JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
15 December 1999 *

In Joined Cases T-132/96 and T-143/96,

Freistaat Sachsen, represented by Karl Pfeiffer and Jochim Sedemund, Rechtsanwälte, Berlin, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

and

Volkswagen AG and Volkswagen Sachsen GmbH, companies incorporated under German law, established in Wolfsburg (Germany) and Mosel (Germany) respectively, represented by Michael Schütte, Rechtsanwalt, Berlin, and Martina Maier, Rechtsanwalt, Düsseldorf, with an address for service in Luxembourg at the Chambers of Bonn and Schmitt, 62 Avenue Guillaume,

applicants,

supported by

Federal Republic of Germany, represented initially by Ernst Röder and subsequently by Wolf-Dieter Plessing, Ministerialräte, at the Federal Ministry of Finance, acting as Agents, assisted by Thomas Oppermann, Professor at the University of Tübingen, Graurheindorferstraße 108, Bonn (Germany),

intervener,

* Language of the case: German.

Commission of the European Communities, represented initially by Paul Nemitz and Anders Jessen, of its Legal Service, and, subsequently, by Paul Nemitz alone, acting as Agents, assisted by Hans-Jürgen Rabe, Georg Berrisch and Marco Nuñez Müller, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by John Collins, of the Treasury Solicitor's Department, acting as Agent, assisted by Sarah Moore, Barrister, of the Bar of England and Wales, with an address for service in Luxembourg at the Embassy of the United Kingdom, 14 Boulevard Roosevelt,

intervener,

APPLICATION for the partial annulment of Commission Decision 96/666/EC of 26 June 1996 concerning aid granted by Germany to the Volkswagen Group for works in Mosel and Chemnitz (OJ 1996 L 308, p. 46),

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

composed of: A. Potocki, President, K. Lenaerts, C.W. Bellamy, J. Azizi and A.W.H. Meij, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 30 June 1999,

gives the following

Judgment

Legal background

1 By letter of 31 December 1988, the Commission informed Member States that, during its meeting of 22 December 1988 and following its decision of 19 July 1988 to establish a Community framework on State aid to the motor vehicle industry ('Community framework'), based on Article 93(1) of the EC Treaty

(now Article 88(1) EC), it had laid down the conditions for implementing that framework, reproduced in a document attached to the letter. It asked Member States to inform it of their acceptance of that framework within one month.

2 The Community framework was the subject of a notice (89/C 123/03) published in the *Official Journal of the European Communities* (OJ 1989 C 123, p. 3). Point 2.5 thereof provided that it was to 'enter into force on 1 January 1989' and to be 'valid for two years'.

3 According to the fourth paragraph of Point 1, a major objective of the framework was to impose stricter discipline on the granting of aid in the motor vehicle industry in order to ensure that the competitiveness of the Community industry was not distorted by unfair competition. The Commission stated that it could operate an effective policy only if it were able to take a position on individual cases before aid was granted.

4 Under the first paragraph of Point 2.2 of the Community framework:

'All aid measures to be granted by public authorities within the scope of an approved aid scheme to (an) undertaking(s) operating in the motor vehicle sector as defined above, where the cost of the project to be aided exceeds ECU 12 million are subject to prior notification on the basis of Article 93(3) of the EEC Treaty. As regards aid to be granted outside the scope of an approved aid scheme, any such project, whatever its cost and aid intensity, is of course subject without

exception to the obligation of notification pursuant to Article 93(3) of the EEC Treaty. Where aid is not directly linked to a particular project, all proposed aid must be notified, even if paid under schemes already approved by the Commission. Member States shall inform the Commission, in sufficient time to enable it to submit its comments, of any plan to grant or alter aid.'

5 In Point 3 of the Community framework, concerning guidelines for the assessment of aid cases, the Commission stated, *inter alia*, as follows:

'— Regional Aid

[...]

The Commission acknowledges the valuable contribution to regional development which can be made by the implantation of new motor vehicle and component production facilities and/or the expansion of such existing activities in disadvantaged regions. For this reason the Commission has a generally positive attitude towards investment aid granted in order to help overcome structural handicaps in disadvantaged parts of the Community.

[Such] aid is usually granted automatically in accordance with [detailed rules] previously approved by the Commission. By requiring prior notification of such aids in future, the Commission should give itself an opportunity to assess the regional development benefits (i.e. the promotion of a lasting development of the region by creating viable jobs, linkages into [the] local and Community economy)

against possible adverse effects on the sector as a whole (such as the creation of [significant] overcapacity). Such an evaluation does not seek to deny the central importance of regional aid for the achievement of cohesion within the Community but rather to ensure that other aspects of Community interest such as the development of the Community's industry are also taken into account.

[...]'

6 Since the German Government indicated to the Commission that it had decided not to apply the Community framework, the Commission adopted, in accordance with Article 93(2) of the Treaty, Decision 90/381/EEC of 21 February 1990 concerning German aid schemes for the motor vehicle industry (OJ 1990 L 188, p. 55). Article 1 of that decision provides:

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

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

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

7 By letter of 2 October 1990 addressed to the German Government, the Commission approved the regional aid scheme laid down for 1991 by the Nineteenth Outline Plan adopted pursuant to the German Law of 6 October 1969 on the Joint Task [between the Federal Government and the *Länder*] of 'Improving the regional economic structure' (*Gesetz über die Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur'*; hereinafter 'the Joint Task Law'), whilst at the same time issuing a reminder of the need, when implementing the measures envisaged, to take account of the Community framework existing in certain sectors of industry. The Nineteenth Outline Plan itself indicates (Part I, point 9.3, p. 43) that the Commission:

'has taken decisions which prohibit the implementation of State aid granted in certain sectors even if it were granted in the context of approved programmes (regional aid for example), or which make its implementation subject to the need for prior authorisation of each of the projects which it is intended to benefit ...

Such rules exist in the following areas:

(a) ...

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

8 The political reunification of Germany was declared on 3 October 1990, entailing the accession to the Federal Republic of Germany of five new *Länder* from the former German Democratic Republic, including the Freistaat Sachsen (Free State of Saxony).

9 By letter of 31 December 1990, the Commission informed Member States that it considered it necessary to extend the Community framework.

10 That Commission decision also formed the subject-matter of a notice (91/C 81/05) published in the *Official Journal of the European Communities* (OJ 1991 C 81, p. 4). That notice stated, *inter alia*, as follows:

'[...] the Commission believes it necessary to renew the framework on State aid to the motor vehicle industry [...]. The only modification which the Commission has decided extends the prior notification obligation for the Federal Republic of Germany to Berlin (West) and the territory of the former GDR (Article 1(3) of the Commission's Decision of 21 February 1990, as published in OJ No L 188 of 20 July 1990, is no longer valid as from 1 January 1991).

After two years the framework shall be reviewed by the Commission. If modifications appear necessary (or the possible repeal of the framework) these shall be decided upon by the Commission following consultation with the Member States.'

11 By letters to the German Government of 5 December 1990 and 11 April 1991, the Commission approved the application of the Joint Task Law to the new *Länder*, whilst reiterating the need, when implementing the measures in question, to take account of the Community framework existing in certain sectors of industry. Similarly, by letter of 9 January 1991, it approved the extension of existing regional aid schemes to the new *Länder*, stating that the provisions of the Community framework had to be complied with.

12 On 23 December 1992, the Commission decided that 'the [Community] framework will not be modified', and that it would remain valid until a subsequent review to be organised by the Commission. That decision formed the subject-matter of a notice (93/C 36/06) published in the *Official Journal of the European Communities* (OJ 1993 C 36, p. 17).

13 In its judgment of 29 June 1995 in Case C-135/93 *Spain* v *Commission* [1995] ECR I-1651, at paragraph 39, the Court of Justice held that that decision should be interpreted as 'having extended the framework only until its next review, which, like the previous ones, had to take place at the end of a further period of application of two years', expiring on 31 December 1994.

14 Following the delivery of that judgment, by letter of 6 July 1995, the Commission informed Member States that, in the Community interest, it had decided on 5 July 1995 to prolong retroactively from 1 January 1995 its decision of 23 December 1992, thereby making the Community framework apply without interruption. The Commission stated that that prolongation would come to an end once the procedure under Article 93(1) of the Treaty, which it had simultaneously decided to open, had concluded (see paragraph 15 below). That

decision, which formed the subject-matter of a notice (95/C 284/03) published in the *Official Journal of the European Communities* (OJ 1995 C 284, p. 3), was annulled by the judgment of the Court of Justice of 15 April 1997 in Case C-292/95 *Spain* v *Commission* [1997] ECR I-1931.

15 By a second letter of 6 July 1995, the Commission further informed the Member States of its decision of 5 July 1995 to propose to them, in the light of the judgment in *Spain* v *Commission*, to reintroduce the Community framework for a period of two years whilst making a number of amendments thereto, in particular the raising of the notification threshold to 17 million ecus (see Notice 95/C 284/03, cited above). The new text of the proposed Community framework provided, at Point 2.5, that: 'The appropriate measures shall enter into force when all Member States have signalled their agreement or at the latest by 1 January 1996. All aid projects, which have not yet received a final approval by the competent authority by that date, shall be subject to prior notification.' The German Government gave its approval to that reintroduction of the Community framework by letter of 15 August 1995.

Factual background

16 The entry into force of the economic, monetary and social union between the Federal Republic of Germany and the German Democratic Republic on 1 July 1990 brought with it the collapse of demand for, and production of, Trabant vehicles in Saxony. In order to safeguard the motor-vehicle industry in that region, Volkswagen AG ('Volkswagen') entered into negotiations with the Treuhandanstalt ('THA'), the public-law body entrusted with restructuring the businesses of the former German Democratic Republic, which led to an agreement in principle in October 1990. That agreement provided, *inter alia*:

— for the joint creation of Sächsische Automobilbau GmbH ('SAB'), a company entrusted with the responsibility for maintaining jobs ('Beschäftigungsge-

sellschaft'), 87.5% of whose capital was initially held by the THA and 12.5% by Volkswagen;

— for the reopening by SAB of the existing paint workshop (then under construction) and the final assembly workshop on the Mosel site ('Mosel I');

— for the reopening by Volkswagen Sachsen GmbH ('VW Sachsen'), a wholly-owned subsidiary of Volkswagen, of an existing vehicle-production plant on the Chemnitz site ('Chemnitz I');

— for the resumption by VW Sachsen of cylinder-head production at the Eisenach site; and

— for the creation by VW Sachsen of a new motor vehicle construction plant in Mosel, comprising the four main activities of manufacture, namely metal pressing, skeleton bodywork, painting and final assembly ('Mosel II') and a new vehicle-production plant in Chemnitz ('Chemnitz II').

17 It was initially agreed that the reopening and restructuring of Mosel I and Chemnitz I constituted a temporary solution, designed to avoid unemployment of the existing workforce, pending the entry into service of Mosel II and Chemnitz II, scheduled for 1994.

18 By letter of 19 September 1990, the Commission asked the German Government to notify it, in accordance with the Community framework, of State aid for those investment projects. By letters of 14 December 1990 and 14 March 1991, the

Commission insisted that that aid could not be put into effect without having been notified to the Commission and received its approval. That question was also entered on the agenda of two bilateral meetings held in Bonn on 31 January and 7 February 1991.

19 On 22 March 1991, on the basis of the Joint Task Law, the Saxon Ministry of the Economy and Employment adopted two decrees providing for the grant of certain investment grants to VW Sachsen in relation to Mosel II and Chemnitz II ('the 1991 decrees'). The amount envisaged for those grants totalled DEM 757 million for Mosel II, with payments spread out between 1991 and 1994, and DEM 147 million for Chemnitz II, with payments spread out between 1991 and 1996.

20 On 18 March 1991, the Finanzamt (Tax Office) Zwickau-Land addressed a decision to VW Sachsen providing for the grant of certain investment allowances in accordance with the German law on investment allowances (Investitionszulagengesetz) of 1991.

21 The Volkswagen group also sought the possibility of making special depreciation write-offs, in accordance with the German Assisted Areas Law (Fördergebietsgesetz) of 1991.

22 By letter of 25 March 1991, the German authorities supplied the Commission with certain information concerning the aid referred to in paragraphs 19 to 21 above, whilst indicating that they did not yet have more precise information and that it was intended to grant it in the context of the aid schemes approved by the Commission for the new *Länder*. By letter of 17 April 1991, the Commission

indicated that the letter from the German authorities of 25 March 1991 constituted a notification pursuant to Article 93(3) of the Treaty, but that further information was necessary.

23 By letter of 29 May 1991, the German authorities argued, *inter alia*, that the Community framework was not applicable to the new *Länder* between 1 January and 31 March 1991. In the submission of those authorities, since the aid in question had been approved before 31 March 1991, the various files related thereto could henceforth be examined by the Commission only by reference to the regional aids scheme (see paragraph 7 above). The Commission rejected the arguments of the German authorities at a meeting on 10 July 1991 and requested further detailed information by letter of 16 July 1991. Following the reply of the German Government of 17 September 1991, the Commission raised a new series of questions by letter of 27 November 1991.

24 In October and December 1991, the Volkswagen group received investment grants amounting to DEM 360.8 million and investment allowances amounting to DEM 10.6 million in relation to Mosel II and Chemnitz II.

25 By decision of 18 December 1991 (OJ 1992 C 68, p. 14; 'the decision to review'), notified to the German Government on 14 January 1992, the Commission opened the procedure under Article 93(2) of the Treaty for reviewing the compatibility of the various aids for financing the investments in Mosel I and II, Chemnitz I and II and the Eisenach factory with the common market.

26 In that decision, the Commission concluded, *inter alia*:

'[...] the aids proposed by [the German] authorities give rise to major concern for the following reasons.

— they have not been properly notified to the Commission according to the procedure of Article 93(3) of the EEC Treaty;

— the apparent high aid intensity proposed to a plan involving significant expansion of capacity within the European car market could give rise to unfair distortion of competition;

— not enough evidence has been presented to date which justifies the combination of the relatively high intensity of regional aid, the granting of indirect investment aid by the THA and the granting of a temporary operating aid also by THA by reference to the structural and economic problems which VW undoubtedly faces in the new *Länder*; on the contrary, the global aid intensity could be disproportionately high and incompatible with the criteria of the Community framework on State aid to the sector.'

27 By letter of 29 January 1992, the German Government declared itself willing to suspend all aid payments until the review procedure was terminated.

28 By letter of 24 April 1992, the Commission asked the German authorities, the THA and Volkswagen for further information. Further to a meeting of 28 April

1992 and the Commission's letters of 14 May, 5 June, 21 August and 17 November 1992, the German authorities provided additional information by letters of 20 May, 3 and 12 June, 20 and 29 July, 8 and 25 September, 16 and 21 October, and 4 and 25 November 1992; Volkswagen gave additional information by letters of 15 June and 30 October 1992, and 12 and 20 June 1993. The parties also met on 16 June, 9 September, 12 and 16 October and 3 December 1992, and on 8 and 11 June 1993.

29 On 13 January 1993, Volkswagen decided to postpone a large part of the investments initially intended for the Mosel and Chemnitz factories. The paint workshop and final assembly line of Mosel II were henceforth to become operational only in 1997, and the vehicle-production unit at Chemnitz II was not to enter into service until 1996. The Commission agreed to review its assessment on the basis of Volkswagen's new investment projects.

