OPINION OF ADVOCATE GENERAL MISCHO

delivered on 28 May 2002 [1]

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1 — Original language: French.

1. In Joined Cases C-57/00 P and C-61/00 P, Freistaat Sachsen, first, and Volkswagen AG ('Volkswagen') and Volkswagen Sachsen GmbH ('VW Sachsen'), second, have appealed against the judgment delivered on 15 December 1999 by the Court of First Instance of the European Communities, Second Chamber (Extended Composition), in *Freistaat Sachsen and Others* v *Commission*[2] ('the contested judgment').

I — Introduction

2. For a description of the legal background and the facts from which the dispute arises, I refer to paragraphs 1 to 44 of the contested judgment which, for the sake of brevity, I shall not reproduce here.

3. However, I note briefly that the origin of the present cases lies in Commission Decision 96/666/EC of 26 June 1996 concerning aid granted by Germany to the Volkswagen Group in Mosel and Chemnitz[3] ('the contested decision').

4. In the contested decision, the Commission declared that certain aid granted to the Volkswagen Group for investment projects in Saxony was compatible, in particular, with Article 92(3)(c) of the EC Treaty (now Article 87(3)(c) EC).

5. On the other hand, it stated that the investment aid granted to the Volkswagen Group for its investment projects comprising the creation of a new motor vehicle construction plant at Mosel ('Mosel II') and a new engine production plant at Chemnitz ('Chemnitz II') in the form of special depreciation on investment under the German Assisted Areas Law, with a nominal value of DEM 51.67 million, and also investment aid granted to the Volkswagen group for its investment projects at Mosel II, with a value of DEM 189.1 million, were not compatible with that provision.

6. The Commission also limited the combined effective aid intensity, expressed in gross grant equivalent, to 22.3% for Mosel II and 20.8% for Chemnitz II.

7. The actions brought by Freistaat Sachsen and by Volkswagen and VW Sachsen in the Court of First Instance, seeking partial

2 — T-132/96 and T-143/96, [1999] ECR II-3663.
3 — OJ 1996 L 308, p. 46.

annulment of the contested decision, were dismissed in the contested judgment.

8. In their appeals, the appellants claim that the Court should annul the contested judgment, allow the claims put forward at first instance, and order costs against the Commission. The Federal Republic of Germany intervenes in support of their claims.

9. The Commission contends that the appeal should be rejected, that its submissions at first instance, for the actions to be rejected as unfounded, should stand, and that costs should be ordered against the appellants.

II — Analysis

A — *First plea in law, alleging infringement of Article 92(2)(c) of the Treaty*

10. The appellants, supported by the German Government, criticise the interpretation of Article 92(2)(c) of the Treaty given by the Court of First Instance. [4]

11. That Court found as follows:

'129 Under Article 92(2)(c) of the Treaty, aid compatible with the common market includes "aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division".

130 Far from being implicitly repealed following German reunification, that provision was retained by both the Maastricht Treaty concluded on 7 February 1992 and the Amsterdam Treaty concluded on 2 October 1997. Moreover, an identical provision was inserted into Article 61(2)(c) of the Agreement on the European Economic Area concluded on 2 May 1992 (OJ 1994 L 1, p. 3).

4 — The parties use the new numbering of the Treaty in their pleadings but I feel that, since we are considering an appeal, we should use the same numbering as was used by the Court of First Instance.

131 Having regard to the objective scope of the rules of Community law, the authority and effectiveness of which must be preserved, it cannot therefore be assumed that that provision has become devoid of purpose since the reunification of Germany, as the Commission maintained at the hearing, contradicting its own administrative practice (see, in particular, the Daimler-Benz [5] and Tettau [6] decisions).

132 It should, nevertheless, be emphasised that, since it is a derogation from the general principle laid down in Article 92(1) of the Treaty that State aid is incompatible with the common market, Article 92(2)(c) of the Treaty must be interpreted narrowly.

133 Moreover, as the Court of Justice has emphasised, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the aims of the rules of which it forms part (Case 292/[82] *Merck* v *Hauptzollamt Hamburg-Jonas* [1983] ECR 3781, 3792; Case 337/82 *St. Nikolaus Brennerei* v *Hauptzollamt Krefeld* [1984] ECR 1051, 1062).

134 In this case, the phrase "division of Germany" refers historically to the establishment of the dividing line between the two zones in 1948. Therefore, the "economic disadvantages caused by that division" can only mean the economic disadvantages caused by the isolation which the establishment or maintenance of that frontier entailed, such as, for example, the encirclement of certain areas (see the Daimler-Benz decision), the breaking of communication links (see the Tettau decision), or the loss of the natural markets of certain undertakings, which therefore need support, either to be able to adapt to new conditions or to be able to survive that disadvantage (on that point, but in relation to the fourth paragraph of Article 70 of the ECSC Treaty, see *Barbara Erzbergbau*, p. 409).

135 By contrast, the conception of the applicants and the German Government, according to which Article 92(2)(c) of the Treaty permits full compensation for the undeniable economic backwardness suffered by the new *Länder*, until such time as they reach a level of development comparable with that of the original *Länder*, disregards both the nature of that provision as a derogation and its context and aims.

136 The economic disadvantages suffered by the new *Länder* as a whole have

5 — Commission Decision 92/465/EEC of 14 April 1992 concerning aid granted by the *Land* of Berlin to Daimler-Benz AG Germany (C 3/91 ex NN 5/91) (OJ 1992 L 263, p. 15).

6 — Commission Decision of 13 April 1994 on aid to producers of glass containers and porcelain, Tettau (OJ 1994 C 178, p. 24).

not been caused by the division of Germany within the meaning of Article 92(2)(c) of the Treaty. As such, the division of Germany has had only marginal consequences on the economic development of either zone, which, moreover, it affected equally at the outset, and it has not prevented the economies of the original *Länder* from developing favourably thereafter.

137 It follows that the differences in development between the original and the new *Länder* are explained by causes other than the division of Germany as such, and in particular by the different politico-economic systems established in each State on either side of the frontier.

138 It also follows from the above that the Commission did not make any error of law by stating generally, in the third paragraph of Point X of the [contested decision], that the derogation laid down in Article 92(2)(c) of the Treaty should not be applied to regional aid for new investment projects and that the derogations provided for in Article 92(3)(a) and (c) of the Treaty and the Community framework were sufficient to deal with the problems faced by the new *Länder*.'

12. In Case C-156/98 [7] the Court of Justice interpreted Article 92(2)(c) of the Treaty similarly and in almost identical words. And, rather more even than did the Court of First Instance, it also stressed the geographical aspect of the division, for paragraph 54 in that judgment, which should be compared with paragraph 136 of the contested judgment, reads:

'The economic disadvantages suffered by the new *Länder* as a whole have not been directly caused by the *geographical* division of Germany within the meaning of Article 92(2)(c) of the Treaty'. [8]

13. The appellants and the German Government, however, hold to their view that this interpretation is mistaken and too restrictive.

14. Let us consider the various arguments which they put forward on this.

7 — Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraphs 46 to 56.

8 — Emphasis added.

1. Interpretation of the wording

15. According to the appellants and the German Government, the Court of First Instance misconstrued the wording of Article 92(2)(c) of the Treaty in basing the contested judgment on an interpretation of the expression 'division of Germany' which derives from criteria that are purely physical and/or relate to transport.

16. They submit that, within the context of a provision which deals with compensation for economic disadvantages, the concept of 'division of Germany' is commonly understood to refer to the division of Germany into two separate economic and political systems.

17. In support of this interpretation, the appellants and the German Government also refer to the Protocol on German Internal Trade, which also includes the words 'division of Germany'.

18. The Commission maintains that, under Article 42(2) and Article 118 of the Rules of Procedure of the Court of Justice, which prohibit new pleas in law in the course of the proceedings, the appellants are precluded from relying on the Protocol on German Internal Trade. I do not share that view because, in my opinion, the reference to that Protocol is not a new plea in law raised by the appellants but an argument in support of a plea already raised at first instance.

19. In any event, as regards the Protocol, the appellants themselves explain that '[s]ince in 1957, at the conclusion of the EEC Treaty, there was still hope that the iron curtain might soon be lifted, the signatory States took action so that, as regards the movement of goods between the two German states, the establishment of the *external customs frontier of the territory of the Community* should not disproportionately hinder the trade in goods which still passed at that time between the two economic zones'. [9]

20. Thus, the stress was laid not on the existence of two different political and economic systems but on the existence, between the two Germanies, of a frontier which, without the relief given by that Protocol, would have constituted an external Community frontier like any other.

21. The appellants also refer to a number of other documents to show that the

9 — Emphasis added.

expression 'division of Germany' must be taken as a synonym for differentiation between opposing economic and political systems. More particularly, these are the judgment in *Anastasiou and Others* [10], which refers to the '*de facto* partition of the territory of Cyprus', [11] the answer to Written Question 2654/85, by Mr Pordea, Member of the European Parliament, [12] which refers to the 'division of Europe', the Resolution of the European Parliament on the conclusions of the Luxembourg European Councils on 21 November and 12 and 13 December 1997, [13] which refers to the 'division of Europe', and the preamble to the Maastricht Treaty, which mentions the 'division of the European continent'.

