THE COURT

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Lecourt	Monaco	Pescatore
Donner	Mertens de Wilmars	Kutscher
Ó Dálaigh	Sørensen	Mackenzie Stuart

Delivered in open court in Luxembourg on 12 July 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 19 JUNE 1973 [1]

Mr President,
Members of the Court,

I — Introduction

If the attainment of the Common Market entails in many fields the implementation of a common economic policy and for this reason allows interventions by the institutions in certain circumstances to control the economy, the Treaty of Rome, a liberal concept, relies no less on freedom of competition.

The activities of the Community must, according to Article 3 (f) of the Treaty, lead to 'the institution of a system ensuring that competition in the common market is not distorted'.

This principle does not only result in the prohibition of understandings, i.e. agreements between undertakings, and concerted practices likely to prevent, restrict or distort competition (Art. 85) and also of the abuse by undertakings of dominant positions (Art. 86); it is equally applicable to Member States. They intervene in fact for their own advantage in their national economies, in particular by granting aid to undertakings having regard either to

1 — Translated from the French.

their location or to the nature of their activities. Whether the aid is granted for regional objectives or to certain sectors of the economy, State intervention is therefore likely to affect the conditions of competition by interferring with the principle of equal access to resources and by eventually destroying the principles of equality of opportunity for undertakings competing with each other in a single market.

Nevertheless, certain types of State aid can be shown to be necessary in the common interest for the development of regional or sectional activities or to be essential for the continuance of certain activities which technological changes tend to make obsolete. It is at least reasonable that temporary government help be given to facilitate the adaptation, or to use the current word, the 'conversion', of any branch of manufacturing industry suffering from a recession caused by its structure.

That is why, when stating the principle that 'aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' is incompatible with the Common Market, Article 92 of the Treaty grafts on to this principle the various exceptions therein defined.

There you have the *basic rules* governing the community system of State aid.

The *machinery for its implementation* is determined by Article 93 which lays down the procedure whereby the Community institutions, the Council and the Commission, intervene in this field and defines the powers which they enjoy with regard to the Member States.

If you have recently had to deal with actions concerning the compatibility with the Treaty of certain measures for providing aid which Member States have decided to take, this case gives you the opportunity of studying the procedure for intervention by the Commission and will lead you to determine the extent of the powers conferred upon it.

II — The general structure of Article 93 of the Treaty

It is essential to explain at the very beginning the nature of these powers and the way in which they must be used.

In this respect Article 93 of the Treaty distinguishes between two entirely different situations:

— The first paragraph deals with *systems of aid existing* in Member States in respect of which the Commission has the power to review and make proposals and also the power to give directives and take decisions, ratified if necessary by the Court of Justice.
Having reviewed such a system of aid after full consulation with the Member State concerned, the Commission can in fact in the first place suggest to that State the measures made necessary by the progressive development on the functioning of the Common Market. These are, within the meaning of Article 189, last paragraph, of the Treaty, 'simple recommendations' which are not binding upon the party to whom they are addressed.

— The second paragraph of Article 93 goes much further. If the Commission has any reason to think that an existing system of aid could be incompatible with the Common Market, in other words if it is confronted with a 'suspect' system of aid, it must adopt a *procedure* which begins with a notice addressed to the Member States and also to the other parties concerned, and therefore to the natural and legal persons affected in any way by the system of aid, with the object of permitting such persons to submit their comments.

If, after examining these comments, the Commission finds that the aid is incompatible with the Common Market, it has the power to decide that the State concerned shall abolish or alter such aid within a period of time to be determined

by the Commission. This decision is enforceable. If the State concerned refuses to comply with such a decision, it can attack it by means of an application for annulment brought within the period laid down by Article 173 of the Treaty. Otherwise it will no longer be admissible to challenge the legality of the decision, or even to plead illegality before the Court of Justice, because the defence of illegality under Article 184 is only admissible in the case of regulations.

It is true that this Court allowed an exception to this principle in its Judgment of 10 December 1969 *(Republic of France v Commission, Rec. 1969, p. 523-540)* in a case where the defect in the decision of the Commission pleaded by the State concerned was so serious that, if it was deemed to be substantiated, 'the decision would lack any legal foundation in the context of the Community'. But that is an exceptional case.

