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

12 September 2007 *

In Case T-25/04,

González y Díez SA, established in Villabona-Llanera, Asturias (Spain), represented by J. Díez-Hochleitner and A. Martínez Sánchez, lawyers,

applicant,

v

Commission of the European Communities, represented initially by J. Buendía Sierra, acting as Agent, and subsequently by C. Urraca Caviedes, acting as Agent, and by Buendía Sierra, lawyer,

defendant,

ACTION for the annulment of Articles 1, 3 and 4 of Commission Decision 2004/340/EC of 5 November 2003 concerning aid to the company González y Díez SA to cover exceptional costs (aid for 2001 and incorrect use of the aid for 1998 and 2000), amending Decision No 2002/827/ECSC (OJ 2004 L 119, p. 26),

* Language of the case: Spanish.

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

composed of J. Pirrung, President, A.W.H. Meij, N.J. Forwood, I. Pelikánová and S. Papasavvas, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 31 January 2007,

gives the following

Judgment

Legal Framework

1 Article 5(1) of Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry (OJ 1993 L 329, p. 12) is worded as follows:

'Aid to cover exceptional costs

1. State aid to coal undertakings to cover the costs arising from or having arisen from the modernisation, rationalisation or restructuring of the coal industry which

are not related to current production (inherited liabilities) may be considered compatible with the common market provided that the amount paid does not exceed such costs. Such aid may be used to cover:

— the costs incurred only by undertakings which are carrying out or have carried out restructuring,

— the costs incurred by several undertakings.

The categories of costs resulting from modernisation, rationalisation and restructuring of the coal industry are defined in the Annex to this Decision.'

2 The Annex to Decision No 3623/93, entitled 'Definition of the costs referred to in Article 5(1)', states inter alia:

'I. Costs incurred only by undertakings which are carrying out or have carried out restructuring and rationalisation

Exclusively:

...

(c) the payment of pensions and allowances outside the statutory system to workers who lose their jobs as a result of restructuring and rationalisation and to workers entitled to such payments before the restructuring;

...

(e) residual costs resulting from administrative, legal or tax provisions;

(f) additional underground safety work resulting from restructuring;

(g) mining damage provided that it has been caused by pits previously in service;

(h) residual costs resulting from contributions to bodies responsible for water supplies and for the removal of waste water;

(i) other residual costs resulting from water supplies and the removal of waste water;

...

(k) exceptional intrinsic depreciation provided that it results from the restructuring of the industry (without taking account of any revaluation which has occurred since 1 January 1986 and which exceeds the rate of inflation);

(l) costs in connection with maintaining access to coal reserves after mining has stopped.

...'

3 Article 12 of Decision No 3632/93 states that that decision entered into force on 1 January 1994 and expired on 23 July 2002.

4 Article 7 of Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry (OJ 2002 L 205, p. 1) is worded as follows:

'Aid to cover exceptional costs

1. State aid granted to undertakings which carry out or have carried out an activity in connection with coal production to enable them to cover the costs arising from or having arisen from the rationalisation and restructuring of the coal industry that are not related to current production ("inherited liabilities") may be considered

compatible with the common market provided that the amount paid does not exceed such costs. Such aid may be used to cover:

(a) the costs incurred only by undertakings which are carrying out or have carried out restructuring, i.e. costs related to the environmental rehabilitation of former coal mining sites;

(b) the costs incurred by several undertakings.

2. The categories of costs resulting from the rationalisation and restructuring of the coal industry are defined in the Annex.'

5 The Annex to Regulation No 1407/2002, entitled 'Definition of costs referred to in Article 7', states inter alia:

'1. Costs incurred and cost provisions made only by undertakings which are carrying out or have carried out restructuring and rationalisation

Exclusively:

...

(c) the payment of pensions and allowances outside the statutory system to workers who lose their jobs as a result of restructuring and rationalisation and to workers entitled to such payments before the restructuring;

...

(f) residual costs resulting from administrative, legal or tax provisions;

(g) additional underground safety work resulting from the closure of production units;

(h) mining damage provided that it has been caused by production units subject to closure due to restructuring;

(i) costs related to the rehabilitation of former coal mining sites, notably:

— residual costs resulting from contributions to bodies responsible for water supplies and for the removal of waste water,

— other residual costs resulting from water supplies and the removal of waste water;

...

(k) exceptional intrinsic depreciation provided that it results from the closure of production units (without taking account of any revaluation which has occurred since 1 January 1994 and which exceeds the rate of inflation).

...'

6 The second subparagraph of Article 14(1) of Regulation No 1407/2002 states that that regulation is to apply from 24 July 2002.

7 Communication 2002/C 152/03 from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty (OJ 2002 C 152, p. 3) specifies the consequences which the Commission intends to draw from the expiry of the ECSC Treaty as regards, in particular, the treatment of cases of State aid to the coal industry.

Background to the dispute

8 The applicant is a mining undertaking whose operations are situated in Asturias. Those operations include an open-cast operation in the 'Buseiro' sector and two underground operations in the 'Sorriba' Sector, one of which is situated in the subsector known as 'La Prohida' and the other in the subsector known as 'Tres Hermanos'.

9 By Decision 98/637/ECSC of 3 June 1998 (OJ 1998 L 303, p. 57) and Decision 2001/162/ECSC of 13 December 2000 (OJ 2001 L 58, p. 24) on the granting by Spain of aid to the coal industry in 1998 and 2000 respectively, the Commission authorised the Kingdom of Spain, inter alia, to grant aid, pursuant to Article 5 of Decision No 3632/93, to cover the exceptional technical costs of closing down mining installations as a result of the measures to modernise, rationalise, restructure and reduce the activity of the Spanish coal industry.

10 For the years 1998 and 2000, the Spanish authorities granted the applicant aid totalling ESP 651 908 560 (EUR 3 918 049.35) and ESP 463 592 384 (EUR 2 786 246.34) respectively, to cover the technical expenses of the annual production capacity cuts of 48 000 t in 1998 and 38 000 t in 2000. Those production capacity cuts were to take place in 1998 at the open-cast mine of Busiero, where production was terminated completely, and in 2000 at the underground mine of Sorriba (La Prohida subsector) to the extent of 26 000 t and at the open-cast mine of Buseiro to the extent of 12 000 t.

11 On 23 July 1998, the company Mina la Camocha acquired 100% of the applicant's capital. Prompted by information which appeared in the press in June 1999, suggesting that the aid received by the applicant in 1998 exceeded the costs of the supposed capacity reduction since it had been accounted for as operational income and had been paid to the parent company, the Commission decided to analyse the granting of the aid to cover exceptional costs to the applicant and, by letter of 25 October 1999, requested the Kingdom of Spain to provide it with information in that regard. In subsequent letters, the Commission extended its requests for information on the aid in respect of 2000 and 2001. As part of an exchange of correspondence which lasted until April 2002, the Spanish authorities sent the information requested.

12 By letter of 21 November 2000, supplemented by letters of 19 and 21 March 2001, the Kingdom of Spain informed the Commission of the aid to the coal industry which it intended to grant during the 2001 financial year. That aid included, ESP 393 971 600 (EUR 2 367 817) to cover the applicant's costs of cutting annual production capacity by 34 000 t which was due to take place in 2001 in the La Prohida subsector.

13 By Decision 2002/241/ECSC of 11 December 2001 on the granting by Spain of aid to the coal industry in 2001 (OJ 2002 L 82, p. 11), the Commission authorised the Kingdom of Spain to pay aid to cover the technical costs of closing down mining installations as a result of the measures to modernise, rationalise, restructure and reduce the activity of the Spanish coal industry, with the exception, in particular, of the aid granted to the applicant on which the Commission stated that it would give a decision at a later date. In relation to that aid, the Commission proposed, first, to analyse the information to be sent to it by the Spanish authorities on the aid granted to the applicant for 1998 and 2000.

14 By letter of 13 May 2002, the Kingdom of Spain informed the Commission that, in anticipation of the latter's decision to that effect, it had paid the applicant ESP 383 322 896 (EUR 2 303 817) for 2001, which was less than the amount notified.

15 By Decision 2002/827/ECSC of 2 July 2002 on the granting by Spain of aid to the undertaking González y Díez, SA in 1998, 2000 and 2001 (OJ 2002 L 296, p. 80), the Commission declared incompatible with the common market the aid granted to the applicant to cover exceptional restructuring costs in 1998, 2000 and 2001 totalling EUR 5 113 245.96 (ESP 850 772 542). That sum corresponded to the amount, first, of aid paid for 1998 and 2000 totalling EUR 2 745 428.96 (ESP 456 800 943) and,

second, of the aid totalling EUR 2 367 817 (ESP 393 971 600) which was notified to the Commission by the Kingdom of Spain for 2001.

16 On 17 September 2002, the applicant brought an action for the annulment of Articles 1, 2 and 5 of Decision 2002/827. That action was registered at the Registry of the Court of First Instance as Case T-291/02.

17 In the light of the arguments put forward in that action, the Commission expressed doubts about certain parts of the procedure which led to the adoption of Decision 2002/827. The Commission therefore decided to reopen the formal investigation procedure in the light of the revocation of Articles 1, 2 and 5 of Decision 2002/827 and of the replacement of that decision with a new decision. By letter of 19 February 2003, the Commission notified the Kingdom of Spain of its decision to initiate the procedure provided for in Article 88(2) EC. An invitation to submit comments in accordance with that provision was published in the *Official Journal of the European Union* on 10 April 2003 (OJ 2003 C 87, p. 17).

18 On 5 November 2003, the Commission adopted Decision 2004/340/EC concerning aid to the company González y Díez, SA to cover exceptional costs (aid for 2001 and incorrect use of the aid for 1998 and 2000), amending Decision No 2002/827 (OJ 2004 L 119, p. 26) ('the contested decision'). The contested decision was notified to the Kingdom of Spain on 6 November 2003 under the number C(2003) 3910 and was published in the *Official Journal of the European Union* on 23 April 2004.

19 Article 1 of the contested decision states that the aid totalling EUR 3 131 726.47 granted by the Kingdom of Spain to the applicant to cover exceptional restructuring costs for 1998 and 2000 pursuant to Article 5 of Decision 3632/93/ECSC constitutes

an incorrect application of Decisions 98/637/ECSC and 2001/162/ECSC and is incompatible with the common market.

20 Article 2 of the contested decision states that the aid totalling EUR 2 249 759.37 (ESP 374 328 463) granted to the applicant to cover, for 2001, exceptional costs of closure incurred during the period from 1998 to 2001 is compatible with Article 7 of Regulation No 1407/2002.

21 Article 3(a) of the contested decision states that the aid totalling EUR 602 146.29 (ESP 100 188 713) granted for 2001, intended for investments in mining infrastructure for the working of the Tres Hermanos subsector is incompatible with Article 7 of Regulation No 1407/2002. Article 3(b) of the contested decision adds that the aid totalling EUR 601 012.10 (ESP 100 000 000) granted for 2001, intended to constitute a provision for covering future costs incurred by the closure of the La Prohida subsector and the partial closure of the Buseiro sector, which took place during the period from 1998 to 2001, is also incompatible with that provision.

22 Article 4(1)(a) of the contested decision orders the Kingdom of Spain to recover from the applicant the aid paid for 1998 and 2000, referred to in Article 1 of that decision. Article 4(1)(b) of the contested decision orders the recovery from the applicant of the amount of EUR 54 057.63 (ESP 8 994 433), paid illegally before authorisation by the Commission for the 2001 financial year, and constituting an unauthorised excess over the aid authorised pursuant to Article 2 and, where appropriate, any other amount paid illegally in the same circumstances.

