

Joined Cases T-12/99 and T-63/99

UK Coal plc

v

Commission of the European Communities

(ECSC Treaty — Decision No 3632/93/ECSC — Operating aid and aid for the reduction of activity — Authorisation *ex post facto* of aid already paid — Improvement of the viability of recipient undertakings — Degression of aid — Bonus paid to underground mineworkers (*Bergmannsprämie*) — Amendment of a modernisation, rationalisation and restructuring plan — Taking account of a concentration between undertakings — Statement of reasons)

Judgment of the Court of First Instance (Second Chamber, Extended Composition), 12 July 2001 II-2161

Summary of the Judgment

1. *Actions for annulment — Action brought by an undertaking against an individual ECSC decision not addressed to it — Decision authorising the grant of aid to a competitor — Undertakings 'in competition' — Concept — Criteria (ECSC Treaty, Arts 4(c) and 33, second para.; General Decision No 3632/93)*

2. *ECSC — Aid to the coal industry — Authorisation by the Commission — Authorisation after payment of the aid — Whether permissible*
(ECSC Treaty, Art. 4(c); General Decision No 3632/93, Art. 9(5))
3. *ECSC — Aid to the coal industry — Prohibition — Authorisation by the Commission — Conditions — Improvement in economic viability*
(ECSC Treaty, Art. 4(c); General Decision No 3632/93, Arts 2(1) and 3)
4. *ECSC — Aid to the coal industry — Prohibition — Authorisation by the Commission — Conditions — Degression of aid*
(ECSC Treaty, Art. 4(c); General Decision No 3632/93, Arts 2(1) and 3(1) and (2))
5. *Actions for annulment — Action brought under the first paragraph of Article 33 of the ECSC Treaty — Pleas in law — Manifest failure by the Commission to observe the provisions of the Treaty or any rule of law relating to its application — Meaning — Limits on the Court's power of assessment*
(ECSC Treaty, Art. 33, first para.)
6. *ECSC — Aid to the coal industry — Operating aid and aid for the reduction of activity — Prohibition — Authorisation by the Commission — Conditions — Covering of the difference between production costs and the selling price on the world market — Scrutiny by the Commission in advance and after the event — Scope of the scrutiny*
(ECSC Treaty, Arts 4(c), 35 and 88; General Decision No 3632/93, Arts 3(1) and 9(1), (2), (4) and (6))
7. *Acts of the institutions — Statement of reasons — Obligation — Scope — ECSC Decision*
(ECSC Treaty, Arts 15, first para., and 33, second para.)

1. In deciding when an undertaking is 'concerned' because it is 'in competition' with another undertaking, it should be noted, first, that the conditions governing admissibility laid down by the second paragraph of Article 33 of the ECSC Treaty are less strict than those for an action for annulment brought under the second paragraph of Article 173 of the EC Treaty (now, after amendment, the second paragraph of Article 230 EC). Also, the provisions of the ECSC Treaty concerning the right of individuals to bring

an action must be interpreted widely in order to safeguard their legal protection.

Second, with regard specifically to the State aid rules in the ECSC Treaty, Article 4(c) of the Treaty lays down such a general, strict and unconditional prohibition on aid that it is unnecessary to examine whether, in point of fact, there is interference or potential inter-

ference with the conditions of competition in order to be able to declare aid incompatible with the common market. That prohibition does not presuppose that the aid is such as to distort or threaten to distort competition by favouring certain undertakings or the production of certain goods.

tioned above, it is sufficient to establish that there is a body of evidence supporting the conclusion that competition between the undertakings in question is not an unrealistic possibility.

(see paras 53-56)

Moreover, Article 4(c) of the ECSC Treaty does not contain a *de minimis* rule under which aid entailing only a slight distortion of competition would escape from the prohibition laid down. Nor does Decision No 3632/93 establishing Community rules for State aid to the coal industry contain a *de minimis* rule, such as that laid down for the regime governing State aid falling within the EC Treaty.