If, therefore, a state, not having challenged the decision in good time, does not comply with it within the prescribed period, the Commission, as well as any other state concerned, can refer the matter to the Court of Justice direct.

Article 93 (2) provides a special form of action for failure to fulfil an obligation, which has the same effect as applications under Articles 169 and 170 but which differs from them, so far as the procedure is concerned, in that the Commission does not have to give a reasoned opinion before referring the matter to the Court of Justice. Referring the matter to the Court of Justice direct is justified in such cases by the fact that the Commission has already by its formal notice enabled the State concerned, as much as the other parties concerned, to submit their comments. The feature of the preliminary procedure that all parties should be heard is therefore observed.

Furthermore, an exceptional power is conferred upon the Council. On application by a Member State, the Council in fact may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the Common Market, in derogation from Article 92, if such aid is justified by exceptional circumstances.

But it seems to be clear from the wording of Article 93 (2), third paragraph, that this application, or rather this 'application in order of precedence', to the Council must be made either before the Commission has put in motion the procedure for abolishing or altering the aid in question or, in any event, before the Commission has made its decision. In fact, the effect of applying to the Council is to suspend the procedure in those cases when it has been initiated. This provision would be meaningless if the State could still apply to the Council after the Commission has made its decision, thereby bringing the procedure to a close.

Moreover, such suspensory effect is limited in time: if the Council has not made its attitude known within three months of the said application, the Commission shall give its decision, its power to do so having revived.

Finally, if the application to the Council can be made after the Commission has taken its decision, how can the Council's intervention, which is essentially a matter of expediency, be reconciled with the right granted to the Commission to apply to the Court of Justice for a declaration that a State has failed to comply with its obligations under the Treaty? It is inconceivable that the authors of the Treaty could have allowed for a possible conflict between a decision of the Council based on a determination of circumstances which are exceptional, and which derogate from Article 92, and a judgment of the Court which can only be based on a definitive interpretation of this provision of the Treaty.

It follows, therefore, from the system created by Article 93 (2) concerning existing aid that, if the Commission has

the power to decide whether certain aid is incompatible with the Common Market, its decision only takes effect *in the future*. Moreover, in accordance with a general principle of law commonly recognized by Member States and this Court, it cannot have retroactive effect. Such a decision creates rights and is not declaratory. It is from this decision, and from this alone, that the prohibition of aid or the obligation to alter it is derived.

To interpret Article 93 in any other way would mean ignoring the rights acquired by third parties, would destroy all legal certainty and would lead in the end to insuperable difficulties in the application of the Article.

The position is quite different if the Commission is considering a scheme for new aid or for the alteration of existing aid. In fact, a scheme cannot give rise to any subjective right. It has therefore been thought to be possible, in such a case, to confer on the Commission the exceptionally wide power to oppose the implementation of projected measures, if it considers that they are incompatible with the Common Market within the meaning of Article 92.

But it is not sufficient for the Commission merely to 'consider' that a scheme is incompatible with the Common Market and to communicate its reservations to the State which drew up the scheme. In order to be able to give a more detailed opinion on the compatibility of the scheme with the Treaty, it must encourage the parties concerned to submit their comments by giving some publicity to its possible intention to oppose the scheme or demand its alteration. It is for this purpose that the Commission is *under a duty* to initiate, without delay, the procedure laid down by Article 93 (2), that is to say to give notice to the states and other parties concerned to submit their comments. It is only to such notice that a suspensory effect attaches. It brings about an actual stay of execution until the procedure culminates in a final decision.

It follows from this system, in my opinion, that the Commission, having initiated the procedure, must always act, either by prohibiting absolutely the implementation of the projected measures, by making them subject to certain alterations or adjustments, or by recognizing, on the other hand, after a more detailed examination, the compatibility of the aid with the Common Market. If the Commission takes too long to make a decision and brings the operation by the State concerned to a halt indefinitely it seems that the State could bring against it an action for failure to act.

III — Statement of the Facts

It is now necessary to state the facts which induced the Commission to bring an action before your court, under Article 93 (2), against the Federal Republic of Germany which it accuses of not having complied with a decision ordering the suspension of a system of aid for investments.

The German legislature passed on 15 May 1968 a law called 'Kohlegesetz'.