23 Article 6 of the contested decision states that Articles 1, 2 and 5 of Decision 2002/827 are repealed.

24 Following a request by the Commission for a ruling that there was no need to adjudicate in the case, the Court of First Instance brought the proceedings in Case T-291/02 *González y Díez* v *Commission* (not published in the ECR) to an end by order of 2 September 2004.

Procedure

25 By application lodged at the Registry of the Court of First Instance on 22 January 2004, the applicant brought the present action.

26 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure as laid down in Article 64 of the Rules of Procedure of the Court put written questions to the parties to which they replied within the prescribed period.

27 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 31 January 2007.

28 During the hearing, the applicant produced a document containing schematic presentations of the Sorriba sector. After the parties had been heard, that document

was placed in the file by decision of the President of the Second Chamber, Extended Composition.

29 The Commission was authorised to lodge at the Registry of the Court of First Instance a document entitled 'Annexo al informe pericial sobre la ayuda a la reducción de actividad de la empresa Gonzáles y Díez, SA' (Annex to the expert's report on the aid for the reduction of the activity of the company Gonzáles y Díez, SA), dated 17 September 2002. The applicant was given an opportunity to submit its comments on that document, which it did within the prescribed period. After the parties had been heard, the Court of First Instance decided to place the document in the file.

30 The oral procedure was closed by decision of the President of the Second Chamber, Extended Composition, on 9 March 2007.

Forms of order sought

31 The applicant claims that the Court should:

— annul Articles 1, 3 and 4 of the contested decision;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

33 The applicant raises fours pleas in law, alleging, respectively, a lack of competence on the part of the Commission to adopt Articles 1, 3 and 4 of the contested decision, infringement of essential procedural requirements in the procedure followed to revoke Articles 1, 2 and 5 of Decision 2002/827 and to adopt the contested decision, infringement of the principle of the protection of legitimate expectations and of essential procedural requirements, and a manifest error of assessment.

The first plea, alleging a lack of competence on the part of the Commission to adopt Articles 1, 3 and 4 of the contested decision

Arguments of the parties

34 The applicant submits that neither the ECSC Treaty nor the EC Treaty grants the Commission the competence to adopt the decision to initiate the revocation procedure and to adopt the contested decision.

35 As regards the ECSC Treaty, the applicant claims that that treaty could not serve as a legal basis after its expiry on 23 July 2002 (Opinion of Advocate General Alber in Joined Cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P *International Power and Others* v *NALOO* [2003] ECR I-11421, point 48).

36 As regards the EC Treaty, the applicant submits that, pursuant to Article 305(1) EC, that treaty does not provide a legal basis for the Commission to rule on the aid granted for 1998, 2000 and 2001.

37 The provisions of the EC Treaty applicable to goods falling within the scope of the ECSC Treaty cannot be applied retroactively to earlier situations on expiry of that latter treaty. The applicant claims that the application of legal provisions to situations arising prior to their entry into force would be incompatible with the principle of legal certainty (Case C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraph 17; Case C-34/92 *GruSa Fleisch* [1993] ECR I-4147, paragraph 22; Opinion of Advocate General Léger in Case C-223/95 *Moksel* [1997] ECR I-2379, points 40 to 42). In support of that submission, the applicant also refers to Article 28 of the Vienna Convention of 23 May 1969 on the Law of Treaties (*United Nations Treaty Series*, Volume 788, p. 354) which lays down the principle of non-retrocactivity of treaties. According to the applicant, if the Member States had intended to authorise the application of the EC Treaty to the coal industry in respect of situations prior to 24 July 2002, they would have made express provisions to that effect.

38 Therefore, the Commission cannot use Article 88(2) EC and its rules of application as a basis for annulling or amending aid to the coal industry which was authorised under the ECSC Treaty or in respect of which no position had been adopted while that treaty was still in force.

39 In addition, Article 14(1) of Regulation No 1407/2002, which provides for that regulation to apply from 24 July 2002, confirms that the EC Treaty cannot be applied retroactively. The applicant also indicates that it is apparent from the substantive provision of that regulation that the Community legislature intended only to legislate for the future, since none of its provisions regulates aid granted to the coal industry before its entry into force.

40 The applicant points out that, in any event, neither the Member States nor the Community legislature can be unaware of the principle of non-retroactivity of provisions which are restrictive of individual rights, since the latter is enshrined in the constitutional orders of the Member States.

41 The applicant adds that the Commission was aware of the fact that the rules of the EC Treaty were not applicable to aid granted to the coal industry before the ECSC Treaty had expired. That is apparent from paragraph 25 of Communication 2002/C 152/03 and from the fact that the Commission states, in paragraph 46 of that communication, that it found it necessary to close the proceedings concerning State aid to the coal industry before the expiry of the ECSC Treaty.

42 The applicant submits that it is not trying to assert the existence of a legal vacuum after the expiry of the ECSC Treaty. It is merely claiming that the Commission should have used the powers conferred on it by the ECSC Treaty to revoke Articles 1, 2 and 5 of Decision 2002/827.

43 As regards the procedure which needs to be complied with to verify the performance of the obligations resulting from the ECSC Treaty in relation to the aid which was granted to it for 1998, 2000 and 2001, the applicant states that Article 226 EC is capable of being applicable.

44 The applicant challenges the relevance of Article 3 EU in relation to the issue of the competence of the Commission and considers that that provision is unconnected with the Community system of attribution of competences. It also challenges the relevance of the principle put forward by the Commission which states that, in the

absence of transitional provisions, a new rule applies to the future effects of a situation which came about under an old rule. The applicant states that it opposes only the retroactive application of the EC Treaty to a past situation, and not a future one, which came about under a rule which had been repealed. Finally, the applicant denies that a distinction may be made between substantive rules and procedural rules.

45 The Commission observes, first, that the issue of the Commission's competence to adopt the contested decision must be resolved in the light of the unity of the Community legal order which encompasses the ECSC and EC Treaties, laid down in Article 3 EU. It notes, next, that the Commission's competence to monitor State aid is not in doubt since the ECSC and EC Treaties have both conferred on it monitoring powers in that field.

46 The Commission submits that, in the absence of transitional provisions, a new rule applies immediately to the future effects of a situation which came about under the old rule (Opinion of Advocate General Alber in *International Power and Others* v *NALOO*, point 48). No transitional provision of primary law has been adopted in the field of State aid. The Commission adds that the case-law excluding the application of the provisions of the EC Treaty in the field of State aid to situations covered by the ECSC Treaty, pursuant to Article 305 EC, concerns the resolution of conflicts between rules which are in force at the same time and does not apply to situations in which those rules succeed each other over time.

47 It states that a distinction is traditionally made between procedural rules and substantive rules. As regards procedural rules, those which are applicable are the ones in force at the time at which the relevant phase is opened (Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 22). Thus, the reopening of a procedure concerning

aid granted before the expiry of the ECSC Treaty should be carried out on the basis of Article 88 EC and Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1).

48 As regards the applicable substantive law, the Commission considers that it is necessary to distinguish between the aid for 2001 and that for 1998 and 2000. In relation to the aid for 2001, the contested decision had to apply Article 7 of Regulation No 1407/2002 in accordance with paragraph 47 of Communication 2002/C 152/03, to reflect the intention of the legislature expressed in recital 24 in the preamble to Regulation No 1407/2002 to apply it retroactively, as well as with Case C-162/00 *Pokrzeptowiz-Meyer* [2002] ECR I-1049, paragraph 50, and the role of *lex generalis* which Article 305 EC affords to the EC Treaty in relation to the ECSC Treaty.

49 The Commission also submits that, in any event, the content of Article 7 and the Annex to Regulation No 1407/2002 is identical to that of Article 5 and the Annex to Decision No 3632/93 which was formerly applicable, save only that the new set of rules authorises aid for the complete closure of production units, whereas the ECSC rules also authorised aid for partial closure. Nevertheless, the Commission points out that, in the present case, the aid granted in 2001 is related to the complete closure of the installations of the La Prohida subsector. Since the rules applicable are thus identical in the present case, the succession over time of the rules applying under the ECSC Treaty and those applying under the EC Treaty did not adversely affect the applicant.

50 As regards the aid granted in 1998 and 2000, the Commission submits that the contested decision did not make any new analysis on the basis of the general rules of the ECSC Treaty or the EC Treaty, but merely verified whether the conditions laid down in Decisions 98/637 and 2001/162 had been complied with. The lawfulness of that aid should thus be assessed only in the light of the conditions laid down in those authorisation decisions, which are still fully in force.

51 In respect of the applicant's argument that the Commission should have acted on the basis of Article 226 EC, the latter considers that, if it is accepted that the EC Treaty is applicable to ensure that the conditions pursuant to which the aid granted under the ECSC Treaty are complied with, the applicability of Article 88 EC, which is the provision applicable *ratione materiae*, cannot be challenged.

52 Finally, the Commission contends that the applicant's submission alleging the lack of competence of the Commission would result in the Commission also having no competence to revoke Decision 2002/827 and that it would be impossible to have a decision taken under the ECSC Treaty annulled after the expiry of that Treaty, since the competence of the Community courts and that of the Commission have the same legal basis.

Findings of the Court

53 The Community Treaties put in place a unique legal order (see, to that effect, Opinion 1/91 of the Court of 14 December 1991, ECR I-6079, paragraph 21, and Case T-120/89 *Stahlwerke Peine-Salzgitter* v *Commission* [1991] ECR II-279, paragraph 78) in the context of which, as is reflected in Article 305(1) EC, the ECSC Treaty constituted a specific regime derogating from the general rules established by the EC Treaty.

54 Pursuant to Article 97 thereof, the ECSC Treaty expired on 23 July 2002. Consequently, on 24 July 2002, the scope of the general scheme resulting from the EC Treaty was extended to the sectors which were initially governed by the ECSC Treaty.

55 Although the succession of the legal framework of the EC Treaty to that of the ECSC Treaty has led, since 24 July 2002, to a change of legal bases, procedures and applicable substantive rules, that succession is part of the unity and continuity of the Community legal order and its objectives. It should be pointed out, in that regard, that the putting in place and maintaining of a system of free competition, within which the normal competitive conditions are ensured and on which, in particular, the rules in the field of State aid are based, constitutes one of the essential objectives of both the EC Treaty (see, in the latter regard, to that effect, Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 31) and of the ECSC Treaty (see, to that effect, Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 33, and Case T-89/96 *British Steel* v *Commission* [1999] ECR II-2089, paragraph 106). In that context, although the rules of the ECSC and the EC Treaties governing the regime relating to State aid differ to a certain extent, it must be pointed out that aid granted under the ECSC Treaty falls within the meaning of aid for the purposes of Articles 87 EC and 88 EC. Thus, the pursuit of the aim of undistorted competition in the sectors which initially fell within the common market in coal and steel is not suspended by the fact that the ECSC Treaty has expired, since that objective is also pursued in the context of the EC Treaty.

