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

In Case T-244/94,

Wirtschaftsvereinigung Stahl, an association constituted under German law, established in Düsseldorf (Germany),

Thyssen Stahl AG, a company incorporated under German law, established in Duisburg (Germany),

Preussag Stahl AG, a company incorporated under German law, established in Salzgitter (Germany),

Hoogovens Groep BV, a company incorporated under German law, established in Ijmuiden (Netherlands),

represented by Jochim Sedemund and Frank Montag, Rechtsanwälte, Cologne, and, as regards Hoogovens Groep BV, by Eric Pijnacker Hordijk, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicants,

* Language of the case: German.

Commission of the European Communities, represented by Bernd Langeheine 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, Director in its Legal Service, and Stephan Marquardt, Administrator in its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, General Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

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 Decision 94/259/ECSC of 12 April 1994 concerning aid to be granted by Italy to the public steel sector (Ilva group) (OJ 1994 L 112, p. 64),

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: '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 system of aid authorizing the grant of State aid to the steel industry in a limited number of cases. That system has been subject to successive amendments in order to resolve the specific economic difficulties of the steel industry. Thus, the Steel Aid Code in force during the period under consideration in this case 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 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 continuing 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 for 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 Commission's programme 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 aids', 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 the assents for the 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 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), 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 Seatão 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 conclusions reached by the Council on 25 February 1993.

Procedure

10 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 24 June 1994, the association Wirtschaftsvereinigung Stahl and the companies Thyssen Stahl AG, Preussag Stahl AG and Hoogovens Groep BV applied under Article 33 of the Treaty for the annulment of Decision 92/259/ECSC, cited above, concerning the Ilva group.

11 In parallel, two other actions were brought, one by the European Independent Steelworks Association (EISA) against the six decisions adopted by the Commis-

sion on 12 April 1994 (Case T-239/94) and the other by British Steel against Decisions 94/258/ECSC and 94/259/ECSC authorizing the granting of State aid to the undertaking CSI and to the Ilva steel group respectively (Case T-243/94).

12 In these proceedings, the Council, the Italian Republic and Ilva Laminati Piani SpA (hereinafter 'Ilva') lodged applications at the Court Registry on 24 October, 8 November and 29 November 1994 respectively for leave to intervene in support of the defendant. By orders of 9 March 1995 the President of the Second Chamber, Extended Composition, of the Court of First Instance granted those applications.

13 Upon hearing the report of the Judge-Rapporteur it was decided to open the oral procedure without any preparatory inquiries. The parties presented oral argument and answered the questions put to them orally at the hearing on 25 February 1997.

Forms of order sought

14 The applicants claim that the Court should:

— annul Commission Decision 94/259/ECSC of 12 April 1994;

— in the alternative, annul the contested decision to the extent to which it does not impose an obligation to reduce Ilva's production capacity by more than 2 million tonnes per year;

— order the Commission to pay the costs.

15 The defendant, supported by the Council and the Italian Republic, contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

16 The intervener Ilva contends that the Court should:

— dismiss the application as unfounded;

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

Substance

17 The applicants put forward in support of their application for annulment seven pleas in law alleging, first, breach of the Aid Code; second, infringement of the conditions for the application of Article 95 of the Treaty; third, breach of the principle of proportionality; fourth, breach of the principle of non-discrimination; fifth, breach of the obligation to state reasons; sixth, irregularity of the decision-making procedure, and, seventh, breach of the rights of the defence.

The first plea in law: breach of the Aid Code

18 The applicants maintain that authorization for aid not provided for in the Fifth Aid Code is illegal. This plea comprises two parts. By authorizing the grant of aid not meeting the conditions laid down by the Aid Code, the Commission, first, misused its powers and, second, infringed the principle of the protection of legitimate expectations.

The alleged misuse of powers

— Arguments of the parties

19 The parties consider that, in so far as State aid is prohibited by Article 4(c) of the Treaty, the Aid Code, adopted on the basis of the first and second paragraphs of Article 95 of that Treaty, determines bindingly and definitively the conditions under which such aid may nevertheless be authorized to attain the objectives set out in Articles 2, 3 and 4 of the Treaty. They state that certain doubts may be expressed as to the competence of the Commission to adopt the Aid Code, which derogates from Article 4(c) of the Treaty, on the basis of the first and second paragraphs of Article 95 of that Treaty but they make it clear that they do not wish to raise that issue. They merely maintain that the aid does not meet the conditions laid down by the Aid Code which, in any event, are incompatible with the common market and are caught by the prohibition laid down in Article 4(c) of the Treaty.

20 That analysis, they say, is confirmed by the preamble to the Aid Code and by Article 1 thereof, which expressly provides that '[a]id to the steel industry ... financed by Member States ... may be deemed Community aid and therefore compatible with the orderly functioning of the common market only if it satisfies the provisions of Articles 2 to 5'.

21 The Commission is bound by its interpretation, in the Aid Code, of the combined provisions of the first and second paragraphs of Article 95 and Article 4(c) of the Treaty. The exercise of the discretion conferred on it by the abovementioned provisions of Article 95 took the form of adoption of that Code, so that the Commission cannot derogate from it without contradicting itself and misusing its powers.

22 In particular, an individual decision cannot, without contravening the principle of non-discrimination embodied in Article 4(b) of the Treaty, derogate from the Aid Code, which is of general application, even if those measures formally occupy the same rank in the hierarchy of norms. In that connection, the Court has laid down the principle that an individual decision must meet the conditions of the general decision, both in the sphere of anti-dumping measures (see in particular the judgments of the Court in Case 113/77 *NTN Toyo Bearing and Others* v *Council* [1979] ECR 1185 and Case 118/77 *ISO* v *Council* [1979] ECR 1277) and in the sphere of State aid (see, in connection with Articles 92 and 93 of the EC Treaty, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125). In connection with the Treaty, it has held that the Commission was guilty of misuse of powers when using those conferred on it by the Treaty in order to evade a procedure specifically prescribed by the applicable basic decisions and without amending those decisions in accordance with the procedure established by the Treaty for dealing with the circumstances with which it is required to cope (see 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 *Stahlwerke Peine-Salzgitter and Hoogovens* v *Commission* [1988] ECR 4309).

23 It follows that the only derogation from the Aid Code which it was open to the Commission to make was to amend it so that the same rules would apply to all undertakings.

24 Furthermore, the adoption of an individual decision not fulfilling the conditions laid down by the Aid Code is contrary to the principle that derogating measures must be interpreted restrictively. Derogations from the prohibition of State aid laid

down by Article 4(c) of the Treaty, granted on the basis of the first and second paragraphs of Article 95 thereof, should be limited to what is strictly necessary. They may be authorized only temporarily and on the condition that they are subject to specific obligations. Only the Aid Code satisfies those requirements. The first and second paragraphs of Article 95 of the Treaty cannot therefore be relied upon to adopt an individual decision which nullifies the abovementioned prohibition of aid.

25 The Commission considers that the applicants' view that the Aid Code is binding and exhaustive disregards the fact that the prohibition of State aid derives from Article 4(c) of the Treaty and not from the Aid Code. The latter recognizes that certain State aid is in the nature of Community aid and also does no more than repeat the prohibition laid down by Article 4(c) of the Treaty. Article 95 of the Treaty may therefore be relied upon for *ad hoc* decisions authorizing certain aid in special circumstances.

26 In that light, the Commission concedes that the wording of the Aid Code might give the impression that the Council and the Commission itself did not intend applying Article 95 of the Treaty in the future. However, because of the new situation of a serious crisis in the industry, it had become essential to make rational use of that provision. It is clear from settled case-law of the Court of Justice that the emergence of a crisis situation may be regarded as an unforeseen difficulty within the meaning of that article (see Case 214/83 *Germany* v *Commission* [1985] ECR 3053).

27 The Council states that, under the scheme of the ECSC Treaty, the first and second paragraphs of Article 95 confer on the Commission a considerable degree of latitude in order to cope with sudden situations of crisis. In this case, the aid in question was authorized to facilitate partial closure of production facilities as part of an overall programme designed to reduce capacity definitively, within the scope of the objectives of the Treaty. It was thus a case not provided for by the Treaty, within the meaning of the first paragraph of Article 95 thereof.

28 Contrary to the applicants' claims, the Aid Code and the contested decision do not constitute, respectively, a basic decision and an individual decision. On the contrary, they are legal measures of the same rank, with the same legal basis, a fact which, moreover, the applicants themselves admit. Furthermore, the aid authorized by the contested decision does not fall within the scope of the Aid Code.

29 The Italian Republic states that the first paragraph of Article 95 of the Treaty provides a means of action which it is appropriate to use to attain one of the objectives of the Community in cases not provided for by the Treaty, as in this instance. Article 4(c) merely prohibits State aid which is incompatible with the objectives pursued by the Community. Neither the Aid Code nor the contested decision is caught by that prohibition, since they seek to attain those objectives. The Italian Government also rejects the applicants' view that the Aid Code represents a binding interpretation of the first paragraph of Article 95 of the Treaty. The Code and the contested decision are based on the same Treaty provision and therefore have the same legal value. The power conferred on the Commission by the first paragraph of Article 95 is permanent and inexhaustible: that article seeks to ensure that the Commission is at all times and in all circumstances in a position to deal with situations not provided for by the Treaty by adopting, in agreement with the Council, a measure required in pursuance of one of the objectives of the Community.