This law contains, on the one hand, a plan for the rationalization of the coal industry, intended to avoid economic recession in the areas affected by the coal production crisis and to reabsorb the unemployment caused by the closure of certain mines; and, on the other hand, measures designed to encourage in those areas the setting up, expansion or transfer of industrial undertakings in order to stimulate employment there and to make possible a diversification of the economic structure until then based too exclusively on coal mining.

In particular, Article 32 (1) of this law introduces investment grants for the benefit of those liable to tax, being natural persons companies or firms, who build or enlarge an industrial undertaking in one of the coalmining areas. This aid does not take the form of a direct subsidy. It consists of a tax

allowance against the income of individuals and the profits of companies or firms equal to 10 % of the amount of the investment carried out.

The allowance is only granted if the Federal Delegate for the Coal-Mining Industry, a senior official coming under the direct authority of the Ministry of Economic Affairs, has, in agreement with the Land concerned, certified that the setting up of a new undertaking or the expansion of an existing undertaking is likely to improve the economic structure of the mining area and, more generally, to benefit the national economy. If the setting up of a new undertaking or the expansion of an existing undertaking is accompanied by the transfer of an undertaking, a considerable number of new jobs must be found.

The acceptance of the investment as being eligible for tax relief is effected by the issue of a 'Certificate of Conformity' according to which the tax authorities have to grant a tax allowance proportionate to the amount of the investment.

The request for the issue of a certificate can precede investment; the certificate will then, when appropriate, be granted for a scheme the location and the nature of which and the amount of the capital to be invested in which have to be determined with sufficient accuracy. But the request can be made after completion of the investment or indeed while the operation is in progress.

Finally, and this point is decisive, the tax allowance is only granted under Article 32 of the Law of 15 May 1968 for investment carried out during a period called 'the incentive period' which ran originally from 30 April 1967 to 1 January 1970. Nevertheless, if the setting up or expansion of an industrial undertaking has been undertaken during this period, the benefit of the tax allowance is granted, within certain limits, for investments where the work was carried out and completed during a supplementary period of two years following the 'incentive' period.

This system of tax allowances amounts, without any doubt, to 'State aid' within the meaning of Article 92, since it tends to encourage the setting up or expansion of industrial undertakings and because, being a reduction of the tax burden on industry, it is a charge on public funds.

The Federal Government moreover made no mistake, since, as far back as 1967, when the Kohlegesetz was still in the draft stage, it notified the Commission of the European Economic Community in accordance with the duty imposed upon it by Article 93 (3) of the Treaty.

At that time, the Commission had raised no objection to the grant of such aid, at least in so far as it was to be limited in time.

Having regard to the severe crisis at that time in the coalmining industry, the difficulty in selling coal, the unsatisfactory trend of incomes in these coalmining areas compared with the incomes of the whole of the Federal Republic, and finally to the need to create about 20 000 new jobs during the 'incentive period', the Commission came to the conclusion that this system of aid, which was designed to avoid the serious economic and social difficulties caused by the great recession in the leading industry in the economic structure of these areas, was justified.

It considered that the conditions laid down were satisfactory:

— a major effort was made to rationalize the affected sector;

— the aid was 'transparent', that is to say could be measured in relation to the particular investment and included a system of selection, since, taking the form of a tax allowance, only those undertakings making a profit, and therefore in general in competition with each other, were to benefit;

— finally the coalmining areas were clearly and precisely defined.

It was therefore with the agreement of the Commission that, with the entry into force of the Kohlegesetz, the system of investment grants for coalmining areas was implemented.

One year later, the Federal Government brought before the Bundestag a draft of a Tax Modification Law, including, in particular, a body of measures of general application to aid for investment for areas bordering on the 'East Zone' and for other areas also in need of incentives.

This draft Law did not include in the original wording any amendment to the Kohlegesetz. But during the second reading in the Bundestag, the Parliamentary Finance Committee raised the question of the application of this draft Law to coalmining areas. With the exception of the Sarre, it considered, in agreement with the Committee for Economic Affairs, that it was sufficient to extend by two years in the other mining regions the period during which the special system of aid laid down by Article 32 of the Kohlegesetz should be applied. By way of amendment to the Government's draft, the two Committees proposed to extend *until January 1972* the 'incentive period' which was originally to continue until 1 January 1970. As a result, the 'supplementary period', during which investments concerned with the setting up or expansion of an industrial or commercial undertaking could also benefit from the tax allowances, was not to expire until 31 December 1973.