22. But, as the Commission rightly notes, these documents do not constitute an interpretation of the words 'division of Germany' in Article 92(2)(c) of the Treaty. They are therefore not relevant to the resolution of the present action.

23. That said, I agree with the appellants and the German Government that there is a close link between the existence of an inter-German frontier and the existence of two differing politico-economic systems. The radical difference between those two systems was assuredly the origin of the fact that, apart from the openings created by the Protocol on German Internal Trade, the inter-German frontier was more tightly closed than, for example, the German-Swiss frontier. In addition, it cut the bonds that had been created between these territories over a lengthy period when they had been part of one and the same country. The economic disadvantages resulting from that frontier were therefore particularly serious.

24. However, I consider that paragraph 134 of the contested judgment is fully compatible with that viewpoint. It cannot be said that the Court of First Instance meant the physical frontier alone, since it mentions the encirclement of certain areas, the breaking of communication links and the loss of the natural markets of certain undertakings, which are circumstances that can be explained only by the existence of two differing politico-economic systems, for they do not occur along a 'normal' frontier such as the German-Swiss frontier.

25. What the Court of First Instance was seeking to contrast in paragraphs 134 and 135 of the contested judgment were, on the one hand, the consequences of the establishment of that politico-economic frontier and, on the other, the economic backwardness which resulted from the policy pursued by the governing bodies of the German Democratic Republic.

10 — Case C-432/92 [1994] ECR I-3087.
11 — *Anastasiou and Others*, paragraph 37.
12 — OJ 1988 C 236, p. 4.
13 — OJ 1998 C 14, p. 180.

26. But it is that economic backwardness which the appellants and the German Government rely on in support of the applicability of Article 92(2)(c) of the Treaty.

27. That leads us to consider what is to be understood by the expression 'economic disadvantages *caused* by that *division*' [14] which is found in that provision.

28. The terms used clearly establish a causal link between the 'economic disadvantages' and the 'division of Germany'.

29. However, it has to be admitted that, after that division was ended, those words — retained by the treaties of Maastricht and Amsterdam — must now be understood as referring to the *consequences* of that division.

30. But can those terms therefore be construed as 'aid necessary to compensate for the backwardness of economic development which can be attributed to the politico-economic system that existed in the territory of the new *Länder* before that division was ended'? This is how I believe I may sum up the German Government's contention.

31. For my part, I believe that to construe Article 92(2)(c) of the Treaty thus would substantially modify its scope. The causal link between the 'economic disadvantage' and the 'division of Germany' would become much too indirect.

32. Where a provision has, as the appellants and the German Government admit, become applicable to reunited Germany simply through the effect of the principle of the mobility of the territorial scope of treaties, that near-automatic extension alone cannot modify its scope or content.

33. Thus, this provision cannot now be construed to cover situations which are not the direct consequence of the previous existence of an inter-German frontier but, to a large extent, result from particular decisions of economic policy taken by the former authorities of the German Democratic Republic.

14 — Emphasis added.

34. If the position were otherwise, that could make the division of Germany the justification for aid granted to create a new industry in the open countryside, in an area which has always been purely agricultural, for the reason that, if that area had been part of the Federal Republic of Germany earlier, an industry would certainly have been established there long before.

35. The German Government does indeed deny intending to take its argument so far. I may quote here a passage from the German Government's reply in *Germany* v *Commission* (Case C-301/96), pending in the Court of Justice, where it states that it has 'always indicated that it is itself of the opinion that only certain reconstruction projects in the East are covered by the division clause, namely those which meet the factual conditions in Article 92(2)(c) of the EC Treaty (now, after amendment, Article 87 EC), and that must be verified in each specific case'. [15]

36. But, when it comes down to defining these 'factual conditions', the German Government dismisses every criterion connected with the former frontier and refers only to the economic and technological backwardness of the former German Democratic Republic as a whole.

37. But it has to be one or the other. Either 'the economic situation of East Germany in 1996 [is] comparable in several respects to that of Greece or Portugal, for example'. [16] In this case, I cannot see why the slightly more restrictive criteria of Article 92(3)(c) of the Treaty should be applied to Greece and Portugal and not to East Germany. The mere presence of the division clause in the Treaty would not be sufficient explanation: I can hardly imagine that the Treaty negotiators intended that clause to justify different treatment in two similar situations.

38. Or else 'there was an essential difference between the projects for *re*construction of an old industrial landscape that was in existence even before 1945 — we have a classic case of that in the old motor-vehicle area in Saxony around Mosel and Chemnitz! — and the general support granted to previously less developed areas of the Community under Article 92(3) EC'. [17]

39. In which case, it is even harder to see why more favourable treatment, in terms of public aid, should be given to areas located quite close to the centre of Europe, where even before the ending of the division of Germany there was a skilled workforce,

15 — Point 15 of the reply in that case (see ECR 2003, p. I-9919).

16 — Ibid.

17 — Ibid. Emphasis is that of the German Government.

production plant and rail and road links, than to areas, handicapped by their location at the periphery of the Community, which had never experienced any industrial development.

40. Furthermore, in interpreting the actual words of Article 92(2)(c) of the Treaty, we cannot ignore the terms '*certain* areas... *affected*' [18] which are found there.

41. In paragraph 135 of the contested judgment, the Court of First Instance found that the applicants and the German Government had expounded 'the conception... according to which Article 92(2)(c) of the Treaty permits full compensation for the undeniable economic backwardness suffered by the *new Länder*, until such time as they reach a level of development comparable with that of the original *Länder*'.[18]

42. That argument was also confirmed in the written pleadings lodged as part of the present appeal.

43. Very clearly, that conception amounts to saying that the area affected, within the meaning of Article 92(2)(c) of the Treaty, is the entire territory of the former German Democratic Republic, since the economic development of the whole of that territory was backward. That would mean that any kind of aid granted to any kind of undertaking or entity located in that territory would now fall within the scope of the division clause.

44. However, upon being questioned, the German Government stated at the hearing before the Court of Justice that it did not support such a wide interpretation and that the areas referred to were the areas of Mosel and Chemnitz. In my opinion, this latter interpretation is the only one compatible with the wording of the clause.

45. Indeed, before reunification, it was never considered that all of the areas or undertakings of West Germany could rely on the division clause.

46. Thus, the Mosel and Chemnitz areas could be regarded as having suffered 'economic disadvantages *caused* by the division of Germany' only if the existence of the politico-economic frontier between the two parts of Germany had constituted an obstacle to their economic development in a way that had marked them out from the

18 — Emphasis added.

other areas of the former German Democratic Republic (or at least from all those areas not affected by the frontier in the same way as them).

47. But the Mosel and Chemnitz areas are more than 100 km from the former inter-German frontier and, far from having been worse constrained in their economic development than other areas, they have 'after the period from 1945 to 1949,... experienced a recovery which is remarkable if we compare it to the circumstances of the Communist economic system',[19] as the German Government itself tells us.

48. On the basis of the considerations above, I consider that the Court of First Instance did not misconstrue the wording of Article 92(2)(c) of the Treaty.

2. Interpretation in the light of the effectiveness of the provision

49. The points made above are closely linked with the matter of maintaining the effectiveness of Article 92(2)(c) of the Treaty, and I would therefore like to consider that before the appellants' other arguments.

19 — Point 25 of the application in Case C-301/96.

50. The appellants and the German Government support the observation by the Court of First Instance, in paragraph 131 of the contested judgment, that the authority and effectiveness of the rules of Community law prevent Article 92(2)(c) being regarded as a provision that has become devoid of purpose since German reunification.

51. However, they claim that the interpretation set out in paragraph 134 of the contested judgment is incompatible with the fact that Article 92(2)(c) of the Treaty was maintained after reunification; this provision therefore cannot be intended, as the Court of First Instance states, to apply only to the disadvantages caused by the encirclement of certain areas, the breaking of communication links or the loss of markets in the East.

52. Since the contracting parties were aware that those direct consequences of the physical alignment of the frontier between West Germany and East Germany would very speedily be eliminated after reunification, the interpretation adopted by the Court of First Instance would be correct only if the latter were attributing to the States signatory to the Treaty of Amsterdam the intention, in Article 92(2)(c) of the Treaty, of maintaining a provision devoid of meaning or scope. Since the Treaty of Amsterdam led to a detailed revision of many of the provisions of the EC Treaty, it would be very unrealistic to attribute such an intention to the contracting States.

53. On this point, it should be noted, first, that this provision has not become devoid of all scope: as the Court of First Instance pointed out in paragraph 131 of the contested judgment, Article 92(2)(c) of the Treaty has been applied on two further occasions since the German reunification, namely the Daimler-Benz decision, adopted on 14 April 1992, and the Tettau decision, adopted on 13 April 1994. The provision, as the Court of First Instance has interpreted it, has therefore continued to have practical effect even after German reunification.

54. Certainly the provision was not applied between 1994 and 1997, the year in which the Treaty of Amsterdam was signed, but that does not prove as yet that the negotiators of the Treaty of Amsterdam kept a now meaningless provision in the Treaty.

