act which in view of its legal effects may give rise to an action for a declaration of nullity under Article 173 of the Treaty. If as a result of the action the refusal to make the payment is declared void, the applicant's right will be established and it will be for the institution concerned, pursuant to Article 176 of the Treaty, to ensure that the payment which has been unlawfully refused is made. Moreover, if an institution fails to reply to a request for payment, the same result may be obtained by means of Article 175.

2. In the event of a refusal by an institution to make a payment, a letter from the institution defining unequivocally and definitively its attitude with regard to the request for payment submitted to it constitutes an act which may be the subject of an action for a declaration of nullity under Article 173 of the Treaty. These conditions are not fulfilled by a communication from an institution whose content the institution subsequently states that it is ready to discuss and reconsider.

3. The duty of administration and control with which the Commission is entrusted as regards the European Social Fund by Article 124 of the EEC Treaty and Articles 11 and 13 of Regulation No 2396/71 of the Council as well as by the requirements relating to the sound administration of Community finances necessarily imply that the accounts of the Social Fund must be cleared within a reasonable period and that the Commission is empowered to determine that period and to attach to it penalties which will ensure its observance. In view of the importance of that period for the sound administration of the Social Fund, it is impossible to rule out the possibility that the penalties provided for may extend to the loss of the right to payment as a result of the fixing of a preclusive period.

4. The principle of legal certainty requires that a provision laying down a preclusive period, particularly one which may have the effect of depriving a Member State of the payment of financial aid its application for which has been approved and on the basis of which it has already incurred considerable expenditure, should be clearly and precisely drafted so that the Member States may be made fully aware of the importance of their complying with the time-limit.

   Article 4 of Commission Decision 78/706 cannot be regarded as laying down a time-limit failure to comply with which involves the loss by the State concerned of the right to the payment of the balance of the assistance from the European Social Fund which has been approved.

In Case 44/81

FEDERAL REPUBLIC OF GERMANY AND BUNDESANSTALT FÜR ARBEIT, Nürnberg [Federal Labour Office, Nuremberg], represented by M. Seidel, Ministerialrat at the Federal Ministry for Economic Affairs, Bonn, and by J. Sedemund, acting as Agent, duly authorized to act in the proceedings, with an address for service in Luxembourg at the Chancellery of the Embassy of the Federal Republic of Germany, 5 Boulevard Royal,

applicants,

and

IRELAND, represented by L. J. Dockery, Chief State Solicitor, acting as Agent, assisted by E. P. Fitzsimons, Senior Counsel, and J. O'Reilly, Barrister at Law, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

intervener,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by J. Amphoux, Legal Adviser to the Commission, assisted by M. Hilf, a Member of the Commission's Legal Department, with an address for service in Luxembourg at the office of O. Montalto, a Member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION

1. Primarily, for an order that the Commission should pay to the Bundesanstalt für Arbeit DM 16 928 855.52 and, in the alternative, for a declaration that the Commission decision of 10 December 1980 refusing to pay the balances due under the Commission's decision of 23 December 1977 is void;

2. In the alternative for a declaration that the Commission's letter of 16 December 1980 concerning the application of Article 4 of Commission Decision 78/706/EEC of 27 July 1978 on certain administrative procedures for the operation of the European Social Fund (Official Journal 1978, L 238, p. 20) is void,

THE COURT,

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the submissions and arguments of the parties may be summarized as follows:

I — The background to the dispute

Pursuant to Articles 5 and 7 of Council Decision 71/66/EEC of 1 February 1971 on the reform of the European Social Fund (Official Journal, English Special Edition 1971 (I), p. 52) the Commission, by decision of 23 December 1977, approved the grant of assistance from the Social Fund for four projects to be carried out by the Bundesanstalt für Arbeit in the fields of the clock-making industry (adaptation to quartz electronics) and of the unemployment of young persons.

Instalments were paid in respect of each project. The various periods for implementation were 1 May 1977 to 30 April 1978, 16 November 1977 to 31 August 1978, 1 January 1978 to 31 August 1978 and 16 November 1977 to 31 August 1978. With the exception of one part of the last-mentioned scheme, the projects were carried out in full.

The requests for payment of the balances of the assistance from the Social Fund were not submitted to the Commission until 8 May 1980. They amounted in total to DM 16 928 855.52.

On 11 and 15 July 1980 the Commission informed the government of the Federal Republic of Germany that it was unable to grant the request for payment of the balance because it had not been submitted within the period laid down by Article 4 (1) of Commission Decision 78/706 of 27 July 1978 on certain administrative procedures for the operation of the European Social Fund (Official Journal 1978, L 238, p. 20). Despite a meeting on 29 September 1980 between officials of the Commission and of the Ministry of Employment of the Federal Republic of Germany and notwithstanding letters sent on 6 October 1980 and on 4 December 1980 by the State Secretary of the Federal Ministry of Labour and Social Affairs and by the President of the Bundesanstalt für Arbeit with a view to obtaining payment of the balances, Mr Vredeling, a Member of the Commission, confirmed the Commission's refusal by letter of 10 December 1980.

In a circular letter of 16 December 1980 sent *inter alios* to the Ministry of Labour and Social Affairs of the Federal Republic of Germany, the Commission reaffirmed that the Member States lost their rights to the payment of the assistance on the expiry of the period laid down by Commission Decision 78/76 and added:

"In the case of a multiannual operation any supporting documents attached to a request for payment that has been rejected would, however, be used to justify any advance payments that may have been made, if the situation has not yet been normalized by means of a supplementary payment.

If no request for payment is submitted to the Fund before expiry of the above-mentioned time-limit, but advances have

been paid, the Member State is required to furnish within three months the supporting documents specified in Article 4 (1) of Council Regulation No 858/72. Failing submission of the latter, the full amounts paid must be recovered. Similarly, if the supporting documents presented in connection with the above two cases do not fully account for the advances paid, procedures for recovery of the remainder will be initiated, preferably by offsetting any payments made against another operation.

Any appropriation that cannot be used as a result of rejection of the request for payment will be released for reallocation by the fund staff and the case will be closed. The same procedure will be followed if 18 months after completion of the operation no claim for payment is submitted under a decision granting approval.

In any case, rejection of a claim for payment of the balance submitted after the time-limit does not call in question any previous supplementary payment unless the claim for payment in question reveals a negative balance which would then have to be recovered.

From 1 January 1981, only amendments entailing a reduction in the amount requested in a claim for payment properly submitted before the end of the eighteen-month time-limit can be taken into consideration."