30 According to Ilva, the first paragraph of Article 95 of the Treaty is intended to provide the Commission with the means to overcome exceptional situations which could not have been foreseen by the authors of the Treaty. That aim would not be respected if the adoption of a decision of general scope under that article were to have the effect of preventing the Commission from using at a later stage the powers conferred on it by that article. Whether a measure taken by the Commission on the basis of Article 95 of the Treaty is general or individual depends on the circumstances with which it must deal. In this case, the Commission regulated certain categories of aid in the Aid Code, whilst at the same time reserving to itself the power to give decisions case by case on types of aid not provided for by the Code. If the Aid Code included a provision excluding the adoption of subsequent individual decisions authorizing aid, that provision would, in Ilva's view, be contrary to the Treaty.

— Findings of the Court

31 The applicants suggest, essentially, that by authorizing the aid in question in the contested individual decision 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 conditions laid down by the Aid Code, which is of general application. Their view is based on the premiss that the Code — whose validity they do not formally challenge — defines bindingly and exhaustively the categories of State aid which may be authorized.

32 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'.

33 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, legal grounds, part B. I.1. b, at p. 22, in which the Court held that, just as certain non-State financial assistance to coal- and steel-producing undertakings authorized by Articles 55(2) and 58(2) of the Treaty 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.

34 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, at 233).

35 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.

36 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 a 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.

37 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.

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

39 It should be borne in mind that the aid code applicable when the contested decision was adopted was established by Commission Decision No 3855/91/ECSC of 27 November 1991, cited above. This was the Fifth Aid Code which, as provided by 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 Decision No 3484/85/ECSC of 27 November 1985 establishing Community rules for aid to the steel industry and Commission Decision No 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.

40 The contested decision, for its part, was adopted by the Commission on the basis of the first and second paragraphs of Article 95 of the Treaty for the purpose, according to its preamble, of facilitating the restructuring of the public steel undertaking Ilva, which was experiencing serious difficulties in one of the Member States, Italy, in which the steel industry was endangered by the severe deterioration of the Community steel market. The essential aim of the aid in question in this case was privatization of the Ilva steel group which had until then benefited from loans granted as a result of the unlimited liability of the single shareholder provided for in Article 2362 of the Italian Civil Code (points II and IV of the grounds). The Commission made clear 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 by the Treaty (point IV of the grounds).

41 A comparison of the Fifth Aid Code with the contested decision 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 decision authorizes, for exceptional reasons and on one occasion only, aid which could not in principle be regarded as compatible with the Treaty.

42 In that light, the applicant's view that the Code is binding, exhaustive and definitive 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 *Walzstahl-Vereinigung and Thyssen* v *Commission*, *CIRFS and Others* v *Commission*, and *Stahlwerke, Peine-Salzgitter and Hoogovens* v *Commission*, cited above).

43 Conversely, aid not falling within the categories exempted from the prohibition 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), 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).

44 In this case, the decision at issue — authorizing State aid for the restructuring of large public steel making groups in certain Member States — does 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 decision 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).

45 In those circumstances the contested decision cannot be regarded as an unjustified derogation from the Fifth Aid Code but constitutes a measure based, like that code, on the first and second paragraphs of Article 95 of the Treaty.

46 It follows that the applicants' view that the contested decision was adopted to favour the undertaking to which the aid in question was granted, by modifying the Aid Code covertly, has no basis whatsoever. 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 scope of the Code did not cover the economic situation which prompted the Commission to adopt the contested decision, 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.

47 Since the applicants have put forward nothing to show that the Commission, by adopting the decision at issue, sought to evade the Aid Code, the complaint alleging misuse of powers must be rejected.

The alleged frustration of legitimate expectations

— Arguments of the parties

48 According to the applicants, the contested decision, by authorizing on the basis of Article 95 of the Treaty the payment to Ilva of aid allegedly incompatible with the Aid Code, is in breach of the principle of the protection of legitimate expectations.

49 First, that decision frustrates the expectation which publication of the various aid codes and the declarations by the Council and the Commission regarding strict observation thereof legitimately caused the undertakings concerned to entertain. The binding rules in the Code apply to all State aid in the steel industry. They thus provide undertakings with a legal framework within which they may reasonably expect to be treated in the same way and, possibly, where unforeseen events occur, the conditions for granting authorization for aid to be altered by means of a general decision taking account of the circumstances of all the operators concerned, without any special treatment for the benefit of one or more undertakings.

50 Secondly, the Commission caused Ilva's competitors to entertain a legitimate expectation when it declared, on authorizing the grant of aid to that undertaking in the past, that further aid could not be envisaged in the future, at least to the extent to which it would be incompatible with the Aid Code which applied to all undertakings. The applicants refer in that connection to Decision 89/218/ECSC of 23 December 1988 concerning aid that the Italian Government proposed to grant to the public steel sector (OJ 1989 L 89, p. 76), as amended by Decisions 90/89/ECSC of 13 December 1989 (OJ 1990 L 61, p. 19) and 92/17/ECSC of 27 November 1991 (OJ 1992 L 9, p. 16) concerning the aid that the Italian Government proposed to grant to the public steel sector, mentioned in the contested decision. Furthermore, by initiating the procedure under Article 6(4) of the Aid Code with regard to the aid granted to Ilva in 1992 (OJ 1992 C 257, p. 4) and in 1993 (OJ 1993 C 213, p. 6) and by taking provisional measures against the Italian

Government under Article 88 of the ECSC Treaty (Twenty-third Report on Competition Policy, 1993, point 491), the Commission confirmed that it sought to ensure strict observation of the Aid Code.

51 The Commission rejects that argument. The first and second paragraphs of Article 95 of the Treaty provide for action by the Community institutions in the event of unforeseen difficulties. Since such difficulties cannot be foreseen, there can be no legitimate expectations regarding such decisions. In this case, the Fifth Aid Code reflects the position of the Commission and the Council at the time of its adoption, but does not exclude the possibility that economic circumstances might render a different approach necessary (Joined Cases 63/84 and 147/84 *Finsider* v *Commission* [1985] ECR 2857).

52 Furthermore, quite apart from the question whether any acts or measures of Community institutions may have been such as to give rise to a legitimate expectation, the Commission considers that, in view of the circumstances of this case, any such expectation is excluded in the applicants' case. Decision 89/218/ECSC, cited above, was adopted in similar circumstances, on the basis of the first and second paragraphs of Article 95 of the Treaty, without the Third Aid Code then in force being amended. Similarly, Commission Decision 92/411/ECSC of 31 July 1992, adopted when the Fifth Aid Code, applicable in this case, was in force, authorized under that article of the Treaty the grant of aid not covered by the Code to undertakings established in Denmark and the Netherlands (OJ 1992 L 223, p. 28). The applicants were therefore in a position to know that an Aid Code could be supplemented by *ad hoc* decisions.

53 According to the Council, there is a breach of the principle of the protection of legitimate expectations in the sphere of Community economic law 'if, in the absence of an overriding matter of public interest, a Community institution abolishes with immediate effect and without warning a specific advantage, worthy of protection, for the undertakings concerned without adopting appropriate transitional measures' (Case T-472/93 *Campo Ebro and Others* v *Council* [1995] ECR II-421, paragraph 52). That principle does not mean that in general new rules

cannot be applied to the future effects of situations which arose under the earlier rules, particularly where an adjustment is necessary as a result of changes in the economic situation. In this case, the contested decision did not have the effect of depriving the applicants of an advantage worthy of protection. Under the scheme of the Treaty, the Commission was entitled, under the conditions laid down in the first paragraph of Article 95 of the Treaty, to adopt decisions to deal with cases not provided for. The Aid Code created a legal framework facilitating a flexible reaction to economic fluctuations affecting the Community steel industry. Similarly, the contested decision was adopted in order to take account of a 'change in the economic situation'. Thus, by virtue of their nature and their objectives, measures adopted on the basis of the first paragraph of Article 95 of the Treaty cannot create a binding and immutable legal framework for all economic operators. The nature of the Aid Code was not therefore such that the applicants might entertain a legitimate expectation that the Commission would not authorize other derogations from the prohibition of aid laid down in Article 4(c).

54 The Italian Republic, for its part, contends that in any event the applicants have not shown that the alleged capacity of the Aid Code to give rise in theory to a legitimate expectation is reflected in the facts. They merely state that the members of the applicant association took investment and reorganization decisions and closed facilities at certain locations, without proving that those decisions were decisively influenced by the idea that the Community would not authorize aid for restructuring operations and, in particular, that those decisions would have been different if they had been aware of such a possibility. Moreover, the applicants had no grounds for any legitimate expectation that the adoption of the Aid Code would exclude any other intervention in unforeseen but foreseeable circumstances. No such interpretation has ever been confirmed in Community law. On the contrary, past experience shows that the application of the Aid Code is no obstacle to the grant of individual authorizations, which have in fact been granted pursuant to the first paragraph of Article 95 of the Treaty.

