JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
9 September 1999 *

In Case T-110/98,

RJB Mining plc, a company incorporated under English law, with its registered office at Harworth, United Kingdom, represented by Mark Brealey, Barrister, of the Bar of England and Wales, and Jonathan Lawrence, Solicitor, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Paul F. Nemitz and Nicholas Khan, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

supported by

Federal Republic of Germany, represented by Claus-Dieter Quassowski, Regierungsdirektor, of the Federal Ministry of Finance, acting as Agent, and Michael Schütte, Rechtsanwalt, Berlin, 108 Graurheindorferstraße, Bonn,

Kingdom of Spain, represented by Rosario Silva de Lapuerta, Abogado del Estado, of the Community Legal Affairs Department, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

and

RAG Aktiengesellschaft, a company incorporated under German law, established in Essen, Germany, represented by Sven B. Völcker, Rechtsanwalt, Berlin, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

interveners,

APPLICATION for annulment of Commission Decision 98/687/ECSC of 10 June 1998 on German aid to the coal industry for 1997 (OJ 1998 L 324, p. 30),

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

composed of: B. Vesterdorf, President, C.W. Bellamy, J. Pirrung, A.W.H. Meij and M. Vilaras, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 15 December 1998

gives the following

Judgment

Legal background

Legislation

1 The Treaty establishing the European Coal and Steel Community prohibits, in principle, State aid granted to coal-mining undertakings. Article 4 thereof provides, therefore, that the following are incompatible with the common market for coal and steel and are accordingly to be prohibited 'within the Community, as provided in this Treaty:... (c) subsidies or aids granted by States... in any form whatsoever...'.

2 The first paragraph of Article 95 of the ECSC Treaty states:

'In all cases not provided for in this Treaty where it becomes apparent that a decision... 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... with the unanimous assent of the Council and after the Consultative Committee has been consulted.'

3 Pursuant to that provision the High Authority and then the Commission have, since 1965, adopted legislation allowing the grant of aid to the coal sector. The last measure in that series of legislation is Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry (OJ 1993 L 329, p. 12, hereinafter 'the Code of 1993' or 'the Code'). The Council unanimously assented to that code on the basis of, and after discussion of, a communication of 27 January 1993 from the Commission, entitled 'Request for Council assent and consultation of the ECSC Committee, pursuant to Article 95 of the ECSC Treaty concerning a draft Commission Decision establishing Community rules for State aid to the coal industry' (hereinafter 'the communication of 27 January 1993').

4 Under Article 1(1) of the Code, '[a]ll aid to the coal industry... granted by Member States... may be considered Community aid and hence compatible with the proper functioning of the common market only if it complies with Articles 2 to 9'.

5 Article 2(1) of the Code, which, like Article 1(1), is contained in Section I entitled 'Framework and general objectives', provides that '[a]id granted to the coal industry may be considered compatible with the proper functioning of the common market provided it helps to achieve at least one of the following objectives:

— to make, in the light of coal prices on international markets, further progress towards economic viability with the aim of achieving degression of aids,

— to solve the social and regional problems created by total or partial reductions in the activity of production units,

— to help the coal industry adjust to environmental protection standards'.

6 Under Article 3(1) of the Code, 'operating aid' to cover the difference between production costs and the selling price resulting from the situation on the world market may be considered compatible with the common market on certain conditions. The aid notified per tonne must not, in particular, exceed for each undertaking or production unit the difference between production costs and foreseeable revenue in the following coal production year.

7 The first subparagraph of Article 3(2) of the Code provides that Member States which intend to grant operating aid for the 1994 to 2002 coal production years to

coal undertakings are required to submit to the Commission in advance 'a modernisation, rationalisation and restructuring plan design[ed] to improve the economic viability of the undertakings concerned by reducing production costs'.

8 According to the second subparagraph of Article 3(2) of the Code, that plan must provide for appropriate measures and also efforts to generate 'a trend towards a reduction in production costs at 1992 prices, during the period 1994 to 2002'.

9 Article 4 of the Code concerns 'Aid for the reduction of activity', namely aid to cover the production costs of undertakings or production units 'which will be unable to attain the conditions laid down by Article 3(2)'. Such aid may be authorised provided that it is the subject of a closure plan.

10 Article 5 of the Code deals with aid to cover exceptional costs.

11 Section III of the Code, entitled 'Notification, appraisal and authorisation procedures', contains Articles 8 and 9. Article 8 provides as follows:

'1. Member States which intend to grant operating aid as referred to in Article 3(2) or aid for the reduction of activity as referred to in Article 4 for the 1994 to 2002 coal production years shall submit to the Commission, by

31 March 1994 at the latest, a modernisation, rationalisation and restructuring plan for the industry in accordance with Article 3(2) and/or an activity-reduction plan in accordance with Article 4.

2. The Commission shall consider whether the plan or plans are in conformity with the general objectives set by Article 2(1) and with the specific objectives and criteria set by Articles 3 and 4.

3. Within three months of notification of the plans, the Commission shall give its opinion on whether they are in conformity with the general and specific objectives, without prejudging the ability of the measures planned to attain these objectives....'