II — Course of the procedure

By an application lodged at the Court Registry on 22 February 1981 the government of the Federal Republic of Germany and the Bundesanstalt für Arbeit brought an action for an order that the Commission should pay DM 16 928 855.52 and, in the alternative, for a declaration that the Commission's decision of 12 December 1980 was void.

By the same document the government of the Federal Republic of Germany also brought an action for a declaration that the communication sent to it by the Commission on 16 December 1980 was void.

Upon lodging an application at the Court Registry on 17 June 1981 Ireland was allowed to intervene by order of the Court of 1 July 1981 in support of the conclusions of the government of the Federal Republic of Germany and of the Bundesanstalt für Arbeit, Nürnberg, the applicants.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the Commission to inform it in writing before the hearing of the procedures and time-limits, including any time-limits entailing forfeiture of rights, laid down in the context of the European Agricultural Guidance and Guarantee Fund and of the Regional Fund for the submission of applications by the Member States for payment of aids granted to them by the Community.

III — Conclusions of the parties

The government of the Federal Republic of Germany and the Bundesanstalt für Arbeit, Nürnberg, claim that the Court should:

Primarily, order the Commission to pay the second applicant the sum of DM 16 928 855.52;

In the alternative, declare that the Commission decision of 12 December 1980 refusing to pay the balances due under the Commission decision of 23 December 1977 is void.

The government of the Federal Republic of Germany further claims that the Court should:

Declare that the Commission's letter of 16 December 1980 concerning the application of Article 4 of the Commission Decision 78/706/EEC of 27 July 1978 on certain administrative procedures for the operation of the European Social Fund is void.

The government of Ireland adopts the conclusions of the applicants.

The Commission contends that the Court should:

1. Dismiss the principal claim contained in the first head of claim as unfounded and dismiss the alternative claim as inadmissible;

2. Dismiss the second head of claim as inadmissible;

3. Order the applicants to pay the costs.

IV — Submissions and arguments of the parties

A — Concerning the first head of claim

1. Admissibility

(a) Of the principal claim

According to the applicants when a person entitled to a right enforces a right to the payment of a sum of money it must be open to him, in accordance with the provisions of Article 215 of the EEC Treaty, to enforce such rights directly by means of a claim for payment. As the case-law of the Court of Justice on Article 215 of the EEC Treaty shows, that claim for payment is in no way conditional upon success in a prior procedure for annulment under Article 173 of the EEC Treaty. In any event the applicants point out as a precaution that, by reason of their content and of their form, the letters addressed to them by the Commission cannot be considered as acts within the meaning of the first paragraph of Article 173 of the EEC Treaty. As to their substance, these letters constitute a mere refusal to pay which, in accordance with the general principles of law, is a mere factual step and not a legal act independently producing legal effects.

In its defence the Commission considers that the claim for payment is based upon an application by analogy of the second paragraph of Article 215 of the EEC Treaty. According to the Commission the analogy appears to consist in the fact that, instead of concerning reparation for an injury, the application seeks to obtain a benefit which has not yet been provided. In connection with this special procedure the Commission states that it would not oppose it if it were the only means available to the applicants of obtaining effective legal protection by the courts but it cannot agree to the extension to this case of the decisions of the Court on the second paragraph of Article 215 in accordance with which an application based on that provision is not subject to an action for annulment or for failure to act, even where such actions lie. In the view of the Commission such actions were available in this case and the proceedings instituted by the applicants are thereby rendered inadmissible. In this connection it claims that, on the one hand, it is impossible to rule out the possibility that the letters whereby it refused payment of the balances claimed should be considered as acts within the meaning of Article 173 of the EEC Treaty against which an application for annulment accordingly lies, although it recognizes that there are good grounds for regarding those letters simply as factual steps without legal effect, stating that the time-limit has expired and indicating the consequences laid down in such circumstances in the Commission

Decision of 27 July 1978 regarding the operation of the European Social Fund (Official Journal, L 238, p. 20). On the other hand, even if these letters are not to be considered as decisions it would have been possible, according to the Commission, to initiate the procedure for failure to act under Article 175 of the EEC Treaty.

In response to the considerations of the Commission, the applicants maintain that the claim for payment or the claim for a mandatory injunction against the defendant, like the claim for damages under Article 214 of the EEC Treaty, constitutes a class of autonomous actions which exist independently together with actions for annulment and for failure to act. The existence of such an action is furthermore generally recognized in the Member States as a procedure for enforcing a right to payment. In addition it is only by recognition of that right that it is possible to treat in the same way rights to payment arising directly from a measure of Community law and the rights to payment arising from the contractual or non-contractual liability expressly mentioned in Article 215 of the EEC Treaty, thereby ensuring the observance of the law which the Court is required under Article 164 of the EEC Treaty to uphold. Furthermore only by the recognition of an independent action for payment is it possible to provide an effective guarantee of the right to payment without requiring circuitous, difficult and laborious procedures, calling for the participation of many institutions which would be the case if the applicants had first of all instituted proceedings for annulment or for failure to act. The applicants conclude that, even though it is possible in this case to take proceedings for annulment or for failure to act, since such proceedings do not provide the same legal protection as the direct action for enforcement the latter action cannot be considered as subsidiary in relation to the former actions.

In its rejoinder the Commission maintains that the applicants had available to them effective legal protection within the framework of the proceedings for failure to act provided for in Article 175 of the Treaty. It rejects the idea that the action for performance is a class of independent proceedings. In its view neither the general reference to Article 164 of the EEC Treaty nor mention of the possibility of legal protection existing in this field in all the Member States is relevant. The EEC Treaty in fact contains arrangements for an independent procedure which may not be supplemented or enlarged by resort to the procedures provided for in the national legal systems. The Court of Justice in fact has in principle only the powers which have been conferred upon it by the Treaty and it appears that the contracting parties to that Treaty did not consider it necessary to make provision for proceedings for enforcement, at least in relations between the Community institutions and the Member States. The Commission further states that if the Court were to find within the framework of an action for failure to act a failure on the part of the Commission in respect of an obligation to make payment the Commission would fulfil that obligation without the need for an order to that effect by the Court in a separate procedure following an additional action for payment. Finally, according to the Commission, the principle of effective protection invoked by the applicants certainly requires that the provisions concerning protection should not be interpreted narrowly but a wide interpretation cannot justify the creation of a new kind of action. In addition the Court has expressly recognized in Joined Cases 261 and 262/78 ([1979] ECR 3045) that an action for payment of an amount under a system set up by a Community measure cannot be brought on the basis of Article

178 and of the second paragraph of Article 215 of the EEC Treaty.