55 Ilva, for its part, contends that the applicants cannot credibly claim that they had no idea of the Commission's intention to authorize new subsidies under Article 95

of the Treaty or even of the possibility of such an occurrence. The fact that the Council's declaration of 25 February 1993 refers to it and the precedents cited by the Commission show that the authorization of the aid in question by the contested decision cannot be regarded as an isolated or unforeseen case but that, on the contrary, it forms part of a clear policy which had been brought to the notice of a wide sector of the public. All the big European undertakings were thus informed of the Commission's intention to authorize aid under Article 95 of the Treaty, in particular through Eurofer meetings in which the applicants participated regularly.

— Findings of the Court

56 The applicants consider that the contested decision contravenes the principle of the protection of legitimate expectations in that it has the effect of disturbing the common market in steel by introducing, notwithstanding the express prohibition of State aid and the existence of a very strict aid code, confusion liable to render ineffective the industrial strategies of undertakings not in receipt of aid.

57 That argument is based on the mistaken idea — as the Commission and the interveners supporting it have rightly observed — that the existence of the Aid Code gave the undertakings concerned reason to believe that no specific decision authorizing State aid outside the categories covered by the Code would be adopted in special circumstances. However, as the Court has already stated (see paragraphs 38 to 44 above), the Aid Code does not pursue the same object as the contested decision, which was adopted to deal with an exceptional situation. It was not, therefore, in any way capable of giving rise to legitimate expectations as to the possibility of granting individual derogations from the prohibition of State aid, on the basis of the first and second paragraphs of Article 95 of the Treaty, in an unforeseen situation such as that which prompted the adoption of the contested decision (see paragraph 40 above).

58 Furthermore, and in any event, it is settled case-law of the Court of Justice that: 'whilst the principle of the protection of legitimate expectations is one of the fundamental principles of the Community, traders cannot have a legitimate expectation that in the existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained' (see Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33).

59 The proper functioning of the common market in steel clearly involves the obvious need for constant adjustments to fluctuations in the economic situation and economic operators cannot claim a vested right to the maintenance of the legal situation existing at a given time (see Case 230/78 *Eridania* v *Minister for Agriculture and Forestry* [1979] ECR 2749, paragraph 22, and Case T-472/92 *Campo Ebro and Others* v *Council* [1995] ECR II-421, paragraph 52). In particular, for 'prudent and discriminating traders' the adoption of specific measures, intended to deal with situations where there is clearly a crisis is, in certain circumstances, foreseeable and cannot contravene the principle of the protection of legitimate expectations (Case 78/77 *Lührs* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 169, paragraph 6).

60 In this case it is clear that the applicants should, on any view, having regard to their very substantial economic importance and their participation on the ECSC Consultative Committee, have realized that the overriding need to adopt effective measures to safeguard the interests of the European steel industry would arise and justify the adoption of *ad hoc* decisions under the first and second paragraphs of Article 95 of the Treaty, as had already happened on several occasions whilst the Aid Code was in force. In that connection, the Commission rightly refers to Decision 89/218/ECSC of 23 December 1988 and Decision 92/411/ECSC of 31 July 1992, cited above, with authorized certain State aid outside the aid code in force at that time.

61 It follows that the contested decision does not contravene the principle of the protection of legitimate expectations.

The second plea in law: infringement of Article 95 of the Treaty

Arguments of the parties

62 The applicants maintain that the contested decision does not fulfil the conditions for the application of the first paragraph of Article 95 of the Treaty in that the aid which it authorizes does not pursue an aim covered by the objectives set out in Articles 2 to 4 of the Treaty and is not necessary to attain those objectives.

63 The objective pursued by the contested decision — that of 'providing the Italian steel industry with a sound and economically viable structure' (point 4 of the grounds of the decision) — does not, in their view, fall within the objectives defined by Articles 2, 3 and 4 of the Treaty, which concern the common market and the Community steel industry as a whole, not the industry of a single Member State or indeed the survival of a single undertaking (Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671 and Joined Cases 351/85 and 360/85 *Fabrique de Fer de Charleroi and Dillinger Hüttenwerke* v *Commission* [1987] ECR 3639). To support individual undertakings like Ilva through the grant of substantial aid cannot be in conformity with the objectives of the Treaty where unsubsidized undertakings of other Member States must reduce their capacity by their own endeavours. On the contrary, the exclusion from the market of unprofitable steel undertakings or at least reduction of their unused capacity and closure of their uncompetitive plants would contribute to attainment of the objectives of the second paragraph of Article 2 of the Treaty, under which the Community must take care 'not to provoke fundamental and persistent disturbances in the economies of Member States'. Moreover, the Commission could only have taken action against such a danger on the basis of Article 37 of the Treaty, which provides that '[i]f a Member State considers that in a given case action or failure to act on the part of the Commission is of such a nature as to provoke [such] disturbances in its economy, it may raise the matter with the Commission', and not on the basis of the first and second paragraphs of Article 95 (see *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited above).

64 The authorization given for the grant of aid to Ilva is likewise not justified by the need to 'safeguard[...] continuity of employment' in accordance with Article 2 of the Treaty. According to the applicants, the aid in question simply enables the problems of the Italian market to be shifted to the labour market in other Member States, where numerous jobs have been lost and continue to be lost in the steel industry. The applicants challenge on that point the Commission's view that the contested decision forms part of a 'global programme' for the reduction of capacity and restoration of the viability of steel undertakings. In any event, when implementing such a global programme, the Commission should satisfy itself that there is no discrimination between steel undertakings or between the public and the private sectors.

65 Moreover, the aid granted to Ilva is not, in any event, 'indispensable' for attainment of the objectives of the Treaty purportedly pursued by the contested decision. To fulfil the criterion of indispensability or necessity, the aid authorized must cause as little harm as possible to competition on the common market in steel in attaining the objective pursued. However, the Commission already authorized the grant of aid to Ilva in the sum of ECU 10 900 million for the period 1980 to 1985 and ECU 3 250 million in 1988 to 1989. That aid did not restore the viability of the beneficiary undertaking. The precedents show that, rather than leading to an improvement in competitiveness and restoration of the viability of the Italian steel industry, the aid in question may be used by Ilva to finance the sale of its products at low prices in order to increase its market share, with serious repercussions for the competitiveness of unsubsidized undertakings.

66 The Commission, supported by the Italian Republic, which endorses all its arguments, considers that the contested decision is in conformity with the first paragraph of Article 95 of the Treaty.

67 It maintains, first, that the decision pursues the attainment of certain objectives mentioned in Articles 2 and 3 of the Treaty, which in particular require the

Community to safeguard continuity of employment and to avoid provoking fundamental and persistent disturbances in the economies of the Member States. It forms part of a global programme for the reduction of capacity and restoration of the viability of European steel undertakings. It is not thus concerned with the survival of a single undertaking in a single Member State, but rather with safeguarding the Community steel industry as a whole.

68 Accordingly, the Commission endeavoured, as part of a very far-reaching political compromise, to reconcile possibly contradictory objectives envisaged by the Treaty as far as it was able. The contested decision seeks in particular to reconcile reorganization of the Ilva group with the shedding of jobs to a 'reasonable' extent. The repercussions of the crisis in the Italian steel industry have thus been mitigated as regards employment, avoiding the loss of more than 38 000 jobs all at once.

69 As regards the indispensable nature of the aid, the Commission emphasizes that in this case there are special circumstances relating in particular to the crisis, the privatization of Ilva and the fact that there would in the future be no further requests under Article 95 of the Treaty.

70 According to the Council, all the conditions required for the application of Article 95 of the Treaty were complied with in this case. The contested decision forms an integral part of the restructuring plan and the restructuring plan as a whole is in line with the objectives of the Treaty, in particular the general objective of 'taking care not to provoke fundamental and persistent disturbances in the economies of the Member States' (second paragraph of Article 2 of the Treaty). The Council observes that, under the first paragraph of Article 33 of the Treaty, the Court's review may not include evaluation of the situation resulting from economic facts or circumstances underlying the contested decision, unless there has been a misuse of powers or the Commission has 'manifestly failed to observe the provisions of

[the] Treaty or any rule of law relating to its application'. In this case, however, the applicants have produced no evidence to show that the Commission's assessment in the contested decision is manifestly erroneous (see Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraphs 90 and 95).

71 For its part, Ilva maintains that there is nothing in the second paragraph of Article 2 of the Treaty to justify the interpretation advocated by the applicants to the effect that that provision draws a distinction between a priority objective, namely the most rational distribution of production, and secondary objectives such as safeguarding continuity of employment and the need to avoid fundamental and persistent disturbances of the economies of the Member States. Furthermore, the Commission cannot be criticized for pursuing only those Treaty objectives which it regarded as enjoying priority in the light of the particular circumstances of this case, unless it is shown that it relied on manifestly erroneous assessments.

Findings of the Court

72 It must be borne in mind at the outset that, as held earlier in this judgment (paragraphs 31 to 46), 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.

73 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.

74 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.