12 Article 9 of the Code provides:

'1. By 30 September each year (or three months before the measures enter into force) at the latest, Member States shall send notification of all the financial support which they intend to grant to the coal industry in the following year, specifying the nature of the support with reference to the general objectives and criteria set out in Article 2 and the various forms of aid provided for in Articles 3 to 7 and its relationship to the plans submitted to the Commission in accordance with Article 8.

2. By 30 September each year at the latest, Member States shall send notification of the amount of aid actually paid in the preceding coal production year and shall declare any corrections made to the amounts originally notified.

3. When notifying aid as referred to in Articles 3 and 4 and making the annual statement of aid actually paid, Member States shall supply all the information necessary for verification of the criteria set out in the relevant articles.

4. Member States may not put into effect planned aid until it has been approved by the Commission on the basis, in particular, of the general criteria and objectives laid down in Article 2 and of the specific criteria established by Articles 3 to 7. If the Commission has taken no decision within three months of receipt of notification of the measures planned, the measures may be implemented 15 working days after transmission to the Commission of notice of intent to implement them. Any request made by the Commission for further information shall cause that three-month period to run afresh from the date on which the Commission receives the information.

5. In the event of refusal, any payment made in anticipation of authorisation from the Commission shall be repaid in full by the undertaking that received it and shall invariably be considered an unfair advantage in the form of an unjustified cash advance and, as such, shall be liable to charges at the market rate payable by the recipient.

6. In its assessment of the measures notified, the Commission shall check whether the measures proposed are in conformity with the plans submitted in accordance with Article 8 and with the objectives set out in Article 2. It may request Member States to explain any deviation from the plans originally submitted and to propose the necessary corrective measures.

...'

13 According to Article 12 thereof, the Code is to expire on 23 July 2002.

Individual decisions approving aid to the German coal industry for 1994, 1995 and 1996

14 By letter of 28 December 1993, the Federal Republic of Germany notified to the Commission planned financial aid which it intended to grant, under Article 5 of the Code, to its coal industry for 1994. As a result, the Commission adopted, on 1 June 1994, Decision 94/573/ECSC authorising the granting of aid by Germany to the coal industry in 1994 (OJ 1994 L 220, p. 10).

15 Also by letter of 28 December 1993, the Federal Republic of Germany notified other aid, under Article 3 of the Code, for 1994. In addition, by letter of 29 April 1994, it submitted to the Commission a modernisation, rationalisation and restructuring plan for the German coal industry. By Decision 94/1070/ECSC of 13 December 1994 on German aid to the coal industry for 1994 (OJ 1994 L 385, p. 18), the Commission approved the financial measures notified. That decision also includes an assessment, in the light of Articles 2, 3 and 4 of the Code, of the modernisation, rationalisation and restructuring plan submitted. It finds that plan to be compatible, in principle, with the objectives and criteria defined in those articles.

16 By letter of 25 January 1995, the German Government notified aid planned, under Articles 3 and 5 of the Code, for 1995. The Commission approved it by Decision 95/464/ECSC of 4 April 1995 on German aid to the coal industry for 1995 (OJ 1995 L 267, p. 42).

17 By letter of 4 April 1995, the German Government again notified an additional financial measure, under Article 3 of the Code, for 1994, which was approved by Commission Decision 95/499/ECSC of 19 July 1995 authorising additional aid by Germany to the coal industry for 1994 (OJ 1995 L 287, p. 53).

18 By letter of 5 October 1995, the German Government finally notified the aid it intended to grant, under Articles 3 and 5 of the Code, to the German coal industry for 1995 and 1996. That aid was authorised by Commission Decision 96/560/ECSC of 30 April 1996 on German aid to the coal industry for 1995 and 1996 (OJ 1996 L 244, p. 15).

19 The applicant did not bring an action to contest any of the abovementioned decisions.

The contested individual decision

20 By letter of 30 September 1996, the Federal Republic of Germany notified to the Commission, in accordance with Article 9(1) of the Code, financial aid which it intended to grant to the coal industry for 1997. That aid included operating aid, aid for the reduction of activity and aid to cover exceptional costs within the meaning of Articles 3, 4 and 5 of the Code. At the Commission's request, the Federal Republic of Germany supplied additional information in that regard by letters of 15 October 1996, 5 June and 22 October 1997, and 27 January and 4 March 1998.

21 By Commission Decision 98/687/ECSC of 10 June 1998 on German aid to the coal industry for 1997 (OJ 1998 L 324, p. 30, 'the contested decision'), that aid in the amount of DEM 10.4 thousand million was authorised. In that decision, the Commission states, in particular, that it has checked, in accordance with Article 9(6) of the Code, whether the aid proposed was in conformity with the German plan which had been approved by Decision No 94/1070.

22 It is common ground that the aid covered by the contested decision was paid before it was authorised.

Background to the dispute and procedure

23 The applicant is a privately-owned mining company established in the United Kingdom of Great Britain and Northern Ireland, which took over the principal mining operations of British Coal. As the appearance of substitute energy sources and the increase in imports of coal from outside the Community have caused a large reduction in demand for coal in the United Kingdom — the applicant's 'traditional' market — since 1990, the applicant has attempted to find a market for some of its surplus production, in particular in Germany.

