JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
24 October 1997 *

In Case T-239/94,

Association des Aciéries Européennes Indépendantes (EISA), an association constituted under Belgian law, established in Brussels, represented by Alexandre Vandencasteele, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Michel Nolin and Ben Smulders, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, Wagner Centre, Kirchberg,

defendant,

supported by

Council of the European Union, represented by Rüdiger Bandilla and Stephan Marquardt, respectively Director and Administrator in its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

* Language of the case: French.

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of the Economy, and Bernd Kloke, Oberregierungsrat in the same Ministry, acting as Agents, with an address for service in Luxembourg at the German Embassy, 20-22 Avenue Émile Reuter,

Italian Republic, represented by Umberto Leanza, Head of the Legal Service, Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

Ilva Laminati Piani SpA, a company incorporated under Italian law, established in Rome, represented by Aurelio Pappalardo, of the Trapani Bar, and Massimo Merola, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Alain Lorang, 51 Rue Albert I,

interveners,

APPLICATION for the annulment of Commission Decisions 94/256/ECSC to 94/261/ECSC of 12 April 1994 concerning aid to be granted by various Member States to steel undertakings established in their respective territories (OJ 1994 L 112, pp. 45, 52, 58, 64, 71 and 77),

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

composed of: A. Saggio, President, A. Kalogeropoulos, V. Tiili, A. Potocki and R. M. Moura Ramos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 25 February 1997,

gives the following

Judgment

Legal background

1 The Treaty establishing the European Coal and Steel Community ('the Treaty') prohibits in principle State aid to the steel industry by providing in Article 4(c) that 'subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever' are recognized as incompatible with the common market for coal and steel and are accordingly to be abolished and prohibited within the Community, as provided in the Treaty.

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

'In all cases not provided for in this Treaty where it becomes apparent that a decision or recommendation of the Commission is necessary to attain, within the

common market in coal and steel and in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4, the decision may be taken or the recommendation made with the unanimous assent of the Council and after the consultative Committee has been consulted.

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

3 In order to meet the needs of restructuring the steel sector, the Commission relied on the first two paragraphs of Article 95 of the ECSC Treaty in order to establish, as from the beginning of the 1980s, a Community scheme under which the grant of State aid to the steel industry could be authorized in a limited number of cases. That scheme has been subject to successive amendments in order to resolve the specific economic difficulties of the steel industry. Thus, the Community Steel Aid Code in force during the period under consideration in this case is the fifth in the series, having been 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 Aid Code'). The recitals in the preamble to that decision show that that code, like its predecessors, establishes a Community system, inasmuch as it is designed to cover aid, whether specific or non-specific, financed by Member States in any form whatsoever. The Code does not authorize either operating or restructuring aid, save in the case of aid for closure.

The facts

4 In view of the deterioration of the economic and financial situation in the steel industry, the Commission presented a restructuring plan to the Council and the European Parliament on 23 November 1992 in its Communication SEC (92) 2160 final entitled 'Towards greater competitiveness in the steel industry: the need of further restructuring'. That plan was based on the finding of structural overcapacity and was aimed primarily at achieving, through the voluntary participation of

steel companies, a substantial and definitive capacity reduction of the order of at least 19 million tonnes. With that aim in view, it proposed a series of accompanying measures in the social field, together with financial incentives including Community aid. In parallel with that plan, the Commission gave an exploratory mandate to an independent expert, Mr Braun, former Director General for industrial affairs at the Commission, his essential task being to list projects for the closure of steel undertakings over the period envisaged in the above communication, which covered the years 1993 to 1995. On 29 January 1993 Mr Braun, having contacted the heads of some 70 steel undertakings, submitted his report, entitled 'Current or Planned Restructuring in the Steel Industry'.

5 In its Conclusions of 25 February 1993, the Council welcomed the broad outlines of the programme submitted by the Commission following the Braun Report, with a view to achieving a substantial reduction in excess production capacity. The enduring restructuring of the steel industry was to be facilitated by 'a package of supporting measures of limited duration which strictly comply with the rules on control of State aid', it being understood in relation to such aid that 'the Commission [confirmed] its commitment to rigorous and objective application of the aids code and [would] ensure that any derogations proposed to the Council under Article 95 of the Treaty contribute fully to the required overall effort to reduce capacity. The Council [would] act promptly on [those] proposals, on the basis of objective criteria'.

6 Accordingly, the Council and the Commission indicated in their joint statement entered in the minutes of the Council meeting of 17 December 1993 — which refer to the global agreement reached within the Council to grant assents under the first and second paragraphs of Article 95 of the Treaty for State aid for the public undertakings Sidenor (Spain), Sächsische Edelstahlwerke GmbH (Germany), Corporación de la Siderurgia Integral (CSI, Spain), Ilva (Italy), EKO Stahl AG (Germany) and Siderurgia Nacional (Portugal) — that they '[believed] that the

only way to secure a healthy EC steel industry, able to compete on the world market, [was] to put a permanent end to State subsidization of the steel industry and to close loss-making capacity. In giving its unanimous consent to the current Article 95 proposals, the Council [reaffirmed] its commitment to a strict application of the Steel Aids Code [...] and, in the absence of authorization under the Code, Article 4(c) of the ECSC Treaty. Without prejudice to the right of any Member State to request a decision under Article 95 of the ECSC Treaty, and in accordance with the Council conclusions of 25 February 1993, the Council [declared] its firm commitment to avoid any further Article 95 derogations in respect of aid for any individual companies'.

7 On 22 December 1993 the Council gave its assent in accordance with the first two paragraphs of Article 95 of the Treaty as regards the grant of the abovementioned aid intended to accompany the restructuring or privatization of the public undertakings concerned.

8 It was against that legal and factual background and with a view to facilitating further restructuring of the steel industry that, on 12 April 1994, following the Council's assent, the Commission adopted six *ad hoc* decisions on the basis of the first and second paragraphs of Article 95 of the Treaty, which authorize the granting of State aid not meeting the criteria permitting derogation, pursuant to the Aid Code, from Article 4(c) of the Treaty. In those six decisions the Commission authorized, respectively, grant of the aid which Germany planned to grant to EKO Stahl AG, Eisenhüttenstadt (Decision 94/256/ECSC, OJ 1994 L 112, p. 45, hereinafter 'Decision 92/256'), 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).

9 Those authorizations were made the subject, in accordance with the Council's assent, of 'obligations corresponding to net capacity reductions of at least 2 million tonnes of crude steel and a maximum of 5.4 million tonnes of hot rolled products (disregarding the possible construction of a wide-strip mill at Sestão and an increase in the capacity of EKO Stahl above 900 000 tonnes after mid-1999)' on the basis of the Commission's communication to the Council and the European Parliament of 13 April 1994 (COM(94) 125 final) presenting an intermediate report on the restructuring of the steel industry and making suggestions for the consolidation of that process in the spirit of the conclusion reached by the Council of 25 February 1993, mentioned above.

Procedure

10 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 6 June 1994, the Association des Aciéries Européennes Indépendantes (EISA) applied under Article 33 of the Treaty for the annulment of the six decisions of 12 April 1994 mentioned above.

11 By separate document received at the Registry of the Court of First Instance on the same date, the applicant also applied under Article 39 of the Treaty for the application of Article 1 of the contested decisions to be suspended inasmuch as those decisions declared the aid in question to be compatible with the orderly functioning of the common market and therefore authorized it. That application was dismissed by order of the President of the Court of First Instance of 15 July 1994 (Case T-239/94 R *EISA* v *Commission* [1994] ECR II-703).

12 In parallel, two other actions were brought, one by British Steel plc against Decisions 94/258 and 94/259 of 12 April 1994, mentioned above, respectively authorizing the grant of State aid to CSI and to the Ilva steel group (Case T-243/94), and

the other by Wirtschaftsvereinigung Stahl, Thyssen Stahl AG, Preussag Stahl AG and Hoogovens Groep BV against Decision 94/259 authorizing the granting of State aid to the Ilva steel group (Case T-244/94).