30 On 30 March 1993, the Saxon Ministry of the Economy and Employment adopted two decrees amending the 1991 decrees ('the 1993 decrees'). The total amount of the investment grants thenceforth envisaged amounted to DEM 708 million for Mosel II, with payments spread between 1991 and 1997, and DEM 195 million for Chemnitz II, with payments spread between 1992 and 1997.

31 Certain details of Volkswagen's new investment projects were submitted to the Commission during an interview which took place on 5 May 1993. By letter of 6 June 1993, Germany also communicated certain information on those projects, which Volkswagen supplemented by letters of 24 June and 6 July 1993 and a fax message of 10 November 1993. That new information was also examined during interviews which took place on 18 May, 10 June, 2 and 22 July 1993. Fresh information of the production capacities envisaged by Volkswagen was supplied

in a letter from the German Government of 15 February and a fax message of 25 February 1994.

32 The Commission also collected new information on those projects on a visit to the sites at the beginning of April 1994 and during interviews which took place on 11 May and 2, 7 and 24 June 1994. In addition, documents were submitted to it on the occasion of those interviews and others were sent to it by the German authorities and by Volkswagen on 10 May, 30 June and 4 and 12 July 1994.

33 On 24 May 1994, the Saxon Ministry of the Economy and Employment adopted two decrees amending the 1991 and 1993 decrees ('the 1994 decrees'). The total amount of the investment grants thenceforth envisaged amounted to DEM 648 million for Mosel II, with payments spread between 1991 and 1997, and DEM 167 million for Chemnitz II, with payments spread between 1992 and 1997.

34 By an agreement of 21 June 1994, supplemented by an annex of 1 November 1994, Volkswagen acquired from the THA the 87.5% of the shares in SAB which it did not already own.

35 On 27 July 1994, the Commission adopted Decision 94/1068/EC of 27 July 1994 concerning aid granted to the Volkswagen Group for investments in the new German *Länder* (OJ 1994 L 385, p. 1; 'the Mosel I decision'). In that decision,

the Commission found, *inter alia*, as follows (Point IV, fourth paragraph, of the recitals):

'On opening the procedure the Commission had regarded all Volkswagen's investment plans in Saxony as a single project and therefore intended to decide on all elements of State aid together. Even after its decision in 1993 to postpone investment in the new plants, Volkswagen initially argued that this did not affect the production technology, the labour input and other crucial variables. This year, however, on the basis of information collected during a site visit and through new expert advice, it became obvious that this view could no longer be maintained. Volkswagen also acknowledged to the Commission that their former plans had become obsolete and that they were being reworked. The new plans for the new car and engine plants Mosel II and Chemnitz II will now be closely linked to the development of the Golf A4 that will be put into production at the same time as Mosel II is now planned to come on stream, i.e. in 1997. A final version of the new plans will only be available at the end of 1994. On the basis of current information these new plans will include significant changes in technology and production structure. Under these circumstances it is obvious that the original link between the investment projects in the existing former THA plants and the new greenfield projects has been severed. The Commission has therefore decided to limit its current decision to the restructuring aid for the existing plants, on which it can form a clear opinion on the basis of the available information, and to postpone the decision on the aid to the greenfield projects until Volkswagen and Germany are able to present their definitive investment and aid plans.'

36 The Mosel I decision shows that the paint and final assembly workshops of Mosel I were modernised and altered in accordance with the agreement concluded with the THA (see paragraph 16 above). In an initial period to 1992, Mosel I was used for the final assembly of the VW Polo and Golf A2 models, the parts for which were manufactured elsewhere by other plants of the Volkswagen group and delivered to Mosel in separate pieces. From July 1992, the combined use of the paint and final assembly workshops of Mosel I, the alteration of which had just been completed, and of the new body workshop of Mosel II, which had just come into service, allowed the production launch of the Golf A3 model at Mosel,

pressing work being carried out elsewhere. As a result, logistics were transferred from the Wolfsburg site to Mosel I in January 1993, and new supplier undertakings, capable of supplying the necessary parts to Mosel I and Chemnitz I, were established in the proximity. The new press shop of Mosel II started to function in March 1994, close to Mosel I.

37 It was in those circumstances that, in Article 1 of the Mosel I decision, the Commission declared various aids granted up to the end of 1993 (the date on which the restructuring was to be completed), and amounting to DEM 487.3 million for Mosel I and DEM 84.8 million for Chemnitz I, compatible with the common market. However, certain aid granted subsequently was declared incompatible with the common market, particularly that categorised as aid for replacement and modernisation investments, which according to the Mosel I decision could not be authorised under the Community framework (see the Mosel I decision, Points IX and X).

38 Subsequently, the German Government verbally informed the Commission, a number of times, of delays occurring in the creation of Mosel II and Chemnitz II. In a letter of 12 April 1995, the Commission reminded the German authorities that they were required to notify it of Volkswagen's projects for those new plants, so that it could carry out a review of the aids concerned. That letter received no reply. By letter of 4 August 1995, the Commission requested that the necessary information be communicated to it as soon as possible, stating that, if Germany did not comply with that request, it would adopt a provisional decision, followed by a definitive one, on the basis of the information it already had. In reply to that letter, the German Government informed the Commission, by letter of 22 August 1995, that Volkswagen's investment projects were still not finalised.

39 On 31 October 1995, the Commission adopted Decision 96/179/EC, enjoining the German Government to provide all documentation, information and data on

the new investment projects of the Volkswagen Group in the new German *Länder* and on the aid to be granted to them (OJ 1996 L 53, p. 50).

40 Following that decision, certain information concerning those projects and on the subject of production capacity was communicated to the Commission during an interview on 20 November 1995. That information was confirmed by letter of 13 December 1995 and clarified on a visit to the sites on 21 and 22 December 1995. On 15 January 1996, the Commission put other questions to the German authorities. After an interview on 23 January 1996, most of the missing information was communicated to the Commission by letters of 1 and 12 February 1996.

41 On 21 February 1996, the Saxon Ministry of the Economy and Employment adopted two decrees amending the 1991, 1993 and 1994 decrees ('the 1996 decrees'). The total amount of the investment grants thenceforth envisaged amounted to DEM 499 million for Mosel II, with payments spread between 1991 and 1997, and DEM 109 million for Chemnitz II, with payments spread between 1992 and 1997.

42 By letter of 23 February 1996, the Commission reminded the German authorities that it still lacked certain information. That information was communicated to it at an interview on 25 March 1996 and was subsequently discussed on 2 and 11 April 1996. A further interview took place on 29 May 1996.

43 On 26 June 1996, the Commission adopted Decision 96/666/EC concerning aid granted by Germany to the Volkswagen Group in Mosel and Chemnitz (OJ 1996 L 308, p. 46; 'the Decision'), the operative part of which reads as follows:

'*Article 1*

The following aid proposed by Germany for the various investment projects of Volkswagen AG in Saxony is compatible with Article 92(3)(c) of the EC Treaty and Article 61(3)(c) of the EEA Agreement:

— aid granted by Germany to [the Volkswagen group] for [its] investment projects in Mosel (Mosel II) and Chemnitz (Chemnitz II) in the form of investment grants (Investitionszuschüsse) of up to DEM 418.7 million,

— aid granted by Germany to [the Volkswagen group] for [its] investment projects in Mosel (Mosel II) and Chemnitz (Chemnitz II) in the form of investment allowances (Investitionszulagen) of up to DEM 120.4 million.

Article 2

The following aid proposed by Germany for the various investment projects of Volkswagen AG in Saxony is incompatible with Article 92(3)(c) of the

EC Treaty and Article 61(3)(c) of the EEA Agreement and may not be granted:

— the proposed investment aid for [the Volkswagen group] for [its] investment projects in Mosel II and Chemnitz II in the form of special depreciation on investment under the Assisted Areas Law (Fördergebietsgesetz) with a nominal value of DEM 51.67 million,

— the proposed investment aid to [the Volkswagen group] for [its] investment project in Mosel II in the form of investment grants (Investitionszuschüsse) in excess of the amount specified in the first indent of Article 1 and constituting an additional DEM 189.1 million.

Article 3

Germany shall ensure that the capacity of the Mosel plants in 1997 does not exceed a level of 432 units per day [...]

Furthermore, Germany shall send to, and discuss with, the Commission an annual report on the realisation on the DEM 2 654.1 million of eligible investments in Mosel II and Chemnitz II and the actual payments of aid so as to

ensure that the combined effective aid intensity expressed in gross grant equivalent does not exceed 22.3% for Mosel II and 20.8% for Chemnitz II [...]

Article 4

Germany shall inform the Commission within one month of the notification of this Decision of the measures taken to comply herewith.

Article 5

This Decision is addressed to the Federal Republic of Germany.'

44 Following a letter sent by the chairman of Volkswagen to the first minister of the Free State of Saxony on 8 July 1996, the Free State of Saxony paid Volkswagen, in July 1996, DEM 90.7 million in investment grants which the Commission had declared in its Decision to be incompatible with the common market.

Procedure

45 By applications lodged at the Registry of the Court of First Instance on 26 August and 13 September 1996, the Free State of Saxony, of the one part, and

Volkswagen and VW Sachsen, of the other part, brought two actions for the partial annulment of the Decision, which were registered under case numbers T-132/96 and T-143/96 respectively.

46 By application lodged at the Registry of the Court of Justice on 16 September 1996, the Federal Republic of Germany brought an action, registered under case number C-301/96, for the partial annulment of the Decision.

47 By application lodged at the Registry of the Court of Justice on 16 September 1996, the Commission brought an action against the Federal Republic of Germany for failure to fulfil its obligations, following the payment by the Free State of Saxony of DEM 90.7 million in aids which had been declared by the Decision to be incompatible with the common market. That action was registered under case number C-302/96.

48 By a separate application, lodged at the Registry of the Court of First Instance on 8 November 1996, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure in Case T-132/96.

49 By order of 4 February 1997, the Court of Justice stayed proceedings in Case C-301/96 *Germany* v *Commission* until the delivery of judgments by the Court of First Instance.

50 By applications lodged at the Registry of the Court of First Instance on 13 and 19 February 1997 respectively, the Federal Republic of Germany and the United Kingdom applied for leave to intervene in Cases T-132/96 and T-143/96.

51 By letters of 10 April and 17 July 1997 and 26 May 1998, the applicants requested that certain information be treated as confidential in relation to the United Kingdom.

52 By order of 26 March 1998, the President of the Court of Justice removed Case C-302/96 from the register.

53 On 29 June 1998, the Court of First Instance (Second Chamber, Extended Composition) held an informal meeting with the parties.

54 By order of 30 June 1998, the Court of First Instance (Second Chamber, Extended Composition) joined the objection of inadmissibility raised by the Commission to the substance of the case.

55 By orders of 1 and 3 July 1998, the President of the Second Chamber, Extended Composition, of the Court of First Instance granted leave to the Federal Republic of Germany and the United Kingdom to intervene in Cases T-132/96 and T-143/96 in support of the applicants and the Commission respectively. The President also partially allowed the applications for confidential treatment.

56 By order of 7 July 1998, the President of the Second Chamber, Extended Composition, of the Court of First Instance joined Cases T-132/96 and T-143/96 for the purposes of the written procedure, the oral procedure and the judgment.

57 By letters received between 17 and 22 July 1998 in reply to a question by the Court of First Instance (Second Chamber, Extended Composition) in the context

of measures of organisation of procedure, the main parties and the Federal Republic of Germany stated their view of the likely consequences for the further conduct of Cases T-132/96 and T-143/96, with particular reference to the subject-matter of the dispute, of the amicable settlement which had occurred in Case C-302/96.

58 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure. With the exception of the United Kingdom, which was excused, the parties presented oral argument and replied to the oral questions of the Court of First Instance at the hearing in open court on 30 June 1999.

Forms of order sought by the parties

59 The Free State of Saxony claims that the Court should:

— annul Article 2 of the Decision;

— order the Commission to pay the costs.

60 Volkswagen and VW Sachsen claim that the Court should:

— annul Article 2 of the Decision;

— annul Article 3 of the Decision in so far as the aids intensity expressed in gross grant equivalent is limited to 22.3% for Mosel II and 20.8% for Chemnitz II;

— annul Article 1 of the Decision in so far as the amount of investment grants declared compatible with the common market is limited to DEM 418.7 million;

— order the Commission to pay the costs.

61 The Federal Republic of Germany supports the form of order sought by the applicants.

62 The Commission contends in Case T-132/96 that the Court should:

— dismiss the application as inadmissible and, in the alternative, as unfounded;

— order the Free State of Saxony to pay the costs.

63 The Commission contends in Case T-143/96 that the Court should:

— dismiss the application as unfounded;

— hold Volkswagen and VW Sachsen jointly and severally liable for the costs.

64 The United Kingdom supports the form of order sought by the Commission.

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

The admissibility of the application in Case T-132/96

Arguments of the parties

66 In support of its objection of inadmissibility, the Commission argues, first, that a territorial entity such as the Free State of Saxony does not, a priori, have the capacity to bring an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) in the context of the State-aid regime, since it is only the Member States which Article 93 of the Treaty envisages as legal persons *vis-à-vis* the Community.

67 The Commission states in particular that Article 92 of the EC Treaty (now, after amendment, Article 87 EC) refers in paragraph (1), as does Article 93(2), to aid 'granted by a Member State or through State resources'; that the duty of notification in Article 93(3) of the Treaty applies only to the Member State concerned; that only that State is involved in the procedure implemented pursuant to Article 93(2) of the Treaty; that, if the Commission decides that an aid is incompatible with the common market, the obligation to withdraw or amend it falls on the Member State only, and that, where that obligation is not complied with, the action by the Commission under the second subparagraph of Article 93(2) of the Treaty is directed solely against the Member State.

68 In those circumstances, to recognise a territorial entity as having a right of action would call into question the exclusive responsibility of the Member State as regards aid financed through public resources, and could give rise to conflicts of interest between the territorial entity and the Member State concerned, which neither the Commission nor the Community judicature would have power to resolve.

69 In any event, from the point of view of Community law, the Free State of Saxony and the Federal Republic of Germany are partially identical, and the former cannot be regarded as a different person from the latter without altering the system of remedies established by Article 173 of the Treaty.

70 The Commission adds that if the action were held to be admissible, this would necessarily entail a proliferation of such actions, increase legal uncertainty, endanger the system laid down by Articles 92 and 93 of the Treaty, and thus jeopardise the implementation of the Commission's decisions in the field of State aid.

71 The Commission argues, secondly, that the Free State of Saxony has no interest in bringing an action under the fourth paragraph of Article 173 of the Treaty for the

twofold reason that, on the one hand, the aid granted by it in this case was prescribed by federal laws and, on the other, the Federal Republic of Germany has a right of action under the second paragraph of Article 173. In the Commission's submission, therefore, the Free State of Saxony cannot be regarded as having an interest in bringing an action which is distinct from that of Germany, which has moreover also brought an action for the annulment of the Decision (Case C-301/96).

