JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
7 July 1999 *

In Case T-89/96,

British Steel plc, a company incorporated under English law, whose registered office is in London, represented by William Sibree and Philip Raven, Solicitors, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Prussen, 15 Côte d'Eich,

applicant,

supported by

Hoogovens Staal BV, a company incorporated under Netherlands law, whose registered office is at IJmuiden, Netherlands, represented by E. H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of Luc Frieden, 62 Avenue Guillaume,

intervener,

v

Commission of the European Communities, represented by Nicholas Khan and Paul Nemitz, of its Legal Service, acting as Agents, with an address for service in

* Language of the case: English.

Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Irish Ispat Ltd, a company incorporated under Irish law, whose registered office is at Haulbowline, Cobh, Ireland, represented by Richard Martin, Solicitor, and Jeremiah Healy SC and David Barniville, of the Irish Bar, with an address for service in Luxembourg at the Chambers of Zeyen, Beghin & Feider, 56-58 Rue Charles Martel,

and

Ireland, represented by Michael A. Buckley, Chief State Solicitor, acting as Agent, and Alex Schuster, of the Irish Bar, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

interveners,

APPLICATION for annulment of Commission Decision 96/315/ECSC of 7 February 1996 concerning aid to be granted by Ireland to the steel company Irish Steel (OJ 1996 L 121, p. 16),

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

composed of: R. M. Moura Ramos, President, R. García-Valdecasas, V. Tiili, P. Lindh and P. Mengozzi, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 25 November 1998,

gives the following

Judgment

Legal background

1 In principle, the Treaty establishing the European Coal and Steel Community (hereinafter 'the Treaty') prohibits State aid to the steel industry. Article 4(c) states that 'subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever', are incompatible with the common market in coal and steel.

2 The first and second paragraphs of Article 95 of the Treaty provide:

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

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

3 In order to meet the needs of restructuring the steel sector, the Commission took the first two paragraphs of Article 95 of the Treaty as the legal basis for setting up, as from the early 1980s, a Community scheme under which the grant of aid to the steel industry could be authorised in a limited number of cases. The scheme has undergone successive amendments with a view to resolving the specific economic difficulties of the steel industry. Thus, the Community code governing aid to the steel industry which was in force at the material time was the fifth in the series and was established by Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57, hereinafter 'the Fifth Code'). It remained in force until 31 December 1996. With effect from 1 January 1997, it was replaced by Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ 1996 L 338, p. 42), which forms the sixth steel aid code. It is clear from the preamble to the Fifth Code that, like its predecessors, it introduced Community rules which were intended to apply to aid, whether specific or non-specific, granted by Member States in any form whatsoever. The Fifth Code did not authorise either operating or

restructuring aid, save in the case of aid for closure (Case T-243/94 *British Steel* v *Commission* [1997] ECR II-1887 (hereinafter '*British Steel*'), paragraph 3).

4 In tandem with the Fifth Code, which constituted a general decision, the Commission had recourse on several occasions to Article 95 of the Treaty in order to adopt individual decisions authorising specific aid by way of exception. In that context, the Commission adopted on 12 April 1994 six *ad hoc* decisions authorising, respectively, the aid which Germany planned to grant to EKO Stahl AG, Eisenhüttenstadt (Decision 94/256/ECSC, OJ 1994 L 112, p. 45); the aid which Portugal planned to grant to Siderurgia Nacional (Decision 94/257/ECSC, OJ 1994 L 112, p. 52); the aid which Spain planned to grant to Corporación de la Siderurgia Integral (CSI) (Decision 94/258/ECSC, OJ 1994 L 112, p. 58); the grant by Italy of State aid to the public steel sector (Ilva steel group) (Decision 94/259/ECSC, OJ 1994 L 112, p. 64); the aid which Germany planned to grant to Sächsische Edelstahlwerke GmbH, Freital/Sachsen (Decision 94/260/ECSC, OJ 1994 L 112, p. 71); and the aid which Spain planned to grant to Sidenor, an undertaking producing special steels (Decision 94/261/ECSC, OJ 1994 L 112, p. 77). Those decisions were contested in three actions for annulment before the Court of First Instance, resulting in the judgments of 24 October 1997 in Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839 (hereinafter '*EISA*'); *British Steel*; and Case T-244/94 *Wirtschaftsvereinigung Stahl and Others* v *Commission* [1997] ECR II-1963 (hereinafter '*Wirtschaftsvereinigung*').

Facts

5 Irish Steel Ltd is a 100% State-owned company, operating Ireland's only steel-making and rolling plant, and is situated in Haulbowline, Cobh, County Cork. It has a liquid steel production capacity of 500 000 tonnes per annum and a hot-rolling capacity of 343 000 tonnes per annum in finished products (sections).

During the five commercial years from 1990 to 1995, its actual production of hot-rolled products — 278 000, 248 000, 272 000, 276 000 and 258 000 tonnes per annum, respectively — was considerably lower than its capacity.

6 Between 1980 and 1985 Irish Steel received aid worth IEP 183 million from the Irish Government with the Commission's prior approval. It then suffered a spell of persistent financial difficulties leading to total losses at the end of the 1994/95 commercial year in excess of IEP 138 million.

7 In 1993 the Irish Government underwrote two loans (worth IEP 10 million and IEP 2 million, respectively) which were granted at an effective rate of interest below the market rate. Those loans were deemed necessary to enable Irish Steel to continue operating. That aid was not notified to the Commission at the time.

8 Irish Steel's deteriorating financial performance led the Irish Government to notify the Commission, by letter dated 1 March 1995, of a restructuring plan for the company and associated public financial assistance. The plan allowed for a contribution of IEP 40 million in equity and IEP 10 million by way of the State guaranteed loan referred to above (hereinafter 'the first restructuring plan'). At the same time, the Irish authorities opened negotiations for the privatisation of Irish Steel.

9 On 4 April 1995, by Commission Notice 95/C 284/04 pursuant to Article 6(4) of [the Fifth Code] to other Member States and other parties concerned regarding aid which Ireland has granted to Irish Steel (OJ 1995 C 284, p. 5; hereinafter 'Notice 95/C'), the Commission gave notice to the parties concerned to submit their comments on the compatibility of the notified measures with the common

market. However, the first notification of 1 March 1995 was withdrawn by letter of 7 September 1995 and the Irish authorities submitted a revised notification to the Commission. This concerned a new plan for State aid in exchange for the acquisition of Irish Steel by Ispat International — a privately owned company based in Indonesia, controlled by Indian capital and operating in several countries — following an open bid procedure. The second proposal was not notified to other interested persons at all.

10 According to the Commission's estimates, the total value of the State aid contemplated in connection with the sale of Irish Steel was IEP 38.298 million. The aid was to be apportioned as follows:

— a maximum amount of IEP 17 million for the writing-off of the interest-free Government loan;

— a cash contribution of up to a maximum of IEP 2.831 million to cover a balance sheet deficit;

— a cash contribution of up to a maximum of IEP 2.36 million to cover specific remedial environmental works;

— a cash contribution of up to a maximum of IEP 4.617 million towards the costs of servicing debts;

— a cash contribution of up to a maximum of IEP 0.628 million to cover a deficit in the pension scheme;

— a cash contribution of up to a maximum of IEP 7.2 million to take account of revisions to the restructuring plan as a condition of the Council's assent;

— indemnities of up to a maximum of IEP 2.445 million in respect of possible residual taxation and other costs and financial claims arising from the past;

— up to a maximum of IEP 1.217 million, representing the aid element contained in State guarantees on two loans worth IEP 12 million (which were covered by the procedure opened under Article 6(4) of the Fifth Code, and which under the sale agreement will now effectively be taken over by the investor providing counter cover indemnifying the State against the risks under the guarantees).

11 The second restructuring plan provided for Ispat International to purchase all of the shares in Irish Steel for IEP 1 and to assume all debts and outstanding liabilities, save for the interest-free Government loan of IEP 17 million, which was to be written off. In addition, Ispat International undertook to make an immediate capital injection of IEP 5 million and to make investments over the next five years totalling IEP 25 million.

12 By letter of 11 October 1995, the Commission notified the second plan to the Council, which approved it on 22 December 1995. Commission Decision 96/315/ECSC of 7 February 1996 concerning aid to be granted by Ireland to the steel

company Irish Steel, published on 21 May 1996 (OJ 1996 L 121, p. 16; hereinafter 'the contested decision') approved the proposed State aid.

13 The Commission made its approval conditional on compliance with the requirements set out in parts V to VII of the contested decision and specified in Articles 2 to 5 thereof. In part V of the contested decision, in particular, it was provided 'that there should be no increase in existing capacity for liquid steel and hot-rolled finished products, other than resulting from productivity improvements, for a period of at least five years starting from the date of the last payment of aid under the plan'.

14 Unlike Decisions 94/256, 94/257, 94/258, 94/259, 94/260 and 94/261, the contested decision did not, however, require production capacity to be reduced because 'it is not technically possible to have capacity reductions... without closing the plant since Irish Steel has only one hot-rolling mill' (part V). Neverthless, it imposed the following additional conditions on Irish Steel:

— its current range of products, as communicated to the Commission in November 1995, was not to be extended during the first five years following the payment of aid;

— during that time, beams of a larger size than its current range of sizes were not to be produced;

— it could not exceed set limits to its annual production of hot-rolled finished products and semi-finished products (billets) in each financial year up until 30 June 2000;

— during the same period, it had to maintain its European sales (that is to say, in the Community, Switzerland and Norway) of finished products below a certain ceiling.

15 By deed of 18 June 1996, Irish Steel changed its company name to Irish Ispat Ltd (hereinafter 'Ispat').

Procedure

16 By application lodged at the Registry of the Court of First Instance on 11 June 1996, British Steel plc (hereinafter 'the applicant') brought an action under Article 33 of the Treaty for annulment of the contested decision.

17 At the same time, another action contesting the same decision was brought on 10 July 1996 by Wirtschaftsvereinigung Stahl. This was registered at the Court of First Instance as Case T-106/96.