75 The contested decision clearly indicates, in point IV of its grounds, that its purpose is to reorganize the steel industry in the Member State concerned. It states that 'providing the Italian steel industry with a sound and economically viable structure contributes to achieving the objectives' of the Treaty.

76 It is necessary, therefore, first to verify whether that aim is in line with the objectives of the Treaty and, second, whether authorization for the aid in question was necessary with a view to attaining those objectives.

77 As to whether, first, the reorganization of the beneficiary undertaking is conducive to attaining the objectives of the Treaty, it is expressly stated in the grounds of the contested decisions that that aim was complex and comprised several components. The aid in question was intended to facilitate the privatization of the beneficiary

undertaking, the closure of certain plants, the reduction of excess capacity and reduction of the work force within acceptable limits (see point II of the grounds of the contested decision). It was that body of objectives which, once realized, was to provide the undertaking concerned with a sound and profitable structure.

78 The contested decision thus pursues a wide variety of objectives and it is necessary to verify whether, in the context of the crisis experienced by the steel industry (see paragraphs 72 to 74 above), they are within the scope of the objectives laid down by Articles 2 and 3 of the Treaty, specifically referred to in the grounds of the contested decision.

79 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] 133, Part B, grounds 3-5, Case 8/57 *Groupement des Hauts Fourneaux et Aciéries Belges* v *High Authority* [1958] ECR 245, Part B, ground 3, 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, 33/79, 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'.

80 In this case, the Court finds that the contested decision reconciles various objectives of the Treaty, with a view to safeguarding important interests.

81 The rationalization of the European steel industry through the restructuring of certain groups, including Ilva, the closure of obsolete or uncompetitive plant, the reduction of excess capacity, privatization of the Ilva group in order to ensure its viability and the shedding of jobs within 'reasonable' limits — to use the Commission's words — mentioned in that decision 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, in particular Italy, 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 greatest public importance, particularly by exacerbating the problem of unemployment and creating the risk of a major economic and social crisis.

82 In those circumstances the contested decision, by seeking to resolve those difficulties by reorganizing the Ilva steel group, is 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, it pursues 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)). It is designed to rationalize the European steel industry, in particular through definitive closure of obsolete or uncompetitive plant (for example in Bagnoli) and the irreversible reduction of production capacity for certain products (for example at Taranto, in Italy) with a view to dealing with excess capacity (see Article 2 of the contested decision). It, together with the other five individual decisions mentioned above, authorizing State aid and adopted on the same day, thus form part of a comprehensive programme for restructuring of 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 undertak-

ing — 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, in particular regarding the conditions for privatization of the Ilva group.

83 It follows that the contested decision is intended to safeguard the common interest, in accordance with the objectives of the Treaty. The applicants' view that the decision is not conducive to the attainment of those objectives must therefore be rejected.

84 It having been found that the contested decision pursues Treaty objectives, it is necessary, secondly, to verify whether it was necessary in order to attain those objectives. As the Court of Justice held in *Germany* v *Commission*, cited above, the Commission 'was under no circumstances entitled to authorize 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).

85 It must be pointed out in that connection that the first paragraph of Article 33 of the Treaty provides that '[t]he Court of Justice may not ... examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the Commission took its decision or made its recommendations, save where the Commission is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application'.

86 With regard to State aid, the Court of Justice has consistently held that 'the Commission has a discretion the exercise of which involves 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, and Joined Cases T-244/93 and T-486/93 *TWD* v *Commission* [1995] ECR II-2265).

87 As far as the present plea in law is concerned, involving as it does a complex economic and technical assessment, the Court's review must, according to settled case-law, therefore be limited to verifying that the facts are materially accurate and that there has been no manifest error of assessment (see Case T-266/94 *Skibsværfts-foreningen and Others* v *Commission* [1996] ECR II-1399, paragraph 170; Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 104, and Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraph 140).

88 In this case, in support of their view that the aid granted to Ilva is 'not necessary', the applicants insist that, in view of past experience and of the excess production capacity in the steel industry, any attempt to restore the viability of the undertaking in question by means of State aid will inevitably fail, with serious repercussions for competition.

89 However, the applicants have adduced no specific evidence to show that the Commission committed a manifest error in assessing whether the aid in question was necessary and, in particular, whether it could facilitate reorganization of the beneficiary undertaking.

90 A mere assertion, referring only to the ineffectiveness of earlier aid, that the aid in question will probably not be capable of producing the intended results constitutes nothing more than purely speculative and hypothetical conjecture. Any attempt to extrapolate for the future results obtained in the past, without examining in detail the specific conditions imposed by the contested decision in order to achieve reorganization of the beneficiary undertaking in order to ensure its viability, cannot constitute evidence of failure by the Commission to comply with the Treaty.

91 The Court also finds that, contrary to the applicant's assertions, the antecedents to the contested decision and the statement of the reasons on which it is 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, produced by the Commission, corroborates the information contained in the communication from the Commission to the Council and the European Parliament 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 plan accompanying the aid programme envisaged by the Member State concerned in terms of its capacity to ensure the viability of the beneficiary undertaking (point III of the grounds of the contested decision).

92 Moreover, it is apparent from the Commission's communications to the Council in the course of the procedure leading to the adoption of the contested decision that the Commission analysed in detail the conditions under which the undertaking receiving the aid in question would be viable. In particular, Chapter 2 of the Commission's communication to the Council and to the ECSC Consultative Committee of 15 December 1993 (SEC(93)2089 final) requesting the assent of the Council and the opinion of the ECSC Consultative Committee under Article 95 of the ECSC Treaty contains an analytical description of the prospects of viability of the undertakings (ILP and AST) resulting from privatization of the Ilva group (points 2.5 and 2.6), as accepted by the Council, and a reference to the activities of an independent expert instructed to identify 'the hot-rolling mills which could be closed without jeopardizing the viability of either of the new companies, be it ILP or AST' (ibid., point 2.9). It is clear from the document in question that the expert took account of six options involving different possibilities of closures and reduction of capacity, the second of which was chosen by the Italian Government. Option 2 is described as follows: 'eliminating one of the four reheating furnaces belonging to the No 1 mill and one of the three furnaces belonging to the sheet mill at Taranto and closing down completely the facilities at Bagnoli' (ibid., point 2.9). On the basis of those details, the Commission considered that ILP and AST would be viable. In particular, on the basis of the criterion that a steel undertaking becomes viable 'if it is able to show a return on its equity capital in the range of

1-1.5% of turnover' it emphasized that ILP's profits would be of the order of 1.4 to 1.5% of turnover, (ibid., point 3.3.2., p. 20), even if financial charges were to increase. As regards the production levels needed in order not to undermine the viability of ILP and AST, points 2.5 and 2.6 of the document concerned (pp. 5 to 8) contain an economic analysis of the conditions needed to achieve a satisfactory situation no later than the end of 1996; those results were used to define the content of Article 2 of the contested decision.

93 As regards the applicants' arguments concerning the impact of the contested decision on competition, they too are without any foundation. The applicants fail to take into account the precautions taken by the Commission in the contested decisions with a view to ensuring Ilva's viability, in particular by resolving the problem of its debts (see point II of the grounds of the contested decision), whilst at the same time limiting 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' having regard in particular to the present difficulties in the steel market (point VI of the grounds of the contested decision). In that respect, the Court finds that the Commission, in order not to provide the beneficiary undertaking with an undue advantage over other undertakings in the sector, took care in the contested decision in particular to ensure that that undertaking concerned did not at the outset have its net financial charges reduced below 3.5% of annual turnover (3.2% in the case of AST) which, according to the Commission, which has not been contradicted on that point by the applicants, represents the present average for Community steel undertakings. More generally, Article 2 of the contested decision imposes certain conditions intended to ensure that the financing aid is limited to what is strictly necessary. In view of those considerations, the applicants' argument designed to show that in the present situation of overcapacity the aid in question would merely enable the beneficiaries to sell their products at below production cost is entirely unfounded.

94 In those circumstances, the applicants have adduced no evidence to show that the Commission committed a manifest error of assessment by considering that the aid in question, on the terms laid down in the contested decision, was necessary in order to attain certain objectives of the Treaty.

95 It follows that the contested decision is not rendered unlawful by any breach of the conditions for the application of the first and second paragraphs of Article 95 of the Treaty.

The third plea in law: breach of the principle of proportionality

Arguments of the parties

96 The applicants maintain that the contested decision failed to require the beneficiary undertaking to reduce its steel production sufficiently. They challenge the Commission's position that Ilva's obligation to reduce its production capacity by 2 million tonnes per year represents a sufficient coounterpart for the grant of the aid in question and the distortions of competition which it is likely to cause.

97 In particular, they criticize the Commission for applying, in order to determine the amount of that reduction of capacity, a 'criterion similar to that used in the other cases of aid for steel undertakings'. In their view the Commission should have taken account of the special circumstances of this case with regard, in particular, to the profitability of the beneficiary undertaking's plant and the restructuring effort which it had undertaken before receiving the aid, the fact — of essential importance — that the undertaking had already received aid and the manner in which it was used, and, finally, its share of excess production capacity. On the basis of those criteria, the grant of the aid in question should have been subject to an obligation to reduce capacity by far more than 2 million tonnes per year.