13 In these proceedings the Federal Republic of Germany, the Council, the Italian Republic and Ilva Laminati Piani Spa (hereinafter 'Ilva') lodged applications at the Registry of the Court of First Instance dated 14, 24 and 28 October and 2 November 1994 respectively for leave to intervene in support of the defendant. By orders of 25 and 28 November and 15 December 1994 the President of the Second Chamber, Extended Composition, of the Court of First Instance granted those applications.

14 On 21 December 1994 the Commission, by Decision 94/1075/ECSC concerning aid to be granted by Germany to the steel company EKO Stahl GmbH, Eisenhüttenstadt (OJ 1994 L 386, p. 18), withdrew the abovementioned Decision 94/256 concerning that undertaking.

15 On 3 December 1996 the Court put to the Commission, under Article 64(3) of the Rules of Procedure, a number of questions, to which it submitted answers within the time allowed.

16 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory enquiry. The parties presented oral argument and answered questions put to them by the Court at the hearing on 25 February 1997.

Forms of order sought

17 The applicant claims that the Court of First Instance should:

— annul Commission Decisions 94/256/ECSC to 94/261/ECSC of 12 April 1994;

— order the Commission to pay the costs.

18 The defendant, supported by the Council and the Italian Republic, contends that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

19 The Federal Republic of Germany contends that the Court should:

— dismiss the application in so far as it seeks the annulment of Decisions 94/256 and 94/260.

20 Ilva contends that the Court of First Instance should:

— declare the application admissible but unfounded;

— order the applicant to pay the costs in their entirety, including those incurred by Ilva.

Admissibility

Arguments of the parties

21 In support of the admissibility of its application, the applicant maintains that, contrary to the German Government's contention, it is an undertaking which is concerned, within the meaning of the second paragraph of Article 33 of the Treaty, by the contested decisions (Joined Cases 172/83 and 226/83 *Hoogovens* v *Commission* [1985] ECR 2831 and Case C-180/88 *Wirtschaftsvereinigung Eisen-und Stahlindustrie* v *Commission* [1990] ECR I-4413). It also states that the production of several of its members competes directly with that of the two German undertakings to which the aid in question has been granted and with that of their purchasers.

22 The Federal Republic of Germany contests the *locus standi* of the applicant on the ground that it has not shown that the contested decisions are harmful to its own interests or to those of the undertakings which it represents. In particular, the members of EISA are not in competition with EKO Stahl and Sächsische Edelstahlwerke, since it does not appear that they manufacture the same products.

Findings of the Court

23 It is necessary, before examining whether there is a bar to proceeding with the case, as suggested by the Federal Republic of Germany, to consider whether in the light of the Rules of Procedure it is permissible for that intervener to raise such a matter.

24 The defendant did not raise the question of inadmissibility during the written procedure. Submissions made in an application to intervene are to be limited to

supporting the submissions of one of the parties (second paragraph of Article 34 and the first paragraph of Article 46 of the ECSC Statute of the Court of Justice). Moreover, interveners must accept the case as they find it at the time of their intervention (Article 116(3) of the Rules of Procedure).

25 It follows that the intervener, the Federal Republic of Germany, has no standing to submit that there is a bar to proceeding with the case and the Court of First Instance is not therefore required to consider the grounds of inadmissibility on which it relies (see in that connection Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125).

26 However, under Article 113 of the Rules of Procedure, the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case, including any raised by the interveners (see in that connection Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945 and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203).

27 In this case the matter raised by the Federal Republic of Germany, in so far as it concerns the applicant's *locus standi* and its access to certain remedies, gives rise to the question whether there is an absolute bar to proceeding with the case, and, in accordance with the abovementioned case-law, may therefore be considered by the Court of its own motion.

28 In that context, the Court points out that according to settled case-law an association within the meaning of Article 48 of the Treaty, made up of undertakings in the steel industry, whose purpose is to represent the common interests of its members, is concerned — within the meaning of the second paragraph of Article 33 of the Treaty — by decisions authorizing the payment of State aid to competing undertakings (see *Wirtschaftsvereinigung Eisen-und Stahlindustrie* v *Commission*, cited above, paragraph 23).

29 EISA is an association made up of independent European steel companies, so that it may be presumed that State-owned steel undertakings receiving aid authorized by the contested decisions are competitors of the members of EISA. As the applicant has stated, it has not been disputed by the defendant or by the interveners, with the exception of the Federal Republic of Germany, that the undertakings represented by EISA do in fact compete with the State-owned steel undertakings which benefited from the aid authorized by the contested decisions. As far as the Federal Republic of Germany is concerned, it merely contended that 'it does not appear' that the members of EISA manufacture the same products as EKO Stahl or Sächsische Edelstahlwerke, without however putting forward adequate arguments to call in question the status, as competitors, of the undertakings represented by EISA.

30 EISA's application must therefore be held to be admissible.

The subject-matter of the application for annulment

Arguments of the parties

31 The Federal Republic of Germany maintains that the application for annulment of Decision 94/256 concerning EKO Stahl AG (hereinafter 'EKO') has become devoid of purpose since the Commission withdrew that decision by means of Decision 94/1075 of 21 December 1994, cited above.

32 The applicant observes that, even if Decision 94/256 concerning EKO has been withdrawn by the Commission, the application for the annulment of that decision is not thereby rendered devoid of purpose since the applicant has an interest in securing a finding by the Court that the individual decisions authorizing the grant of operational State aid on the basis of the first and second paragraphs of Article 95 of the Treaty are illegal, in order to prevent any repetition of that practice.

33 The Commission confirms that, by its Decision 94/1075 of 21 December 1994, cited above, it 'withdrew and cancelled' its Decision 94/256 and that as a result the application for annulment regarding Decision 94/256 has become devoid of purpose and there is no need for the Court to adjudicate on it.

Findings of the Court

34 The Court considers that the applicant's view is unfounded. According to settled case-law, it is inappropriate to adjudicate on an application for annulment where the contested decision has been withdrawn, rendering it inapplicable (see for example the order of the Court of Justice in Case 75/83 *Ferriere San Carlo* v *Commission* [1983] ECR 3123). It is not disputed that the contested decision has been withdrawn, thereby becoming inapplicable. The action for annulment by EISA against Decision 94/256 has therefore become devoid of purpose, and it is unnecessary to examine the reasons which prompted the Commission to withdraw that decision.

35 Consequently, there is no need to adjudicate on that part of the application which concerns the annulment of Decision 94/256.

Substance

36 In support of its application for annulment the applicant puts forward two pleas in law, alleging, first, infringement of the Treaty and of the Aid Code and misuse of powers and, second, that the contested decisions are retroactive.

The first plea in law: infringement of the Treaty and of the Aid Code and misuse of powers

37 In support of its first plea in law the applicant alleges, first, failure to observe the prohibition of State aid laid down by the Treaty and the Aid Code and misuse of powers, second, infringement of the conditions for the application of the first paragraph of Article 95 of the Treaty and, third, breach of the principle of non-discrimination laid down by the Treaty.

Arguments of the parties

38 The applicant states first that, in the contested decisions, the Commission expressly recognizes that the aid in question is incompatible with the Treaty and the Aid Code. However, that institution was not entitled to derogate from the prohibition of aid laid down by those instruments by basing itself on the first and second paragraphs of Article 95 of the Treaty. The adoption of the contested decisions involves what is in fact a modification of the Treaty and necessitated a prior amendment thereof, in accordance with the procedure laid down by Article N of the Treaty on European Union, following the repeal by Article H(21) of that Treaty of Article 96 of the ECSC Treaty, with effect from 1 November 1993.

39 The applicant claims that, by granting a series of individual derogations without specifying the circumstances which prompted it to depart from the provisions of the Aid Code for the benefit of the five undertakings with which the contested decisions were concerned, the Commission purported to exercise a power which was excessively vague and general, going beyond any adjustment to the Treaty covered by either the first or the third or fourth paragraphs of Article 95 and which, in any event, does not allow any verification as to whether the conditions for the application of those provisions are met.

