue*'.[38]

38. Finally, and most important, there appears to be a complete absence of any legal means enabling the Commission to rectify possible distortions of competition due to the grant of lawful aid, the need for which, although real at the time when the decisions releasing aid were adopted, does not subsequently appear so evident. Although Community law allows for the withdrawal of *unlawful* measures, provided it takes place within a reasonable period and the Commission takes sufficiently into account the extent to which those concerned might possibly have relied on the measure being lawful,[39] there is no way in which lawful acts can be challenged once the time-limit for bringing an action for annulment has elapsed.

39. Despite the questions put to the applicant at the hearing on this point, it has not, moreover, indicated what concrete measures it wished the Commission to adopt in order to re-establish the equality of competition that had allegedly been disrupted.

40. The application therefore appears to be ill founded. However, it should be remembered that there is no need for the

38 — Case 59/70 [1971] ECR 639, paragraph 21, my emphasis.

39 — Judgments in Joined Cases 7/56 and 3/57 to 7/57 *Algera* [1957-58] ECR 39, at p. 56, in Case 14/61 *Hoogovens* [1962] ECR 253, at p. 272, in Case 111/63 *Lemmerz-Werke* [1965] ECR 677, at p. 690, in Case 14/81 *Alpha Steel* [1982] ECR 749, paragraph 10, and in Case 15/85 *Consorzio Cooperative d'Abruzzo* [1987] ECR 1005, paragraph 12; see in connection with this last judgment: Miren A. Letemendia: *Cahiers de droit européen 1989*, p. 627.

Court to examine these issues unless it decides not to follow my opinion regarding the inadmissibility of the action, to the effect that the challenge to the decisions releasing aid is out of time.

41. I shall now turn very briefly to the second submission, alleging the grant of unauthorized aid. The Commission contends that this claim is inadmissible on the ground that the request was made only in the applicant's second letter of 20 May 1988; the Commission replied by a letter dated 25 July 1988 which has not been challenged and is no longer capable of forming the subject-matter of an action. This appears in fact to be a defence that goes to the substance. The Commission considers the submission to be invalid since it is attacking a refusal which is not to be found in the contested decision because the question was not raised with the Commission at that stage.

42. In this respect, it is very difficult to accept the applicant's assertion that its first letter of 30 March 1988 also raised with the Commission questions concerning the existence of unauthorized aid, relying on the reference to 'authorized or *tolerated* aid'[40] to indicate that it meant to address that problem as well.[41] That reference is found in a paragraph which deals solely with the question of the grant to the British Steel Corporation of unnecessary aid. The recapitulation of the formal claims made by the applicant to the Commission pursuant to Article 35 of the ECSC Treaty does not refer, even indirectly, to the grant of unauthorized aid. It would therefore be reading too much into the terms of the letter of 30 March 1988 to say that the matter of a possible payment of unauthorized aid was raised with the Commission.

43. Accordingly, it was only by way of the second letter from the applicant, dated 20 May 1988, that the matter was raised with the Commission. An application against the Commission's *second decision*, dated 25 July 1988, would be inadmissible as out of time. The present application, however, is directed solely against the *first decision*, dated 26 May 1988. Since that decision was in no way connected with allegedly unauthorized aid, the second submission dealing with the granting of such aid must be held invalid.

44. The applicant cites several of the Court's judgments which, it says, allow for an enlargement, in the course of the procedure, of the subject-matter of the application.[42] The Court has indeed held that the adoption of a decision which

'replaced, while this action was in progress, a previous decision *having the same subject-matter* . . . must be regarded as a new factor which allows the applicant to amend its pleadings. It would not be in the interests of the due administration of justice and the requirements of procedural economy to oblige the applicant to make a fresh application to the Court'.[43]

45. However, the situation in this case is not the same. In the judgments cited, the

40 — This appears on p. 7, Annex A, of the application's Annex 2.

41 — Applicant's observations on the objection of inadmissibility, p. 18.

42 — Observations on the objection of inadmissibility, pp. 19 and 20.

43 — Case 14/81 *Alpha Steel* [1982] ECR 749, paragraph 8, my emphasis; see also judgment in Joined Cases 351/85 and 360/85 *Fabrique de fer de Charleroi and Dillinger Hüttenwerke* [1987] ECR 3639, paragraph 11; judgment in Case 103/85 *Stahlwerke Peine-Salzgitter* [1988] ECR 4131, paragraph 11.

Commission adopted an amending decision while the action was in progress, concerning the same facts forming the subject-matter of the case. In most of the cases it was an express decision of rejection, replacing the silence that had been interpreted as an implied decision of rejection. In this case the decision of 25 July 1988 deals with subject-matter different from that of the decision of 26 May 1988. The applicant's observations do not therefore raise any doubt as to the dismissal of the case on this point.

46. I therefore conclude that:

(1) the application should be rejected in so far as it refers to the grant of unauthorized aid;

(2) for the rest, the application is inadmissible, and in the alternative should be dismissed;

(3) the applicant should be ordered to pay the costs.