55. In 1997, three years after the latest case arose, it was in fact conceivable that problems of that type might still present themselves, although the likelihood was very small.

56. It should be added, second, that the principle of the effectiveness to be attached to a Community provision does not prevent that provision from being applied less and less frequently and, in the end, not being applied at all. The German Government acknowledges, moreover, that the instances where Article 92(2)(c) of the Treaty is applied will become increasingly rare.

57. In fact, the principle of effectiveness cannot be regarded as an instrument intended to keep a provision in force where the conditions for it to apply are such that, over time, no further cases fall within its scope. Effectiveness would otherwise become a pretext for attaching to a provision a meaning which it has never had.

58. In my opinion, the meaning of the division clause has never been that of a sort of regional-development clause, forming, as it were, a synthesis of Article 92(3)(a) and (c) of the Treaty, but now freed from the restriction laid down in subparagraph (c), so that the Commission can object to its use only in cases of manifest abuse.

59. Nor, then, could any such meaning have been attributed to that provision simply because it was maintained in the treaties of Maastricht and Amsterdam, both signed after the division of Germany ended. Indeed, I believe that no such fundamental modification of the scope of a provision can be assumed. If that had been the intention of the inter-governmental conference, it should at least have

adopted an interpreting protocol to be annexed to the Treaty of Amsterdam and submitted with it for parliamentary ratification.

3. Historical interpretation

60. In the course of the foregoing discussion, I have in fact already shown that I agree with the historical interpretation which the Court of First Instance gave to the provision at issue. However, for the sake of completeness, I must examine the objections to that interpretation voiced by the appellants and the German Government.

(a) The Declarations of 1957

61. The appellants refer first to the declarations by the Federal Government in 1957 regarding the Treaties establishing the European Economic Community and the European Atomic Energy Community; among other things, we read here that '[t]he Treaties take account of that requirement [to strengthen the internal and external links of the Federal Republic with the Germans of the Soviet Zone and to support the position of Berlin] by means of a number of specific provisions benefiting Berlin and the areas affected by the division of Germany and also a protocol on German internal trade'.

62. As the Commission rightly points out, these are unilateral and internal explanations given by one Member State and they are not appropriate for the purpose of giving an interpretation valid *erga omnes* of a provision of Community law. Furthermore, these declarations do little more than repeat the text of Article 92(2)(c) of the Treaty and thus do not contribute to an interpretation of that provision.

(b) The case of the Saarland

63. The appellants and the German Government refer next to the case of the Saarland: on this, the Court of First Instance found as follows, in paragraph 147 of the contested judgment:

'As for the decision concerning the Saarland, none of the parties have produced or requested it in these proceedings. The applicants have failed to show that the latter decision reflected a different approach by the Commission in the past and that such an approach, if it were established, would call into question the validity of the legal assessments made in 1996.'

64. On this, Volkswagen and VW Sachsen complain, first, that the Court of First

Instance infringed Article 64(2)(b) of its Rules of Procedure, on the ground that it failed to order the Commission to produce a copy of that decision.

65. According to the appellants, the Court should have made use of such a measure of inquiry because the Commission contradicted itself in the case at first instance regarding that decision. On the one hand, the Commission acknowledged in its defence that the decision on the Saarland was based on Article 92(2)(c) while, on the other, it stated in its rejoinder that, from a reading of the decision as published,[20] there is nothing to suggest that the decision was not taken on the basis of Article 92(2)(b) of the Treaty.

66. I feel that it is enough to note that the Court of First Instance is the sole judge of any need for the information available to it concerning the cases before it to be supplemented.[21] In addition, at no stage of the proceedings at first instance did Volkswagen and VW Sachsen ask the Court for measures of organisation of procedure, in this case consisting in the production of the decision on the Saarland, although that possibility was open to them 'at any stage of the proceedings'.[22] Therefore, their argument that the Court was obliged to take such a measure cannot be accepted.

67. Next, regarding the substance of the case, the appellants and the German Government maintain that the instance of the Saarland shows that Article 92(2)(c) of the Treaty has not been interpreted by the Commission only as a rule on compensating for disadvantages resulting directly from the physical alignment of the frontier between East Germany and West Germany but also, in a general manner, as a provision intended to overcome the economic consequences of the division of Germany into different economic zones as implemented in the context of reorganisation after the war.

68. Unlike what was the case during the proceedings in the Court of First Instance, we now have the decision in question, which has been submitted to this Court by the German Government as part of this appeal. It is in the form of a letter from the President of the Commission to the German Minister for Foreign Affairs; it is dated 14 December 1964 and its subject is stated as: 'Aid to eliminate certain consequences

20 — *Bulletin of the European Economic Community* No 2-1965, p. 33.

21 — Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, paragraph 19.

22 — Article 64(4) of the Rules of Procedure of the Court of First Instance.

of the division of Germany' ('Beihilfen zur Beseitigung bestimmter Folgen der Teilung Deutschlands'). The first part of the latter reads as follows:

'Aid for the elimination of certain consequences of the division of Germany was the subject of a detailed multilateral examination by a working group on 10 July 1963.

The Commission considered that it should give special treatment to the measures specified, if only because of their special nature, and as a matter of priority resolve all issues arising in this connection, so that it could then focus its activity on general or regional measures.

In the light of the additional information supplied by your Government, the Commission considers it proper to inform you of its conclusions:

1. As regards an initial category of measures, as follows:

— aid for deportees, refugees and victims of the war or dismantling operations;

— measures in favour of certain areas along the zone border [*Zonenrandgebiete*] (reduced-rate interest, accelerated depreciation, compensation for additional transport costs);

— aid to take account of the special circumstances of the *Land* of Berlin (credit guarantees, accelerated depreciation, measures to encourage the establishment of stocks, reduced income tax, allowance for workers in Berlin, partial reimbursement of certain tolls charged by the authorities of the Soviet Zone, partial exemption from turnover tax for small- and medium-sized undertakings and the self-employed professions);

— aid to facilitate the economic reintegration of the Saarland into the Federal Republic of Germany;

the Commission has, in the light of the information available, come to the conclusion that this aid meets the conditions for applying the following derogations: Article 92(2)(b), "aid to make good the damage caused by natural disasters *or* exceptional occurrences" *or* Article 92(2)(c), "aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of

Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division"....'.[23]

69. The following observations should be made regarding this decision. We should note, first, that it is not a 'decision on the Saarland' properly so called because there are references to all the types of measures or aids that might relate to the consequences of the Second World War or the division of Germany. Nor, second, is it a decision within the meaning of Article 93 of the EC Treaty (now Article 88 EC), rather it puts into written form conclusions which the Commission has reached from discussions which it has had with the German authorities.

70. Third, these conclusions are of a preliminary nature, for they refer to the 'details available'. We are not told which particular aids have been planned to assist the reintegration of the Saarland. Neither in the written submissions nor at the hearing has there been mention of aid which was actually granted to the Saarland as a whole or to certain areas or undertakings in that *Land* and which the Commission did not dispute.

71. Fourth, the letter of 14 December 1964 does not state whether any aid granted to the Saarland was going to be examined by the Commission under Article 92(2)(c) of the Treaty or under Article 92(2)(b) of the Treaty. These two legal bases are mentioned as alternatives and, since the letter refers also to aid for 'certain areas along the zone border' ('bestimmte Zonenrandgebiete') and the special circumstances of the *Land* of Berlin, it is possible that reference was made to Article 92(2)(c) of the Treaty only in respect of those areas.

72. I even think that this is likely: any aid of this type granted to the Saarland was clearly not related to the division between the Federal Republic of Germany and the German Democratic Republic. Thus, for that aid to qualify under Article 92(2)(c) of the Treaty, one would have to consider that the words 'division of Germany' in that provision refer not only to the division between East and West but also to the other division of Germany, that between the Federal Republic of Germany and the Saarland.

73. On this point, we should note that, during the post-war years, the Saarland enjoyed political autonomy and that there was an economic and monetary union

23 — Emphasis added.

between France and this territory. [24] Under agreements made in October 1956, France accepted that the political union of the Saarland and Germany should take place on 1 January 1957 and that the economic union should be terminated after a three-year transition period.

74. Therefore when the Treaty of Rome was signed, on 25 March 1957, the Saarland was already a part of the Federal Republic of Germany in political terms. Thus it is very questionable whether the words 'division of Germany' referred also to the Saarland question.

75. Furthermore, the Treaty refers only to '*the* division of Germany'. [25] Since the two situations are so very different in their nature, both in geographic and in political and economic terms, I think that the division between the Federal Republic of Germany and the Saarland could be regarded as falling within the scope of Article 92(2)(c) of the Treaty only if, in one way or other, the Treaty had explicitly referred to both divisions.

76. Finally, I feel that the comparison between the present case and that of the Saarland lacks relevance also in so far as the Saarland and the Federal Republic of Germany did not have substantially different politico-economic systems. Hence there could not have been aid intended to compensate for delayed development due to such a difference of systems.

77. Consequently, even if — hypothetically — it were accepted that the legal basis for that aid was Article 92(2)(c) of the Treaty, it could only be inferred that the end of the division does not mean that this provision ceases to be applicable. But this has not been in any way disputed.