24 As the Commission made clear in its Mid-Term Report (COM(1998)288 final) of 8 May 1998, which was submitted to the Council pursuant to Article 10(2) of the Code and which dealt with experience in applying the Code ('the Mid-Term Report'), coal production in the Community fell, over the years from 1992 to 1996, from 184 million tonnes (1992) to 128 million tonnes (1996). In the United Kingdom, production fell from 84 million tonnes in 1992 to 50 million tonnes in 1996, while production in Germany fell from 72 to 53 million tonnes during the same period (p. 5 of the Report).

25 By application lodged at the Registry of the Court of First Instance on 20 July 1998, the applicant brought the present action against the contested decision.

26 By application lodged on the same day, the applicant brought a further action for annulment of three Commission decisions authorising the granting by the Kingdom of Spain of aid to the coal industry in respect of 1994 to 1996, 1997 and 1998. That action was registered under number T-111/98.

27 By separate documents, also lodged on 20 July 1998, the applicant requested the grant of interim measures in both cases (T-110/98 R and T-111/98 R).

28 By separate documents, lodged on 18 September 1998, the applicant applied for the adoption of certain measures of inquiry and of organisation of procedure in the two main actions. In particular, it requested that Article 55 of the Rules of Procedure be applied and that the cases be given priority on the ground that they concerned the very foundations of the ECSC State aid scheme in the coal sector and that the judgments to be given would also be relevant to future aid in that sector.

29 In its observations submitted on 15 October 1998, the Commission partially endorsed that point of view as to the appropriate procedure and proposed that the Court should treat certain questions of law raised by the actions as a matter of priority and give interlocutory judgments restricted to those questions.

30 Following those observations, the applicant stated, in faxes of 20 October 1998, that the measures of inquiry and of organisation of procedure which it had requested and the proceedings for interim relief would cease to be relevant if the Court were willing to give interlocutory judgments on the questions of pure law, which were the same in Cases T-110/98 and T-111/98, namely:

— whether the Commission is authorised by the Code to give *ex post facto* approval to aid which has already been paid without its prior approval; and

— whether the Commission has power under Article 3 of the Code to authorise the grant of operating aid provided only that the aid enables the recipient undertakings to reduce their production costs and achieve degression of aid, without their having any reasonable chance of achieving economic viability within the foreseeable future.

31 While awaiting agreement as to the procedure to be followed, the applicant, by fax of 22 October 1998, withdrew its applications for interim measures in Cases T-110/98 R and T-111/98 R.

32 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) accepted that the subject-matter of the proceedings should be restricted and the proceedings expedited, as requested by both parties. It decided to organise an informal meeting with the parties in order to discuss the future course of the proceedings.

33 At that meeting on 27 October 1998, the applicant stated that it would not lodge a reply in Case T-110/98 and the parties agreed, for the purpose of the present proceedings, to restrict their subject-matter to the two pleas in law referred to in paragraph 30 above, as expounded in the application and in the defence. As a result, the President informed the parties that they would have all the more time at the hearing to expand their arguments. Furthermore, pursuant to Article 77(c) of the Rules of Procedure, the parties submitted a joint request for a stay of proceedings in Case T-111/98, which is broadly similar to the present case.

34 By decision of 28 October 1998, the President fixed 15 December 1998 as the date for the hearing of oral argument in Case T-110/98.

35 By order of the President of 28 October 1998, proceedings in Case T-111/98 were stayed pending delivery of the judgment in Case T-110/98.

36 By orders of 28 October and 25 November 1998, the President granted the Federal Republic of Germany, the Kingdom of Spain and RAG Aktiengesellschaft leave to intervene in Case T-110/98 in support of the form of order sought by the Commission.

37 On 16 and 24 November and on 9 December 1998 respectively, the Kingdom of Spain, the Federal Republic of Germany and RAG Aktiengesellschaft lodged their statements in intervention.

38 At the hearing on 15 December 1998 the parties presented oral argument and answered the oral questions put by the Court of First Instance.

39 On that occasion, the Commission — which, in its defence to the application, had raised an objection of partial inadmissibility against the plea alleging infringement of Article 3 of the Code — stated that, in the context of the present proceedings restricted to questions of law, it was no longer contending that the unchallengeable nature of Decision 94/1070 precluded a challenge to the operational aid at issue which was part of the German multiannual plan for 1994 to 2002 and which had therefore been authorised once and for all by that decision.

Forms of order sought by the parties

40 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

41 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

42 The interveners submit that the Court should:

— answer the questions of law raised as follows: first, the Commission has the power under the Code of 1993 to authorise State aid even if that aid has already been paid before the decision of authorisation is adopted and, second, Article 3 of the Code does not require any statement relating to the viability of the undertaking concerned;

— as a result, dismiss the application.

Law

43 The Court finds, first of all, that the applicant has not challenged, in the present proceedings, either the legality of the Code of 1993 or the accuracy of the historical, economic and legal assessments made by the Commission in its communication of 27 January 1993 (see paragraph 3 above). As a result, the two pleas raised by the applicant will be considered in particular in the context of the applicable provisions of that code, taking account of that communication.

The plea alleging that the Commission lacked competence to authorise ex post facto *aid already paid*

Arguments of the parties

44 The applicant submits that, since the aid to which the contested decision relates was granted by the Federal Republic of Germany to the recipient undertakings before the date on which it was authorised, the Code of 1993 did not allow the Commission to approve it *ex post facto*.

