OPINION OF ADVOCATE GENERAL MISCHO

delivered on 12 March 2002 [1]

1. The Federal Republic of Germany is asking the Court to annul the Decision of the Commission of the European Communities of 14 March 2000, notified under document number C(2000) 809 final, on the redefinition of areas under the joint scheme entitled 'Improving regional economic structures' in Germany for the period 1 January 2000 to 31 December 2003 — West Germany and Berlin (hereinafter 'the contested decision'). [2]

I — Legal background

2. Article 87(3) EC on aids granted by States provides:

'The following may be considered to be compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

...

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

...'

3. On 10 March 1998, the Commission published a text in the C series of the *Official Journal of the European Communities* [3] entitled 'Guidelines on National Regional Aid'. According to the introduction, the document deals with 'the criteria applied by the Commission when examin-

1 — Original language: French.

2 — OJ 2001 L 97, p. 27.

3 — OJ 1998 C 74, p. 9.

ing the compatibility of national regional aid with the common market under Articles 92(3)(a) and 92(3)(c) of the EC Treaty.' Its purpose is to revise 'all the criteria currently applied' and to replace the Commission's eight previous 'documents' with a single text with the aim of 'transparency, up-to-dateness and simplification'.

4. The document is neither signed nor dated. During the proceedings to which this Opinion relates, the Commission stated that the text had been drawn up in close cooperation with the Member States and adopted by the College on 16 December 1997.

5. In particular, the guidelines make provision for the method by which the Commission sets the population ceiling for the whole of the Community for regions which may receive national regional aid.

6. The following are automatically included within the Community ceiling under Article 92(3)(a) of the EC Treaty (now, after amendment, Article 87(3)(a) EC): any region which is a 'NUTS' (Nomenclature of Statistical Territorial Units) level II geographical unit, and which has a per capita gross domestic product (GDP), measured in purchasing power standards (PPS), not exceeding 75% of the Community average.

7. The method of determining the total population figure under Article 92(3)(c) of the Treaty is not, however, fixed. Annex III of the guidelines states that the figure is obtained by deducting from the overall ceiling for the Community the population of the regions eligible under Article 92(3)(a). It is then distributed between the Member States, taking account of regional socio-economic disparities within each Member State, assessed within the context of the Community. This takes place in two stages.

8. Firstly, a distribution key is used for each NUTS III region over three years and using two statistical criteria set by the Statistical Office of the European Communities (Eurostat) — unemployment indices and per capita GDP/PPS — to evaluate the difference between the basic Community thresholds and those indicators (85 for per capita GDP and 115 for the unemployment index). Regions which display a significant difference in relation to at least one of the two basic thresholds may be taken into account. All regions of Member States which are not included under Article 92(3)(a) and which satisfy this condition are added, which allows the

relative weightings of each Member State within the whole to be established. The distribution key between the Member States is then applied to the total population figure of the regions covered by Article 92(3)(c), thus providing the weighting of each Member State as an absolute value.

9. Secondly, 'the results thus obtained are corrected, if necessary, in order:

— to guarantee to each Member State that the population assisted under the 92(3)(c) derogation is at least equal to 15% and does not exceed 50% of its population not covered by the 92(3)(a) derogation,

— to attain, in each Member State, a sufficient level to include all the regions which have just lost 92(3)(a) status and the areas with a low population density,

— to limit the reduction in the total coverage (under the two Article 92(3) regional derogations) of a Member State to 25% of its previous coverage.'

Finally, 'the results obtained for the Member States not directly concerned by the abovementioned corrections are then adjusted proportionately so that the sum of the individual ceilings equals the Article 92(3)(c) ceiling set for the Community.'

II — Facts of the dispute

10. The facts of the dispute are particularly important in this case in regard to the admissibility of the action. For this reason they must be set out in considerable detail.

11. On 24 February 1998, the Commission sent a letter to the Federal Republic of Germany, the purpose of which was defined as follows: 'Proposal relating to appropriate measures regarding State regional aid under Article 93(1) of the EC Treaty.'

12. In this letter, the Commission first forwarded the Guidelines to the Federal Republic of Germany.

13. It went on to inform Germany that it had set [4] the total distribution ceiling for regional aid, for the years 2000-2006, at 42.7% of the Community's population (19.8% under Article 92(3)(a), 22.9% under Article 92(3)(c)) as compared to the previous figure of 46.7% (22.7% under category (a), 24% under category (c)).