72 The fact that the Free State of Saxony has the status of a '*Land*' in accordance with the internal constitution of the Federal Republic of Germany is, the Commission submits, of no relevance in Community law. The EC Treaty confers no individual rights on the *Länder*, save those which may be conferred upon them by Article 198a of the EC Treaty (now, after amendment, Article 263 EC) in the context of the 8 Committee of the Regions. It does not follow therefore, that the Free State of Saxony, as a legal person, automatically has standing to bring an action in Community law (see the Opinion of Advocate General Lenz in Case 62/87 *Exécutif Régional Wallon and Glaverbel* v *Commission* [1988] ECR 1573, 1581, paragraph 13; Opinion of Advocate General Van Gerven in Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041, I-2063; Opinion of Advocate General Lenz in Case C-298/89 *Gibraltar* v *Council* [1993] ECR I-3605, I-3621, paragraphs 38 to 51).

73 Moreover, investment aid in the form of special depreciation granted under the law known as the Fördergebietsgesetz was based solely on a federal law, the Gesetz über Sonderabschreibungen und Abzugsbeträge im Fördergebiet, the application of which, pursuant to Article 87 of the Basic Law, falls to the tax authorities. The Commission submits that the same applies as regards tax allowances for investment (Investitionszulagengesetz, 1993). Similarly, the Joint Task Law, on which the investment grants in question were based, was a federal law based on Article 91a of the Basic Law, which in principle entrusted the various *Länder* with 'the improvement of regional economic structures', but in close cooperation with the Federation (see Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 2 et seq.), which bore half the expenses. Moreover, according to Article 85 of the Basic Law, the Federal Government could adopt general administrative provisions, issue instructions to the authorities of the *Land*

and send representatives to them, and require reports and communication of the file. That shows, first, that the action of the Federation continues to be exercised at the stage of the implementation of the joint tasks and, secondly, that the Federation and the *Länder* have identical interests when it comes to improving regional economic structures. The Free State of Saxony is therefore unable to show in what way its interests are distinct from those of Germany (see Case 282/85 *DEFI* v *Commission* [1986] ECR 2469, paragraph 18). In this case, legal protection is ensured by the fact that the Federal Republic of Germany has itself brought an action.

74 Thirdly, the Commission maintains that the Free State of Saxony is neither directly nor individually concerned by the Decision.

75 It is not directly concerned because, first, it did not at any time participate in the administrative procedure, unlike the other applicants, and, secondly, its obligation to award investment grants is based on a federal law. The fact that, under Article 9 of the Joint Task Law, implementation of the outline plan is entrusted to the *Länder*, with the Federation reimbursing half the expenses, does nothing to alter than assessment. In any event, the Decision concerns not merely investment grants but also other subsidies granted by the Federation. It is a single decision, on the whole of the aid, addressed to the Federal Republic of Germany only.

76 Nor, the Commission submits, is the Free State of Saxony individually concerned. It is not in a factual situation differentiating it from all other persons, and thereby distinguishing it individually just as in the case of the person addressed (see the Opinion of Advocate General Lenz in Case 222/83 *Municipality of Differdange* v *Commission* [1984] ECR 2889, 2898, 2905).

77 Finally, the Commission argues that the situation in this case is equivalent to that identified by the Court of First Instance in its order in Case T-238/97 *Comunidad Autónoma de Cantabria* v *Council* [1998] ECR II-2271. By contrast, the judgments of the Court of First Instance in Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717 and Case T-288/97 *Regione Autonoma Friuli Venezia Giulia* v *Commission* [1999] ECR II-1871 cannot be transposed to this case because, first, investment aid in the form of exceptional write-offs are granted by the federal authorities and under federal law; secondly, investment grants are based on federal law, the Free State of Saxony not exercising any competence of its own and having no discretion in the matter; and, thirdly, the Decision does not require the Free State of Saxony to claim repayment of the aid in question but merely prohibits its payment.

78 The United Kingdom essentially supports the Commission's arguments.

79 The Free State of Saxony contests the Commission's arguments. It maintains, essentially, that the Commission encouraged it to bring the action, that the decisions to grant the aid in question fall within its exclusive competence under German law, that that aid was at least partially financed by it, that its representatives took part in the administrative procedure, and that it is in any event directly and individually concerned by the Decision.

80 The Federal Republic of Germany essentially supports the arguments of the Free State of Saxony.

Findings of the Court of First Instance

81 As a preliminary point, it must be observed that, since the Free State of Saxony has legal personality under German law, it may bring an action for annulment under the fourth paragraph of Article 173 of the Treaty, whereby any natural or legal person may institute proceedings against a decision addressed to that person and against decisions which, although in the form of a regulation or a decision addressed to another person, are of direct and individual concern to the former (*Vlaams Gewest*, paragraph 28 and case-law cited therein; order in *Comunidad Autónoma de Cantabria*, cited above, paragraph 43).

82 Since the Decision was addressed to the Federal Republic of Germany, it is therefore necessary to ascertain whether it is of direct and individual concern to the Free State of Saxony.

83 In that respect, it should be recalled that persons other than those to whom a decision is addressed may only claim to be individually concerned within the meaning of the fourth paragraph of Article 173 of the Treaty if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107; Case 169/84 *Cofaz* v *Commission* [1986] ECR 391, paragraph 22). The purpose of that provision is to ensure that legal protection is also available to a person who, whilst not the person to whom the contested measure is addressed, is in fact affected by it in the same way as is the addressee (*Municipality of Differdange*, cited above, paragraph 9).

84 In this case, the Decision is concerned with aid granted by the Free State of Saxony, partly from its own resources. It not only affects measures of which the Free State of Saxony is the author, namely the decrees of 1991, 1993, 1994 and

1996, but also prevents it from exercising its autonomous powers as it would wish (see the judgments in *Vlaams Gewest*, paragraph 29, and *Regione Autonoma Friuli Venezia Giulia*, paragraph 31).

85 As to those powers, paragraphs 2 to 4 of the judgment in Case 248/84 *Germany* v *Commission*, cited in paragraph 73 above and relied on by the Commission, show that, in the Federal Republic of Germany, regional aid is as a general rule granted by the various *Länder*, even though, since an amendment to the Basic Law in 1969, a new Article 91a provides that the Federation is also to contribute to the improvement of regional economic structures. Under the Joint Task Law adopted on the basis of Article 91a, aid programmes have been established since 1972 in the form of framework plans adopted regularly on a joint basis between the Federation and the *Länder*. Aid paid in implementation of those framework plans are financed both by the Federal State and by the *Länder*. In parallel with the framework plans adopted pursuant to the Joint Task Law, the *Länder* may also maintain regional aid programmes for the benefit of undertakings investing within their territory.

86 Furthermore, the Decision has the effect of obliging the Free State of Saxony to initiate the administrative procedure for recovering the aid from recipients, a procedure which it alone has the power to implement at national level. In that respect, formal notice was taken at the hearing, at the Commission's request, of the fact that part of the aid had been repaid to the Free State of Saxony itself.

87 Contrary to what the Commission maintains, the situation of the Free State of Saxony cannot be compared with that of the Comunidad Autónoma de Cantabria which gave rise to the order in Case T-238/97, cited above, since that regional body claimed to be distinguished individually merely on the basis of the socio-economic repercussions of the contested measure in its territory.

88 It follows that the Free State of Saxony is individually concerned by the Decision within the meaning of the fourth paragraph of Article 173 of the Treaty.

89 Moreover, even though the Decision was addressed to the Federal Republic of Germany, the national authorities did not exercise any discretion when communicating it to the Free State of Saxony.

90 The latter is therefore also directly concerned by the contested measure within the meaning of the fourth paragraph of Article 173 of the Treaty (see Joined Cases 41/70, 42/70, 43/70 and 44/70 *International Fruit Company and Others* v *Commission* [1971] ECR 411, paragraphs 26 to 28; Case 113/77 *NTN Toyo Bearing Company and Others* v *Council* [1979] ECR 1185, paragraph 11; Case 207/86 *Apesco* v *Commission* [1988] ECR 2151, paragraph 12).

91 As for the question whether the interest of the Free State of Saxony in contesting the Decision is subsumed within the interest of the German State (see *Regione Autonoma Friuli Venezia Giulia*, paragraph 34), it follows from the above that its position cannot be compared with that of the applicant in the case which gave rise to the judgment in *DEFI*, cited in paragraph 73 above. In that case, the French Government had the power to determine the management and policy of the DEFI Committee and thus also to determine the interests which the DEFI should defend. By contrast, the investment grants at issue in this case constitute measures taken by the Free State of Saxony pursuant to the financial and legislative autonomy which it enjoys directly by virtue of the German constitution.

92 It follows that the Free State of Saxony has an interest in challenging the Decision which is distinct from that of the German State, and, therefore, that it is entitled to take action against that decision under the fourth paragraph of Article 173 of the Treaty.

93 As for the other pleas and arguments raised by the Commission in support of its objection of inadmissibility, these must be rejected for reasons identical to those set out in paragraphs 37 to 49 of the judgment in *Regione Autonoma Friuli Venezia Giulia*.

94 For all those reasons, the Commission's objection of inadmissibility must be dismissed.

Substance

95 In support of their claims in Case T-143/96, Volkswagen and VW Sachsen raise essentially four pleas in law, alleging, respectively, distortion of the facts, which they claim amounts to an infringement of essential procedural requirements within the meaning of Article 173 of the Treaty, infringement of Article 92(2)(c) of the Treaty, various infringements of Article 92(3) of the Treaty and infringement of the principle of the protection of legitimate expectations. They also claim that the reasoning in the Decision is defective in a number of respects. In support of its claims in Case T-132/96, the Free State of Saxony puts forward two pleas in law alleging, respectively, infringement of Article 92(2)(c) of the Treaty and infringement of Article 92(3) of the Treaty.

96 It must be observed, however, that the plea alleging distortion of the facts by the Commission, as set out by the applicants, has no independent content in relation to the other pleas in the action. Moreover, a distortion of the facts cannot be characterised as an 'infringement of essential procedural requirements' within the meaning of Article 173 of the Treaty. Furthermore, the Court is not bound by the parties' characterisation of their pleas and arguments.

97 In this case, it is necessary to examine the whole of the pleas and arguments in the actions under three main headings, concerning the alleged infringements, first, of Article 92(2)(c) of the Treaty, secondly, of Article 92(3) of the Treaty, and, thirdly, of the principle of the protection of legitimate expectations. The complaints concerning distortion of the facts and the plea alleging defects in the reasoning for the Decision can in any event be exhaustively examined whilst at the same time being formally attached to one or other of those three headings, as the applicants acknowledged in their written observations on the Report for the Hearing.

I — *Infringement of Article 92(2)(c) of the Treaty*

Arguments of the parties

98 According to the applicants, the Commission infringed Article 92(2)(c) of the Treaty by indicating, in the third paragraph of Point x of the Decision, that the derogation provided for therein 'should be interpreted narrowly and should not be applied to regional aid for new investment projects'. The Commission thus declined to examine whether the conditions for applying that provision were met in this case and contented itself with a reference to considerations of appropriateness, whereas, in the matter of a legal derogation from the prohibition of State aid laid down in Article 92(1) of the Treaty, it had no margin of discretion (see Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 17; Opinion of Advocate General Tesauro in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, I-979, paragraph 19 (hereinafter '*Tubemeuse II*)'; Opinion of Advocate General Lenz in Case 102/87 *France* v *Commission* [1988] ECR 4067, 4075, paragraph 25).

99 First, the applicants argue that Article 92(2)(c) of the Treaty continued to apply after the reunification of Germany in 1990, even in regions not adjacent to the former frontier.

100 Secondly, they maintain that Article 92(2)(c) of the Treaty was applicable to the new *Länder*. That provision made general reference to regions affected by the division of Germany, without making any distinction between East and West.

101 The applicants emphasise that Article 92(2)(c) of the Treaty was not abrogated at the time of the signature of the Maastricht Treaty, that an equivalent provision was inserted in the Agreement on the European Economic Area, and that, at the conclusion of the Amsterdam Treaty, that provision was repeated without amendment in the new Article 87(2)(c) EC. According to the Free State of Saxony, the only obvious interpretation of the intention thus manifested by the High Contracting Parties is that that provision should apply to all of those regions of Germany which, by reason of the economic damage caused there by the Communist regime, remain significantly behind other regions of the Federal Republic from the point of view of economic development.

102 In that respect, the Free State of Saxony challenges the Commission's persistent refusal to apply Article 92(2)(c) of the Treaty to the new *Länder* since 1990. It points to the contradiction between that position and the position taken by the Commission in its decision of 11 December 1964 concerning aids designed to facilitate the integration of the Saarland into the economy of the Federal Republic of Germany (*Bulletin of the European Economic Community* No 2-1965, p. 33; 'the Saar decision').

103 Thirdly, the applicants point out that the German Government claimed during the administrative procedure that Article 92(2)(c) of the Treaty should be applied

(see Point V, first paragraph, subparagraph 1 of the Decision). Since that provision is a legal derogation from the prohibition laid down in Article 92(1) of the Treaty, they maintain that the onus was on the Commission to establish that the conditions for applying the derogation were not met in this case, and not on the German Government to prove the opposite. Yet the Commission refused to take cognisance of more detailed information or to consider that question, despite a letter from Commission Member Sir Leon Brittan to the German Government of 1 June 1992, indicating that the possibility of applying Article 92(2)(c) of the Treaty would be examined by the Commission's departments. By so doing, the Commission also failed to fulfil its obligation to research the relevant facts itself (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299; Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 267 and 268; Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraphs 66 to 68).

104 Fourthly, the reasoning of the Decision on that point (Point X, third paragraph) does not comply with the requirements of the case-law of the Court of Justice and is therefore insufficient to justify the failure to apply Article 92(2)(c) of the Treaty in this case (see, in particular, Case 24/62 *Germany* v *Commission* [1963] ECR 131, 155; Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraphs 23 and 24; Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraphs 44 and 45; and Joined Cases C-329/93, C-62/95 and C-63/95 *Germany* v *Commission* [1996] ECR I-5151, paragraphs 36 and 53). In that regard, the applicants maintain that the fact that the addressee of a decision has the possibility of finding the reasons for it in previous decisions is not sufficient (Case 294/81 *Control Data Belgium* v *Commission* [1983] ECR 911, 932).

105 The applicants argue that the deficiency in reasoning affecting the Decision on this point cannot be corrected in the defence, since the Decision does not contain reasons, even in rudimentary form (Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22; Case 183/83 *Krupp* v *Commission* [1985] ECR 3609, paragraph 21; Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992]

ECR II-1931, paragraphs 131 and 137). In any event, the line of argument put forward in the defence, to the effect that application of Article 92(2)(c) of the Treaty in the new *Länder* is excluded for territorial reasons, conflicts with that adopted in the Decision.

106 Fifthly, the applicants maintain that the reasoning for the Decision is itself contradictory, in so far as, in the Decision, the Commission excludes the application of Article 92(2)(c) of the Treaty on the ground that this case concerns a 'new investment project', whilst indicating in its investigation of the aid pursuant to Article 92(3)(c) of the Treaty that this was not a 'new investment' but an extension of existing capacity.

107 Sixthly, the applicants argue that the Free State of Saxony, especially in the part of its territory including the cities of Zwickau and Chemnitz, fulfilled the conditions laid down by Article 92(2)(c) of the Treaty in that it was entirely cut off from West Germany from the economic point of view. In that respect, the Free State of Saxony refers to an expert report by Von Dohnanyi and Pohl, establishing that the poor economic situation of the new *Länder* results from the division of Germany.

