JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

1 July 2004 *

In Case T-308/00,

Salzgitter AG, established in Salzgitter (Germany), represented by J. Sedemund and T. Lübbig, lawyers, with an address for service in Luxembourg,

applicant,

supported by

Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, assisted by K. Schroeter, lawyer,

intervener,

* Language of the case: German.

Commission of the European Communities, represented by K.-D. Borchardt and V. Kreuschitz, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision 2000/797/ECSC of 28 June 2000 on State aid granted by the Federal Republic of Germany to Salzgitter AG, Preussag Stahl AG and the group's steel-industry subsidiaries, now known as Salzgitter AG — Stahl und Technologie (SAG) (OJ 2000 L 323, p. 5),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of: V. Tiili, President, J. Pirrung, P. Mengozzi, A.W.H. Meij and M. Vilaras, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 16 October 2003,

gives the following

Judgment

Legal framework

1 Article 4 CS provides:

'The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:

...

(c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever.'

2 Article 67 CS provides:

'1. Any action by a Member State which is liable to have appreciable repercussions on conditions of competition in the coal or the steel industry shall be brought to the knowledge of the Commission by the government concerned.

2. If the action is liable, by substantially increasing differences in production costs otherwise than through changes in productivity, to provoke a serious disequilibrium, the Commission, after consulting the Consultative Committee and the Council, may take the following steps:

— if the action taken by that State is having harmful effects on the coal or steel undertakings within the jurisdiction of that State, the Commission may authorise it to grant aid to these undertakings, the amount, conditions and duration of which shall be determined in agreement with the Commission. ...;

— if the action taken by that State is having harmful effects on the coal or steel undertakings within the jurisdiction of other Member States, the Commission shall make a recommendation to that State with a view to remedying these effects by such measures as that State may consider most compatible with its own economic equilibrium....'

3 The first and second paragraphs of Article 95 CS provide as follows:

'In all cases not provided for in this Treaty where it becomes apparent that a decision or recommendation of the Commission is necessary to attain, within the common market in coal and steel and in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4, the decision may be taken or the recommendation made with the unanimous assent of the Council and after the Consultative Committee has been consulted.

Any decision so taken or recommendation so made shall determine what penalties, if any, may be imposed.'

4 In order to meet the restructuring needs of the steel industry, the Commission relied on the provisions of Article 95 CS to introduce, in the early 1980s, a Community scheme authorising the grant of State aid to the steel industry in specific and limited cases. That scheme underwent a series of amendments in order to deal with the cyclical problems encountered by the steel industry. The decisions successively adopted for that purpose are commonly known as the 'Steel Aid Codes'.

5 On 18 December 1996, the Commission adopted Decision No 2496/96/ECSC establishing Community rules for State aid to the steel industry (OJ 1996 L 338, p. 42), which constitutes the Sixth Steel Aid Code. That decision was applicable from 1 January 1997 to 22 July 2002.

Pre-litigation procedure

6 Salzgitter AG — Stahl und Technologie ('the applicant') is a group operating in the steel sector which includes Preussag Stahl AG and other undertakings involved in the same sector.

7 In Germany, the Zonenrandförderungsgesetz (German law on the development of the border zone between the former German Democratic Republic and the former Czechoslovak Socialist Republic, 'the ZRFG') was adopted on 5 August 1971 and

approved, along with subsequent amendments to it, by the Commission following assessment of the measures planned by the Commission pursuant to Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the EC Treaty (now Article 88 EC). The most recent amendments to the ZRFG were approved by the Commission as State aid compatible with the EC Treaty (OJ 1993 C 3, p. 3). The ZRFG came to an end definitively in 1995.

8 From the beginning, Paragraph 3 of the ZRFG provided for tax incentives in the form of special depreciation allowances (Sonderabschreibungen) and tax-free reserves (steuerfreie Rücklagen) for investments made in any establishment of an undertaking situated along the border area between the former German Democratic Republic and the former Czechoslovak Socialist Republic ('the Zonenrandgebiet'). The special depreciation allowances permitted the entry of a higher rate of depreciation for eligible investment in the company accounts than would be possible, under the ordinary legislation, in the initial year or years of the investment of the company in question. Thus the company's tax base was reduced and liquidity was increased for the first year or years of the investment, thereby procuring a gain for the company. Tax-free reserves also produced a gain for the company. The special depreciation allowances and tax-free reserves could not be cumulated, however.

9 By letter dated 3 March 1999 the Commission, after having observed from a reading of the annual accounts of Preussag Stahl AG, one of the companies of the current Salzgitter AG group, that the company had been subsidised repeatedly between 1986 and 1995 on the basis of Paragraph 3 of the ZRFG, informed Germany of its decision to initiate the procedure under Article 6(5) of the Sixth Steel Aid Code in respect of the aid granted by Germany to Preussag Stahl AG and to the other subsidiaries of the Salzgitter AG group. By that decision, published on 24 April 1999 in the *Official Journal of the European Communities* (OJ 1999 C 113, p. 9), the Commission invited the parties concerned to submit their observations on the aid in question.

10 During the administrative procedure, the Commission received comments from the German authorities, by letter of 10 May 1999, and the observations of the only third party concerned, the UK Steel Association, which it forwarded to the Federal Republic of Germany.

11 On 28 June 2000, the Commission adopted Decision 2000/797/ECSC, on State aid granted by the Federal Republic of Germany to Salzgitter AG, Preussag Stahl AG and the group's steel-industry subsidiaries, now known as Salzgitter AG — Stahl und Technologie (SAG) (OJ 2000 L 323, p. 5, 'the contested decision'), by which the special depreciation allowances and tax-free reserves pursuant to Paragraph 3 of the ZRFG of which the applicant had been the recipient in respect of eligible bases of DEM 484 million and DEM 367 million respectively were found to be State aid incompatible with the common market. By Articles 2 and 3 of the contested decision, the Commission ordered the Federal Republic of Germany to recover that aid from the recipient and requested it to state the specific conditions for its recovery.

Procedure and forms of order sought

12 By application lodged at the Registry of the Court of First Instance on 21 September 2000 the applicant brought this action.

13 Further to a request made by the applicant in its application, the Court, by letter from the Registrar dated 13 November 2000, asked the defendant to comply with its obligations under Article 23 of the Protocol on the Statute of the Court of Justice of the ECSC. On 3 January 2001, the defendant lodged with the Registry a file consisting of 27 document files, none of which were confidential. By letter of 11 January 2001, the Registrar informed the applicant that it could consult the file lodged at the Registry.

14 On 30 January 2001 the Federal Republic of Germany sought leave to intervene in the case in support of the form of order sought by the applicant.

15 As the principal parties did not raise any objection to that application, on 29 March 2001 the Federal Republic of Germany was granted leave to intervene by order of the President of the Fourth Chamber, Extended Composition, of the Court of First Instance.

16 The written procedure was closed on 3 September 2001, after the applicant and defendant had lodged their respective observations on the Federal Republic of Germany's statement in intervention.

17 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to produce certain documents and to reply to certain questions before the hearing. The parties complied with those requests within the periods allowed.

18 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 16 October 2003.

19 The applicant and the Federal Republic of Germany, which has intervened in support of the form of order sought by it, claim that the Court of First Instance should:

— annul the contested decision;

— order the defendant to pay the costs.

20 The defendant contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Law

21 The applicant relies on eight pleas in law in support of its action for annulment. The first plea alleges that the Commission made a number of incorrect findings regarding the concept of State aid; the second plea alleges an incorrect interpretation of Article 4(c) CS and of Article 67 CS; the third plea alleges failure to apply Article 95 CS; the fourth plea alleges an error of assessment arising from the classification of certain investments as measures falling within the scope of application of the ECSC Treaty; the fifth plea alleges error of assessment by virtue of the Commission's failure to classify certain investment plans as environmental protection measures; the sixth plea alleges an error of assessment in the definition of the decisive discount rate; the seventh plea alleges infringement of the principle of legal certainty; and, lastly, the eighth plea alleges breach of the duty to state reasons.

First plea: that the Commission made a number of incorrect findings concerning the concept of State aid

22 By its first plea, the applicant maintains that the Commission wrongly found the special depreciation allowances and tax-free reserves provided for in Paragraph 3 of the ZRFG to be State aid within the meaning of the ECSC Treaty. This plea is subdivided into four parts: the general nature of the measures provided for by Paragraph 3 of the ZRFG, the alleged compensatory nature of those measures, the alleged need to examine the tax rules of the Member States in order to determine what constitutes a 'normal' tax burden and, lastly, the alleged obligation for the Commission to demonstrate the effects on competition of the measures provided for by Paragraph 3 of the ZRFG.

The first part: the tax provisions of Paragraph 3 of the ZRFG were incorrectly classified inasmuch as they constitute general tax provisions

— Arguments of the parties

23 The applicant submits that the tax provisions of the ZRFG are general provisions, applicable to all undertakings in the Community which have establishments in the Federal Republic of Germany in the region along the border between the former German Democratic Republic and the former Czechoslovak Socialist Republic. The applicant maintains that the tax measures provided for in Paragraph 3 of the ZRFG cannot therefore be classified as State aid.

24 The intervener essentially supports that position.

25 The defendant observes, first, that the definitive nature of the Commission's earlier decisions concerning the ZRFG already precluded the adoption of a decision which did not classify the measures provided for in Paragraph 3 of the ZRFG as State aid, since the concept of State aid in Article 4(c) CS and in Article 87 EC are undeniably identical, even though their rules are fundamentally different.

26 The defendant goes on to state that the tax breaks provided for in Paragraph 3 of the ZRFG are targeted at a specific region. Thus, whilst all undertakings may in principle benefit from the measures provided for by that provision, they confer competitive advantages only on investments made in that region and not on investments made in establishments outside that region. The measures were adopted with a view to favouring a specific region and must therefore be viewed as being State aid.