14. It justified that reduction, firstly, on account of the improvement in the economic and social situation in certain regions which meant that they were no longer eligible under Article 92(3)(a) of the Treaty, and, secondly, on account of its wish to ringfence more strictly the aid under category (c), concentrating it on the regions most in need, in order to ensure that aid granted should not unfavourably affect intra-Community trade, whilst preserving its effectiveness and coherence within the Structural Funds policy. Finally, the prospect of Community enlargement during the period 2000-2006 was invoked in order to justify realignment of the system.

15. The Commission went on to say that, 'in its opinion', during the period 2000 to 2006, 35.7% of the population of Germany might benefit from regional aid under Article 92(3) of the Treaty, with 17.4% under category (a) and 18.3% under category (c).

4 — In the course of these proceedings, it was ascertained that a ceiling was also set on 16 December 1997.

16. The Commission stated finally:

— that it had decided, on the basis of Article 93(1) of the Treaty, it would propose to Member States ... as a relevant measure under Article 93(1), an expiry date for their regional maps of 31 December 1999;

— that it was proposing that Member States should notify it, in accordance with Article 93(3) of the Treaty and before 31 March 1999, of the method used to determine from 1 January 2000 eligible regions, the map of eligible regions and the amount of the aid and the level applicable of the ceilings on combination.

17. Finally, the Commission informed Germany that if it failed to respond or was unable to accept the relevant measures, it reserved the right to commence proceedings under Article 93(2) of the Treaty.

18. By letter of 23 April 1998, the German Government informed the Commission that, whilst it accepted the principle of the guidelines, it was not in a position to approve all aspects thereof, and that it was, therefore, unable to approve the 'appropriate measures' proposed by the Commission.

19. That letter is very important because it reveals the essence of the matter before the Court. Referring to the 'corrections' (mentioned above), the German Government particularly criticised the fact that regions which until that time had been covered by Article 92(3)(a), but which no longer met the conditions, were automatically transferred to category (c) of the same article. By proportionately changing the percentage figures of the ceilings of Member States which had not benefited from correction measures, as the Commission later did, regions in those countries which were clearly entitled to category (c) status were removed entirely from the list of recipients, to the advantage of comparatively more developed regions of Member States thus favoured, simply because those regions previously came under category (a).

20. The Federal Republic of Germany believed that that method breached the principle of equal treatment. It considered, therefore, that the question of regions that previously fell under category (a) should be settled either by offsetting those regions against the national ceiling of the country in question, or by raising the overall Community ceiling.

21. By letter of 24 August 1998, however, the Federal Republic of Germany approved the appropriate measure which involved altering existing systems of aid as from 31 December 1999, but excluding from approval the method for calculating the ceiling for the eligible German regions.

22. A further letter from the Commission dated 30 December 1998 informed the Federal Republic of Germany that its revised ceiling was now set at 34.9% of its population, with 17.3% under category (a) and 17.6% under category (c). Appendix A of the letter stated that the Commission had initially set the latter figure at 23.4% and the reason for its reduction was compensation for the correction measures taken in favour of other Member States.

23. By letter of 30 March 1999, the German Government sent to the Commission the draft map of its regional aid areas, proposing areas covering 17.6% of its population under category (a) and 23.4% under category (c) (in the *Länder* of western Germany and in Berlin), a total of 40.56% of the German population.

24. By letter of 17 August 1999, the Commission stated that the draft presented for areas under category (a) was compatible with the Common market, but initiated the procedure under Article 88(2) EC for the regions under category (c). [5]

5 — OJ 1999 C 340, p. 8.

25. In a letter dated 17 September 1999, the Federal Republic of Germany, detailing its objections to the method adopted by the Commission regarding the corrections, acknowledged that the Commission was in any case prepared to consider a population ceiling of 17.6% under Article 87(3)(c). On that basis, Germany stated it was assuming ('geht davon aus') that the Commission 'in the first instance' would at least ('zumindest') declare the regions corresponding to the figure of 17.6% on the enclosed list to be compatible with the common market.

26. The Federal Republic of Germany proposed to the Commission the resumption of joint talks in respect of the size of the regional area covering between 17.6% and 23.4% of the German population so as to find an acceptable solution to the problem for all parties.