18 In the present case, Ispat and Ireland lodged applications at the Registry of the Court of First Instance, on 5 November 1996 and 6 November 1996 respectively, seeking leave to intervene in support of the form of order sought by the defendant. On 8 November 1996, Hoogovens Staal BV (hereinafter 'Hoogovens') lodged an application at the Registry of the Court of First Instance seeking leave to intervene in support of the form of order sought by the applicant. On 5 December 1996 the applicant lodged its observations on those applications.

19 On 21 and 28 November 1996, British Steel lodged requests at the Registry of the Court of First Instance for the confidential treatment of certain parts of the

application, the defence (in so far as it recapitulates certain parts of the application) and the reply.

20 By order of 29 May 1997, the Court of First Instance (First Chamber, Extended Composition) granted those requests for leave to intervene in support of the forms of order sought by the defendant and the applicant, and upheld in part the requests for confidential treatment.

21 By letter lodged at the Registry on 26 August 1997 and in its statement in intervention Ispat also asked the Court of First Instance to grant it access to certain procedural documents in *British Steel*. The Court refused that request and communicated its decision by letters of 19 September 1997 and 22 October 1997.

22 On hearing the report of the Judge Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure and called on the parties to reply in writing to certain questions. At the hearing on 25 November 1998, the parties presented oral argument and replied to oral questions put by the Court.

Forms of order sought

23 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs, including those of the applicant;

— order the interveners to bear their own costs.

24 The intervener, Hoogovens, claims that the Court should:

— annul the contested decision in its entirety;

— order the Commission to pay the costs.

25 The Commission, supported by Ireland, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

26 The intervener, Ispat, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs, including those occasioned by Ispat's intervention.

Admissibility

Arguments of the parties

27 The Commission claims that the application is out of time because the applicant failed to observe the time-limit laid down in the third paragraph of Article 33 of the Treaty of one month from notification or publication of the decision. According to the Commission, supported by Ispat, time starts to run, for the purposes of that provision, on the day when the applicant gains sufficient knowledge of the measure in question to be able to exercise its right of action, it being immaterial whether or not the act is subsequently published in the *Official Journal of the European Communities*. In the present case, the applicant gained sufficient knowledge of the contested decision by 28 February 1996 at the latest, that being the day on which it received the press release announcing the measure's adoption.

28 Moreover, the applicant was at all times kept informed of developments in the procedure for authorisation of the aid to Irish Steel. This is evident, *inter alia*, from a letter which the applicant sent to the Commission on 10 October 1995 and from the discussions of the ECSC Consultative Committee (hereinafter 'the Committee'), a body on which the applicant is represented, at its meeting on 25 October 1995.

29 There is also ample evidence to show that the applicant had acknowledged that it had sufficient knowledge of the contested decision long before the application was lodged on 11 June 1996. In this regard the Commission relies on articles in the *Irish Times* and two reports from Reuters, all of which appeared on 21 December 1995, in which the applicant, following the Council's assent, announced its intention of challenging the contested decision. Furthermore, it was stated in the Annual Report of the Steel Subsidies Monitoring Committee, a body set up by the United Kingdom Department of Trade and Industry to monitor State aid in the steel sector, that 'the Committee understands British Steel's decision to take legal action against the Commission over this decision'.

30 Ireland supports the Commission's claim that time for the purposes of Article 33 of the Treaty starts to run as soon as the applicant has precise knowledge of the measure in question. In the present case, given the close links between the Steel Subsidies Monitoring Committee and the United Kingdom Department of Trade and Industry, the latter would have brought the contested decision to the applicant's attention several months before it received a copy of the decision from the Commission.

31 However, the applicant, supported by Hoogovens, maintains that it did not gain precise knowledge of the measure until 21 May 1996, the day when it was published in the Official Journal. The applicant had asked the Commission for a copy of the decision within one week of its adoption, but did not receive one until 28 May 1996, after the decision was published. Accordingly, the applicant was not in a position to apply for annulment of the decision before its publication.

32 In any event, the Commission's interpretation of the third paragraph of Article 33 of the ECSC Treaty (and of Article 173 of the EC Treaty; now, after amendment, Article 230 EC) — to the effect that time for the purposes of that provision starts to run from the day on which the measure in question came to the knowledge of the person concerned, it being immaterial whether or not that measure is subsequently published — is inconsistent not only with the wording of those provisions but also with the case-law of the Court of Justice.

Findings of the Court

33 The third paragraph of Article 33 of the Treaty provides that proceedings for annulment must be instituted within one month of the notification or publication, as the case may be, of the decision or recommendation. Interpreting that provision in the light of the fifth paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230 EC), the Court of Justice has held that in the absence of publication or notification, it is for the party which has knowledge of

a decision concerning it to request the whole text thereof within a reasonable period; subject to that, however, time for the purposes of bringing an action can start to run only from the moment when the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based, in such a way as to enable it to exercise its right of action (Case 236/86 *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761, paragraph 14, and Case C-180/88 *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *Commission* [1990] ECR I-4413, paragraphs 22 to 24).

34 Moreover, in the context of the EC Treaty, the Court of First Instance has already held that the criterion of the date when a measure came to the knowledge of an applicant, as the starting point of the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure (Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraph 47 and the case-law cited therein).

35 In the present case, the contested decision was published in the Official Journal on 21 May 1996. The application lodged on 11 June 1996 was therefore made within the one-month period prescribed in the third paragraph of Article 33 of the Treaty.

36 That being so, there is no need to apply the subsidiary criterion and the Commission's arguments to the effect that the applicant had knowledge of the contested decision before its publication are therefore beside the point.

37 It follows that the preliminary plea of inadmissibility must be rejected.

Substance

38 In support of its action for annulment, the applicant puts forward three pleas in law, alleging: (i) that the Commission lacked competence to adopt the contested decision; (ii) infringement of the Treaty or of a legal rule for its implementation; and (iii) breach of essential procedural requirements.

1. *The plea alleging that the Commission lacked competence*

Arguments of the parties

39 The applicant states that its arguments in the present case are essentially the same as those put forward in its application in *British Steel*. Supported by Hoogovens, the applicant maintains that the Commission was not competent to adopt the contested decision. The Fifth Code constitutes an exhaustive and binding legal regime, in that it prohibits the authorisation of any aid incompatible with its provisions. Operating and investment aid, in particular, are expressly prohibited by Article 1 thereof. Accordingly, the Commission had no power to authorise the grant of such aid. The Commission cannot arrogate such a power to itself under the first paragraph of Article 95 of the Treaty since the Fifth Code itself was adopted by the Commission under Article 95, and that Code determines definitively — unless it is itself amended by a general decision — what is necessary to achieve the objectives of the Treaty.

40 On this point, the applicant argues that if the Commission plans to authorise aid which does not satisfy the conditions laid down in the Fifth Code, it must amend the actual text of the Code by a general decision applying to all the undertakings concerned. The Code would become completely useless if it were circumvented

by individual decisions which the Commission was prompted to adopt in order to take account of particular cases. In the present case, the Commission did not amend the Code; it merely adopted a decision which, in contravention of the Code, improperly granted benefits to certain public undertakings at the expense of competitors for whom State aid had not been authorised. Moreover, it failed to make authorisation of the aid subject to capacity reductions.

41 In its observations on the statements in intervention and on the subject of the judgment in *British Steel*, the applicant adds two further arguments in support of its plea. First, it argues that the Fifth Code must be interpreted by reference to the preceding aid codes (*British Steel*, paragraph 47). This would imply that the Code is exhaustive and binding in respect of all kinds of aid, not just those which it lists. Secondly, even if the Fifth Code were binding only in respect of the aid which it lists, the cash contribution of IEP 2.36 million 'to cover specific remedial environmental works' would fall into the category of 'aid for environmental protection' provided for in Article 3 of the Code.

42 The Commission essentially contends that the various aid codes were adopted under Article 95 of the Treaty and thus have the same legal basis as the contested decision. The decision therefore has the same legal weight and the Fifth Code cannot be regarded as definitive and binding.

43 Ispat argues that the Commission did indeed have the power to adopt the contested decision on the basis of Article 95 of the Treaty. The fact that the Fifth Code was also adopted on the basis of Article 95 does not detract from the Commission's competence in the matter.

44 According to Ireland, it is inconceivable that secondary legislation such as the Fifth Code could be used to frustrate a rule of primary law such as Article 95 of the Treaty. The existence of the Fifth Code cannot preclude the Commission from taking individual decisions on the basis of Article 95 of the Treaty to approve the grant of aid to steel undertakings in circumstances falling outside the scope of that Code.

Findings of the Court

45 It should be noted at the outset that the preamble to the Fifth Code (see section I, in particular) indicates that the primary purpose was 'not to deprive the steel industry of aid for research and development or for bringing plants into line with new environmental standards'. In order to reduce production overcapacity and restore balance to the market, the Code also authorised, under certain conditions, 'social aid to encourage the partial closure of plants or finance the permanent cessation of all ECSC activities by the least competitive enterprises'. As the Court of First Instance has already held, *inter alia* in *British Steel* (paragraphs 47 and 49), the Code referred in general to certain categories of aid deemed compatible with the Treaty. It introduced derogations of general scope from the prohibition of State aid solely in the case of aid for research and development, environmental protection or closures, and regional aid for steel undertakings established on the territory or part of the territory of certain Member States, provided that the aid in question satisfied certain conditions.

46 Accordingly, the Fifth Code constitutes an exhaustive and binding legal framework only for the types of aid which it lists and which it deems compatible with the Treaty. In the case of aid within the exempted categories which it defines, it establishes a comprehensive system intended to ensure uniform treatment governed by a single procedure. This system is thus binding on the Commission only when it must determine whether aid covered by the Code is compatible with

the Treaty. Consequently, it cannot authorise such aid by an individual decision which runs counter to the general rules established by that code (see *EISA*, paragraph 71, *British Steel*, paragraph 50, and *Wirtschaftsvereinigung*, paragraph 42).