— Findings of the Court

27 It should be recalled, as a preliminary point, that according to settled case-law the concept of State aid is wider than that of a subsidy because it embraces not only positive benefits, such as the subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, 19; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13, and Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34).

28 In addition, the Community judicature has clarified the concepts referred to in the provisions of the EC Treaty relating to State aid. That clarification is relevant when applying the corresponding provisions of the ECSC Treaty to the extent that it is not incompatible with that Treaty. It is therefore permissible, to that extent, to refer to the case-law on State aid deriving from the EC Treaty in order to assess the legality of decisions regarding aid covered by Article 4(c) CS. This is particularly true of the case-law clarifying the concept of State aid (Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraph 100; and Case T-234/95 *DSG* v *Commission* [2000] ECR II-2603, paragraph 115).

29 According to settled case-law, the condition that a State measure should relate to a specific undertaking or apply selectively is one of the defining features of State aid, whether it be under the EC Treaty (see, to that effect, Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 24; and Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 17) or the ECSC Treaty (*Ecotrade*, cited above in paragraph 27, paragraph 40), even though that criterion is not specifically laid down in Article 4(c) CS. An assessment must therefore be conducted as to whether the measure in question confers exclusive advantages on certain undertakings or certain sectors of activity (see, to that effect, *Ecotrade*, cited above in paragraph 27, paragraphs 40 and 41).

30 Finally, it must be noted that aid, as defined in the EC Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Community judicature must in principle, having regard both to the specific features of the case before it and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25; Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 95; and Case T-98/00 *Linde* v *Commission* [2002] II-3961, paragraph 40).

31 The same holds true for the question whether a measure falls within the scope of application of Article 4(c) CS, since that type of judicial review is not incompatible with the ECSC Treaty.

32 In the present case, the applicant essentially complains that the Commission found that the tax provisions of Paragraph 3 of the ZRFG were selective in nature.

33 In the light of the case-law cited above in paragraph 29, it is therefore necessary to ascertain whether or not the measures in question conferred advantages on certain undertakings or certain sectors of activity.

34 Paragraph 3 of the ZRFG provides that taxpayers who invest in industrial establishments situated in the Zonenrandgebiet may, on request and having regard to the special economic disadvantages of that region, post in advance certain factors which are likely to reduce their tax base. The special depreciation allowances and the special reserves permitted under Paragraph 3 of the ZRFG relate to both real and moveable property forming part of the assets of the establishment. The special depreciation allowances of up to 50% of the cost price of the assets may be entered in the tax year during which the acquisition or manufacture occurred or during the four following fiscal years in addition to the depreciation allowances provided for by the law on income tax. The tax-free reserves (up to 50% of the cost price of real assets) may be established up to two years before the investment is completed.

35 It is common ground that Paragraph 3 of the ZRFG applies without distinction to all sectors of activity, all types of investments in real or moveable property, and to all undertakings regardless of size, sector of activity or seat.

36 It is none the less also common ground that a necessary condition for benefiting from the measures provided for in Paragraph 3 of the ZRFG is that the establishments in which the investments are made must be situated in the Zonenrandgebiet. It is also undisputed that the applicant benefited from the application of the tax measures provided for in Paragraph 3 of the ZRFG for its two establishments situated at Peine and at Salzgitter, in the Zonenrandgebiet.

37 When the advantage conferred by a tax measure provided for by federal law is made subject to a condition that the investments must be made in a geographically-limited area within a Member State, as is the case here, that is in principle sufficient for the measure in question to be viewed as relating to a specific category of undertakings.

38 As a general rule, a tax measure which is likely to be found to be State aid differs from a general tax provision in that the number of recipients tends to be limited in law or in fact. It does not matter that the selective nature of the measure flows, for example, from a sectoral criterion or, as in the present case, from a criterion relating to geographic location in a defined part of the territory of a Member State. What matters, however, for a measure to be found to be State aid, is that the recipient undertakings belong to a specific category determined by the application, in law or in fact, of the criterion established by the measure in question (see, to that effect, Case E-6/98 *Norway* v *EFTA Surveillance Authority* [1999] EFTA Court Report 74, paragraph 37).

39 In the present case the very purpose of the tax measures in question is to favour investment in establishments situated in a geographically-limited area in Germany, that is, in the regions along the border between the former German Democratic Republic and the former Czechoslovak Socialist Republic. Neither the applicant nor the intervener contests the fact that, in order to enjoy the tax benefits in question,

the investments must be made in establishments situated in a geographically-limited area in Germany.

40 It is common ground that establishments established in Germany could not benefit from the special depreciation allowances and the tax-free reserves provided for by Paragraph 3 of the ZRFG for investments made in their establishments situated outside the Zonenrandgebiet. It follows that those measures could not be of benefit to all undertakings regardless of where they were situated within the country.

41 This finding is not affected by the fact that the tax measures provided for in Paragraph 3 of the ZRFG referred only to 'establishments' situated in the Zonenrandgebiet and not undertakings. If it were to be accepted that such measures were not selective simply on the grounds that it is not the undertakings which benefit from them directly but only their establishments situated in the Zonenrandgebiet, this would encourage circumventing of the Community scheme for State aid. In any event in the present case the applicant has stated that it was still the only steel undertaking active in the Zonenrandgebiet.

42 Lastly, the applicant has not alleged that the differentiation resulting from the tax measures in question arises from the nature and structure of the system of which they form part (see, by analogy, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33; Case C-353/95 P *Tiercé Ladbroke* v *Commission* [1997] ECR I-7007, paragraphs 32 to 37; Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 52; Case T-471/93 *Tiercé Ladbroke* v *Commission* [1995] ECR II-2537, paragraph 62).

43 In those circumstances, the first part of the first plea must be rejected.

Second part: alleged compensatory nature of the tax measures provided for in Paragraph 3 of the ZRFG

— Arguments of the parties

44 The applicant maintains that the tax measures provided for in Paragraph 3 of the ZRFG did not confer a special financial advantage on undertakings meeting the conditions for the special depreciation allowances or the tax-free reserves, but rather mere (at least partial) compensation for the particular disadvantages suffered from carrying on an economic activity in a region which, due to the division of Europe, had been artificially isolated from the economic hinterland with which it had a natural connection. Thus, according to the applicant, the financial provisions of Paragraph 3 of the ZRFG did not give rise to any regional aid measure intended to compensate for naturally-occurring handicaps in the region. The sole purpose of those provisions was to compensate for the economic disadvantages caused by the purely political and artificial isolation of certain border regions of Germany.

45 The applicant observes that it is clear from Article 87(2)(c) EC, which declares aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany to be compatible with the common market, that the conditions in the border regions of the former German Democratic Republic were not 'normal'. This indicates that the measures taken in favour of the border regions were not part of the usual regional aid schemes, but rather a set of *sui generis* rules. The applicant adds that what is true for the EC Treaty is true just as much for the ECSC Treaty.

46 The intervener states that Article 87 EC draws a distinction between measures to compensate for disadvantages, provided for in Article 87(2)(c), and ordinary regional aid, provided for in Article 87(3)(a) and (c), in that the compensatory measures and

the aid in question here cannot be assessed in the same manner. Regional aid is characterised by the fact that the undertaking situated in the disadvantaged region receives, by virtue of State aid, an advantage in relation to normal economic conditions and normal conditions of competition. By contrast, the aid referred to in Article 87(2)(c) EC serves to compensate for the disadvantages which do not result from normally-occurring economic factors for the undertaking concerned but from a case of *force majeure*, namely the division of Europe. Thus, the aid to compensate for the disadvantages merely serves to bring the recipient closer to the conditions in which it would find itself were it not for that damaging event.

47 According to the intervener, the reason why the ECSC Treaty fails to take account of the situation of the German border areas in question is historical: the ECSC Treaty was signed on 18 April 1951, that is, at a time when it was still believed that the division of Germany was temporary and would be overcome by a general peace treaty.

48 The intervener adds that since the ZRFG, particularly Article 3 thereof, provided for measures that were not specific to the steel industry, the ECSC Treaty did not preclude the subsidiary application of Article 87(2)(c) EC to the steel industry or prevent steel undertakings from benefiting from such general measures. Since the Commission had examined the ZRFG and the subsequent amendments thereto in the light of Article 87(2)(c) EC and had concluded that the provisions of the ZRFG were necessary to compensate for the economic disadvantages caused by the division of Germany, the Commission recognised the causal link between the division of Germany and the need for the compensatory measures provided for by the ZRFG. According to the intervener, on the basis of the assessment made by the Commission, Germany was then authorised, even by virtue of the EC Treaty alone, to introduce in the steel industry measures such as those provided for in Paragraph 3 of the ZRFG, without having to obtain authorisation from the Commission. The intervener adds that the Commission does not have any 'power to approve' in respect of the scope of application of Article 87(2)(c) EC, which establishes a legal exception. The intervener concludes that the Commission was not competent to declare that the use of the special depreciation allowances by the steel undertakings

pursuant to Paragraph 3 of the ZRFG was incompatible with the rules governing the common market for coal and steel.

49 The defendant states that the selective granting of favourable measures such as those provided for in Paragraph 3 of the ZRFG also constitutes State aid when it is intended to compensate for an economic disadvantage. According to the defendant, aid must be assessed according to its effects and not according to the aims pursued. Paragraph 3 of the ZRFG cannot therefore be viewed as a general tax measure without the characteristics of State aid because its declared purpose is to compensate for the economic disadvantages of a region.