78. Accordingly, we may conclude that the Court of First Instance did not make an error in finding that '[t]he applicants have failed to show that the latter decision reflected a different approach by the Commission in the past and that such an approach, if it were established, would call into question the validity of the legal assessments made in 1996'.

(c) Aid to the *Zonenrand*

79. Finally, the appellants assert that, contrary to what the Court of First Instance

24 — See, for example, Duroselle, J-B., *Histoire diplomatique de 1919 à nos jours*, Éditions Dalloz, 1957, in particular, pp. 556-557.

25 — Emphasis added.

states in the contested judgment, application of the division clause was by no means restricted, even in the past, to compensation for mere technical difficulties relating to access to areas situated immediately adjacent to the East/West frontier.

80. According to the appellants, the aid to areas bordering on the Soviet-occupied zone (*Zonenrandförderung*) which the Commission authorised for decades under Article 92(2)(c) of the Treaty extended to a territory which was equivalent to one third of the old Federal territory.

81. The Commission denies that aid to the *Zonenrand* related to one third of the territory of the old *Länder* without the need to establish the existence of a specific disadvantage caused by the frontier. Furthermore, according to the Commission, encouragement to areas located within the *Zonenrand* certainly never related to the *Länder* remote from the frontier, such as North Rhine-Westphalic or Rhineland-Palatinate. The Commission points out that the Volkswagen works at Mosel and Chemnitz are also at least 100 km from the former inter-German frontier.

82. I feel that there is a misunderstanding here as to what the Court of First Instance meant.

83. In finding that 'the "economic disadvantages caused by [the] division" can only mean the economic disadvantages caused by the isolation which the establishment or maintenance of that frontier entailed', [26] I do not believe that the Court intended to rule that only areas located within a very short distance from the inter-German frontier can benefit under Article 92(2)(c) of the Treaty.

84. The interpretation of that provision adopted by the Court of First Instance is based not on the distance from the partition line to a potential beneficiary of aid but on the effects of that frontier in terms of economic disadvantages caused by the division it created. Even though there is a greater likelihood of such effects occurring in the areas very close to the partition line, economic disadvantages — for example in the form of a loss of natural markets — may well occur also farther from the frontier.

85. On this point, furthermore, the appellants themselves state that, by means of the aid to the *Zonenrand*, the Federal Republic of Germany 'was seeking to avoid greater difficulty when Germany was reunified in due course, by gradual desertification of the (by then) former *Zonenrand* in the midst of a united Germany'.

26 — Contested judgment, paragraph 134.

86. And it is indeed conditions such as the encirclement of certain areas, the breaking of communication links or the loss of the natural markets of certain undertakings — which, according to the Court of First Instance, may warrant aid under Article 92(2)(c) of the Treaty — which can bring about this risk of desertification.

87. Finally, I think there is no need to dwell on a remark by the German Government that the date 1948, which the Court of First Instance mentions as the year that the line of partition was drawn between the two zones, is historically inaccurate: there is no doubt that, at the time that the EEC Treaty was signed, there was an East/West division of Germany and that it was the origin of the clause at issue.

4. Systematic interpretation

88. The appellants and the German Government also consider that the interpretation adopted by the Court of First Instance does not take account of the fact that, in accordance with the scheme of the Treaty, provision is already made in respect of transport, in Article 82 of the EC Treaty (now Article 78 EC), to compensate for the disadvantages linked to the division of Germany.

89. That article reads as follows:

'The provisions of this Title shall not form an obstacle to the application of measures taken in the Federal Republic of Germany to the extent that such measures are required in order to compensate for the economic disadvantages caused by the division of Germany to the economy of certain areas of the Federal Republic affected by that division.'

90. We should note, first, as does Erdmenger,[27] that that article allows the Federal Republic of Germany to maintain or to lay down national measures relating to transport policy ('*nationale verkehrspolitische Maßnahmen*'). It therefore applies to measures derogating from the Community's 'common transport policy'. But it does not apply to measures derogating from the rules governing public aid to transport infrastructures. Like the Commission, I consider that such aid remains covered by Articles 92 and 93 of the Treaty.

91. As Erdmenger points out also, that Member State has not felt the need to rely on that provision either during the period of the division or subsequently. The transitional measures required by German re-

27 — Erdmenger, J., in Groeben, Thiesing and Ehlermann, *Kommentar zum EU-/EG-Vertrag*, Nomos Verlagsgesellschaft, 5th edition, 1999, on Article 82.

unification were also adopted not on the basis of Article 82 of the Treaty but on the basis of Article 75 of the EC Treaty (now, after amendment, Article 71 EC). [28]

92. Second, the Commission rightly points out that the Court of First Instance did not limit the disadvantages caused by the division of Germany, within the meaning of Article 92(2)(c) of the Treaty, only to the consequences affecting communication links. In paragraph 134 of the judgment, those consequences were cited only as one example among other possible consequences, such as the encirclement of certain areas or the loss of natural markets.

93. Therefore, the appellants' argument regarding Article 82 of the Treaty is not convincing.

5. The burden of proof on the Federal Republic of Germany

94. Volkswagen and VW Sachsen, with the support of the German Government, consider that the Court of First Instance erred regarding the extent of the burden of proof on the Federal Republic of Germany.

95. Regarding this, the contested judgment reads:

'140 Moreover, as regards the question whether, apart from its character as aid for the economic development of the Free State of Saxony, the aid in question is specifically designed to compensate for the disadvantages caused by the division of Germany, it should be borne in mind that a Member State which seeks to be allowed to grant aid by way of derogation from the Treaty rules has a duty to collaborate with the Commission, requiring it in particular to provide all the information to enable the Commission to verify that the conditions for the derogation sought are fulfilled ([Case C-364/90] *Italy* v *Commission* [[1993] ECR I-2097], paragraph 20).

141 On that point, there is nothing in the documents before the Court to show that the German Government or the applicants put forward specific arguments during the administrative procedure in order to prove a causal link between the situation of the motor-vehicle industry in Saxony after German reunification and the division of Germany.

28 — See Council Regulation (EEC) No 3572/90 of 4 December 1990 amending, as a result of German unification, certain Directives, Decisions and Regulations relating to transport by road, rail and inland waterway (OJ 1990 L 353, p. 12).

142 The Commission is therefore right in maintaining that the parties have not put forward specific evidence capable of justifying the application of Article 92(2)(c) of the Treaty to this case.'

96. Volkswagen and VW Sachsen believe that, in paragraph 141 of the contested judgment, the Court of First Instance was wrong in complaining that the Federal Republic of Germany had not put forward specific arguments on the applicability of the division clause: they say that clearly there was no point in a statement of the conditions for application because the Commission had decided in advance, at policy level, not to apply the provision.

97. But that argument cannot be upheld.

98. It confounds two successive stages of the reasoning: first, the definition of the scope of Article 92(2)(c) of the Treaty and, second, once that definition has been established, whether in actual fact the aid at issue fulfils the conditions in that provision. At this latter stage, as is apparent from the judgment in *Italy* v *Commission*, the Member State has a duty to provide all the information to enable the Commission to verify that the conditions for the derogation sought are fulfilled.

99. The Federal Republic of Germany does not accept the definition of the scope of Article 92(2)(c) of the Treaty adopted by the Commission in the contested decision and subsequently endorsed by the Court of First Instance in the contested judgment, but that will not relieve it of the burden of proof if it seeks nevertheless to benefit from that provision.

100. The Court of First Instance therefore properly interpreted the burden of proof which lay on the Federal Republic of Germany here.

101. The German Government also adds that the Court of First Instance was wrong in not regarding a number of documents annexed to its application in Case C-301/96 that it had also submitted to that Court in connection with its intervention in the case at first instance. These are a letter of 9 December 1992 from the Federal Chancellor to the President of the Commission and also two communications, of 15 October 1993 and 19 September 1994, and a memorandum, of 13 May 1996, all sent to the Commission.

102. The German Government says that, had the Court of First Instance appraised those documents, it would not have been able to state that there was nothing in the documents before the Court to show that the Federal Republic of Germany had put forward arguments on the applicability of the division clause.

103. But, in effect, this argument questions an appraisal of the facts by the Court of First Instance, although it is settled case-law that 'the Court of First Instance has sole jurisdiction to find and appraise the facts, except in a case where the factual inaccuracy of its findings arises from evidence adduced before it. The appraisal of the facts by the Court of First Instance does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice'. [29]

104. There is no question here of the Court of First Instance distorting the sense of the facts: on reading the documents to which the German Government refers, it is clear that there is no information in them intended to show that the aid in dispute satisfies the conditions laid down by Article 92(2)(c) of the Treaty as interpreted by that Court, and that they only put forward arguments for a different interpretation of that provision.

105. Having rejected that interpretation, the Court of First Instance was thus able, without distorting the sense of those documents, to find that no specific argument had been put forward during the administrative procedure in order to prove a causal link between the situation of the motor-vehicle industry in Saxony after German reunification and the 'division of Germany' taken in the sense which the Court of First Instance attaches to that concept.