(b) Of the alternative claim

Within the framework of this claim, which was made solely in case, contrary to the opinion of the applicants, it was possible to bring proceedings for annulment under Article 173 and in case such proceedings were to exclude bringing an action for payment, the applicants consider that only the last letter of refusal dated 10 December 1980 may be considered as an act of the Commission within the meaning of the first paragraph of Article 173 of the EEC Treaty. The letters of 11 and 15 July do not correspond, as to either form or content, to an act of that class. They were in fact addressed to a particular person rather than to the Permanent Representative of the Federal Republic of Germany in Brussels or to the Federal Minister for Labour and Social Affairs, were in the form of a mere duplicated communication, gave no indication whatever that in this matter the Commission itself or a person duly authorized in that behalf had taken a decision and were not signed by the Director General. As to their content, these letters constituted a mere refusal of payment which must be considered as a mere factual step since rights to payment arising through aid granted within the framework of the Social Fund, in the opinion of the applicants, are only extinguished if the commitment to incur expenditure is revoked, which it was not in the letters of July 1980. According to the applicants these letters may be understood as constituting a communication of a sort not unusual in the administration of the Fund, which necessitated a more thorough examination of the circumstances of the request for payment. That impression was strengthened by the subsequent course of the discussions between the Commission and the applicants' representatives. The applicants were thus justified in considering that the Commission had not yet taken a final decision, especially as it would have been in accordance with the principle of good administration to enable the Member State in question to give its views on that decision. Only the letter of 10 December 1980 can form the subject-matter of an action under Article 173 of the EEC Treaty since that is the letter which contains a definitive refusal to pay.

On the other hand the Commission considers that the letter of 10 December 1980 displays all the characteristics of a letter which is purely confirmatory and that, according to the case-law of the Court, such letters do not constitute legal acts which may be contested. With regard to the possible revocation of the credits which, according to the applicants, distinguishes the letter of 10 December from the preceding letters, the Commission maintains that this is an internal measure which is not decided until all controversy has been settled. In this case the revocation has still not been decided upon. In receiving a representative of the applicants for a discussion following the dispatch of the letters of 11 and 15 July 1980 refusing the payment of the balances requested the Commission merely undertook to consider whether there was a case of *force majeure* or comparable circumstances which might have led to a re-opening of the procedure.

Since no factor of that nature was established the communication confirming that the Commission had not modified its point of view was not, according to the Commission, a legal act capable of being contested. In consequence the Commission considers the alternative claim as inadmissible.

Nevertheless, the applicants contend that the letter of 10 December 1980 constitutes the first declaration of the Commission after it was duly notified of the matter, in which it set out an objective view of the matter, thereby ruling out the possibility of proceedings for failure to act. In those circumstances and in case the Court dismisses the applicants' principal claim it will be necessary, in order to avoid a lacuna in the arrangements for legal protection, which would be contrary to the Treaty, for that decision to be capable of being contested through proceedings for annulment.

In its rejoinder the Commission claims that it never undertook, after dispatching the letters of July 1980, to participate in fresh negotiations concerning any alteration of its views. The director of the European Social Fund merely declared himself willing to discuss the matter and, within the framework of the discussions which took place, the Commission made it plain that it was unable to review its decision to refuse payment. The letter of 10 December 1980 merely confirms that position.

2. The substance of the case

(a) As regards the principal claim

The applicants claim first of all that in view of the tenor of the Community provisions on the Social Fund the Commission is not entitled to prescribe a time-limit involving complete loss of rights. Pursuant to Article 127 of the EEC Treaty decisions of substance concerning the use of the financial resources of the Fund, including implementing provisions, belong in principal to the Council since that provision reserves to the Council power to lay down the provisions required to implement Articles 124 to 126. Articles 7 and 8 of Regulation No 2893/77 and Article 4 of Regulation No 858/72, adopted by the Council, show that the Commission must make the payments when the conditions fixed by the Council are fulfilled. Article 13 of Regulation No 2396/71 of the Council, upon which Decision 78/706 was based, expressly restricted the powers of the Commission to the measures necessary for the application of the implementing regulation adopted by the Council. The power of the Commission to abolish aids already granted even where a Member State has provided proof of the expenses to which it has committed itself is no longer, as to its substance, a measure in implementation of Regulation No 2396/71 of the Council but constitutes a substantive measure of implementation of Article 127 of the Treaty, which comes within the powers of the Council. Any exception to that rule must be laid down expressly in the provisions enacted by the Council, as is shown by Article 4 of Council Regulation No 852/72 which fixes, in conditions which are clearly defined, the powers of the Commission to reduce or withhold payment of aid. Finally, the applicants remark that in their view the matter of ascertaining whether rights to payment already vested, arising from assistance for projects the due completion of which can be proved, may be abolished merely because the time-limit for submitting supporting documents has not been complied with constitutes a question of principle of such importance that it must on any view be reserved to the Council

Furthermore, the defendant's view that the time-limit in question is one involving absolute loss of rights is not confirmed either by the wording or by the place of Article 4 in the general plan of Commission Decision 78/706. On the contrary, according to the applicants, the wording of Article 4 (1) indicates instead that the provision in question is of an administrative nature and that impression

is further borne out by the recitals in the preamble to Decision 78/706 which relate to that provision and by the fact that Article 2 of Decision 78/706 expressly lays down the consequences of failure to observe the time-limit mentioned therein. In the applicants' view if the Commission's intervention was to have been accompanied in Article 4 with a penalty so serious as a time-limit carrying absolute loss of rights it ought to have been expressly included in the provision (as it was in Article 2) or at least in the recitals in the preamble to the decision.

Furthermore, an interpretation of Article 4 of Decision 78/706 as laying down a time-limit involving absolute loss of rights is contrary to the objective in view and foreign to the subject-matter in question because it adversely affects recipients of assistance from the Fund who are particularly scrupulous in drawing up their accounts precisely in the interest of the Fund itself and might induce the Member States to use up all instalments even if it may be foreseen that not all the credits originally granted will be used.

In any case, according to the applicants, the lack of clarity of Article 4 of Decision 78/706 made it possible for them to interpret it as a mere administrative provision and conferring upon that provision the status of a time-limit involving absolute loss of rights frustrates the applicants' legitimate expectations in the scope of that provision. This is all the more true since in relation to projects concluded before 1 January 1978 the Commission on a number of occasions extended the time-limits for submitting requests for payment.