50 The defendant also states that there can be no question of applying Article 87(2)(c) EC by analogy. Article 4(c) CS prohibits subsidies and aid authorised by States in any form whatsoever. Any softening of that prohibition is inconceivable. The defendant adds that any such application could only be justified if there were a lacuna in the ECSC Treaty which, in its view, is not the case. In the view of the defendant, the lack of a specific provision concerning the German border zones in the ECSC Treaty can be explained by the more rigorous discipline in that sector and shows that favourable treatment was not intended by the authors of the treaty. The defendant submits that in any event Article 87(2)(c) EC does not preclude all power of assessment by the Commission, since it must ascertain that the aid is actually necessary to compensate for the economic disadvantages caused by the division of Germany.

— Findings of the Court

51 By the second part of its first plea, the applicant maintains in substance that the Commission has not proven the existence of the second element of State aid, namely the advantage obtained through the measures in question.

52 Accordingly, it is necessary to consider whether, as the Commission found in the contested decision, the tax measures in Paragraph 3 of the ZRFG conferred an advantage on the applicant.

53 According to the case-law referred to above in paragraph 27, the concept of aid encompasses State intervention which, in various forms, mitigates the charges which are normally included in the budget of an undertaking.

54 It is apparent from Paragraph 3 of the ZRFG that the Federal Republic of Germany decided not to apply the tax rules under the ordinary German legislation governing depreciation and establishment of reserves for investments in real property in establishments situated in the Zonenrandgebiet.

55 As stated above in paragraph 36, the applicant benefited from the application of the tax measures provided for in Paragraph 3 of the ZRFG for its two establishments situated at Peine and at Salzgitter in the Zonenrandgebiet.

56 A reading of Paragraph 3 of the ZRFG shows that those measures could have led to a reduction in taxes for the applicant, an advantage it would not have had under the ordinary German legislative tax scheme, in at least two respects.

57 First, those measures enabled it to write off special depreciation allowances in addition to allowances for depreciation in the first years following the tax year in which the investments were made; since those amounts were deducted from gross profit, the undertaking's taxable income could be reduced considerably for those same years. Thus, as the Commission found in recital 60 of the contested decision, the applicant thereby obtained a 'gain' which it would not have had if its establishments had not been situated in the Zonenrandgebiet. Moreover, in its

written pleadings, the applicant acknowledged having had excess liquidity as a result of the measures provided for in Paragraph 3 of the ZRFG, a point noted by the Commission in recital 100 of the contested decision.

58 Second, under Paragraph 3 of the ZRFG the special depreciation allowances could be used not only during the tax year in which the investment had been made, but also during the four following tax years; that possibility allowed the recipient undertaking to spread out, and even reduce, its taxable income base. As stated in recital 61 of the contested decision, 'the deferral of tax ... can be analysed as a zero-interest loan for the amount of tax deferred and the duration of the deferral'. Even though the income tax still had to be paid at the end of the deferral period, the undertaking had none the less benefited for the entire deferral period from a sum equivalent to the difference between the discounted amount of tax at the end of the deferral period, taking interest rates into account, and the amount of tax which would have been owing had the deferral not been granted.

59 It follows that the tax measures provided for by Paragraph 3 of the ZRFG constituted a tax deferral which mitigated the charges which normally should have been included in the applicant's budget.

60 This finding is not affected by the applicant's and the intervener's arguments, first, that the sole purpose of the tax measures under Paragraph 3 of the ZRFG is to compensate for the economic disadvantage resulting from the artificial isolation of the Zonenrandgebiet regions whose origin is political and, second, that Article 87(2)(c) EC makes it clear that the situation of the German border regions was not normal.

61 First, the fact that, as stated by the applicant and the intervener, Article 87(2)(c) EC recognises the compatibility of 'aids 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' cannot affect the issue of whether a measure is to be classified as State aid for the purposes of the ECSC Treaty.

62 Under Article 305(1) EC the provisions of the EC Treaty do not affect the provisions of the ECSC Treaty, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down in that treaty for the functioning of the common market in coal and steel. Accordingly, the provisions of the ECSC Treaty retain their own sphere of application (see Case T-37/97 *Forges de Clabecq* v *Commission* [1999] ECR II-859, paragraph 132). It is only in so far as matters are not the subject of provisions in the ECSC Treaty or rules adopted pursuant thereto that the EC Treaty and the provisions adopted for its implementation can apply to products covered by the ECSC Treaty (Case 328/85 *Deutsche Babcock* [1987] ECR 5119, paragraph 10; Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 100).

63 Moreover, as the Court of Justice has previously held, grants of State aid are covered by Article 4(c) CS and, consequently, Member States did not seek to adopt the same rules or the same scope of action for the Communities in respect of the matter (see *Falck and Acciaierie di Bolzano* v *Commission*, cited above in paragraph 62, paragraphs 101 and 102).

64 Consequently, in the absence of provisions in the ECSC Treaty identical or equivalent to Article 87(2)(c) EC, the recognition of the compatibility of aids granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany under the EC Treaty does not affect either the scope of application of Article 4(c) CS or, by extension, the concept of State aid as laid down by that provision.

65 Nor can the intervener's argument that historical reasons account for the absence of provisions in the ECSC Treaty identical or equivalent to Article 87(2)(c) EC be accepted.

66 It is clear from both the wording of Article 4(c) CS and the context and objectives surrounding that provision that the intention was for the ECSC Treaty to treat the prohibition on State aid particularly stringently. Although it was possible in 1951 to believe, as maintained by the German Government, that the division of Germany would be only temporary, the fact remains that that situation, which dated from 1948 when the dividing line was set up between the two occupied zones, could have been taken into account when the ECSC Treaty was drawn up and been reflected in its wording.

67 It is true that until the expiry of the First Steel Aid Code (Commission Decision 257/80/ECSC of 1 February 1980 establishing Community rules for specific aids to the steel industry, OJ 1980 L 29, p. 5) on 31 December 1981, the Commission adopted an interpretation different from the one advocated in the present case, according to which Article 4(c) CS applied only to specific aid in favour of undertakings in the coal and steel industry, that is, to aid which benefited those undertakings especially or principally, whereas the application of general and regional aid schemes to the steel industry was monitored by the Commission on the basis of both Article 67 CS and Articles 87 and 88 EC.

68 However, subject to the examination of the second plea concerning the interpretation of Article 4(c) CS and Article 67 CS, the fact that, for a certain period, the Commission found in its decisions that general and regional aid schemes did not fall within the scope of Article 4(c) CS, even when they were applicable to the steel industry, cannot affect the scope of application of the ECSC Treaty.

69 It is not apparent from the ECSC Treaty that its authors clearly wished to give Article 4(c) CS such a restrictive scope of application and that, consequently, they did not think it necessary to include a derogation from that provision to take account of the division of Germany.

70 It would, moreover, be incorrect to deduce from the existence of an exception to a prohibition laid down in the EC Treaty that there is an automatic and retroactive extension of that exception to an equivalent prohibition contained in the ECSC Treaty, which had been concluded earlier. That would be tantamount to amending the wording of the ECSC Treaty and circumvent the procedures provided for that purpose.

71 Second, even if one were to suppose, as advocated by the applicant, that the mere existence of Article 87(2)(c) EC establishes the 'abnormal' nature of the conditions prevailing in the Zonenrandgebiet, that still would not be sufficient in the present case to preclude the application of Article 4(c) CS on the ground that the tax measures provided for by Paragraph 3 of the ZRFG are alleged to compensate for the economic disadvantages affecting that area.

72 As the Court of Justice has held with respect to the ECSC Treaty, since the abolition and prohibition contained in Article 4(c) CS are general and absolute in character, they cannot be annulled by application of a vague and ill-defined procedure for compensation (*De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited above in paragraph 27, p. 55). The applicant has not demonstrated a clear causal link between the alleged disadvantage and the measures intended to compensate for it.

73 In addition, it follows from settled case-law that the legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16; and Case C-241/94 *France* v *Commission*, cited above in paragraph 29, paragraph 33).

74 In the present case, it is apparent from the documents in the case-file that the intervener, during the administrative procedure before the Commission, merely referred to the exception to the general rule prohibiting State aid provided for in Article 87(2)(c) EC in submitting that the measures in Paragraph 3 of the ZRFG compensated for a disadvantage caused by the division of Germany. The same approach was followed during the written procedure before this Court. As stated above in paragraphs 64 to 66, Article 87(2)(c) EC does not apply and has no equivalent under the ECSC Treaty. Moreover, the examination of the compensatory nature of such measures falls within the power of assessment of the Commission under which it verifies that the conditions for the derogation sought are fulfilled (see, to that effect, Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraph 140).

75 Accordingly, the mere reference to the exception provided for in Article 87(2)(c) EC does not suffice to prove a certain causal link, for the purposes of the ECSC Treaty, between the advantage conferred on the applicant and an alleged economic disadvantage suffered by the undertakings situated in the Zonenrandgebiet.

76 In the light of all the foregoing, the Court must reject the second part of the first plea.

Third part: alleged necessity to examine the tax rules of the Member States to determine what constitutes a 'normal' tax burden

— Arguments of the parties

77 The applicant submits that the contested decision does not mention any reliable criterion which may be reviewed by the Court in order to determine what is a

'normal' tax burden for the undertakings and in relation to which an assessment can be made as to whether there is State aid within the meaning of Article 4(c) CS. According to the applicant, in order to make its comparison with what is 'normal', the Commission should not have referred only to the tax provisions of the Federal Republic of Germany, as it did in recital 60 of the contested decision, where it contrasted the rules on the special depreciation allowances under the ZRFG with the general rules applicable to special depreciation allowances in Germany. The Commission should have also referred to the tax rates and the depreciation periods for capital goods applicable to the steel industry throughout the common market or, at the very least, in the Member States where competitors of the applicant are established. Only that type of comparative examination of the tax rules applicable in the various Member States would have enabled it to ascertain whether the application of Paragraph 3 of the ZRFG gave the applicant an advantage of the same type with effects identical to a subsidy in the strict sense of the term.