98 In any event, in the applicants' view, if the Commission had applied the same criterion as that applied when authorizing the aid paid to East German undertakings, the volume of the capacity reductions to be undertaken by Ilva would necessarily have been at least 3 million tonnes.

99 In addition, the Commission should not have included in the reduction of capacity imposed on Ilva the 'earlier closures', since in Ilva's case they constituted on each occasion the counterpart for aid already received in the past.

100 In addition, the Commission's view that it is appropriate to refer to maximum possible production (MPP) to determine the capacity reductions to be effected should be rejected since it does not allow a real decrease to be achieved in the beneficiary undertaking's production, which, in the applicants' view, is the only possible way of compensating for distortions of competition provoked by such aid. In this case, it would be necessary to reduce capacity by much more than 4 million tonnes of hot-rolled products in order to have an impact on the market, since Ilva's present capacity exceeds its actual production by at least 4 million tonnes.

101 Against that background, the applicants maintain that the contested decision does not even guarantee the capacity reduction of 2 million tonnes required by the Commission. That reduction would include closure of the Bagnoli steelworks, where nothing has been produced since mid-1992 (see the Commission communication to the Council of 15 December 1993, pp. 22 and 23), and the capacity reduction of 1.7 million tonnes at Taranto, whose official capacity (3.5 million tonnes) far exceeds its actual production (about 2 million tonnes).

102 The Commission contests all the arguments put forward by the applicants. The capacity reduction required in this case, which amounts to around 750 000 tonnes per year and per ECU 1 000 million of aid granted, is appropriate. Moreover, the 'other cases of aid for steel undertakings' mentioned by the Commission in its communication to the Council of 15 December 1993 were authorized by the five other decisions mentioned above, adopted on the same day as the contested decision under Article 95 of the Treaty. They, with the contested decision, constitute all the measures then taken to facilitate reorganization of the steel industry. In that regard, the Commission states that, of the 5.5 million tonnes capacity reduction imposed by those six decisions, 2 million tonnes relate to Ilva.

103 In this case, the Commission took account in particular of the special circumstances of the Ilva group. It took account not only of the reduction of production capacity to be made but also of other factors varying from one region of the Community to another, such as the restructuring effort undertaken before 1981, the regional and social problems caused by the crisis in the steel industry, technical developments and adaptation by undertakings to market requirements.

104 In those circumstances, the Commission cannot be criticized for failing to take account of the aid previously granted to Ilva. In that regard, the applicants have provided no specific evidence in support of their allegations to show that the aid was inappropriately used by the beneficiary undertaking.

105 Ilva, for its part, states that the Commission applied to this case criteria of assessment similar to those employed by it in relation to the other undertakings receiving aid. The six decisions mentioned above, adopted on 12 April 1994, fulfilled all the same requirements, pursued the same objectives and conformed to the same criteria of assessment laid down in the general plan for restructuring of the Community steel industry. The capacity reductions imposed on Ilva merely reflect a particularly strict and rigorous application of those criteria. Although the Commission is not required to ensure a strict ratio between capacity reductions and the amount of aid, it endeavoured so far as possible to keep to a constant figure of 750 000 tonnes capacity reduction per year and per ECU 1 000 million of aid paid. Ilva also contests the applicants' assertions to the effect that the capacity reductions imposed by the contested decision have no practical impact on the common market in steel. The present situation justifies the recommissioning, without excessive difficulty, of the Bagnoli plant, whereas, as far as Taranto is concerned, the argument that, in calculating the closures, the Commission took account of capacity reductions already made in return for earlier investments is unfounded, since the second reheating furnace at Taranto is still operational and the decision to dismantle it will have important repercussions for the steel market.

Findings of the Court

106 By this plea alleging breach of the principle of proportionality, the applicants maintain essentially that the contested decision does not require the beneficiary undertaking to reduce its capacity sufficiently, as a counterpart for the economic advantages conferred on it by the aid in question and to the resultant distortions of competition.

107 According to the first paragraph of Article 95 of the ECSC Treaty, decisions adopted by the Commission to deal with cases not provided for in the Treaty must conform with Article 5 of the Treaty, according to which the Commission is to carry out its task 'with a limited measure of intervention'. The latter provision must be interpreted as embodying the principle of proportionality (see, to that effect, the Opinion of Advocate General Roemer in Case 31/59 *Acciaieria e Tubificio di Brescia* v *High Authority* [1960] ECR p. 71, part B. I. a., at p. 88).

108 With regard to State aid, the Court of Justice held in *Germany* v *Commission*, cited above, that the Commission was not entitled to authorize the granting of aid which 'would be likely to give rise to distortions of competition on the common market in steel' (paragraph 30). To the same effect, it held in Case 15/57 *Compagnie des Hauts Fourneaux de Chasse* v *High Authority* [1958] ECR 211, at 227, that that institution 'has a duty to act with circumspection and to intervene only after carefully balancing the various interests concerned whilst so far as possible restricting the foreseeable damage to third parties'.

109 Moreover, according to settled case-law, the Commission enjoys in this area a 'wide discretion ... reflecting the political responsibilities' which it exercises (see Case C-8/89 *Zardi* [1990] ECR I-2515, paragraph 11). Consequently, only if a decision adopted by the Commission is 'manifestly inappropriate' or dispro-

portionate having regard to the objective pursued will the legality of that decision be affected (see Case 265/87 *Schräder* [1989] ECR 2237, paragraph 22, and Case 179/84 *Bozzetti* v *Invernizzi* [1985] ECR 2301).

110 In this case, therefore, it is necessary to verify whether, in the light of the case-law cited, the Commission required the beneficiary undertaking, by means of the contested decision, to carry out appropriate plant closures and reductions of capacity as a counterpart for the aid authorized.

111 In that regard, 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 the 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.

112 In this case, an analysis of the grounds and of the operative part of the contested decision, and of the context of that decision, shows that the Commission imposed on the beneficiary undertaking appropriate conditions as a counterpart to the aid in question in order to contribute to the restructuring of the entire sector concerned and to reduction of capacity, whilst at the same time taking into account the economic and social objectives pursued by the authorization of that aid (see paragraph 81 above).

113 It is clear from points V and VI of the grounds of the contested decision that the Commission took care to observe the principle of proportionality. In particular it states in point V that '[s]o as to limit the impact on competition to the minimum, it is important that the Italian public steel sector should make a crucial contribution to the structural adjustment still necessary in that sector, through capacity reductions carried out in return for the aid' and that '[t]he granting of operating aid must be limited to what is strictly necessary'. Accordingly, in Article 2 of the decision it requires reductions of production capacity for hot-rolled products of 1.7 million tonnes per year in Taranto through the demolition of reheating furnaces — or up to 0.5 million tonnes per year through the demolition of other plants which manufactured products of that kind until the date of Ilva's privatization, which now belong to the new owner of ILP — and complete closure of the Bagnoli plant. The total reduction of capacity thus imposed was 2 million tonnes per year, according to the particulars supplied by the Commission, according to which the figure adopted for closure of the Bagnoli plant — the maximum production capacity of which was 1.25 million tonnes — was only 0.3 million tonnes. It does not appear to be manifestly disproportionate having regard to the economic and social circumstances prevailing in the steel industry of the Member State concerned, in relation to the overall reduction of 19 million tonnes envisaged by the Commission in the context of its comprehensive restructuring plan for the European steel industry, of which the contested decision forms part.

114 In particular, the applicants' argument designed to show that the capacity reductions imposed by the contested decision are inappropriate must be rejected. The Court finds, first, that the reductions of capacity specified in the contested decision do not cover certain reductions already imposed in earlier decisions authorizing the grant of aid to Ilva. On this point, the applicants' assertions are undermined by specific and detailed information provided by the Commission regarding, first, the actual types of products and plant affected by capacity reductions under earlier decisions and, second, actual implementation of those reductions under the Commission's control. Similarly, the applicants, when referring to the increase in Ilva's production capacity as a result of the investments made during previous years at Taranto and Novi Ligure, failed to take account of the fact that the abovementioned Decision 89/218/ECSC, which authorized aid for Ilva, did not prohibit that

undertaking from making such investments. In any event, the modernization of the plant at Novi Ligure was only carried out in return for a corresponding reduction of capacity, as is clear from the information provided by the Commission and not disputed by the applicants. In those circumstances, it cannot be contended that, by failing to require, in the contested decision, an additional reduction of capacity corresponding to those investments, the Commission committed a manifest error of assessment.

115 Moreover, the argument that the Commission should have taken account in the contested decision of the aid paid earlier to Ilva must also be rejected since the grant of that aid was authorized in circumstances different from those of this case and it too was made subject, at the time, to the obligation to carry out certain capacity reductions, as mentioned above. In this case, the contested decision could only and was required only to prescribe appropriate capacity reduction having regard to the amount of aid authorized and the purpose of that aid.