27. Following further communications and exchanges of letters, the Federal Republic of Germany, by letter dated 2 February 2000, declared it was prepared, for the time being ('zunächst'), to restrict the regions receiving support under Article 87(3)(c) EC to the area agreed on by the Commission so as to prevent aid to structurally weak regions being halted in the absence of authorisation from the Commission.

28. The Federal Republic of Germany annexed a new list to this effect covering 17.7% of the German population. Regarding the remaining 5.7% of the population in issue, it declared it would maintain its legal position that failure to take account of those regions breaches the principle of equal treatment.

29. Lastly, on 14 March 2000, the Commission Decision in issue was published. It authorises the regional aid map corresponding to 14 546 097 inhabitants, or 17.7% of the German population, 'for the regions eligible under Article 87(3)(c) of the EC Treaty, provided Germany complies with the conditions and requirements set out in Article 2.' Article 2 provides, *inter alia*: 'Germany shall introduce at national level measures which quite clearly distinguish those regions which are eligible under Article 87(3)(a) of the EC Treaty from those regions which are eligible under Article 87(3)(c) of the EC Treaty and which clearly establish that only these regions are entitled to receive regional aid within the meaning of the guidelines on national regional aid.'

III — Forms of order sought

30. In its application, lodged with the Court registry on 16 June 2000, the Federal

Republic of Germany, as applicant, claims that the Court should:

— annul the Commission Decision of 14 March 2000 concerning the redefinition of areas proposed under the joint programme 'Improvement of regional economic structures' in Germany for the period 1 January 2000 to 31 December 2003 — West Germany and Berlin, on the grounds that it finds that the proposals notified by Germany regarding regional aid for those areas covered by Article 87(3)(c) EC and which represent 23.4% of Germany's population are not compatible with the Common market;

— order the defendant to pay the costs.

31. As defendant, the Commission, in its defence lodged on 16 June 2000 with the Court registry, contends that the Court should:

— dismiss the application as inadmissible;

— order the applicant to pay the costs.

IV — Analysis

Admissibility

A — First plea of inadmissibility by the Commission on the basis that there is no act which adversely affects the Federal Republic of Germany

32. As its principal argument, the Commission maintains that the contested decision does not adversely affect the Federal Republic of Germany and that the action by Germany is, for that reason, inadmissible.

33. The Commission contends that the application is based on the mistaken notion that the contested decision includes a certain number of positive provisions (authorisation of the map of the eligible regions representing 17.7% of the German population) and a certain number of negative provisions (refusal to recognise that the additional 5.7% of the German population is eligible). It is the Commission's view, however, that the contested decision contains only the positive provisions cited above.

34. In support of its argument, the Commission states that the contested decision was adopted on the basis of the notification from the German Government of

30 March 1999 which the Commission considered to have been amended by the letter of 2 February 2000. In that letter, according to the Commission, Germany submitted a map of the eligible regions which no longer covered 23.4% of the German population as in the notification of 30 March 1999, but 17.7%. As the Commission approved the amended map, the contested decision does not adversely affect the Federal Republic of Germany.

35. The German Government, on the other hand, considers that the contested decision does indeed contain the negative provisions mentioned above. It states that it has always adhered to its notification of 30 March 1999, which was not amended and did not become void by virtue of the letter of 2 February 2000. In Germany's view, therefore, the contested decision contains negative provisions in so far as the decision did not state that the regions of the total area submitted by it were compatible. Since the contested decision does adversely affect it, the German Government concludes that the action is admissible.

36. Starting with this first plea of inadmissibility, I shall first examine the contents of the contested decision.

37. Several passages of the contested decision confirm that the Commission proceeded on the basis that the Federal Republic of Germany had amended its initial notification of 30 March 1999 by its letter of 2 February 2000. To this effect, reference may be made to paragraph 35 which states: 'Germany's notification of 2 February 2000, amended in relation to the Article 87(3)(c) areas, is examined in the light of Article 87(3)(c) of the EC Treaty and, in particular, in the light of the guidelines', and to paragraph 49 which states: 'During the course of the procedure, so as to bring the notification into line with the guidelines, Germany provided a list of regions that was reduced to the population ceiling set by the Commission ...' and paragraph 74 which provides: 'In any case, Germany has amended its list of assisted regions eligible under Article 87(3)(c) of the EC Treaty ... .'