This amendment, which was adopted on the second reading by the Bundestag, became Article 9 of the Tax Modification Law which the Bundesrat also passed on 10 July 1969.

A few days later, on 17 July, the Federal Government notified the Commission of the European Communities of the amending law.

Reacting quickly to this notification, the Commission pointed out that it should have been given notice of the amendment to Article 32 of the Kohlegesetz at the prescribed time, i.e. when the amendment draft Law was presented. But it merely asked the Federal Republic to supply 'the particulars of and the reasons for this extension'.

The latter replied, but not until October, that no amendment of Article 32 of the Kohlegesetz had been anticipated originally by the government, the extension of the incentive period being due to the right of Parliament to propose and pass amendments; it had not therefore been possible to notify the Commission of the amendment before it was passed.

Meanwhile the new Tax Law had been promulgated on 18 August 1969. It was published in the Bundesgesetzblatt (the Federal Official Gazette) on 21 August and entered into force the next day, official notice of which was received by the Commission on 19 September.

It endeavoured, it tells us, to obtain from the Federal Government more explicit information justifying the extension of the system of investment grants in coalmining areas.

None of the particulars supplied — apparently not without reservations — convinced it that the continuance of this specific aid on a non-selective basis was compatible with the Common Market. On the contrary a study in greater depth led it to conclude that the economic and social situation in the coalmining basins had improved considerably and that the level of employment had become satisfactory, particularly in North Rhine-Westphalia. In two years, some tens of thousands of jobs had been created; most of the unemployed had been reabsorbed. The effects of the crisis in the coalmines, not yet completely resolved, were henceforth substantially mitigated.

Without calling into question the extension of the system for the coalmining areas outside the Land of North Rhine-Westphalia, where other regional problems were super-imposed on those caused by the coalmining recession, the Commission then thought

that the grant of non-selective investment allowances was not justified.

That is why it decided to make use of the powers conferred upon it by Article 93 (2) by notifying the Federal Government on 30 July 1970 that it should bring to an end the non-selective award of investment grants in North Rhine-Westphalia provided by Article 32 of the Kohlegesetz, with effect from the following 1 December, while at the same time inviting it to submit its comments within a period of six weeks.

The same invitation was made to the other Member States. So far as the parties affected by the system of aid under consideration were concerned, they were also invited to give their views by a communication in the Official Journal of the European Communities dated 14 August 1970.

The German Government did not submit its comments in reply to this notice until 5 November 1970.

And it was only on 14 February 1971, six months after initiating the procedure, that the Commission, having considered all the replies from the parties concerned, made its Decision, the first Article of which ordered the Federal Republic to take 'forthwith' all necessary steps to bring to an end in the coalmining areas of the Land of North Rhine-Westphalia the non-selective award of investment grants provided by Article 32 (1) of the Law on the Adaptation and Rationalization of the German Mining Industry and Mining Regions, as amended by Article 9 of the Tax Law of 18 August 1969.

The statement of the reasons for the Decision included in section V two facts which throw light on its scope:

— on the one hand, the grant of aid provided by Article 32 of the Kohlegesetz should only be *suspended* until a selective allocation of this aid could be guaranteed;

— on the other hand, undertakings which had obtained, before this decision, a certificate of conformity from the Federal Delegate for the Coal-Mining Industry should retain the benefit of the supplementary period provided by Article 32 (1), second sentence, of the Kohlegesetz, that is to say they could obtain the tax allowances relating to investments completed after 1 January 1970, provided that these investments related to the setting up of new undertakings or the expansion of existing undertakings before that date.

Finally, in its letter of notification, the Commission suggested to the German Government that it should begin discussions with the object of defining the economic and territorial criteria according to which a system of selective aidg compatible with the Common Market could be implemented.

Following a meeting held in Brussels on 4 May 1971, the German Government made proposals to this end which, after an examination and an exchange of views, the Commission accepted by a letter dated 16 December 1971.

According to this letter, the award of investment grants in the Districts specified (Landkreise), and also in certain towns not part of the Kreise, should be subject to alternative conditions:

— either that in 1969 more than 20 % of the workers in the industrial sector were still employed in those districts in the coalmines and that the gross domestic product per head of the inhabitants of these districts was less than 10 % of the average for the Land;

— or that steps to rationalize the coal industry (that is to say to close down pits) had already been taken in those districts and had not yet been completed or should be taken before 31 December 1971.