It follows that the admissibility of an action brought under the second paragraph of Article 33 of the ECSC Treaty by a Community coalmining undertaking, complaining of an infringement of Article 4(c) of that Treaty and directed against a decision by the Commission authorising the grant of State aid to another Community coalmining undertaking, cannot depend on actual or potential competition being proved. Having regard to the specific features of the ECSC regime which are men-

2. No provision of Decision No 3632/93 establishing Community rules for State aid to the coal industry prohibits the Commission from examining the compatibility of planned aid with the common market solely because the Member State which notified that aid has already paid it without waiting for prior authorisation. On the contrary, in so far as Article 9(5) of that decision makes the repayment of aid paid in anticipation expressly subject to the condition that the Commission must have refused authorisation, it necessarily implies that the Commission has the power to grant authorisation in such a situation. Finally, at a more general level, the substantive and procedural provisions in that decision and the system established by Articles 92 and 93 of the EC Treaty (now, after amendment, Articles 87 and 88 EC) do not differ on points of principle, so that it would not be justified to interpret the provisions of the decision, in relation to Article 4(c) of the ECSC Treaty, more restrictively than paragraphs 2 and 3 of

Article 92 of the EC Treaty in relation to paragraph 1 thereof, and the Commission is obliged, under Article 92 of the EC Treaty, to make an *ex post facto* assessment of aid already paid.

profitability and its non-competitiveness.

(see para. 81)

(see para. 68)

3. No provision of Decision No 3632/93 establishing Community rules for State aid to the coal industry states expressly that operating aid must be strictly reserved for undertakings with reasonable chances of achieving economic viability in the long term, in the sense that they must be capable of meeting competition on the world market on their own merits. The relevant provisions of the decision do not require that the undertaking in receipt of operating aid achieve viability by the end of a fixed period. They require only that economic viability improve, the reason for that open-ended formulation being the structural uncompetitiveness faced by the Community coal industry because most of its undertakings remain uncompetitive in relation to imports from non-member countries. It follows that improvement in the economic viability of a given undertaking necessarily means no more than a reduction in the level of its non-

4. As provided in Article 3(1) of Decision No 3632/93 establishing Community rules for State aid to the coal industry, operating aid is intended solely to cover the difference between production costs and the selling price on the world market. By virtue of Article 3(2) of the decision, that aid may be authorised only if there is at least a trend towards a reduction in the production costs of the undertakings receiving it. In that context, the first indent of Article 2(1) of the decision sets as one of the objectives to be attained that of achieving degression of aids, an aim to be achieved in the light of coal prices on international markets. In this connection, the economic realities — namely the structural unprofitability of the Community coal industry — in the light of which the decision was adopted must be taken into account when interpreting Article 2(1) of the decision.

As the Community institutions, the Member States and the undertakings concerned do not have a significant

influence on the world market price, the Commission cannot be reproached for having attached overriding importance, in terms of a degression of aid to the coal industry, to reducing production costs, since any reduction necessarily means that the volume of aid is smaller than if the reduction had not occurred, irrespective of movements in world market prices.

(see paras 117, 119-121)

5. Where the Court conducts a review under the first and second paragraphs of Article 33 of the ECSC Treaty, it must, as regards the assessment of complex economic facts or circumstances carried out by the Commission which supports a decision contested before it, confine itself to ascertaining whether the institution which took that decision manifestly failed to observe the provisions of the ECSC Treaty or any rule of law relating to its application, the term 'manifestly' in Article 33 presupposing a breach of the legal provisions so serious that it appears to derive from a manifest error in the assessment, having regard to the provisions of the ECSC Treaty, of the situation in respect of which the decision was taken.

(see para. 159)

6. By virtue of Article 3(1) of Decision No 3632/93 establishing Community rules for State aid to the coal industry, operating aid and aid for the reduction of activity are intended to cover the difference between production costs and the selling price freely agreed between the contracting parties in the light of the conditions prevailing on the world market. It follows that any matter of a financial nature which — by reducing costs or increasing revenue — causes the aid notified to exceed that difference, results in the corresponding fraction of aid being no longer covered by that basic rule and therefore incapable of authorisation, as operating aid or aid for the reduction of activity, under that decision. Accordingly, such aid not covered by the decision is, in principle, caught by the absolute prohibition laid down by Article 4(c) of the ECSC Treaty.