108 In order to determine the disadvantages resulting from that partition, the applicants maintain that it is necessary to compare the economic situation of Saxony before and after that partition. By contrast, they argue that the consequences of the political and economic system established in the German Democratic Republic are irrelevant for the purposes of this action.

109 Before the division of Germany, a large motor-vehicle industry, and particularly Auto Union AG, had been set up in the region, at Zwickau and Chemnitz. By reason of the partition, sales of vehicles on the traditional markets, situated in West Germany and the rest of Europe, were entirely broken off. Auto Union AG then set up new factories at Ingolstadt, in Bavaria. Subsequently, despite the

existence of limited openings in eastern Europe, production of vehicles and engines in Zwickau and Chemnitz collapsed. Without the division of Germany, Auto Union AG, which subsequently became Audi, would have been able to remain in the region and would be as prosperous as it is now.

110 In those circumstances, the applicants argue, all the aid at issue, intended to facilitate the establishment of a motor vehicle construction plant and an engine construction plant in Saxony, is 'necessary' within the meaning of Article 92(2)(c) of the Treaty to the extent that the disadvantages resulting from the division of Germany continue. In this case, only the prospect of receiving all that aid gave Volkswagen the incentive to invest in the re-establishment of a motor vehicle industry comparable in size to that which existed in the region before partition. Volkswagen's investments were, moreover, a signal aimed at encouraging other undertakings to invest in the region.

111 Seventhly, the applicants argue that the Commission's refusal to apply Article 92(2)(c) of the Treaty in the Mosel I decision is irrelevant, since neither the German Government nor Volkswagen had the opportunity to challenge that decision in law, the main part of the aid in question having been declared compatible with the common market.

112 The Commission was therefore wrong in the Decision to apply the criteria of Article 92(3) of the Treaty, and particularly those of the Community framework, which differ fundamentally from those which it should have applied under Article 92(2)(c) of the Treaty.

113 The Federal Republic of Germany essentially supports the arguments of the applicants and also refers to its written submissions in Case C-301/96.

114 In a letter of 9 December 1992 concerning this case, the Federal Chancellor, Mr Kohl, told the President of the Commission, Mr Delors, that the German Government '[regarded] Article 92(2)(c) of the EEC Treaty as the determining factor as regards matters currently pending before the Commission of the European Communities'. Notwithstanding its difference with the Commission concerning the application of that provision to the new *Länder*, the Federal Republic of Germany had cooperated with the Commission in the context of the administrative procedure, given that, in other matters, the Commission had shown understanding of the difficult economic situation in those *Länder*, making compromises possible. The German Government had, however, expressly stated a reservation in order to emphasise that, in its opinion, on a correct interpretation of the Treaty Article 92(2)(c) should be applied.

115 The Federal Republic of Germany insists that this is a legal derogation and that, where the factors envisaged by Article 92(2)(c) of the Treaty are present, the aid is automatically compatible with the common market. Moreover, under Article 93(2) of the Treaty, the Commission's investigation should be limited to verifying that the national authorities which granted the aid did not 'misuse' the criteria of Article 92(2)(c) of the Treaty.

116 Unlike Article 92(2)(b) of the Treaty, concerning aid in cases of natural disaster and similar occurrences, Article 92(2)(c) does not aim to 'make good damage' but to 'compensate' for the consequences of the division of Germany. That more flexible formulation takes account of the complex economic situation connected

with the disadvantages caused by that partition, and envisaged the whole of the measures intended to create economic and social structures in the new *Länder* comparable with those existing in the other regions of Germany.

117 According to the German Government, Article 92(2)(c) of the Treaty covers all the territory of the new *Länder*. The 'economic disadvantages' at issue in this case were clearly 'caused' by the division of Germany, as is shown by comparing the percentage of German motor-vehicle production carried on in Saxony before 1939 (about 27% in 1936) with that achieved in 1990 (about 5%). That decline was primarily due to the loss of traditional market openings in the West and their forced replacement by those of Comecon in an inefficient form of economy.

118 Finally, the German Government emphasises that Volkswagen's investments in Saxony amounted in 1996 to a total of approximately DEM 3.5 billion and generated about 23 000 jobs. Such investments were thus of crucial importance for reconstruction works in the new *Länder*.

119 The Commission maintains that it did in fact verify whether Article 92(2)(c) of the Treaty was applicable in this case. It was however entitled to decline to apply it, giving the same reasoning as adopted in the Mosel I decision.

120 First, the German Government did not discharge its duty during the administrative procedure of providing all the information making it possible to determine whether the conditions for the requested derogation were fulfilled (*Philip Morris*, paragraph 18, and the Opinion of Advocate General Capotorti in that case, p. 2693, paragraph 6; *Italy* v *Commission*, paragraph 20; Opinion of Advocate General Darmon in *Germany* v *Commission*, p. 4025, paragraph 8). Neither the

German Government nor Volkswagen claimed the benefit of Article 92(2)(c) of the Treaty after February 1993, and they did not at any time submit concrete evidence that the conditions required by that provision were met, even after the Commission disapplied it in this case in the Mosel I decision.

121 Secondly, being a derogating provision, Article 92(2)(c) of the Treaty should be interpreted narrowly (Joined Cases 3/58 to 18/58, 25/58 and 26/58 *Barbara Erzbergbau and Others* v *High Authority* [1960] ECR 366, 408 and 409).

122 Thirdly, the Commission argues that Article 92(2)(c) of the Treaty requires a direct causal link between the economic disadvantage to be compensated for and the division of Germany. Since reunification, the direct consequences of that division had practically disappeared, rail and road links having been re-established and traditional market openings being once again accessible. Since 1990, therefore, that provision has applied only in certain exceptional cases.

123 The Commission argues that the retention of the provision in Article 92(2)(c) of the Treaty in the Maastricht and Amsterdam Treaties is explained by the veto put forward by the Federal Republic of Germany against its removal. Neither the Treaty on European Union nor the Amsterdam Treaty reveal any intention to give the new Article 87(2)(c) EC any meaning other than that of Article 92(2)(c) of the Treaty in its initial interpretation. Nor, moreover, do the applicants explain why that provision should henceforth cover not only the consequences of the division of Germany but also the repercussions of the planned economy of the German Democratic Republic and the consequences of the introduction of a market economy after the reunification of the country.

124 Fourthly, the Commission argues that, even before the reunification of Germany, only certain regions of the former Federal Republic which were disadvantaged by reason of their immediate proximity to the frontier were capable of benefiting from aids pursuant to Article 92(2)(c) of the Treaty. These were primarily regions bordering on the eastern zone ('Zonenrand') and West Berlin. The reunification of Germany did not alter that principle in any way. Even if, in certain exceptional cases, application of Article 92(2)(c) of the Treaty might be justified in relation to border regions situated on both sides of the former frontier and thus to the 'Zonenrand' of the former German Democratic Republic, the Commission maintains that that provision does not permit general and widespread support for the development of the new *Länder*.

125 Fifthly, the Commission emphasises the consistency of its decision-making practice. Since the reunification of Germany, it based only two decisions on Article 92(2)(c) of the Treaty [Commission Decision 92/465/EEC of 14 April 1992 concerning aid granted by the *Land* of Berlin (Germany) to Daimler-Benz AG (OJ 1992 L 263, p. 15; the 'Daimler-Benz decision') and a Commission decision of 13 April 1994 concerning aid to producers of glass containers and porcelain in Tettau (OJ 1994 C 178, p. 24; the 'Tettau decision')], concerning cases in which the direct consequences of the line of the frontier between the two zones continued to be felt. In its other decisions concerning aid to the new *Länder*, the Commission did not use Article 92(2)(c) of the Treaty. As for the decision concerning the Saarland, the Commission points out that that was already a *Land* at the time the EEC Treaty entered into force. Moreover, on a reading of EEC Bulletin No 2-1965, there was nothing to support the conclusion that the aid in question was authorised pursuant to Article 92(2)(c) of the Treaty rather than Article 92(2)(b).

126 Sixthly, the poor general economic situation of the new *Länder* was a direct consequence not of the division of Germany but of the political system of the former German Democratic Republic and of the reunification itself, especially the loss of the markets of those *Länder* in the context of Comecon and relations with

the former USSR, the entry into force of German monetary, economic and social union, the alignment of East German salary levels with those of West Germany and legal uncertainty concerning, in particular, real-property rights.

127 In any event, the motor vehicle industry established in Zwickau and Chemnitz suffered a decline before the end of the Second World War, as moreover did that of other European countries.

128 Finally, knowing that its decision-making practice had never been challenged, the Commission had no cause to state further grounds in the Decision as to the inapplicability of Article 92(2)(c) of the Treaty.

Findings of the Court of First Instance

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

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

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

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

133 Moreover, as the Court of Justice has emphasised, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the aims of the rules of which it forms part (Case 292/83 *Merck* v *Hauptzollamt Hamburg-Jonas* [1983] ECR 3781, 3792; Case 337/82 *St. Nikolaus Brennerei* v *Hauptzollamt Krefeld* [1984] ECR 1051, 1062).

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

135 By contrast, the conception of the applicants and the German Government, according to which Article 92(2)(c) of the Treaty permits full compensation for

the undeniable economic backwardness suffered by the new *Länder*, until such time as they reach a level of development comparable with that of the original *Länder*, disregards both the nature of that provision as a derogation and its context and aims.

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

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

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

139 In that respect, the applicants are wrong to accuse the Commission of contradictory reasoning in its description of the disputed investments at other points in the Decision as extensions of existing capacity. The expression 'regional

aid for new investment projects' is used in reply to a general argument raised by the German Government (see Point V, first paragraph, subparagraph 1 of the Decision) and thus concerns not aid to Volkswagen's investment plans at Mosel II and Chemnitz II specifically, but the whole of the aid intended to promote general economic development of the new *Länder*.

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

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

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

143 Before the Court, the applicants, and the German Government, which refers on those questions to its written submissions in Case C-301/96, have argued that proof of the economic disadvantages caused to Saxony by the division of Germany arose from a comparison between German motor-vehicle production

carried on in that region before 1939 and that achieved in 1990. According to those parties, the relative decline of the motor-vehicle industry in Saxony, compared with that of West Germany in general, was caused in particular by the partition of the German market and the corresponding loss of that industry's traditional outlets to the West, following that partition.

144 In so far as that argument is capable of being raised before the Court of First Instance, given that it was not raised during the administrative procedure (see Joined Cases C-278/92, C-279/82 and C-280/82 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31; Case T-37/97 *Forges de Clabecq* v *Commission* [1999] ECR II-859, paragraph 93), it must be rejected.

145 Even if there were obstacles to inter-German trade, entailing the loss of traditional outlets for the motor-vehicle industry in Saxony, that would not automatically mean that the poor economic situation of that industry in 1990 was a direct consequence of that loss of outlets caused, *ex hypothesi*, by the division of Germany in 1948. The difficulties referred to by the applicants are primarily the result of the different economic organisation of the East German regime itself, which was not 'caused by the division of Germany' within the meaning of Article 92(2)(c) of the Treaty.

146 A comparison between the position of the motor-vehicle industry in Saxony before 1939 and that in 1990 is not therefore in itself enough to establish the existence of a sufficiently direct link between the economic disadvantages suffered by that industry at the time of the granting of the aid in dispute and the 'division of Germany' within the meaning of Article 92(2)(c).

147 As for the decision concerning the Saarland, none of the parties have produced or requested it in these proceedings. The applicants have failed to show that the latter decision reflected a different approach by the Commission in the past and

that such an approach, if it were established, would call into question the validity of the legal assessments made in 1996.

148 In those circumstances, the applicants and the Federal Republic of Germany have not adduced sufficient evidence to support the conclusion that the Commission exceeded the limits of its discretion by holding that the aid in question did not comply with the conditions for benefiting from the derogation laid down in Article 92(2)(c) of the Treaty.

149 As for the complaint of insufficient reasoning, it should be recalled that the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must clearly and unequivocally show the reasoning of the institution which adopted the measure, so as to enable the Community judicature to exercise its power of review and the persons concerned to know the grounds on which the measure was adopted (see, for example, Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 46).

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

151 Nevertheless, the Decision was adopted in a context that was well known to the German Government and the applicants and forms part of a consistent line of decision-making practice, particularly in relation to those parties. Such a decision

may be supported by a summary statement of reasons (Case 73/74 *Papiers Peints* v *Commission* [1975] ECR 1491, paragraph 31; Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, paragraph 35).

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

153 The arguments put forward by the German Government in that regard were rejected in various letters or decisions of the Commission [see, in particular, the Commission notice pursuant to Article 93(2) of the EEC Treaty to other Member States and other parties concerned regarding the proposal by the German Government to award State aid to the Opel group in support of its investment plans in the new *Länder* (OJ 1993 C 43, p. 14); the Commission notice pursuant to Article 93(2) of the EEC Treaty to other Member States and interested parties concerning aid which Germany proposes to grant Rhône-Poulenc Rhotex GmbH (OJ 1993 C 210, p. 11); Commission Decision 94/266/EC of 21 December 1993 on the proposal to award aid to SST-Garngesellschaft mbH, Thüringen (OJ 1994 L 114, p. 21); the Mosel I decision; and Commission Decision 94/1074/EC of 5 December 1994 on the German authorities' proposal to award aid to Textilwerke Deggendorf GmbH, Thüringen (OJ 1994 L 386, p. 13)].

154 In that respect, particular importance should be accorded to the Mosel I decision, in which the Commission declared some of the aid in question, amounting to DEM 125.2 million, incompatible with the common market after excluding, on grounds identical to those used in the Decision, the possibility that that aid might be covered by Article 92(2)(c) of the Treaty. It should be noted, moreover, that

neither the applicants nor the German authorities have brought any action against that earlier decision.

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

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

157 It follows from the above considerations as a whole that the complaints alleging infringement of Article 92(2)(c) of the Treaty and an insufficient statement of reasons must be rejected.

II — *Infringement of Article 92(3) of the Treaty*

158 The applicants claim that there have been a number of infringements of Article 92(3) of the Treaty, some arising from the general tenor of that article and others relating specifically, and respectively, to subparagraphs (a) and (b) of that provision. It is appropriate to begin by considering whether there has been infringement of Article 92(3)(b).

Infringement of Article 92(3)(b) of the Treaty

Arguments of the parties

159 The applicants maintain that the Commission has infringed Article 92(3)(b) of the Treaty by not examining the conditions for applying that provision. They refer to the second paragraph of Point x of the Decision, according to which:

'The derogation in Article 92(3)(b) can certainly not be applied to Germany. It is true that German unification has had negative effects on the German economy, but these alone are not sufficient to apply that provision to an aid scheme. Recently, the Commission took the view that an aid scheme remedied a serious disturbance in the economy of a Member State when, in 1991, aid was approved for a privatisation programme in Greece. In its decision the Commission noted that the privatisation programme was an integral part of the undertakings given pursuant to Council Decision 91/306/EEC of 4 March 1991 in connection with the consolidation of the national economy as a whole. The German situation is clearly different.'