45 In that regard, it states that, under Article 1(1) of the Code, aid granted to the coal industry may be considered Community aid and hence compatible with the proper functioning of the common market 'only if it complies with Articles 2 to 9'. That clear provision, it submits, makes the authorisation of State aid subject to mandatory compliance with, *inter alia*, Article 9 of the Code.

46 The applicant states that Article 9(1) of the Code lays down a general requirement of prior approval and provides for only one exception: that referred to in Article 9(4) which, however, is not applicable in this case.

47 The applicant submits that the inclusion in the Code of the special procedure under Article 9(4) means that it can be inferred, *a contrario*, that in other cases the Commission has no power to approve aid that has already been granted. If the

Commission had the power to approve aid that had already been granted, the whole prior notification procedure would be rendered worthless and the efficacy of the scheme of preventive control established in Articles 8 and 9 of the Code would be considerably weakened.

48 The applicant states that, as a derogation from Article 4(c) of the ECSC Treaty — which prohibits all State aid —, the Code, and in particular the phrase 'only if it complies with Articles 2 to 9' in Article 1(1) thereof, must be construed restrictively.

49 Furthermore, the wording of Article 1(1) of the Code, in so far as it imposes compliance with Article 9 as a precondition of any authorisation, has changed as compared with the text of the previous code on aid to the coal industry, namely Commission Decision No 2064/86/ECSC of 30 June 1986 establishing Community rules for State aid to the coal industry (OJ 1986 L 177, p. 1, 'the Code of 1986'). Article 1 of the Code of 1986 required only compliance with 'the general objectives and criteria set out in Articles 2 to 8', without referring to Articles 9 and 10 relating to the notification, appraisal and authorisation procedures.

50 The applicant concludes accordingly that the procedural scheme set up by the Code of 1993 was considerably strengthened as compared with that under the Code of 1986. The preamble to the Code of 1993 confirms that tendency to make the conditions for authorisation more rigorous, as is clear from the last paragraph of point IV in the preamble, according to which 'it is essential that no payment should be made, in whole or in part, before the Commission has given explicit authorisation'.

51 As to Article 9(5) of the Code, the applicant submits that that provision is applicable only in the context of the procedure under Article 9(4). As a result — and in the light of the last paragraph of the preamble to the Code —, paragraph 5

cannot be interpreted as conferring on Member States the right to pay aid before it is authorised.

52 The applicant accepts that in the sphere of the EC Treaty the Court of Justice has held that a failure to notify did not make aid unlawful *per se*, in the sense that failure to notify did not relieve the Commission from examining whether the aid was in fact compatible with the common market (Case C-301/87 *France* v *Commission* [1990] ECR I-307; hereinafter '*Boussac*'). The applicant states, however, that the Court of Justice reached that conclusion by analysing the powers and responsibilities of the Commission and the Member States (*Boussac*, paragraph 12). It is therefore essential to have regard to the powers and the responsibilities which the ECSC Treaty and the Code of 1993 allocate to the Member States and the Commission. In that context, the applicant submits that several factors distinguish the State aid scheme in the EC Treaty from that established by the ECSC Treaty.

53 First, the Court of Justice has held that the general prohibition in Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC) is neither absolute nor unconditional, since Article 92(3) confers on the Commission a wide discretion to exempt aid from it. On the other hand, under the fundamental rule in Article 4(c) of the ECSC Treaty, the grant of State aid is prohibited without qualification or condition. Unlike the EC Treaty, the ECSC Treaty therefore provides that the grant of State aid is *per se* unlawful.

54 Second, unlike Article 92 of the EC Treaty and Article 93 of the EC Treaty (now Article 88 EC), which provide a basis for analysing State aid, the Code of 1993 must be interpreted subject to Article 4(c) of the ECSC Treaty, that is restrictively, as a derogation from that article. Furthermore, having been adopted under Article 95 of the ECSC Treaty, the Code constitutes a limited and secondary legal basis for exemption of aid. The legal basis for exemption of aid is therefore prior authorisation.

55 Third, the Court of Justice pointed out that the Council had not yet adopted any regulation under Article 94 of the EC Treaty (now Article 89 EC) for the application of Articles 92 and 93 of the EC Treaty (*Boussac*, paragraph 14). However, in this case, the Code of 1993 establishes fixed and detailed conditions for exemption, such as should be found in a regulation for the application of those articles. On that point, the scheme laid down under the ECSC Treaty is therefore different from that under the EC Treaty. In particular, the specific and comprehensive nature of Article 9 of the Code precludes any automatic application of the solution adopted in *Boussac*. According to the applicant, those rules in the Code would become redundant in their entirety if the Commission were able to rely, in the sphere of the ECSC Treaty, on that decision.

56 The applicant observes, lastly, that the Court of Justice has held that the final sentence of Article 93(3) of the EC Treaty constitutes the means of safeguarding the machinery for review laid down by that article, which is essential for ensuring the proper functioning of the common market (*Boussac*, paragraph 17). It contends that this line of reasoning applies, *a fortiori*, to the much stricter sphere of the ECSC Treaty.