6. Institutional balance

106. Lastly, Volkswagen and VW Sachsen allege that the Court of First Instance compromised the institutional balance by finding, in paragraph 136 of the contested judgment, that the 'disadvantages suffered by the new *Länder* as a whole have not been caused by the division of Germany within the meaning of Article 92(2)(c) of the Treaty. As such, the division of Germany has had only marginal consequences on the economic development of either zone, which, moreover, it affected equally at the outset, and it has not prevented the economies of the original *Länder* from developing favourably thereafter.'

29 — See Joined Cases C-280/99 P to C-282/99 P *Moccia Irma and Others* v *Commission* [2001] ECR I-4717, paragraph 78. See also Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 29, Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 66, and Case C-265/97 P *VBA* v *Florimex and Others* [2000] ECR I-2061, paragraph 139.

107. They claim that there is nothing to be found about this subject in the contested decision. The Court of First Instance therefore assumed the role of the Commission in making factual findings as to the applicability of that provision.

108. This argument cannot be upheld.

109. It is enough to note, as the Commission rightly does, that paragraph 136 of the contested judgment only repeats an argument submitted by the Commission at first instance.

110. As we see in paragraph 126 of the contested judgment, the Commission had maintained that the poor general economic situation of the new *Länder* was a direct consequence not of the division of Germany but of the political system of the former German Democratic Republic and of reunification itself.

111. Furthermore, it is not relevant that the disputed decision says nothing on this matter: the Commission was fully entitled, during the proceedings in the Court of First Instance, to answer the appellants' argument that establishing the backwardness of economic development in the new *Länder* was sufficient to render Article 92(2)(c) of the Treaty applicable, by stating that, in its opinion, there was no causal link between that situation and the division of Germany.

112. I consider that it follows from the points made above that the appellants have not shown that the Court of First Instance erred in its interpretation of Article 92(2)(c) of the Treaty.

113. I therefore propose that their first plea be rejected.

B — *Second plea in law, alleging infringement of Article 190 of the EC Treaty (now Article 253 EC)*

114. The appellants and the German Government consider that the Court of First Instance erred in law in finding as follows regarding the Commission's duty to state reasons:

'149 As for the complaint of insufficient reasoning, it should be recalled that the statement of reasons required by Article 190 of the EC Treaty (now

Article 253 EC) must clearly and unequivocally show the reasoning of the institution which adopted the measure, so as to enable the Community judicature to exercise its power of review and the persons concerned to know the grounds on which the measure was adopted (see, for example, Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 46).

150 In this case, the [contested decision] contains only a brief summary of the grounds for the Commission's refusal to apply the derogation in Article 92(2)(c) of the Treaty to the facts of the case.

151 Nevertheless, [that decision] was adopted in a context that was well known to the German Government and the applicants and forms part of a consistent line of decision-making practice, particularly in relation to those parties. Such a decision may be supported by a summary statement of reasons (Case 73/74 *Papiers Peints* v *Commission* [1975] ECR 1491, paragraph 31; Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, paragraph 35).

152 Since 1990, in its relations with the Commission, the German Government has referred many times to Article 92(2)(c) of the Treaty, insisting on the importance of that provision for the recovery of the former East Germany (see, in particular, the letter from Chancellor Kohl to President Delors of 9 December 1992, cited above).

153 The arguments put forward by the German Government in that regard were rejected in various letters or decisions of the Commission [see, in particular, the Commission notice pursuant to Article 93(2) of the EEC Treaty to other Member States and other parties concerned regarding the proposal by the German Government to award State aid to the Opel group in support of its investment plans in the new *Länder* (OJ 1993 C 43, p. 14); the Commission notice pursuant to Article 93(2) of the EEC Treaty to other Member States and interested parties concerning aid which Germany proposes to grant Rhône-Poulenc Rhotex GmbH (OJ 1993 C 210, p. 11); Commission Decision 94/266/EC of 21 December 1993 on the proposal to award aid to SST-Garngesellschaft mbH, Thüringen (OJ 1994 L 114, p. 21); the Mosel I decision; [30] and Commission

30 — Commission Decision 94/1068/EC of 27 July 1994 concerning aid granted to the Volkswagen Group for investments in the new German Lander (OJ 1994 L 385, p. 1).

Decision 94/1074/EC of 5 December 1994 on the German authorities' proposal to award aid to Textilwerke Deggendorf GmbH, Thüringen (OJ 1994 L 386, p. 13)].

154 In that respect, particular importance should be accorded to the Mosel I decision, in which the Commission declared some of the aid in question, amounting to DEM 125.2 million, incompatible with the common market after excluding, on grounds identical to those used in the [contested decision], the possibility that that aid might be covered by Article 92(2)(c) of the Treaty. It should be noted, moreover, that neither the applicants nor the German authorities have brought any action against that earlier decision.

155 Even though, between the adoption of the Mosel I decision and the adoption of the [contested decision], the Commission, the German authorities and the applicants have had numerous contacts revealing their continuing differences of opinion concerning the applicability of Article 92(2)(c) of the Treaty to the aid in question (see Points V and VI of the [contested decision]), it should also be noted that no specific or new argument has been put forward in that context, particularly as to the existence of a causal link between the position of the motor-vehicle industry in Saxony after German reunification and the division of Germany (see paragraph 141 above).

156 In those circumstances, the Court finds that the applicants and the Federal Republic of Germany were sufficiently informed of the grounds for the [contested decision] and that, in the absence of more specific arguments, the Commission was not obliged to state the grounds for it more extensively.'

115. The appellants, supported by the German Government, maintain that the contested judgment infringes Article 190 of the Treaty in that it unlawfully reduces the requirements of the obligation to state reasons. They allege that the contested decision does not in fact enable either them or the Court of First Instance to know the reasons for which the Commission refused to apply Article 92(2)(c) of the Treaty.

116. The Commission submits that, by this plea, the appellants are in fact criticising an appraisal of the facts by the Court of First Instance, even though they assert that their argument refers to a problem of law, that is, a misinterpretation of Article 190 of the Treaty.

117. However, I do not share this view of the Commission.

118. In *Commission* v *Daffix*, [31] the Court of Justice held, in paragraphs 34 and 35, that:

'... [C]ontrary to the findings of the Court of First Instance..., the contested decision gave a sufficiently precise indication of the conduct with which the official was charged....

In so far as it considered that the contested decision did not indicate sufficiently precisely the conduct with which Mr Daffix was charged and that hence Article 190 of the Treaty and Article 25 of the Staff Regulations had been infringed, the Court of First Instance committed *an error of law*'. [32]

119. This judgment confirms that whether the reasons for a decision are stated sufficiently is a matter of law and not of fact. In finding whether the reasons for a decision are stated sufficiently, the Court of First Instance is not ascertaining a fact but already classifying it in law. But the legal classification of a fact relates to a point of law and, as such, is subject to review by the Court of Justice. [33]

120. Let us now consider the individual arguments advanced by the appellants in their second plea in law. First of all, they believe that the Court of First Instance erred in holding that the decisions cited at paragraphs 153 and 154 of the contested judgment could contribute to the statement of reasons for the contested decision even though, first, this latter makes no reference to those other decisions and, second, the reasons for those other decisions are no more fully stated than those of the contested decision itself.

121. The Commission rightly points out that the Court of First Instance referred to those decisions — which had all been published and which the appellants cannot therefore claim to have been unaware of — as part of its description of the context of the contested decision, which, as the Court has consistently held, contributes to the statement of reasons for a decision. [34]

122. There was therefore no need for the contested decision to refer to those decisions or for the reasons for those decisions to be stated more explicitly than in the contested decision. A reference to earlier reasons would not be a 'context' but the consideration of an explicit statement of grounds that would make reference to a context redundant.

31 — Case C-166/95 P [1997] ECR I-983.

32 — Emphasis added.

33 — See the Opinion of Advocate General Van Gerven in Case C-145/90 P *Costacurta* v *Commission* [1991] ECR I-5449, point 3. See also Wathelet, M. and Van Raepenbusch, S., 'Le contrôle sur pourvoi de la Cour de justice des Communautés européennes, dix ans après la création du Tribunal de première instance', in Rodriguez Iglesias, G.C., Due, O., Schintgen, R., Elsen, C., (ed.), *Mélanges en hommage à Fernand Schockweiler*, Nomos Verlagsgesellschaft, 1999, p. 605, 612.

34 — See, in particular, Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 17; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-289/97 *Eridania* [2000] ECR I-5409, paragraph 41; and *Germany* v *Commission*, paragraph 97.

123. The appellants also claim that it is not sufficient for the persons with an interest in a decision to be able to deduce the reasons for it by comparing the decision in question with similar earlier decisions.

124. In this connection, they refer to the judgment in *Control Data Belgium* v *Commission* [35] where, in paragraph 15, the Court held that '... it is not sufficient that the Member States as addressees of the decision, are aware of the reasons as a result of their participation in the preliminary procedure and that the applicant the person directly and individually concerned, is able to deduce these reasons by comparing the decision in question with similar earlier decisions. It is further necessary that the applicant should be enabled in practice to defend its rights and the Court should be able effectively to exercise its power of review on the basis of the statement of reasons....'