Finally, the applicants claim that an interpretation of the provision in question laying down a time-limit involving absolute loss of rights is in breach of the principle of proportionality since the objective in view, to speed up the procedure, can be attained by less severe means, such as an administrative provision which allows of exceptions which are objectively justified but which certainly does not preclude a lawful refusal to pay if the time-limit is arbitrarily exceeded. The applicants furthermore remark that risk of arbitrarily exceeding the time-limit is reduced since any recipient of aid from the Fund has an interest in obtaining reimbursement of his expenditure as soon as possible in order to reduce the expenses and interest which he must bear.

The Commission rejects in their entirety the arguments relied upon by the applicants to show that it has acted unlawfully.

With regard more particularly to the powers of the Commission to fix a time-limit involving loss of rights the Commission remarks that, in its view, Article 4 of Decision 78/706 constitutes the corner-stone of a reform of the Social Fund which was intended to contain within strict limits the amounts of appropriations committed for each Member State and consequently not yet used and to avoid allowing them to accumulate to excess; the purpose of this was to meet the requirements contained in the decisions as to budgetary policies and to prevent the effectiveness and economical nature of the measues as a whole from being compromised. The provision concerning the time-limit which is contained in Article 4 of the contested decision was furthermore favourably received by the representatives of the Member States when it was introduced and resulted in the appropriations being used to the extent of 78.8 % in 1979 and 100 % in 1980. The influence of the introduction of the time-limits in question is moreover shown by the following table:

	Appropriations	Percentage in relation to the previous financial year	Unexpended balance of previous appropriations	Percentage in relation to the previous financial year
1977	616·63	—	953·37	—
1978	568·08	— 7·87	1 221·15	+ 28·09
1979	774·45	+ 36·32	1 341·00	+ 9·81
1980	1 014·22	+ 30·96	1 399·88	+ 4·24

The Commission emphasizes the reduction thereby brought about in the growth of an unexpended balance of appropriations which probably made the budgetary authority less willing to enter new appropriations in the budget and which, by requiring the implementation of part of the prior commitments, froze in advance part of the authorizations of payment, thereby reducing the financial margin available at the beginning of each financial year. The Commission accordingly concludes that the fixing of a time-limit permitted it to conclude after the financial year 1981 a large number of projects and to create a climate favourable to fresh action by the Social Fund.

The Commission, in fixing that time-limit, has carried out in full the duty with which it was charged in Article 13 of Regulation No 2396/71 of the Council, which is to take "the necessary measures for implementing the rules laid down in this regulation". The Commission is fully entitled to avail itself of that power which is covered by the duties conferred upon it under the first indent of Article 155 of the EEC Treaty, is not limited by Article 127 of the EEC Treaty and was conferred upon it by the Council within the framework of the fourth indent of Article 155 of the EEC Treaty.

Finally the Commission considers that the reference made by the applicants to the power expressly conferred on the Commission to reduce or terminate assistance where irregularities or changes are revealed in the operations referred to (Article 4 of Regulation No 858/72 as amended by Council Regulation No 2894/77) does not provide grounds for concluding by inverse reasoning that it was improper for the Commission to lay down a time-limit capable of rendering inadmissible a request for payment of the balance of the assistance. That time-limit is in fact related to the conclusion of procedures concerning projects which as such may not be compared with the rules quoted by the applicants.

With regard to the proper interpretation of Article 4 of Commission Decision 78/706 the Commission considers that that article constitutes one of the many provisions of Community law concerning time-limits the consequences of which may be deduced only through an interpretation. It is the meaning and purpose of those provisions which make it possible in each case clearly to discern the consequences of failure to observe the time-limits. In this case the background to the provision points to the conclusion that an unjustified failure to observe a time-limit cannot be devoid of consequences and must on the contrary result in a refusal to consider late requests for payment.

In the Commission's view the Member States could not be mistaken as to the meaning of these provisions. It also maintains that only a time-limit involving loss of rights could induce Member States to take the necessary action to speed up the conclusion of procedures concerning financial aids for projects undertaken. If the Commission had laid down a purely formal time-limit the only means of enforcement available to it where that limit was not observed by the Member States would have been the procedure for infringement of the Treaty which is too complicated to be employed effectively.

Finally the existence of a time-limit involving loss of rights does not prevent the Commission from taking exceptional circumstances into consideration provided that such difficulties are notified to it in good time, that is to say before the expiry of the time-limit.

Since the Commission accordingly considers that the Member States could not, having regard to the circumstances, be mistaken as to the scope of the time-limit laid down by Article 4 of its decision it rejects as unfounded the argument based on breach of the principle of the protection of legitimate expectation.

With regard to any breach of the principle of proportionality the Commission remarks that, according to it, a time-limit of 18 months, like that which was laid down in the provision in question, provides any State administration operating normally with a margin of time which is sufficient, if not excessive, to submit the final accounts of projects after their conclusion. Furthermore, as the Member States are in a position to notify the Commission before the expiry of the time-limits of particular problems which they encounter there are no grounds for considering the time-limit in Article 4 of Decision 78/706 as being in breach of the principle of proportionality.

The Commission finally emphasizes that although in respect of projects concluded before 1 January 1978 it adjusted time-limits in accordance with Decision 78/706 and may possibly have fixed new time-limits for the communication of certain information — though not for the submission of a request for payment — this cannot be regarded as constituting a derogation from the arrangements contained in Article 4 of the decision of 27 July 1978.

In their reply the applicants emphasize above all the fact that their application is not based on any illegal conduct on the part of the Commission but in fact on the decision of the Commission of 23 December 1977 giving its approval, which the applicants claim should be implemented. According to them the Commission must accordingly show that it is justified in refusing to pay part of the assistance granted when the projects in question have incontestably been properly concluded in their entirety. The applicants next wish to reply to the various defences advanced by the Commission.

With regard to the power of the Commission to fix a time-limit involving loss of rights the applicants consider that once the appropriations are committed the Commission is concerned only with carrying out the detailed implementing provisions adopted by the Council since the principle is that once agreement is obtained on an intervention by the Social Fund in respect of a project which has been submitted any claimant must be fully reimbursed for costs which he has incurred in duly carrying out the project covered by the assistance by means of credits from the Fund placed at his disposal for that project.