116 Second, there is no basis for the applicants' argument that the capacity reductions imposed in this case are disproportionate in that they take no account of earlier efforts to restructure Ilva, of its profitability and of its share of excess production capacity in the steel industry. It must be pointed out, first, that the alleged increases of production capacity for crude steel on the Italian market are largely attributable to the big private steel companies established in that country and not to the State-owned undertaking Ilva, as is apparent from the file, and, second, that Ilva in particular reduced its production capacity for cast iron and steel by 5.78 million tonnes per year between 1980 and 1986, under the abovementioned Decision 89/218/ECSC. Moreover and in any event, the submission of the applicants, who suggest that the effort to reduce production capacity must be borne solely by the undertakings receiving aid and take account of their profitability, leaving other undertakings the right to retain even 'colossal' overcapacity as long as their economic situation allows them to do so, misconstrues the very purpose of the contested decision. The aid in question was not granted solely to facilitate reduction of overall excess production capacity but was also intended to restore Ilva's viability, in pursuit of certain economic and social priorities, in the specific

context of the present case. In that context, the capacity reductions required of Ilva by the contested decision were to be determined by reference not only to the need to contribute decisively to structural adjustment in the steel industry in return for the aid in question but also to requirements linked with restoration of its viability.

117 Third, and similarly, the view that the capacity reduction should have been assessed by reference to the actual production of the beneficiary undertaking and not its maximum possible production cannot be upheld. As the Commission points out, where there is excess capacity, the quantity produced by an undertaking depends essentially on economic developments. It thus reflects the market situation rather than the production capacity of the undertaking. Only the maximum production capacity — which is capable of being mobilized rapidly and at limited cost by the undertaking concerned — represents a constant value allowing an assessment to be made, unclouded by conjunctural uncertainties, of the capacity actually available to the undertaking. Moreover, contrary to the applicants' assertions, a reduction of that maximum production capacity has an impact on the market in that the closed plant is no longer available where, in particular, other plants fail or there is growth in demand.

118 For all those reasons, the applicants' argument based on a comparison of the capacity reductions imposed in this case with the reductions made in other decisions concerning, for example, undertakings established in the former East Germany, cannot be upheld, since capacity reductions are a reflection of the specific circumstances prevailing on the market concerned. The applicants not only do not identify those 'other decisions' to which they refer but, furthermore, they give no indication concerning either the industry in question or the circumstances of the undertakings to which those decisions relate. Moreover, in this case, the only specific reasons put forward by the applicants for which, in their view, the particular situation of the Italian State-owned steel industry should be subject to capacity reductions of a significantly greater magnitude than those imposed by the contested decision are without foundation, as held above.

119 It follows that the allegation of breach of the principle of proportionality is unfounded.

The fourth plea in law: breach of the principle of non-discrimination

Arguments of parties

120 The applicants consider that the contested decision contravenes the prohibition of discrimination laid down in Article 4(b) of the Treaty, which prohibits measures and practices giving rise to discrimination between producers, buyers and users. They point out that, in its judgment in Case 304/85 *Falck* v *Commission* [1987] ECR 871, paragraph 27, the Court of Justice held that 'although any aid measures are 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. In such a case the grant of aid would involve distortion of competition to an extent contrary to the common interest'.

121 The contested decision, in their view, contravenes the principle of non-discrimination in two ways: it leads to unequal treatment of certain undertakings in the same situation as Ilva and to unequal treatment of the private sector in comparison with the public sector, to which Ilva belongs. In particular, Thyssen Stahl, Preussag Stahl and the other undertakings in the German steel industry association Wirtschaftsvereinigung Stahl, and Hoogovens Groep BV, all of which have substantially less overcapacity than Ilva, are unjustly discriminated against by the decision authorizing the grant of aid to Ilva. That applies also to the entire private sector since in practice aid authorized under the first and second paragraphs of Article 95 of the Treaty benefits only public undertakings.

122 As regards Ilva's claim that the judgment of the Court of First Instance should not upset the balance existing between the positions of the various undertakings in receipt of aid, the applicants regard it as manifestly incorrect: Ilva would not be discriminated against if the Court of First Instance were to annul the contested decision and if the other decisions continued to stand. There is no equality in illegality nor any entitlement to equal unlawful treatment.

123 The Commission, supported by the Italian Republic, contends first that any decision concerning the volume of aid is a matter for the Member States, which must notify the details thereof to the Commission. Its responsibility is limited to verifying that the interests of the Community as a whole are safeguarded and that the envisaged aid pursues attainment of the objectives of the ECSC Treaty without distorting competition. In this case, the contested decision indisputably contributes to the restructuring of the European steel industry as a whole since it forms part of an overall plan and includes very strict conditions concerning the privatization of Ilva and the closure of certain establishments. Accordingly, it is wrong to speak of discrimination between Ilva and competing steel undertakings or between the private steel sector and State-owned steel undertakings. Moreover, the closures carried out by private steel undertakings could also give rise to financial support measures. In particular, a number of undertakings, including the three applicants, sought through Eurofer and obtained, by Commission Decision 94/6/ECSC of 21 December 1993 authorizing common financial arrangements in respect of individual programmes involving the closure of production capacity in the Community steel industry for heavy sections, hot-rolled wide coils and strip, and reversing-mill plate (OJ 1994 L 6, p. 30), authorization to set up common financial arrangements with a view to implementing programmes for individual closure of production capacity.

124 According to the Council, the contested decision does not infringe the principle of non-discrimination. Nothing in the arguments put forward in that respect by the applicants shows that the contested decision gave rise to an objectively unjustified difference of treatment as between Ilva and the applicants.

125 According to Ilva, it is not possible to maintain that undertakings receiving aid are treated differently from their competitors unless it is shown that there is no appropriate counterpart, having regard to the common interest, for the advantage thus afforded them. However, in this case the grant of the aid at issue was appropriately offset by financial reorganization, reduction of capacity and privatization.

Findings of the Court

126 According to Article 4(b) of the Treaty, 'measures or practices which discriminate between producers' are recognized as incompatible with the common market for steel and are accordingly prohibited within the Community.

127 According to settled case-law, discrimination arises where like cases are treated differently, so that some traders are subjected to disadvantages and others are not, and such difference in treatment is not justified by the existence of substantial objective differences (Case 250/83 *Finsider* v *Commission* [1985] ECR 131, paragraph 8). With respect to aid to the steel industry in particular, the Court of Justice has held that there is unequal treatment and therefore discrimination where a decision authorizing 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).

128 The question of discrimination regarding aid as between the public and private sectors under the Treaty was examined in the judgment in *Falck* v *Commission*, cited above. After emphasizing that the responsibility for granting aid falls primarily upon 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. In such a case the grant of aid would involve distortion of competition to an extent contrary to the common interest' (paragraph 27).

129 In this case, in order to determine whether the contested decision is discriminatory, it is necessary to verify whether it accords to the undertaking to which the aid at issue is granted treatment different from that accorded to other undertakings in the same situation, or whether it involves distortions of competition to an extent contrary to the common interest.

130 In that regard, it must first be observed that the applicants have advanced no argument capable of showing that the aid in question was the subject of more favourable treatment by the Commission than other comparable State aid notified to it (see paragraph 118 above). Nor have they provided the slightest evidence to show that the contested decision is liable to distort conditions of competition 'to an extent contrary to the common interest' and thereby involves 'manifest' discrimination against, in particular, private undertakings.

131 As the Italian Government states, the context in which the contested decision was adopted and the decision itself disclose no support for the assertion that it was decisively influenced by the fact that the undertaking to which the aid was granted was a public undertaking and that, consequently, the decision would have been different had it been a private undertaking. Moreover, the public nature of the undertaking concerned could not lawfully be relied on by the Commission to refuse to grant the aid in question since to do so would contravene the principle of equal treatment as between public and private undertakings.

132 Moreover, it must be borne in mind that, as already held (see paragraphs 112 to 121 above), the advantages afforded to the undertaking to which the aid in question was granted are proportionate to the objectives pursued, as a result in particular of the counterpart obligations imposed on that undertaking (plant closures and reduction of production capacity). Furthermore, the distortions of competition resulting from the contested decisions are limited to what is strictly necessary (see paragraph 93 above) and are justified by the very aim of the decision — restoration of a sound and profitable structure for the beneficiary undertakings — which has been held to be compatible with the Treaty (see paragraphs 77 to 83 above). Finally, Article 1(3) of the decision states '[t]he aid shall not be used for the purpose of unfair competition practices'. Pursuant to Article 6(1) of the contested decision, if any of those obligations is not observed, the Commission may require the suspension of payment or recovery of the aid in question.

133 In those circumstances, the Court finds that the Commission acted in the common interest, appraising the various interests involved and ensuring that important economic and social interests were safeguarded, whilst at the same time avoiding unfavourable consequences for other economic operators to the extent to which the very subject-matter and the purpose of the contested decision allowed.

134 This analysis is in conformity with the case-law of the Court of Justice which held, in *Valsabbia* v *Commission*, cited above, (paragraph 49) '[t]he Commission is indeed under an obligation by virtue of Article 3 of the Treaty to act in the common interest, but that does not mean that it 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'.

135 It follows that the applicant's argument that the contested decision is vitiated by breach of the principle of non-discrimination must be rejected.

The fifth plea in law: breach of the obligation to state reasons

Arguments of the parties

136 The applicants consider that the contested decision does not, in several respects, fulfil the obligation to state reasons laid down in Article 15 of the Treaty.