47 Conversely, aid not falling within the categories exempted from the prohibition by the provisions of the Code may qualify for an individual derogation from that prohibition if the Commission considers, in the exercise of its discretion under Article 95 of the Treaty, that such aid is necessary to attain the objectives of the Treaty. The Fifth Code cannot be intended to prohibit aid which does not fall into any of the categories which it lists exhaustively. The Commission has no power under the first and second paragraphs of Article 95 of the Treaty — that article being concerned only with cases for which the Treaty makes no provision (see Case 9/61 *Netherlands* v *High Authority* [1962] ECR 213, p. 233) — to prohibit certain categories of aid, since a prohibition of that kind is already laid down by the Treaty itself in Article 4(c). Aid falling outside the categories which the Code exempts from the prohibition thus remains subject exclusively to Article 4(c). Consequently, where such aid nevertheless proves necessary to attain the objectives of the Treaty, the Commission is empowered to rely on Article 95 of the Treaty in order to resolve such an unforeseen situation, if need be, by means of an individual decision (see *EISA*, paragraph 72, *British Steel*, paragraph 51, and *Wirtschaftsvereinigung*, paragraph 43).

48 In the present case, since the State aid covered by the contested decision enables Irish Steel to be restructured and thereby privatised, it does not fall within the scope of the Fifth Code. The Commission was therefore entitled to authorise that aid by an individual decision adopted on the basis of Article 95 of the Treaty, provided that the conditions laid down therein were satisfied.

49 Relying on *EISA*, *British Steel* and *Wirtschaftsvereinigung*, the applicant argues on the other hand that the cash contribution of a maximum of IEP 2.36 million

to cover specific remedial environmental works falls into one of the categories listed in the Code and, consequently, the Commission was not competent to authorise it without following the procedure provided for therein.

50 Article 3 of the Fifth Code exempts 'aid... for bringing into line with new statutory environmental standards plants which entered into service at least two years before the introduction of the standards', provided that this does not exceed '15% net grant equivalent of the investment costs directly related to the environnmental measures concerned'.

51 The cash contribution at issue in these proceedings does not fall within the scope of Article 3 of the Code. As Ispat's representative stated during the hearing, even if that contribution is intended to finance the adaptation of plant to meet statutory requirements for the protection of the environment, it exceeds 15% net grant equivalent of the investment costs related to those measures. Accordingly, it is not exempted by virtue of Article 3 of the Code from the general prohibition laid down in Article 4(c) of the Treaty.

52 In those circumstances, that aid may be authorised by an individual decision directly based on Article 95 of the Treaty, since the conditions laid down therein are satisfied (see paragraphs 46 and 47 above). Since the scope of the contested decision is not coterminous with that of the Fifth Code — given that it approves, on exceptional grounds in *ad hoc* cases aid which in principle cannot be compatible with the Treaty — the Fifth Code has absolutely no bearing on the derogation which that decision authorises. That being so, it is not subject to the conditions laid down in the Code and thus its effect is to supplement the Code for the purposes of achieving the objectives defined by the Treaty.

53 It follows from all the foregoing that the contested decision cannot be regarded as an unjustified derogation from the Fifth Code, but constitutes rather a measure

based, like the Code, on the first and second paragraphs of Article 95 of the Treaty.

54 The plea alleging that the Commission had no power to adopt the contested decision is therefore unfounded.

2. *The plea alleging infringement of the Treaty or of a legal rule for its implementation*

55 The applicant divides this plea into four parts, alleging that the contested decision infringes the Treaty in so far as (i) it leads to a distortion of competition; (ii) it is not necessary for the attainment of one of the objectives of the Treaty; (iii) it contravenes the principle of non-discrimination; and (iv) it legitimises *ex post facto* non-notified aid.

The alleged distortion of competition

56 The applicant divides this argument into two branches. It maintains that (a) the Commission committed a manifest error of assessment in the contested decision in so far as it allowed Irish Steel to increase production in the belief that that would not entail a distortion of competition, and (b) the conditions imposed on Irish Steel are not sufficient to eliminate all anti-competitive effects.

(a) The contested decision allows production to be increased and, consequently, entails a distortion of competition

Arguments of the parties

57 According to the applicant, the grant of aid to Irish Steel leads to unacceptable distortion of competition in the steel sector. The applicant relies in this connection on Case 214/83 *Germany* v *Commission* [1985] ECR 3053, in which the Court of Justice held that 'the Commission was under no circumstances entitled to authorise the granting of State aid which was not necessary to attain the objectives of the Treaty and would be likely to give rise to distortions of competition on the common market in steel' (paragraph 30). In that judgment, the Court of Justice also affirmed the principle that the granting of aid is closely linked to the restructuring of the steel industry, in particular to the reduction of capacity.

58 The Commission gave effect to that principle when adopting Decisions 94/256, 94/257, 94/258, 94/259, 94/260 and 94/261, in which it made authorisation of the aid subject to capacity reductions (see *XXIIIrd Report on Competition Policy*, point 481). The contested decision, which authorises the aid allocated to Irish Steel but does not require capacity reductions, is therefore flagrantly at odds with those decisions and with the case-law of the Court of Justice.

59 Although the contested decision recognises that the sections sector suffers from overcapacity and that an increase in capacity would distort competition to an extent contrary to the common interest, it allows Irish Steel — which it considers to play a minor role on the Community market — to increase both its production capacity and its production and sales.

60 As regards Irish Steel's position on the market in question, the Commission was wrong to identify the relevant market as the market for steel beams rather than

that for small beams (steel beams up to a height of 300 mm), since those two markets are completely different in terms of both supply and demand (see the fourth part of the report by T. A. J. Cockerill, entitled *Appeal of Article 95 Decision on Irish Steel Limited, Irish Steel and the European Union Market for Billets and Small Beams* ('the Cockerill Report'), appended to the application). In fact, Irish Steel held 9.1% of the Western European market (calculated on sales between 1986 and 1994), not 5% as estimated by the Commission. Moreover, according to the applicant, its market share will reach 12% in the course of the next five years. In any event, the classification in Annex I to the Treaty is not a proper basis for defining the market because it was not drawn up with a view to defining product markets for the purposes of competition analysis.

61 Furthermore, the *de minimis* argument finds no authority in precedent and is inconsistent with the Commission's own practice.

62 As regards the increase in billet production capacity, the contested decision authorises Irish Steel to step up its production regularly over five years so as to produce, by the financial year 1999/2000, 361 000 tonnes per annum of sections and 90 000 tonnes per annum of billets, whereas its existing casting capacity of 400 000 tonnes per annum is only sufficient to meet the estimated level of section production. With a view to being able to produce the 90 000 tonnes per annum of billets, Irish Steel expressed its intention of acquiring a new continuous caster and of re-configuring the existing caster (as reported in the *Metal Bulletin* of 25 March 1996).

63 Further, Irish Steel's small beam production capacity before the grant of aid was expected to grow by 10 000 tonnes per annum (see the Commission's 1994 survey on investment in the Community coalmining and iron and steel industries, pp. 119 and 120, tables 34 and 36, and the statements made by Mr Andropoulos (Commission representative) to the Consultative Committee at the meeting of 25 October).

64 Finally, maximising output really means increasing production capacity, and increased capacity need not entail the construction of new plant but

may also be achieved, for example, by increasing the number of shifts worked.

65 As regards the increase in production and sales, the applicant points out that the contested decision allows an increase in the production of billets and, according to statements made by Mr Armstead, Chief Executive Officer of Irish Steel (as reported in the *Metal Bulletin*, cited above), it would appear that Irish Steel plans to concentrate on the production of higher quality billets. The Cockerill Report demonstrates that increased sales of high quality billets would have negative effects for producers such as the applicant, and would depress prices.

66 As regards small beams, Irish Steel is authorised to increase its sales in Western Europe by nearly 14%. Those sales would account for 12% of annual structural excess capacity which, according to the Cockerill Report, is a little over 3 million tonnes for beams. On the other hand, demand for beams is likely either to stagnate or to decline as a result of the slowdown in the construction sector on which that demand largely depends and the tendency in that sector towards a reduction in the consumption of steel. The applicant denies, moreover, that the capacity reductions invoked by the Commission could have had a significant effect on supply.

67 Irish Steel's increased production would therefore have a number of anti-competitive effects. First, an increase in its sales would drive prices down (by approximately 10.48%) as other producers sought to maintain their volume of sales, taking small beam prices to a level very close to variable costs. Secondly, that fall in prices would impair the profitability of unsubsidised undertakings, which would in the long term lead other producers to cease production. Thirdly, given that prices are already below the level required for an adequate return on

capital and for reinvestment, a reduction in prices might reduce overall investment made by existing producers below the level necessary to ensure long-term efficiency in the sector. Finally, the drop in prices would cost British Steel approximately GBP 10 million in gross revenue.

68 Consequently, the Commission was wrong to conclude that an increase in Irish Steel's production would help to solve the problem of overcapacity and, accordingly, would not involve any distortion of competition. Moreover, in considering whether there is distortion of competition, the question whether or not Irish Steel increases capacity by improving efficiency is of little relevance. The crucial factor is the volume of product which comes on to the market.

69 The Commission points out that the applicant's economic estimates must be corrected. First, so far as concerns increased capacity, Irish Steel's raw steel capacity and casting capacity remains unchanged, at 500 000 tonnes.

70 So far as concerns small beams production, the re-calculation of capacity does not mean an increase in future capacity. In fact, the only change in Irish Steel's situation is reduced production of hot-rolled products in 1992.

71 Furthermore, the applicant presents a distorted picture of the actual state of the market in asserting that Irish Steel's small beams capacity accounts for 12% of the Western European market. In order to arrive at such a conclusion, the applicant compared Irish Steel's maximum authorised output in 1999/2000 with present levels of capacity. If, however, the basis used for comparison is the overall beam capacity within the EC (12 275 000 tonnes) for 1994, Irish Steel's market share (361 000 tonnes) would be only 2.9%.

72 Secondly, the contested decision expressly provided that increases in small beam production were to be made in the context of growth brought on by improved productivity. As regards the projected increase in Irish Steel's sales in Western Europe until 1999/2000, the applicant failed to take account in its calculations of the fact that Irish Steel's production was abnormally low in 1994/95; if 1990/91 production levels had been used, the conclusion would have been that sales would rise by only about 6% over five years, not 14% as claimed by the applicant.