57 In support of its argument, the applicant relies on several decisions of the Court of Justice and the Court of First Instance.

58 First, it relies on the judgment of the Court of First Instance in Case T-150/95 *UK Steel Association* v *Commission* [1997] ECR II-1433, paragraphs 95 and 101, in which a Commission decision authorising State aid, pursuant to Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57, hereinafter 'the Fifth Steel Code'), was annulled on the ground that one of the substantive preconditions for the compatibility of that aid with the orderly functioning of the common market in respect of the environment had not been satisfied.

59 Second, it refers to the judgment of the Court of First Instance in Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, also concerning the Fifth Steel Code and in particular Article 1(1) and (3) thereof, according to which all aid provided for by that code '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', it being made clear that that aid 'may be granted only after the procedures laid down in Article 6 have been followed', '[t]he deadline for payments of [regional investment] aid falling under Article 5 [being] 31 December 1994'. The Court of First Instance held that, after the deadline of 31 December 1994, the Commission was no longer competent to approve the aid, on the ground that it was clear from the general scheme of the procedural provisions of the Fifth Steel Code that the Commission was to have a period of at least six months within which to give a decision on the planned aid notified to it and that the aid could be implemented only after it had been given prior approval. According to the applicant, the lesson to be drawn from that judgment for the present case is that prior approval must be regarded as a procedural condition which must be strictly observed.

60 Third, the applicant states that strict compliance with procedural conditions is also necessary in the sphere of block exemptions under Article 85(3) of the EC Treaty (now Article 81(3) EC), which, the applicant argues, can be compared to the procedural conditions forming the subject-matter of the present case. Thus the Court of Justice, in its judgment in Case C-234/89 *Delimitis* [1991] ECR I-935, paragraphs 39 and 46, and Advocate General Van Gerven in his Opinion in that case (p. I-955) emphasised the need for a strict interpretation of the conditions for such an exemption. The applicant submits that the same reasoning precludes the possibility of disregarding the words, in Article 1(1) of the Code 'only if it complies with Articles 2 to 9'. In that context, the applicant also refers to the judgment of the Court of Justice in Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229.

61 Finally, the applicant refers to the order in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, again concerning the Fifth Steel Code, in which the President of the Court of Justice emphasised the particular sensitivity of the

steel sector, the importance of the Member States' obligation to notify to the Commission their planned aid and the obligation to make all grants of aid subject to a prior decision of the Commission (paragraphs 53 to 55 of the order).

62 The Commission and the parties intervening in its support contend, on the contrary, that payment of aid does not prevent its later authorisation under the Code of 1993. The express wording of Article 9(5) of the Code acknowledges the possibility that aid can be paid before it is authorised and determines the effect of such a payment by providing that the amount of the aid must be repaid only 'in the event of refusal'.

63 They conclude that, in the event of an advance payment, the Commission is not only entitled, but is also under a duty, to examine the compatibility of the aid with the common market. That situation, which is subject to the ECSC Treaty, does not differ from that governed by the EC Treaty.

64 As regards the implications of *Boussac*, the Commission states that until that judgment was delivered it had considered that lack of notification gave rise, of itself, to recovery of aid without any further examination. However, *Boussac* shows that advance payment does not prevent authorisation of aid. If the Commission had wished to ensure that the position it had advocated in that case would prevail under the Code of 1993, it would have been necessary for it to have inserted in it a provision to that effect and for it to have given itself power to declare aid incompatible with the common market simply on the ground that it had not been notified. However, it merely provided, under Article 9(5), that advance payment should lead to repayment of aid, with interest, in the event of refusal.

Findings of the Court

65 It should be stated at the outset that no provision of the Code prohibits the Commission from examining the compatibility of planned aid with the common market, solely because the Member State which notified that planned aid has already paid it without waiting for prior authorisation.

66 It should next be borne in mind that, under Article 1(1) of the Code, aid 'may be considered Community aid and hence compatible with the proper functioning of the common market only if it complies with Articles 2 to 9'. The purpose of that provision is, by a global reference, to define as 'Community aid' those financial measures planned by Member States which comply 'with Articles 2 to 9' of the Code.

67 It is clear from a reading of Articles 2 to 9 of the Code that many of the provisions they contain do indeed concern the very attributes of the financial measures concerned. Thus, according to Article 2(1), those measures must be capable of helping to achieve certain objectives. Similarly, Articles 3 to 7 list several categories of aid which are, by definition, considered compatible with the common market.

68 However, Articles 2 to 9 also include some provisions of a procedural nature. Thus, the obligation for Member States to notify, each year, the global amount of aid actually paid during the preceding coal production year (Article 9(2)) has no impact on the question whether an individual financial plan exhibits features of a

nature such as to characterise it as Community aid. That finding is also true of the provisions which oblige the Commission to undertake certain specific reviews or to give opinions (the third subparagraph of Article 3(2), Article 8(2) and the first sentence of Article 8(3)).

69 It follows that the reference in Article 1(1) to Articles 2 to 9 of the Code concerns two kinds of provisions, namely substantive provisions, on the one hand, and procedural provisions, on the other. While provisions of the first kind, in so far as they relate to the attributes of aid, may determine once and for all its compatibility with the common market, the impact of those of the second kind on the assessment of aid depends, for each provision, on its function within the scheme of the Code.