38. Furthermore, it cannot be denied that the Commission explicitly limited the scope of the contested decision to the contents of the letter of 2 February 2000. This is clear from paragraph 9 which reads: 'This Commission Decision relates only to the assisted regions and permitted maximum aid intensities which fall under the derogation of Article 87(3)(c) of the EC Treaty according to the German proposal as amended by the German Government during the formal investigation procedure.'

39. Since the text of the Commission decision is clear, it remains for me to consider the main issue which is whether the Commission misinterpreted the letter from the Federal Republic of Germany of 2 February 2000.

40. Attached to the letter of 2 February 2000 is Annex 1 entitled 'List of assisted regions under Article 87(3)(c) of the EC Treaty corresponding to 17.73% of the population.' The list is accompanied by comments in the letter itself which I have summarised above but which it is important to cite in detail:

'The German Government states firstly that the Federal Republic of Germany continues to adhere to its legal position that a reduction in the percentage of regions eligible under Article 87(3)(c) of the EC Treaty from 23.4% of the population of Germany, a figure initially set by the European Commission, to 17.6% of the population is not compatible with the principle of equal treatment. The German Government also believes, as previously stated, that the relevant provisions of the EC Treaty need not prevent a small-scale exchange of regions ("adjustments" of assisted regions).

The Federal Republic of Germany is nevertheless prepared, *for the time being*,[6] to restrict the percentage of assisted regions under Article 87(3)(c) of the EC Treaty to the level accepted by the European Commission and not to make adjustments to those regions, thus avoiding support for structural reforms in structurally weak regions, where the need is urgent, from being halted for a period of time in the absence of authorisation from the Commission.

The Bund and the *Länder* therefore intend henceforth to designate the assisted regions under Article 87(3)(c) of the EC Treaty at 17.73% of the population (14 546 097 inhabitants) (category C, see Annex 1 ...).'

41. So, whilst the German Government adheres to its position that a reduction of the ceiling from 23.4% to 17.6% or 17.73% is in breach of the principle of equal treatment, it states, nevertheless, that it is prepared for the time being ('zunächst') to restrict the area of the regions eligible to the level accepted by the Commission.

42. It is difficult to interpret that passage as anything other than a request to the Commission to authorise 'for the time being' the list attached as Annex 1 to the letter in which it appears. At the risk of being excessively formalistic, therefore, I am bound to conclude that the Commission did not make an error of interpretation in holding that the letter of 2 February 2000 amended the communication of 30 March 1999.

6 — Emphasis added.

43. It is certainly true that the letter of 2 February 2000 also contained an Annex 3 entitled 'List of eligible regions under the joint project agreed by the competent Bund/Länder planning committee on 25 March 1999 which could not be part of the assisted regions under Article 87(3)(c) of the EC Treaty with a ceiling set of 17.73% of the German population (5.67% of the population).' However, it cannot be inferred either from the title of that annex nor from the contents of the letter of 2 February 2000 that the German Government was asking the Commission, as in the case of the list attached in Annex 1, to authorise 'for the time being' the list in Annex 3 as falling under Article 87(3)(c) EC.

44. It might even be said that the opposite is true. Under point 1.1.1 of the same letter the Federal Republic of Germany makes clear its intention to implement in those regions types of aid to which Article 87(1) EC does not apply (promotion of infrastructure) or is considered inapplicable (*de minimis* aid). Germany, moreover, has expressed its wish to be able to grant those regions aid under the Community regime of State aid to small and medium-sized enterprises and is asking the Commission to grant it the corresponding authorisation. For this reason, it states that it is attaching the list of regions in Annex 3.

45. On the basis of the text of the letter of 2 February 2000 and of the contested decision, I am compelled to conclude that that decision contains only one provision which is entirely positive, the acceptance of a map of the eligible regions representing 17.73% of the German population, and that, on the other hand, the decision does not contain an implicit refusal to recognise the eligibility of additional regions representing 5.63% of the German population.

46. It must be acknowledged that Germany's request for authorisation for a more restricted area in accordance with the Commission's view was considered by Germany simply as the first stage of a process. The reason behind that request was a laudable concern for legal certainty and sound administration, in order as rapidly as possible to bring about clarity with regard to the point that was undisputed between itself and the Commission, and to avoid an interruption in aid to regions experiencing particular difficulties.

47. On the other hand, I cannot support Germany's intention to use its application against that limited authorisation to obtain a judgment by the Court on the rest of its claims.