137 First, the contested decision contains no statement of reasons concerning the Commission's entitlement to authorize the aid in question, which is incompatible with the Aid Code in force, under conditions and according to procedures not provided for by that code.

138 Second, the Commission does not identify in the contested decision the objectives set out in Articles 2 and 3 of the Treaty which it seeks to attain by authorizing the grant of aid to Ilva.

139 Third, the Commission did not give a satisfactory statement of reasons concerning the necessity of the aid authorized in accordance with the case-law of the Court of Justice concerning the conditions for application of the first and second paragraphs of Article 95 of the Treaty. It takes no account of the fact that substantial aid was granted to Ilva on several occasions on condition that it recovered its viability within a specified period through a restructuring programme and that the undertaking had never discharged that obligation.

140 Lastly, the Commission did not state in the contested decision why a capacity reduction of 2 million tonnes per year in return for aid of ECU 2 600 million is reasonable and adequate. Moreover, the decision contains no reference to any examination by the Commission of the impact of the aid on competition or the risk of discrimination regarding other steel undertakings.

141 The Commission, supported by the Italian Republic, states that the extent of the obligation to state reasons depends on the nature of the measure in question and the context in which it was adopted (see, for example, Case 13/72 *Netherlands* v *Commission* [1973] ECR 27). In this case, the statement of reasons is adequate, having regard both to the context of the contested decision as a whole and to the applicants' involvement when the Commission considered the reorganization of the Community steel industry.

Findings of the Court

142 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 states '[d]ecisions, 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 has an obligation to state reasons when adopting general or individual decisions, whatever the legal basis chosen for that purpose.

143 According to settled case-law, 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 carry out its review. It is not necessary 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 *Skibsværftsforeningen and Others* v *Commission*, cited above, paragraph 230). Moreover, the statement of the reasons on which a measure is based must 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).

144 In this case, it is necessary to consider successively the applicants' various complaints concerning the alleged inadequacy of the statement of reasons for the contested decision. As regards, first, the reasons for which the Commission considered that it was empowered to authorize the aid in question not under the Aid Code but on the basis of the first and second paragraphs of Article 95 of the Treaty, the decision contains an adequate statement of reasons in points I and IV, stating clearly and in detail that, in view of the sharp deterioration in the steel market and the serious difficulties experienced in the industry in several Member States, including Italy, the Community found itself faced with an unforeseen situation justifying recourse to that article.

145 As regards, second, the reasons for which the Commission considered that the aim of the aid in question, namely a return to viability for the beneficiary undertaking, contributed to attainment of the objectives of the Treaty, it must be emphasized that those reasons are set out in point IV and developed throughout the preamble to the decision. More specifically, it is apparent from point IV that, in the Commission's view, it was because of the serious difficulties arising in the steel industry, in this case in Italy, since the second half of 1990, that the reorganization of Ilva was to be regarded as conforming with the objectives laid down in Articles 2 and 3 of the Treaty. Since the economic and social impact on the steel industry of the Member State concerned of the restoration of the viability of that undertaking was manifest in the period of crisis described in that decision, the failure formally to specify the exact provisions of Articles 2 and 3 whose implementation was more particularly being pursued in this case cannot be regarded as an inadequacy of the statement of reasons. Moreover, in points V and VI of the grounds of the decision, the Commission states that it is designed among other things to make a contribution to the structural adjustment of the sector through capacity reductions. It also emphasizes that one of the aims pursued by the various conditions imposed is to limit to a minimum the impact of the aid in question on competition. In those circumstances, the Court considers that the statement of reasons for the contested decision was sufficient to enable the applicant to identify the objectives of the Treaty which that decision sought to pursue and to assess whether the reorganization of Ilva was consonant with those objectives.

146 As regards, third, the aptness of the aid in question to bring about the recovery of the undertaking to which the aid was granted, the Court finds that the contested

decision clearly indicates the means by which Ilva's viability must, in the Commission's view, be restored, where it lists, in particular in point II of the grounds, the various aspects of the restructuring programme supported by the aid. It is expressly stated that the means used to restore Ilva's viability will be privatization of the group, that being the essential objective of the aid in question, and a new reorganization programme, involving in particular the splitting of its core business into two new companies in the manner outlined in the decision.

147 Moreover, the Commission makes it clear in the contested decision (point III of the grounds) that, as part of its examination of the restructuring plan notified to it by the Italian Government, it used the same criteria as those imposed by it during the previous restructuring of the Community steel industry. Those criteria could not therefore have been unknown to the economic operators in that sector, the applicants in particular. In those circumstances, by specifying the main elements of the abovementioned restructuring plans, the contested decision sufficiently indicated the reasons for which the aid in question would, in the Commission's view, enable Ilva to be provided with a sound and viable structure.

148 It follows that, contrary to the applicants' assertions, the reasons for which the aid in question would, in the Commission's view, attain the objectives pursued, unlike the aid granted to Ilva in the period 1988 to 1991, are clear from the contested decision. In point II of the grounds of that decision, the Commission also reviews the earlier aid, which 'was supposed, under normal market conditions and on the basis of strict implementation and rigorous management control, to ensure the viability of the undertaking'. It emphasizes that, despite a major restructuring effort, the objective pursued was not obtained by Ilva which, since 1991, has continued to build up deficits. In point IV of the grounds of the decision, the Commission links that situation with the sharp deterioration of the steel market since mid-1990 in order to justify adoption of the contested decision under Article 95 of the Treaty.

149 Moreover, the statement of reasons for the contested decision, as far as the viability of the beneficiary undertaking is concerned, is substantially supplemented and

developed by the documents in the file. In particular, the Commission produced the full text of its communication to the Council of 15 December 1993 (doc. SEC(93) 2089 final) in which it sought the assent of the Council under the first paragraph of Article 95 of the Treaty. That communication, repeating in part the content of an earlier communication of 10 November 1993 (doc. SEC(93) 1745 final) contains a detailed analysis of the conditions for the viability of the company receiving the aid in question (see paragraph 92 above).

150 Finally, the complaint that the statement of reasons is inadequate regarding, first, the appropriateness of the capacity reductions imposed in return for the aid in question and, second, the limitation of the resultant distortions of competition, must be rejected. As already stated (see paragraphs 93 and 113 above), those various aspects were amply examined in the contested decision.

151 It follows from all the foregoing considerations that the contested decision is not rendered unlawful by any inadequacy of its statements of reasons.

The sixth plea in law: irregularity of the decision-making procedure

152 This plea comprises two parts. It is alleged that the contested decision departs from the Council's assent. It is also claimed that the decision was not adopted in accordance with the procedure laid down by Article 97 et seq. of the Agreement on the European Economic Area ('the EEA Agreement').

The alleged failure to adhere to the terms of the Council's assent

— Arguments of the parties

153 The applicants maintain that the contested decision is not in conformity with the assent given by the Council. The time-limit of 30 June 1994 imposed on Ilva for fulfilment of its obligations to reduce capacity and close plant, provided for in the communication of 15 December 1993 on which the Council's assent was based, was not included in the operative part of the contested decision. It is mentioned only in the recitals in the preamble to the decision as a mere element of the restructuring programme submitted by the Italian Government.

154 The Commission denies that the contested decision departs from the Council's assent. Although the time-limit of 30 June 1994 is not expressly mentioned in the operative part of the decision, the decision lays emphasis on the need to comply with the restructuring programme, to which the eighth paragraph of point II, which mentions that time-limit, makes reference. And, according to the case-law of the Court of Justice, the statement of reasons is an essential part of a legal measure (see Case 131/86 *United Kingdom* v *Council* [1988] ECR 905, paragraph 37).

155 Ilva states that the time-limit laid down by the Council for closure of the plant concerned appears in the grounds of the decision. It adds that it complied with that time-limit, so it is pointless to deny that reference to it in the grounds of the decision is sufficient to ensure attainment of the objective pursued.

— Findings of the Court

156 The applicants consider the contested decision to have been adopted in breach of the Council's assent prescribed in mandatory terms by the first paragraph of

Article 95 of the Treaty because the time-limit of 30 June 1994 for fulfilment by Ilva of its obligation to reduce its production capacity at Taranto appears in the Commission communication of 15 December 1993 (paragraph 3.3.4, p. 24), on which the Council's assent of 22 December 1993 was based, but does not appear in the operative part of the contested decision, but only in the preamble (point II, eighth paragraph).

157 It is not disputed that the date of 30 June 1994 appeared in the programme for reorganization and privatization of the Ilva group endorsed by the Istituto Nazionale per la Ricostruzione Industriale (IRI) in September 1993 and notified by the Italian Government to the Commission by letter of 13 December 1993 (see point II of the grounds of the relevant decision). Nor is it disputed that that date appeared in paragraph 3.3.4., p. 24, of the communication from the Commission to the Council of 15 December 1993 on which the Council's assent was based, and does not appear in the operative part of Decision 94/259 but only in the preamble (point II).