70 In that respect, the aim of the provisions of Article 9 of the Code in aggregate is not to determine the attributes of aid, but to regulate the procedural arrangements for its notification, appraisal, authorisation and implementation.

71 It is, admittedly, incontrovertible that Article 1(1) of the Code of 1986 referred, for the definition of Community aid, only to the substantive provisions (Articles 2 to 8), while providing elsewhere that that aid was to be implemented in compliance with the procedural provisions (Articles 9 and 10). However, the mere replacement in the Code of 1993 of those two separate references by one global reference to substantive and procedural provisions combined cannot have the effect of converting procedural provisions into substantive provisions. In view of the foregoing, what is concerned here is merely a change in general presentation as compared with the previous code.

72 That analysis is borne out by the origin of the Code of 1993. The communication of 27 January 1993 (see paragraph 3 above), on the basis of which that code was

approved by the Council, contains nothing to suggest that the legislature's intention was to raise procedural provisions to the level of substantive provisions with the result that the substantive assessment of Community aid would thereafter be dependent on compliance with the formal requirements with respect to such aid.

73 On the contrary, according to that communication, the new code was not only to ensure the continuity of the Community's coal policy, but also to prepare for incorporation of the coal industry in the EC Treaty (p. 2). It may be concluded from that statement that it was not planned to abandon the distinction between substantive and procedural provisions, as incorporated in the Code of 1986 and in the system established by Articles 92 and 93 of the EC Treaty. Accordingly, it is logical that the actual wording of the Code of 1993, apart from the global reference analysed above, should preserve such a distinction.

74 As regards the legal effects of a breach of the procedural principle of prior authorisation, Article 9(5) of the Code provides that, '[i]n the event of refusal, any payment made in anticipation of authorisation from the Commission shall be repaid in full'. That provision, in so far as it makes the repayment of aid paid in anticipation expressly subject to the condition that the Commission must have refused authorisation, necessarily implies that the Commission has the power to grant authorisation.

75 Moreover, the applicant's argument that Article 9(5) covers only cases governed by Article 9(4) runs counter to the wording of paragraph 5, which is expressly applicable to 'any payment'. It is also at variance with the internal logic of Article 9, since the provision set out in paragraph 5 is the subject of a separate and autonomous paragraph within the scheme of that article and, specifically, does not form part of paragraph 4.

76 At a more general level, although the prohibition in Article 4(c) of the ECSC Treaty is formulated in stricter terms than that in Article 92 of the EC Treaty, the substantive and procedural provisions in the Code of 1993 and the system established by Articles 92 and 93 of the EC Treaty do not differ in principle. As a result, it would not be justified to interpret the provisions of the Code of 1993, in relation to Article 4(c) of the ECSC Treaty, more restrictively than paragraphs 2 and 3 of Article 92 of the EC Treaty in the light of paragraph 1 thereof.

77 The Court of Justice has held that breach of the procedural obligations referred to in Article 93(3) of the EC Treaty is not such as to relieve the Commission from the duty of examining the compatibility of aid in the light of Article 92(2) of the EC Treaty and that the Commission cannot declare that aid unlawful without checking whether or not it is compatible with the common market (see *Boussac*, paragraphs 21 to 23, and, more explicitly, Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 20; and Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *French State* [1991] ECR I-5505, paragraph 13).

78 That interpretation, which obliges the Commission to make an *ex post facto* assessment, necessarily means that the question whether it has the power to give *ex post facto* approval to aid paid prior to authorisation must be answered in the affirmative. In other words, nothing required the Commission to adopt, in this case, a more restrictive approach, in the matter of procedure, than that indicated in the case-law mentioned in the previous paragraph.

79 In the light of the particular features of the present case, which falls within the ambit of the scheme of aid to the coal industry, the lessons which the applicant seeks to draw from *Delimitis* and *Distillers Company*, relating to Article 85 of the EC Treaty and Article 86 of the EC Treaty (now Article 82 EC) and to block and individual exemptions, are irrelevant.

80 As regards the case-law relating to the Fifth Steel Code, which the applicant relies on in the present context, it should be pointed out that the steel sector is characterised by the competitiveness of the undertakings operating on the market. By contrast, the coal sector has been marked, since 1965, by the need of the Community's industry to obtain constant financial support and by the structural uncompetitiveness in that industry (communication of 27 January 1993, p. 2 et seq., in particular p. 9). The President of the Court of Justice indeed stated, in the order in *Germany* v *Commission*, cited above, paragraphs 54, 57 and 80, that the steel sector is particularly sensitive to interference in its competitive operation, since the purpose of the system of aid to that sector is to ensure the survival of successful undertakings and not to maintain undertakings which could not continue to exist under normal market conditions. Since the State aid regime in the steel sector is stricter than that in the coal sector, that case-law cannot be transposed to the present case.

81 As regards the judgment in *UK Steel Association*, it is sufficient to observe that the Court of First Instance annulled the decision contested in that case on the ground that the Commission had infringed one of the substantive provisions of the Fifth Steel Code and authorised aid which, in truth, could not be considered compatible with the proper functioning of the common market. What is concerned in the present case, on the other hand, is the application of the procedural provisions of the Code of 1993.