48. The result is an application for annulment of the decision and, at the same time, a request that its full effects should be

maintained. The actual substance of that decision is therefore entirely acceptable to it.

49. Given that fact and all the other considerations above, I am compelled to point out that the German Government is in fact challenging something other than the content of the contested decision.

50. As the Commission rightly points out, we are clearly concerned here with the 'decisions' of 16 December 1997 and 16 December 1998 in which the Commission set a ceiling of eligible regions under Article 87(3)(c) EC of 18.3% and 17.6% respectively of the German population. I shall have the opportunity under the second plea of inadmissibility to consider the legal merit of those stances, in particular, the issue of whether, as the Commission maintains, those decisions were definitive decisions such that the Federal Republic of Germany should have commenced proceedings against them within a period of two months.

51. Meanwhile, in relation to the first plea of inadmissibility invoked by the Commission, it may be concluded that both the letter of the German Government of 2 February 2000 and the text of the contested decision make clear that the decision refers only to the list in Annex 1 of that letter. It does so in a positive manner, in accordance with the request of the German Government.

52. In conclusion, the contested decision does not adversely affect the Federal Republic of Germany, and the action must be dismissed as inadmissible.

B — Second plea of inadmissibility by the Commission based on the lateness of the application

53. In the alternative, the Commission submits that the action was brought out of time. If the contested decision was nevertheless to be considered as refusing authorisation for eligible regions up to a ceiling of 23.4% of the German population, that decision, according to the Commission, only confirms the decision of 16 December 1997 communicated to the German Government by letter of 24 February 1998 and the decision of 16 December 1998 forwarded to the German Government by letter of 30 December 1998.[7] As the Federal Republic of Germany did not contest those decisions within the time-limit, the action must be declared inadmissible.

54. The German Government contests this second plea of inadmissibility, claiming that the decisions of 16 December 1997

7 — It should be pointed out that the Commission has submitted one copy only of those letters in these proceedings and no copy of those decisions. Germany, however, has not claimed any discrepancy between the contents of the decisions and the letters.

and 16 December 1998 are only interim decisions of a purely preparatory nature. Since only measures with binding legal effects may be contested, it would not have been able to bring an action against those decisions. Its action against the contested decision, a decision which, it claims, has undeniably produced legal effects, is therefore not too late.

55. I shall therefore consider the nature of the Commission decisions of 16 December 1997 and 16 December 1998.

56. When questioned at the hearing as to the legal basis of those decisions, the Commission referred to Article 88(3) EC.

57. That paragraph provides: 'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2 ... .'

58. I do not see how that paragraph can attribute powers to the Commission to set binding conditions which certain types of aid must fulfil before it has received notification of a specific plan. Article 88(3) EC refers only to an act which itself is of a preparatory nature, that is the commencement of a procedure under Article 88(2) EC. Article 88(3) does not therefore allow the Commission to adopt a decision which legally binds Member States, the purpose of which is to set population ceilings to establish regions as eligible under Article 87(3)(a) and (c) EC.

59. Rather, it should be observed that the decisions of 16 December 1997 and 16 December 1998 set population ceilings within the meaning of and according to the method set by the guidelines. They constitute executing measures of those guidelines.

60. In order, therefore, to establish the legal effect of those decisions, it is necessary first to consider the legal nature and the effects of the guidelines themselves. That decisions taken under the guidelines should have legal effects going beyond the effects of the guidelines themselves cannot, in my view, be accepted.

61. The parties agree that the guidelines do not have binding legal effect on Member States and that they may therefore not be

contested autonomously. The Commission recognises this explicitly in its rejoinder.

62. It cannot be disputed that the Treaty confers no powers on the Commission to legislate in the area of State aid. As regards measures of a general nature, Article 88(1) EC empowers the Commission only to 'propose [to the Member States] any appropriate measures required by the progressive development or by the functioning of the common market.'

63. In *IJssel-Vliet*, [8] the Court gave a ruling on the subject of the effect of guidelines issued by the Commission for the examination of State aid in the fisheries sector. [9]

64. The judgment states that guidelines proposed as an appropriate measure to Member States have binding effect only if the Member State concerned accepts the rules set out in the guidelines.