78 The defendant submits that the basic conditions, in particular the infrastructures, vary from one Member State to another and that, as a rule, the higher the taxes, the better the basic conditions. In its view, this is why the Member State concerned is the appropriate reference point to take into account in examining the selective nature of the measure in question. It is therefore irrelevant to compare the rules applicable in the various Member States on the matter.

— Findings of the Court

79 As the Court of Justice has held with respect to the EC Treaty, the application of Article 87(1) EC only requires it to be determined whether under a particular statutory scheme a State measure is such as to favour 'certain undertakings or the production of certain goods' over others which are in a legal and factual situation that is comparable in the light of the objective pursued by that scheme (Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41; and *Spain* v *Commission*, cited above in paragraph 42, paragraph 47).

80 Such an assessment must also apply in respect of the ECSC Treaty (see, to that effect, *Ecotrade*, cited above in paragraph 27, paragraph 41).

81 Consequently, in order to identify what constitutes an advantage as contemplated in the case-law on State aid, it is imperative to determine the reference point in the scheme in question against which that advantage is to be compared. In the present case, when a 'normal' tax burden within the meaning of the aforementioned case-law is being determined, comparison of the tax rules applicable in all of the Member States, or even some of them, would inevitably distort the aim and functioning of the provisions on the monitoring of State aid. In the absence of Community-level harmonisation of the tax provisions of the Member States, such an approach would in effect compare different factual and legal situations arising from legislative and regulatory disparities between the Member States. The information provided by the applicant in the present case illustrates, moreover, the disparity which exists between the Member States, particularly as regards tax bases and rates of taxation on capital goods.

82 Accordingly, the Commission was entitled to examine only the advantage resulting from the measures in Paragraph 3 of the ZRFG as compared to the scheme under the ordinary German tax legislation.

83 In addition, contrary to what the applicant maintains, Community case-law does not require the Commission to prove that the mitigation of charges which normally must be borne by an undertaking has had the same effect as a subsidy in the strict sense of the term.

84 Whilst the concept of State aid embraces not only positive benefits, such as the subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which,

without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect (see, inter alia, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited above in paragraph 27, p. 39; *Banco Exterior de España*, cited above in paragraph 27, paragraph 13, and *Ecotrade*, cited above in paragraph 27, paragraph 34), the purpose of the case-law is not to establish a hierarchy between what constitutes a subsidy in the strict sense of the term, on the one hand, and the other measures which may be likened to a subsidy, on the other, but rather to define the concept of aid for the purposes of Article 4(c) CS. It follows from that definition that, once it has been proven that a State intervention measure mitigates the charges which should normally be included in the budget of an undertaking, that measure must be classified as aid and, by virtue of that very classification, has the same effect as a subsidy in the strict sense of the term. Accordingly, contrary to the suggestion of the applicant, no additional evidence need be adduced.

85 The third part of the first plea must, accordingly, be dismissed.

Fourth part: alleged obligation on the Commission to prove that the tax measures under Paragraph 3 of the ZRFG have the same effect on competition as conventional subsidies

— Arguments of the parties

86 The applicant submits that the contested decision does not contain any assessment of the effects that the tax measures criticised by the Commission have had on competition, whereas it is clear from paragraph 34 of the judgment in *Ecotrade*, cited above in paragraph 27, that the Commission cannot classify, as aid for the purposes of Article 4(c) CS, State measures which mitigate the charges of an undertaking unless it has established beforehand that those measures have the same effects on competition as conventional subsidies.

87 The defendant contends, first, that the monitoring of State aid is a limited task because it is not intended to eliminate all distortions of competition within the common market, but only to prohibit certain aspects of State intervention, such as the granting of aid. The defendant also observes that the concept of aid is more general than that of a subsidy because it also encompasses measures which, by their nature and effects, are equivalent to direct subsidies. In its view, it follows that in order to classify measures as aid for the purposes of Article 4(c) CS, it is not necessary to prove beforehand that the measures in question have the same effects on competition as conventional subsidies. Moreover, the relevant provisions on aid, namely Article 87(1) EC and Article 4(c) CS, do not draw any distinction between aid in the form of conventional subsidies and other types of aid. The defendant observes, with regard to *Ecotrade*, cited above in paragraph 27, which discussed the distinction between subsidies in the strict sense of the term, namely direct cash injections, on the one hand, and other types of aid, such as relinquishment of tax revenues which normally would have been collected, on the other, that that distinction is completely irrelevant for the assessment of the measures at issue here and has no bearing on the assessment of their selective nature.

— Findings of the Court

88 By the fourth part of its plea, the applicant complains that the Commission failed to consider whether a mitigation of the charges which are normally included in the budget of an undertaking produces the same effects as a conventional subsidy. The applicant also maintains that it is clear from the judgment in *Ecotrade*, cited above in paragraph 27, that the Commission should have adduced evidence to show the effects of the measures under Paragraph 3 of the ZRFG.

89 Regarding the first complaint, for the same reasons as those set out above in paragraph 84, the Court finds that the Commission is not under an obligation to consider whether a mitigation of the charges which are normally included in the budget of an undertaking produces the same effects as a subsidy in the strict sense of the term. That complaint must therefore be dismissed.

90 With regard to the second complaint, concerning the need to prove the effects of the measures under Paragraph 3 of the ZRFG, it follows from settled case-law that, under Article 4(c) CS, aid is deemed incompatible with the common market and there is no need to establish or even to consider whether, in actual fact, there is, or is likely to be, any interference with competitive conditions (Joined Cases T-164/96 to T-167/96, T-122/97 and T-130/97 *Moccia Irme and Others* v *Commission* [1999] ECR II-1477, paragraph 82; and Case T-158/96 *Acciaierie di Bolzano* v *Commission* [1999] ECR II-3927, paragraph 113).

91 Consequently, in order to be caught by the provisions of Article 4(c) CS, an aid measure does not necessarily need to have an effect on trade between Member States or on competition (see Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraphs 32 and 33; and *Falck and Acciaierie di Bolzano* v *Commission*, cited above in paragraph 62, paragraph 102).

92 In addition, contrary to the applicant's submissions, paragraph 34 of the judgment in *Ecotrade*, cited above in paragraph 27, does not concern the issue of the effects on competition which a measure likely to be classified as State aid may have, but merely refers to the settled case-law cited above in paragraph 84 concerning the concept of State aid.

93 In those circumstances, and contrary to the line of argument put forward by the applicant, the Commission did not have to consider whether the tax measures provided for in Paragraph 3 of the ZRFG had an effect on competition in order to classify them as State aid within the meaning of Article 4(c) CS.

94 It follows that the fourth part of the first plea must be dismissed, as must the first plea in its entirety.

Second plea: incorrect interpretation of Article 4(c) CS and Article 67 CS

Arguments of the parties

95 The applicant submits that, because of the 'partial integration' established by the ECSC Treaty, Article 4(c) CS covers only specific aid in favour of undertakings in the coal and steel industry. Consequently, so-called 'non-specific' aid, that is, in this case, aid schemes which benefit not only undertakings in the coal and steel industry but also in all other sectors of the economy, do not come within the scope of the prohibition laid down in Article 4(c) CS. The applicant maintains that it follows from the Court's case-law and the Commission's administrative practice that the Member States' schemes establishing non-specific aid are subject only to coordinated monitoring regulated by the EC Treaty provisions on State aid and Article 67 CS.

96 The applicant submits that, consequently, the contested decision is based on a broadening of the scope of application of Article 4(c) CS, which is contrary to the Treaty. That broadening cannot have validly altered the scope of application of Article 4(c) CS and of Article 67 CS. According to the applicant, the broadening occurred upon the adoption of the steel aid codes, by which the Commission has, since 1986, moved away from the distinction between specific and non-specific aid.

97 The applicant maintains that Article 67 CS does not apply only to Member States' measures which cannot be classified as State aid. It also applies to all non-specific support measures which Member States have adopted under their general competence in matters of economic and fiscal policy. Moreover, by virtue of

Article 305 EC, the Commission was not entitled to alter, through the adoption of various steel aid codes, the partial nature of the integration effected by the ECSC Treaty.

98 According to the applicant, since the tax rules provided for in Paragraph 3 of the ZRFG do not constitute State aid within the meaning of Article 4(c) CS, the obligation to notify, to which the Commission refers in recitals 67 to 76 of the contested decision, did not exist. The applicant submits that, on the contrary, the tax measures of Paragraph 3 of the ZRFG constituted an 'action by a Member State' within the meaning of Article 67(1) CS which the Federal Republic of Germany would have had to notify to the Commission if their application had had 'appreciable repercussions on conditions of competition in the coal or the steel industry'. According to the applicant, the question whether those conditions were met in the present case is irrelevant because the German Government informed the Commission of the ZRFG on several occasions, pursuant to the notification procedure provided for in Article 88(2) EC. It is also irrelevant that the Federal Republic of Germany, as observed by the Commission in recital 66 of the contested decision, did not rely on Article 67 CS during the administrative procedure, since, according to the applicant, that article is an imperative provision based on a sharing of powers between the Community and the Member States, provided for by the ECSC Treaty with a view to attaining partial integration.

99 The intervener concurs with the applicant's arguments.

100 The defendant states in reply that the distinction between general and specific aid is not relevant, since the ECSC Treaty does not make such a distinction. It submits that although Article 67 CS may apply to broad areas of the Member States' fiscal policy, it does not apply to tax measures which fall only within the scope of Article 4 (c) CS. That limitation on scope shows clearly that it is solely the nature of the aid which determines the applicable provision of the ECSC Treaty.

101 In its observations on the statement in intervention, the defendant also maintains that the strictness of the prohibition laid down in Article 4(c) CS would be rendered meaningless if the provision did not apply to an aid scheme not reserved to the coal and steel industry. According to the defendant, it would be easy for the Member States to circumvent the provision by using a non-specific aid scheme which, by its terms, would benefit principally although not exclusively the coal and steel industry.