40 In particular, the contested decisions do not relate to a case not covered by the Treaty: on the contrary, Article 4(c) of the Treaty expressly prohibits State aid. The applicant rejects the Commission's argument that the contested decisions authorize not State aid prohibited by Article 4(c) of the Treaty but Community aid. It submits that it is clear from the contested decisions that they approve national aid and not Community aid. It is clear that the Commission's action was limited to authorizing the Member States concerned, under certain conditions, to grant to their companies aid for which they themselves determine the amount and the detailed arrangements, outside the Community context. By thus disregarding the prohibition of State aid laid down by the Treaty, even in pursuit of a purpose purportedly in conformity with the objectives of the Treaty, the contested decisions undermine the principle of a Community governed by the rule of law.

41 Accordingly, the applicant considers that the individual nature of the derogations from the prohibition of State aid laid down by the Treaty, granted by the contested decisions, shows that they were intended not to deal with a case not provided for by the Treaty with a view to attaining the objectives laid down by the Treaty but rather to resolve the difficulties encountered by certain undertakings in complying with the Treaty rules, observance of which is required of their competitors. Those decisions in fact are intended to legalize certain State aid which could not fit into the legal framework defined by the Treaty. Moreover, even if the problem here could be regarded as not provided for by the Treaty, which the applicant denies, recourse to the first and second paragraphs of Article 95 of the Treaty to adopt individual decisions in order to deal with a general problem constitutes a misuse of powers. Such recourse runs counter to one of the fundamental objectives of the Treaty, namely equality of treatment as between economic operators.

42 The applicant then submits that the conditions for the application of the first paragraph of Article 95 of the Treaty are not met by the contested decisions. By authorizing operational aid, those decisions do not fit into the operational framework of the common market for steel and do not pursue the attainment of any Community objective. Moreover, they are not necessary for the purpose of attaining the objectives pursued.

43 First, the applicant submits that the contested decisions do not fit into the operational framework of the common market in steel and do not seek to attain any of the Community objectives defined in Articles 2, 3 and 4, as required by the first paragraph of Article 95 of the Treaty. The decisions are intended artificially to maintain excess production, through the grant of operational aid. In support of that view, the applicant states, first, that the contested decisions do not contain the information necessary to show that the restructuring plans presented by the Member States concerned are viable. The applicant also expresses doubts as to the value of the statement that the aid in question will be the last operating aid granted, since in the past the Commission has already been prompted to default on such assurances. In that connection, it observes that, in its Conclusions of 17 December 1993, the Council took care to state that it was without prejudice to the right of any Member State to seek a decision under Article 95 that it declared itself to be resolved to avoid any further derogation for aid in favour of any given undertaking. The applicant refers to the difficulties — which became apparent as soon as the first reports from the Member States were submitted, as is clear from the Commission communication to the Council and the European Parliament of 21 June 1994, entitled 'Fresh impetus for restructuring the steel industry in the Community', referred to above — with which the Commission is confronted in monitoring compliance with the conditions imposed by the contested decisions.

44 In those circumstances, the contested decisions run counter to attainment of most of the objectives laid down in the abovementioned articles of the Treaty, by artificially maintaining unviable undertakings, thus perpetuating the excess capacity which gave rise to the structural crisis affecting the industry as a whole. Thus, they do not enable conditions to be established under which the most rational distribution of production referred to in the second paragraph of Article 2 of the Treaty can be achieved. Moreover, the aid in question improves the position of the beneficiary undertakings on the market, as a result of a policy of subsidized prices and/or production. By contributing to artificial distortion of the conditions of competition, the aid in question is not such as to ensure a price level allowing the necessary amortization and a normal return on invested capital (Article 3(c) of the Treaty), maintenance of conditions which will encourage undertakings to expand and improve their production potential (Article 3(d)), harmonization of working and living conditions for workers (Article 3(e)), the growth of international trade (Article 3(f)), or orderly expansion and modernization of production and the

improvement of quality (Article 3(g)). The grant of aid to certain steel undertakings severely undermines the viability of the other undertakings as a result of artificially keeping their competitors in business. The applicant states that, whilst it is true that the Aid Code in force from 1980 to 1985 envisaged the possibility of granting operational aid, the effect of such aid on the competitive position of undertakings was strictly limited at that time by the framework imposed on production and prices by the Commission from 1980 to 1988 under the system to be established in times of manifest crisis referred to in Article 58 of the Treaty.

45 Secondly, the contested decisions are not necessary for attainment of the objectives pursued, as required by the first paragraph of Article 95 of the Treaty. The applicant rejects the Commission's argument that those decisions form part of a general policy of capacity reductions accompanied by supporting measures, in line with the abovementioned Braun Report of 29 January 1993. Such a general policy could be implemented by existing legislative measures and regulations. Since the Aid Code expressly authorizes aid for closure, a capacity reduction could have been achieved by means of social supporting measures intended to reduce the burdens borne by undertakings in connection with closures. That, moreover, was the solution advocated in the Braun Report which, according to the applicant, refers to the harmful consequences of financial intervention by the public authorities of the kind authorized in this case by the contested decisions. The applicant also states that it was never involved in the drawing up of the restructuring plan approved by the Council which, contrary to that institution's assertions, was not prepared 'jointly with the steel industry'.

46 Finally, the applicant considers that the contested decisions involve discrimination between producers, contrary to Article 4(b) of the Treaty. It contests the view, first, that the closure of production capacity by the undertakings to which the aid is granted, referred to in Article 3 of the contested decisions, demonstrates that there is no discrimination between those undertakings and other producers in the steel industry. In particular, the capacity reduction of 750 000 tonnes per year for each ECU 1 000 million of aid granted, imposed by the contested decisions, is

particularly favourable if compared with the ratio of 516 000 tonnes per ECU 400 000, which will not be paid until after closure, adopted in discussions between the Commission and Bresciani, a private Italian steel undertaking. Furthermore, it is clear from the table relating to the capacity reductions provided for in the contested decisions, as produced by the Commission, that most of the closures are scheduled for the end of the period over which the aid is granted. During that period the competitiveness of the beneficiary undertakings will thus be artificially increased. Moreover, certain reductions are substantially offset by new investments. The latter involve an increase of 900 000 tonnes capacity both for CSI and for Siderurgia Nacional. Also, other reductions relate to capacity which is nominal rather than real. That applies to Ilva as regards at least 300 000 tonnes.

47 The applicant states, furthermore, that the discrimination derives also from the fact that the beneficiary undertakings may, when being reorganized, reduce their financing costs to a minimum of 3.5% of annual turnover, which corresponds to the average for Community steel undertakings (Article 4 of Decision 94/256 and Article 3 of the other contested decisions). The contested decisions thus make it possible artificially to reduce to the Community average the financing costs of non-viable undertakings which, as a result, will have a significantly higher level of indebtedness. The applicant adds that the discrimination alleged by it cannot be imputed to the Member States concerned, as the Commission suggests, even if the aid in question comes from those States. Before taking any decision based on the first and second paragraphs of Article 95, the Commission is required to ensure that it involves no discrimination contrary to the objectives laid down in Article 4(b) of the Treaty.

48 The Commission, supported by the interveners, denies that the aid authorized by the contested decisions is incompatible with the Treaty. It concedes that the aid, as notified by the Member States concerned, was incompatible with the Treaty by virtue of Article 4(c) thereof and the Aid Code, as national aid, in view of the fact that it did not come within the scope of that provision. It states, however, that the aid in question 'became Community aid' as a result of the contested decisions

authorizing it on the basis of the first and second paragraphs of Article 95, after the imposition of strict conditions, so that such aid may be regarded as compatible with the functioning of the common market.