Thus the system of selective aid, outlined in the Decision of 17 February 1971, was not able to be worked out in concrete

and precise terms until the end of that year.

From that time, the Government of the Federal Republic of Germany conformed, as the Commission admits, to the criteria of selection which the latter had laid down. It never challenged either the principle of the incompatibility with the Common Market of a non-selective system of aid applicable to the whole of the Land of North Rhine-Westphalia or the legality of the Decision taken by the Commission.

In these circumstances, it might appear, at first sight, a little surprising that the Commission thought it necessary to bring an action before your Court.

The difficulties which have arisen have no bearing on the substance of the problem, but only on the interpretation of the Decision of 17 February 1971 and on the time-limit for its implementation.

According to the Commission, the failure attributed to the Federal Republic of Germany consists in having continued, after 24 February 1971, the date when the Decision was received, to grant aid for investments undertaken throughout the whole of the Land of North Rhine-Westphalia, after January 1970, that is to say when the 'incentive period' defined originally in Article 32 of the Kohlegesetz, had come to an end.

In addition the applicant asks this Court to rule that the Federal Republic of Germany should be required to withdraw the allowances relating to certificates issued after 24 February 1971, unless the investments for which they were granted were undertaken by 20 August 1970 at the latest or the request for the issue of a certificate had been made before that date.

The choice of time-limit is justified by the fact that the investors concerned had been duly notified by the communication published in the Official Journal of the European Communities dated 17 August 1970 of the incompatibility of the extension of a non-selective system of aid with the Common Market.

IV — Analysis of the legal issues

Before considering the submissions of each of the parties, it is necessary, in order to clarify the various arguments, to analyse the legal issues arising out of the facts which have just been stated and to examine them in the light of the provisions of Article 93 of the Treaty.

When the German Government notified the Commission on 16 July 1969 of the passing by its Parliament of the amendment designed to extend the system of investment allowances laid down by Article 32 of the Kohlegesetz, the applicant was faced with a *plan to alter* existing aid within the meaning of Article 93 (3), first sentence.

On the one hand, there is no doubt that the provisional nature of the aid to coalmining areas was an essential factor which had, moreover, caused the Commission in 1967 to consider this system to be compatible with the Common Market; as a result, the extension for two more years of this system was likely to justify the opposition of the Commission in that that extension amounted to a fundamental alteration of the previous system; on the other hand, although the extension amendment had already been passed in Parliament at the time the applicant was notified of it, the law had not yet been promulgated or made public.

In my opinion, therefore, the Commission could have exercised the power conferred upon it by Article 93 (3), second sentence, by immediately initiating the procedure provided for in the preceding paragraph, that is to say by inviting, not only the Federal Republic, but the other Member States and all parties concerned to submit their comments. In this way it would have brought the German legislative proceedings to a halt and the Federal Republic would have been prevented in law from implementing the proposed measures until this procedure had resulted in a final decision.

But the Commission merely sent the Federal Republic a 'protest' in principle and began talks by asking for particulars and explanations.

This step, which was given no publicity, could not in law amount to a suspension of execution of the project.

The Tax Law, Article 9 of which included the extension of investment grants in coalmining areas, entered into force on 22 August 1969, after being promulgated and made public.

Whether it liked it or not, the Commission was henceforth faced with an 'existing aid' within the meaning of Article 93 (1).

Two objections can be made to this argument which, however, I believe can be dismissed.

In the first place, can a law already passed by parliamentary assemblies when the Commission was notified of it be regarded as a 'plan'? It appears that the President of the Federal Republic does not have under the Constitution the power to refuse to promulgate a law passed by Parliament. But when the Commission was notified, the Tax Law of 1969 was not yet complete: it was not enforceable. The Federal Government could not, in my opinion, have made the rules of its constitution prevail over the provisions of the Treaty. The supremacy of Community Law would have brought about a stay of execution, provided however that the Commission had initiated without delay the procedure of Article 93 (2), with its suspensory effect.

In the second place, did not the German Government itself misunderstand the obligation imposed upon it by this provision of the Treaty by delaying its notification to the Commission until a date when the amendment had already been passed? Could it not have done so as soon as the Bundestag Finance Committee raised the question of the extension?