160 The applicants submit, first, that such a statement of reasons is insufficient. The Commission merely repeated a standard formula appearing in previous decisions (see, in particular, the Mosel I decision). The Decision did not touch in any way on the decisive question, namely whether, in the particular circumstances of the case, the aid was designed to remedy a serious disturbance in the economy of the Federal Republic of Germany. Nor did the Decision explain what the differences were between the present case and the privatisation programme in Greece, which in the Commission's argument justified the non-application of Article 92(3)(b) of the Treaty.

161 Secondly, the Commission did not seriously examine the question of the applicability of Article 92(3)(b) of the Treaty, even though the German Government had relied on it a number of times during the administrative procedure, arguing that the problems of integrating the former planned economy of the new *Länder* and transforming it into a market economy caused a serious disturbance in its economy.

162 Thirdly, the applicants argue that the conditions for applying Article 92(3)(b) of the Treaty are fulfilled in this case. It was sufficient for that purpose to establish that the aid in question was intended to remedy a serious disturbance in the economy of a *Land* (*Philip Morris*, paragraphs 20 to 25). In that respect, the Free State of Saxony had been notable, particularly in 1991, for a remarkably low gross national product in comparison with the European average and a particularly high rate of unemployment. Moreover, application of Article 92(3)(b) of the Treaty was not excluded where the aid in question was intended for a single undertaking, and neither did it depend on the share held by that undertaking in the national economy. That argument, raised by the Commission in its defence in Case T-143/96, is, the applicants maintain, out of time and inadmissible in any event.

163 The Commission argues, first, that it has a wide discretion when making the economic and social assessments referred to in Article 92(3)(b) of the Treaty (*Philip Morris*, paragraph 24).

164 It maintains, secondly, that in referring to the aid granted to the privatisation programme in Greece, approved in implementation of a Council decision and concerning the whole of the economy of that Member State, it was merely recalling the conditions normally required for the purposes of applying

Article 92(3)(b) of the Treaty. There was therefore no infringement of Article 190 of the Treaty.

165 Thirdly, the Commission maintains that the conditions for applying Article 92(3)(b) have not been fulfilled in this case.

Findings of the Court

166 Under Article 92(3)(b) of the Treaty, aid may be considered to be compatible with the common market if it is '[...] to remedy a serious disturbance in the economy of a Member State'.

167 It follows from the context and general scheme of that provision that the disturbance in question must affect the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory. This, moreover, is in conformity with the need to interpret strictly a derogating provision such as Article 92(3)(b) of the Treaty. The judgment in *Philip Morris*, relied on by the applicants in support of their argument, makes no comment of any kind on the point at issue here.

168 The applicants' argument must therefore be rejected as inoperative since they merely refer to the state of the economy of the Free State of Saxony, without even alleging that this caused a serious disturbance of the economy in the Federal Republic of Germany as a whole.

169 Moreover, the question whether German reunification has caused a serious disturbance in the economy of the Federal Republic of Germany involves complex assessments of an economic and social nature, to be made within a Community context, which fall within the exercise of the wide discretion which the Commission enjoys under Article 92(3) of the Treaty (see, by analogy, Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 26). In that context, judicial review must be limited to verifying whether the rules on procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment and no misuse of powers. In particular, it is not for the Community judicature to substitute its economic assessment for that of the Commission (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 56; Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraph 63).

170 In this case, the applicants have not put forward any concrete evidence capable of establishing that the Commission made a manifest error of assessment in taking the view that the unfavourable repercussions of the reunification of Germany on the German economy, however real, did not in themselves constitute a ground for applying Article 92(3)(b) of the Treaty to an aid scheme.

171 As for the statement of reasons for the Decision, although brief, it appears to be sufficient having regard to the context of the case, to its antecedents, especially the Mosel I decision, and to the absence of specific arguments raised during the administrative procedure. In that regard, the considerations set out in paragraphs 140 to 142 and 149 to 156 above apply, *mutatis mutandis*, as regards the statement of reasons for the Commission's refusal to apply in this case the derogation laid down in Article 92(3)(b) of the Treaty.

172 It follows from the above that the complaints alleging infringement of Article 92(3)(b) of the Treaty and an insufficient statement of reasons must be rejected.

Infringement of Article 92(3)(a) of the Treaty

Arguments of the parties

173 The applicants argue that the Commission infringed Article 92(3)(a) of the Treaty, which provides that 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment' may be considered to be compatible with the common market.

174 First, they maintain that Saxony is one of the regions envisaged by that provision, as the Commission impliedly acknowledged in the first paragraph of Point XII of the Decision. Yet the Decision did not contain any discussion concerning the possible application of Article 92(3)(a) of the Treaty. By refusing to express any view on that point, the Commission abused its discretion and infringed that rule.

175 Secondly, although the requirements of Article 92(3)(a) of the Treaty are stricter than those of Article 92(3)(c) in determining which regions are capable of benefiting from the derogations, Article 92(3)(a) does not require that trading conditions should not be adversely affected to an extent contrary to the common interest (*Germany* v *Commission*, paragraph 19). In the applicants' submission, it thus constitutes a special provision, the applicability of which should be examined in priority to that of Article 92(3)(c) of the Treaty.

176 Thirdly, the applicants state that Article 92(3)(a) of the Treaty allows the national authorities to offer an investor wishing to set up business in a particularly disadvantaged region a special encouragement ('top up' aid) going beyond mere

compensation for regional disadvantages. Even if it is not possible totally to exclude considerations relating to the economic sector when carrying out an investigation under Article 92(3)(a) of the Treaty (Case C-169/95 *Spain* v *Commission* [1997] ECR I-135), in the case of aid to economically weak regions for the purposes of that provision, more weight must be given to regional development, whereas, in the case of regions envisaged by Article 92(3)(c) of the Treaty, sectoral considerations play a more important role. The applicants thus maintain that a higher intensity of aid is permissible in the former case.

177 In those circumstances, the applicants argue, the reference in the Decision to the existence of surplus production capacity in the motor-vehicle industry was not sufficient to exclude the application of Article 92(3)(a) of the Treaty. That was only a consideration to be potentially taken into account when exercising the discretion implied by that rule. Moreover, decisions involving a discretion required a particularly extensive and detailed statement of reasons (Joined Cases 36/59, 37/59, 38/59 and 40/59 *Präsident Ruhrkohlen and Others* v *High Authority* [1960] ECR 423, 439 et seq.; Opinion of Advocate General Roemer in Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 352), especially in the case of decisions concerning State aids intended to benefit defined undertakings (Opinion of Advocate General Darmon in *Germany* v *Commission*, p. 4027).

178 The Commission maintains that it did examine the question whether aid might be authorised under Article 92(3)(a) of the Treaty, as is shown by the third paragraph of Point x and the first paragraph of Point XII of the Decision.

179 It points out first that, in the case of Germany, it has a policy of fixing the maximum intensity limit for regional aid (that is to say the amount of the aid as a percentage of the amount of the investment) at 35% for the regions envisaged in

Article 92(3)(a) of the Treaty and 18% for those envisaged in Article 92(3)(c) of the Treaty. Since the Decision authorised aid of an intensity of 22.3% for Mosel II and 20.8% for Chemnitz II, it was obvious that the Commission applied Article 92(3)(a) of the Treaty to the facts of the case.

180 Whilst acknowledging that the new *Länder* are regions capable of receiving aid under Article 92(3)(a) of the Treaty, the Commission cites, secondly, the wide discretion it enjoys in the matter (Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 23 et seq.). It was entitled in particular to take account of the effects of the aid in question on the economic sector concerned throughout the Community, including the risk of creating surplus production capacity, and the proportionality between the amount of the aid and the regional disadvantages.

181 Thirdly, the Commission emphasises, the Decision sets out in its detail that the aid in question would exacerbate existing overcapacity in the motor-vehicle industry, and was thus contrary to the Community interest. It had therefore given sufficient reasons for its refusal to authorise that aid under Article 92(3)(a) of the Treaty, beyond the accepted limits.

182 Finally, the Commission argues that Article 92(3)(a) of the Treaty should not be applied in priority over Article 92(3)(c). It adds that regions falling under Article 92(3)(a) of the Treaty are characterised by the fact that an investor encounters cost disadvantages for his investment there that are greater than in regions falling under Article 92(3)(c) of the Treaty. Given that, in a case such as the present, those disadvantages are taken into consideration in analysing costs and benefits for the purposes of calculating the total amount of aid capable of being authorised by the Commission, account was therefore taken of the higher

eligibility for aid of regions falling within Article 92(3)(a) of the Treaty. Therefore, the Commission argues, parallel application of subparagraphs (a) and (c) of Article 92(3) of the Treaty cannot have the effect of depriving the provision in subparagraph (a) of its particular scope.

Findings of the Court

183 In the first paragraph of Point x of the Decision, the Commission begins by recalling the argument of the German Government that the three derogations laid down respectively by Articles 92(2)(c), 92(3)(b) and 92(3)(a) of the Treaty are applicable in this case. In the two following paragraphs, the Commission states the reasons leading it to exclude the application of Articles 92(3)(b) and 92(2)(c) to the aids in question. In the second sentence of the third paragraph, the Commission states that 'not only the conditions for exemption provided for in Article 92(3)(a) and (c) but also... the Community framework on State aid to the motor vehicle industry allow it to respond appropriately to the problems which the new *Länder* are facing'.

184 The Commission therefore acknowledged the applicability to the aid in question not only of Article 92(3)(c) but also of Article 92(3)(a), as is confirmed by the use of wording from the latter in the first paragraph of Point XII of the Decision. The Commission there acknowledges that the new *Länder* constitute 'an underdeveloped region' where 'the standard of living is low' and 'the level of unemployment is exceptionally high and still rising'. It then states that high levels of investment and other aid have been authorised 'in order to contribute to the development of the region'.

185 In its pleadings, the Commission has further argued, without being contradicted by the applicants or the German Government, that in this case it allowed an aid

intensity higher than it was its policy to accept when applying Article 92(3)(c) of the Treaty to regional aid in Germany. It that respect, it has explained that the specific disadvantages encountered by investors in the regions falling within Article 92(3)(a) of the Treaty are taken into consideration in its cost-benefit analysis for the purposes of fixing the total amount of the aid capable of being authorised, so that those calculations take account of the higher aid eligibility of those regions.

186 The argument that the Commission was unwilling to apply the more favourable provision of Article 92(3)(a) of the Treaty to the aid in question is therefore unfounded.

187 Moreover, in its judgment in *Spain* v *Commission*, the Court of Justice expressly rejected the argument of the applicants in their application by holding (at paragraph 17) that the difference in wording between subparagraphs (a) and (c) of Article 92(3) of the Treaty '[could not] lead to the conclusion that the Commission should take no account of the Community interest when applying Article 92(3)(a), and that it must confine itself to verifying the regional specificity of the measures involved, without assessing their impact on the relevant market or markets in the Community as a whole.' The Court of Justice also held (at paragraph 20) that 'the application of both Article 92(3)(a) and Article 92(3)(c) presupposes the need to take into consideration not only the regional implications of the aid covered by those provisions but also, in the light of Article 92(1), its impact on trade between Member States and thus the sectoral repercussions to which it might give rise at Community level'.

188 In those circumstances, the arguments by which the applicants criticise the reference in the Decision to existing surplus capacity in the motor-vehicle industry are clearly ill founded, having regard to the wide discretion which the Commission enjoys under Article 92(3) of the Treaty (see also the judgment in

Spain v *Commission*, paragraph 18). That applies particularly in respect of 'top-up' aid, as to which the Commission states in the fifth paragraph of Point XI of the Decision that, in assessing regional aid to the motor vehicle industry, such top-up aid 'is normally approved except in cases where the investment contributes to the creation of capacity problems in the relevant sector. In such cases, the aid will be strictly limited to the net regional disadvantages'.

189 Finally, the Court finds that the Commission gave proper reasons, especially in Points X, XI and XII of the Decision, for its assessment with respect to Article 92(3)(a) of the Treaty.

190 It follows from the above that the complaints alleging infringement of Article 92(3)(a) of the Treaty and an insufficient statement of reasons must be rejected.

Contravention of the general scheme of Article 92(3) of the Treaty

191 The applicants put forward essentially five complaints.

(a) The need for an investigation *ex ante* and the applicability of the Community framework

— Arguments of the parties

192 The applicants argue that, in order to express a view as to the compatibility of aid with the common market, the Commission must take into account the information which it held at the time the aid in question was granted (investigation *ex ante*) rather than at the time it adopted its decision (investigation *ex post*). They rely in that respect on Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 43 and 45 (the '*Boussac*' judgment) and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraphs 96 and 98. In addition, they raise the following arguments:

— where Article 93(3) of the Treaty provides that the Commission is to be informed in advance of any aid plans, that is precisely in order to enable it to examine *ex ante* their compatibility with the common market;

— the deciding moment for assessing the compatibility of aid with the common market is that at which it produces its effects on competition (see, as regards the repayment of aid, Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 26);

— the assessment of the existence of a State-aid element, and in particular the application of the 'private investor in a market economy' test, must be made *ex ante* (*Boussac* judgment, paragraphs 43 to 45; *Tubemeuse II*; Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 19);

— assessment of the situation *ex post* is contrary to the principle of a State governed by the rule of law. If the factual and legal situation that is decisive for assessing an aid were to be that prevailing at the time the Commission's decision were adopted, the Commission would be able to choose the most convenient moment according to the desired result. Moreover, the criteria must be foreseeable, which is not guaranteed if the situation is assessed *ex post*.

193 It follows, in the applicants' submission, that the compatibility of the aid in question with the common market must be assessed at the date on which it was granted, namely 22 March 1991, and not at the date of the adoption of the Decision in 1996. That approach also applied to the parts of the aid which were not yet paid when the Decision was adopted, since all instalments of aid granted in the context of a single decision and by virtue of a single project must be assessed in accordance with the same legal and factual framework.

194 The applicants go on to argue, first, that the aid in question falls within a programme of regional aid that was already approved, and that the Commission was therefore not entitled to subject it to an examination of its compatibility with the Community framework. In their submission, the Commission had only the limited power to examine whether the aid in question complied with the conditions of the regional aid programme already approved.

195 In this case, the investment grants were definitively allocated by the 1991 decrees (see paragraph 19 above). The amendments made to those decrees later did not concern the substance, but merely reduced the amount of the aid, thus attenuating its negative consequences for competition. As for the investment subsidies, a firm undertaking concerning them was given on 18 March 1991 (see paragraph 20 above).

196 All that aid was granted within the context of the Nineteenth Outline Plan adopted pursuant to the Law on the Joint Task. That programme had already been approved by the Commission, as is shown by the fourth paragraph of Point

VIII of the Decision. It follows, in the applicants' submission, that the clause in the 1991 decrees, whereby the aid was granted subject to its authorisation by the Commission, was devoid of purpose.

197 Moreover, the applicants challenge the claim in the Commission's defence that, in its approval of the general aid programmes, it expressly reserved to itself the right to verify whether Articles 92 and 93 of the Treaty were complied with. They accuse the Commission of not having sent to them the documents said to contain that reservation and argue that their production at the rejoinder stage is out of time and inadmissible.

198 Even if the Commission's approval of the Nineteenth Outline Plan contained a reservation whereby the provisions of the Community framework had to be complied with, that framework, the applicants argue, was not applicable in March 1991, the date of the definitive grant of the aid in question.