In that context the power conferred upon the Commission by Article 13 of Regulation No 2396/71 of the Council

cannot be understood as indicating a general provision conferring upon the Commission power to take all supplementary measures which appear to it to be necessary. That power is accordingly distinct from the powers contained in Article 155 of the EEC Treaty since the Council has here reserved to itself power to take all decisions of substance, including settlement of matters of detail and has furthermore made use of this power. The Commission accordingly cannot in this sphere fix time-limits involving loss of rights which, although they are procedural provisions, result in a material restriction of the legal rights of recipients of assistance and affect the substantive scope of the rules adopted by the Council which the Commission is no more entitled to modify than are the Member States. The applicants also emphasize that, since the Council has expressly laid down in Article 4 (3) of Regulation No 858/72 as amended by Regulation No 2894/77 rules for the reduction of assistance for operations where it is proved that they have not been duly carried out it is *a fortiori* for the Council itself to decide upon the termination of assistance in respect of operations which have been duly carried out. With regard to the need for laying down a time-limit involving loss of rights in order to prevent appropriations committed from being frozen for too long or in the end not being used, the applicants claim that whilst that factor may suffice to establish that such a time-limit is appropriate it does not show that such a limit constitutes an adequate means of attaining that objective and above all cannot supply power for the Commission to intervene in a field which the Council has expressly reserved to itself. On the contrary if the fixing of a time-limit must in fact be considered as a "cornerstone" of the reform of the Social Fund it cannot come within the powers of the Commission alone.

In any case the applicants consider that the Commission has failed to prove the causal connection which it claims exists between the fixing of a time-limit and the restriction of the appropriations committed or *a fortiori* the connection between the fixing of a time-limit and the attainment of the socio-political objectives of the Fund. They claim in particular that the year 1978, being a transitional year, is not representative, that the reduction in the percentages of appropriations committed but not yet used may equally well be explained by other improvements in procedure and above all by pressure in the form of the interest charges borne by the Member States if they are late in rendering their accounts and finally that it is impossible to see how the prime objective of the Fund which, in the Commission's view, consists in attaining the socio-political objectives of the Fund, can be attained by failing to satisfy claims for assistance on the sole ground that a Member State, in its accounting and supervision of a project which qualifies for the assistance of the Fund and has been duly carried out, has exceeded, possibly only very slightly, the time-limit laid down by the Commission.

The applicants also persist in their claim that the time-limit fixed by the Commission must be interpreted, if regard is had to its place in the general plan of the scheme, as an administrative time-limit which, when it is exceeded for reasons duly given, cannot affect the rights of a claimant for assistance. That is the explanation for the fact that seven out of nine Member States exceeded these time-limits and nevertheless submitted claims for payment of balances. In support of their interpretation the applicants point to the wording of Article 4, the fact that at the outset at least the Commission extended the time-limit, the possibility referred to in the letter of 16 December 1982 of taking into consideration documents submitted after the expiry of the time-limit in order

to justify advances not yet settled, the fact that it would be contrary to the principles applicable in this field to place at a disadvantage claimants for assistance who check with particular care the right to the payment of balances, even at the cost of exceeding the time-limit by a very small degree, the fact that it is contrary to the principle of proportionality to terminate assistance for projects which have been duly carried out even in the case of delay for which objective reasons are provided and the fact that the principle of legal certainty requires in fixing a time-limit affecting the existence of a right that the consequences for the persons concerned must be expressly and clearly set out in the relevant provision (judgment of 15 July 1970 in Case 41/69 [1970] ECR 661). The applicants also recall that their belief that this interpretation was correct was further reinforced by the request for information from the Commission of 9 May 1980 and by the entry into negotiations in the course of the second half of 1980. The applicants also refer to what in their view constitutes a contradiction between the various arguments of the Commission, in that it considers the time-limit of 18 months as a time-limit involving absolute loss of rights whilst it maintains that it enjoys a discretion sufficiently wide to accept requests at a later date where reasons are given. With regard to the Commission's argument to the effect that that wide discretion requires that it be notified of the reasons for the delay before the expiry of the time-limit they emphasize that the Commission was aware before the autumn of 1980 of the problems which they were encountering since they arise essentially from the requirement of separate accounting for each person qualifying for the assistance of the Fund and the applicants proposed a number of times to the Commission that a combination of information based on actual budgetary transactions and official statistics which should constitute appropriate proof, that the question of the separate statement for each recipient was discussed at the offices of the Bundesanstalt from 5 to 7 April 1976 and finally that the question of the clearing of the accounts was discussed with the competent director of the Social Fund on 2 February 1977 in Nuremberg. Furthermore, according to the applicants, there can be no difference from the legal point of view whether the reasons for the delay are communicated before or after the expiry of the time-limit. The sole criterion is whether the delay is justified or not.

In any case, whatever the view to be taken of the time-limit involving loss of rights (a time-limit leaving a discretion to the Commission or a strict time-limit) the applicants consider that it is unlawful. In their view the first kind of time-limit is contrary to legal certainty which requires that a time-limit should be fixed in advance by the Community legislature. It refers in this connection to the above-mentioned judgment in Case 41/69. A time-limit involving absolute loss of rights is equally unlawful since it is in breach of the principle of proportionality, is too short, as is shown by the fact that hardly any of the Member States were able to comply with it, is in breach of the principle of the protection of legitimate expectation since, in the absence of any communication to the contrary, they were entitled to consider that the time-limit constituted a purely formal time-limit and, finally, the time-limit was laid down by an institution which had no power so to act.

In its rejoinder the Commission emphasizes that the wide administrative powers which are conferred upon it under Article 13 of Regulation No 2396/71 of the Council must be appraised in relation to the main objectives of the Social Fund at least as much as to the wording of the enabling legislation. Admittedly that provision does not authorize the Commission to

adopt all measures which appear to it appropriate or necessary in order to supplement the arrangements in force but restricts its role to determining the rules necessary to the administration of the Fund. The fixing of time-limits involving loss of rights is in fact necessary for the good administration of the Fund as was moreover recognized by the Court in its judgment of 30 November 1972 (Case 32/72, [1972] ECR 1181) and in its judgment of 16 December 1976 (Case 45/76, [1976] ECR 2043).

With regard to the comparison with Article 4 (3) of Council Regulation No 2894/77 the Commission states that the two cases are not comparable. In Article 4 (3) of Regulation No 2894/77 the whole of the assistance may be affected whereas in the provision contested by the applicants only the balance of the assistance is referred to. The decisive factor is the legal nature of the procedural time-limits, which bears no relation to the appraisal of substantive law.