102 Lastly, the defendant contends that, according to the case-law of the Court of Justice, the action referred to in Article 67 CS cannot be that which Article 4(c) CS declares, in whatever form, to be incompatible with the common market in coal and steel and to be abolished and prohibited. According to the defendant, Article 67(2) CS is a special provision which must be applied in accordance with the conditions for which it provides. Only the Commission may, exceptionally, authorise some forms of financial aid in the situation referred to in the first indent of Article 67(2) CS or assent to them subject to the stringent requirements of Articles 54 to 56 CS. The defendant submits that, in any event, Article 4(c) CS, which lays down the prohibition on aid, constitutes the general rule, whereas the first indent of Article 67 (2) CS, which permits authorisation of aid in certain instances, is the exception.

Findings of the Court

103 As a preliminary point, by virtue of Article 80 CS, only undertakings engaged in production in the coal or the steel industry are governed by the rules of the ECSC Treaty.

104 It follows that an undertaking is subject to the prohibition laid down in Article 4(c) CS only in so far as it is engaged in such production (see, to that effect, Case 14/59 *Pont-à-Mousson* v *High Authority* [1959] ECR 215, 225 and 226; and Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 78).

105 In the present case, as stated by the Commission in recital 13 of the contested decision, it is common ground that the applicant is an undertaking within the meaning of Article 80 CS.

106 In the light of the response to the first plea in law, the Court considers that the examination of this second plea must be limited to determining whether the Commission was entitled to find in the contested decision that Article 4(c) CS applied to a non-specific aid scheme in the coal and steel industry.

107 Article 4(c) CS prohibits, as provided in the ECSC Treaty, subsidies or aids granted by States in any form whatsoever.

108 Article 4(c) CS is intended to abolish and prohibit certain types of action by Member States in a field which, under the ECSC Treaty, comes within the jurisdiction of the Community (see, to that effect, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited above in paragraph 27, p. 25).

109 The Court notes that Article 4(c) CS does not draw any distinction between individual aid and aid schemes or between specific and non-specific aid schemes in the coal and steel industry. In addition, the prohibition on State aid laid down in that provision is formulated in strict terms (see, to that effect, Case T-110/98 *RJB Mining* v *Commission* [1999] ECR II-2585, paragraph 76).

110 Article 67 CS is intended to prevent the distortion of competition which exercise of the residual powers of the Member States inevitably entails (*De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited above in paragraph 27, p. 25; and Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v *Commission* [2001] ECR II-1523,

paragraph 83). Article 67 CS thus simply lays down safeguard measures that the Community may adopt against action by a Member State which, whilst having considerable influence on the conditions of competition in the coal and steel industries, does not have an immediate and direct impact on them (Joined Cases 27/58 to 29/58 *Hauts fourneaux et fonderies de Givors and Others* v *High Authority* [1960] ECR 241, 274).

111 The Community judicature has therefore held that Article 4(c) CS and Article 67 CS cover two distinct areas (*De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited above in paragraph 27, p. 25; and Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 88), with Article 67 CS not covering State aid (*Forges de Clabecq* v *Commission*, cited above in paragraph 62, paragraph 141). Accordingly, Article 67 CS is not a specific application of the rule laid down in Article 4(c) CS.

112 Admittedly, in the early 1970s and until the adoption of Commission Decision No 2320/81/ECSC of 7 August 1981 establishing Community rules for aids to the steel industry (OJ 1981 L 228, p. 14), which was the Second Steel Aid Code, the Commission considered that Article 4(c) CS applied only to specific aid in favour of steel undertakings, that is, to aid which benefited those undertakings specifically or principally, whereas the application to the steel industry of general and regional aid schemes was subject to monitoring by the Commission under both Article 67 CS and Articles 87 and 88 EC.

113 That position was explained by the fact that, because of the strict prohibition in Article 4(c) CS, there was a need to avoid distortions of competition detrimental to undertakings active in the coal and steel industry, even though aid was granted to other industries in the country in question, and by a need to find a solution to the scale of economic and financial difficulties by which the steel industry was so profoundly affected. Faced with the sectoral restructuring measures for which 'almost all the steel undertakings lack the funds required' and for which the Community lacked the necessary funds to fill the gap, the Commission, acting

pursuant to the unanimous assent of the Council, established a system of monitoring under Community control the Member States' aids to the steel industry 'which, if they [were] to retain a Community character, [had to] remain consistent with the Community guidelines in this field' (first recital of the First Steel Aid Code). Nevertheless, the First Steel Aid Code covered only specific aid, since the application of general regional aid schemes was monitored by the Commission pursuant to Article 67 CS and Articles 87 and 88 EC.

114 Adopting that approach favourable to the steel undertakings did not mean, however, that in the context of monitoring State aid the Commission had abandoned completely any power to find that, because of the necessary restructuring of undertakings in the steel industry and the need to phase out State aid, the prohibition laid down in Article 4(c) CS in principle applied fully unless that aid, whether or not it was specific to the steel industry, could be found by the Commission to be 'Community' aid and therefore compatible with the proper functioning of the common market. This is how the Second Steel Aid Code and the subsequent codes should be interpreted, including the Sixth Steel Aid Code, on which the contested decision is based.

115 Thus, although, from the Second Steel Aid Code onwards, the codes refer to 'all aids to the steel industry, whether specific or non-specific', that clarification merely serves to restore to Article 4(c) CS its original scope, since that article does not draw any distinction between the types of aid covered by the prohibition in it.

116 In the present case, as the Court has found in its examination of the first plea in law, since the tax measures provided for by Paragraph 3 of the ZRFG in favour of the applicant constitute State aid, they therefore fall within the scope of application of Article 4(c) CS.

117 Accordingly, and notwithstanding the uncertainty which may have been caused in this case by the Commission's change of interpretation, a matter which will be examined in the assessment of the seventh plea below, the Commission was entitled to find in recital 66 of the contested decision that Article 4(c) CS applied to the present case and that Article 67 CS did not.

118 Consequently, the second plea in law, alleging an error in the interpretation of Article 4(c) CS and Article 67 CS, must be rejected.

Third plea: failure to apply Article 95 CS

Arguments of the parties

119 The applicant submits that if the Court does not uphold the plea alleging incorrect interpretation of Article 67 CS, it must be recognised that the Commission committed an error by not considering on its own initiative whether the tax measures under Paragraph 3 of the ZRFG could be declared compatible with the common market, having regard to all the objectives of the ECSC Treaty (Articles 2 to 4 CS). In its reply, the applicant states that the Commission does not have any discretion when deciding whether it must proceed with monitoring pursuant to Article 95 CS. Its discretion is limited to the interpretation and application of Articles 2, 3 and 4 CS, referred to in Article 95 CS.

120 The applicant challenges the Commission's statement in recital 123 of the contested decision that the judgment of the Court of First Instance in Case T-106/96 *Wirtschaftsvereinigung Stahl* v *Commission* [1999] ECR II-2155 ('*Irish Steel*') precludes it from authorising, pursuant to Article 95 CS, aid which does not fulfil

the criteria set by the steel aid codes. The applicant submits that in that judgment the Court held that the prohibition laid down in each code was valid only for the aid which it lists and which it deems compatible with the ECSC Treaty, the Commission being bound by the code only when it assesses whether aid covered by the code is compatible with the treaty. In other cases, the applicant maintains, the steel aid codes do not apply and therefore cannot influence a decision taken by the Commission pursuant to Article 95 CS. The applicant states that since the rules governing special depreciation allowances provided for in Paragraph 3 of the ZRFG do not correspond to the definition of aid covered by the steel aid codes, a decision pursuant to Article 95 CS could be adopted.

121 The applicant adds that, in the light of the objectives of the ECSC Treaty as laid down in Articles 2, 3 and 4 CS, a finding that Paragraph 3 of the ZRFG was compatible was really necessary in order to ensure that there would be sufficient incentives for undertakings to expand and improve their production potential (Article 3(d) CS) in the border regions while safeguarding against a loss of their workforce and economic disturbances (second paragraph of Article 2 CS). These are, according to the applicant, the same political considerations which, due to the artificial division of Europe, led the authors of the EC Treaty to state in Article 87(2)(c) EC that aid granted to the economy of certain border areas was compatible with the common market. Those considerations should also be taken into account in view of the objectives pursued by the ECSC Treaty. In the present case, the Commission did not do this under Article 95 CS.

122 The intervener contends that a failure by the Member State to notify pursuant to Article 95 CS is not sufficient to release or even prevent the Commission from taking action on its own initiative under that provision and, if appropriate, declaring aid to be compatible with the common market.

123 The intervener adds that the steel aid codes do not mention the special case of compensation for the disadvantages caused by the division of Germany. The non-applicability of the steel aid codes also follows from the judgment in *Irish Steel*, cited above in paragraph 120, according to which aid not falling into one of the categories covered by the provisions of those codes may be the subject of an individual decision granting an exemption pursuant to Article 95 CS. The intervener submits that since those compensatory measures for losses cannot be equated with regional aid within the meaning of the steel aid codes, those codes were not applicable to the present case and thus did not preclude a decision by the Commission pursuant to Article 95 CS.

124 Lastly, the intervener complains that the Commission committed a manifest error of assessment in the exercise of its discretion pursuant to Article 95 CS. The error arises from the Commission's failure to assess the compensatory aid for losses caused to the German border regions in question as specific losses caused by the division of Germany, which was a case of *force majeure*, but only according to the rules established by the steel aid codes, which were inapplicable in this case. The intervener contends that, in any event, since the disadvantages caused by the division of Germany were a matter not provided for by the ECSC Treaty, the Commission should have assessed this case on the basis of the criteria laid down in Article 87(2)(c) EC.