49 The Commission explains that it was empowered to adopt the contested decisions on the basis of the first and second paragraphs of Article 95 of the Treaty. It contends that, in spite of the adoption of increasingly strict Steel Aid Codes, the Community steel industry has, since the beginning of the 1990s, gone through 'its most difficult period since the first half of the 1980s', as indicated in the preambles to the five contested decisions. In its judgment in Case 214/83 *Germany* v *Commission* [1985] ECR 3053, the Court of Justice recognized that a crisis situation is a situation not provided for by the Treaty and may justify intervention under the first and second paragraphs of Article 95 thereof. The only limitation which the Court of Justice placed on Commission action lies in the fact that it 'cannot approve aid the grant of which may result in manifest discrimination between the public and private sectors. In such a case the grant of aid would involve distortion of competition to an extent contrary to the common interest' (Case 304/85 *Falck* v *Commission* [1987] ECR 871, paragraph 27). In this case, the aid authorized by the contested decisions does not involve any discrimination, particularly since the Commission made the authorization of it subject to the condition that the net financing costs of the beneficiary undertakings were not to be less than 3.5% (or 3.2% in the case of AST) of their annual turnover, corresponding to the present average for Community steel undertakings. Furthermore, by making authorization of the aid in question subject to proportional offsetting measures, in the form of substantial capacity reductions, the contested decisions form part of an overall restructuring plan which was implemented also in the interests of private undertakings.

50 The Commission states that the applicant does not deny that Community aid may be granted on the basis of Article 95 of the Treaty under general decisions. The only question which arises is therefore whether aid for partial closures, which was not available under the Aid Code, could be the subject of individual approval decisions based on those provisions. An *ad hoc* approval, under the procedure established by Article 95, is possible provided that it pursues the same aim and is

subject to the same conditions as aid authorized under the successive Aid Codes. The Commission considers that to be the case here, since the contested decisions impose the three essential conditions associated with the grant of State aid in the steel industry, in accordance with the practice consistently followed by the Commission since 1980. In particular, the Commission verified, on the basis of reports drawn up by independent experts in most cases, that the aid authorized would guarantee the financial viability of the beneficiary undertaking. The amount of aid was limited to what was strictly necessary. Finally, the aid was offset by capacity reductions proportionate to the amount of the aid, so as to serve the common interest.

51 In those circumstances, the Commission rejects the view that the power exercised by it in adopting the contested decisions was too vague and general to come within the framework defined by Article 95 of the Treaty. It concedes that, as the applicant says, 'the contested decisions do not set up a regulatory framework allowing all undertakings in the objective circumstances described by the rules to benefit from a derogation from the prohibition laid down in Article 4(c) of the Treaty.' However, those individual decisions are based on the same logic as the various codes introduced since 1980 and impose sufficiently clear and precise conditions, so that the complaints put forward by the applicant have no basis.

52 In particular, the Commission contends that, contrary to the applicant's assertions, the contested decisions pursue the attainment of Community objectives, as required by the first and second paragraphs of Article 95 of the Treaty. It points out that it made provision, on the basis of the Braun Report, mentioned above, for two parallel and complementary actions consisting of, first, preparation of a capacity reduction programme covering at least 19 million tonnes and, second, the introduction of supporting measures relating to social aspects, improvement of structures, and stabilization of the market and external relations on the basis of the existing rules, in particular the Aid Code and Articles 46, 53(a) and 56 of the Treaty (Annex 9 to the defence), in order to facilitate implementation of that programme. Being concerned with the progressive elimination of excess capacity as part of an overall plan, the reorganization of the undertakings concerned and, therefore, the preservation of thousands of jobs, the contested decisions pursue the objectives defined in Articles 2 and 3 of the Treaty.

53 The Commission also rejects the applicant's criticisms concerning the procedures for supervision. It contends in particular that the reports from the Member States are not relevant because the validity of a decision cannot be affected by steps taken after its adoption.

54 For its part, the Council states that the contested decisions constitute an essential part of the restructuring plan drawn up by the Commission in consultation with the steel industry in view of the new difficulties which have emerged in the steel sector. The contested decisions relate to aid which, although not provided for by the Treaty, contributes to the attainment of its objectives, in particular recovery of the market through partial closures of production plant as part of a definitive capacity reduction programme. The aid in question should therefore be regarded as Community aid, not prohibited by Article 4(c) of the Treaty, which prohibits State aid for the sole reason that such aid might in principle give rise to distortions of competition contrary to the objectives of the Treaty. In this case, that provision does not therefore raise any obstacle to authorization of the aid at issue under the first paragraph of Article 95 of the Treaty. By adopting the contested decisions, the Commission did not exceed the powers conferred on it by that article.

55 The Federal Republic of Germany states that the contested decisions form part of the present programme for restructuring of the Community steel industry adopted by the Council in its Conclusions of 25 February 1993. They are properly based on the first and second paragraphs of Article 95 of the Treaty since they relate to a situation not provided for by the Treaty or the Aid Code, not only because of the deterioration of the situation on the steel market but also because the German undertakings concerned were subject, before the end of 1990, to a controlled and planned economy. The German Government also draws attention to the parallel between the Aid Code and the contested decisions as regards pursuit of the fundamental objectives of the Treaty. In both cases, it is for the Member State to decide, in accordance with the national rules, whether to grant aid funded by the national budget and to choose the beneficiary undertakings, even where the aid is allocated under the Aid Code. As regards the capacity reduction imposed by the

contested decisions, they are in line with the usual ratio of 750 000 tonnes for each 1 000 million ecus of aid. Moreover, those decisions do not place the beneficiary undertakings in a privileged situation as compared with competing undertakings, since they limit the amount of aid authorized to what is strictly necessary, prevent any alleviation of indebtedness beyond the usual level in the industry and provide for appropriate self-financing by private investors.

56 The Italian Republic, for its part, maintains that the aid in question is not incompatible with the common market in steel since it is clearly necessary for attainment of the Community objectives laid down in Articles 2, 3 and 4 of the Treaty. It explains that intervention funded from State resources is not in itself contrary to the Treaty provided that it pursues the objectives defined by the Treaty. In particular Article 4, which treats State aid in the same way as customs duties and quantitative restrictions, prohibits the grant of State aid only in the framework of a State policy for the protection of national undertakings. The lack of any general prohibition of State aid is confirmed by the fact that Article 5 of the Treaty includes financial support measures for undertakings among the means available to the Community for the accomplishment of its task. According to the Italian Government, the criterion for determining whether aid is lawful relates not to the source from which it is funded, namely the State or the Community, but to its conformity with the objectives of the Treaty. In this case, the serious crises in the European steel industry made action by the Community necessary in order to safeguard both production and employment. In those circumstances, in the absence of specific rules in the Treaty, the Commission was empowered to rely on the first paragraph of Article 95 of the Treaty to authorize the aid in question.

57 Ilva maintains that, in accordance with the case-law of the Court of Justice, the purpose of the first paragraph of Article 95 of the Treaty is to establish a system for special derogations from the Treaty in order to enable the Commission to cope with unforeseen situations which justify case-by-case temporary adjustments to the Treaty either in the form of a single individual measure or in the form of a decision creating a regulatory framework to cover an unspecified number of cases.

In that connection, the adoption of a general regulatory framework is not always necessary, where the situation does not demand it, as the text of the first paragraph of Article 95 makes no reference to it. In any event, in this case, such a framework is provided by the abovementioned Council resolution of 25 February 1993. Accordingly, Ilva contends that the Aid Code cannot be seen as exhaustive. Its sole function is to determine the fundamental conditions under which certain specific categories of aid can be regarded as compatible with the Treaty. It does not in any way bar the adoption of supplementary decisions authorizing aid not falling within those categories or not fulfilling the prescribed conditions where, after a detailed examination of the aid, the Commission considers that it is conducive to attainment of one of the Treaty objectives and that the other conditions for application of the first paragraph of Article 95 are fulfilled.

58 In this case, the aid in question facilitates restructuring of the undertakings concerned and reduction of production capacity. It thereby helps to ensure that the economies of the Member States do not suffer fundamental and persistent disturbances, in accordance with the second paragraph of Article 2 of the Treaty. Moreover, reorganization of the undertakings concerned enables thousands of jobs to be preserved, an aim which corresponds to the second paragraph of Article 2 and Article 3(e) of the Treaty, and the effectiveness of their production facilities to be maximized, an objective set by Article 3(d) and (g), in observance of the principles of sound economic management laid down in Article 3(c).