199 Point 2.5 of the Community framework, as published in 1989, shows that the framework was to be applied for a two-year period from 1 January 1989. The Community framework therefore expired on 31 December 1990. The Federal Republic of Germany did not consent to its reintroduction until April 1991, after the definitive grant of the aid in question.

200 In that respect, the applicants put the following specific points by way of support for their argument:

— Decision 90/381 of 21 February 1990, cited above, requiring the Federal Republic of Germany, 'pursuant to' the Community framework, to notify aid exceeding a certain amount to the Commission, was not applicable to the

new *Länder*, which did not yet form part of that Member State, and it could not have extended that framework, which expired on 31 December 1990, beyond its original duration;

— the decision to extend the duration of the Community framework, henceforth extended to the new *Länder*, was published in OJ C 81 of 26 March 1991, made available on 27 March 1991, after the definitive grant of the aid in question. The Community framework could not apply retrospectively, because its wording did not so provide and because it would be contrary to the principle of legal certainty to place the commencement of the validity of a Community measure at a time prior to its publication (Case C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraph 17);

— the date of adoption of the decision extending the Community framework has not been established. Moreover, it is doubtful whether that decision was validly adopted. The Commission's letter to the Member States is dated 31 December 1990, although the Commission does not hold meetings at the end of the year. Moreover, the text published in the *Official Journal of the European Communities* (OJ 1991 C 81, p. 4) does not correspond to that received by the German Government;

— the Commission's letter proposing to the German Government that the Community framework be extended was not received by that government until 8 January 1991, as evidenced by the entry stamp by the permanent representation of Germany at the European Communities. At that date, the validity of the former Community framework had already expired, and the Commission's proposal should therefore be understood as proposing the reintroduction of that framework, without the possibility of retrospective application in the absence of consent from the Member States (Case

C-135/93 *Spain* v *Commission*, paragraph 24; Case C-292/95 *Spain* v *Commission*, paragraph 28 et seq.);

— the Community framework has in itself no binding force as against Member States for as long as they do not consent to it. In this case, the Federal Republic of Germany opposed the Community framework from the outset (see Decision 90/381 of 21 February 1990, cited above); on 7 February 1991, the Secretary of State at the Federal Ministry of the Economy explained to the Member of the Commission responsible for competition matters the position of his government to the effect that the Community framework did not apply to the new *Länder*, and the consent of the Federal Republic was not finally given until April 1991.

201 The Commission argues essentially that it was entitled to apply the Community framework as in force in June 1996 and to take account of the factual circumstances existing at the date on which the Decision was adopted. In this case, the applicants had changed their plans fundamentally since March 1991, and the decrees granting the aid had also been amended several times up to February 1996. There could therefore be no question of the Commission, in 1996, having to examine the compatibility of the aid by reference to the situation prevailing in 1991, whilst in the meantime all the relevant criteria had been fundamentally changed.

202 The Commission further contends that the aid in question had to be notified to it with a view to its prior authorisation.

— Findings of the Court

203 Contrary to what the applicants maintain, the aid measures in dispute cannot be regarded as falling within a regional aid programme already

approved by the Commission and thus exempt from the duty of prior notification.

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

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

206 In the light of the factors described above, the fact that application of the Community framework was suspended between January and April 1991, even if established, cannot have the legal consquence that the aid to the motor-vehicle industry is to be regarded as covered by the approval of the Nineteenth Outline Plan. On the contrary, if that fact were established, it would have to be held that Article 93(3) of the Treaty remained fully applicable to the aid in question.

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

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

209 In that respect, it should be emphasised that, although the rules of the Community framework, as 'appropriate measures' proposed by the Commission to the Member States on the basis of Article 93(1) of the Treaty, are entirely devoid of binding force and bind Member States only if the latter have consented to them (Case C-292/95 *Spain* v *Commission*, paragraphs 30 to 33), there is nothing to prevent the Commission from examining the aid which must be notified to it in the light of those rules when exercising the wide discretion which it enjoys for the purposes of applying Articles 92 and 93 of the Treaty.

210 It should, nevertheless, be added that the applicants' argument that the investigation, in 1996, of the compatibility of the aid at issue with the common market could be based only on assessment criteria which existed in 1991 finds no support in the case-law of the Court of Justice and the Court of First Instance.

Thus, in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16, and Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33, the Court of Justice stated that the legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted. The Court of First Instance did the same in Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 81).

211 Moreover, Article 92(1) of the Treaty prohibits, in so far as it affects trade between Member States, any aid 'which distorts or threatens to distort competition'. It follows that, when it establishes the existence of an aid within the meaning of that provision, the Commission is not strictly bound by the conditions of competition existing at the date on which its decision is adopted. It must carry out an assessment in a dynamic perspective and take account of the foreseeable development of competition and the effects which the aid in question will have upon it.

212 The Commission cannot therefore be criticised for having taken account of factors arising after the adoption of a plan to grant or alter aid. The fact that the Member State concerned implemented the proposed measures before the investigation procedure resulted in a final decision, in breach of its obligations under Article 93(3) of the Treaty, is of no relevance to that question.

213 The applicants' argument that such a practice is incompatible with the principle of legal certainty cannot be accepted. Whilst the preliminary investigation procedure under Article 93(3) of the Treaty is intended to allow the Commission sufficient time, the Commission must, nevertheless, act diligently and take account of the interest of the Member States of being informed of the position quickly in spheres where the need to intervene may be urgent by reason of the effect that the Member States expect from the planned incentive measures. The Commission must therefore take a position within a reasonable period, which the Court of Justice has assessed at two months [Case 120/73 *Lorenz* v *Commission*

[1973] ECR 1471, paragraph 4; see also Article 4 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1]. Moreover, the Commission is bound by the same general duty of diligence where it decides to initiate the *inter partes* investigation procedure laid down by Article 93(2) of the Treaty, and its failure to act in the matter may in appropriate cases be condemned by the Community judicature in proceedings under Article 175 of the EC Treaty (now Article 232 EC).

214 Moreover, the question of a possible infringement of the principle of legal certainty does not arise in this case. The length of time which elapsed between the date on which the first decrees granting aid were adopted (March 1991) and the date of the Decision (26 June 1996) was due, first, to the absence of complete notification of the measures in question; secondly, to the successive amendments which the applicants made to their plans, which in turn entailed successive amendments to the decrees granting the aid; and, thirdly, to the considerable difficulties which the Commission encountered in obtaining from the German Government and the applicants the information which it needed in order to take a decision (see paragraphs 16 to 42 above).

215 In particular, the Mosel I decision shows that, at the beginning of 1993, the Commission was in a position to take a decision on the whole of Volkswagen's investment plans, as initially submitted to it. It was at the express request of Volkswagen, submitted on 31 January 1993, that the Commission limited its assessment to the aid concerning Mosel I and Chemnitz I. It was then necessary to wait until 1995, when the Commission threatened the German authorities that it would adopt a decision on the basis of the incomplete file in its possession, for the information which it needed to be finally communicated to it. In short, it was not until 1996 that the Commission was placed in a position to take a decision with full knowledge of the facts.

216 In the meantime, the applicants' initial plans had been changed three times and, in consequence, the 1991 decrees had been amended by the 1993, 1994 and 1996

decrees. Although the parties disagree as to the extent of those successive amendments, it is undisputed that, at the very least, they involved a significant reduction in the scale of the plans and, above all, the postponement by three to four years of the entry into service of the paint and final assembly workshops of Mosel II and Chemnitz II.

217 In those circumstances, the applicants are wrong when they maintain that the Commission was required to examine plans that were successively devised in 1993, 1994 or 1996 solely in the light of the information at its disposal in 1991. On the contrary, the Commission was right to take account in its assessment of the changes that were subsequently made.

218 Moreover, even if it had initially approved the aid granted by the 1991 decrees, the Commission would have been entitled to re-examine it at the time of its amendment, in accordance with Article 93(3) of the Treaty, under which the Commission is to be informed, in sufficient time to enable it to submit its comments, of any plans to alter the aid. Thus, while acknowledging that there was no surplus capacity in the motor-vehicle industry in 1991, the Commission would in principle have been entitled to take account of surplus capacity which became apparent from 1993 onwards.

219 It follows from the above that the applicants' arguments concerning, first, the need for an investigation *ex ante* and, secondly, the inapplicability of the Community framework, must be rejected in their entirety.

(b) The classification of the paint and final assembly workshops at Mosel II and Chemnitz II as 'extensions of existing capacity'

— Arguments of the parties

220 The Free State of Saxony submits that, by making a distinction between extensions of existing capacity and new investments that does not appear in the Community framework, the Commission infringed the principle of institutional equilibrium (Case C-70/88 *Parliament* v *Council*, cited in paragraph 72 above, at paragraphs 21 and 22; Case C-316/91 *Parliament* v *Council* [1994] ECR I-625, paragraph 11 et seq.). They maintain that, under Article 94 of the EC Treaty (now Article 89 EC), it is for the Council to make any appropriate regulations for the application of Articles 92 and 93 of the Treaty.

221 The applicants also argue that it is incorrect to classify the paint and final assembly workshops of Mosel II and Chemnitz II as 'extensions of existing capacity'. If they had been classified as 'greenfield investments', like the press and body shops of Mosel II, all the investment grants at issue would have been declared compatible with the common market.

222 First, the applicants maintain that the classification 'extension of existing capacity' applies only in cases of enlargement of an existing factory. In this case, Mosel II had been built on a field, its buildings and facilities were entirely new and materially separate from Mosel I, and they were built by a different company from the one that built the latter. Moreover, Mosel I was destined for closure on the entry into service of all parts of Mosel II. Throughout the administrative procedure and in the Decision itself, the Commission had always referred to the applicants' 'new factories' or 'new investment plans'. Mosel II should therefore be regarded as a greenfield investment. The same applies to Chemnitz II.

223 Secondly, Mosel II and Chemnitz II also satisfy the definition of 'greenfield' investment given in the eighth paragraph of Point XII of the Decision. In that respect, the Commission wrongly established a distinction between the press and body shops of Mosel II on the one hand and the paint and final assembly workshops of Mosel II and Chemnitz II on the other, whereas the project as a whole constitutes a greenfield investment.

224 The applicants emphasise that Mosel II and Chemnitz II constitute a single project, even though executed in several stages. The basic conception of that project, namely the construction of a motor-vehicle factory comprising the four operations of manufacture (pressing, skeleton bodywork, painting and final assembly), with an engine-construction plant nearby, did not undergo any modification despite the spacing out in time, the reduction of the sum invested and the reduction of production capacity and the amount of the aid in relation to the initial project of 1991.

225 The applicants insist that the production premises were constructed as planned. The skeleton bodywork and press shops of Mosel II were completed as planned, in 1992 and 1994 respectively. The entry into service of the final assembly workshop was simply postponed from 1994 to 1996, and that of the paint shop from 1994 to 1997. Only the logistics centre, which did not form part of the production units, was constructed not, as envisaged, by Volkswagen on the Mosel site, but by another undertaking some kilometres away from the factory.

226 The applicants add that the technology used at Mosel II is more modern than that initially envisaged, that production has been simplified and automated and that productivity has been increased, especially by the use of qualified suppliers nearby and the externalisation of certain services. They stress, however, that the investment project has not changed in content but has simply been adapted to technical progress.

227 It does not follow from the solution adopted on a transitional basis, consisting in the delivery by the already-finished part of Mosel II of skeleton bodywork to Mosel I, that Mosel II is not a greenfield investment. In that regard, the Commission erred in holding that that solution had permitted the establishment in Mosel in 1994 of a 'fully operational' factory, composed of the assembly and paint shops of Mosel I and the press and skeleton body shops of Mosel II.

228 Mosel I and II were never designed or constructed with a view to their forming an integrated motor-vehicle construction plant. There are considerable technical differences between them, making lasting integration of Mosel I in Mosel II's production process economically absurd.

229 The Commission was perfectly aware that Mosel I was only an interim solution and that it was intended to be closed. The applicants refer to the ninth paragraph of Point IX of the Mosel I decision, according to which 'the rationale behind the interim project was to maintain and train a workforce for automobile production at the location until the new plant Mosel II comes on stream'.

230 In accordance with that interim solution, assembly was abandoned at Mosel I on 23 December 1996 and the paint shop was closed in March 1997. Assembly of the Passat B5 model started at Mosel II in October 1996. Only a small part of Mosel I's buildings were still used for touching-up work and to store detached components from other factories in the group. It was not intended to integrate Mosel I into Mosel II.

231 It is, moreover, both technically and economically out of the question to maintain Mosel I facilities in service, or to reopen them, after the completion of Mosel II.

232 Moreover, the Commission made a factual error in stating that Volkswagen's undertakings in Saxony had been profitable since 1994 (ninth paragraph of Point XII of the Decision). On the contrary, Volkswagen transferred DEM 367 million to VW Sachsen to compensate for its losses between 1994 and 1996. The Commission was aware of this. The applicants add that there is no connection between, on the one hand, a factory's productivity and rate of use and, on the other, its profitability. In any event, the alleged profitability of the Mosel facilities in 1994 played no part in the administrative procedure, and neither the applicants nor the Federal Republic of Germany had the opportunity to express their point of view on the question.

233 The applicants see no relevance in the fact that, in 1996, they had already eliminated certain typical disadvantages of a greenfield investment. Volkswagen made efforts, at its own expense and with a view to the completion of Mosel II, to develop infrastructure, logistical organisation and supplier structure. Moreover, the initial disadvantages had not been taken into consideration in the Mosel I decision, so that the Commission was under a duty in the Decision to take account of all the disadvantages in connection with the investments in Mosel II.

234 As regards the training of Mosel I's workers for the needs of Mosel II, the applicants argue that the traditional (solvent-based) painting technique used in Mosel I differs considerably from the (water-based) technique used in Mosel II. The same applies to the final assembly chain. The highly advanced technologies of the Mosel II facilities and computerised control techniques require a particular mastery of machines which is in no way comparable with the know-how employed in Mosel I.

235 As regards suppliers, there were none meeting Volkswagen's needs established in the area in 1990. However, thanks to Volkswagen's efforts in anticipation of Mosel II, there were eight 'just-in-time' suppliers present in 1994 and, at the end of 1997, there were 11 suppliers of that type, supplying 13 modular construction groups. However, those subcontractors established themselves near Mosel and Chemnitz not on account of the transitional retention of Mosel I and Chemnitz I,

but solely on account of the long-term perspective offered by Mosel II and Chemnitz II.

236 The Commission contends that the decisive factor in the categorisation of the paint and final assembly shops at Mosel II was Volkswagen's decision in 1993 to divide the Mosel II project into four separate units, the construction and entry into service of which were to happen at different times. The Commission maintains that consideration of the disadvantages linked to operating costs must commence for each of those units separately at the time of its entry into service.

237 In the Commission's view, Volkswagen has had an operational motor-vehicle construction plant in Mosel since July 1992, the date of the entry into service of the Mosel II body shop, an on-site pressing unit not being strictly necessary. In any event, as from 1994 at the latest, Volkswagen was able to prepare vehicles, with parts delivered by its suppliers, in its press shop (entered service March 1994) and skeleton body shop (entered service July 1992) at Mosel II, and to finish them in the paint and final assembly shops of Mosel I, situated close by on the same industrial estate.

— Findings of the Court

238 It should be noted that investigation of the compatibility of the aid at issue with the common market, in accordance with the Community framework, consisted primarily in assessing the net additional costs entailed by setting up at the chosen site as compared with setting up in a central, non-disadvantaged area of the Community.