73 Thirdly, the Commission never denied that the contested decision might have the effect of distorting competition, a result which, moreover, is not precluded by the Court's judgment in *Germany* v *Commission*, cited above. However, the applicant's allegations do not show that competition would be distorted to an extent contrary to the common interest.

74 First, Irish Steel's output of billets during the period covered by the contested decision is projected to rise from 30 000 tonnes to 90 000 tonnes, accounting for 0.2% of the present Community consumption, which is approximately 40 million tonnes (according to data given in the Cockerill Report). Even if Irish Steel were to concentrate exclusively on the production of high-grade billets, its market share would still be negligible by comparison with the near monopoly enjoyed by the applicant in that market.

75 Next, as regards the small beams market, the Commission, supported by Ispat and relying on the *Report on Commission Decision 96/315/ECSC of 7 February 1996* by F. O'Toole and P. Walsh (appended to Ispat's statement in intervention), denies having committed an error of assessment in concluding that the relevant market was that for steel beams, rather than for small beams.

76 Lastly, as regards the impact of the increase in Irish Steel's production on competitors' prices and profits, the applicant's calculations and estimates are

based, yet again, on statistics which are not comparable, and yield an exaggerated result.

77 In Ispat's submission, the applicant is in effect asking the Court to review the economic analysis on which the contested decision is based. Ispat notes that the data produced by the applicant in order to claim that the Commission has made a manifest error of assessment need to be corrected. Its true production capacity is 500 000 tonnes of liquid steel. Application of a 98.5% conversion rate between liquid steel and billets gives a billet casting capacity of 492 500 tonnes. That is sufficient for the production of 361 000 tonnes of finished product, as well as 90 000 tonnes (in the long term) of billets for the open market.

78 Ispat disputes, furthermore, the assertion that it intended to acquire a new continuous caster. The article in the *Metal Bulletin* on which the applicant relies misrepresents Mr Armstead's comments. Moreover, it would be wholly unrealistic to instal a new continuous caster simply to increase production from 65 to 85 tonnes per hour as that article claims.

79 Ireland maintains, first of all, that there is no general rule which obliges the Commission to impose capacity reductions as a precondition for granting State aid. Each individual decision is *sui generis* and since, in the present case, it was not possible to impose capacity reductions at Irish Steel, the Commission opted for a restructuring plan involving significant restrictions on production and sales. Consequently, the validity of the contested decision is not undermined by the fact that no capacity reduction was imposed.

80 Secondly, Ireland observes that in order to determine whether competition is distorted, the test is whether or not it is distorted to an extent contrary to the common interest. Taking into account the fact that Irish Steel's potential casting

capacity was 500 000 tonnes in 1998 and that that represents a mere 0.33% of the projected Community total of 184 million tonnes, any distortions of competition arising from the grant of State aid to Irish Steel would fall into the *de minimis* category. Although minor distortions are not exempt from the rules on competition, the stringency of the conditions imposed by the Commission will ensure the decision's validity on the basis that it is justifiable in the common interest of the Community steel industry.

Findings of the Court

81 In matters concerning State aid, the Court of Justice ruled in *Germany* v *Commission*, cited above, that the Commission cannot authorise the granting of State aid 'which... would be likely to give rise to distortions of competition on the common market in steel' (paragraph 30). The Court also stated in Case 15/57 *Compagnie des Hauts Fourneaux de Chasse* v *High Authority* [1957 and 1958] ECR 211, p. 227, that the High Authority 'has a duty to act with circumspection and to intervene only after carefully balancing the various interests concerned while so far as possible restricting the foreseeable damage to third parties'.

82 Furthermore, according to established case-law, in this area the Commission enjoys a 'wide discretion... reflecting the political responsibilities conferred on it' (see Case C-8/89 *Zardi* [1990] ECR I-2515, paragraph 11). Consequently, the legality of a decision adopted by the Commission can be affected only if, having regard to the objective which the Commission intends to pursue, that measure is 'manifestly inappropriate', or out of all proportion (see Case 179/84 *Bozzetti* [1985] ECR 2301 and Case 265/87 *Schräder* [1989] ECR 2237, paragraph 22).

83 As regards the issue of distortion of competition by the contested decision, it must first be determined whether the Commission committed a manifest error of

assessment in its definition of the relevant product market on which to base its calculation of the market share held by the recipient undertaking, in its calculation of the production capacity needed to ensure the increased production provided for by the contested decision (Article 2), and in its analysis of the impact of the aid on competition.

84 First, it should be noted that the points relied on by the applicant in connection with the substantive definition of the market (fourth part of the Cockerill Report) do not demonstrate that the Commission committed a manifest error of assessment in identifying the market concerned as that of steel beams in general. The applicant argues that within the steel beams market (long, hot-rolled finished products), there is a separate sub-market in small beams (steel beams up to 300 mm in height) to which Irish Steel's production corresponds. Given the considerable differences between them in terms of price, weight and storage requirements, steel beams and small beams cannot be regarded as sufficiently interchangeable. However, the Commission has maintained — and the Cockerill Report does not contradict this — that the restricted substitutability of demand is not sufficient to establish that the two markets are different, since the substitutability of supply enables the majority of producers to redirect their production if the demand for small beams rises, without incurring extra costs or risks. In fact, as the applicant itself points out, two thirds of small beam production takes place in 'multi mills', which have greater flexibility of production and a wider range of products (paragraphs 4.32 and 4.34 of the Cockerill Report).

85 Secondly, as regards the increased production capacity, the parties admitted at the hearing that, when the aid was authorised, Irish Steel's true liquid steel capacity was 500 000 tonnes, not 400 000 tonnes as stated by the applicant. Accordingly, the argument that Irish Steel's production capacity was insufficient to meet the maximum production figures provided for in the contested decision for 1999/2000 — 361 000 tonnes of sections and 90 000 tonnes of billets — is

unfounded. In any case, the contested decision does not prohibit increases in capacity resulting from improved productivity (part V) and it is common ground that Irish Steel need merely raise its productivity by 1% per annum to produce 361 000 tonnes by the year 2000.

86 Thirdly, the applicant's projections are not sufficient to prove that the Commission's findings concerning increased production and sales and the impact thereof on the market are vitiated by a manifest error of assessment. As regards billets, the applicant's prediction that Irish Steel would turn to the higher quality billet market and thereby bring about a fall in prices is mere assumption based on a press article. As the applicant itself admitted in the application, 'the contested decision does not specify the type of billets which Irish Steel will produce and so it is impossible to analyse the precise effect of Irish Steel's increasing sales of billets'.

87 As regards small beams, the applicant draws exaggerated conclusions from figures which are not comparable. Indeed, if calculations are made on the basis of average sales in Western Europe during the five years immediately preceding the contested decision (263 000 tonnes, see paragraph 5.36 of the application), rather than sales during 1994 which were abnormally low (238 000 tonnes), the increase in sales projected for 1995 to 2000 would be 57 000 tonnes, not 82 000 tonnes, as the applicant claims. Given that total consumption in 1994 on the European market was 5 460 000 tonnes for steel beams and 2 457 000 tonnes for small beams (according to the data quoted in the Cockerill Report) the authorised increase in sales amounts to 1.04% and 2.31% respectively. Similarly, if account is taken of the demand for steel beams during 1994 — 5 460 000 tonnes — and the sales permitted to Irish Steel for 1999/2000 — 320 000 tonnes — Irish Steel's market share amounts to 5.8%, that is to say, 1% more than the 4.8% which it held on average between 1990 and 1995.

88 Lastly, the impact on competition of the aid authorised by the contested decision may be quantified at 0.15% ((90 000 - 30 000): 40 000 000; see paragraph 74

above) on the market for steel alloy billets and 1% on the steel beams market. Although aid which has a minor impact does not escape the prohibition laid down in Article 4(c), it should be borne in mind that the contested decision was taken on the basis of Article 95 of the Treaty, which permits the Commission to authorise aid which is necessary to attain the objectives of the Treaty. In the present case, the Commission properly concluded that the aid at issue could not, given its minimal impact, distort competition to an unacceptable extent.

89 Accordingly, it has not been shown that the Commission committed a manifest error of assessment in maintaining that the aid authorised by the contested decision does not bring about distortion of competition contrary to the common interest.

(b) The conditions imposed are insufficient to eliminate distortion of competition

Arguments of the parties

90 The applicant submits that the conditions imposed by the Commission are manifestly unsuited to achieving the objective pursued. First, the overall tonnage limits placed on sales in Western Europe are not adequate counterpart measures since Irish Steel will still be able to increase its sales, albeit by only 12% rather than 20%. By definition, however, a counterpart measure implies a forfeit exacted from the recipient undertaking — hitherto in the form of a corresponding reduction of capacity — to compensate other producers for the advantage granted, and not merely, as in the present case, a reduction in profits.

91 Secondly, the requirement that Irish Steel must not extend its range of sections and must limit production of its three largest small beams on the European Union market to 35 000 tonnes per annum is unlikely to redress the damage which the

other producers will probably suffer on account of the aid to Irish Steel. As regards British Steel, specifically, the Commission wrongly concluded that its Shelton plant was protected from the effects of Irish Steel's sales. The Shelton mill manufactures sections which are generally larger than those produced by Irish Steel. However, the two Scunthorpe mills where British Steel produces medium sections will probably be affected by Irish Steel's sales and since Shelton is a higher cost mill, being so far from the liquid steel source, investment in the plant there will be heavily curtailed. Shelton's future thus remains uncertain. It follows that, in practice, the proposed measure would not attain the objective pursued.

92 The Commission maintains that the applicant's projections regarding the increase in Irish Steel's sales are mistaken because they are based on a comparison drawn between sales made in a Community of 12 and future sales in Western Europe.

93 Furthermore, the submissions made in relation to the Shelton mill are based on the mistaken assumption that the aim of the measure imposed by the Commission is to protect that mill specifically, whereas in fact the limitation applies to the Community market and is for the benefit of all Community producers. It is, however, known that the applicant produces approximately 2 million tonnes of small beams per annum and that sales by Irish Steel to the United Kingdom of the largest sizes have been almost non-existent this decade. In any event, even if Irish Steel's sales of such beams (165 tonnes in 1993/94) were to increase to match its overall penetration of the United Kingdom market in respect of its entire range of products — that is to say, approximately 25% of its total sales — then the competition confronting British Steel would amount to a mere 8 000 tonnes of such beams.