56 The continuity of the Community legal order and the objectives which govern its functioning thus require that, in so far as it succeeds the European Coal and Steel Community and in its own procedural framework, the European Community ensures, in respect of situations which came into being under the ECSC Treaty, compliance with the rights and obligations which applied *eo tempore* to both Member States and individuals under the ECSC Treaty and the rules adopted for its application. That requirement applies all the more in so far as the distortion of competition resulting from the non-compliance with the rules in the field of State aid is liable, under the EC Treaty, to expand its effects over time after the expiry of the ECSC Treaty.

57 It follows from the above that, contrary to what the applicant contends, Article 88(2) EC must be interpreted as enabling the Commission to review, after 23 July 2002, the compatibility with the common market of State aid granted in the fields falling

with the scope of the ECSC Treaty *ratione materiae* and *ratione temporis*, and the application by the Member States of decisions authorising State aid adopted pursuant to the ECSC Treaty, in respect of situations existing prior to the expiry of that Treaty.

58 In addition, the succession, within the Community legal order, of rules of the EC Treaty in a field which was originally governed by the ECSC Treaty must take effect in conformity with the principles governing the temporal application of the law. In that regard, it follows from settled case-law that, although procedural rules are generally held to apply to all disputes pending at the time when they enter into force, this is not the case with substantive rules. The latter must be interpreted, in order to ensure respect for the principles of legal certainty and the protection of legitimate expectations, as applying to situations existing before their entry into force only in so far as it clearly follows from their wording, objectives or general scheme that such an effect must be given to them (see Joined Cases 212/80 to 217/80 *Salumi* [1981] ECR 2735, paragraph 9; Case 21/81 *Bout* [1982] ECR 381, paragraph 13; and Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraph 55).

59 From that point of view, as regards the question of the substantive provisions applicable to a legal situation which was definitively established before the expiry of the ECSC Treaty, the continuity of the Community legal order and the requirements relating to the principles of legal certainty and the protection of legitimate expectations require the application of substantive provisions drawn from the ECSC Treaty to the facts which fall within their scope of application *ratione materiae* and *ratione temporis*. Just because, by reason of the expiry of the ECSC Treaty, the regulatory framework in question is no longer in force at the time when the assessment of the factual situation is carried out does not alter that situation since that assessment concerns a legal situation which was definitively established at a time when substantive provisions adopted under the ECSC Treaty were applicable.

60 In the present case, the contested decision was adopted on the basis of Article 88(2) EC following a procedure carried out in accordance with Regulation No 659/1999. The provisions concerning the legal basis and the procedure followed until the adoption of the contested decision fall within the scope of procedural rules for the purposes of the case-law referred to in paragraph 58 above. Since the contested decision was adopted after the expiry of the ECSC Treaty, the Commission rightly applied Article 88(2) EC and the procedural rules contained in Regulation No 659/1999.

61 As regards substantive rules, and in so far as the applicant's arguments seek to claim that the contested decision is unlawful by reason of the allegedly incorrect application of Regulation No 1407/2002, it should be pointed out, first of all, that the contested decision concerns legal situations which definitively existed before the expiry of the ECSC Treaty since all the relevant facts took place before 23 July 2002. The contested decision aims to examine, first, the possible misapplication of the aid granted for 1998 and 2000 and, second, the compatibility with the common market of the aid granted for 2001 in anticipation of authorisation from the Commission.

62 Thus, the review of the use of the State aid granted for 1998 and 2000 must be carried out under Authorising Decisions 98/637 and 2001/162, since those decisions set out in the conditions for the granting of that aid. In so far as those authorising decisions require compliance with the reglementary framework established by Decision No 3632/93, the use of the State aid granted for 1998 and 2000 must be examined in the light of the rules laid down in that decision.

63 Similarly, the compatibility of the State aid paid for 2001 must be examined in the light of the rules set out in Decision No 3632/93. Although the reglementary framework which that decision established has not been in force since 24 July 2002 and thus cannot determine the compatibility of the aid granted after that date, that framework nevertheless constituted the regime applicable at the time of the facts at issue.

64 The Court finds, however, that, although the Commission stated, in recital 63(a) in the preamble to the contested decision, that it was reviewing the use of the aid corresponding to 1998 and 2000 in the light of the conditions laid down by Decisions 98/637 and 2001/162 and, as a consequence, the rules set out in Decision No 3632/93, in recital 74 in the preamble to the contested decision the Commission nevertheless decided to proceed to analyse the aid to cover the exceptional costs of restructuring in the La Prohida subsector on the basis of Article 7 and the Annex to Regulation No 1407/2002.

65 Similarly, although, in recital 74 in the preamble to the contested decision, the Commission expressed its intention to examine the aid to cover the costs relating to the partial closure of the Buseiro sector on the basis of Decision No 3632/93, it nevertheless explicitly examined, in recitals 81 to 83 and 86 in the preamble to that decision, the compatibility with the common market of some of that aid on the basis of Regulation No 1407/2002.

66 In addition, in recital 63(b) in the preamble to the contested decision, the Commission stated that, pursuant to paragraph 47 of Communication 2002/C 152/03, it intended to examine the compatibility of the aid for 2001, paid in anticipation of authorisation from the Commission, with Article 7 of Regulation No 1407/2002.

67 It must be pointed out, however, that, under the second subparagraph of Article 14(1) of Regulation No 1407/2002, that regulation is to apply from 24 July 2002. An exemption, laid down in Article 14(2), makes it possible, on the basis of a reasoned request by a Member State, for aid covering costs for 2002 to continue to be subject to the rules and principles laid down in Decision No 3632/93, with the exception of rules regarding deadlines and procedures. It is thus clear from the wording of Article 14 of Regulation No 1407/2002 that that regulation applies to situations existing from 24 July 2002 at the earliest.

68 The Commission was thus not justified in finding, in paragraph 47 of Communication 2002/C 152/03, that State aid put into effect before 23 July 2002 without its prior approval would be subject to the provisions of Regulation No 1407/2002.

69 Moreover, the various arguments put forward by the Commission in support of that submission must be rejected. First, recital 24 in the preamble to Regulation No 1407/2002 cannot lead to the conclusion that the legislature intended to give that regulation retroactive effect (see paragraph 58 above) so that its provisions could be applied to situations prior to 24 July 2002. That recital at most prefigures Article 14 of Regulation No 1407/2002, which provides that, although that regulation entered into force on the day of its publication in the *Official Journal of the European Communities*, namely 2 August 2002, it was already applicable from 24 July 2002.

70 Next, the Commission cannot rely on the judgment in *Pokrzeptowicz-Meyer*. It must be found that the principle referred to in paragraph 50 of that judgment, according to which a new rule applies immediately to the future effects of a situation which came about under the old rule, applies only to situations which are current at the time of entry into force of the new rule, and not in respect of situations which, as in the present case, were definitively established under the old rule (see, to that effect, *Pokrzeptowicz-Meyer*, paragraphs 51 and 52).

71 Finally, it follows precisely from the *lex generalis* nature of the EC Treaty in relation to the ECSC Treaty, enshrined in Article 305 EC, that the specific regime resulting from the ECSC Treaty and the rules enacted for its implementation is, in accordance with the principle *lex specialis derogat legi generali*, applicable only to situations existing prior to 24 July 2002.

72 It follows that Regulation No 1407/2002 did not constitute the regulatory framework on the basis of which the incorrect application of the aid for 1998 and 2000 or the compatibility with the common market of the aid granted for the year 2001 could be examined.

73 The Commission submits, however, that the content of Article 7 and of the Annex to Regulation No 1407/2002 is identical to that of Article 5 and the Annex to Decision No 3632/93 and that the application of the rules under the EC Treaty instead of the rules under the ECSC Treaty did not adversely affect the applicant.

74 It must be pointed out, in that regard, that the irregularity found in the present case would render the contested decision unlawful and, consequently, lead to its annulment only in so far as that irregularity might affect its content. If it were established that, in the absence of that irregularity, the Commission would have arrived at exactly the same conclusion since the irregularity in question was, in any event, incapable of influencing the content of the contested decision, it would not be necessary to annul that decision (see, to that effect, in relation to disputes regarding the appropriate legal basis, Case C-491/01 *British American Tobacco (Investments) and Imperial Tabacco* [2002] ECR I-11453, paragraph 98; Case C-211/01 *Commission* v *Council* [2003] ECR I-8913, paragraph 52; and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 44; see also, to that effect, in relation to the infringement of procedural rights, Case 30/78 *Distillers* v *Commission* [1980] ECR 2229, paragraph 26; Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 31; and, finally, Case T-314/01 *Avebe* v *Commission* [2006] ECR I-3085, paragraph 67).

75 It should be pointed out that the substantive provisions of Regulation No 1407/2002 on the basis of which the incorrect use and the compatibility of the aid were examined, namely Article 7 and point 1(c), (f), (g), (h), (i) and (k) of the Annex to that Regulation, contain rules identical to those laid down in Article 5 and paragraph I(c), (e), (f), (g), (h), (i) and (k) of the Annex to Decision No 3632/93. Consequently,

the Commission would have arrived at exactly the same conclusion if it had correctly applied Decision No 3632/93.

76 Furthermore, it is also apparent from the contested decision that, in certain cases, the Commission nevertheless applied Decision No 3632/93 carefully since it examined whether certain costs fell within the category referred to in paragraph I(l) of the Annex to that decision, which is a category of costs which was not included in the Annex to Regulation No 1407/2002.

77 Given that the incorrect application of Regulation No 1407/2002 instead of Decision No 3632/93 did not have any repercussions on the meaning and the content of the contested decision, it cannot be found that that irregularity, as regrettable as it may be, is sufficient to render the contested decision unlawful.

78 For all of the above reasons, the first plea, alleging a lack of competence on the part of the Commission to adopt the contested decision on the basis of Article 88(2) EC must be rejected. That same finding also applies in so far as the applicant claims by its first plea that the contested decision is unlawful by reason of the application of Regulation No 1407/2002.

The second plea, alleging infringement of essential procedural requirements in the procedure followed to revoke Articles 1, 2 and 5 of Decision 2002/827 and to adopt the contested decision

Arguments of the parties

79 The applicant submits that the procedure used by the Commission to adopt the contested decision was not appropriate.

80 In response to the Commission's arguments, the applicant denies that the plea is inadmissible and claims that a decision to initiate an investigation procedure on the basis of Article 88(2) EC is capable of being challenged in so far as it classifies the aid as existing or new (Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraphs 39 to 43). First, the applicant has not challenged the classification of the aid examined in the present case by Decision 2002/827 and, second, the decision of 19 February 2003 to initiate the investigation procedure did not alter the classification in question. There was thus no need to bring an action against the latter decision.

81 The applicant next submits that neither Article 88(2) EC nor Regulation No 659/1999 contains a provision stipulating the procedure to be followed to revoke an unfavourable decision. Article 9 of Regulation No 659/1999 is applicable only to the revocation of favourable decisions taken pursuant to Article 4(2) or (3), or Article 7(2), (3), (4) of that regulation, that is to say, decisions by which the Commission finds there not to be aid or that aid is compatible with the common market, whether that be with or without conditions. The revoked articles concerned aid which was either regarded as having been used incorrectly or declared to be incompatible with the common market. In addition, Article 9 of Regulation No 659/1999 provides for the revocation of a decision where that decision is based on incorrect information which is provided during the procedure and which is a determining factor in reaching that decision. However, the revocation of Articles 1, 2 and 5 of Decision 2002/827 was not the result of incorrect information but of an unlawful act caused by the infringement of the applicable rules of procedure.