239 Concerning the calculation of operating costs, the Commission makes a distinction between what it calls 'greenfield' investments, the additional costs of which it takes into account for a period of five years, and what it refers to as 'extension' investments, the additional operating costs of which it takes into account for only three years.

240 According to the eighth paragraph of Point XII of the Decision:

'The term "greenfield project" does not simply mean that the project is situated in a green field somewhere, but that, from the investing company's point of view, the site is a new, as yet undeveloped one. Consequently, the company faces the following typical special problems as compared with the extension of an existing plant: lack of adequate infrastructure, lack of organised logistics, no trained workforce adapted to the needs of the company, and no established supplier structure. If, however, these services can be provided by a nearby plant belonging to the same group, then the project is treated as an extension, even if it is located in a green field. The Community concept differs from the concept of new investments that may be defined in national law. Since, in the case of a greenfield project as defined in this way, more difficulties arise and the time-span for reaching full capacity and thus viability is somewhat longer, there is justification for calculating the operating cost disadvantages over a longer period.'

241 Contrary to what the Free State of Saxony maintains, the Commission does not undermine the principle of institutional equilibrium by making such a distinction. The power to make any appropriate regulations for the application of Articles 92 and 93 of the Treaty, conferred on the Council by Article 94 of the Treaty, is in no way called into question by the fact that the Commission uses pre-established operational criteria, such as those underlying the distinction between greenfield investments and extensions of existing capacity, when exercising the wide discretion which it enjoys in applying those provisions.

242 In this case, the Commission considered that the skeleton body shop and the press shop of Mosel II were greenfield investments. It therefore took their operating costs into account over a period of five years, namely from 1993 until 1997 (body shop) and from 1994 until 1998 (press shop), in its cost-benefit analysis. By contrast, the paint and final assembly shops of Mosel II and Chemnitz II were classified as extensions of existing capacity, with the result that their operating costs were taken into account over a period of three years, namely from 1997 until 1999.

243 In that respect, the Commission states in the ninth and tenth paragraphs of Point XII of the Decision:

'In the present case, the Commission had to take into account the fact that the different shops of the investment in Mosel come on stream at different times. Thus, the start-up problems associated with the different subprojects will also occur at different times. Furthermore, the Commission took account of the fact that, through the delay in project implementation, the character of the project has also changed. With the setting up of the press and body shops and their link with the modernised paint shop and final assembly halls of the old Mosel I plant, a fully operational car plant was established in Mosel by 1994. This is also demonstrated by the profitability of the VW companies in Saxony since 1994.

The future investment for a new paint and final assembly hall in Mosel II thus no longer constitutes a greenfield investment but represents an extension of existing capacity. Since a supplier structure is already in place [...], [...] the infrastructure exists and... most of the workers will be taken over from Mosel I, the typical handicaps associated with greenfield investments will arise to a much lesser degree. This also applies to the Chemnitz II engine plant. As in other cases of capacity extension, the build up of production in these plants is very rapid. Although the German authorities and VW originally suggested an analysis of the period from 1998 to 2002 for all projects in Mosel and Chemnitz, the Commission has analysed the operating handicaps over five years for the proposed greenfield projects, i.e. for 1993 to 1997 (body shop) and for 1994 to 1998 (press shop), and over three years for the extension projects, i.e. 1997 to

1999 (paint shop, final assembly, Chemnitz II). It was also taken into account that the press shop and the body shop will be expanded from a production capacity of 432 cars/day to 750 cars/day during the same period in order to be able to supply fully the new Mosel II paint shop and final assembly. Therefore, the additional operating handicaps for this period (1997 to 1999) that can be attributed to this extension of capacity were also included in the analysis.'

244 As stated above, the question whether the paint and final assembly shops of Mosel II and Chemnitz II were to be classified as extensions of existing capacity or as greenfield investments falls within the wide discretion which the Commission enjoys when applying Article 92(3) of the Treaty. Review by the Court of First Instance must therefore be restricted to checking that the facts relied on in making the disputed classification are materially accurate, and that there has been no obvious error in the assessment of those facts (see the *Matra* judgment, cited in paragraph 180 above, at paragraphs 23 to 28).

245 It should be noted, moreover, that the classification of an investment as an extension of existing capacity or, on the other hand, as a greenfield investment, is made in a Community context, irrespective of the classification under the accounting or tax law of the Member State to which the beneficiary undertaking is subject (see, by analogy, Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 76).

246 In that respect, it has not been established that the Commission's conception is manifestly erroneous. That conception is based on the idea that the taking into account of the disadvantages linked to the operating costs of a new plant must commence at the time of its entry into service or, when the coming-on-stream of its various production units is staggered, at the time of the entry into service of each of them. Each unit must thus form the subject-matter of a separate assessment, so as to permit the state of development of the site to be taken into

account as at the time of its entry into service. That conception complies with the rule that derogations from the principle laid down in Article 92(1) of the Treaty that State aid is incompatible with the common market are to be interpreted strictly.

247 In this case, contrary to their initial plans, the applicants opened the four workshops of Mosel II at different times between 1992 and 1997. In those circumstances, the arguments they put forward are not sufficient to invalidate the Commission's conclusion that the paint and final assembly shops of Mosel II and Chemnitz II cannot be classified as greenfield investments, since, from 1994 at the latest, there was a fully operational motor-vehicle production unit in Mosel composed of the paint and final assembly shops of Mosel I (in the modernisation of which the applicants invested more than DEM 414 million, and which the Mosel I decision describes as an ultra-modern assembly and paint factory), the skeleton body and press shops of Mosel II (which entered service in July 1992 and March 1994 respectively), and Chemnitz I. As the Commission has pointed out, without being contradicted, the production capacity of that unit has been 100 656 vehicles per year since 1992, and 34 000 vehicles of the new model Golf A3 were built there in 1992, 71 800 in 1993, 90 100 in 1994 and 100 100 in 1995.

248 The applicants have, it is true, argued that the investments in Mosel II and Chemnitz II form a whole and that the combination of Mosel I/Chemnitz I and the first part of Mosel II represents only an interim solution. It should nevertheless be remembered that the Volkswagen group has enjoyed considerable aid, amounting to DEM 487.3 million for Mosel I and DEM 84.8 million for Chemnitz I (see the Mosel I decision). That aid enabled it to have the benefit of a fully operational motor-vehicle construction plant in 1994 at the latest, and to commence production as from that year. If that aid had not been granted, its Mosel II and Chemnitz II projects would have been classified as greenfield investment in their entirety, but, as against this, the new plant would not have been able to enter service so quickly and the investments there would have been

more costly since it would, in any event, have had to develop its infrastructure, logistics, workforce and supplier network. In short, the applicants' argument, if accepted, would thus amount to allowing the Volkswagen group to benefit from the greenfield investment regime twice in relation to the same project for the construction of a motor-vehicle factory.

249 Moreover, as the Commission has pointed out, investments are not primarily meant to secure State aid but to ensure future profits. Therefore, an investor who succeeds in eliminating certain handicaps connected with his investment, more quickly, by accelerating the entry into service of certain parts of his project, should not consider himself 'penalised' by a reduction in the aid which he may enjoy, since his operating costs in connection with the infrastructure diminish and his production conditions improve.

250 Accordingly, the Commission has not made any manifest error of assessment in classifying the paint and final assembly shops of Mosel II, and Chemnitz II, as 'extensions of an existing plant'. It is incorrect in those circumstances to maintain that those workshops of Mosel II and Chemnitz II were erected 'on a greenfield site'. On the contrary, as the Commission maintains, the Volkswagen group had already, in 1996, eliminated certain disadvantages typical of a greenfield investment, in the sense in which that expression is used in the Decision.

251 In particular, the documents before the Court show that, as from 1994, and by 1997 at the latest, it had in place an appropriate infrastructure, organised logistics, a workforce trained to meet its needs and a well-established supplier structure.

252 As the Commission has pointed out, the fact that the Mosel I workforce, comprising about 1 330 employees and which was transferred to Mosel II, had to undergo a certain amount of training before being able to work on the new

models or according to the new production techniques does not mean that that workforce was untrained within the meaning of the definition of greenfield investments.

253 As for suppliers, the document joined as Annex B4 to the application in Case T-143/96 shows that, in Mosel at the end of 1995, there were 129 suppliers of parts (eight under the 'just in time' method) and 267 suppliers in the field of construction, equipment and services, together employing 22 000 workers. According to the same document, the number of local suppliers rose from 0 in 1990 to 87 in June 1993. The Commission has argued, without being contradicted, that that represents a proportion of local suppliers of 30%, which far exceeds the European average in the motor-vehicle industry.

254 The foregoing considerations cannot be invalidated by a factual error allegedly made by the Commission in its assessment of the profitability of the Volkswagen undertakings in Saxony since 1994. In the first place, the alleged error has not been established, since the accounts of those undertakings, produced as an annex to the rejoinder in Case T-143/96, show that they made an operating profit of DEM 49.4 million in 1994, DEM 170 million in 1995 and DEM 209 million in 1996. Moreover, the Commission has rightly observed that the profitability of a new motor-vehicle plant is only one of a number of indicators for determining whether that plant should be regarded as a greenfield investment or as an extension. It should be noted in that respect that the Decision treats the profitability of the Volkswagen undertakings in Saxony as no more than a confirmation that, as early as 1994, Mosel I and the pressing and skeleton body shops of Mosel II formed a complete and operational motor-vehicle construction plant.

255 Moreover, the question whether or not the facilities of Mosel I will be retained in service after the completion of Mosel II is irrelevant for the purposes of the present analysis.

256 As for Chemnitz II, the applicants have not put forward any concrete argument capable of casting doubt on the Commission's assessment that this was an investment extending Chemnitz I. The Commission has pointed out that the transfer of production of various engine parts from Chemnitz I to Chemnitz II took place progressively between 1996 and 1998, so that the two plants, in parallel, produced essential engine parts (see Annex B10 to the application in Case T-143/96).

257 It follows from the above that the arguments put forward by the applicants for the purposes of challenging the classification of the paint and final assembly shops of Mosel II and Chemnitz II as extensions of existing capacity must be rejected.

(c) The calculation of the costs and benefits of the investment

— Arguments of the parties

258 The applicants maintain that the analysis of the costs and benefits of the investment was made on the basis of incomplete documents and that the reasons for that analysis were insufficiently and/or erroneously stated.

259 They claim, first, that the Commission did not take account of certain essential documents. The Commission sent to Mr Sterk, the expert it designated to carry out that analysis, only the documentation which Volkswagen sent in January 1996. In fact, that documentation was only an addition to the documents

submitted by Volkswagen in May 1993 and May 1994. The documentation of 1996 was therefore incomplete and likely to mislead the expert.

260 At a meeting held on 29 May 1996, Volkswagen became aware of the fact that the expert did not have the 1993 and 1994 documents and sent them to him directly. However, the applicants argue, it is evident from the very short period of time which elapsed between the sending of those documents and the adoption of the Decision on 26 June 1996, and from the Decision itself, that the expert was not in a position to study them.

261 In the light of the expert report produced in the defence, the applicants claim that the expert did not have the time to examine carefully the handicaps described in points 6.1.1, 6.1.3 and 6.5.2 to 6.5.7 of that report, and in particular the subsidy for connection to the road network.

262 Secondly, the applicants argue that the fifth, sixth, seventh, eleventh, twelfth and thirteenth paragraphs of Point XII of the Decision do not provide a comprehensible explanation of the calculation of costs and benefits, with the result that the Decision infringes Article 190 of the Treaty.

263 In their submission, even if the Commission is not required to set out in the Decision each of the factors entering into the calculation of the extra investment and operating costs, the most significant of them should be indicated and quantified, at least in outline. They maintain that this is so *a fortiori* where the aid declared incompatible with the common market is substantial.

264 Thirdly, the Decision does not indicate what additional costs put forward by Volkswagen were not accepted. In particular, Volkswagen estimated that if, within a short space of time, the employees of VW Sachsen were no longer to be

remunerated in accordance with the collective agreement for the Saxon metallurgy industry but in accordance with Volkswagen's own tariff, this would entail an increase in the burden of wages and salaries of DEM 161.6 million. That risk was an essential element which the Commission completely ignored or wrongly dismissed, making no mention of it in the Decision. In that respect, the explanation contained in the defence comes too late.

265 The applicants add that the Commission made a factual error in stating, in the fourteenth paragraph of Point XII of the Decision, that, during the administrative procedure, its provisional cost-benefit analysis was accepted by Volkswagen.

266 In their reply, the applicants state that, thanks to the defence, they are in a position to understand the cost-benefit analysis carried out by the Commission. That, however, is irrelevant to the question whether sufficient reasons are stated in the Decision itself. The applicants repeat that that is not the case, since the cost-benefit analysis was not annexed to the Decision. The business secrets contained in that analysis were those of the applicants themselves, and it would therefore have sufficed for the Commission to have sent them the analysis as an integral part of the Decision.

267 The Commission states, *inter alia*, that it entrusted Plant Location International, a subsidiary of the company auditors Price Waterhouse, with the task of preparing a draft cost-benefit analysis. That draft was checked and corrected, where necessary, by the relevant departments of the Commission. Volkswagen had contacts with Mr Sterk, who was the last person to be concerned with the matter for Plant Locational International, several months before the Decision was adopted, and in particular at the meetings on 11 April and 29 May 1996. The 1996 documentation, supplied by the Commission to Mr Sterk, contained all the relevant information. Since Mr Sterk analysed the situation over a period of months and was therefore conversant with the project in all its details, it was

possible for him to examine rapidly and completely the 1993 and 1994 documents which Volkswagen subsequently sent to him.

— Findings of the Court

268 As regards, first of all, the allegation that the statement of reasons is defective, inasmuch as the Decision does not provide a comprehensible explanation of the cost-benefit analysis, it should be pointed out that, according to settled case-law, the reasons given for a measure must be assessed, in particular, by reference to the interest which the addressee or other persons concerned may have in receiving explanations, particularly where they played an active part in the procedure prior to the adoption of the contested measure and knew the reasons of fact and law which led the Commission to take its decision (see, for example, Case T-106/96 *Wirtschaftsvereinigung Stahl* v *Commission* [1999] ECR II-2155, paragraph 172). It should also be pointed out that the Commission is not required, in stating its reasons for a decision, to reply to all the issues of fact and law raised by the interested parties, provided it takes account of all the circumstances and all the relevant factors of the case (*British Airways and British Midland Airways*, paragraph 94).

269 In this case, the documents before the Court show that the applicants were closely associated with the administrative procedure which led to the drawing up of the Decision. In particular, they have not denied the fact that the successive draft cost-benefit analyses prepared by the Commission from 1992 were sent to them and were commented upon point by point with their representatives and those of the German Government, especially at the meetings of 11 April and 29 May 1996 (see the minutes of those meetings, Annexes B9 and B12 to the defence in Case T-143/96). It appears, moreover, that the definitive cost-benefit analysis on which the Decision is based essentially reproduces the analysis contained in the

drafts examined at those meetings, the alterations that were made being favourable to the applicants.

270 In those circumstances, neither the fact that the Decision does not reproduce the detailed figures of the cost-benefit analysis, nor the fact that the analysis was not annexed to the Decision, constitutes a breach of the duty to state reasons laid down in Article 190 of the Treaty.