125. However, the context to that judgment is very specific because the issue was whether two particular types of computers could be regarded as scientific apparatus and so be exempted from duty under the Common Customs Tariff, as opposed to other computers for which such exemption had been refused in a serious of earlier decisions. [36]

126. In the present case, by contrast, the Court of First Instance established that, during the administrative procedure, the applicants had not put forward any specific or new argument, [37] particularly as to the existence of a causal link between the position of the motor-vehicle industry in Saxony after German reunification and the division of Germany, that would have made it possible to distinguish this case from the earlier decisions.

127. In those circumstances the Court was fully entitled to consider that the contested decision formed part of a consistent line of decision-making practice and so could be supported by a summary statement of reasons. [38]

128. The appellants consider also that, since the German authorities and the Commission have taken different positions as to the interpretation of the derogation in Article 92(2)(c) of the Treaty and since the importance of that interpretation for the German authorities has been stressed several times, this argues, contrary to the view of the Court of First Instance, that the Commission had a duty to state its reasons specifically.

35 — Case 294/81 [1983] ECR 911.

36 — *Control Data Belgium* v *Commission*, paragraph 12.

37 — Contested judgment, paragraph 155.

38 — *Papiers peints* v *Commission*, paragraph 31, Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15, and *Germany* v *Commission*, paragraph 105.

129. That argument is not convincing, however.

130. Failure to agree with a position taken does not in fact mean that the reasons for it cannot be understood. Therefore the mere existence of a difference of position — which is always to be found in an appeal — does not mean that the reasons for a decision had to be stated in a specific manner.

131. The appellants also submit that the wording used in the contested decision is too terse for its reasons to be understood.

132. It is enough to note that the Court of First Instance essentially took its lead from the context and, more particularly, from the existence of a constant line of decision-making practice which, as has been said, can contribute to the statement of reasons for a decision.

133. However, the appellants also dispute that the decisions to which the Court of First Instance referred in paragraphs 153 and 154 of the contested judgment are able to constitute a constant line of decision-making practice from which the reasons of the contested decision may be understood. They consider that that Court erred when, in paragraph 154 of the contested judgment, it accorded particular importance to the Mosel I decision and noted that neither the applicants nor the German authorities had brought any action against that earlier decision.

134. However, I do not share the appellants' view here.

135. It is difficult to understand their explanation that that decision did not adversely affect them — which would have explained their refraining from bringing an action — because, in the Mosel I decision, the Commission declared aid amounting to DEM 125.2 million to be incompatible with the common market.

136. Moreover, as a Member State the Federal Republic of Germany did not have to demonstrate a legal interest in bringing an action for annulment [39] and could thus seek annulment of the Mosel I decision solely on the ground that its legal basis was wrong.

39 — Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 30.

137. Similarly, the appellants' argument regarding the fact that the Mosel I decision related to the refusal of certain aids for the renewal of plant and to cover losses, whereas the contested decision related to the refusal to authorise aid granted for new investment, does not seem relevant.

138. As the Commission has noted, rightly, in both cases the entity granting the aid, the recipient of the aid and the purpose and the place of use of the aid were practically identical. The Court of First Instance was therefore entitled to regard the Mosel I decision as contributing to the statement of reasons for the contested decision.

139. Furthermore, the argument that it was not possible to deduce the reasons for the contested decision from the constant line of decision-making practice cited by the Court of First Instance is contradicted by the Daimler-Benz and Tettau decisions.

140. As the Commission says, '[b]y comparing these two decisions, where the Commission had applied [Article 92(2)(c) of the Treaty], with all the other decisions cited, where the Commission had expressly refused to apply that provision and which are all known to the appellants, anyone might see how strict were the terms on which the Commission held the conditions for applying the provision to be fulfilled and how it interpreted the concept of "division of Germany".'

141. I may add that German legal writers were in any event not unaware of the way in which the Commission applied Article 92(2)(c) of the Treaty. [40]

142. Lastly, I note that, in *Germany* v *Commission*, cited above, [41] the Court ruled that, in circumstances practically identical to those in this case, the reasons for the Commission's decision in question were stated sufficiently.

143. I consider that the appellants have not shown that the Court of First Instance infringed Article 190 of the Treaty, and I therefore propose that their second plea be rejected.

40 — See, for example, Schütterle, P., 'Die Rechtsgrundlage für Beihilfen zur Überwindung der wirtschaftlichen Folgen der Teilung Deutschlands', EuZW, 1994, p. 715; von Wallenberg, G., in: Grabitz and Hilf, *Das Recht der Europäischen Union. Kommentar*, Verlag C.H. Beck, Artikel 92 EGV, paragraph 40; Kruse, E., 'Ist die "Teilungsklausel" als Rechtsgrundlage für Beihilfen zum Ausgleich teilungsbedingter Nachteile obsolet?', EuZW, 1998, p. 228; Mederer, W., in: Groeben, Thiesing and Ehlermann, *Kommentar zum EU-/EG-Vertrag*, Nomos Verlagsgesellschaft, 5th Edition, 1999, Artikel 92, paragraphs 60 to 64.

41 — Paragraphs 104 to 108.

C — *Third plea in law, alleging infringement of Article 92(3)(b) of the Treaty*

144. The appellants, supported by the German Government, complain that the Court of First Instance misinterpreted Article 92(3)(b) of the Treaty.

145. In paragraph 167 of the contested judgment, the Court said with respect to that provision:

'It follows from the context and general scheme of that provision that the disturbance in question must affect the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory. This, moreover, is in conformity with the need to interpret strictly a derogating provision such as Article 92(3)(b) of the Treaty....'

146. The applicants consider 'wrong in law the Court's interpretation that [Article 92(3)(b) of the Treaty] may apply only if *the whole* of the territory of a Member State is affected'. [42]

42 — Emphasis by Volkswagen and VW Sachsen.

147. It should first be noted that the Court did not refer to the whole of the *territory* of a Member State but to the whole of the *economy* of the Member State concerned.

148. Second, as the Commission judiciously observes, unlike subparagraphs (a) and (c) in Article 92(3) of the Treaty, subparagraph (b) refers not to 'areas' but to serious disturbance in the economy 'of a Member State'.

149. Thus, having regard also to the need for strict interpretation of a derogating provision, the Court of First Instance was entitled to find 'that the disturbance in question must affect the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory'.

150. The appellants maintain also that neither the wording nor the practical effect of Article 92(3)(b) of the Treaty justifies the Court's conclusion that the collapse of the old socialist economy of the German Democratic Republic during the reunification is not to be described as 'serious disturbance in the economy' of the Federal Republic of Germany.

151. On this, the Court ruled that '... the question whether German reunification has

caused a serious disturbance in the economy of the Federal Republic of Germany involves complex assessments of an economic and social nature... which fall within the exercise of the wide discretion which the Commission enjoys...' [43] and that 'the applicants have not put forward any concrete evidence capable of establishing that the Commission made a manifest error of assessment in taking the view that the unfavourable repercussions of the reunification of Germany on the German economy, however real, did not in themselves constitute a ground for applying Article 92(3)(b) of the Treaty to an aid scheme'. [44]

152. Undeniably, the assessment of the total impact of reunification on the economy of the Federal Republic of Germany does involve complex assessments of an economic and social nature. The German Government is therefore wrong in asserting that merely referring to the provision, in the context of a known factual situation, was sufficient to show that the conditions were fulfilled for applying Article 92(3)(b) of the Treaty.

153. Moreover, the appellants' argument is an invitation to reconsider the Court of First Instance's assessment of the facts, namely that there was no manifest error of assessment by the Commission. However, since the appellants do not offer any evidence of clear distortion of the facts by the Court, their argument must be rejected.

154. For all these reasons, I therefore propose that the appellants' third plea be rejected.

D — *Fourth plea in law, alleging infringement of Article 92(3) and Article 93 of the Treaty*

155. In their fourth plea, the appellants, supported by the German Government, complain that the Court of First Instance infringed Article 92(3) and Article 93 of the Treaty in ruling as follows:

'203 Contrary to what the applicants maintain, the aid measures in dispute cannot be regarded as falling within a regional aid programme already approved by the Commission and thus exempt from the duty of prior notification.

43 — Contested judgment, paragraph 169.
44 — Contested judgment, paragraph 170.

204 By referring, in the Nineteenth Outline Plan adopted pursuant to the Joint Task Law, [45] to a number of specific sectors in which each of the projects to be supported remained subject to the need for prior authorisation from the Commission (see paragraph 7 above), Germany acknowledged that approval of the regional aid envisaged by that outline plan did not extend to the sectors in question and, in particular, the motor-vehicle industry, to the extent that the cost of a support operation exceeded 12 million ecus.