94 Ispat makes the preliminary remark that the purpose of counterpart measures is to ensure that competition is not distorted to an extent contrary to the common interest. That is the only condition which the Commission must observe in the exercise of its powers under Article 95 of the Treaty. Accordingly, the authorisation of State aid under Article 95 is not contingent upon exacting an

individual forfeit, as the applicant claims. Furthermore, if a comparison were made of the conditions imposed in a number of earlier decisions adopted under Article 95, in particular the 1994 decisions (see paragraph 4 above), it is clear that the counterpart measures imposed by the contested decision are of the same kind. Moreover, the contested decision imposes a novel type of restriction in the form of a five-year ban on the introduction of new products or larger sizes.

Findings of the Court

95 The main thrust of the applicant's submissions is that the contested decision is disproportionate both because it does not impose capacity reductions and because the counterparts required are not sufficient to minimise the impact of the aid on competition.

96 The case-law of the Community, particularly *Germany* v *Commission*, cited above, has always highlighted the close relationship between the grant of aid to the steel industry and efforts towards restructuring (paragraph 30). Moreover, the Community judicature has emphasised on several occasions that efforts towards restructuring entail in particular reductions in production capacity on the part of recipient undertakings. However, the factors which are liable to influence the exact levels of aid to be authorised do not consist simply in the tonnage of production capacity to be cut; there are other factors, too, which vary from one region of the Community to another, such as the record of restructuring efforts made, the regional and social problems occasioned by the crisis in the steel industry, technical developments and the adaptation of undertakings to meet market requirements (see *Germany* v *Commission*, cited above, paragraphs 31 and 34, and *British Steel*, paragraph 135).

97 Furthermore, there is no rule or general principle of Community law requiring the Commission to impose capacity reductions as a condition for granting State aid in the coal and steel sector. The only obligation incumbent on the Commission in

this respect is to require appropriate counterpart measures in order to curb the aid's anti-competitive effects and thereby prevent unacceptable distortion of competition. Acceptance of such a rule would limit the discretion conferred on the Commission under Article 95 of the Treaty to deal with unforeseen situations by taking into account the particular features in each case. Moreover, the rule would compel the Commission to refuse authorisation of aid despite the negative consequences for the common market of doing so whenever, as in the present case, a capacity reduction would mean that the undertaking would have to be shut down. Where the Commission believes that a capacity reduction is not possible or would not best serve the objectives pursued, it may always impose other counterpart measures, such as production and sales restrictions, provided that they serve to minimise the impact of the aid on competition. As the Court of First Instance has already held, the Commission's assessment cannot be reviewed solely by reference to economic criteria. The Commission may legitimately take account of a wide variety of political, economic and social considerations in the exercise of its discretion under Article 95 of the Treaty (*British Steel*, paragraph 136).

98 In Article 2 of the contested decision, the Commission imposes several conditions on Irish Steel:

'1. The beneficiary company shall not increase the existing liquid steel capacity of 500 000 tonnes per annum and the existing hot-rolling capacity of 343 000 tonnes per annum in finished products, other than resulting from productivity improvements, for a period of at least five years starting from the date of the last payment of aid under the plan.

2. The beneficiary company shall not extend its current range of finished products, as communicated to the Commission in November 1995, in the first five years and shall not produce beams of a larger size than its current range of sizes in that period. Within its current range of beams it shall limit production for the Community market of its largest U beams (Imperial), HE beams (metric) and IPE beams to a cumulative 35 000 tonnes per annum during that period.

3. The beneficiary company shall not exceed the following levels of production per financial year:

(1 000 tonnes)

	1995/1996	1996/1997	1997/1998	1998/1999	1999/2000
Hot-rolled finishedproducts	320	335	350	356	361
Billets	30	50	70	80	90

4. The beneficiary company shall not exceed the following levels of European sales (Community, Switzerland and Norway) in hot-rolled finished products per financial year:

(1 000 tonnes)

1995/1996	1996/1997	1997/1998	1998/1999	1999/2000
298	302	312	320	320

...'

99 The production and sales restrictions placed on Irish Steel were the outcome of an exercise in weighing and balancing several factors, such as the specific situation in the steel sector and, in particular, the existing overcapacity (part I of the contested

decision); Irish Steel's position on the market concerned (paragraph 4.3 of the letter of 11 October 1995); Ispat International's capability of restoring the beneficiary undertaking to commercial viability (part III of the contested decision); and the need to impose certain counterpart measures in order to limit the impact on the market of the advantages entailed by the grant of aid, while permitting the undertaking to increase its productivity (part V). The applicant has failed to show that setting production and sales ceilings as counterparts for the authorisation of aid is either manifestly inappropriate or disproportionate.

100 In any event, as the applicant itself points out, in order to limit the anti-competitive effects of the aid in a market with overcapacity, the key step is to limit the arrival of products on the market. The contested decision placed production and sales restrictions on the recipient undertaking (see paragraph 98 above). Admittedly, Irish Steel is allowed to increase its sales by over 8% by comparison with its previous performance. However, those ceilings were fixed by reference to the increased productivity which the undertaking must achieve in order to become profitable. Furthermore, bearing in mind the limited market share held by Irish Steel as compared with major steel producers like the applicant, the 2.31% increase (see paragraph 87 above) viewed against the overall consumption of 2 457 000 tonnes appears a minor distortion, unavoidable if the beneficiary undertaking is to be restored to economic health. Even if the other counterpart measures imposed by the Commission, such as limiting production to the three largest sizes of beam manufactured by Irish Steel, cannot protect the Shelton mill, that cannot be regarded as sufficient to establish that the Commission committed a manifest error of assessment, since the purpose of those measures is to protect all Community producers, not any one producer in particular.

101 It follows that the plea alleging that the Commission committed a manifest error of assessment by imposing inadequate counterpart measures to offset the distortion of competition must be rejected.

The need for the aid

Arguments of the parties

102 The applicant criticises the Commission, first, for taking into account considerations which were of no relevance in determining whether aid was necessary.

103 In the present case, the Commission took into account considerations drawn from the EC Treaty and based its decision to a large extent on the Council's view that the problems of Member States where there is only one steel undertaking are covered by the objectives set out in Articles 2 and 3 of the ECSC Treaty (conclusions of the Council at the meeting on 8 November 1994). At paragraph 2.1 of the letter of 11 October 1995, the Commission observes that Ireland is 'eligible for national regional aid under Article 92(3)(a) of the EC Treaty'. Since the objectives of the ECSC Treaty and those of Article 92(3)(a) of the EC Treaty (now, after amendment, Article 87(3)(a) EC) are different, the latter are not relevant in determining whether aid is necessary (see Case C-128/92 *Banks* [1994] ECR I-1209). Furthermore, the objective set by Article 92(3)(a) does not accord with any ECSC Treaty objective, since under that Treaty the Commission could never promote specific underdeveloped areas without considering the repercussions on other regions. In any event, it is not within the powers of the Council to alter Treaty provisions by statements made at Council meetings.

104 Secondly, the applicant argues that the Commission's letter of 11 October 1995 does not explain why the aid to Irish Steel is necessary in order to attain one of the objectives set out in Articles 2 and 3 of the ECSC Treaty. Given the overcapacity and the fall in demand referred to above, the contested decision — which allows Irish Steel to increase its production capacity and authorises the aid granted to that undertaking — not only fails to further the objectives set out in

Articles 2 and 3 of the Treaty, but also exacerbates the difficult situation of the steel industry as a whole.

105 The Commission maintains that it is for the institutions, in the exercise of their broad discretion, to interpret the precise content of Articles 2 and 3 of the Treaty so as to give practical effect to them through the measures which they adopt in order to implement the Treaty. The approach set out by the Court of Justice in Joined Cases 154/78, 205/78, 206/78, 226/78, 227/78, 228/78, 263/78 and 264/78, 31/79, 39/79, 83/79 and 85/79 *Valsabbia and Others* v *Commission* [1980] ECR 907, paragraphs 54 and 55, is therefore applicable. The Commission contends that, in any event, it did not rely on the EC Treaty in adopting the contested decision.

Findings of the Court

106 Article 4(c) of the Treaty prohibits in principle State aid within the European Coal and Steel Community in so far as it is liable to compromise attainment of the Community's primary objectives laid down in the Treaty, particularly the establishment of conditions of free competition.

107 However, that prohibition does not mean that all State aid within the purview of the ECSC must be regarded as incompatible with the objectives of the Treaty. If Article 4(c) is construed in the light of the Treaty objectives as a whole, as defined in Articles 2 to 4, it does not prevent the grant of State aid which may further the attainment of those objectives. It reserves to the Community institutions the right to determine whether aid is compatible with the Treaty and, where appropriate, to authorise the granting of such aid in matters covered by the Treaty. This analysis is confirmed by Case 30/59 *Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, p. 22, and in *British Steel*, paragraph 41, in which it was held that, just as certain non-public financial assistance to coal and steel-

producing undertakings, authorised by Articles 55(2) and 58(2) of the Treaty, can be allocated only by the Commission or with its express authorisation, Article 4(c) must similarly be interpreted as conferring on the Community institutions exclusive competence with regard to aid within the Community.

108 In the scheme of the Treaty, therefore, Article 4(c) does not prevent the Commission from authorising, by way of derogation, aid contemplated by the Member States and compatible with the objectives of the Treaty, on the basis of the first and second paragraphs of Article 95, with a view to dealing with unforeseen situations (see *Netherlands* v *High Authority*, cited above, and *British Steel*, paragraph 42).

109 Inasmuch as, in contrast with the EC Treaty, the ECSC Treaty does not confer on the Commission or the Council any specific power to authorise State aid, the Commission is empowered by the first and second paragraphs of Article 95 to take all measures necessary to attain the objectives of the Treaty and, accordingly, under the procedure thereby established, to authorise such aid as it may consider necessary in order to attain those objectives (see, *inter alia*, *EISA*, paragraphs 61 to 64, and the case-law cited). Contrary to the applicant's assertions, since the aid is deemed necessary for the proper operation of the common market in steel, it does not constitute State aid prohibited under the Treaty.