271 Moreover, the applicants have failed to demonstrate that the Commission's expert was not in a position to express a view on the documents which were sent to him at the end of May and the beginning of June 1996. On the contrary, it should be noted that the expert report (Annex 13 to the defence in Case T-143/96) is endorsed 'January 22, 1996, revised June, 1996'. Moreover, the Commission observes, rightly, that the fact that some of the data sent was not treated as constituting additional investment or operating costs does not mean that it was not examined. That applies in particular to the request of the local authorities for repayment of the subsidy granted to the applicants in 1994 for the costs of connection to the road network, on the subject of which the applicants' point of view is discussed — and rejected — by the expert at point 6.1.1 of the report.

272 As for the applicants' complaint that the Decision does not state which additional costs were not accepted, that complaint merges with the allegation of defective reasoning and must be rejected on the grounds indicated above. As regards, more particularly, the cost of DEM 161.6 million which might result from the future application of Volkswagen's collective agreement on wages and salaries to the workers at Mosel, the Commission has rightly pointed out that this was a hypothetical risk, the occurrence of which it was not possible to assess at the time

when the Decision was adopted, and which could not therefore be taken into account in the cost-benefit analysis.

273 It is also clear from the minutes of the meeting on 29 May 1996 (Annex 12 to the defence in Case T-143/96, p. 3) that Volkswagen had indeed acknowledged that the Commission's analysis concerning the calculation of operating costs was reasonable and could be accepted.

274 It follows that the applicants' arguments concerning the calculation of the costs and benefits of the investment must be rejected.

(d) Top-up aid

— Arguments of the parties

275 The applicants submit that the Commission erred in rejecting the possibility of top-up aid, in addition to simple compensation for regional disadvantages, on the ground of overcapacity problems in the motor-vehicle industry.

276 The Commission did not touch on the really decisive question in the context of Article 92(3)(c) of the Treaty, namely incentive to set up businesses in a disadvantaged region. In this case, only top-up aid could lead investors to set up in Mosel and Chemnitz. Nor did the Commission take account of the fact that,

according to the Decision itself, 3 600 jobs were created or safeguarded, and that the establishment of suppliers on the spot, and other multiplier effects for the economy of the new *Länder*, will indirectly permit the creation of 20 000 others.

277 Moreover, the Commission itself acknowledged that the motor-vehicle industry has been suffering from overcapacity only since 1993. Since the aid is to be assessed by reference to the market situation at the time when it was granted, in March 1991, those overcapacity problems should not have been taken into consideration and the top-up aid should therefore have been authorised.

278 In addition, the Decision contained a limitation on the production capacity of Mosel II until 1997. Therefore, the applicants submit, the Commission could not refuse to allow the top-up aid, at least for the pressing and skeleton body shops.

279 According to the Commission, the Decision explains that top-up aid is not authorised where the investment contributes to the creation of overcapacity problems in the industry concerned. The Commission carefully examined overcapacity existing since 1993 in the motor-vehicle industry, on the basis of precise figures. In those circumstances, it was not necessary to assess separately whether there was any need to create particular incentives in Mosel and Chemnitz.

— Findings of the Court

280 In the exercise of its power of assessment, whether pursuant to Article 92(2)(c) or 92(3)(a) of the Treaty, the Commission may take account of the consequences of

aid on the industry concerned (*Matra*, paragraph 26). The Commission was therefore entitled to take into account all the factors existing at the time when the Decision was adopted in June 1996.

281 In this case, the first paragraph of Point XII of the Decision shows that the Commission duly took into account the need to create incentives to invest in disadvantaged regions, such as Mosel and Chemnitz. Indeed, it is stated in that paragraph that high levels of investment and other aid have been authorised there in order to contribute to the development of the region, and that the regions of Mosel and Chemnitz are eligible for investment aid of up to 33% (until April 1991) and of up to 35% gross aid intensity (after that date).

282 The Commission makes the qualifying statement, however, in the fifth paragraph of Point XI of the Decision, that 'top-up' aid intended to create particular incentives to invest in disadvantaged regions is not authorised where the investment contributes to the creation of capacity problems in the relevant sector. Similarly, in the nineteenth paragraph of Point XII of the Decision, the Commission states that, when applying the Community framework to cases where investments have adverse effects on the sector as a whole, it has a policy of strictly limiting the aid to the net incremental costs facing the investor in the disadvantaged region.

283 Moreover, the Decision sets out, precisely and in detail, the considerable overcapacity problems existing since 1993 in the motor-vehicle construction industry (fifteenth paragraph of Point XII) and the extent to which that overcapacity will be exacerbated by the investments in question (18th paragraph

of Point XII). The Commission also takes account (in the 16th and 17th paragraphs of Point XII) of the limitation of Mosel II's production capacity.

284 Having regard to the above considerations, and bearing in mind the broad power of assessment which the Commission has in the matter, the applicants' arguments concerning top-up aid must be rejected.

(e) The determination of the aid authorised

285 The Decision concludes, in the nineteenth paragraph of Point XII, that aid of an intensity, expressed in gross grant equivalent, of 22.3% for Mosel II and 20.8% for Chemnitz II are acceptable. It states that investment grants of DEM 418.7 million for Mosel II and Chemnitz II and investment allowances of DEM 120.4 million for Mosel II and Chemnitz II may be authorised. According to Article 1 of the Decision, the granting of aid up to those amounts is compatible with the common market. According to Article 2 of the Decision, the granting of special depreciation with a value of DEM 51.67 million for Mosel II and Chemnitz II and of investment grants of DEM 189.1 million for Mosel II and Chemnitz II is incompatible with the common market.

286 According to the applicants, the Commission has infringed Article 190 of the Treaty in that it is not possible to determine, from the gross grant equivalent which it has used, the amounts stated in Articles 1 and 2 of the Decision. The decision did not state the discount rate used by the Commission. Even knowing that factor, on the basis of information belatedly provided in the defence in Case

T-143/96, it was impossible to ascertain with certainty what calculation gave rise to the amounts indicated in Articles 1 and 2 of the Decision.

287 That argument cannot be accepted. As the Court has held above, the applicants and the German Government were closely associated with the administrative procedure and were thus placed in a position to discuss point by point the successive draft cost-benefit analyses prepared by the Commission since 1992. Although they do not appear in the Decision, the method of calculating the discounting of the gross grant equivalent used to arrive at the authorised amount of aid and, in particular, the rate of discounting ('Nominal Discount Rate') of 7.5%, appear both in the cost-benefit analysis annexed to the Commission's expert report and in the minutes of the meeting of 29 May 1996.

288 It follows from the all the foregoing considerations that the complaints relating to infringement of Article 92(3) of the Treaty must be dismissed.

III — *Breach of the principle of the protection of legitimate expectations*

Arguments of the parties

289 The applicants submit that the Commission infringed the principle of the protection of legitimate expectations by classifying the paint and final assembly

shops of Mosel II and Chemnitz II as extensions of existing capacity and, in consequence, adopting a reference period of three years for the cost-benefit analysis. The Commission had caused them to entertain a justified hope that it would examine the aid promised by means of a cost-benefit analysis based on a five-year period.

290 In their submission, the expectations of traders deserve protection where a Community institution has given rise to justified hopes on their part as to its future conduct (Case 265/85 *Van Den Bergh en Jurgens* v *Commission* [1987] ECR 1155, paragraph 44). Similarly, traders who have taken measures in reliance on the existing state of the law are protected against a subsequent alteration of the institutions' assessment of those measures (Case 161/88 *Binder* v *Hauptzollamt Bad Reichenhall* [1989] ECR 2415, paragraphs 21 to 23; Case C-189/89 *Spagl* v *Hauptzollamt Rosenheim* [1990] ECR I-4539, paragraph 9; *Crispoltoni*, paragraph 21).

291 In this case, the Commission classified Mosel II and Chemnitz II as new or greenfield investments throughout the administrative procedure, from September 1990 until April 1996. In that respect, the applicants points to the following factors:

— in its letter to the German Government of 19 September 1990, the Commission requested notification of all aid 'for Volkswagen's new investment';

— in its letter informing that Government of its decision to initiate the investigation procedure, the Commission distinguished between the 'retention of existing production units' (Mosel I) and the 'construction of a new adjacent plant' (Mosel II);

— during the years 1992 to 1994, the Commission carried out a cost-benefit analysis for Mosel II and Chemnitz II which was based on a reference period of five years;

— in the Mosel I decision, the Commission referred frequently to the 'new plants' of Mosel II and Chemnitz II, which showed that, despite the delays in completing the project, it regarded those investments not as an extension of Mosel I and Chemnitz I but as new investments;

— in its Decision 96/179 of 31 October 1995, referred to in paragraph 39 above, the Commission referred to those projects as 'new investments'.

292 The applicants deny, moreover, that, on the occasion of the site visits on 21 and 22 December 1995, the officials and the expert of the Commission explained that the Mosel II and Chemnitz II projects could not be regarded in their entirety as greenfield investments. The only relevant question discussed on that occasion was whether the calculation of the disadvantages was to have a single starting-point,

namely the completion of the project, or several starting-points corresponding to the completion of each of the workshops.

293 It is also incorrect to maintain that, at the meeting of 11 April 1996, the parties had discussed the application of a three-year period to the disadvantages in connection with the operation of the paint and final assembly shops of Mosel II. The cost-benefit analysis presented by the Commission on 16 April 1996 was still based on a five-year period.

294 Although the application of a three-year period for the disadvantages connected with the operation of the paint and final assembly shops of Mosel II was discussed at the meeting of 29 May 1996, the minutes of that meeting clearly show that the applicants did not in any way accept the principle of this.

295 The applicants emphasise that they have never altered the conception of their projects. In any event, the staggering of the investments over a period of time was known from the beginning of 1993. At the time of the adoption of the Mosel I decision in July 1994, therefore, the Commission knew of the amendments adopted by Volkswagen to the Mosel II and Chemnitz II projects. Since the Commission had adopted a separate decision concerning the aid to Mosel I, Volkswagen had understood that it considered Mosel I and Mosel II as two distinct projects which were to be treated separately from the point of view of the

State-aid regime. The applicants also state that the situation existing at the time the Decision was adopted was identical to that existing at the time of the adoption of the Mosel I decision. The pressing and body shops of Mosel II were in service and the skeleton bodywork produced there were painted at Mosel I, where they underwent final assembly.

296 The applicants further argue that it was only with the prospect of Mosel II and Chemnitz II being classified by the Commission as new investments that they invested considerable sums. They maintain that, at the time of the adoption of the Mosel I decision, it was still possible to halt completely the investments in the paint and final assembly shops and transfer them to another site, and, they add, they would indeed have taken that decision if they had known at the time that the Commission would classify those workshops as extensions of existing capacity.

297 The Commission denies that it ever gave the impression that it classified Mosel II and Chemnitz II as greenfield investments.

298 The applicants could not, in any event, rely on statements made prior to March 1996, since they were based on an incomplete knowledge of the facts. The applicants and/or the Federal Republic of Germany concealed relevant informa-

tion until the last moment, with the result that the Commission lacked essential data for assessing the investment projects.

299 Nor, moreover, may the applicants plead a legitimate expectation, since they were aware of the fact that the Commission might refuse to authorise part of the aid granted, and that they would therefore be obliged to repay the aid already implemented unlawfully. What is more, VW Sachsen's annual balance sheet of 31 December 1995 shows that the applicants had envisaged that possibility and set aside considerable reserves for that reason.

Findings of the Court

300 It is settled case-law that the right to protection of legitimate expectations may be claimed by any individual who finds himself in a position in which it is shown that the Community administration gave rise to justified hopes on his part (see, for example, Case T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 51). However, no one may plead infringement of the principle of the protection of legitimate expectations in the absence of specific assurances given to him by the administration (Case T-521/93 *Atlanta and Others* v *European Community* [1996] ECR II-1707, paragraph 57; Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 68).

301 In this case, it is sufficient to observe that the Commission never gave an assurance that the Volkswagen group's investments in Mosel II and Chemnitz II would be classified in their entirety as 'greenfield' investments.

302 The fact that the Commission referred to Volkswagen's 'new investments' or 'new implantations' throughout the administrative procedure, between 1990 and 1996, is irrelevant in that respect, since that expression was used in its everyday meaning and was intended merely to distinguish the investments in Mosel I from those in Mosel II, without taking any position on the question whether the latter investments should be regarded as extensions of existing capacity or as greenfield investments, within the meaning of the Decision.

303 It should also be pointed out that, in the decision to initiate the investigation procedure, the Commission informed the German Government of its serious concerns as to the compatibility of the aid in question with the common market, by reason, in particular, of its apparent high intensity (see paragraph 26 above).

304 In any event, the fundamental alteration made to the applicants' plans at the beginning of 1993, and the subsequent alterations to those plans in 1994 and 1996, rendered the Commission's earlier assessments obsolete, and thus also rendered obsolete any assurances it might have given concerning the classification

of Mosel II and Chemnitz II as extensions of existing capacity or as greenfield investments.

305 Moreover, the applicants were not entitled to rely on any legitimate expectation for as long as they failed to supply the Commission with all the information which it needed in order to take its decision with full knowledge of the facts. Therefore, the statements and the conduct of the Commission prior to the beginning of 1996 cannot have given rise to legitimate expectations on the part of the applicants.

306 For the rest, it is clear from the minutes of the meeting of 11 April 1996 (Annex B9 to the defence in Case T-143/96, p. 4) that the discussions were particularly concerned with whether, in respect of the paint and final assembly shops of Mosel II, the cost-benefit analysis should take account of incremental operating costs over a period of three years or five years. Thus, as soon as it had all the information necessary for its assessment, the Commission made it known that the applicants' investments in Mosel II and Chemnitz II could not be classified in their entirety as 'greenfield' investments.

307 It follows that the plea alleging breach of the principle of the protection of legitimate expectations must be rejected as unfounded.

308 The applications must therefore be dismissed in their entirety.

Costs

309 Under Article 87(2) of the Rules of Procedure, an unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(5) of the Rules of Procedure, a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Under Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs.

310 It follows from the above that, on a proper view of those provisions, the applicants must bear their own costs and pay those of the Commission, save in so far as they have been incurred by the Commission as a result of the intervention of the Federal Republic of Germany. The Federal Republic of Germany shall bear its own costs. It must also pay the costs incurred by the Commission as a result of its intervention. The United Kingdom shall bear its own costs.

On those grounds,

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

hereby:

1. **Takes formal notice that the applicants discontinue their action in Case T-143/96 in so far as it seeks the annulment of the first indent of Article 2 of Commission Decision 96/666/EC of 26 June 1996 concerning aid granted by Germany to the Volkswagen Group for works in Mosel and Chemnitz;**

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

3. **Orders the applicants to bear their own costs and to pay the costs incurred by the defendant, save in so far as they have been incurred by the latter as a result of the intervention of the Federal Republic of Germany. The Federal Republic of Germany shall bear its own costs and pay the costs incurred by the Commission as a result of its intervention. The United Kingdom shall bear its own costs.**

Potocki Lenaerts Bellamy

Azizi Meij

Delivered in open court in Luxembourg on 15 December 1999.

H. Jung A. Potocki

Registrar President

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