125 The defendant states in reply, first, that even though the possibility of adopting an individual decision pursuant to Article 95 CS independently of the steel aid codes has been recognised by the case-law for the categories of aid for which the steel aid code does not provide, the adoption of such a decision is subject to prior assessment by the Commission. There can be no question of the Commission's being bound by any obligation and even less of the Commission having to establish the situation on its own initiative. The Commission thus has a power to determine whether certain factors justify the application of Article 95 CS to a specific case. The defendant refers to recital 124 of the contested decision where it states that it conducted an assessment pursuant to Article 95 CS but decided not to adopt a decision under that article.

126 Second, according to the defendant, the contested decision does not concern the ZRFG per se, but rather the use of special depreciation allowances and the establishment of tax-free reserves by the applicant, that is, individual aid. Therefore, as regards the question of the need for a decision pursuant to Article 95 CS, it is irrelevant whether the ZRFG was necessary to guarantee the presence of sufficient incentives for the undertakings to expand and improve their production potential of their establishments in the border regions while safeguarding against a loss of their workforce. According to the defendant, it should have been demonstrated that the special depreciation allowances and the tax-free reserves were imperative for certain investments coming under the ECSC Treaty, which the applicant has not done.

127 In its observations on the statement in intervention, the defendant reiterates that, according to the case-law of the Court of Justice, the sole purpose of the first paragraph of Article 95 CS is to establish a system for special derogations from the ECSC Treaty in order to enable the Commission to cope with unforeseen situations. The Commission cannot authorise the granting of State aid which is not indispensable to the objectives set out in the ECSC Treaty and which are such as to lead to distortions of competition.

Findings of the Court

— Preliminary considerations

128 Article 95 CS authorises the Commission to adopt a decision or make a recommendation with the unanimous assent of the Council, and after the ECSC Consultative Committee has been consulted, in all cases not provided for in the Treaty where it becomes apparent that a decision or recommendation of the

Commission is necessary to attain, within the common market in coal and steel and in accordance with Article 5 CS, one of the objectives of the Community set out in Articles 2, 3 and 4 CS.

129 In the scheme of the Treaty, Article 4(c) CS does not prevent the Commission from authorising, by way of derogation, aid envisaged by the Member States and compatible with the objectives of the Treaty, on the basis of the first and second paragraphs of Article 95 CS, in order to deal with unforeseen situations (see Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839, paragraph 63).

130 In the sphere of State aid, the Commission has used the first and second paragraphs of Article 95 CS in two different ways. First, it has adopted general decisions — the 'Steel Aid Codes' — providing for a general derogation from the prohibition of State aid regarding certain categories of aid. Secondly, it has adopted individual decisions authorising certain types of specific aid on an exceptional basis.

131 Thus Article 4(c) CS does not prohibit the Commission from authorising State aid, either under the categories specifically covered by the steel aid codes, or as State aid which does not fall into one of those categories, directly on the basis of the first and second paragraphs of Article 95 CS (*EISA* v *Commission*, cited in paragraph 129 above, paragraphs 70 to 72; *Forges de Clabecq* v *Commission*, cited above in paragraph 62, paragraph 79; and *DSG* v *Commission*, cited above in paragraph 28, paragraph 204).

132 In the present case, according to the wording of the contested decision, the Commission dismissed the application of Article 95 CS on the following grounds:

'(121) The Commission would observe first of all that in the present proceedings no formal application was made to it by Germany for the introduction of the procedure described in Article 95 [CS].

(122) The system created by the ECSC Treaty with regard to State aid empowers the Commission, under certain conditions and subject to compliance with the procedure in Article 95 [EC], to authorise the granting of State aid in all cases not provided for in the Treaty where it becomes apparent that such a decision is necessary to attain within the common market for coal and steel and in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4.

(123) According to the Court of First Instance's decision in [Case T-106/96 *Wirtschaftsvereiningung Stahl* v *Commission* [1999] ECR II-2155], failure to notify is not sufficient reason to release or even prevent the Commission from taking an initiative on the basis of Article 95 [CS] and, if necessary, declaring the aid to be compatible with the common market. However, in paragraph 42 of its judgment, the Court finds that the Commission is bound by the comprehensive rule introduced by the [steel aid] code, where it assesses in the light of the Treaty the compatibility of aid to which the code applies. Consequently, it cannot authorise such aid by an individual decision which runs counter to the general rules established by that code. Regional investment aid is authorised by the [steel aid codes] in force since 1986 only in precisely described areas, which do not include the localities where the investments subsidised by the special depreciation allowances and tax-free reserves were carried out. Thus the Commission concludes that Article 95 [CS] is not applicable in the present case.

(124) Moreover, the Commission, exercising its discretion in this matter, takes the view that it is not dealing in these proceedings with a case that is not provided for in the Treaty, in which a specific decision seems necessary in order to achieve one of the Community objectives more fully described in Articles 2, 3 and 4 [CS]. For instance, the aid granted is not aimed at

providing the German steel industry with a sound, economically viable structure. Similarly, Germany never referred to any plan for reducing capacity within the group concerned which is directly related to the granting of special depreciation allowances and tax-free reserves. The granting of aid under Article 95 [CS] would not be justified, therefore, in this case.

(125) Furthermore, in connection with the economic and financial trend of the steel industry in the early 1990s and the individual decisions taken under Article 95 [CS], in which restructuring aid was granted to several undertakings, the Council and the Commission made the following joint statement in the Council minutes of 17 December 1993: "without prejudice to the right of any Member State to request a decision under Article 95 [CS], and in accordance with the Council conclusions of 25 February 1993, the Council declares its firm commitment to avoid any further Article 95 derogations in respect of aid for any individual companies".'

133 Those grounds show that the Commission rejected the application of Article 95 CS principally on the basis of paragraph 42 of the judgment *Wirtschaftsvereinigung Stahl* v *Commission*, cited above in paragraph 120, according to which it can authorise under Article 95 CS State aid which is covered by the steel aid code only if such authorisation is not contrary to the general rules established by that code (recital 123 of the contested decision). In the alternative, it follows from recital 124 of the contested decision that the Commission found in that case that the conditions for application of Article 95 CS were not met.

134 Consequently, contrary to the applicant's assertion, the Commission did not refuse to consider whether Article 95 CS might apply in the present case. It is common ground that in recital 124 of the contested decision the Commission did consider whether that provision might apply, despite the fact that the Federal Republic of Germany had not asked for Article 95 CS to be applied. It found, however, that in

the circumstances of the case, the conditions for its application were not met. It is, accordingly, not necessary to rule on the applicant's plea relating to the incorrect interpretation by the Commission of *Wirtschaftsvereinigung Stahl* v *Commission*, cited above in paragraph 120, since, in any event and despite that interpretation, in recital 124 of the contested decision the Commission found it necessary to consider whether the conditions for application of Article 95 CS were met in this case.

135 It is in this light that it is appropriate to consider whether the Commission committed an error of assessment in refusing to apply the exception under Article 95 CS to the prohibition on aid laid down in Article 4(c) CS, as the applicant maintains.

— Alleged error of assessment in refusing to apply Article 95 CS

136 It is common ground that the Commission has discretion under Article 95 CS in determining whether aid is necessary in order to achieve the objectives of the Treaty (see, to that effect, *EISA* v *Commission*, cited above in paragraph 129, paragraph 72; Case T-89/96 *British Steel* v *Commission* [1999] ECR II-2089, paragraph 47; and *Wirtschaftsvereinigung Stahl* v *Commission*, cited above in paragraph 120, paragraph 43).

137 Consequently, in this area, the review of legality must be limited to an examination of whether the Commission has exceeded the scope of its discretion by a distortion or manifest error of assessment of the facts or by misuse of powers or abuse of process (see, inter alia, *Wirtschaftsvereinigung Stahl* v *Commission*, cited in paragraph 120, paragraph 63).

138 In order to establish that the Commission committed a manifest error in assessing the facts such as to justify the annulment of the contested decision, the evidence adduced by the applicant must be sufficient to make the factual assessments used in the decision implausible (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 59).

139 The Court notes that the applicant has merely stated that, in the light of the objectives of the ECSC Treaty as laid down in Articles 2, 3 and 4 CS, a finding that Paragraph 3 of the ZRFG was compatible with the Treaty was really necessary in order to ensure that there would be sufficient incentives for undertakings to expand and improve their production potential (Article 3(d) CS) in the border regions and to safeguard against a loss of their workforce and economic decline (second paragraph of Article 2 CS). Such a general allegation cannot be considered sufficient to make the factual assessments of the Commission implausible.

140 In addition, the applicant has not put forward any evidence demonstrating that the investment aid in the form of special depreciation allowances and the tax-free reserves for its benefit were indispensable to achieve the objectives of the ECSC Treaty.

141 The mere reference by the applicant to a statement from the Federal Republic of Germany, dated 14 January 2000, to the effect that it is obvious that the aid declared compatible under Article 87(2) EC also serves the objectives of the ECSC Treaty as set out in Articles 2 and 3 CS cannot be considered as sufficient proof that the aid in question is necessary for the purposes of Article 95 CS. First of all, Article 87(2) EC is not applicable in the context of the ECSC Treaty and, second, the assessment of the necessity of aid under Article 95 CS must be conducted in keeping with the objectives specific to the ECSC Treaty, which do not include aid declared compatible under Article 87(2) EC.

142 The Court finds, in any event, that the Commission did not commit a manifest error of assessment in stating in recital 124 of the contested decision that the Federal Republic of Germany never referred to any plan for reducing capacity within the Salzgitter group which was directly related to the aid granted, and then going on to find that application of Article 95 CS would not be justified.