82 The applicant submits that, since Regulation No 659/1999 does not lay down any procedure for the revocation of unfavourable decisions which are unlawful, the Commission should have revoked the contested decision of its own motion and without delay. By applying the procedure laid down in Article 9 of Regulation No 659/1999 to revoke Articles 1, 2 and 5 of Decision 2002/827, the Commission infringed the principle of legality in so far as it maintained those provisions in force until the date on which the contested decision was adopted, namely 5 November 2003, even though it was aware that they were unlawful, thereby forcing the

applicant to bear the costs and disadvantages related to the enforcement proceedings initiated by the Spanish authorities. The Commission also infringed the principle of good administration, as laid down in Article 41(1) of the Charter of Fundamental Rights of the European Union, according to which every person has the right to have his or her affairs handled within a reasonable time by the institutions and bodies of the Union.

83 The applicant adds that, given that it found it necessary to revoke Articles 1, 2 and 5 of Decision 2002/827, the Commission cannot dispute the unlawfulness of that decision.

84 In addition, it disputes the relevance of the fact that the action was not brought against Article 6 of the contested decision, since the action does not seek annulment of the revocation made by that provision, but concerns the revocation procedure followed by the Commission.

85 The Commission considers that that plea is inadmissible because it was brought out of time. The decision of 19 February 2003 to initiate the procedure precludes the immediate revocation of Articles 1, 2 and 5 of Decision 2002/827. The applicant should thus have brought an action against the decision to initiate the procedure.

86 In addition, the Commission states that, since the action is not brought against Article 6 of the contested decision, which revokes Articles 1, 2 and 5 of Decision 2002/827, the action cannot be directed at the way in which that revocation was carried out. If the Commission had immediately revoked the decision it would, in any event, have been required to initiate the procedure laid down in Article 88(2) EC to re-examine the compatibility of the aid in question. According to the Commission, the failure to have revoked the decision immediately does not affect

the provisions at issue in the present action in any way. In addition, on the assumption that Article 9 of Regulation No 659/1999 does not permit the type of revocation which was carried out in the present case, that unlawful act concerned only Article 6 of the contested decision, which is a provision which the present action is not directed at.

87 The Commission next submits that Decision 2002/827 turned out to be based on partially incorrect information as a result of qualifications occasioned by the applicant when it submitted new information as part of the procedure which led to the adoption of the contested decision. It concedes that the reasons which led it to reopen the procedure, namely doubts about the procedure which led to the adoption of Decision 2002/827 and an interest in strengthening procedural guarantees, are not expressly laid down in Article 9 of Regulation No 659/1999. However, according to the Commission, the cases of revocation specified in that provision are not exhaustive. The general principles of Community law permit the revocation of negative decisions where doubts arise in respect of the regularity of the adoption procedure (Case 15/85 *Consortia Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraphs 12 and 17).

88 As regards the way in which the re-examination was carried out, the Commission submits that that re-examination was likely to have an effect on the applicant's competitors. The method of re-examination of the situation was thus, according to the Commission, in conformity with the principles of legality and good administration.

Findings of the Court

— Admissibility

89 According to settled case-law, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct

change in his legal position is an act or a decision which may be the subject of an action for annulment in terms of Article 230 EC for a declaration that it is void (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9; Case T-81/97 *Regione Toscana* v *Commission* [1998] ECR II-2889, paragraph 21; and order of the Court of First Instance in Case T-276/02 *Forum 187* v *Commission* [2003] ECR II-2075, paragraph 39).

90 In the case of acts or decisions adopted by a procedure involving several stages in particular where they are the culmination of an internal procedure, an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (*IBM* v *Commission*, paragraph 10, and Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 42).

91 In accordance with that case-law, the final decision adopted by the Commission in order to conclude the formal review procedure provided for in Article 88(2) EC constitutes a measure which may be contested on the basis of Article 230 EC. Such a decision produces effects which are binding on and capable of affecting the interests of the parties concerned, since it concludes the procedure in question and definitively decides whether the measure under review is compatible with the rules applying to State aid. Accordingly, interested parties are always able to contest the final decision which concludes the formal review procedure and must, in that context, be able to challenge the various elements which form the basis for the position definitively adopted by the Commission (Case T-190/00 *Regione Siciliana* v *Commission* [2003] ECR II-5015, paragraph 45).

92 That right is independent of whether the decision to initiate the formal review procedure gives rise to legal effects which may be the subject-matter of an action for annulment. The right to contest a decision to initiate the formal procedure may not diminish the procedural rights of interested parties by preventing them from challenging the final decision and relying in support of their action on defects at any

stage of the procedure leading to that decision (*Regione Siciliana* v *Commission*, paragraphs 46 and 47).

93 Therefore, the Commission cannot rely on the fact that the second plea put forward by the applicant was raised out of time.

— Substance

94 The applicant submits, in effect, that the contested decision is vitiated by a substantial procedural defect. Since the procedure laid down in Article 9 of Regulation No 659/1999 is not applicable, the Commission infringed the principles of legality and good administration by revoking Articles 1, 2 and 5 of Decision 2002/827 only at the end of the formal investigation procedure initiated with a view to the adoption of the contested decision and not immediately when the decision to initiate that formal procedure was adopted.

95 It should be pointed out, in that regard, that the procedure laid down in Article 9 of Regulation No 659/1999 was not applied in the present case. Neither the decision to initiate the formal investigation procedure nor the contested decision refer to the application of the procedure laid down in Article 9 of Regulation No 659/1999. It follows that, in so far as the applicant submits in the context of this plea that the Commission was wrong to use the procedure laid down in Article 9 of Regulation No 659/1999, the plea must be rejected as lacking any factual basis.

96 In addition, as the applicant contends, that procedure was not applicable. It is apparent from the wording of Article 9 of Regulation No 659/1999 that the

procedure laid down in that provision applies only to the revocation of positive decisions taken pursuant to Article 4(2) or (3), or Article 7(2), (3) or (4) of that regulation, adopted on the basis of incorrect information provided during the procedure. In the present case, Articles 1, 2 and 5 of Decision 2002/827 constitute a negative decision since they establish the wrongful application of an amount of aid authorised for 1998 and 2000 and the incompatibility with the common market of the aid granted unlawfully for 2001.

97 That said, it must be pointed out that, in any event, the Commission's right to revoke a decision on State aid is not restricted solely to the situation referred to in Article 9 of Regulation No 659/1999. That provision is merely a specific expression of the general principle of law according to which retrospective withdrawal of an unlawful administrative act which has created subjective rights is permissible (see, inter alia, Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Assembly* [1957] ECR 39, at 56; Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 10; and Case T-197/99 *Gooch* v *Commission* [2000] ECR-SC I-A-271 and II-1247, paragraph 53), in particular if the administrative act at issue was adopted on the basis of false or incomplete information provided by the party concerned (see Case 42/59 and 49/59 *S.N.U.P.A.T.* v *High Authority* [1961] ECR 53, at 87). The right to withdraw retroactively an unlawful administrative act which has created subjective rights is not, however, limited to that situation alone, since such a withdrawal may always be carried out provided that the institution which adopted the act complies with the conditions relating to reasonable time-limits and the legitimate expectations of beneficiaries of the act who have been entitled to rely on its lawfulness.

98 In the present case, it is apparent from the decision to initiate the formal investigation procedure that the reason for initiating that formal procedure was not based on an erroneous assessment by the Commission in Decision 2002/827 of the unlawful nature of the application of the aid authorised for 1998 and 2000 and the compatibility with the common market of aid granted for 2001, but only on doubts that had arisen as to whether the applicable rules of procedure had been complied with.

99 In addition, it does not appear from the documents before the Court that, when the formal procedure was initiated the Commission had information at its disposal indicating that Articles 1, 2 and 5 of Decision 2002/827 were based on an erroneous assessment of the compatibility of the aid at issue.

100 In addition, it must be found that the fact that Articles 1, 2 and 5 of Decision 2002/827 were not immediately revoked was not capable of having any bearing whatsoever on the content of Articles 1, 3 and 4 of the contested decision, which are the subject of this action for annulment. The applicant has not shown, or even claimed, that the maintaining in force of Decision 2002/827 during the formal investigation procedure was likely to affect the right of the parties concerned to submit their observations.

101 As regards, once more, the circumstance alleged by the applicant (see paragraph 82 above), that the fact that the abovementioned articles were not revoked immediately forced it to bear the costs and disadvantages related to the enforcement proceedings initiated by the Spanish authorities, it is sufficient to point out that, by its very nature, that permit is not relevant in the context of the present action for annulment.

102 Thus, even if it were to be considered as the applicant contends, that the Commission infringed the principles of legality and good administration by failing to revoke Articles 1, 2 and 5 of Decision 2002/827 at the time at which the formal investigation procedure was initiated, such an irregularity, assuming that one is established, would not, in any event, be capable of rendering Articles 1, 3 and 4 of the contested decision invalid.

103 The second plea must therefore be rejected.

The third plea, alleging infringement of the principle of the protection of legitimate expectations and essential procedural requirements

Arguments of the parties

104 The third plea is divided into two parts, the first constituting the primary submission and the second the alternative one.

105 In the first part, the applicant submits that the decision to initiate the formal investigation procedure indicated that that procedure had been reopened with a view to revoking Articles 1, 2 and 5 of Decision 2002/827 and to replacing that decision with a new final decision.

106 The contested decision declared unlawful and unjustified the aid totalling EUR 513 757.49 (ESP 85 482 054) unlawful, relating to the north overburden excavation, in the Busiero sector and the aid totalling EUR 508 456.24 (ESP 84 600 000), relating to the construction of ventilation shafts and other ventilation works in the Sorriba sector. According to the applicant, that aid could, however, have been regarded as compatible with the common market by Decision 2002/827, and was thus not covered by Articles 1, 2 and 5 thereof.

107 In so far as the Commission's favourable position as regards the aid mentioned above was not based on inaccurate information, one of the conditions laid down in Article 9 of Regulation No 659/1999 has not been met. The decision to initiate the revocation procedure was based solely on the infringement of essential procedural requirements in the procedure followed for the purposes of adopting Decision

2002/827. Consequently, since the conditions for the application of Article 9 of Regulation No 659/1999 were not met, the Commission infringed the principle of the protection of legitimate expectations in so far as the applicant was legitimately entitled to consider that Decision 2002/827 was definitive inasmuch as it concerned the aid which had not been declared incompatible with the common market.

108 The applicant submits that the assessment made by the Commission in Decision 2002/827 is based on a document concerning the restoration of abandoned mining works which set out a breakdown of the costs caused by the closure of part of the mining installations. Those costs expressly included the expenses at which the amount of EUR 1 022 213.33 was directed in respect of the north overburden excavation, in the Buseiro sector and the construction of shafts and other ventilation works in the Sorriba sector. In addition, it is apparent from the decision to initiate the formal investigation procedure in order to revoke Decision 2002/827 that the Commission used that document in support of its preliminary analysis of the aid received by the applicant.

109 The applicant denies that the statement of reasons in Decision 2002/827 does not cover the costs at which the amount of EUR 1 022 213.33 was directed and notes that the reasoning of an act must be evaluated in the light not only of its literal reading but also of its context and the facts of the case (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 36, and Case C-114/00 *Spain* v *Commission* [2002] ECR I-7657, paragraph 63).

110 In the second part of that plea, the applicant submits in the alternative that, if the Court of First Instance were to find that Article 9 of Regulation No 659/1999 permitted, in the present case, the revocation of Decision 2002/827, the Commission infringed the procedure applicable under Article 6 of Regulation No 659/1999.