82 Finally, in *Preussag Stahl*, the Court of First Instance inferred from the limited nature of the period during which the aid at issue in that case could be considered compatible with the common market that the Commission's authorisation of that aid was also required to be given during that period (paragraphs 38 to 43). However, the aid at issue in this case may be considered Community aid, compatible with the common market, until 2002. As a result, the contested decision which granted authorisation of that aid in 1998 is in no way affected by the issues dealt with in *Preussag Stahl*.

83 For all the reasons set out above, the plea based on the Commission's alleged lack of competence to authorise *ex post facto* aid already paid, as formulated in paragraph 30, first indent, above, must be dismissed.

The plea of infringement of Article 3 of the Code of 1993

Arguments of the parties

84 As a preliminary point, the applicant submits that the State aid paid in Germany that has been authorised by the Commission, on the one hand, frustrates its attempts to gain access to the German market, and, on the other hand, has an artificial influence on world market prices, which prevents its production from becoming more competitive on the United Kingdom market and on the world market. It states that, after restructuring, without receiving any State aid, it has become very competitive and sells at prices close to the world average. However, it is exposed to competition from German undertakings which, as recipients of such aid, can offer prices lower than its own.

85 The applicant submits that, by approving operating aid under Article 3 of the Code without having examined the economic viability of each of the recipient undertakings, the Commission has infringed the ECSC Treaty and committed a manifest error. As is clear from Article 3(2) and Article 4 of, and the preamble to, the Code, it is necessary to distinguish between operating aid (Article 3) and aid intended to allow a cessation of production (Article 4). In accordance with Article 2(1), first indent, of the Code, only undertakings which can become viable in the foreseeable future may receive operating aid.

86 The applicant concludes from this that Article 3 of the Code precludes operating aid from being granted to undertakings merely because they plan to reduce their

production costs. Where there is no prospect of viability, the only possible aid is that under Article 4 of the Code, which is subject to the submission of a closure plan with a deadline for closure between now and 2002.

87 According to the applicant, that distinction of principle between Article 3 and Article 4 of the Code is borne out by the preamble thereto: under the 10th paragraph of point III of the preamble, it is only for undertakings which have no hope of making progress towards greater economic viability in view of coal prices on the world markets that aid arrangements should make it possible to mitigate the social and regional consequences of closures. According to the 11th paragraph of point III of the preamble, steps must be taken not only to create conditions for healthier competition but also to bring about a long-term improvement in the competitiveness of this industry throughout the Community in relation to the world market.

88 The applicant adds that its view is supported by the Commission's 'Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty' (OJ 1994 C 368, p. 12, hereinafter 'the Guidelines'). It refers, in particular, to paragraph 3.2.2(i), according to which the *sine qua non* of all restructuring plans is that they must restore the long-term viability and competitiveness of the undertaking within a reasonable timescale on the basis of realistic assumptions as to its future operating conditions. In that context, the applicant refers to the judgment in *UK Steel Association*.

89 Referring to the Guidelines, the applicant states that the concept of viability must be understood to refer not to the competitiveness of the undertaking concerned at the time when the aid was granted, but to its ability to reach, within a reasonable timescale and on the basis of realistic assumptions as to its future operation, a situation in which it is capable of competing on the world market in the long term on its own merits and without further aid. It refers, in addition, to the communication of 27 January 1993 (see paragraph 3, above). According to that

communication, the primary objective of the management of any coal undertaking should be its economic profitability and operating aid must help to render any subsidy unnecessary within two four-year periods (p. 20); operating aid should be understood to mean any aid intended for the current production of undertakings which are preparing to become economically viable in the long term.

90 The applicant then refers to the Mid-Term Report (see paragraph 24, above), in which the Commission states that operating aid is conditional on the obligation to make further progress towards economic viability in the light of coal prices on international markets, with the aim of degression of aid, which should imply that the undertakings receiving that aid 'must have hope of achieving a degree of competitiveness with imported coal' (p. 4 of the Report).

91 According to the applicant, the argument put forward by the Commission would produce bizarre results, since the most profitable mining undertakings in the Community would close, while those which have no chance of becoming competitive would continue to operate. Undertaking A which is already restructured and has rationalised its production, but which cannot reduce its production costs further, would, for that reason, not receive any operating aid, while undertaking B, whose production costs are actually much higher than those of undertaking A, could have such aid granted and authorised simply by showing that it has succeeded in reducing those costs, even if they are still much higher than those of undertaking A and even if it has no prospect of viability in the long term.

92 The applicant is opposed to any extensive interpretation of Article 3 of the Code in the terms advocated by the Commission. The general prohibition on State aid pursuant to Article 4(c) of the ECSC Treaty and the nature of the Code, as an exception adopted under Article 95 of that Treaty, show that if aid is to be capable of approval it must comply strictly with the conditions laid down by that code.

93 Consequently, any exception to the general rule in Article 4 of the ECSC Treaty, which prohibits State aid, must be necessary in order to attain one of the Community objectives laid down in Articles 2 to 4 of the Treaty, such as, *inter alia*, ensuring the most rational distribution of production at the highest level of productivity (Article 2), the establishment of the lowest prices (Article 3(c)) and the maintenance of conditions which will encourage undertakings to expand and improve their production potential (Article 3(d)).