143 Because the steel sector is known for having overcapacity, a reduction in production capacity might have in fact appeared necessary for achieving the objectives of the Treaty in the context of aid which might be the subject of an individual decision under Article 95 CS. Such a reduction can help to maintain conditions which will encourage undertakings to expand and improve their production potential (Article 3 (d) CS) or to promote the modernisation of production (Article 3(g) CS). In addition, with the overcapacity in the steel sector, the use of such a criterion avoids favouring economically precarious initiatives which, because they serve only to exacerbate the imbalances affecting the markets in question, will ultimately not resolve the problems of the regions and undertakings concerned in an efficient and lasting manner.

144 Accordingly, in view of the diversity of the objectives set by the Treaty, and the latitude given to the Commission in its role of ensuring at all times that those various objectives are reconciled, by exercising its discretion, in order to meet the requirements of the common interest (see to that effect, inter alia, *Wirtschaftsvereinigung Stahl* v *Commission*, cited above in paragraph 120, paragraph 65, and the case-law cited therein), the Commission's use in the present case of the criterion of reduction in production capacity is not a manifest error of assessment in the context of determining whether Article 95 CS is applicable.

145 Since the Commission was not in a position to find that the investment aid in question reduced the applicant's production capacity, notably because the Federal

Republic of Germany had not informed it of any capacity reduction plan, the Commission was unable to find that the aid in question served to achieve the objectives of the Treaty.

146 It follows that the third plea in law must be dismissed in its entirety.

147 It follows from all of the foregoing that the Commission was entitled to find that the tax measures under Paragraph 3 of the ZRFG which benefited the applicant constituted State aid which was incompatible with the common market. The Court considers it appropriate to examine next the seventh plea in law, alleging breach of the principle of legal certainty in that the Commission required the Federal Republic of Germany to recover from the applicant the aid declared to be incompatible.

Seventh plea: beach of the principle of legal certainty

Arguments of the parties

148 The applicant observes, first, that in recital 81 of the contested decision the Commission seems to argue that under the ECSC Treaty there is no time-bar on the right to recover aid, in contrast to the EC Treaty, because it 'would conflict with th[e] fundamental principle of the ECSC Treaty' providing for an absolute prohibition on State aid. According to the applicant, this line of argument makes a distinction between the law on aid under the ECSC Treaty and under the EC Treaty which is not actually present in either the spirit or the letter of those Treaties

or in the Commission's practice. The alleged absolute nature of a prohibition does not preclude compliance with the principle of legal certainty and the recognition of a limitation period.

149 It follows, in the applicant's view, that the principle of legal certainty may also be relied upon in the context of the ECSC Treaty. It is a general principle of law which also applies in the context of State aid and which binds the Commission.

150 The applicant states next that the order to recover State aid for which Community law provides is intended to eliminate competitive advantages obtained illegally which have enabled the recipient undertaking to operate with lower prices than its competitors. The applicant states that the Commission has not made any findings in this case on the effects the special depreciation allowances provided for in Paragraph 3 of the ZRFG have had on competition.

151 The applicant adds that the powers of the Commission to recover aid are in any event subject to a limitation period of 10 years. That limitation period provided for in Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) should have guided the Commission in the present case, since it strikes a balance between the principle of legal certainty and the need to re-establish undistorted competition.

152 Lastly, in response to the written questions from the Court requesting it to expand upon and clarify some of those statements, the applicant stated that, beginning in 1980/1981, it regularly submitted annual reports and accounts to the Commission, in particular to the departments charged at the time with the examination of

restructuring aid in the steel industry within the framework of the operating system for production quotas for the steel industry and the Commission's related actions as part of the restructuring of the European steel industry, put in place in the 1980s. Those statements were reiterated before the Court.

153 In its written pleadings, the intervener refers to *Acciaierie di Bolzano* v *Commission*, cited above in paragraph 90, paragraph 69, in which the Court of First Instance stated that since at the time of the adoption of the decision at issue in that judgment, no time-bar had been laid down and the Commission was therefore not obliged to comply with a time-limit when it adopted its decision. It is clear from that judgment that the Court would have dealt with the question of the time-limit differently if Regulation No 659/1999 had been in force at the time the contested decision was adopted. According to the intervener, since subsidiary application of the EC Treaty and the secondary law adopted on the basis thereof to the areas covered by the ECSC Treaty is possible, the subsidiary application of Article 15 of Regulation No 659/1999 to State aid under the ECSC Treaty could be excluded only if the ECSC Treaty provisions were repugnant to it, which is not the case here.

154 The defendant refers to recital 80 of the contested decision and to Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 67, where it was held that 'in order to fulfil their function of ensuring legal certainty limitation periods must be fixed in advance by the Community legislature'. The defendant observes that that is not the case here.

155 Regarding the argument concerning the subsidiary application of Regulation No 659/1999, the defendant observes that this regulation concerns only the EC Treaty and that its scope of application cannot be extended to the ECSC Treaty through interpretation. Only the legislator is empowered to do that. *Acciaierie di Bolzano* v *Commission*, cited above in paragraph 90, changes nothing in this regard. Although

it is true that that regulation was in force at the time of adoption of the contested decision, the fact remains that the ECSC Treaty did not provide for a limitation period and therefore no time-limit applied.

156 Lastly, the defendant stated in response to the written questions from the Court that it did not matter whether or not it had read the annual accounts sent by applicant, since that could not be a substitute for a notification under the procedure governing State aid.

Findings of the Court

157 The Court notes, as a preliminary point, that in recital 81 of the contested decision, the Commission stated:

'Pursuant to the ECSC Treaty, all national aid is prohibited unless special authorisation is granted under a [Steel Aid Code] based on Article 95 [CS]. This situation is fundamentally different to that under Article 87(1) and (3) [EC], where the Commission has wide powers of discretion and where it is a question not of aid being prohibited unconditionally but of its possible incompatibility. While the prescription clause in Regulation ... No 659/1999 is necessary in order to give legal certainty to the situation covered by the EC Treaty, there is no point to prescription in the ECSC sector, since this continues to be subject to an unconditional prohibition. The prohibition in the ECSC Treaty ensures legal certainty, since without special authorisation aid is unlawful. Time-barring the examination of the measures would conflict with this fundamental principle of the ECSC Treaty.'

158 That analysis does not withstand scrutiny.

159 It is true that, in order to fulfil their function, limitation periods must be fixed in advance. The fixing of their duration and the detailed rules for their application come within the powers of the Community legislature. The latter has not taken steps to prescribe a limitation period concerning the review of aid granted under the ECSC Treaty (see, inter alia, *Falck and Acciaierie di Bolzano* v *Commission*, cited above in paragraph 62, paragraph 139).

160 It should be borne in mind, however, that the fundamental principle of legal certainty in its various forms aims to ensure that situations and legal relationships governed by Community law remain foreseeable (Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20; and Case T-73/95 *Oliveira* v *Commission* [1997] II-381, paragraph 29).

161 Contrary to what the Commission has maintained before the Court, breach by the Commission of the fundamental principle of legal certainty in this case cannot be excluded either on grounds of the lack of a limitation period or the failure by the Federal Republic of Germany to give prior notification of the aid measures in question in accordance with the procedure provided for under the ECSC Treaty.

162 The Court notes, first, that in *Falck and Acciaierie di Bolzano* v *Commission*, cited above in paragraph 62, the Court of Justice did not rule out the possibility of finding and, where appropriate, sanctioning a breach of the principle of legal certainty by the Commission in adopting a decision requiring the recovery of aid where there is no time-bar and prior notification of the aid (*Falck and Acciaierie di Bolzano* v *Commission*, cited above in paragraph 62, paragraph 140).

163 The Court observes, next, that the breach of the principle of legal certainty is pleaded by the applicant, the recipient of the aid in question here. The mechanism for reviewing and examining State aids established by the Sixth Steel Aid Code does not impose any specific obligation on the recipient of aid. First, the notification requirement and the prior prohibition on implementing planned aid laid down in Article 6 of the Sixth Steel Aid Code are addressed to the Member State. Second, the Member State is also the addressee of the decision by which the Commission finds that aid is incompatible with the common market and requests the Member State to abolish the aid within the period determined by the Commission (see, by analogy under the EC Treaty, Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 73). Since the Member State is the only official party with which the Commission has a duty to communicate for the purposes of monitoring State aid under the ECSC Treaty (see, to that effect, Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, paragraph 80), the applicant cannot be held responsible for the failure to give prior notification of the aid in question.

164 If the Commission's line of argument were to be accepted, it would mean that its power to order the recovery of aid could not be called into question quite simply on the ground that prior notification of the aid had not been given by the Member State, even though the irregularity was not attributable to the recipient of the aid.

165 It is true that the Community Courts have held that, save in exceptional circumstances, a recipient cannot have a legitimate expectation that aid was properly granted unless it has been granted in compliance with the provisions on prior control of State aid. A prudent economic operator should usually be able to ascertain that that procedure was followed (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14, and Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 51; *Preussag Stahl* v *Commission*, cited above in paragraph 163, paragraph 77; Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 121; and *ESF Elbe-Stahlwerke Feralpi* v *Commission*, cited above in paragraph 110, paragraph 182).

166 However, the applicant is not pleading a legitimate expectation that aid was properly granted but rather a breach of the principle of legal certainty, a matter which does not depend solely on the conditions required for the creation of a legitimate expectation on the part of the recipient of the aid.

167 It is, accordingly, appropriate to consider whether in the present case the Commission acted in a manner contrary to the principle of legal certainty.

168 It is appropriate to start with the situation created by the Commission's decision on 4 August 1971 not to raise objections regarding the application of the aid scheme provided for by Paragraph 3 of the ZRFG.

169 As stated above in paragraph 67, until the expiry of the First Steel Aid Code on 31 December 1981, the Commission maintained an interpretation different from the one used in the contested decision, according to which the application of general and regional aid schemes to the steel industry was subject to monitoring by the Commission, pursuant to both Article 67 CS and Articles 87 EC and 88 EC, but not Article 4(c) CS.