65. Referring to *CIRFS and Others* v *Commission*, [10] the Court stated in *IJssel-Vliet* that it 'recognised that a "discipline" of the same legal nature as the Guidelines, *whose rules were accepted by the Member States*, [11] was binding.' [12]

66. Thus, taking account of the Netherlands' acceptance of the rules set out in the guidelines for the examination of State aids in the fisheries sector, the Court, at paragraph 44 of *IJssel-Vliet*, points to the binding nature on the Netherlands of the guidelines in the following words: '... as a result of the obligation of cooperation laid down by Article 93(1) of the Treaty and *of its acceptance of the rules laid down in the Guidelines*, [13] a Member State, such as the Netherlands, must apply the Guidelines when deciding on an application for aid for the construction of a vessel intended for fishing.'

67. Similarly, in *Germany* v *Commission*, [14] acknowledging that Germany had accepted the rules set out in the Guidelines for the examination of State aid in the

8 — Case C-311/94 [1996] ECR I-5023.
9 — OJ 1988 C 313, p. 21.
10 — Case C-313/90 [1993] ECR I-1125, paragraph 35.
11 — Emphasis added.
12 — *IJssel-Vliet* cited above, paragraph 42.
13 — Emphasis added.
14 — Case C-288/96 [2000] ECR I-8237.

fisheries and aquaculture sector,[15] the Court ruled, with reference to *CIRFS and Others* v *Commission* and *IJssel-Vliet*, that 'those rules bind the Commission and the German Government.'[16]

68. It may also be observed that the Community legislature itself referred to that case-law, including the following words in Article 19(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty:[17] 'Where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding and inform the Member State thereof. The Member State *shall be bound by its acceptance*[18] to implement the appropriate measures.'

69. What conclusions may be drawn from the above regarding the present case?

70. The Federal Republic of Germany and the Commission entered into a series of arguments relating to the scope of the appropriate measure proposed by the Commission in its letter of 24 February 1998. According to the German Government, the Commission has proposed amendment of all the national rules applicable to regional aid so that the rules are compatible with the guidelines adopted by the Commission as from 1 January 2000. The Commission, however, claims that its proposal regarding an appropriate measure concerned the existing aid regimes only.

71. Whatever the scope of the appropriate measure proposed, it cannot be disputed that the Federal Republic of Germany never accepted the rules set out in the guidelines on the calculation of population ceilings.

72. Indeed, whilst, in its letter of 24 August 1998, the German Government informed the Commission that it would accept the proposed appropriate measure, it did so subject to the following reservation: 'Acceptance of this appropriate measure does not mean that the German Government approves the method used for calculating the ceiling for assisted German regions, nor the rules of the European Commission relating to the method of selection of eligible national regions or its powers to set maximum levels below the general ceiling.'

73. It is clear that Annex III of the guidelines containing the method of calculation of the ceilings in issue, at the very least, may not be considered as an appropriate measure accepted by Germany and, on that basis, may not be considered as having a binding effect on it.

15 — OJ 1992 C 152, p. 2.
16 — *Germany* v *Commission* cited above, paragraph 65.
17 — OJ 1999 L 83, p. 1.
18 — Emphasis added.

74. That is not to say, naturally, that the Commission is not entitled to set itself guidelines.

75. Indeed, as the Court ruled in paragraph 62 of *Germany* v *Commission*, 'it should be borne in mind that the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as the Guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and they do not depart from the rules of the Treaty.'

76. The adoption of a policy of this kind may even be the expression of a concern for sound administration. Indeed, as the Court ruled in *Spain* v *Commission*,[19] on the subject of the Commission's internal guidelines of 15 October 1997 concerning net financial corrections in the context of the application of Article 24 of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments,[20] as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993,[21] (hereinafter 'the coordination regulation'), 'those guidelines contribute to ensuring that, when the Commission takes decisions pursuant to [Article 24 of the coordination regulation], the Member States or the authorities designated by them benefit from identical treatment in comparable situations. Also, such guidelines are likely to strengthen the transparency of individual decisions addressed to Member States.'[22]

77. In *Spain* v *Commission*, the Court, however, also ruled on the legal effect of those internal guidelines, stating:

'The internal guidelines ... indicate the general lines along which, pursuant to Article 24 of the coordination regulation, the Commission envisages subsequently adopting individual decisions whose legality may be challenged before the Court by the Member State concerned in accordance with the procedure laid down by Article 173 of the Treaty.