With regard to the need for and the appropriateness of the contested time-limit in relation to the good administration of the Social Fund the Commission maintains that the situation radically improved after the modification of the administrative arrangements, of which the introduction of the time-limit of 18 months constitutes one of the essential mechanisms. The success of the measures adopted is shown by the fact that in 1980 the volume of supplementary and final payments amounted to 250 000 000 units of account as against 152 000 000 for the preceding year and that in the same period the amount of annulments of assistance increased from 9 300 000 to 158 000 000 units of account. With regard to the length of the time-limit fixed by the Commission it remarks that from 1 August 1980 to 31 May 1981 it was able to make within the prescribed time-limits 511 final payments, of which 36 concerned requests for balances of German payments and that it found only two cases where time-limits were exceeded by other Member States in September 1981 and only one in October which furthermore was by a very small margin. It follows that the strict application of the time-limit by the Commission meant that the administrations of the Member States were obliged to adapt themselves to that procedure. The Commission does not consider that that improvement is due to the present level of interest rates since past experience does not indicate that the conduct of large-scale administrations is guided primarily by economic principles. Even today there are, moreover, a large number of advances which have not been claimed despite the pressure exerted by interest rates. In addition the Commission remarks that the levels of interest rates may also in fact constitute an incentive to retain as long as possible sums received in excess.

With regard to the interpretation of the time-limit fixed by Article 4 of its Decision 78/706 the Commission, after emphasizing that exceeding a time-limit casts no light at all on the legal views of the Member States exceeding it and that in any case the opinion of the Member States is of no particular value in the interpretation of a provision of Community law, maintains that an effect of loss of rights, which five Member States have moreover accepted and all interpreted as such, at any rate from October 1980, may be deduced from the context of the provisions relating to the time-limit and the description of the function of those provisions within the framework of the arrangements for the administration of the Fund. In this connection it refers to the judgment of the Court of 30 November 1972 (Case 32/72 [1972] ECR 1181).

Naturally the fixing of the contested time-limit for making the payments was not intended to have an adverse effect on Member States which are particularly scrupulous in supervising projects but the Commission considers that the assumption which the applicants made that a time-limit prescribed within the framework of a general scheme of administration would have no legal consequences does not constitute, having regard to the experience of the Member States in this sphere, conduct worthy of protection.

With regard to the charge levied against it by the applicants that the Commission enjoys a margin of discretion which permits it to make derogations from the time-limit in question in special cases just as it pleases, the Commission recalls that it has only declared its willingness, regard being had to the case law of the Court, to take into consideration cases of *force majeure* or other compelling circumstances.

Finally with regard to the argument regarding the cumbersome nature of the present system of administration the Commission claims that it is not appropriate in this case to consider whether it is too cumbersome and might not be replaced by simpler arrangements. The present measures were enacted after consultation with experts from the Member States and the Commission takes pains to follow as closely as possible the provisions in force. With regard more particularly to the individual supervision of projects, that is necessary in order to ensure that a project qualifying for aid in fact concords well with the characteristics of the projects supported by the Social Fund.

(b) With regard to the alternative claim

Since the submissions made in support of the alternative claim are identical to those relied upon in support of the main claim it is sufficient to refer to the considerations set out above.

B — The second head of claim

1. Admissibility

According to the applicant the administration of the Fund, by its letter of 16 December 1980, adopted a series of provisions which considerably exceeded the framework of Article 4 of Commission Decision 78/706 and which were clearly intended to regulate, exhaustively and in their entirety, the consequences of failure to observe that time-limit. It concludes from this that that letter is intended to establish binding rules for the conduct of the Member States; such rules constitute an act of the Commission within the meaning of Article 173 of the Treaty, against which proceedings may be instituted even though it was not adopted in the form prescribed in Article 189 of the Treaty.

The Commission for its part maintains that the circular letter issued by the competent director of the administration of the Social Fund on 16 December 1980 cannot be considered as a legislative measure. That letter was preceded by two other letters dated 27 April 1979 and 29 February 1980 of identical content concerning the time-limit of 18 months established by Commission Decision 78/706. These letters at the most constitute a notice of policy binding on their author but not productive of direct legal effects for the Member States to which they are addressed. They indicate the interpretation placed by the Commission on the existing provisions.

More particularly the letter of 16 December 1980 appeared necessary in order to explain the effects of the expiry of the time-limit, with regard to their administrative implications. Circulars of this nature are known to the administrations of all the Member States and no administration considers that they may be contested. Only individual

decisions adopted subsequently may be contested.

In its reply the applicant claims that the circular letter describes various phases of the administrative procedure in such a way as to imply that it does not expect, and at the same time that it by implication requires, Member States to comply with it. The circular thus contains rules which cannot be deduced from the existing provisions and which consequently confront the Member States with a new situation as regards the administrative procedure. The applicant concludes from this that by reason of the factual compulsion for Member States to conform to these new rules it is the circular which adversely affects them directly and not only the subsequent individual decisions. The applicant can thus establish an interest in taking proceedings for the annulment of that circular.

In its rejoinder the Commission contends that the contested circular does not contain new rules which may be contested but only an interpretation of the provisions in force.

2. Substance

The applicant draws a distinction between the various problems considered in the circular letter:

With regard to the time-limit involving absolute loss of rights fixed in the first paragraph of the letter the applicant refers to the considerations set out with regard to its first head of claim.

With regard to the rules concerning balances already paid it considers this as applying discriminatory treatment inasmuch as, despite failure to observe the time-limits, all advances may be retained if they have already been normalized by means of supplementary payment or if they may still be accounted for by appropriate documents to be submitted and, therefore, according to the applicants, loss of the assistance of the Fund where time-limits are not observed depends upon the balances paid. An applicant for payment who fails to respect the time-limits and who has obtained significant balances is thus treated better than an applicant who has obtained smaller balances because he has restricted his requests to realistic sums. The applicant concludes from this that the rules constitute misuse of powers and that they are not compatible either with the spirit or the objective of the rules on the Social Fund since they encourage applicants for intervention to inflate their claims.

Misuse of powers may also be discerned in the fact that the administration of the Fund is prepared to recognize payments of instalments even when no request for payment of the balance has been submitted, which results in according harsher treatment to a claimant who has indeed allowed the time-limit of 18 months to expire but who has duly kept accounts and submitted documentary evidence for his request for payment but who has refrained from requesting payment of instalments than to a person who has requested payment of instalments and failed to submit any request for payment of the balance.

The annulment of the appropriation for expenditure when the request for payment of the balances is not submitted within the time-limit laid down is contrary to Article 8 of Regulation No 2396/71 and is not covered by the financial regulation which the Council adopted on the basis of that provision.