59 Finally, Ilva does not agree that the aid in question is discriminatory. The circumstances of the beneficiaries of the aid authorized by the contested decisions differed sufficiently from those of their competitors when the aid was authorized, and, according to settled case-law (*Germany* v *Commission*, cited above), there is therefore no discrimination in such a situation. In any event, any such discrimination would not be attributable to the Commission but rather to the Member States, which must take the initiative to ask the Commission to authorize aid (*Falck* v *Commission*, cited above).

Findings of the Court

— The alleged breach of the prohibition of State aid, and misuse of powers

60 The applicant submits essentially that, by authorizing the aid in question in the individual decisions, the Commission used the powers conferred on it by the first and second paragraphs of Article 95 of the Treaty in order to evade the prohibition of State aid laid down by the Treaty and by the Aid Code. Its view is based on the premiss that that code — the validity of which it does not formally contest — defines in a binding and exhaustive manner the categories of State aid which may be authorized.

61 It is appropriate first to consider the legal context of the contested decisions. Article 4(c) of the Treaty prohibits, in principle, State aid within the European Coal and Steel Community to the extent to which it is liable to undermine attainment of the essential objectives of the Community laid down by the Treaty, in particular the establishment of conditions of free competition. According to that provision, '[t]he following are recognized as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty: ... ((c) subsidies or aids by States ... in any form whatsoever'.

62 However, the existence of such a prohibition does not mean that all State aid within the sphere of the ECSC must be regarded as incompatible with the objectives of the Treaty. Article 4(c), interpreted in the light of all the objectives of the Treaty, as defined by Articles 2 to 4 thereof, is not intended to impede the grant of State aid capable of contributing to attainment of the objectives of the Treaty. It reserves to the Community institutions the right to assess the compatibility with the Treaty and, if appropriate, to authorize the grant of such aid, in the area covered by the Treaty. That analysis is confirmed by the judgment in Case 30/59 *De*

Gezamenlijke Steenkolenmijnen in Limburg v *High Authority* [1961] ECR 1, in which the Court of Justice held that, just as certain non-State financial assistance to coal- and steel-producing undertakings can be allocated only by the Commission or with its express authorization, Article 4(c) must similarly be interpreted as conferring on the Community institutions exclusive competence with regard to aid within the Community (grounds of judgment, B. I.1.(b), sixth paragraph, p. 22).

63 In the scheme of the Treaty, Article 4(c) does not therefore prevent the Commission from authorizing, by way of derogation, aid envisaged by the Member States and compatible with the objectives of the Treaty, on the basis of the first and second paragraphs of Article 95, in order to deal with unforeseen situations (see Case 9/61 *Netherlands* v *High Authority* [1962] ECR 213).

64 The abovementioned provisions of Article 95 empower the Commission to adopt a decision or a recommendation, with the unanimous assent of the Council and after the ECSC Consultative Committee has been consulted, in all cases not provided for by the Treaty in which such a decision or recommendation appears necessary in order 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. They provide that any decision or recommendation so made is to determine what penalties, if any, may be imposed. It follows that, to the extent to which, by contrast with the EC Treaty, the ECSC Treaty confers on the Commission or the Council no specific power to authorize 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, therefore, to authorize, under the procedure thereby established, such aid as seems to it to be necessary to attain those objectives.

65 The Commission is thus competent, in the absence of any specific Treaty provision, to adopt any general or individual decision necessary for attainment of the objectives of the Treaty. The first and second paragraphs of Article 95, which confer that power upon it, do not give any specific indication of the scope of the

decisions which the Commission may adopt. In those circumstances, it is for the Commission to assess in each case which of the two kinds of decision, general or individual, is the most appropriate to attainment of the objectives pursued.

66 In the sphere of State aid, the Commission has used the legal instrument constituted by the first and second paragraphs of Article 95 of the Treaty in two different ways. First, it has adopted general decisions — the 'Aid Codes' — allowing a general derogation from the prohibition of State aid regarding certain specified categories of aid. Secondly, it has adopted individual decisions authorizing certain types of specific aid on an exceptional basis.

67 In this case, the problem is, therefore, to determine the respective object and scope of the Aid Code and of the contested individual decisions.

68 It should be borne in mind that the aid code applicable in the period covered by the contested decisions was established by Commission Decision No 3855/91 of 27 November 1991, cited above. This was the Fifth Aid Code which, as provided in Article 9 thereof, entered into force on 1 January 1992 and applied until 31 December 1996. Based on the first and second paragraphs of Article 95 of the Treaty, that code was expressly stated to continue the series of earlier codes (see, in particular, Commission Decisions Nos 3484/85/ECSC of 27 November 1985 and 322/89/ECSC of 1 February 1989 establishing Community rules for aid to the steel industry, OJ 1985 L 340, p. 1 and OJ 1989 L 38, p. 8 respectively), by reference to which it may therefore be interpreted. It may be seen from its preamble (see in particular point I of the grounds of Decision No 3855/91) that it was intended in the first place '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, it also authorized, 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'. Finally, it expressly prohibited operating or investment aid, with the exception of 'regional investment aid in certain Member States'. The possibility of such regional aid was available to undertakings established in Greece, Portugal or the former German Democratic Republic.

69 The five decisions at issue, for their part, were adopted by the Commission on the basis of the first and second paragraphs of Article 95 of the Treaty for the purpose, according to the preambles to those decisions, of facilitating the restructuring of public steel undertakings experiencing serious difficulties in the Member States concerned, in which the steel industry was experiencing its worst crisis as a result of the severe deterioration of the Community steel market. The essential aim of the aid in question was privatization of the beneficiary undertakings. The Commission made clear in the contested decisions that the very difficult economic situation confronting the Community steel industry was accounted for by largely unforeseeable economic factors. It considered therefore that it was facing an exceptional situation not specifically provided for in the Treaty (point IV of the grounds).

70 A comparison of the Fifth Aid Code with the contested decisions thus makes it clear that those various measures have the same legal basis, namely the first and second paragraphs of Article 95 of the Treaty, and derogate from the general prohibition of aid laid down as a principle by Article 4(c) of the Treaty. Their scope is different: the Code refers in general to certain categories of aid which it regards as compatible with the Treaty and the contested decisions authorize, for exceptional reasons and on one occasion only, aid which could not in principle be regarded as compatible with the Treaty.

71 In that light, the applicant's view that the Commission was not empowered to derogate, by individual decisions, from the prohibition of State aid laid down, according to the applicant, not only by Article 4(c) of the Treaty but also by the Aid Code, cannot be upheld. The Code constitutes a binding legal framework only

for the types of aid enumerated by it which are compatible with the Treaty. In relation thereto, it establishes a comprehensive system intended to ensure uniform treatment, in the context of a single procedure, for all aid within the categories which it defines. The Commission is only bound by that system when assessing the compatibility with the Treaty of aid covered by the Code. It cannot therefore authorize such aid by an individual decision conflicting with the general rules established by that code (see Case 113/77 *NTN Toyo Bearing and Others* v *Council* [1979] ECR 1185 (the 'ball bearings case'); Case 118/87 *ISO* v *Council* [1979] ECR 1277; Case 119/77 *Nippon Seiko and Others* v *Council* [1979] ECR 1303; Case 120/77 *Koyo Seiko and Others* v *Council and Commission* [1979] ECR 1337; Case 121/77 *Nachi Fujikoshi and Others* v *Council* [1979] ECR 1363 and Joined Cases 140/82, 146/82, 221/82 and 226/82 *Walzstahl-Vereinigung and Thyssen* v *Commission* [1984] ECR 951, and Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 *Peine-Salzgitter and Hoogovens* v *Commission* [1988] ECR 4309, and *CIRFS and Others* v *Commission*, cited above).