111 That provision requires that, before revoking a favourable decision, the Commission must initiate a formal investigation procedure and that, in the decision to open that formal procedure, it must carry out a preliminary examination of the parts of the decision which it intends to revoke and express its doubts as to the compatibility of the aid in question with the common market. The purpose of that requirement is to enable the interested parties to submit their observations, in accordance with the principle that no unfavourable decision may be adopted without giving the parties adversely affected by the act the opportunity to submit their observations in respect of the doubts which might be entertained by the Commission (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 29; the Opinion of Advocate General Alber in Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, at I-7876, points 96 and 99; and Joined Cases T-228/99 and T-233/99 *Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraphs 142 and 147).

112 The formal investigation procedure initiated by the Commission concerned only the revocation of Articles 1, 2 and 5 of Decision 2002/87 and not the views set out in that decision that were favourable to the undertaking, declaring some of the aid to be compatible with the common market. In addition, the Commission did not carry out any form of preliminary examination or express any doubts about the aid which had been the subject of a positive assessment in Decision 2002/827. On the contrary, according to the applicant, in the decision to initiate the formal investigation procedure the aid considered to be compatible with the internal market in Decision 2002/827 would have been considered as such once again.

113 By not informing the Spanish authorities and the applicant of either the doubts which it had in respect of the aid which had been considered to be compatible with the common market in Decision 2002/827 or of the possible revocation of that decision to a greater extent than only Articles 1, 2 and 5 thereof, the Commission did not enable the Kingdom of Spain and the applicant to submit relevant observations in that regard. Articles 1, 3 and 4 of the contested decision are thus vitiated by a procedural error.

114 The Commission denies that this plea in law is well founded.

Findings of the Court

115 As regards the first part of this plea, the Court observes that it is apparent from recital 3 in the preamble to Decision 2002/827 that the purpose of that decision was, in particular, to examine, first, the possible incorrect use of the aid to cover exceptional costs referred to in Article 5 of Decision No 3632/93, granted for 1998 and 2000 totalling EUR 3 918 049.35 (ESP 651 908 560) and EUR 2 786 246.34 (ESP 463 592 384) respectively and which was covered by authorising decisions 98/637 and 2001/162 and, second, the compatibility with the common market of the aid to cover exceptional costs referred to in Article 5 of Decision No 3632/93, granted for 2001 in anticipation of the Commission's decision, totalling EUR 2 367 817 (ESP 393 971 600).

116 It is apparent from Articles 1 and 2 of Decision 2002/827, read in the light of recitals 3 and 19 to 22 in the preamble to that decision, that the Commission considered that EUR 2 745 428.96 (ESP 456 800 943) of the aid to cover exceptional costs authorised for 1998 and 2000 had been incorrectly used. As regards the aid to cover exceptional costs granted for 2001, the Commission considered that the whole of that aid, namely EUR 2 367 817 (ESP 393 971 600), was incompatible with the common market.

117 It must thus be found that Articles 1, 2 and 5 of Decision 2002/827 declared incompatible with the common market and ordered the Kingdom of Spain to recover all of the aid to cover exceptional costs granted for 1998, 2000 and 2001,

with the exception, however, of the sum of EUR 3 958 866.73 (ESP 658 700 000) granted for 1998 and 2000, which the articles referred to above do not rule on, and which therefore remained within the scope of authorising decisions 98/637 and 2001/162.

118 According to the applicant, the amounts of EUR 513 757.49 (ESP 85 482 054) and EUR 508 456.24 (ESP 84 600 000) relating, respectively, to the north overburden excavation in the Buseiro sector and the construction of ventilation shafts and other ventilation works in the Sorriba sector form part of the amount of EUR 3 958 866.73 (ESP 658 700 000) which corresponds to the part of the aid to cover exceptional costs granted for 1998 and 2000 which was not declared to have been used incorrectly.

119 In that regard, contrary to what the applicant claims, it must be made clear that, although the Commission did not state in Decision 2002/827 that that part of the aid to cover exceptional costs granted for the years 1998 and 2000 had been incorrectly used, it cannot however be considered, *a contrario*, that it took the view that that aid had been used in accordance with the requirements of Article 5 of Decision No 3632/93. In the light of the information which was submitted for its appraisal, the Commission considered only that those amounts of aid had not been used incorrectly. Thus, the fact that Decision 2002/827 found that only part of the aid to cover exceptional costs granted for the years 1998 and 2000 had been incorrectly applied does not confer any additional individual right on the applicant which had not already been conferred by the initial authorising decisions in respect of the other part of the aid in question which was not found to have been incorrectly used. As has already been pointed out in paragraph 117 above, that part of the aid remained within the scope of Authorising Decisions 98/637 and 2001/162 and benefits, as such, from a presumption that it was not used incorrectly (see, to that effect, Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle and Zemag* v *Commission* [2005] ECR II-1579, paragraph 86).

120 In addition, in so far as the Commission intended to revoke Articles 1, 2 and 5 of Decision 2002/827, namely the provisions relating to the incompatibility with the common market of the aid to cover exceptional costs granted for 1998, 2000 and 2001, and to adopt a new decision in that regard, it was bound, in respect of the examination of the possible incorrect use of the aid granted for 1998 and 2000 to carry out that re-examination on a factual basis identical to that which existed when Decision 2002/827 was adopted. Similarly, in so far as the whole of the aid to cover exceptional costs granted for 2001 was declared incompatible with the common market, the Commission had to re-examine that aid in its entirety. Therefore, the examination carried out in the context of the new formal procedure had to relate to all the amounts of aid covered by the first examination in the context of the procedure which led to the adoption of Decision 2002/827. As was pointed out in paragraph 115 above, it is apparent from recital 3 in the preamble to Decision 2002/827 that the purpose of that decision was to examine, first, the possible incorrect use of the amounts of EUR 3 918 049.35 (ESP 651 908 560) and EUR 2 786 246.34 (ESP 463 592 384) granted to the applicant for 1998 and 2000 respectively, in the context of Article 5 of Decision No 3632/93, and, second, the conformity with that provision of the amount of EUR 2 367 817 (ESP 393 971 600), granted to the applicant for the year 2001, in anticipation of the Commission's decision.

121 In the light of the above, the applicant cannot rely on a legitimate expectation that the amounts of aid which were not considered to have been used incorrectly by Decision 2002/827 would not fall within the scope of the Commission's examination in the context of the new formal procedure in which the decision to initiate was notified to the Kingdom of Spain by letter of 19 February 2003.

122 For those reasons, even if it were to be considered, as the applicant contends, that the amounts of EUR 513 757.49 (ESP 85 482 054) and EUR 508 456.24 (ESP 84 600 000) relating, respectively, to the north overburden excavation in the Busiero sector and the construction of ventilation shafts and other ventilation works in the Sorriba sector, were not covered by Articles 1, 2 and 5 of Decision 2002/827, it cannot, in any event, be found that the contested decision was adopted in breach of

the principle of the protection of legitimate expectations based on the fact that, in that latter decision, the Commission considered that the amounts of aid in question were compatible with the common market.

123 The first part of the third plea must therefore be rejected.

124 As regards the second part of that plea, alleging infringement of the procedure applicable under Article 6 of Regulation No 659/1999, it must be noted that, in accordance with that provision, the decision to initiate the formal procedure must give the interested parties the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments. For that purpose, it is sufficient for the parties to be aware of the reasoning which led the Commission provisionally to conclude that the measure in issue might constitute new aid incompatible with the common market (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 138, and Joined Cases T-269/99, T-271/99 and T-272/99 *Diputación Foral de Guipúzcoa and Others* v *Commission* [2002] ECR II-4217, paragraph 105).

125 In carrying out the procedure involving review of State aid the Commission must take account of the legitimate expectations which the parties concerned may entertain as a result of what was said in the decision to initiate the procedure (Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v *Commission* [2001] ECR II-1523, paragraph 126) and, subsequently, that it will not base its final decision on the absence of information which, in the light of what was said in that decision, the parties concerned could not have formed the view that they were under a duty to make available to it.

126 In the present case, the applicant submits that, in the decision to initiate the formal investigation procedure, the Commission did not express any doubts in respect of the compatibility with the internal market of the amounts of EUR 513 757.49 (ESP 85 482 054) and EUR 508 456.24 (ESP 84 600 000) relating, respectively, to the overburden excavation in the Buseiro sector and the construction of ventilation shafts and other ventilation works in the Sorriba sector.

127 The Court finds, however, that the decision to initiate the formal investigation procedure contained observations which enabled the interested parties to submit their arguments in relation to the compatibility with the common market of the amounts of aid at issue.

128 As regards the aid to cover the amount of EUR 513 757.49 (ESP 85 482 054) relating to the overburden excavation in the Busiero sector, it should be observed that, in point 5 of the decision to initiate the formal procedure, entitled 'Request for information', the Commission requested that it be sent a report of independent mining experts containing, in particular, 'evidence as to whether the costs of moving earth in the Buseiro open-cast mine were entered for the financial year in which they were required as operating costs or investment costs'.

129 As the Commission rightly pointed out in its responses to the Court's written questions, it follows from Article 5 of Decision 3632/93 that only costs which are not related to current production may benefit from aid to cover exceptional costs. That rule, which aims to ensure that the same cost does not benefit both from production aid and aid to cover exceptional costs, is applied in the fourth paragraph of point V of Decision 98/637 and in recital 41 in the preamble to Decision 2001/162.

130 Therefore, the applicant could not be unaware, given the applicable reglementary context, the rules of which were reiterated in Authorising Decisions 98/637 and 2001/162, that the entering in the undertaking's accounts of the cost of moving earth in the Buseiro sector as a production cost was likely to lead the Commission to consider that the aid to cover exceptional costs did not comply with the conditions laid down in Article 5 of Decision No 3632/93.

131 In that regard, the Court notes that, although the applicant submits that the costs relating to the moving of earth in the Buseiro sector result from the closing of mining installations, it does not dispute the fact that those costs were partially covered by operating aid within the meaning of Article 3 of Decision No 3632/92 and that those costs thus benefited from cumulation of aid.

132 In the light of the above, the Court considers that the Commission's request for information, referred to in paragraph 128 above, was capable of enabling the applicant to put forward its arguments and to provide the information which it might consider necessary in that regard with full knowledge of the facts.

133 As regards the aid to cover the amount of EUR 508 456.24 (ESP 84 600 000), concerning the construction of ventilation shafts and other ventilation works in the Sorriba sector, the Court finds that, in point 4.2 of the decision to initiate the formal investigation procedure relating to aid to cover exceptional costs for 2001, the Commission stated that 'the costs corresponding to safety work within the mine [did] not correspond ... to the restructuring which took place between 1998 and 2001, in the light of the fact that those works [involved] ventilation shafts necessary for the mining of other reserves in the Sorriba sector'.

134 In addition, in point 5 of that decision, relating to the application for information, the Commission requested that the report of the independent mining experts provide explanations regarding the question whether the objective of the extraction works in 2001, aimed at ensuring the safety of the adjacent sectors and the modification of the ventilation circuit, was to ensure the safety of the abandoned workings or to carry out the work necessary for the exploitation of new reserves.