The last paragraph of the letter concerns the amendment of claims submitted within the prescribed time-limits and precludes such amendment on the part of the person responsible for the project, whilst the Commission reserves to itself the right to recover any excess paid

without being obliged to comply with any time-limit whatever. Previously persons requesting assistance were entitled to amend requests for payment, and frequently did so, because the fixed time-limit was by no means suitable in many cases. These new rules are not appropriate to the matters governed by them and they are vitiated by misuse of powers in that they render it quite impossible to take into consideration the special structure of a project and objective difficulties which may be involved in the clearance of accounts in a particular case. This results in a situation in which persons submitting claims who carry out a particularly detailed check or who encounter special difficulties by reason of the special structure of national projects are placed at a disadvantage without any objective reasons in relation to other persons who, by reason of particularly advantageous circumstances or of failure to take care over details, submit requests for the payment of balances in good time.

The applicant finally claims that there has been a breach of the requirement to provide a statement of reasons.

In its defence the Commission merely emphasizes that even on the supposition made by the applicant that the contested circular is a source of improper conduct on the part of the applicant Member States it would not constitute a ground for annulment, even if it were possible to challenge it.

In its observations the Irish Government emphasizes first of all that the proceedings brought by the applicants against the Commission of the European Communities raise questions of principle which are identical to those which have arisen in an Irish claim against the European Social Fund concerning the sum of £702 905.75, being the balance of monies due for four programmes of the Social Fund. The Irish Government adheres to the arguments and submissions made on behalf of the applicants in support of their conclusions, which it adopts.

According to the Irish Government, in approving the German projects as qualifying for payment from the European Social Fund the Commission was placing itself under a contractual obligation to such successful applicants to pay over the requisite amounts. Even if it were necessary to consider that approval of the projects in question by the Commission did not give rise to contractual liability on the part of the Community the intervener considers that non-contractual liability to make the payments arises by virtue of the Commission's approval and of the contents of the relevant regulations.

With regard to the time-limit of 18 months imposed by the Commission the Irish Government considers that it should not be applied. In this connection it relies upon the submissions concerning lack of powers, infringement of the aim and purpose of the Social Fund, the principle of legal certainty and the principle of proportionality which have already been made by the applicants. It states that the claim of the Commission to fix a time-limit for submitting requests for the payment of balances constitutes retrolegislation. The subject-matter of the Irish requests and one of the German requests is in fact projects completed before the purported modification in the law arising from Commission Decision 78/706. By such retroactive legislation the Commission fails to observe a fundamental of principle of law common to the legal systems of the Member States. In this connection the Irish Government refers to the opinion of Mr Advocate General Mayras in Case

158/78 ([1979] ECR 1103) and to the opinion of Mr Advocate General Reischl in Case 53/75 ([1975] ECR 1658 and 1659).

V — Oral procedure

At the sitting on 26 February 1982 oral argument was presented by the following: J. Sedemund, for the applicants; E. P. Fitzsimons, Senior Counsel, for the government of Ireland; and M. Hilf, a member of the Commission's Legal Department, for the Commission.

The Advocate General delivered his opinion at the sitting on 16 March 1982.

Decision

1 By an application lodged at the Court Registry on 20 February 1981, the government of the Federal Republic of Germany and the Bundesanstalt für Arbeit [Federal Labour Office] brought an action whose first head of claim is primarily for an order that the Commission should pay the sum of DM 16 928 855.52 due under the Commission's decision of 23 December 1977 approving the grant of assistance from the Social Fund for four projects to be carried out by the Bundesanstalt für Arbeit and, in the alternative, for a declaration pursuant to the first paragraph of Article 173 of the EEC Treaty that the Commission's decision of 10 December 1980 refusing payment of that sum is void.

2 The second head of claim introduced by the government of the Federal Republic of Germany pursuant to the first paragraph of Article 173 of the EEC Treaty is for a declaration that the Commission's letter of 16 December 1980 concerning the application of Article 4 of Commission Decision 78/706/EEC of 27 July 1978 on certain administrative procedures for the operation of the European Social Fund (Official Journal 1978, L 238, p. 20) is void.

3 By this action the applicants are in substance challenging the Commission's refusal to grant the requests to pay the balances of approved assistance from the Social Fund on the ground that the requests were not submitted within the period of 18 months laid down by Article 4 (1) of Commission Decision 78/706.

I — First head of claim

1. The claim for payment

4 The applicants maintain that in a situation such as theirs where aid has been granted to them by a Commission decision, the Commission's failure to pay that aid entitles them to make a claim for payment. Such a claim is the only remedy offering them the effective legal protection guaranteed to them by Article 164 of the Treaty. Moreover, the applicants consider that if this claim were rejected, the effect would be to ensure that claims for payment based on a unilateral act adopted by the Commission in favour of the applicant would be treated differently from claims of the same kind which have their basis in contractual or non-contractual liability and may be made under Article 215 of the Treaty. Such a difference in treatment is not justified where it is a question of ensuring payment of sums due from the Community.

5 In the Commission's view, a claim for payment such as that made by the applicants is extraneous to the system of remedies established by the Treaty and therefore inadmissible. That is particularly so since the applicants are not wholly without effective legal protection, as this is sufficiently guaranteed by the possibility open to them of bringing an action for failure to act against the Commission under Article 175 of the Treaty.

6 It is true that in this area there is no provision in the Treaty entitling a person in favour of whom an institution has entered unilaterally into a financial commitment to bring before the Court an action for payment against that institution. That of itself does not mean that the person concerned has no remedy where that institution refuses to honour its commitments. Indeed, in so far as the institution, by refusing payment, disputes a prior commitment or denies its existence, it commits an act which in view of its legal effects may give rise to an action for a declaration of nullity under Article 173 of the Treaty. If as a result of the action the refusal to make the payment is declared void, the applicant's right will be established and it will be for the institution concerned, pursuant to Article 176 of the Treaty, to ensure that the payment which has been unlawfully refused is made. Moreover, if an institution fails to reply to a request for payment, the same result may be obtained by means of Article 175.

7 It follows that whilst the EEC Treaty makes no provision for an action of the type brought by the applicants, this cannot be regarded as a lacuna which must be filled in order to ensure that persons concerned have effective protection for their rights. The claim for payment made by the applicants must therefore be declared inadmissible.