Such an act of the Commission, which reflects only its intention to follow a particular line of conduct in the exercise of the power granted to it by Article 24 of

19 — Case C-443/97 [2000] ECR I-2415.
20 — OJ 1988 L 374, p. 1.
21 — OJ 1993 L 193, p. 20.
22 — *Spain* v *Commission* cited above, paragraph 32.

the coordination regulation, cannot therefore be regarded as intended to produce legal effects (Case 114/86 *United Kingdom* v *Commission* [1988] ECR 5289, paragraph 13, and Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 28).' [23]

78. The same is to my mind true of the guidelines in issue here. They too must be regarded as internal guidelines which simply reflect the Commission's intention to follow a particular line of conduct in the exercise of the power granted to it by Article 88(2) EC in making any decision on an aid project notified by a Member State. In themselves, those guidelines produce no legal effect in respect of Member States. Only a decision made in accordance with Article 88(2) EC may have legal effect.

79. Therefore, given that Annex III of the guidelines has no binding effect in respect of the Federal Republic of Germany, the measures taken to implement that annex, the decisions of 16 December 1997 and 16 December 1998, cannot have binding effect. Their legal effect cannot go beyond the act which those decisions are intended to implement.

80. The Commission also refers to the fact that the letter of 24 February 1998 which, it claims, contains the decision of 16 December 1997, was authorised by the Commission acting as a college and that the terms '... the Commission *has decided* [24] to set the ceiling ...' were used in that letter.

81. Those facts do not, however, prove that in this case the Commission adopted a decision which had legal effect. Indeed, the fact that the Commission adopts an act acting collegiately and terms it a 'decision' is not sufficient for it to be understood to be a decision which has legal effect, if the Commission clearly does not have the powers to adopt a decision of this kind.

82. Finally, it may be noted that in its letter of 17 August 1999 initiating the procedure set out in Article 88(2) EC, the Commission 'expresses doubts' as to the compatibility with the last sentence of point 3.10 of the guidelines of a list of regions covering 23.4% of the German population. It states that that ceiling may not, 'in its current state', be regarded as compatible with the common market. It does not, however, state that that ceiling signifies a failure to respect a decision made by the Commission.

23 — *Spain* v *Commission* cited above, paragraphs 33 and 34.

24 — Emphasis added.

83. It is therefore clear from all of the foregoing that the decisions of 16 December 1997 and 16 December 1998 are preparatory acts which have no binding legal effect.

84. I am therefore of the view that the second plea of inadmissibility which I have considered in the alternative only must be dismissed.

85. The fact that the decisions of 16 December 1997 and 16 December 1998 are described as preparatory acts, however, is also important in the matter of what actions Germany may bring.

86. As it is clear, in my view, that the Commission has never made a definitive statement — neither in the 'decisions' of 16 December 1997 and of 16 December 1998 nor in the contested decision — on the matter of Germany's application for authorisation for aid to regions covering 23.4% of its total population (instead of 17.73%), it could still submit a supplementary list of regions covering 5.67% of its population. It would then be for the Commission to open the formal review procedure laid down in Article 88(2) EC if it considered it appropriate.

Substance of the case

87. In the event that the Court none the less considers the plea by the Federal Republic of Germany to be admissible, and that the Commission has therefore implicitly declared a list of regions covering 23.4% of the German population as not compatible with the common market, I would like to make the following observations on the substance of the case.

88. The German Government invokes four pleas: breach of Article 3(1)(g) and Article 87(3) EC, breach of the principle of equal treatment and of the principle of proportionality and failure to give reasons.

89. I first propose to consider the plea of breach of the principle of equal treatment.

90. Indeed, from the time of the German Government's first answer to the Commis-

sion's notification of the decision of 16 December 1997, in its letter of 23 April 1998, it made clear that the ceiling of 17.6% set for regions under Article 93(3)(c) of the Treaty was, in its opinion, incompatible with the principle of equal treatment.

91. Specifically, the German Government states that it does not, in principle, oppose the Commission's idea of tempering by means of corrections cases of hardship which might arise from a global reduction of assisted regions as provided by paragraph 8 of Annex III of the Guidelines. It disputes, however, that those correction measures must then be 'paid for' under paragraph 9 of Annex III, by a proportional adjustment of those results obtained for the Member States not directly concerned by the corrections.

92. The German Government points out in this regard that the ceiling of 23.4% initially calculated by the Commission was done so on the basis of objective economic data corresponding to the actual difficulties of those regions. To adjust that ceiling subsequently in such a way as to affect only the Member States not concerned by corrections constitutes a breach of the principle of equal treatment.