135 It must thus be found that the Commission expressed doubts as regards the conformity with Article 5 of Decision No 3632/93 of the aid to cover the costs relating to the construction of ventilation shafts and other ventilation works in the Sorriba sector. Therefore, the applicant could reasonably have submitted its observations during the administrative procedure.

136 Since none of the arguments put forward by the applicant in support of the second part of the third plea can be upheld, that part must be rejected.

137 Accordingly, the third plea must be rejected as unfounded in its entirety.

The fourth plea, alleging manifest errors of assessment

138 The applicant submits that the Commission committed manifest errors of assessment in declaring seven amounts of aid to be incompatible with the common market. The Court will examine, in turn, the complaints put forward by the applicant in relation to each of those amounts of aid.

The amount of EUR 295 409.47 (ESP 49 152 000) relating to the construction of 1 030 m of galleries in the La Phohida subsector

— Contested decision

139 In recital 75 in the preamble to the contested decision, the Commission considered, in particular, that the cost of the construction of 1 030 m of galleries needed for the working of the 170 000 t of abandoned coal had been put down, in the undertaking's accounts, to operating costs. In so far as 40% of those costs were covered by State aid, the Commission considered that, in order to avoid a cumulation of incompatible aid, a maximum of 60% of the construction costs of those 1 030 m of galleries could be justified, namely EUR 443 114.21 (ESP 73 728 000). The Commission thus took the view that the remainder, namely EUR 295 409.47 (ESP 49 152 000), was not compatible with the common market.

— Arguments of the parties

140 The applicant submits that the Commission's assessment is unjustified in the light of the definitive cessation of all workings in the La Prohida subsector and in the light of the fact that the Commission considered as compatible with the common market the aid to cover the costs related to the definitive abandonment of a total of 3 070 m of galleries in other parts of the La Prohida subsector.

141 Although the Commission considers that the estimate of the cost of construction of those 1 030 m of galleries is excessive, it did not provide any other comparative criterion which would make it possible to determine what that cost should be under prevailing market conditions.

142 The applicant denies that a significant part of the 1 030 m of abandoned galleries was allocated to the extraction of coal and states that the Commission does not indicate the precise part of those galleries which was used for the alleged mining of the coal reserves, nor the duration of that alleged use. It stresses that the abovementioned gallery was of no practical use before its closure in so far as it had been dug out only in order to gain access to 170 000 t of coal, the extraction of which had been abandoned, which is the reason why that gallery was valued according to its construction cost.

143 In response to the Commission's arguments that 40% of the costs related to the definitive abandonment of 1 030 m of galleries in the La Prohida subsector were covered by operating aid, the applicant claims that operating aid and aid to cover exceptional costs have different objectives and must therefore be distinguished. The fact that those costs were entered as operating costs in the annual accounts does not prevent them from being assimilated to exceptional costs, since those costs do not result from current production but from the closure of mining installations.

144 The Commission denies that the arguments put forward by the applicant are well founded.

— Findings of the Court

145 It should be noted that, in its written pleadings, the applicant expressly admits that the costs relating to the construction of the 1 030 m of galleries were entered as operating costs in the undertaking's accounts. The applicant also does not contest the fact, stated in recital 75 in the preamble to the contested decision, that those costs were covered by operating aid within the meaning of Article 3 of Decision

No 3632/93. In so far as the applicant submitted, at the hearing, that the proportion of the costs which were covered by operating aid was not established in a sufficiently precise manner by the Commission, it must be found that it did not provide any information that would show any error on that institution's part.

146 Accordingly, it cannot be found that the Commission made a manifest error of assessment by accepting the compatibility of the aid to cover exceptional costs in respect only of 60% of the costs considered. As the Commission rightly points out, to allow 100% of those cost and closure aid would give rise to a cumulation of aid of 140%, which would be manifestly incompatible with the common market.

147 In addition, since the reason for which the amount of aid at issue was declared incompatible is based on the fact that the cost of the construction of 1 030 m of galleries was recorded as an operating cost, the applicant's argument claiming that the Commission wrongly considered that the cost of the construction of those galleries was excessive, is irrelevant.

148 Finally, the applicant also cannot plead that the Commission accepted the compatibility of the aid intended to cover the costs relating to the definitive abandonment of a total of 3 070 m of galleries in other parts of the La Prohida subsector. The Commission authorised that aid in the light of the fact that, in the undertaking's accounts, the costs relating thereto were recorded as fixed assets.

149 That complaint must therefore be rejected as unfounded.

The amount of EUR 513 757.49 (ESP 85 482 054) relating to the moving of 1 005 080 m^3 of earth in the Buseiro sector

— Contested decision

150 In recital 81 in the preamble to the contested decision, the Commission stated that the amount of EUR 1 902 805.52 (ESP 316 600 200) related to the movement of 1 005 080 m^3 of earth in the Buseiro sector was entered in the undertaking's accounts as an operating cost. The Commission observed that the applicant had received aid to cover operating losses, which were of the order of 27% of the production costs. Consequently, 27% of the EUR 1 902 805.52 (ESP 316 600 200) corresponding to the moving costs recorded by the undertaking, namely EUR 513 757.49, could not be covered by closure aid since they were already covered by aid to compensate the open-cast operating losses.

— Arguments of the parties

151 The applicant submits that the Commission merely considered that the volume of additional earth moved had been overvalued, without, however, providing any information which would make it possible to determine the volume which it might have been possible to regard as reasonable to move. The applicant disputes, in that regard, the relevance of the Commission's argument alleging that the vein of abandoned coal had a high level of ash, given that, irrespective of the percentage of ash of the abandoned reserves of 585 000 t, the volume of earth moved to gain access at more than 545 m above sea level, which is the level at which those reserves were situated, had remained the same.

152 The applicant maintains, in addition, that the cost of moving 1 005 080 m^3 of additional earth, namely ESP 315 per m^3, was in line with the market conditions at the time it was carried out, as is confirmed by the report by independent mining experts. It adds that that price is lower than the cost borne by the applicant for the work involved in modernising, setting up, loading and transporting earth in 1995 and 1996, which amounted on average to ESP 352.60 per m^3.

153 In response to the Commission's arguments, according to which 27% of the costs relating to moving earth in the Buseiro sector were covered by operating aid, the applicant claims that operating aid and aid to cover exceptional costs have different objectives and must therefore be distinguished. The fact that those costs were entered as operating costs in the annual accounts does not prevent them from being assimilated to exceptional costs, since those costs do not result from current production but from the closure of mining installations.

154 The Commission denies that the arguments put forward by the applicant are well founded.

— Findings of the Court

155 In must be noted that, in its written pleadings, the applicant expressly admits that the costs relating to the moving of 1 005 080 m^3 of earth have been recorded as operating costs in the undertaking's accounts, as is also indicated in the report of the independent mining experts. The applicant also does not dispute the fact, stated in recital 81 in the preamble to the contested decision, that approximately 27% of those costs were covered by operating aid. As the Court held in paragraph 145 above, in so far as the applicant submitted, at the hearing, that the proportion of the costs which were covered by operating aid was not established in a sufficiently precise manner by

the Commission, it must be held that it did not provide any information that would show any error on that institution's part.

156 Accordingly, it cannot be found that the Commission made a manifest error of assessment by accepting the compatibility of the aid to cover exceptional costs in respect only of 73% of the total costs of the moving of the 1 005 080 m^3 of earth at issue. As the Commission rightly points out, to allow 100% of those costs as closure aid would give rise to a cumulation of aid of 127%, which would be manifestly incompatible with the common market.

157 In addition, it must be found that, since, in the contested decision, the reason for which the amount of EUR 513 757.49 was declared incompatible with the common market was based on the fact that the costs relating to the moving of earth were recorded as operating costs in the undertaking's accounts, the applicant's arguments seeking to challenge the Commission's views concerning the over evaluation of the volume of earth displaced and of the cost of that work, which were put forward for the sake of completeness, are irrelevant.

158 That complaint must therefore be rejected as unfounded.

The amount of EUR 547 066.46 (ESP 91 024 200) corresponding to the agreements signed with the Government of Asturias to guarantee the restoration of land

— Contested decision

159 In recital 85 in the preamble to the contested decision, the Commission stated that the costs amounting to EUR 547 066.46 (ESP 91 024 200), corresponding to the

agreements signed with the Government of Asturias to guarantee the restoration of land after the mining of the open-cast deposit, are part of the production costs of the coal extracted in the western zone of the Buseiro sector. It considered that 'land restoration [was] the final part of the production cycle of an open-cast mine and [that] the cost of that restoration [was] a component of the total cost of the coal extracted'. It stated that the applicant '[did] not provide justification that abandonment of the mine waste tip involves additional restoration costs' and that, on the contrary, it justified those expenses 'on the basis of the legal obligation established by Royal Decree 1116/1984 of 9 May 1984 and the Order of the Ministry of Industry and Energy dated 13 June 1984 developing it, which establishes that after operations, the areas affected [had to] be restored'. The Commission noted that 'the company [had] received State aid to cover all operating losses, including the restoration of the open-cast mine of Buseiro, [and that] the new aid would be on top of that received to cover operating losses'. The Commission thus considered that the amount of EUR 547 066.46 (ESP 91 024 200) could not be authorised.

— Arguments of the parties

160 The applicant states that Royal Decree 1116/1984 of 9 May 1984 and the implementing decree of the Ministry of Industry and Energy dated 13 June 1984 require mining undertakings to restore land situated in open-cast coal mines which have been abandoned.

161 The applicant restored the 77 ha of land concerned by the mining of the open-cast deposit of Buseiro. A part of that area, namely 24.87 ha, corresponds to the area of a waste tip in the eastern zone of the Buseiro deposit which had been abandoned as a result of the new sea level. The applicant states that, in accordance with its statutory obligations, it provided securities to a total amount of EUR 1 693 504.15 (ESP 281 775 381) as a guarantee for the restoration of the land and that the cost of the restoration work for the 24.87 ha of the waste tip was evaluated proportionately in

relation to the securities provided. That cost thus amounted to EUR 547 066.46 (ESP 91 024 200).

162 The applicant submits that the abandonment and the restoration of the land stemmed from the modernisation, rationalisation and restructuring which it had undertaken in order to benefit from the aid to cover exceptional costs laid down in Article 5 of Decision No 3632/93, not from the end of the coal production cycle at the Buseiro site. It states that it is illogical for the Commission to consider the costs relating to the abandonment of the waste tip to be justified and not those related to its restoration, since the latter is directly related to the abandonment of the waste tip.

163 The applicant alleges that the Commission's reasoning is such as to lead to the assumption that any costs borne in execution of a statutory obligation cannot be classed as exceptional costs within the meaning of Article 5 of Decision No 3632/93, which would mean that paragraph I(e) of the Annex to that decision, which classes residual costs resulting from administrative, legal or tax provisions as exceptional costs, has no practical effect.

164 In response to the written questions of the Court, the applicant stated that the contested decision contained an error in so far as it was stated that the 24.87 ha of the waste tip in question were situated in the western zone of the Buseiro sector although they were actually situated in the eastern zone of that sector. In addition, it stated that that land was not necessary for the mining activities carried out in the western zone of the Buseiro sector and that they had not been used for that purpose. However, at the hearing, the applicant went back on that statement and indicated that the area in question had been used for the storage of the rubble resulting from the extraction of coal in the western part of the Buseiro sector.

165 The Commission denies that the applicant's arguments are well founded.

— Findings of the Court

166 The Court observes that the applicant claims only that the abandonment and the restoration of the land stemmed from the restructuring carried out in order to obtain aid under Article 5 of Decision No 3632/93.