110 The criterion of need is satisfied in particular where the sector concerned is in a state of exceptional crisis. In that connection, the Court of Justice emphasised in *Germany* v *Commission*, cited above, paragraph 30, that 'there is a close link, for the purposes of the implementation of the ECSC Treaty, between the granting of aid to the steel industry and the restructuring which that industry is required to undertake'. In the context of that implementation, the Commission determines at its discretion whether aid to accompany restructuring measures is compatible with the fundamental principles of the Treaty (*EISA*, paragraphs 77 and 78).

111 In its review of legality in such matters, therefore, the Court must confine itself to determining whether the Commission has exceeded the scope of its discretion by a distortion or manifest error of assessment of the facts or by misuse of powers or abuse of process (see, *inter alia*, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 25).

112 In part IV of the contested decision it is stated that the aim of that measure is '[to provide] the steel industry in Ireland with a sound and economically viable structure'. It must therefore be determined, first, whether or not that aim is consistent with the objectives set in Articles 2 and 3 of the Treaty and, secondly, whether or not the contested decision was necessary in order to attain those objectives.

113 It is established case-law that, in view of the diversity of the objectives set by the Treaty, the Commission's role consists in ensuring at all times that those various objectives are reconciled, by exercising its discretion, in order to meet the requirements of the common interest (see Case 9/56 *Meroni* v *High Authority* [1957 and 1958] ECR 133, pp. 151-152, Case 8/57 *Aciéries Belges* v *High Authority* [1957 and 1958] ECR 245, pp. 254-255, and Joined Cases 351/85 and 360/85 *Fabrique de Fer de Charleroi and Dillinger Hüttenwerke* v *Commission* [1987] ECR 3639, paragraph 15). In particular, in *Valsabbia and Others* v *Commission*, cited above, paragraph 54, the Court of Justice held that, if the Commission detects any conflict between the various objectives considered individually, it must grant such priority to one or other of the objectives laid down in Article 3 as appears necessary having regard to the economic facts and circumstances in the light of which it adopted its decision.

114 As regards the question whether restoring the recipient undertaking to economic health serves the objectives of the Treaty, it should be recalled that, as the Court of First Instance stated in *EISA*, *British Steel* and *Wirtschaftsvereinigung*, where an undertaking is privatised in order to ensure its viability, and jobs are shed, within reasonable limits, this contributes to attainment of the objectives of the Treaty, given the sensitive nature of the steel industry and the fact that any worsening of the crisis could lead to extremely serious and long-term problems for the economy of the Member State concerned. It is not disputed that the aid at

issue is intended to facilitate the privatisation of the public undertaking receiving it, the restructuring of existing plant and, within reasonable limits, the reduction of jobs (see part II of the contested decision). Nor is it disputed that in a number of Member States the steel industry is of essential importance because of the location of steel plants in regions where there is low employment and because of the importance of the economic interests at stake. In those circumstances, any decisions to close plant or shed jobs would, in the absence of support measures from the public authorities, be likely to create difficulties of the gravest public importance, particularly by exacerbating unemployment and creating the risk of a major economic and social crisis (*British Steel*, paragraph 107). The fact that Irish Steel is the only steel undertaking in Ireland inevitably reinforces the adverse impact which its closure would have on that Member State's economy and employment situation.

115 In those circumstances, by seeking to resolve those difficulties through the restoration of Irish Steel to economic health, the contested decision satisfies the requirements laid down by the Treaty in so far as it is incontestably designed to safeguard 'continuity of employment', as required by the second paragraph of Article 2 of the Treaty. Moreover, it pursues the objectives set out in Article 3 concerning, *inter alia*, 'maintenance of conditions which will encourage undertakings to expand and improve their production potential' (paragraph (d)) and the promotion of 'orderly expansion and modernisation of production, and the improvement of quality, with no protection against competing industries' (paragraph (g)) (see, to that effect, *British Steel*, paragraph 108).

116 It follows that the contested decision reconciles various objectives of the Treaty, with a view to safeguarding the proper functioning of the common market.

117 It remains, secondly, to verify whether the contested decision was necessary in order to attain those objectives. As the Court of Justice held in *Germany* v *Commission*, cited above, paragraph 30, the Commission 'was under no circumstances entitled to authorise the granting of State aid which was not

necessary to attain the objectives of the Treaty and would be likely to give rise to distortions of competition on the common market in steel' (*British Steel*, paragraph 110).

118 The first point to note is that with regard to State aid, the Court of Justice has consistently held that 'the Commission has a discretion the exercise of which involves complex economic and social assessments which must be made in a Community context' (Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 24; *Matra* v *Commission*, cited above; Joined Cases T-244/93 and T-486/93 *TWD* v *Commission* [1995] ECR II-2265, paragraph 82; and *British Steel*, paragraph 112).

119 It is apparent from both the contested decision (see part III) and the letter of 11 October 1995 that the restructuring plan linked to the privatisation of Irish Steel was presented to the Commission as the only solution which would enable the company to be restored to viability at a minimum socio-economic cost (see, in particular, paragraph 5 et seq. of the notice). The sale of the company to a private investor operating at the international level, with wide experience in the steel sector, and the capacity to turn round loss-making steel undertakings, were among the considerations which led the Commission to adopt the contested decision. Furthermore, the viability of the restructuring plan linked to the privatisation of Irish Steel was confirmed by independent experts, who considered the investments proposed by Ispat International likely to achieve the improved efficiency necessary and to reduce costs (see *inter alia* paragraphs 7.15 to 7.18 and 13.1 of the letter of 11 October 1995).

120 As regards the argument that the Commission took into account considerations which were of no relevance in determining whether aid was necessary, it should be noted that the reference to Article 92(3)(a) of the EC Treaty serves merely to explain the special circumstances of the Irish Steel case. When there is only one small-scale steel undertaking in a Member State and it is located in a region which is under-developed, the Commission may take those factors into consideration in order to assess the need for aid. In any case, the difficult economic situation of the

region where Irish Steel is located was only one of the factors which the Commission took into account.

121 Consequently, the applicant has failed to provide any firm evidence that the Commission committed a manifest error of assessment in its appraisal of the need for aid in order to restore the recipient undertaking to economic health.

Breach of the principle of non-discrimination

Arguments of the parties

122 The applicant argues that the contested decision is in breach of the principle of non-discrimination in that it discriminates in favour of a public undertaking to the detriment of private undertakings. Irish Steel received the aid at issue only because it is a State-owned undertaking. However, the principle of non-discrimination requires that comparable situations should not be treated differently or different situations in the same way unless such treatment is objectively justified. Where Member States propose to assist only public undertakings, the Commission cannot authorise aid the grant of which may result in manifest discrimination between the public and private sector. The Commission's role when assessing State aid plans is, *inter alia*, to ensure that such plans are not discriminatory (see, in this connection, Case 304/85 *Falck* v *Commission* [1987] ECR 871, paragraph 27).

123 Secondly, the contested decision authorises aid to an undertaking which had made no move towards radical restructuring; this operated to the detriment of competing undertakings which had already done so, like the applicant. Lastly, the

contested decision is also discriminatory inasmuch as it allows Irish Steel to raise production beyond current capacity whereas in the past other undertakings had been forced to make capacity reductions in order to receive aid. In the present case, that difference in treatment is not justified on any objective grounds.

124 The Commission contends that the applicant is wrong to compare the circumstances in which aid was granted to Irish Steel with the situation of other undertakings, such as the applicant, which have received no aid since 1985 and which have nevertheless undergone restructuring. In fact, between 1980 and 1985 the applicant received aid which enabled it to be privatised and to establish a sound and economically viable structure. The Commission goes on to add, supported by Ispat, that the principle of non-discrimination, as defined in *Falck*, cited above, cannot be relied upon in the present case. Moreover, the argument that the decision is discriminatory because it authorises Irish Steel to increase its capacity is unfounded for the reasons already explained.

125 Ireland observes that the aid package was approved in the context of the privatisation of Irish Steel and thus brought to an end State participation in that company. Accordingly, the argument that the aid discriminates in favour of public undertakings cannot be accepted.

Findings of the Court

126 In this context, it must be recalled that Article 4(b) of the Treaty provides that 'measures or practices which discriminate between producers' are to be recognised as incompatible with the common market for steel and are accordingly prohibited within the Commmunity.

127 According to settled case-law, discrimination arises where like cases are treated differently, so that some traders are disadvantaged and others are not, and where such difference in treatment is not justified by the existence of substantial objective differences (see Case 250/83 *Finsider* v *Commission* [1985] ECR 131, paragraph 8). As regards aid to the steel industry in particular, the Court of Justice has held that there is unequal treatment and therefore discrimination where a decision authorising aid gives rise 'to different advantages for steel undertakings placed in the same situation or to identical advantages for steel undertakings placed in appreciably different situations' (*Germany* v *Commission*, cited above, paragraph 36, and *British Steel*, paragraph 142).

128 The question of discrimination as between the public and private sectors in matters of aid covered by the ECSC Treaty was examined in *Falck* v *Commission*, cited above. After emphasising that responsibility for granting aid rests primarily with the government concerned, the Court of Justice clarified the role of the Commission in the following terms: '[i]t is true... that although any aid measure is likely to favour one undertaking in relation to another, the Commission cannot approve aid the grant of which may result in manifest discrimination between public and private sectors; [i]n such a case the grant of aid would involve distortion of competition to an extent contrary to the common interest' (*British Steel*, paragraph 143).

129 However, as the Commission contends, *Falck* v *Commission* can be relied on only where the Member State has chosen between potential recipients and given preference to the public sector. In the present case, Irish Steel is the only steel undertaking established in Ireland. Moreover, there is nothing in the circumstances surrounding authorisation of the aid to suggest that this was decisively influenced by the fact that Irish Steel was a public undertaking. Accordingly, the contested decision cannot have given rise to manifest discrimination between the public sector and the private sector, as the applicant alleges. In any event, the aid held to be compatible was granted by the Irish State in the context of the privatisation of Irish Steel (see paragraph 11 above).