It probably should have done, but its behaviour does not appear to me to have any legal consequence. It was for the Commission at that time to bring without delay an action for failure to comply 'within the prescribed time' with the obligation to notify the Commission. It did not do so.

Therefore, as I have mentioned, in order to implement the procedure of Article 93 (3) by giving notice to all the parties concerned to submit their comments, the Commission in fact stipulated a time limit of one month, long enough, it seems to me, for them to do so. It was only necessary that the extension appeared to it to be 'suspect' for it to be able to initiate the procedure and, at the same time, to ensure a stay of execution of the project.

It would then have had sufficient time to make enquiries, study the effects of the plan and, after due deliberation, make a final decision.

As it did not make use of this power, the applicant could then only rely on the system of reviewing 'existing aid'. This it did, but over a commendably long period of time, since it was not until one year after the law was made public that, on 14 August 1970, it finally decided to initiate the procedure by notifying the persons concerned.

It is therefore — and the Commission does not dispute this — in Article 93 (2) that the legal problem before your Court is to be found and this fact is of paramount importance in deciding this case.

V — *The problem of the time-limit laid down in Article 93 (2) for the implementation of a decision of the Commission*

The Government of the Federal Republic of Germany submits in answer to the application by the Commission what it calls a primary plea of inadmissibility based on the fact that, by its Decision of 17 February 1971, the Commission did not prescribe any time-limit for it to bring to an end the non-selective award of investment grants in the Land of North Rhine-Westphalia.

The requirement of a time-limit stated in the Article itself is a condition precedent to an action by the Commission to your Court direct for failure to fulfil an obligation under the Treaty.

In reality, it is not my view that the question thus raised can be expressed in terms of the admissibility of the action. What is at issue is whether the Decision of the Commission is binding of not.

The Federal Republic's case in that, in the absence of a time-limit, expressed in units of time, the decision was incomplete; a vital element was lacking. Since, by virtue of the wording of the Article, the Commission determines the period of time within which the State concerned must abolish or alter a system of aid held to be incompatible with the Common Market, from what date could a failure to comply with the obligation to abide by its Decision be established, if no period of time has been determined?

This argument, based on a literal interpretation, is only superficially valid.

It ignores two factors:

— the first, also arising from the wording of the Article, stems from the actual decision. If, according to the French text, the Commission stipulated that the Federal Republic of Germany should discontinue 'sans delai' ('forthwith') the award of non-selective investment grants, the German text uses the expression 'unverzüglich', which would be better translated 'sans retard' ('without delay'). This means that the State to which the decision is addressed must carry it out with all due diligence.

— the second factor is based on the general structure of Article 93 (2). It must be borne in mind that the decision which the Commission is called upon to take on the incompatibility of a system of aid with the Common Market forms the conclusion of a procedure in which all parties are heard. It has been preceded by a notice intended to elicit the comments of the states and other parties concerned; these comments have been studied by the Commission; they have given rise in most cases to an exchange of views with the Government concerned. The latter, having been given warning by the notice is, as a general rule, fully acquainted by this exchange of views with the attitude of the Commission.

If, therefore, Article 93 (2) lays down that a period of time be fixed within which the State should comply with the decision, it is for the Commission to fix such period of time, taking into account, in particular, the domestic procedures necessary for the implementation of its decision (Mégret, Vol. IV, p. 393).

In other words, the Commission has a wide discretionary power under this Article. If the modification of a system of aid entails, legislative action, for example, it is obvious that a fairly long period of time will be necessary for the legislative action to be completed.

On the other hand, if the implementation of the decision can be effected by simple administrative measures, capable of being taken immediately, there seems to be no reason why the Commission should not insist that these measures are taken as quickly as possible, or that they are at least taken without unjustifiable delay.

That was what happened in this case. The procedure for awarding investment grants provided for by Article 32 of the Kohlegesetz inevitably turns on the issue of a certificate of conformity. In order to bring to an end the entitlement of industrial investors to the grants, the Minister of Economic Affairs only had to instruct the Federal Delegate for the Coal Mining Industry, coming under his authority, to suspend the issue of certificates. No previously stipulated time-limit was essential in this respect.