158 Whilst Article 95 provides that the Commission decision must be taken 'with the unanimous assent of the Council', it does not lay down the procedures under which the Commission must seek that assent: in particular, it does not state clearly whether the Commission must submit a draft decision to the Council. Since the 1960s the Commission's decision-making practice has been to submit a communication to the Council setting out the basic elements of the national aid programme and the broad outlines of the envisaged action. The procedure followed for the adoption of the decision concerning Ilva conformed with that practice.

159 The applicants do not criticize the Commission's practice of submitting a communication to the Council rather than a draft decision. They merely claim that an important element of the communication submitted to the Council was not included in the operative part of the contested decision.

160 That complaint could not bring about annulment of the contested decision on grounds of infringement of essential procedural requirements unless the Council would not have given its assent if it had known that the Commission would insert the date 30 June 1994 in the preamble rather than the operative part of the decision which it was to adopt (see Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, and *Skibsværftsforeningen and Others* v *Commission*, cited above, paragraph 243).

161 The Council itself has stated that 'it clarified ... certain conditions regarding the grant of aid, and the Commission took account of them' and that it 'unreservedly supported the measures' taken by the Commission.

162 The Court concludes from this that the Council's assent related to the substance of the Commission's proposal, leaving the Commission a degree of latitude regarding the precise form that the final decision should take. The operative part of the contested decision (Articles 1(1) and 4(1) and (6)) emphasizes the absolute need to comply with the restructuring programme described in point II of the grounds of the decision, which expressly mentions the date 30 June 1994. In those circumstances, it cannot validly be claimed that the contested decision departs in any essential respect from what was approved by the Council.

163 It follows that Decision 94/259 is not rendered unlawful by any failure to adhere to the terms of the Council's assent.

The alleged infringement of Article 97 of the EEA Agreement

— Arguments of the parties

164 The applicants claim that the Commission did not observe the decision-making procedure provided for in Article 97 et seq. of the EEA Agreement, which requires in particular that the contracting party concerned inform the other contracting parties of amendments to its domestic legislation and that the EEA Joint Committee conclude that the amended legislation does not detract from the proper functioning of the agreement. The obligation to observe that procedure derives from the combined provisions of Article 27 of the EEA Agreement and Article 5 of Protocol No 14. Since those rules form an integral part of Community law and are binding on the organs of the Community when exercising the discretion conferred on them, any infringement of them constitutes, in the applicants' view, a misuse of powers.

165 According to the Commission, the reference to Article 97 et seq. of the EEA Agreement is irrelevant. First, the contested decision does not constitute a case of amendment of legislation. Second, the applicants cannot derive any individual right from any failure to observe the procedural rules of the EEA Agreement. In any event, infringement of the procedural rules can only be raised as an issue in connection with the EEA, but not in relation to the present dispute.

— Findings of the Court

166 It must be emphasized that the provisions of the EEA Agreement relied on by the applicants contain procedural rules concerning relations between the contracting parties to that agreement, the infringement of which is covered by specific arrangements regarding surveillance (Article 108 et seq. of the EEA Agreement) and the

settlement of disputes (Article 111 et seq. of the EEA Agreement). Without its being necessary to examine the merits of the Commission's position, which is that 'the applicants cannot derive any individual right from any infringement of the procedural rules of the EEA Agreement', it need merely be stated in this case that the adoption of the contested decision manifestly does not constitute a case of amendment of Community legislation within the meaning of Article 97 and Article 99(1) of the EEA Agreement, it being an individual and not a general measure.

The seventh plea in law: breach of the rights of the defence

Arguments of the parties

167 The applicants consider that the contested decision infringes the rights of the defence. Although there is no express provision to that effect in Article 95 of the Treaty, the Commission should have formally called on interested parties to submit their observations under a consultation procedure or, at least, publish in the Official Journal the applications for authorization for aid submitted to it, rather than merely giving notice that it was initiating a procedure against Ilva. Such an obligation is to be inferred from the general principles of procedural law, having regard to the case-law of the Court of Justice on Article 93(2) of the EC Treaty (see in particular Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraphs 15 to 18). That is why Article 6(4) of the Aid Code provides that the Commission must give notice to the parties concerned to submit their comments before any finding that aid is incompatible with the Treaty; that provision should apply *a fortiori* to cases not covered by the Aid Code.

168 The applicants contest the Commission's view, owing to the exceptional nature of *ad hoc* decisions under Article 95 of the Treaty, that there was no obligation to hear the views of Ilva's competitors before adopting the decision; they consider that the Commission's view cannot be reconciled with the principle that States are to be governed by the rule of law or with settled case-law of the Court of Justice.

Moreover, mere awareness of the initiation of a procedure for authorization, obtained indirectly through Eurofer or within the ECSC Consultative Committee, is not sufficient. First, the information obtained through Eurofer did not make it possible to become well acquainted with the detailed facts of the case; second, isolated undertakings have no real opportunity, within the ECSC Consultative Committee, to put forward their own observations.

169 The Commission, supported by the Italian Republic, stresses that there are no rules providing for competitors to be heard in relation to *ad hoc* decisions under the first paragraph of Article 95 of the Treaty. Nor, in view of the exceptional nature of such decisions, does it appear that they are covered by the case-law on Article 93(2) of the EC Treaty. Nor was there any infringement of the procedural rules laid down in Article 6 of the Aid Code. Where the Commission envisages adopting a negative decision on aid projects because they are incompatible with Article 4(c) of the Treaty, the procedure is to be initiated in accordance with the provisions of the code, whereas when the Commission, with the approval of the Council and after hearing the Consultative Committee, reaches the conclusion that aid should be granted under Article 95 of the Treaty, the relevant procedure is the procedure under that article, which provides for no prior hearing of competitors. According to the Commission, the applicants had in any event sufficient opportunity to express their views at all stages of the procedure, the progress of which they were able to follow through the intermediary of Eurofer and in their capacity as members of the ECSC Consultative Committee, which must be consulted by virtue of the first paragraph of Article 95 of the Treaty. It is apparent from the minutes of the ECSC Consultative Committee that the representatives of the majority of the applicants were represented on the Consultative Committee, and that some of them gave their views on the project for the grant of aid.

Findings of the Court

170 The contested decision was adopted on the basis of the first and second paragraphs of Article 95 of the Treaty. Those provisions provide for the assent of the Council and compulsory consultation of the ECSC Consultative Committee. They do not confer any right to be heard on the addressees of decisions and other interested

parties. For its part, Article 6(4) of the Fifth Aid Code does confer such a right, in so far as it states '[i]f, 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 was included in all the aid codes prior to the one in force, starting with the first (see Commission Decision 257/80/ECSC of 1 February 1980 establishing Community rules for specific aid to the steel industry, OJ 1980 L 29, p. 5).

171 The applicants consider that the Commission infringed the rights of the defence, in that, even in the absence of an express provision in Article 95 of the Treaty, it should have initiated an *inter partes* procedure against them, on the pattern of Article 6 of the Fifth Aid Code. They also seek to draw a parallel between Article 95 of the ECSC Treaty and Article 93(2) of the EC Treaty, in order to infer a general principle that the Commission must systematically involve interested parties in the procedure whenever it assesses the compatibility of State aid with the Treaty.

172 Without its being necessary to consider whether any general principle of Community law confers on interested parties the right to be heard in a decision-making procedure regarding State aid, it must be pointed out that, under the procedure for the adoption of the contested decision under the first paragraph of Article 95 of the Treaty, which provides for consultation of the Consultative Committee, the applicants in any event had an opportunity to make their positions known within that Committee. Pursuant to Article 18 of the Treaty, the Consultative Committee consists of members representing producers, workers, consumers and dealers. It is clear from the list of members of that Committee (Annex 5 to the rejoinder) that three of the applicants, namely Wirtschaftsvereinigung Stahl, Preussag Stahl and Hoogovens Groeps, were represented at the highest level within the committee. As regards Thyssen Stahl, it was able to make its views known through the association Wirtschaftsvereinigung Stahl, in which it played an important role, as the Commission has stated without being contradicted on that specific point by that company. It is not disputed that the question of aid to Ilva was discussed at length within the Consultative Committee and that the applicants' representatives were present and gave their views on the measures proposed by the Commission, either individually or through the association Wirtschaftsvereinigung Stahl.

173 Moreover, it is not disputed that the applicants had an opportunity to make known their views on the aid in question in this case before the adoption of the contested decision under the procedure initiated pursuant to Article 6(4) of the Aid Code, when the Italian Republic had not yet notified to the Commission the new programme for reorganization and privatization of the Ilva group (point II of the grounds of the contested decision). That procedure was closed when the decision was adopted, as is clear from point VIII of the decision.

174 It follows that the contested decision is not in any event vitiated by illegality as a result of any infringement of the obligation to initiate the *inter partes* procedure.

175 It follows that the action for annulment must be dismissed.

Costs

176 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. The applicants have been unsuccessful in their action for annulment of the contested decision. Since the Commission and Ilva, the intervener supporting it, have applied for costs, the applicants must be ordered to pay their costs.

177 Under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. It follows that the Council 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. Dismisses the application;

2. Orders the applicants to pay the costs of the defendant and of the intervener Ilva Laminati Piani SpA;

3. Orders the Council 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