170 On the basis of that interpretation, it was thus possible to take the view that, until 31 December 1981, the general and regional aid schemes against which the Commission had not raised objections pursuant to Articles 87 and 88 EC — as was the case here regarding Paragraph 3 of the ZRFG by the Commission's decision of 4 August 1971 — could legitimately be applied for the benefit of steel undertakings.

171 However, with the entry into force of the Second Steel Aid Code on 1 January 1982, and with subsequent codes, the Commission instituted a single system intended to ensure uniform treatment of all aid to the steel industry, grouped under a single procedure and covering both specific aid (that is, aid granted under schemes having as their purpose or principal effect the favouring of steel undertakings) and non-specific aid, including in particular aid granted under general or regional aid schemes. The introduction of such a scheme was part of an effort to set in motion the necessary restructuring of the steel industry, which was in crisis, by providing for the gradual phasing-out of aid. The provisions of the Second Steel Aid Code were silent, however, as to the consequences of the new system for previously-authorised general or regional aid schemes.

172 Starting with the Third Steel Aid Code (Commission Decision No 3484/85/ECSC of 27 November 1985 establishing Community rules for aid to the steel industry, OJ 1985 L 340, p. 1), which applied from 1 January 1986 to 31 December 1988, the Commission stated in Article 6 therein that it was to be informed, in sufficient time to enable it to submit its comments, of any 'plans' to grant or alter aid to the steel industry under schemes on which it had already taken a decision under the EC Treaty. The notifications of aid plans required by Article 6 were to be lodged with the Commission by 30 June 1988 at the latest.

173 The adoption of the Third Steel Aid Code may be viewed at least as an implicit withdrawal of the Commission's non-objection in its 1971 decision, in so far as concerns the undertakings falling under the ECSC Treaty, which included the applicant. It is, moreover, not clear whether the subsequent application of Paragraph 3 of the ZRFG in favour of the applicant came under the obligation to notify 'plans' referred to in Article 6 of the Third Steel Aid Code. Once the applicant had been granted, well before that code, the advantage provided for by Paragraph 3 of the ZRFG, it continued in practice to benefit from the application of that article, the conditions of which it met.

174 Consequently, the situation resulting from the adoption of the Second and Third Steel Aid Codes was characterised by the following elements of uncertainty and lack of clarity, which are attributable to the Commission:

— The implicit nature of the partial — and, therefore, insufficiently clear — withdrawal of the non-objection in the Commission's 1971 decision;

— ambiguity as to the scope of the partial withdrawal of the aforementioned non-objection regarding the question whether the subsequent application of Paragraph 3 of the ZRFG had to be notified as 'plans' for the purposes of Article 6 of the Third Steel Aid Code.

175 Added to this situation of uncertainty and lack of clarity were subsequent factors (described in paragraph 179 et seq. below), related to the legal framework (described in paragraphs 176 to 178 below) set up following the realisation that the steel industry was in deep crisis.

176 Confronted with this situation of manifest crisis, the Commission, by Commission Decision No 2794/80/ECSC of 31 October 1980 establishing a system of steel production quotas for undertakings in the iron and steel industry (OJ 1980 L 291, p. 1), introduced a quota system aimed at restoring the balance between supply and demand in the steel market, having regard to the excess production capacity. It was provided that the calculation of quotas was to be based on reference production figures for each undertaking, with some allowance made to take account of

investments or efforts made to restructure the undertakings. For the application of the quota system, the Commission possessed regular, up-to-date information concerning production and deliveries by the undertakings concerned and had powers to check the information supplied to it, also by on-the-spot checks. This complex system for the Commission's setting quotas and monitoring the market was extended several times by the Commission, in an effort to fine-tune and perfect it.

177 The Commission adapted the scheme thereby established by drawing a clear link between the granting of unauthorised aid and the production quotas so as to avoid a cumulation of those measures. Beginning with Commission Decision No 2177/83/ECSC of 28 July 1983 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (OJ 1983 L 208, p. 1), the Commission could, pursuant to Article 15A thereof, 'make a reduction in an undertaking's quotas if it establish[ed] that the undertaking in question [had] received aids not authorised by the Commission pursuant to Decision No 2320/81/ECSC [Second Steel Aid Code] or if the conditions under which aids were authorised [had] not been complied with'. Under that same provision, if such a finding were made, 'the undertaking in question [would] not be entitled to an adjustment under Articles 14, 14A, 14B, 14C or 16 [of Decision No 2177/83]'. A substantively identical formulation was to be found in the subsequent decisions extending the system of monitoring and production quotas, particularly Article 15A of Commission Decision No 3485/85/ECSC of 27 November 1985 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (OJ 1985 L 340, p. 5) and Article 15A of Commission Decision No 194/88/ECSC of 6 January 1988 extending the system of monitoring and production quotas for certain products of undertakings in the steel industry (OJ 1988 L 25, p. 1) to 30 June 1988. Moreover, the Court has held on several occasions that the scheme of quotas and the steel aid codes form a coherent whole and pursue a common aim, namely the restructuring needed to adapt production and capacity to foreseeable demand and to re-establish the competitiveness of the European steel industry, and it is therefore neither arbitrary nor

discriminatory that the information obtained from the application of either of those systems should be available for use as a reference in the other (Case 250/83 *Finsider* v *Commission* [1985] ECR 131, paragraph 9; Joined Cases 211/83, 212/83, 77/84 and 78/84 *Krupp and Thyssen* v *Commission* [1985] ECR 3409, paragraph 34; and Case 226/85 *Dillinger Hüttenwerke* v *Commission* [1987] ECR 1621, paragraph 2).

178 The Commission was therefore necessarily prompted to check the production-related information it was receiving from the steel undertakings, particularly in order to determine whether the maintenance of or increase in production capacity was not a result of unauthorised aid, which might have run counter to the objective of restructuring the steel industry. Those checks were intended inter alia to determine whether the production quotas which had been granted on a case-by-case basis from time to time to the undertakings should be reduced. The Commission could not be unaware of the increased obligations it was also imposing on steel undertakings to communicate their investment programmes, including the sources of financing for those programmes, in order for the Commission to be able to detect in a timely manner the emergence of developments which might exacerbate the imbalances in production capacity, pursuant to Commission Decision No 3302/81/ECSC of 18 November 1981 on the information to be furnished by steel undertakings about their investments (OJ 1981 L 333, p. 35), as amended by Commission Decision No 2093/85/ECSC of 26 July 1985 (OJ 1985 L 197, p. 19), in force until 16 October 1991.

179 It was in this context of particular obligations on the steel undertakings that the applicant, during the so-called 'Stahlwerke Peine — Salzgitter AG period', at the end of 1988 sent the Commission its annual report and accounts for the years 1987/1988, which indicated that it had had the benefit of exceptional reserves (Sonderposten mit Rücklageanteil) for investments in its steel plants at Peine and Salzgitter, in the Zonenrandgebiet, pursuant to Paragraph 3 of the ZRFG. Identical information was to be found in the annual reports and accounts sent in by the applicant for subsequent years. On the basis of that information, the sending of which has not been contested by the Commission, the Commission should have

observed and found that there was a failure to notify and then commenced appropriate proceedings. Moreover, the Commission once again examined the aid schemes under Paragraph 3 of the ZRFG in 1988, which led to the adoption of the decision of 14 December 1988 [SG(88) D/1748] not to raise objections to them.

180 The situation of uncertainty and lack of clarity described above in paragraph 174, combined with the prolonged lack of reaction on the part of the Commission, in spite of its awareness of the aid received by the applicant, led to the creation by the Commission, in disregard of its duty of care, of an equivocal situation which the Commission was under a duty to clarify before it could take any action to order the recovery of the aid already paid (see, to that effect, Case 26/69 *Commission* v *France* [1970] ECR 565, paragraphs 28 to 32).

181 It is clear that the Commission did not offer any such clarification, however. In particular, in the subsequent versions of the steel aid codes, the Commission merely repeated the wording of Article 6 of the Third Steel Aid Code.

182 Consequently, in the specific circumstances of this case, the Commission could not order the recovery of the aid paid to the applicant between 1986 and 1995, without breaching the principle of legal certainty.

183 The plea alleging breach of the principle of legal certainty must therefore be upheld and Articles 2 and 3 of the contested decision, in so far as they concern the obligation for the Federal Republic of Germany to recover the aid in question from the applicant, must, accordingly, be annulled.

184 In those circumstances, since the recovery of the aid paid to the applicant between 1986 and 1995 is not possible, the Court finds that it is not necessary to rule on the pleas in law which essentially concern the reduction and calculation of the amount of aid to be recovered. As regards the plea alleging a failure to state reasons, which concerns the finding of incompatibility of the aid in question, the Court's review in its examination of the applicant's first three pleas shows sufficiently that that obligation was complied with.

Costs

185 Under Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared or that each party bears its own costs if the parties are unsuccessful on one or more heads. In the present case, the applicant has been successful in respect of a significant part of the form of order sought.

186 Accordingly, in the present circumstances, the Court decides that it is appropriate to order the applicant to bear one third of its own costs and to order the Commission to bear its own costs and to pay two thirds of the applicant's costs.

187 The Court orders the Federal Republic of Germany to bear its own costs, pursuant to the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

1. **Annuls Articles 2 and 3 of Commission Decision 2000/797/ECSC of 28 June 2000 on State aid granted by the Federal Republic of Germany to Salzgitter AG, Preussag Stahl AG and the group's steel-industry subsidiaries, now known as Salzgitter AG — Stahl und Technologie (SAG);**

2. **Orders the applicant to bear one third of its costs;**

3. **Orders the Commission to bear its own costs and to pay two thirds of the applicant's costs;**

4. **Orders the Federal Republic of Germany to bear its own costs.**

Tiili Pirrung Mengozzi

Meij Vilaras

Delivered in open court in Luxembourg on 1 July 2004.

H. Jung V. Tiili

Registrar President

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