In my opinion, the Commission cannot be blamed for not having imposed on the Federal Republic such a time-limit for bringing to an end the non-selective award of investment grants, since the

'necessary measures' for this purpose consisted of straightforward administrative instructions. On this point, the submission of the Government of the Federal Republic of Germany should be rejected. Moreover, the national authorities are under a duty to take all necessary steps to facilitate the implementation in their entirety of Community decisions and the German Government cannot plead the provisions or the practices of its domestic system to justify its failure to carry out the obligations resulting from such decisions (Judgments of 31 July 1972, Case 48/71, *Commission v Italy,* Rec. 1972, p. 534 and of 8 February 1973, Case 30/72, *Commission v Italy,* p. 19, roneoed text). Further, it is permissible to ask oneself whether the Government of the Federal Republic can still invoke the failure of the Commission to fix a time-limit, to the extent that it refrained from bringing an action for annulment of the decision within the prescribed time.

VI — Whether a failure to fulfil an obligation can be substantiated

Having said this, if it is accepted that the Decision of the Commission was binding on the German Government, without being subject to implementation forthwith, it does not necessarily follow that the alleged failure to fulfil an obligation is established. It remains to be considered whether in fact the Government has or has not complied with the terms of the decision.

The first question is therefore: did the Commission have the power to order the suspension of the non-selective grant of aid for investments, when the reasons for the Decision make it quite clear that it did not reject the whole of the system but only wanted, by the use of selective criteria, to confine its application to precisely defined territorial zones?

Should it not have waited, before making its Decision, until the examination procedure had been settled, that is to say until the criteria had been agreed with the Government of the Federal Republic of Germany? In other words, should not the view be taken that by making a provisional order for the complete suspension of the award of investment grants until a final solution is reached, the applicant has, in fact, imposed a stay of execution which, under the Treaty, could only have legal effect in relation to a plan to grant aid and not to existing aid?

I have hesitated to submit that you should reject this interpretation. In fact, to the extent to which the Commission has finally admitted that the system introduced by Article 32 of the Kohlegesetz, as extended, need only be adapted and made selective, one is inclined to the view that it should, in fact, only have made its Decision with full knowledge of the facts and after having defined the districts where the system could still be applied in accordance with the rules of Article 92.

If this view was upheld, it would clearly follow that the Decision of 17 February 1971 could not, in itself, have any binding effect and that it is only on 16 December 1971 that, having been completed by the enumeration of the towns or Landkreise where the grant of investment allowances was lawful, it became enforceable.

On this assumption, it goes without saying that you would have to dismiss the action, as the Commission itself acknowledges that the Federal Government complied with its decision from that latter date.

I shall not, however, rely on this view which appears to me to be excessively 'legalistic' and to take insufficient account of the actual situation.

To uphold it would in fact be tantamount to an admission that the non-selective award of investment grants could have continued for several months after 24 February without, for reasons which I will give later, any possibility of demanding the withdrawal of those grants which had been allocated for

investments completed outside the zones selected for 'incentives'. It should be remembered that Article 93 (2) gives the Commission wide powers which include the complete abolition of a system of aid. By ordering the temporary suspension of the award of investment grants the applicant does not appear to me to have exceeded its powers; its intention was to see that the interest of the Community prevailed over the interests of German industrialists. Moreover, once the districts where the extension of the system of aid was recognized as complying with the Treaty were defined, the right of the investors concerned to claim investment grants was revived. The only effect of the Decision on them was in certain cases to delay the benefit of the aid by a few months.

VII — The problem of the refund of certain grants awarded after 24 February 1971

There remains the last question raised in the applicant's submissions, which puts at issue the application of the Decision to situations arising before 24 February 1971. As has been seen, the Commission maintains that the German Government did not comply with its Decision, from the fact alone that, after being notified of it, it did not instruct the Federal Delegate to the Coal-Mining Industry not to issue any certificates awarding the right to investment grants.

The German Government does not dispute this fact and acknowledges that certificates were in fact issued between 24 February 1971 and mid-December 1971.

But had the Commission the power to order that the issue of certificates be stopped without taking into account rights acquired prior to its Decision or legal situations arising before notification of the Decision.

As I have already mentioned, only for the future can it make decisions within the meaning of Article 93 (2). The decisions which it takes under this Article are not declaratory. By that I mean that it is only from the time the Commission makes its decision that the system of aid under consideration can be held, subject to the jurisdiction of this Court, to be incompatible with the Common Market. This definitely excludes any retroactive effect and cannot in any event justify the refund by undertakings of grants already awarded.