Compliance with the basic rule set out above is ensured by two levels of scrutiny. First, Article 9(1), (4) and (6) of Decision No 3632/93 has established a system of advance scrutiny of the proposed financial support. This system is designed to ensure compliance with the first indent of Article 3(1) of that decision, according to which the aid notified per tonne is not to exceed for each undertaking or production unit the difference between production costs and foreseeable revenue in the following coal production year. Second, Article 9(2) of the deci-

sion has established a system of scrutiny after the event of the amount of aid actually paid, since the Member States are required to send notification, by 30 September each year at the latest, of the amount of aid actually paid in the preceding coal production year and to declare any corrections made to the amounts originally notified. This system is designed to ensure compliance with the second indent of Article 3(1) of the decision, according to which the aid actually paid is to be subject to annual correction, based on the actual costs and revenue, at the latest by the end of the coal production year following the year for which the aid was granted.

When the Commission conducts its advance scrutiny designed to ensure compliance with the basic rule referred to above, it must, if it is not to exceed its wide power of assessment, take into consideration any matter brought to its attention which in all probability has a direct influence on production costs and/or revenue within the meaning of the first indent of Article 3(1) of Decision No 3632/93, in so far as it results in manifestly improper State aid of a precise and not insignificant amount. While the Commission is also obliged to check any reliable information brought to its attention as to the possible existence of such aid, it is, on the other hand, required to consider such information within the procedural framework of Articles 8 and 9 of that

decision only in so far as that consideration does not risk undermining, because of its complexity or duration, the operation of the system involving notification of annual aid falling within a multiannual plan and subsequent decisions of authorisation or refusal.

Financial support granted by the State to the coal industry outside the framework marked out by Decision No 3632/93 which has not been authorised by a Commission decision founded directly on the first paragraph of Article 95 of the ECSC Treaty, remains subject exclusively to Article 4(c) of the ECSC Treaty. The Commission, which, in accordance with Article 8 and the first paragraph of Article 14 of the ECSC Treaty, has the duty of ensuring that the objectives of the Treaty are attained and of carrying out the tasks assigned to it, takes the measures that are necessary in relation to such aid paid in breach of that provision. It may, in particular, adopt a decision under Article 88 of the ECSC Treaty recording a failure by a Member State to fulfil its obligations, and any failure by the Commission to adopt such a decision may be challenged by an action for failure to act under Article 35 of that treaty.

In addition, in the absence of more specific rules, the absolute prohibition in Article 4(c) of the ECSC Treaty applies alone. That provision is, more-

over, capable of having direct effect. It follows that, as long as the Commission has not adopted a decision on such support prohibited by Article 4(c), individuals who consider themselves prejudiced by the support may bring proceedings before the national courts. The possibility for individuals to assert the rights which they derive from Community law before the national courts, which have the power to grant interim relief and, where appropriate, to make a reference for a preliminary ruling, constitutes the very essence of the Community system of judicial protection.

(see paras 160-163, 167)

inasmuch as it must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

Also, in accordance with case-law developed in the context of the EC Treaty, where the Commission finds that State aid alleged by a complainant does not exist or is compatible, it must explain to the complainant, in the statement of reasons for the decision in question, the reasons why the matters put forward by it have not been sufficient for its complaint to be allowed, but the Commission need respond only to contentions which are fundamental to an assessment of the aid plan in issue and is not obliged to define its position on matters which are manifestly irrelevant or meaningless or plainly of secondary importance.

7. The first paragraph of Article 15 of the ECSC Treaty provides that decisions of the Commission are to state the reasons on which they are based. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure so as to defend their rights and to enable the Community judicature to carry out its review. It is not necessary for the reasoning to go into all the relevant facts and points of law, however,

It is true that neither the ECSC Treaty nor Decision No 3632/93 establishing Community rules for State aid to the coal industry contains a provision comparable to Article 93(2) of the EC Treaty (now Article 88(2) EC), in relation to which the foregoing case-law has been developed and which obliges the Commission to give notice to the parties concerned to submit their comments. However, that case-law has established the right of the complainant to be sent an express reply to its complaint, not as an interested party,

but as a person directly and individually concerned by the decision in which its complaint has not been upheld. Where the applicant is concerned within the meaning of the second paragraph of Article 33 of the ECSC Treaty, that case-law in principle applies by analogy.

Finally, an absence of reasons or an inadequacy in the reasons stated goes to an issue of infringement of essential procedural requirements and, involving a matter of public policy, must be raised by the Community judicature of its own motion.

(see paras 196-199)