130 As for the alleged contradiction between the contested decision and previous decisions taken on the basis of Article 95 of the Treaty, in that Irish Steel has not been compelled to reduce capacity, in the first place the size of the aid at issue is not comparable to that of the aid concerned in Decisions 94/256, 94/257, 94/258, 94/259, 94/260 and 94/261. The Commission states at paragraph 14.1 of the letter of 11 October 1995 that if it had made the same provision in that measure as in those decisions — that is to say, if it had required capacity to be reduced by 750 000 tonnes for each billion in aid — Irish Steel would have been required to cut capacity by 28 000 tonnes. That is not comparable with the capacity reductions imposed on those in receipt of the aid concerned in the above decisions, which involved much higher amounts. Secondly, it is important to recall the background to the contested decision. The financial aid declared compatible by that decision is consistent with the objective of providing the Irish steel industry with a sound and economically viable structure. Moreover, the Commission took into account, in accordance with the Council's statement of 25 February 1993, cited above, the problems specific to Ireland, where there is only one, relatively small, company (part IV of the contested decision). Lastly, as the Commission pointed out in the contested decision, it was not technically possible to reduce the capacity of the undertaking without bringing about its closure, since Irish Steel possesses only one mill (part V). In those circumstances, the absence of any capacity reduction requirement is justified by the special context in which the aid was authorised. In any event, the sales restrictions imposed on Irish Steel and the other obligations set out in the contested decision constitute counterpart measures for which there is no precedent.

131 As for the argument alleging that authorisation of the aid at issue was discriminatory in that it was for the benefit of an undertaking which had not carried out significant restructuring in the past, to the detriment of its rivals which had taken such steps, the applicant — which itself received aid so that it could be restructured and privatised — has failed to specify in what manner the contested decision accords preferential treatment to Irish Steel.

132 It follows that the applicant's submission that the contested decision was vitiated by a breach of the principle of non-discrimination must be rejected.

The unlawful regularisation of non-notified aid

Arguments of the parties

133 The applicant argues that between 1990 and 1994 the Irish State granted aid to Irish Steel on several occasions, both in the form of guaranteed loans and advances and in the form of public loans. However, the aid at issue was not notified to the Commission in accordance with Article 6(4) of the Fifth Code (see paragraph 7 above).

134 That aid, which is vitiated by a procedural defect, cannot be regularised *ex post facto* by a Commission decision authorising it. This was confirmed by the Court of Justice in Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* ('*FNCE*') [1991] ECR I-5505, paragraph 16.

135 Although nothing in Article 95 of the Treaty expressly precludes Member States, as a matter of procedure, from granting aid before receiving the Commission's approval, such a prohibition is implied by the fact that the ECSC Treaty is more stringent with respect to State aid than the EC Treaty. In any event, the obligation laid down in Article 6(2) of the Fifth Code to send notification applies in the present case.

136 The Commission points out, first, that only part of the aid was granted without prior notification and authorisation. Secondly, failure to observe the notification procedure has no bearing on the substantive question of the aid's compatibility with the common market, whether in the case of Article 93(3) of the EC Treaty (now, after amendment, Article 88(3) EC) or in the case of Article 6 of the Fifth

Code, which lays down the same obligation of prior notification and prohibits payment in advance. Lastly, the Commission disputes the applicant's interpretation of the *FNCE* judgment.

Findings of the Court

137 Under the system established by the ECSC Treaty with respect to State aid, the Commission may — subject to certain conditions and provided that it observes the procedure laid down in Article 95 of the Treaty — authorise aid which is necessary for the proper functioning of the common market in steel. Accordingly, the prohibition laid down in Article 4(c) is neither unconditional nor absolute.

138 In the case of individual decisions, the general logic of that system inherently requires, first, that the Member State apply to the Commission for the procedure provided for in Article 95 of the Treaty to be set in motion and, secondly, that the Commission determine whether the aid is necessary having regard to the objectives of the Treaty. Consequently, the system established by the ECSC Treaty, like that under Article 93 of the EC Treaty (now, after amendment, Article 88 EC), comprises two separate stages: the first is procedural, requiring Member States to notify to the Commission all planned aid and precluding the payment of aid which the Commission has not approved (this follows, quite simply, from Article 4(c) of the ECSC Treaty); the second is substantive and requires the Commission to determine whether the aid is necessary in order to attain certain of the ECSC Treaty's objectives. Article 6 of the Fifth Code, moreover, lays down in relation to aid which it exempts from the prohibition under Article 4(c) a procedure for notification and for the appraisal of compatibility which is entirely comparable.

139 According to the case-file, the aid at issue, which is worth IEP 1.217 million — corresponding to the State guarantee covering two loans totalling IEP 12 million (see paragraph 7 above) — was granted without prior notification to the

Commission (see, *inter alia*, paragraph 9 of Notice 95/C). It remains therefore to be determined whether, given the lack of prior notification, the contested decision constitutes, as the applicant claims, an unlawful attempt to regularise the aid.

140 In the context of the EC Treaty, the Court of Justice has ruled that breach of the obligations laid down in Article 93(3) of the EC Treaty does not relieve the Commission of its duty to determine whether the aid is compatible in the light of Article 92 of the EC Treaty (now, after amendment, Article 87 EC), and that the Commission may not declare aid unlawful without first verifying whether or not it is compatible with the common market (see, to that effect, *FNCE*, paragraph 13).

141 Since the prohibition laid down in Article 4(c) of the Treaty is merely a matter of principle and the Commission has the power to authorise State aid which is deemed necessary for the proper functioning of the common market, the need for prior notification is a procedural matter, in contrast with the final decision as to the aid's compatibility and, more importantly, the need for such aid in order to attain certain objectives of the Treaty. Lack of notification is not sufficient to excuse or even to prevent the Commission from taking action on the basis of Article 95 and, where appropriate, declaring the aid compatible with the common market. In the present case, the Commission found that the aid for the restructuring of Irish Steel, including the aid at issue, was necessary for the proper functioning of the common market and that it did not give rise to unacceptable distortion of competition. Consequently, the fact that notification was not made does not affect the legality of the contested decision, whether as a whole or solely in so far as the non-notified aid is concerned.

142 Furthermore, the position adopted by the Commission does not prevent individuals affected by the advance payment of the aid from claiming before the national courts that the measures implementing the unlawful aid are illegal or for compensation for any damage suffered, even if the aid has subsequently been declared compatible with the common market. The Court of Justice has already recognised that the prohibition of State aid laid down in Article 4(c) of the Treaty has direct effect (Joined Cases 7/54 and 9/54 *Groupement des Industries*

Sidérurgiques Luxembourgeoises v *High Authority* [1954 to 1956] ECR 175, p. 195). Moreover, as the Commission correctly observes, in *FNCE* the Court emphasises the direct effect of Article 93(3) of the EC Treaty and the obligation for the national courts to draw all the necessary legal inferences from that fact in order to redress the situation and, where appropriate, to award compensation to individuals for damage suffered as a result of the unlawful grant of State aid. However, the fact that Article 93(3) of the EC Treaty has direct effect does not necessarily have any bearing on the substantive appraisal of the aid; nor does it invalidate the Commission's decision on the question of compatibility (paragraphs 13 and 14).

143 Consequently, the allegation of unlawful regularisation of the non-notified aid is unfounded.

144 It follows from all the foregoing that the plea in law alleging breach of the ECSC Treaty or any rule for its implementation must be rejected.

3. *The plea alleging infringement of essential procedural requirements*

145 By this plea, the applicant alleges that the reasons given were insufficient; that the *inter partes* procedure was not initiated; and that the obligation to obtain the opinion of the Committee was not fulfilled.

Insufficiency of the statement of reasons

Arguments of the parties

146 The applicant claims that the Commission failed to give sufficient reasons for the contested decision. That decision, taken pursuant to Article 95 of the Treaty, was adopted by way of an exception; moreover, the Commission departed without justification from its previous practice with regard to decisions. In that connection, the applicant relies on Case 73/74 *Papiers Peints and Others* v *Commission* [1975] ECR 1491, paragraph 31. Moreover, the Commission has not given satisfactory reasons for the authorisation of aid worth in excess of IEP 31 million which, in its letter of 11 October 1995, it had considered to be the maximum strictly necessary.

147 The Commmission contends that sufficient reasons were given for the contested decision.

Findings of the Court

148 The fourth indent of the second paragraph of Article 5 of the Treaty provides that the Community is to 'publish the reasons for its actions'. The first paragraph of Article 15 provides that 'decisions, recommendations and opinions of the Commission shall state the reasons on which they are based and shall refer to any opinions which were required to be obtained'. It is clear from those provisions, and from the general principles of the Treaty, that the Commission is under an obligation to state reasons when adopting general or individual decisions, whatever the legal basis chosen for that purpose.

149 It is settled law that the statement of reasons must be appropriate to the act at issue and 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 and to enable the Community judicature to review it. It is not necessary, however, for the reasoning to go into all the relevant facts and points of law. 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 (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723 and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 230). The statement of the reasons on which a measure is based must also be appraised in relation, *inter alia*, to 'the interest which the addressees or other persons concerned by the measure for the purposes of the second paragraph of Article 33 of the ECSC Treaty may have in obtaining an explanation' (Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 24, and *British Steel*, paragraph 160). Lastly, when a Commission decision goes appreciably further than previous decisions, the Commission must expressly explain its reasoning (*Papiers Peints and Others* v *Commission*, cited above, paragraph 31).

150 First, according to part V of the contested decision, the reason why the Commission did not plan a capacity reduction in the present case was that this was not 'technically possible... without closing the plant since Irish Steel has only one hot-rolling mill' and, moreover, such a step would have been incompatible with 'the aim of providing the steel industry in Ireland with a sound and economically viable structure' (part IV). Furthermore, the Court of First Instance has already held in paragraph 130 that the lack of any capacity reduction requirement was justified by the particular context in which the aid was authorised. Since those circumstances are described in the contested decision, the applicant cannot maintain that the Commission has failed to explain expressly its line of reasoning.