In this case, moreover, the Commission does not go so far; it does not for one moment intend to ask the German Government to withdraw those investment grants linked with tax assessments paid before 24 February 1971.

It even admits that industrialists who received before that date a certificate from the Federal Delegate continue to benefit from the additional period of time provided for by Article 32 of the Kohlegesetz, by retaining the benefit of investment grants.

But on the other hand, it intends to compel the German Government to require the refund of grants if, first, they have been awarded by virtue of certificates issued after 24 February 1971 and if, secondly, these grants relate to investments started after 20 August 1970 or to applications made after that date.

In fact, it seems to me that this argument is somewhat thin. If the submissions of the Commission are to be accepted, there would be altogether, according to the Federal Government, only 18 undertakings which would lose their grants in respect of investments effected after 20 August 1970; these investments came to a total of DM 33 million the value of the corresponding investment grants being DM 3 300 000.

Although the financial interest in this case is in fact modest, it nevertheless raises a question of principle. As I have explained, the system of investment grants created by Article 32 of the

Kohlegesetz offered undertakings several choices:

— in the first place, the application for a certificate and, consequently, the right to qualify for the benefit of the grant could only arise after the works were completed;

— in the second place, the certificate could be issued while the works are being carried out, the party concerned being able to make use of the additional period of time to complete the works;

— finally, the application could precede any commitment of capital; the certificate was then issued for a scheme which had to comply with certain conditions.

It is, in my opinion, only in the last case that the Decision of the Commission calling upon the Federal Government to suspend without delay the issue of certificates after 24 February 1971 could and should be implemented at once, provided that the application for a grant had not already been made by the parties concerned.

As for those industrialists who had already committed their capital before that date and, *a fortiori,* those who had advanced the whole of the money for the setting up of new undertakings or the expansion of existing undertakings, they could, under their domestic law, claim to be legally entitled to the benefit of investment grants, provided only that the Federal Delegate was of the opinion that these investments complied with the aims of the scheme, namely the adaptation and improvement of the economic structure of the coalmining areas. In support of its claim that the grants from which these taxpayers have benefited on the basis of certificates issued after 24 February 1971 should be withdrawn, the Commission relies on the sole fact that the investments in question should have been undertaken or the applications made at the latest by 20 August 1970. It intends, therefore, to make the effect of the suspension of the system of aid retroactive to a date prior to the Decision and more precisely to the date of the Communication which it had published in the Official Journal of the European Communities dated 14 August 1970, assuming that a time-limit of six days from the date of such publication was long enough, in its view, for all the parties concerned to make themselves acquainted with it.

This reasoning seems to me to be erroneous in that it attributes to the communication an effect which it cannot have. It is actually only the first step, devoid of any of the elements of a decision, of a procedure the only enforceable act of which is the decision which brings it to an end. Secondly, contrary to the view of the Commission, it is not the issue of the certificate by the Federal Delegate which gives rise to the award of an investment grant. It is the undertaking and financing of the works acknowledged later to comply with the aims of Article 32 of the Kohlegesetz. Further, as the grant is a reduction of the tax payable by the taxpayer, it is not actually received until the tax assessment is fixed. The Commission argues that it could therefore just as well have ordered that no more grants should be awarded from the date when its Decision was ratified. The arbitrary choise of the date when the certificate is issued has no serious legal foundation.

On the other hand, the choice of 20 August 1970 as the date by which the investment must begin does not appear anywhere in the Decision. It is contained in the letter dated 16 December 1971 sent by the Commission to the Federal Government. This choice, based in my opinion on an erroneous understanding of the powers of the Commission, also involves an infringement of the principle of the protection of confidence, which in your recent judgment of 5 June 1973 *(Commission v Council,* Cases 82/72) you stated was a general principle of Community Law.

In these circumstances, the only obligation which the Commission had

the right to impose upon the Federal Government was to suspend the non-selective award of investment grants in the Land of North Rhine-Westphalia from 24 February 1971, but only for investments not yet undertaken or for applications relating to schemes not lodged by that date.

The German Government has stated, and this is not disputed, that no certificate had been issued for such investments or schemes.

In these circumstances, I can only find that that Government has not failed to comply with the obligations which the Commission could legally impose upon it and I am of the opinion, therefore, that the application of the Commission should be rejected and that the applicant should bear the costs of the action.