72 Conversely, aid not falling within the categories specially referred to by the provisions of the Code may benefit from an individual derogation from that prohibition if the Commission considers, in the exercise of the discretion which it enjoys under Article 95 of the Treaty, that such aid is necessary for attainment of the objectives of the Treaty. The Aid Code is only intended to authorize generally, and subject to certain conditions, derogations from the prohibition of aid for certain categories of aid which it lists exhaustively. The Commission is not competent under the first and second paragraphs of Article 95 of the Treaty, which are concerned only with cases not provided for by the Treaty (see *Netherlands* v *High Authority*, cited above, paragraph 2), to prohibit certain categories of aid, since such a prohibition is already imposed by the Treaty itself, in Article 4(c). Aid not falling into categories which the Code exempts from that prohibition thus remains subject exclusively to Article 4(c). It follows that, 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 deal with that unforeseen situation, if need be by means of an individual decision (see paragraphs 32 to 36 above).

73 In this case, the decisions at issue — authorizing State aid for the restructuring of large public steel-making groups in certain Member States — do not fall within the

scope of the Aid Code. The latter introduces, under certain conditions, derogations of general scope from the prohibition of State aid solely in cases of aid for research and development, aid for environmental protection, aid for closures and regional aid for steel undertakings established on the territory or part of the territory of certain Member States. However, the operating aid and restructuring aid at issue in this case manifestly fall within none of the abovementioned categories of aid. It follows that the derogations authorized by the contested decisions are not subject to the conditions laid down in the Aid Code and therefore supplement it for the purpose of pursuing the objectives set out in the Treaty (see paragraphs 77 to 83 below).

74 In those circumstances, the contested decisions cannot be regarded as unjustified derogations from the Fifth Aid Code but constitute measures based, like that code, on the first and second paragraphs of Article 95 of the Treaty.

75 It follows that the applicant's view that the contested decisions were adopted in order to favour the undertakings to which the aid in question was granted, by modifying the Aid Code in a disguised manner, has no basis. The Commission could not in any circumstances, by adopting the Aid Code, relinquish the power conferred on it by Article 95 of the Treaty to adopt individual measures in order to deal with unforeseen situations. Since in this case the Code does not cover the economic situation which prompted it to adopt the contested decisions, the Commission was entitled to rely on Article 95 of the Treaty in order to authorize the aid in question, provided that it observed the conditions for the application of that provision.

76 For all the foregoing reasons, the allegations of breach of the prohibition of State aid, and misuse of powers, must be rejected.

— The alleged infringement of the first paragraph of Article 95 of the Treaty

77 It must be borne in mind at the outset that, as held earlier in this judgment, the Commission is empowered, by virtue of the first and second paragraphs of Article 95 of the Treaty, to authorize State aid within the Community whenever the economic situation in the steel industry renders the adoption of measures of that kind necessary with a view to attainment of one of the objectives of the Community.

78 That condition is fulfilled in particular where the sector concerned is experiencing exceptional situations of crisis. In that connection, the Court of Justice emphasized in its judgment in Case 214/83 *Germany* v *Commission* [1985] ECR 3053, 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'. The Commission, for the purpose of such implementation, considers in its discretion whether aid intended to accompany the restructuring measures is compatible with the fundamental principles of the Treaty.

79 In this case, it is not disputed that, at the beginning of the 1990s, the European steel industry was beset with a sudden and serious crisis through the combined effect of several factors such as the international economic recession, loss of traditional export outlets, a steep increase in competition from steel industries in developing countries and the rapid growth of Community imports of steel products from the member countries of the Organization of Petroleum Exporting Countries (OPEC). It is against the background of that crisis that, in this case, it should be considered whether the aid in question was necessary, as required by the first and second paragraphs of Article 95 of the Treaty, with a view to attaining the fundamental objectives of the Treaty.

80 The contested decisions clearly indicate, in point IV of their grounds, that their purpose is to reorganize the steel industry in the Member States concerned, and thereby to contribute to attainment of the objectives laid down in Articles 2 and 3 of the Treaty. To that end, they seek to provide a sound and viable structure for the undertakings receiving the aid which they authorized.

81 In that regard, the applicant questions whether the contested decisions were really intended to restore the viability of the beneficiary undertakings, on the grounds, first, that they did not contain the necessary information to show that the restructuring plans notified by the Member States concerned were capable of restoring such viability and, second, that there was no guarantee that the Commission would not subsequently authorize the grant of further aid to the same undertakings, as had already occurred in the past. Those assertions must be rejected.

82 The antecedents to the contested decisions and the statement of the reasons on which those decisions are based reveal a thorough analysis of the present crisis in the European steel industry and of the most appropriate means for dealing with it. The Commission directed that an investigation be carried out by an independent expert, Mr Braun, whose task was to list plans for the closure of steel undertakings; his report was submitted on 29 January 1993. That report corroborates the information contained in the communication from the Commission to the Council of 23 November 1992 (see paragraph 4 above). Moreover, it is clear from documents before the Court that the Commission, with the assistance of outside experts, considered very carefully the restructuring plans accompanying the aid programmes envisaged by the Member States concerned in terms of their capacity to ensure the viability of the beneficiary undertakings (point III of the grounds of each of the contested decisions). Furthermore, the communications from the Commission to the Council in the course of the procedure which led to the adoption of the contested decisions also contain a detailed examination of the conditions under which the beneficiary undertakings would be viable.

83 Moreover, the contested decisions clearly indicate the principal aspects of the restructuring plans intended to be implemented through the grant of the aid in question. They show that the aid is intended to facilitate privatization of the State-owned undertakings receiving it, or of some of their plants, the closure of unprofitable facilities, the reduction of certain excess capacity and the shedding of jobs — accompanied, where appropriate, by social measures designed to ensure a balance between considerations of a social nature and requirements linked with the future profitability of the undertakings concerned. Those various aspects are dealt with in a precise and detailed manner (see point II of the grounds of the contested

decision). All those aspects, taken together, show that the contested decisions seek to provide the undertakings concerned with a sound and profitable structure.

84 In those circumstances, the suggestion — referring only to the ineffectiveness of certain earlier aid, without any examination of the specific restructuring measures provided for in the contested decisions with a view to ensuring the viability of the beneficiary undertakings — that the aid in question will probably not be capable of producing the intended results constitutes nothing more than purely speculative and hypothetical conjecture. As to the applicant's arguments concerning matters post-dating the adoption of the contested decisions, mentioned in particular in the Communication of 21 June 1994, they are in any event — even if well founded, which has not been established — irrelevant to any assessment of the propriety of those decisions, which cannot be affected by circumstances arising after their adoption.

85 It having been established that the contested decisions are in fact intended to ensure the viability of the beneficiary undertakings, it should be verified whether, in the context of the crisis experienced by the steel industry (see paragraphs 77 to 79 above), that aim falls within the scope of the objectives laid down in Articles 2 and 3 of the Treaty, specifically referred to in the grounds of those decisions.

86 Against that background, it must be borne in mind first of all that, in view of the diversity of the objectives determined by the Treaty, the Commission's role consists, according to settled case-law, in ensuring that those various objectives are reconciled at all times, exercising the discretion available to it in order to meet the requirements of the common interest (see Case 9/56 *Meroni* v *High Authority* [1958] ECR 133, at p. 173, Case 8/57 *Groupement des Hauts Fourneaux et Aciéries Belges* v *High Authority* [1958] ECR 245, at p. 253, 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 Joined Cases 154/78, 205/78,

206/78, 226/78, 227/78, 228/78, 263/78, 264/78, 31/79, 39/79, 83/79 and 85/79 *Valsabbia and Others* v *Commission* [1980] ECR 907, paragraph 55, the Court of Justice held '[i]f the need for a compromise between the various objectives is imperative in a normal market situation, it must be accepted *a fortiori* in the state of crisis justifying the adoption of exceptional measures which derogate from the normal rules governing the working of the common market in steel and which clearly entail non-compliance with certain objectives laid down by Article 3, if only that objective (contained in paragraph (c)) which requires that the establishment of the lowest prices be ensured'.