151 Secondly, part IV of the contested decision describes the extent to which the objectives set out in Articles 2 and 3 of the Treaty and pursued by the Commission in that decision are served by the economic and social impact of the aid planned by Ireland as part of Irish Steel's restructuring programme, which independent experts have considered to be viable.

152 Thirdly, it is clear from the contested decision that the additional aid to which the applicant refers was the counterpart of the production and sales restrictions imposed by the Council (part II).

153 Moreover, according to established case-law, the lack of foundation for the complaint just examined is further confirmed by the fact that it is not disputed that the applicant was closely involved — through its representative on the Committee, Mr Evans — in the procedure prior to the adoption of the decision and that it was aware of the factual and legal considerations which led the Commission to consider the aid compatible with the common market and not to require capacity reduction by way of a counterpart measure (see *inter alia* Case 13/72 *Netherlands* v *Commission* [1973] ECR 27, paragraph 12, and *British Steel*, paragraph 168).

154 The complaint alleging that the statement of reasons was inadequate is therefore unfounded.

The failure to initiate the inter partes *procedure*

Arguments of the parties

155 The applicant claims that the Commission is required under Article 93(2) of the EC Treaty (now, after amendment, Article 88(2) EC) and Article 6(4) of the Fifth Code to inform interested third parties of the request for authorisation so that they may submit their comments. In the present case, the Commission published the Irish Government's original plan in the Official Journal (Notice 95/C), but did not do so in the case of the second restructuring plan. Consequently, the Commission failed to observe the applicant's right to be heard and to provide in good time its comments on the proposal under consideration.

156 The Commission disputes those allegations, contending primarily that the procedural rights conferred on the applicant by Article 95 are more extensive than those under Article 6(4) of the Fifth Code. The applicant had more time in which to submit its comments and could have done so either directly or through the Committee.

Findings of the Court

157 The contested decision was adopted on the basis of the first and second paragraphs of Article 95 of the Treaty. This provides for the unanimous assent of the Council and compulsory consultation of the Consultative Committee. It does not confer a right to be heard on the addressees of decisions or on other persons concerned. On the other hand, Article 6(4) of the Fifth Code does confer such a right and states that 'if, after giving notice to the interested parties concerned to submit their comments, the Commission finds that aid in a given case is incompatible with the provisions of this Decision, it shall inform the Member State concerned of its decision'. That provision appeared in all the aid codes preceding the Fifth Code (see, on that point, Commission Decision No 257/80/ ECSC of 1 February 1980 establishing Community rules for specific aids to the steel industry, OJ 1980 L 29, p. 5).

158 The applicant maintains that the Commission failed to observe the rights of the defence in so far as, even though there is no express provision to that effect in Article 95 of the ECSC Treaty, it should have initiated an *inter partes* procedure in the applicant's case, modelled on Article 6 of the Fifth Code. The applicant seeks also to draw parallels between Article 95 of the ECSC Treaty and Article 93(2) of the EC Treaty in order to infer a general principle obliging the Commission systematically to involve interested parties in the procedure each time it must determine whether State aid is compatible with the Treaty.

159 Although there is no need to determine whether there is a general principle of Community law attributing to interested parties the right to be heard during a

procedure for the adoption of a decision in State aid matters, it must be noted that in the course of the procedure for adopting the contested decision, the applicant had in any event an opportunity to air its views within the Consultative Committee. Under Article 18 of the Treaty, the Consultative Committee consists of representatives of producers, workers, consumers and dealers. It is not disputed that British Steel, in its role as producer, was represented on that Committee. At the Committee's 324th meeting on 24 November 1995, the authorisation of aid to Irish Steel was discussed and the applicant's representative had an opportunity to express an opinion on the measures proposed by the Commission (see, to that effect, *British Steel*, paragraph 176).

160 In any event, the publication of Notice 95/C in the Official Journal cannot have misled the applicant as to the proposal submitted to the Council and on which the Committee was heard. Before that notice was published on 28 October 1995, the applicant was already in a position to know, through its participation at the Committee meeting which took place on 25 October 1995, that the Irish authorities had withdrawn the first restructuring plan and had submitted an amended second plan.

161 The applicant therefore had an opportunity to make known its views, in accordance with the procedure laid down in Article 95 of the Treaty, on the adoption of the contested decision. That being so, the complaint alleging breach of the obligation to initiate the *inter partes* procedure must be dismissed.

Breach of the obligation to consult the Consultative Committee

Arguments of the parties

162 The applicant claims that the Commission failed to secure the agreement of the ECSC Consultative Committee to the final aid package. The amount of aid

originally proposed and the conditions for its authorisation were altered between the meeting of the Consultative Committee on 25 October 1995 and the Council's final assent on 22 December 1995. Referring to the case-law of the Court of Justice concerning consultation of the European Parliament in the context of decisions taken pursuant to Article 235 of the EC Treaty (now Article 308 EC) (see Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593), the applicant submits that the Committee should have been re-consulted because the substance of the contested decision is, in two respects, at variance with the proposal put to the Consultative Committee: first, the amount of the aid is 22% higher and, secondly, the restrictions on sales are markedly different. However, the Committee was never given an opportunity to express a view on the distortion of competition which this additional aid was liable to engender or on whether the new conditions were a suitable means of preventing this.

163 The Commission contends that the applicant's arguments are based on the assumption that the aid entails distortion of competition, something which has already been refuted. The case-law relied on by the applicant does not indicate that there is an obligation to re-consult.

Findings of the Court

164 In the present case, the Commission consulted the Committee in accordance with Article 95 of the Treaty at the meeting on 25 October 1995. That consultation related to the Commission's letter of 11 October 1995. However, the final decision authorising the aid was adopted with a number of amendments at the meeting of the Council on 22 December 1995 without the Committee having been consulted afresh regarding those amendments.

165 The proposition argued for by the applicant in this connection — that there is a parallel between the duty to consult the European Parliament and the duty under Article 95 of the Treaty to consult the Consultative Committee — cannot be

accepted. The European Parliament is a Community institution whose effective participation in the legislative process of the Community constitutes an essential factor in the institutional balance intended by the Treaty (see *inter alia* Case C-392/95 *Parliament* v *Council* [1997] ECR I-3213, paragraph 14). By contrast, what is in issue in the present case is the participation of a technical body in the decision-making process of the institutions. Accordingly, the opinion provided for in Article 95 of the ECSC Treaty is not a procedural imperative comparable with consultation of the European Parliament as required by Article 235 of the EC Treaty.

166 In any event, it must be determined whether there was a duty to re-consult in the present case in the light of the general scheme of Article 95 and, in particular, the aims underlying the consultation for which it provides.

167 It is clear from Articles 18, 19 (composition and functions of the Consultative Committee) and 95 of the Treaty, read together, that the purpose of consulting the latter body is, first, to enable all the professionals concerned to express their opinion on the proposals submitted by the Commission and, secondly, to permit the Council to take decisions on the basis of a dialogue involving all interested parties.

168 Thus, there is no longer any need for consultation where the Committee has already had an opportunity, with knowledge of all the factors needed to understand the situation under consideration, to express its opinion on all the questions raised, and that opinion has been imparted to the Council so that it can be borne in mind when the final decision is adopted. It is clear from the case-file that the Committee had an opportunity to express its views on the basis of Notice 95/C, which contained all the necessary information. The fact that, following reservations expressed by several members of the Committee, stricter conditions for authorisation of the aid were imposed as compared with the Commission proposal shows not only that the Council was fully informed of the Committee's opinion, but also that it had taken it into consideration when it adopted the contested decision. As regards the increase in the amount of aid, that constitutes

the necessary counterpart to the loss of income brought about by the stringency of the conditions imposed in order to ensure the viability of the restructuring plan.

169It follows that the failure to re-consult the Committee on the final text of the contested decision did not undermine the efficacity of the consultation for the purposes of Article 95 of the Treaty.

170 The complaint alleging breach of the obligation to consult the Consultative Committee is therefore unfounded.

171 Consequently, the plea alleging breach of essential procedural requirements must be rejected.

172 It follows from all the foregoing observations that the action must be rejected in its entirety.

Costs

173 The applicant claims that the preliminary plea of inadmissibility raised by the Commission is unreasonable and vexatious within the meaning of Article 87(3) of the Rules of Procedure. Accordingly, it claims that the Court should order the Commission to pay the costs, whatever the outcome of the action as a whole.

174 The Court considers that the plea in law put forward by the Commission was relevant at the time when the application was lodged. The question whether time for the purposes of initating the action for annulment started to run with effect from a date before the publication had not previously been addressed by the Community judicature. Furthermore, in raising the question of the admissibility of the application, the Commission did not attempt to criticise the applicant for its lack of acquaintance with the contested decision before its publication, to which it had contributed through its refusal to send it a copy. It based its plea on the fact that the applicant had a sufficient knowledge of the measure well before its publication. In those circumstances, the failure to send a copy of the contested decision, albeit inconsistent with the principle of sound administration, did not play any role in the Commission's arguments. It follows that, in raising that plea, the Commission did not cause the applicant to incur costs unreasonably or vexatiously.

175 The applicant's application under the second paragraph of Article 87(3) of the Rules of Procedure cannot therefore be upheld.

176 Under Article 87(2) of the Rules of the Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. It follows from the foregoing that the applicant has been unsuccessful in its action for annulment of the contested decision. Since the Commission and Ispat, the intervener supporting it, have applied for costs, the applicant must be ordered to pay their costs.

177 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. It follows that Ireland, as intervener, must bear its own costs.

178 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener other than a Member State or an institution to bear its own costs. In this case, Hoogovens, intervener in support of the applicant, must bear its own costs.

On those grounds,

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

hereby:

1. **Dismisses the action.**

2. **Orders the applicant to pay its own costs, those of the defendant and those of Irish Ispat Ltd, intervener.**

3. **Orders Ireland and Hoogovens Staal BV, interveners, to bear their own costs.**

Moura Ramos García-Valdecasas Tiili

Lindh Mengozzi

Delivered in open court in Luxembourg on 7 July 1999.

H. Jung R. M. Moura Ramos

Registrar President