205 That is confirmed, in particular, by the Commission's letter of 2 October 1990 approving the regional aid scheme laid down for 1991 by the Nineteenth Outline Plan (see paragraph 7 above) and by its letter of 5 December 1990 approving the application of the Joint Task Law to the new *Länder* (see paragraph 11 above), in which the Commission expressly drew the attention of the German Government to the need to take account, when implementing the measures contemplated, of the Community framework existing in certain sectors of industry; by its letters of 14 December 1990 and 14 March 1991, insisting that the aid for Volkswagen's new investments could not be implemented without having first been notified to the Commission and having received its approval (see paragraph 18 above); and by the fact that each of the 1991 [decisions] states that it is "subject to the authorisation of the Commission". The applicants are wrong in arguing that such a reference is devoid of purpose having regard to the authorisation already obtained by virtue of the approval of the Nineteenth Outline Plan; that approval does not extend to the motor-vehicle industry, as has just been pointed out in paragraph 204 above. The applicants are also incorrect in arguing that the production of the letters referred to above, in an annex to the rejoinder, was out of time and inadmissible. In the first place, those letters are cited both in Point II of the [contested decision] and in the decision to initiate the investigation procedure. Moreover, they were produced in response to an assertion made for the first time in the reply.

206 In the light of the factors described above, the fact that application of the Community framework [46] was suspended between January and April 1991, even if established, cannot have the legal consequence that the aid to the motor-vehicle industry is to be regarded as covered by the approval of

45 — German Law of 6 October 1969 on the Joint Task of 'Improving the regional economic structure'.

46 — Community framework on State aid to the motor vehicle industry, which was the subject of notice 89/C 123/03 (OJ 1989 C 123, p. 3).

the Nineteenth Outline Plan. On the contrary, if that fact were established, it would have to be held that Article 93(3) of the Treaty remained fully applicable to the aid in question.

graphs 30 to 33), there is nothing to prevent the Commission from examining the aid which must be notified to it in the light of those rules when exercising the wide discretion which it enjoys for the purposes of applying Articles 92 and 93 of the Treaty.'

207 It follows from the above that, in any event, the aid in dispute was subject to the duty of prior notification to the Commission, and that it could not be implemented before the procedure had led to a final decision.

156. According to the appellants, in holding that the aid granted to the undertakings of the Volkswagen group was subject to a duty of individual notification and that it could have been subjected to detailed control by the Commission under Article 92 of the Treaty, the Court of First Instance infringed Articles 92 and 93 of the Treaty. They say that this statement is wrong in law because, contrary to the Court's incorrect view, the aid is part of an approved aid programme.

208 By contrast, the question whether or not the Community framework had binding force *vis-à-vis* Germany in March 1991 is of no relevance for the purposes of these proceedings.

157. In support of their view, the appellants argue as follows.

209 In that respect, it should be emphasised that, although the rules of the Community framework, as "appropriate measures" proposed by the Commission to the Member States on the basis of Article 93(1) of the Treaty, are entirely devoid of binding force and bind Member States only if the latter have consented to them (Case C-292/95 *Spain* v *Commission*, para-

158. The aid in dispute is part of the system of regional aid planned for 1991 in the Nineteenth Outline Plan adopted in accordance with the Joint Task Law, and that system was approved by the Commission

by a letter of 2 October 1990 to the German Government. In letters of 5 December 1990 and 11 April 1991, to the German Government, the Commission approved the application of the Joint Task Law to the new *Länder*. Similarly, by a letter of 9 January 1991, it approved the extension of the existing systems of regional aid to the new *Länder*.

159. The appellants acknowledge that these letters from the Commission state that 'in implementing the programmes, in so far as they concern aid, the German authorities are to take account of the provisions of Community law and of the framework conditions... in force in certain sectors of industry' and thus also of the provisions of the Community Framework. Among other things, this provides in the first paragraph of point 2.2, that '[a]ll aid measures to be granted by public authorities within the scope of an approved aid scheme to (an) undertaking(s) operating in the motor vehicle sector as defined above, where the cost of the project to be aided exceeds ECU 12 million are subject to prior notification on the basis of Article 93(3) of the EEC Treaty....'

160. However, they maintain that, during the period from January to April 1991, the Community Framework was not a provision of Community law 'in force'.

161. Indeed, the Community Framework was applicable for a period of two years up to 31 December 1990. But its extension was not accepted by the German Government until April 1991. Therefore, since it is an appropriate measure within the meaning of Article 93(1) of the Treaty, the Community Framework as extended can, according to the appellants, be regarded as applicable only from April 1991.

162. According to the appellants, the aid in dispute was granted on 22 March 1991 and thus precisely during the period that the Community Framework did not apply. It follows that the aid in dispute must be regarded as part of an aid scheme subject to general authorisation from the Commission. That aid must, therefore, be described as existing aid.

163. This has two consequences, according to the appellants. First (in formal terms) there was no need to notify the aid in dispute. Second (in material terms) the appellants consider that, since this was existing aid, examination by the Commis-

sion was limited to whether the individual aid was covered by the general scheme and whether the conditions laid down in the decision approving the general scheme had been met.

164. However, the appellants' argument fails to convince.

165. That argument is based entirely on the idea that Commission approval of regional aid schemes under the Nineteenth Outline Plan is limited only to the extent that the Community Framework applies. If the latter does not apply, then the approval is general and thus covers all aid under that scheme, including the aid at issue.

166. But that is not the view of the Court of First Instance. In paragraph 206 of the contested judgment, it said that, in the light of the factors described in paragraphs 204 and 205, '... the fact that application of the Community framework was suspended between January and April 1991, even if established, cannot have the legal consequence that the aid to the motor-vehicle industry is to be regarded as covered by the approval of the Nineteenth Outline Plan ...'.

167. In other words, the Court reached the conclusion that, whether the Framework applies or not, aid to the motor vehicle sector is, in any event, not covered by the approval for the regional aid scheme provided in the Nineteenth Outline Plan.

168. That conclusion is based on the Court's assessment of the documents to which it refers in paragraphs 204 and 205 of the contested judgment.

169. This is an assessment of fact by the Court of First Instance, and it cannot be called into question in this appeal unless those facts have been distorted.

170. But I believe that we cannot speak of any such distortion here.

171. The correspondence, cited in paragraph 205 of the contested judgment, by which the Commission drew the German Government's attention, first, to the need to take account, when implementing the measures contemplated, of the Community framework existing in certain sec-

tors of industry (including the motor vehicle sector) and, second, to the fact that the aid for Volkswagen's new investments could not be implemented without having first been notified to the Commission and having received its approval, confirms that the Commission's clear and plain intention as regards the regional aid scheme provided for in the Nineteenth Outline Plan was to give an approval which did not cover certain sectors of industry, one of those being the motor vehicle sector.

172. The Commission's approval of the regional aid scheme provided for in the Nineteenth Outline Plan is therefore not an approval with a variable scope — meaning that it is limited if the Community Framework applies and general if not — but an approval with a scope that in any event excludes aid granted, in particular, in the motor vehicle sector.

173. Nor did the German Government construe it otherwise, as is shown by the text of the Nineteenth Outline Plan, which (at Part I, point 9.3, p. 43) indicates that the Commission 'has taken decisions which prohibit the implementation of State aid granted in certain sectors even if it were granted in the context of approved programmes (regional aid for example), or which make its implementation subject to the need for prior authorisation of each of the projects which it is intended to benefit... Such rules exist in the following areas:

(a) ...

— the motor-vehicle industry, in so far as the cost of an operation which it is intended to benefit exceeds 12 million ecus.'[47]

174. Since the approval did not cover aid in the motor vehicle sector, the aid at issue should have been notified, either under the provisions of the Community Framework or, should that not apply, as the appellants maintain, under Article 93(3) of the Treaty, as the Court of First Instance rightly held in paragraph 206 of the contested judgment.

175. That Court was therefore entitled to rule, in paragraph 207 of the contested judgment, that the aid at issue was subject to the duty of prior notification to the Commission, and that it could not be implemented before the procedure had led to a final decision.

176. My examination could stop here.

47 — See the contested judgment, paragraph 7.

177. The arguments used by the appellants as part of the fourth plea in law are essentially intended to show that the Community Framework did not apply between January and April 1991.

178. Yet, as we have just seen, that issue is not relevant to the solution of the present dispute.

179. That being said, the argument used by the appellants to show that the Community Framework did not apply during that period is not convincing.

180. Their argument is that the German Government only accepted the extension of the Community Framework in April 1991. Since the Community Framework was an appropriate measure within the meaning of Article 93(1) of the Treaty, it could not, in the absence of acceptance by the Member State, apply before that date.

181. But, in paragraph 209 of the contested judgment, the Court of First Instance rightly ruled that '... there is nothing to prevent the Commission from examining the aid which must be notified to it in the light of [the rules of the Community Framework] when exercising the wide discretion which it enjoys for the purposes of applying Articles 92 and 93 of the Treaty.'

182. As the Court of Justice ruled in Case C-288/96,[48] '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'.

183. The Community Framework may thus be applied not only as an appropriate measure but also through the Commission's exercise of its discretion under Articles 92 and 93 of the Treaty.[49]

184. In this connection, we should refer to Commission Decision 90/381/EEC of 21 February 1990 amending German aid

48 — Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 62.