87 In this case, the Court finds that the contested decisions reconcile various objectives of the Treaty, with a view to safeguarding important interests. The rationalization of the European steel industry through the restructuring of certain groups, the closure of obsolete or uncompetitive plant, the reduction of excess capacity, privatization of certain undertakings in order to ensure their viability and the shedding of jobs — to use the Commission's words — within 'reasonable' limits, mentioned in those decisions contribute to attainment of the objectives of the Treaty, having regard to the sensitive nature of the steel industry and the fact that continuation, or indeed aggravation, of the crisis was liable to give rise to extremely serious and enduring disturbances of the economies of the Member States concerned. It is not disputed that the industry is of essential importance in a number of Member States by reason of the location of steel plants in regions where there is low employment and the importance of the economic interests at stake. In those circumstances, any decisions to close plant and shed jobs, and the transfer of control of the undertakings concerned to private companies acting exclusively in accordance with the logic of the market, would have been likely to create, without support measures by the public authorities, difficulties of the gravest public importance, particularly by exacerbating the problem of unemployment and creating the risk of a major economic and social crisis.

88 In those circumstances the contested decisions, by seeking to resolve those difficulties by reorganizing the steel groups in question, are incontestably designed to safeguard 'continuity of employment' and to avoid provoking 'fundamental and persistent disturbances in the economies of the Member States', as required by the

second paragraph of Article 2 of the Treaty. Moreover, they pursue the objectives embodied 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 modernization of production, and the improvement of quality, with no protection against competing industries' (paragraph (g)). They are designed to rationalize the European steel industry, in particular through definitive closure of obsolete or uncompetitive plant and the irreversible reduction of production capacity for certain products with a view to dealing with excess capacity (see Article 2 of the contested decisions). They form part of a comprehensive programme for restructuring the steel industry on an enduring basis and reduction of production capacity in the Community (see paragraphs 4 to 6 above). Accordingly, it must be emphasized that the aim of the aid in question is not simply to ensure the survival of the beneficiary undertaking — which would run counter to the common interest — but to restore its viability whilst keeping the impact of the aid on competition to a minimum and ensuring compliance with the rules of fair competition.

89 It follows that the contested decisions are intended to safeguard the common interests, in accordance with the objectives of the Treaty. The applicant's view that those decisions are incompatible with most of the objectives defined in Articles 2 and 3 of the Treaty must therefore be rejected.

90 As regards the applicant's argument that the aid in question is unnecessary for the attainment of the objectives pursued, it too must be rejected. It is apparent from the file that the five contested decisions form part of an overall restructuring programme for the steel industry and for reduction of production capacity in the Community (see paragraphs 4 to 6 above). The Commission cannot be criticized for failing, within the framework of that programme, to use other means involving allegedly less distortion of competition than the aid at issue, with a view to re-establishing the viability of the undertakings concerned. Even if alternative solutions were evisageable and practicable, which has not been established, the existence of such options is not in itself sufficient to show that the aid in question

was not necessary within the meaning of the first paragraph of Article 95 of the Treaty and to vitiate the contested decisions, since the course followed by the Commission is not affected by any manifest error of assessment or any misuse of powers. It is not for the Court of First Instance to review the appropriateness of the choice made by the Commission, since to do so might involve substituting its own assessment of the facts for that made by the Commission.

91 It follows from the foregoing that the applicant has not put forward any convincing argument such as to render it questionable whether the contested decisions were adopted in accordance with the conditions laid down by the first and second paragraphs of Article 95 of the Treaty.

— The alleged breach of the principle of non-discrimination

92 According to the applicant, the discriminatory nature of the contested decisions derives in particular from the fact that, first, they do not impose sufficient capacity reductions in return for the aid in question and, secondly, they enable the beneficiary undertakings to reduce their indebtedness.

93 As regards, first, the capacity reductions, it must be borne in mind that, as held by the Court of Justice, no 'exact quantitative ratio' has to be established between the 'amount of the aid and the size of the required cuts in production capacity' (see, to that effect, *Germany* v *Commission*, cited above, paragraph 33). On the contrary, the factors which are liable to influence the exact amount of the aid to be authorized 'do not consist simply in a number of tonnes of production capacity having to be cut; there are other factors, too, which vary from one region of the Community to another,' such as the restructuring effort made, the regional and social problems occasioned by the crisis in the steel industry, technical change and the adaptation of undertakings to suit market requirements (ibid., paragraph 34). It follows that the Commission's assessment cannot be subjected to a review based

solely on economic criteria. The Commission may legitimately take account of a wide variety of political, economic and social considerations in exercising its discretion under Article 95 of the Treaty.

94 In this case, it must be held that, in the five contested decisions, the Commission expressly emphasizes that the aid in question must be limited to what is strictly necessary so as not to change conditions of competition to an extent contrary to the common interest. From this it infers that it is important to lay down adequate counterpart measures, commensurate with the amount of aid being exceptionally approved, so that a major contribution is made to the structural adjustment required in the sector.

95 Accordingly, in point V of the grounds of the contested decisions it determines the extent, the arrangements and the timetable for the plant closures and capacity reductions imposed on the beneficiary undertakings, referring where necessary to the restructuring plan notified by the Member State concerned. It should be noted in that connection that the applicant has put forward no argument to show that the closures or capacity reductions in question are inadequate having regard to the level of aid authorized and the objectives pursued.

96 In particular, the applicant's comparison between the capacity reduction of 750 000 tonnes per year per ECU 1 000 million of aid paid, in the contested decisions, on the one hand, and that of 516 000 tonnes for ECU 400 000 of aid, adopted in the discussions between the Commission and the Italian State-owned steel undertaking Bresciani, on the other, is irrelevant, because it takes no account of the special circumstances of the undertakings in receipt of the aid in this case and the specific features of the contested decisions, which were adopted to cope with an exceptional crisis, on the basis of the first paragraph of Article 95 of the Treaty, as

already held (see paragraphs 87 and 89 above). Similarly, the complaint that most of the closures were scheduled, in the decisions, for the end of the period of payment of the aid is unfounded. In determining the time-limit for closure, the Commission could legitimately take account of the purpose of the aid, which was to restore the viability of the undertakings in question. Moreover, and in any event, the requisite closures were carried out, for example, by Sidenor in their entirety and as to two-thirds by Ilva, at a time when the aid paid was still of a very limited level, according to the details given by the Commission which were not challenged by the applicant.

97 As regards the arguments concerning the increase of capacity of CSI allegedly resulting from the new investments, the Court finds that that argument, linked with the proposed creation of hot-rolling capacity at Sestão referred to by the applicant in connection with CSI's increase of capacity, is unconnected with the restructuring plan supported by the aid authorized in the contested decision relating to that undertaking (first paragraph of point V of the grounds of that decision). As regards the increase of capacity of Siderurgia Nacional, it is clear from Article 2 of the decision relating to it that, as explained by the Commission, the replacement of the Seixal blast furnace by an electric arc furnace with a capacity of 900 000 tonnes has no effect on that undertaking's obligation to reduce its production capacity by 140 000 tonnes of hot-rolled products.

98 Finally, the argument that Ilva's capacity reductions are, as far as 300 000 tonnes per year are concerned, purely theoretical must also be rejected. It is clear from the information provided by the Commission that, as regards closure of the Bagnoli plant — whose maximum production capacity was 1.25 million tonnes per year — it decided on a capacity reduction of 300 000 tonnes per year on the ground that production there had ceased. In the absence of any indication to the contrary, that capacity reduction cannot be regarded as ineffective since capacity reductions must

be determined not on the basis of the actual production of the undertaking, which is a reflection of the prevailing economic situation, but on the basis of the actual production capacity which can be rapidly mobilized at moderate cost.

99 In those circumstances, there is no reason to infer that the capacity reductions imposed in the contested decisions do not represent an appropriate counterpart for the grant of the aid in question having regard, first, to the amount of the aid and, second, to both the economic and social objectives pursued by those decisions and the need to reduce production capacity as part of the overall programme for restructuring of the steel industry approved by the Council, mentioned above.