167 Inasmuch as, in accordance with Royal Decree 1116/1984 of 9 May 1984, and as is common ground between the parties, the costs of restoring the land have to be borne in any case by the undertakings at the end of the production cycle, they are an inherent part of the activity of mining. Consequently, the Commission was entitled, without making a manifest error of assessment, to take the view that those costs should have been counted as production costs.

168 In the light of the fact that the applicant received aid to cover operating losses, the Commission was entitled to find that those costs had already been covered by operating aid and that aid to cover exceptional costs would be additional to the aid received to cover operating losses.

169 In that context, it must be found that it does not follow from the arguments put forward by the applicant that it provided information to the Commission during the administrative procedure intended to explain why, as a result of the abandonment of the mining of part of the reserves of the Buseiro sector, part of the costs relating to the restoration of the 24.87 ha of the waste tip in question had not been covered by the results of the mining activities.

170 In the light of the above, the Court takes the view that the Commission did not commit a manifest error of assessment in considering that the aid totalling EUR 547 066.46 (ESP 91 024 200) was incompatible with the common market.

171 As regards the argument put forward by the applicant alleging that the costs of restoration of the land should be able to benefit from aid to cover exceptional costs since other costs relating to the abandonment of the waste tip were considered to be justified, it is sufficient to point out that the restoration costs represent costs which the applicant had to bear in any case at the end of the production cycle. The Commission was thus entitled, without contradicting itself, to consider, first, that other costs relating to the abandonment of the waste tip could be covered by restructuring aid since those costs would not have had to be borne by the applicant if it had not reduced its production capacity and, second, that the restoration costs for the 24.87 ha of land should have been included with operating costs since, as pointed out in paragraph 167 above, those costs had to be borne in any case by the applicant at the end of the production cycle.

172 In addition, the applicant has no basis for claiming that the Commission's reasoning would deprive paragraph I(e) of the Annex to Decision No 3632/93 of any practical effect. The Commission's reasoning is based on the fact that the restoration costs of the land had to be borne, in any event, by the applicant at one time or another since that restoration was part of the final phase of the production cycle. Paragraph I(e) of the Annex to Decision No 3632/93 none the less permits the covering of costs resulting from tax, legal or administrative provisions which the undertaking would never have had to bear in the absence of restructuring measures.

173 That complaint must therefore be rejected as unfounded.

The amount of EUR 372 176.75 (ESP 61 925 000) corresponding to the purchase price of the land bordering the western zone of the Buseiro sector, which was abandoned following the change in sea level

— Contested decision

174 In recital 86 in the preamble to the contested decision the Commission found as follows:

'The land acquired by the company for open-cast mining is registered among the company's fixed assets, but is not an asset that depreciates. The Commission cannot authorise the aid amounting to EUR 372 176.75 ([ESP] 61 925 000) corresponding to the purchase price of the land, since this is not considered to be a lost asset and the aid is not covered by any of the points of the Annex [to] Regulation (EC) No 1407/2002.'

— Arguments of the parties

175 The applicant claims that the purchase of the land at issue enabled the excavation work to be carried out and the embankment to be put in place which were necessary for the mining of the deposit in accordance with the initial project. However, those works ceased to be of any value following the change in sea level in the western zone of the seam. The applicant states that the difference in price between the areas of land which were acquired is attributable to the fact that the seller had managed to impose a selling price which was higher than the market value by reason of the urgency with which a large area of land needed to be acquired.

176 The applicant argues that that land is not a lost asset and does not constitute an asset that depreciates. In its view, the costs at issue could be classed as exceptional intrinsic depreciation within the meaning of paragraph I(k) of the Annex to Decision No 3632/93.

177 In addition, it submits that the Commission contradicts itself since, in considering the aid aimed at covering the residual value of the La Phohida subsector of EUR 2 053 495.41 (ESP 341 672 888) as justified, it included the cost of the acquisition of the land abandoned following the closure of the subsector for an amount of ESP 10 436 600.

178 The Commission denies that the applicant's arguments are well founded.

— Findings of the Court

179 Paragraph I(k) of the Annex to Decision No 3632/93 allows the aid referred to in Article 5 of that decision to extend to costs relating to 'exceptional intrinsic depreciation provided that it results from the restructuring of the industry (without taking account of any revaluation which has occurred since 1 January 1986 and which exceeds the rate of inflation)'.

180 In the present case, it is sufficient to point out that the applicant admits, in its written pleadings, that the land at issue was not subject to depreciation after the activities for which it was used were brought to an end. The applicant thus cannot legitimately claim that those costs may fall within the category referred to in Paragraph I(k) of the Annex to Decision No 3632/93.

181 Consequently, it cannot be found that the Commission made a manifest error of assessment by holding that the costs in dispute could not be covered by restructuring aid.

182 The applicant claims, however, that the Commission's practice is incoherent and contradictory inasmuch as it accepted that the aid to cover the residual value of the La Phohida subsector also covers the cost of the acquisition of the abandoned land. It must be pointed out, however, that that fact does not alter the finding made above that the Commission did not make a manifest error of assessment in considering that the purchase value of the land acquired by the undertaking for the open-cast mine did not amount to exceptional intrinsic depreciation as referred to in Paragraph I(k) of the Annex to Decision No 3632/93, since it is common ground that that land did not constitute a depreciating asset.

183 In addition, in so far as the Commission accepted that the costs of land which were not subject to depreciation were covered by aid to cover exceptional costs on the basis of Paragraph I(k) of the Annex to Decision No 3632/93, or an equivalent provision of Regulation No 1407/2002, that acceptance does mean that the contested decision is vitiated by a manifest error of assessment in that regard. It must instead be held that the Commission made a manifest error of assessment in accepting that the purchase cost of the non-depreciated land abandoned after closure of the La Prohida subsector might be covered by aid to cover exceptional costs. In that regard, it is sufficient to point out that, by virtue of the principle of legality, the applicant cannot rely, in support of his claim, on an unlawful act committed in the context of the assessment of the compatibility with the common market of other amounts of aid (see, to that effect, Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 160).

184 It follows from the above that this complaint must be rejected as unfounded.

The amount of EUR 1 403 316.30 (ESP 233 492 186) relating to the costs incurred following the repayment of the subsidies granted under the SPCA

— Contested decision

185 In recital 87 in the preamble to the contested decision, concerning the amount of EUR 1 403 316.30 (ESP 233 492 186) relating to the refundable subsidies received by the applicant under the programme entitled 'Plan Estatéfico de Accíon Competitiva' (Strategic Plan for Competitive Action) (SPCA), whose purpose is to promote the production of coal in economically viable conditions and to increase productivity, the Commission stated that those loans had '[been] received during the period 1990 to 1993 when the projects [had been] implemented', and that it was apparent from Annex III to the agreement signed with the Ministry of Industry and Energy that the refundable loan of ESP 315 500 000 was mainly intended for the establishment of the new system of operation by 'soutirage'. According to the Commission, 'Annex III of the SPCA Agreement also refer[ed] to "clear indications of exceptional open-cast operations, which would enhance the estimated profitability of the whole" and of an annual production target of 240 000 marketable tonnes, which was exceeded'.

186 The Commission found that the repayment of ESP 233 492 186 (EUR 1 403 316) in 1999 and 2000 corresponded to the repayments of the loans received between 1990 and 1993 and was unrelated to the plan notified to the Commission for the period from 1998 to 2001 to reduce the undertaking's activities. The Commission also stated that it was apparent from the letter of the Ministry of Industry and Energy sent by registered post on 22 December 1997, and other documents which were sent to it, that the repayments which the undertaking made in 1999 and 2000 were much

higher than envisaged in the initial plan, owing to payment delays. It pointed out that the refundable loan of ESP 313 500 000 was accompanied by non-refundable subsidies of ESP 209 000 000 and ESP 23 000 000 for research and technological development activities.

187 The Commission noted that the applicant received aid each year to cover approximately 40% of the underground operating costs and 27% of the open-cast operating costs. In addition, the entire residual value on 31 December 2000 of the fixed assets in the La Prohida subsector and in a substantial part of the Buseiro sector was proposed to be authorised under the contested decision. The Commission thus considered that the aid amounting to ESP 233 492 186 (ESP 181 292 186 for 1998 and ESP 52 200 000 for 2000) corresponding to the repayment of SPCA subsidies, which could include investments in mine works in the La Prohida subsector, would have resulted in a cumulation of aid incompatible with the common market.

— Arguments of the parties

188 The applicant states that it received an amount of ESP 313 500 000 by way of a refundable subsidy which, in accordance with the contract concluded on 30 December 1989 with the Ministry of Industry and Energy, was allocated to the installations and assets aimed at increasing mining production. The schedule of repayments of that amount ran over the period from 1994 to 2000. During 1999 and 2000, the applicant repaid a total of ESP 233 492 186.

189 The applicant submits that it had to repay that amount, which was intended, originally, to increase its production capacity while engaging in a progress of

progressive reduction of that capacity in 1998 and 2000 in the Buseiro and La Prohida seams. The applicant was thus not able to offset and write down the repayment of the amount at issue by increasing its extraction capacity.

190 The Commission denies that the applicant's arguments are well founded.

— Findings of the Court

191 The applicant does not dispute that the authorisation of the aid for reconstruction would lead to a cumulation of incompatible aid since, first, the undertaking received aid to cover approximately 40% of the costs of the underground mine and 27% of the costs of the open-cast mine and, second, the aid to cover the entire residual value, as at 31 December 2000, of the fixed assets in the La Prohida subsector and in a substantial part of the Buseiro sector are authorised by the contested decision. The applicant also does not dispute that the repayment which it made in 1999 and 2000 were much higher than envisaged in the initial plan, owing to payment delays.

192 In addition, the Court notes that the applicant has provided no evidence to show that it sent the Commission, during the administrative procedure, precise information enabling the latter to determine, where necessary, the part of the loan granted under the SPCA which has not already been written down by the increase in the extraction capacity made before the restructuring measures were adopted and which has also not been included in the residual value of the mining works covered by the aid to cover exceptional costs.

193 In the light of the above, the Court considers that the Commission did not make a manifest error of assessment in recital 87 in the preamble to the contested decision by refusing to authorise the amount of EUR 1 403 316.30 (ESP 233 492 186) relating to the costs incurred following the repayment of the subsidies granted under the SPCA.

194 That complaint must therefore be rejected as unfounded.

The amount of EUR 602 146.29 (ESP 100 188 713) relating to the creation of shafts and other work to provide ventilation for the Sorriba sector

— Contested decision

195 In recitals 83 and 105 in the preamble to the contested decision, the Commission observed that the aid amounting to EUR 602 146.29 (ESP 100 188 713) intended for the creation of shafts and other work to provide ventilation for the Tres Hermanas sector corresponded to investments in mining infrastructure. It considered that the new investments could not be regarded as liabilities inherited from the past within the meaning of Regulation No 1407/2002, or in accordance with Decision No 3632/93. The Commission also stated that, as could be deduced from the Kingdom of Spain's notification of 19 December 2002 concerning the 2003 to 2007 plan for the restructuring of the coal industry, Spain did not intend to grant aid for investments of the type envisaged in Article 5(2) of Regulation No 1407/2002. According to the Commission, such investment aid would moreover be incompatible with the aid to cover operating losses of the Sorriba sector which the Kingdom of Spain is granting to the applicant. That aid did not correspond to Part I(l) of the Annex to Decision No 3632/93, since the purpose of the investments in question was to work the reserves in the Tres Hermanas subsector. That aid also

did not correspond to the Annex to Regulation No 1407/2002. According to the Commission, the new investments could thus not be regarded as liabilities inherited from the past.