93. The Commission replies that the figure of 23.4% was not a fixed ceiling to be applied immediately to the Federal Republic of Germany, but represented only an interim, provisional result in the process of determining the ceiling to assign the Federal Republic of Germany on the basis of all the rules in Annex III of the Guidelines.

94. The Commission adds that it was necessary to take into consideration the situation throughout the Community and that 'indicators other than' the Gross Domestic Product or the rate of employment might be taken into account in order to refine the initial analysis. Furthermore, at the hearing, the Commission stated that those corrections should be understood as 'minimum guarantees' which each Member State concerned might expect to enjoy.

95. It should be noted, in this respect, that even though Article 87(3)(c) EC 'gives the Commission power to authorise aid intended to further the economic development of areas of a Member State which are disadvantaged in relation to the national average',[25] the Commission was also entitled, in establishing the method used to calculate the ceiling, to take into consideration the situation across the whole of the Community. Under Article 87(3) EC, 'the Commission has a discretion the exer-

25 — Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 19.

cise of which involves economic and social assessments *which must be made in a Community context.*' [26]

96. However, as the German Government states, the Community context is already relevant during the first stage of calculating the ceiling for each Member State before the corrections are applied, given that the first stage takes into account 'European indicators'. As the Commission itself points out, those indicators 'mean that, in a given Member State, the percentage of the population eligible under Article 87(3)(c) EC is lower where standards in the Member State in question are better in comparison with those of other Member States in terms of unemployment or the standard of living.'

97. It cannot but be observed, moreover, that the corrections under point 8 of Annex III are to some extent political. The same may be said of the principle that each Member State must be guaranteed that the population assisted under the derogation contained in Article 87(3)(c) EC represents at least 15% of its population not covered by the derogation contained in Article 87(3)(a) EC and that each Member State must be guaranteed that the reduction in the total coverage of a Member State should not exceed 25% of its previous coverage.

98. Without wishing to rule out facts of this nature being taken into consideration, in order to ensure that particular regions benefit from transitional measures, it is my view that this must not, however, be done exclusively at the expense of the regions whose difficult economic situation has, in the initial stages, been recognised on the basis of mathematical criteria.

99. As the German Government rightly stresses, the procedure followed by the Commission means that regions of Germany experiencing problems as serious as regions in other Member States are disqualified from the system of aid under Article 87(3)(c) EC in favour of regions situated in other Member States experiencing less acute difficulties.

100. That constitutes a difference in treatment which, in my view, is not objectively justified. The mere fact that a region is located in a Member State which has not been entitled to corrections (for example, Germany) is not a relevant criterion for depriving that region of the possibility of receiving aid under Article 87(3)(c) EC.

26 — Emphasis added; Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, paragraph 24; Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18; Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 18, and Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 67.

101. It would have been possible to reconcile the objective requirements of the German regions in issue and the need for transitional measures either by increasing the overall Community ceiling, as Germany proposed in its first reply to the Commission, or by lowering proportionally all the national ceilings as the German Government proposed in its application.

102. The Commission continues to claim that to distribute the burden of the correction across all the Member States would have negated the purpose of the corrections, given that, for the Member States concerned, they constitute minimum guarantees.

103. That argument, however, cannot be upheld. It rests on the supposition that the corrections and the percentage rates represent the minimum which the Member States concerned should be able to receive, taking account of Article 87(3)(c) EC. But there is, in my opinion, nothing to confirm that that supposition is true.

104. On the contrary, the Commission itself recognises that 'it is certainly possible to define "the corrections" using parameters other than those used by the Commission ...', whilst questioning whether 'in this case, that would have provided a different result more favourable to the Federal Republic of Germany.'

105. But even if the result would not have been more favourable to the Federal Republic of Germany if a different method of calculation had been used, that would not justify using a method that contravenes the principle of equal treatment.

106. It is therefore my opinion that the Commission infringed Article 87(3)(c) EC since, in exercising its power of discretion, it followed internal guidelines, that is to say point 9 of Annex III, which contravene the principle of equal treatment.

107. There being no need to analyse in further detail the other pleas by the German Government, I therefore conclude, if the action were to be considered admissible, that it is well founded.

V — Conclusion

108. On the basis of my conclusion on the main plea, I propose that the Court should:

— dismiss the application as inadmissible;

— order the Federal Republic of Germany to pay the costs.