49 — See also my Opinion of 12 March 2002 in Case C-242/00 *Germany* v *Commission*, pending before the Court, points 73 to 75.

schemes for the motor vehicle industry, [50] which was adopted following the German Government's decision not to apply the Community Framework (in the original version). [51] Article 1 of the Decision provides:

'1. From 1 May 1990, the Federal Republic of Germany shall notify to the Commission pursuant to Article 93(3) of the EEC Treaty all aid measures to be granted for projects costing more than ECU 12 million under the aid schemes set out in the Annex hereto to undertakings operating in the motor vehicle sector as defined in sub-section 2.1 of the Community framework for State aid to the motor vehicle industry. Such notification shall be effected in conformity with the requirements laid down in sub-sections 2.2 and 2.3. The Federal Republic of Germany shall, moreover, provide annual reports as required by the framework.

2. Further to the list of aid schemes set out in the Annex to this Decision (which list is not exhaustive), the Federal Republic of Germany shall also comply with the obligations of Article 1(1) with regard to all other aid schemes capable of benefiting the motor vehicle industry.

3. Aid to undertakings in the motor vehicle industry operating in Berlin which are granted under the Berlin Förderungsgesetz are excluded from the prior notification obligation provided for in the framework but shall be included in the annual reports required by that framework.'

185. As the Commission correctly observes, the validity of that decision was unlimited and, unlike the validity of the Community Framework, was thus not limited to 31 December 1990.

186. However, the appellants reply that the fact that the Community Framework was made binding on the Federal Republic of Germany from 1 May 1990, following a procedure initiated under Article 93(2) of the Treaty, cannot make it binding with no time-limit beyond the expiry date originally provided for it.

187. According to the appellants, it would be contrary to the principle of equal treatment of Member States if the Community Framework could continue to apply only in Germany when it had expired in the other Member States on 31 December 1990.

50 — OJ 1990 L 188, p. 55.

51 — See the contested judgment, paragraph 6.

188. However, this argument, alleging infringement of the principle of equal treatment, cannot be accepted.

189. As regards the duty to notify aid in the motor vehicle sector, the Federal Republic of Germany, to which the rules of the Community Framework applied because of Decision 90/381, was from January to April 1991 in the same position as Member State × where — by definition — the Community Framework no longer applied in the absence of that State's consent to extension.

190. Thus, in both of these cases, aid in excess of ECU 12 million had to be notified, whether on the basis of Decision 90/381 (the Federal Republic of Germany) or directly, on the basis of Article 93(3) of the Treaty (Member State X). All things considered, it was Member State × that was in an even less favourable position, because it had to notify even aid that did not exceed ECU 12 million.

191. It follows therefore that the Court of First Instance observed very acutely, in paragraph 208 of the contested judgment, that the question whether or not the Community framework had binding force *vis-à-vis* Germany in March 1991 was of no relevance for the present proceedings.

192. The Commission also refers to the considerations of the Court of First Instance, in paragraphs 210 to 219 of the contested judgment, where that Court rejects the appellants' argument that the investigation, in 1996, of the compatibility of the disputed aid with the common market could be based only on assessment criteria which existed in 1991 ('investigation *ex ante*').

193. According to the Commission, the appellants' arguments on the application of the Community Framework between January and April 1991 lose their point in the light of these considerations by the Court of First Instance. It considers that the applicability of the Community Framework in March 1991 was irrelevant here, because the Commission could and had to take account of those circumstances of fact and law of which it had knowledge at the time that the contested decision was adopted, on 26 June 1996.

194. However, that argument by the Commission cannot be accepted.

195. As the appellants rightly point out, the question whether there was or not a duty to notify aid must be considered at the date of the decision granting that aid.

196. By contrast, the question of which circumstances of fact and law the Commission must take into account when adopting its decision is another matter entirely. Furthermore, that question arises only if the question whether aid must be notified was answered yes. The answer to that first question, therefore, cannot determine the answer to be given to the latter.

197. Furthermore, we see both from the heading which precedes paragraph 192 and from paragraph 219 of the contested judgment that the Court of First Instance regarded the appellants' arguments concerning the need for an investigation *ex ante* and the inapplicability of the Community framework as two separate arguments.

198. It follows from the above considerations that, in their fourth plea, the appellants have not in my opinion shown that the Court of First Instance erred in law.

199. I therefore propose that that plea be rejected.

E — *Fifth plea in law, adduced by Volkswagen and VW Sachsen, on the partial discontinuance accepted by the Court of First Instance*

200. Volkswagen and VW Sachsen object to paragraph 1 of the operative part of the contested judgment taken together with paragraphs 309 and 65 of the judgment.

201. In paragraph 309 of the contested judgment, the Court stated that '[u]nder Article 87(2) of the Rules of Procedure, an unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(5) of the Rules of Procedure, a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for in the other party's pleadings.'

202. In point 1 of the operative part of the contested judgment, the Court of First Instance:

'1. Takes formal notice that the applicants discontinue their action in Case T-143/96 in so far as it seeks the annulment of the first indent of Article 2 of Commission Decision 96/666/EC of 26 June 1996 concerning aid granted by Germany to the Volkswagen Group for works in Mosel and Chemnitz'.

203. In paragraph 65 of the contested judgment, the Court had declared:

'At the hearing on 30 June 1999, the applicants in Case T-143/96 asked the Court to hold that the action had become devoid of subject-matter in so far as it sought the annulment of the first indent of Article 2 of the [contested decision], declaring investment aid in the form of special depreciation on investment incompatible with the common market, and to apply Article 87(6) of the Rules of Procedure in that respect. The Court also took formal notice of the fact that, in the Commission's submission, that request must be interpreted as a partial discontinuance and entail the application of Article 87(5) of the Rules of Procedure.'

204. Volkswagen and VW Sachsen complain that, without stating any other grounds, the Court accepted the Commission's submission.

205. They point out that they had made clear at the hearing that, following a recent modification in German tax legislation, they would no longer be allowed to effect special depreciation retrospectively, even if their case succeeded (and the Commission issued authorisation). Since they could no longer benefit from a judgment giving them entitlement to special depreciation, they proposed, as they state it, that the proceedings should be terminated, while asking that an order for costs should be made in accordance with Article 87(6) of the Rules of Procedure of the Court of First Instance.

206. The appellants emphasise that they consider it important to establish that they did not discontinue their action in respect of special depreciation. Therefore, they say, costs cannot be ordered under Article 87(5) of the Rules of Procedure.

207. According to the Commission, the appellants' submission is incorrect. An action becomes devoid of subject-matter for the purposes of Article 87(6) of the Rules of Procedure only if the applicant's complaint has been remedied out of court, so that there is no longer any need for a decision and the bringing of an action. In the present case, the action would have been devoid of subject-matter only if the dispute at issue between the Commission and the applicants had ceased to exist after the case had been brought, for example because of a partial revocation of the contested decision. But that did not happen.

208. For my part, I consider that the request from Volkswagen and VW Sachsen

to declare the action partially devoid of subject-matter was unfounded. The subject-matter of the proceedings was the contested decision and, at the time that the contested judgment was given, the decision was fully applicable. At that time, therefore, the subject-matter of the action remained intact, and it is not correct to state that it was partially 'devoid of subject-matter'.

209. On the other hand, the mere fact that one no longer has an interest in the decision being partially annulled, which was the position for Volkswagen and VW Sachsen, would rather be a reason for partial discontinuance. However, I question whether the Court of First Instance is able to take formal note of a partial discontinuance where the party concerned has not made that intention known unequivocally, which appears to me to be the case here.

210. None the less, I consider that the plea raised by Volkswagen and VW Sachsen must still be rejected. The two observations following need to be made.

211. Firstly, had the Court of First Instance accepted the argument that there was no need to adjudicate, the costs would none the less have been at the Court's discretion, under Article 87(6) of the Rules of Procedure. The interest of the appellants in raising that point is therefore not clear.

212. Secondly, and chiefly, we are entitled to consider that a plea alleging infringement of Article 87(5) or (6) of the Rules of Procedure is tantamount to a plea calling into question the burden of costs as resolved by the Court of First Instance.

213. Any such plea is inadmissible here.

214. By virtue of the second paragraph of Article 51 of the EC Statute of the Court of Justice, '[n]o appeal shall lie regarding only the amount of the costs or the party ordered to pay them'.

215. In addition, the Court has consistently held that '... where all the other pleas put forward in an appeal have been rejected, any plea challenging the decision of the Court of First Instance on costs must be rejected as inadmissible by virtue of the second paragraph of Article 51 of the EC Statute of the Court of Justice...'. [52]

52 — Joined Cases C-302/99 P and C-308/99 P *Commission and France* v *TF1* [2001] ECR I-5603, paragraph 31. See also Case C-396/93 P *Henriehs* v *Commission* [1995] ECR I-2611, paragraph 66, the order of 6 March 1997 in Case C-303/96 P *Bernardi* v *Parliament* [1997] ECR I-1239, paragraph 49, and the order of 13 December 2000 in Case C-44/00 P *Sodima* v *Commission* [2000] ECR I-11231, paragraph 93.

III — Conclusion

216. Having regard to the foregoing considerations, I propose the Court should:

— dismiss the appeals;

— order Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH jointly and severally to pay the costs;

— order the Federal Republic of Germany to bear its own costs.