— Arguments of the parties

196 The applicant states that the progressive abandonment of the La Prohida subsector required the readaptation of the ventilation system of the mine which was still active. Thus 463 m of ventilation shafts were put in place for a total amount of EUR 581 825.70 (ESP 96 807 659.90).

197 It submits that the Commission made a manifest error of assessment by wrongly considering that the ventilation works were of use to operations in the Tres Hermanos subsector. It points out that the abandonment of the La Prohida subsector took place step by step making it necessary progressively to adapt the internal ventilation system for the galleries which continued to be mined temporarily, in accordance with the requirements of Spanish legislation. Since the ventilation shafts and the galleries served by those shafts are now closed, it cannot be considered that the adaptation of the ventilation system constituted a new investment.

198 The applicant adds that, in addition to the construction of the ventilation shafts referred to above and the recovery of a transverse gallery, other works, which were necessary to restore ventilation to the mine, were carried out in order to link the fourth level of the Tres Hermanos subsector and the first level of the La Prohida subsector. It states that the construction of those ventilation shafts was the consequence of the abandonment of the La Prohida subsector and would not have taken place if that subsector had not been closed for good.

199 At the hearing the applicant specified that, at that time, the ventilation system of the Tres Hermanos subsector was still in operation and was based on a ventilator situated in the La Phohida subsector. Since then that subsector has been shut down entirely.

200 The Commission denies that the applicant's arguments are well founded.

— Findings of the Court

201 It is evident from Article 5 of Decision No 3632/93 that aid to cover exceptional costs is intended to cover the costs arising from or having arisen from the modernisation, rationalisation or restructuring of the coal industry which are not related to current production.

202 As the applicant itself admits, the abandonment of the La Prohida subsector required that certain work be carried out in order to ensure the ventilation of the Tres Hermanos subsector, which remained active. Thus, even if it were to be accepted that the reason for the ventilation works in question was the closure of the mine at La Prohida, those works are still related to the current production of the mine at Tres Hermanos for the purposes of Article 5 of Decision No 3632/93.

203 Although the applicant claims that the work in question was necessary in order to ensure the ventilation of the La Prohida subsector during the period preceding the abandonment of that subsector, the Court finds that, in the light of the relationship between the amounts invested and the temporary nature of the ventilation of the La Prohida subsector during the period in which it was being abandoned, the Commission was entitled to consider, without making a manifest error of

assessment, that the purpose of that work was, in reality, to ensure ventilation in the Tres Hermanos subsector and, consequently, that it was related to current production. The Commission's assessment is supported by the fact, confirmed by the applicant at the hearing, that the ventilation system in question is still in use and provides ventilation in the Tres Hermanos subsector.

204 Consequently, the Court considers that, in the light of the information at its disposal, the Commission did not make a manifest error of assessment by refusing to authorise the amount of EUR 602 146.29 (ESP 100 188 713), relating to the construction of ventilation shafts and other ventilation works in the Sorriba sector.

205 It follows from the above that this complaint must be rejected as unfounded.

The amount of EUR 601 012.10 (ESP 100 000 000) aimed at covering the exceptional restructuring costs which would be incurred in the future by the closure of the La Prohida subsector

— Contested decision

206 In recitals 84 and 106 in the preamble to the contested decision, the Commission observed that the provision of EUR 601 012.10 (ESP 100 000 000) to cover exceptional restructuring costs which would be incurred in the future by the closure of the La Prohida subsector, the partial closure of the Buseiro sector, or both, had not been included in the notification of aid envisaged by the Kingdom of Spain for 2001. According to the Commission, that amount could not be declared compatible since it exceeded the amount notified and paid in advance by the Kingdom of Spain for that year.

— Arguments of the parties

207 The applicant submits, first, that the Commission made a manifest error of assessment in considering that the provision of aid in question concerned not only the La Prohida subsector but also the Buseiro sector. In that regard, the report of the independent mining experts shows that that provision of aid was intended solely to cover the future costs of the underground seam in the La Prohida subsector.

208 Next, the applicant claims that the notifications made by the Kingdom of Spain in relation to the aid granted to cover exceptional charges do not distinguish between individual costs depending on their intended use. Those notifications concerned the total amounts of aid to the mining industry, which is confirmed by the fact the Commission's authorising decisions concerned overall amounts and did not analyse the specific costs of each of the undertakings to which the aid was to be granted. The applicant adds that Commission Decision No 341/94/ECSC of 8 February 1994 implementing Decision No 3632/93 (OJ 1994 L 49, p. 1) did not require the Member States to show the exact costs at which the aid to cover exceptional costs was targeted since, pursuant to Paragraph 3 of Annex 2 to Decision No 341/94, any format may be used to notify the aid provided for in Article 5 of Decision No 3632/93. Therefore, the Commission cannot claim that the provision of EUR 601 012.10 (ESP 100 000 000) made by the applicant to cover the future costs relating to surface damage was not included in the aid notification forecast by the Kingdom of Spain for 2001.

209 In addition, the aid was granted to the applicant in 1998, 2000 and 2001 not only in the light of the costs actually incurred but also in respect of estimated future costs.

210 The applicant also claims that the provision of aid in question amounted only to an increase in the provision which it had already made in 2001. The applicant's annual accounts for 2001 confirm that a provision of ESP 70 000 000 had been made to cover the costs resulting from the termination of activity in the La Prohida subsector. That amount nevertheless turned out to be insufficient to cover those costs.

211 The Commission claims that that provision did not correspond to any aid notified and actually paid by the Kingdom of Spain. It is an attempt by the applicant to obtain a declaration of compatibility with the common market of part of the aid declared unlawful and incompatible by linking it to unspecified future costs in respect of which the Commission is not able to verify how they compare with the actual costs of closure. Accordingly, no aid can be authorised in that regard. It adds that the aid authorised in the present case amply covers the costs of closure without the need to provide for estimates of future additional costs. Moreover, the equivalent costs are much lower in other Member States.

— Findings of the Court

212 It should be pointed out, first of all, that the applicant disputes that the amount of EUR 601 012.10 (ESP 100 000 000) was not included in the aid notification forecast by the Kingdom of Spain for 2001. Consequently, it also disputes that that amount was not included in the aid actually granted for 2001 in anticipation of the Commission's decision.

213 Next, it is apparent from the Commission's responses to the Court's questions that the Kingdom of Spain notified, for 2001, aid granted to the applicant totalling

ESP 393 971 600, or EUR 2 367 817. As the Commission points out, Article 2 of the contested decision declares compatible with the common market the aid totalling EUR 2 249 759.37 (ESP 374 328 463) to cover, for 2001, the exceptional costs of closure.

214 Consequently, the Commission's authorisation of the amount of EUR 601 012.10 (ESP 100 000 000) would have brought, by definition, the total amount of aid to cover exceptional costs for 2001 declared compatible with the common market to a level higher than the level notified by the Kingdom of Spain and than the amount of EUR 2 303 817 (ESP 383 322 896) which was actually paid to the applicant.

215 It must be found, however, that part of the amount of EUR 601 012.10 (ESP 100 000 000), namely EUR 54 057.63 (ESP 8 994 433), is less than the total amount of EUR 2 303 817 (ESP 383 322 896), which was actually paid to the applicant.

216 The Commission has not produced any information which would give grounds for considering that that amount of EUR 54 057.63 was not included in the total amount of aid notified by the Kingdom of Spain to the Commission.

217 In so far as part of the amount of EUR 601 012.10 (ESP 100 000 000) constituting the provision in question could still be covered by the aid which was actually paid to the undertaking, it was the Commission's task to determine whether that amount of EUR 601 012.10 (ESP 100 000 000) or, at the very least, the relevant part thereof, totalling EUR 54 057.63 (ESP 8 994 433), satisfied the legislative requirements to be eligible to benefit from aid to cover exceptional costs.

218 However, it is not apparent from the contested decision that the Commission carried out such an examination. The Commission did not examine the amount constituting the provision in question either in the light of Article 5 of Decision No 3632/93 or in the light of Article 7 of Regulation No 1407/2002. As is evident from paragraph 206 above, the Commission merely found, in recitals 84 and 106 in the preamble to the contested decision, that the amount of EUR 601 012.10 (ESP 100 000 00) exceeded that which had been notified and that which had been paid in anticipation of authorisation.

219 Consequently, by refraining from examining whether, at the very least, the amount of EUR 54 057.63 (ESP 8 994 433), included in the total amount of EUR 601 012.10 (ESP 100 000 000) constituting a provision of aid to cover the exceptional costs of restructuring which would arise in the future as a result of the closure of the La Prohida subsector, could qualify as aid to cover exceptional charges, the Commission infringed the applicable provisions.

220 In so far as the Commission also claims, in its defence, that the provision of aid in question constitutes an attempt on the applicant's part to obtain a declaration of compatibility for part of the aid declared unlawful and incompatible, it is sufficient to point out that that claim is not substantiated. In addition, since that fact does not appear in the statement of reasons in the contested decision which forms the basis of the Commission's refusal to declare compatible with the common market the aid intended, by definition, to cover the amount of the provision in question, the lack of reasoning in that regard cannot be remedied in the course of proceedings (see, to that effect, Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22).

221 This complaint must therefore be upheld.

222 In the light of the above, the fourth plea, concerning the complaint relating to the amount of EUR 601 012.10 (ESP 100 000 000), corresponding to the provision intended to cover the exceptional costs of restructuring which would result in the future as a result of the closure of the La Prohida subsector must be upheld, up to a maximum of EUR 54 057.63 (ESP 8 994 433). However, that complaint and the whole of the fourth plea must be rejected as to the remainder.

Conclusion

223 For all of the above reasons, Article 3(b) of the contested decision, in so far as it includes the amount of EUR 54 057.63 (ESP 8 994 433) and Article 4(1)(b) of the contested decision must be annulled. The remainder of the action must be dismissed.

Costs

224 Pursuant to Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads.

225 In the present case, since the action brought by the applicant has been only partially successful, the Court will make an equitable assessment of the case in holding that the applicant is to bear four-fifths of its own costs and pay four-fifths of the costs incurred by the Commission. The Commission is to bear a fifth of its own costs and pay a fifth of the costs incurred by the applicant.

On those grounds,

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

hereby:

1. **Annuls Article 3(b), in so far as it concerns the amount of EUR 54 057.63 (ESP 8 994 433), and Article 4(1)(b) of Commission Decision 2004/340/EC of 5 November 2003 concerning aid to the company González y Díez, SA to cover exceptional costs (aid for 2001 and incorrect use of the aid for 1998 and 2000), amending Decision No 2002/827/ECSC;**

2. **Dismisses the action as to the remainder;**

3. **Orders the applicant to bear four-fifths of its own costs and to pay four-fifths of the costs incurred by the Commission. The Commission shall**

bear a fifth of its own costs and pay a fifth of the costs incurred by the applicant.

Pirrung Meij Forwood

Pelikánová Papasavvas

Delivered in open court in Luxembourg on 12 September 2007.

E. Coulon J. Pirrung

Registrar President

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