2. The alternative claim for a declaration that the Commission's letter of 10 December 1980 refusing the payments requested is void

(a) Admissibility

8 For the reasons already stated by the Court in considering the principal head of claim, the refusal to make a payment is an act which may be the subject of an action for a declaration of nullity under Article 173 of the Treaty. However, the Commission maintains that this head of claim is also inadmissible since it is directed against a letter, namely that of 10 December 1980, which merely confirmed a decision which had been definitively adopted and notified to the applicants in July 1980.

9 The Commission thus refers to the letters which the Director General of the Directorate General for Employment and Social Affairs sent to the Federal Ministry of Labour on 11 and 15 July 1980, in which it was stated that it would not be possible to grant the request for payment, since they had not been submitted within the period laid down by Article 4 (1) of Commission Decision 78/706.

10 Before the precise nature of the Commission's letters of July and December 1980 can be determined, it is necessary to put them in context by recalling the sequence of events which occurred between July and December of that year.

11 By a letter of 4 August 1980, the Federal Ministry of Labour replied to the above-mentioned letters of 11 and 15 July 1980, challenging the Commission's position on grounds both of law and of fact and asking it to explain its view. That request was formally accepted by the Commission in its letter of 5 September 1980 and a meeting took place on 29 September 1980 between the director responsible for the administration of the Social Fund and a German official, the Commission director agreeing to reconsider the

view of the Federal authorities and to refer the matter to the Vice-President of the Commission. The Federal authorities' view was again put forward in two letters, one of 6 October 1980 from the State Secretary of the Federal Ministry of Labour and Social Affairs and the other of 4 December 1980 written by the President of the Bundesanstalt für Arbeit. Both letters were addressed direct to the Vice-President of the Commission. In the course of that exchange of views, the Vice-President of the Commission advised the Federal Ministry of Labour and Social Affairs by a letter of 10 December 1980 — the letter which is the subject of this action — that he saw no possibility of instructing the directorate responsible for the Social Fund to revoke its decision of July 1980, since the period laid down by Article 4 of Decision 78/706 had been exceeded.

12 It is clear from the circumstances described above that it was only by its letter of 10 December 1980 that the Commission reached an unequivocal and definitive decision on the request for payment which had been submitted to it. Consequently, that letter must be regarded not as confirmation of a prior act but as the act whereby the Commission notified its definitive decision concerning the payments requested in a form enabling its nature to be identified. The action for a declaration that the letter is void, which was lodged within the period prescribed by law, is therefore admissible.

(b) Substance

13 The applicants contest the view that Article 4 of Commission Decision 78/706 may be interpreted as laying down a preclusive period. They maintain, moreover, that if that were the case, by attaching such a legal effect to the period which it laid down the Commission would have exceeded the powers of implementation conferred upon it by Article 124 of the Treaty and Article 13 of Regulation (EEC) No 2396/71 of the Council of 8 November 1971 (Official Journal, English Special Edition 1979 (III), p. 924), since the Council alone has such power by virtue of Article 127 of the Treaty.

14 The Commission's powers to lay down time-limits and penalties for failure to comply therewith must be determined in the light of the powers conferred upon the Council and the Commission by the Treaty and by the provisions adopted for the application thereof and in the light of the requirements of sound administration.

15 With regard to the European Social Fund, Article 124 of the Treaty expressly provides that the Fund is to be administered by the Commission. Pursuant to that article, the Council has expressly provided in Article 11 of Regulation No 2396/71 of 8 November 1971 implementing the Council Decision of 1 February 1971 on the reform of the European Social Fund that the Commission is to ensure the control of the use of the funds granted to the Social Fund. The Council has also provided in Article 13 of the regulation that the Commission is to be responsible for taking the necessary measures for implementing the rules laid down by the regulation. The duty of administration and control with which the Commission is thus entrusted and the requirements relating to the sound administration of Community finances necessarily imply that the accounts of the Social Fund must be cleared within a reasonable period and that the Commission is empowered to determine that period and to attach to it penalties which will ensure its observance. In view of the importance of that period for the sound administration of the Social Fund, it is impossible to rule out the possibility that the penalties provided for may extend to the loss of the right to payment as a result of the fixing of a preclusive period.

16 The principle of legal certainty, however, requires that a provision laying down a preclusive period, particularly one which may have the effect of depriving a Member State of the payment of financial aid its application for which has been approved and on the basis of which it has already incurred considerable expenditure, should be clearly and precisely drafted so that the Member States may be made fully aware of the importance of their complying with the time-limit. Neither the wording of Article 4 (1) of Commission Decision 78/706 nor the context in which it appears justifies the interpretation that the period is a preclusive period.

17 It should be observed in that regard that neither in the provision itself nor in the recital relating to the provision in the preamble to the decision is any indication given of the existence or the nature of penalties for exceeding the period prescribed. The lack of any indication of the consequences of exceeding the period laid down by Article 4 stands in contrast with the express and precise statement in Article 2 of the same decision concerning the effects attaching to another period, namely the period for the submission of applications for assistance, the consequence of exceeding which is that

'the application for assistance shall be deemed to have been withdrawn'. This contrast between the precision of Article 2 and the imprecision of Article 4 is all the more significant since the preclusive period provided for by Article 2 has far less serious consequences for the Member States, since its effect is merely that the application for approval is deemed to have been withdrawn at a stage at which *ex hypothesi* the Member State concerned has not yet incurred any expenditure.

18 It follows that Article 4 of Commision Decision 78/706 cannot be regarded as laying down a time-limit failure to comply with which involves the loss by the State concerned of the right to the payment of the balance of the assistance approved. Consequently, the Commission's decision of 10 December 1980 refusing payments of assistance from the Social Fund amounting to DM 16 928 855.52 must be declared void, in so far as it is based on the fact that the requests were submitted after the expiry of the period laid down by Article 4 of Commission Decision 78/706.

II — The claim for a declaration that the letter of 16 December 1980 is void

19 By this head of claim the government of the Federal Republic of Germany in fact seeks to obtain indirectly a declaration by the Court that Article 4 of Commission Decision 78/706 laying down a preclusive period is void. Since it became clear in the course of the examination of the claim for a declaration that the letter of 10 December 1980 is void that the provision does not embody a preclusive period, this head of claim no longer serves any purpose and it is therefore unnecessary to give a decision on it.

Costs

20 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since costs have not been asked for by either the applicant or the intervener, the parties should be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Declares void the Commission's decision of 10 December 1980 refusing to pay to the Federal Republic of Germany balances of assistance from the Social Fund amounting to DM 16 928 855.52;**

2. **Dismisses the remainder of the application;**

3. **Orders the parties to bear their own costs.**

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 26 May 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President