100 As regards, secondly, the impact of the aid in question on competition, it must be borne in mind that, whilst any aid is liable to favour one undertaking rather than another, the Commission nevertheless may not authorize aid involving 'distortion of competition to an extent contrary to the common interest' (*Falck* v *Commission*, cited above, paragraph 27). Specifically, the Commission's obligation to act in the common interest does not mean, according to the case-law of the Court of Justice, that that institution must 'act in the interest of all those involved without exception, for its function does not entail an obligation to act only on condition that no interest is affected. On the other hand, when taking action it must weigh up the various interests, avoiding harmful consequences where the decision to be taken reasonably so permits. The Commission may, in the general interest, exercise its decision-making power according to the requirements of the situation, even to the detriment of certain individual interests' (*Valsabbia and Others* v *Commission*, cited above, paragraph 49).

101 In the present case, the Court finds that the contested decisions approve the grant of aid intended in particular to rectify the excessive indebtedness of the undertakings concerned, so as to enable their viability to be restored (see point II of the grounds of the contested decisions). They limit the financial restructuring

measures to the amounts strictly necessary, so as not to 'affect the conditions of trade in the Community steel industry to an extent which is incompatible with the common interest' (point VI of the grounds of the contested decision). In particular, in order not to provide the beneficiary undertakings with an undue advantage over other undertakings in the industry, the Commission took care in the contested decisions in particular to ensure that the undertakings concerned did not at the outset have their net financial charges reduced below 3.5% of annual turnover (3.2% in the case of AST, Acciai Speciali Terni) which, as the parties agree, represents the average indebtedness for Community steel undertakings. More generally, Article 2 of the contested decisions imposes certain conditions intended to ensure that the financing aid is limited to what is strictly necessary.

102 In those circumstances, the fact of reducing the beneficiary undertakings' indebtedness to a level corresponding to the average indebtedness of Community steel undertakings cannot be regarded as contrary to the common interest. In its assessment of the various interests at stake, the Commission took account of the requirements associated with the financial reorganization of the undertakings concerned, which was necessary in order to restore them to viability, whilst at the same time avoiding adverse consequences for other economic operators to the extent to which the very subject-matter and purpose of the contested decisions so allowed.

103 It follows that the complaint concerning breach of the principle of non-discrimination is unfounded.

104 It follows that the first plea in law must be rejected.

The second plea in law: the allegedly retroactive effect of the contested decision

Arguments of the parties

105 The applicant maintains that the contested decisions, adopted on 12 April 1994 and published on 3 May 1994, are retroactive in that authorization for the aid in question was deemed to have been given following the assent given by the Council on 17 December 1993 and the Member States concerned implemented their aid programmes as from that date. That fact, it submits, is evidenced in particular by the fact that those decisions provide for submission, by 15 March 1994, by each of the Member States of the first report concerning the beneficiary undertaking and its reorganization. That retroactivity, for which the Commission has provided no satisfactory explanation, adversely affects the rights of defence since the applicant's opportunity to bring an action was held back four months. Moreover, since applications for annulment do not, under Article 39 of the Treaty, have suspensory effect, the Member States concerned could, according to the applicant, invoke the principle of the protection of legitimate expectations to oppose any application for reimbursement.

106 The Commission contends that the delay between 17 December 1993 and 12 April 1994 was attributable solely to administrative reasons, which explains why the first report from the Member States concerned was fixed for 15 March 1994, as indicated in the draft decisions placed before the Council in December 1993. Moreover, the Commission considers that the fact that the decisions were not adopted until 12 April 1994 had no repercussions for the applicant, since it was open to it to contest their legality before the national courts by virtue of the direct effect of Article 4(c) of the Treaty (Joined Cases 7/54 and 9/54 *Groupement des Industries Sidérurgiques Luxembourgeoises* v *High Authority* [1956] ECR 175). The Commission also contends that, if the contested decisions are annulled by the Court of First Instance, it would be required to demand the repayment of the aid in question in order to ensure the effectiveness of the Court's judgment in accordance

with Article 34 of the Treaty (see Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125). In any event, the plea alleging that the retroactivity of the contested decisions is unlawful is irrelevant to this case, which is concerned only with the legality of the decisions and not with the possibility of the Commission being liable.

Findings of the Court

107 It is not disputed that there was a considerable delay in adopting the contested decisions after the Council had given its assent: it did so on 22 December 1993, whereas the decisions were adopted on 12 April 1994. Referring only to 'administrative reasons', the Commission has provided no detailed explanation in that regard.

108 It is therefore necessary to determine whether that delay adversely affected the applicant's rights.

109 EISA submits that the delay compelled it to bring its action for annulment against the contested decisions only after the aid had almost certainly already been granted by the Member States following the Council's assent. However, even if the aid had been paid immediately after the Council gave its assent, which may or may not be the case, the applicant was not thereby deprived of appropriate protection of its rights. As the Commission rightly observes, the Court of Justice has long

recognized the direct effect of the prohibition of State aid laid down in Article 4(c) of the Treaty (see *Groupement des Industries Sidérurgiques Luxembourgeoises* v *High Authority*, cited above, p. 196), and the applicant could have relied on that fact before the national courts in order to secure a finding that the grant of State aid before authorization thereof by the Commission was illegal. Moreover, by virtue of the case-law of the Community judicature, individuals are entitled to obtain redress where their rights have been impaired by a breach of Community law on the part of a Member State, even where provisions have direct effect (see Joined Cases C-46/93 and C-48/93 *Factortame* [1996] ECR I-1029, paragraphs 20 to 36, and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* v *Germany* [1996] ECR I-4845, paragraphs 20 to 29). The applicant thus enjoyed appropriate legal protection.

110 Moreover, there is no basis for the applicant's argument that the alleged payment of the aid in question before the adoption of the contested decisions caused the beneficiary undertakings to entertain a legitimate expectation that such aid was compatible with the Treaty, an expectation on which they might rely if, in the event of annulment of the contested decisions by the Court of First Instance, the Commission called on the Member States to recover the aid. That argument is irrelevant in this case because it has no bearing on the legality of the contested decisions.

111 It follows that the contested decisions are not unlawful as a result of the Commission's delay in adopting them.

112 It follows from the foregoing that the application has become devoid of purpose as regards Decision 94/256 and, for the rest, must be dismissed.

Costs

113 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. With the sole exception of its claim for annulment of Decision 94/256, which has become devoid of purpose, EISA has been unsuccessful in its claims for annulment of the contested decisions. Since the Commission and, intervening in its support, Ilva have applied for costs, EISA should in principle be ordered to pay their costs.

114 The Court has held, on the basis of Article 87(6) of the Rules of Procedure, that no decision need be given on the claim for annulment of Decision 94/256. On the basis of that provision, the Court may award costs at its discretion, having regard in particular to the fact that the contested decision was withdrawn by the defendant after the proceedings for annulment were commenced and the fact that the applicant did not accept that it was inappropriate to persist in its application on that point and, not having discontinued the proceedings, did not apply for the costs to be borne in part by the Commission because of the latter's conduct (see the first paragraph of Article 87(5) of the Rules of Procedure).

115 It follows that, if it is assumed that the six decisions contested by the applicant were regarded by it as being of the same importance, the applicant should be ordered to pay five-sixths of the costs of the Commission, as defendant, and all Ilva's costs.

116 Under Article 87(4) of the Rules of Procedure, the Member States and institutions which intervened in the proceedings are to bear their own costs. It follows that the Council, the Federal Republic of Germany and the Italian Republic, as interveners, must bear their own costs.

On those grounds,

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

hereby:

1. **Declares that there is no need to adjudicate on the application for annulment of Commission Decision 94/256/ECSC of 12 April 1994 concerning aid to be granted by Germany to the steel company EKO Stahl AG, Eisenhüttenstadt;**

2. **Dismisses the application in all other respects;**

3. **Orders the applicant to pay five-sixths of the defendant's costs and all the costs of the intervener, Ilva Laminati Piani SpA;**

4. **Orders the Council, the Federal Republic of Germany and the Italian Republic to bear their own costs.**

Saggio Kalogeropoulos Tiili

Potocki Moura Ramos

Delivered in open court in Luxembourg on 24 October 1997.

H. Jung A. Saggio

Registrar President