94 Finally, a decision adopted under Article 95 of the ECSC Treaty, such as the Code of 1993, must also take into account Article 5 of the Treaty, pursuant to which the Community is to ensure, *inter alia*, the maintenance of normal conditions of competition and is to exert direct influence on production or upon the market only when circumstances so require.

95 In response to the applicant's preliminary observations, the Commission submits, without being contradicted on that point, that the applicant could, for its part, have applied for State aid, but that the United Kingdom, although it agreed to the adoption of the Code of 1993, has made a political choice not to pay any more aid to the British mining industry. In the Commission's submission it is therefore the policy implemented by its own government which is affecting the applicant's economic interests. The applicant is attempting to impose the effects of that policy on the undertakings of other Member States by means of legal proceedings.

96 As regards the substance of the action, the Commission and the parties intervening in its support contend that the criterion which the applicant advocates in order to establish whether operating aid may be authorised under Article 3 of the Code, namely 'the realistic prospect of becoming viable in the long term', is contrary to the explicit wording of Articles 2 and 3 of the Code and incompatible with the purpose of the Code as set out in the preamble thereto. Recognising that the objective of viability is difficult for coal mines to achieve,

since they are structurally uncompetitive, the Code merely requires that those mines be capable of reducing their production costs in order to achieve degression of operating aid. It is inconceivable that the Council would have assented to a condition which, according to the applicant's interpretation, would have meant that aid under Article 3 of the Code could not be granted in any Member State.

Findings of the Court

97 It should be stated at the outset that no provision in the Code states expressly that operating aid must be strictly reserved for undertakings with reasonable chances of achieving economic viability in the long term, in the sense that they must be capable of meeting competition on the world market on their own merits. It is thus by an interpretation of the relevant provisions of the Code that it is necessary to determine the scope of the notion of viability which is inherent in the scheme of operating aid, that is to say, according to generally accepted usage, aid intended to relieve an undertaking, either wholly or in part, of the expenses which it would itself normally have had to bear in connection with its day-to-day management or its usual activities (see, for example, Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 48).

98 Article 3(1) of the Code defines operating aid, by reference to its purpose, as aid 'to cover the difference between production costs and the selling price freely agreed between the contracting parties in the light of the conditions prevailing on the world market'.

99 Under Articles 3(2), 8 and 9(6) of the Code, read in conjunction, authorisation of operating aid is, in addition, subject to prior communication of a modernisation, rationalisation and restructuring plan which, under the first subparagraph of

Article 3(2), is designed 'to improve the economic viability of the undertakings concerned by reducing production costs'. The second subparagraph of that provision adds that the plan must provide for appropriate measures 'to generate a trend towards a reduction in production costs at 1992 prices, during the period 1994 to 2002'.

100 Those provisions do not require that the undertaking in receipt of aid achieve viability by the end of a fixed period. They require only that economic viability 'improve'. Article 2(1) of the Code, the first indent of which relates to operating aid under Article 3, also requires no more than the achievement of 'further progress towards economic viability' without attaching any precise deadlines to that condition.

101 The reason for that open-ended formulation is the economic reality on which the scheme of State aid to the Community's coal industry is based, namely the structural uncompetitiveness faced by that industry because most of its undertakings remain uncompetitive in relation to imports from third countries.

102 As is clear from the communication of 27 January 1993 (p. 2 et seq.), the Community coal sector has been characterised, since 1965, by permanent financial support in the form of State aid. The constant financial needs of the Community's coal industry also necessitated, therefore, the adoption of the Code of 1993. According to the graph set out in the communication of 27 January 1993 (p. 9), average national production costs between 1975 and 1991 were significantly higher than the average price of imported coal, which led the Commission to conclude that it 'clearly reveal[ed] that uncompetitiveness

remains a problem for the entire coal industry in the Community'. The Commission continued, in the same communication, that '[t]he coal industry in the Community remains dependent on State aid' (p. 17). Moreover, in its Mid-Term Report, the Commission noted the persistent lack of any medium- to long-term prospects of economic viability for the vast majority of the coal industry in the Community (p. 26 of the Report).

103 It follows that improvement in the economic viability of a given undertaking necessarily means no more than a reduction in the level of its non-profitability and its non-competitiveness. Furthermore, in its communication of 27 January 1993 (p. 21), the Commission states that setting a competitiveness target, based on reliable estimates of long-term trends on the world market, is a difficult exercise.

104 Although the applicant refers to the Commission's declaration, according to which the objective of phasing out operating aid should be achieved over two four-year periods (p. 20 of the abovementioned communication), that provisional timetable cannot be severed from the Community scheme of guide costs which the Commission proposed to introduce in order to speed up the phasing-out of operating aid. That scheme, which was more restrictive as regards authorisation of aid than that under Article 3 of the Code, was not approved by the Council. It follows that the two four-year periods relied on by the applicant are irrelevant in the context of the logic of Article 3 of the Code.

105 Next, it is necessary to examine the means, laid down by the Code, by which the objective of improving economic viability is to be achieved.

106 Under the first subparagraph of Article 3(2) of the Code, that improvement must be achieved 'by reducing production costs'. Thus, by expressly providing that that reduction must improve the 'viability' and not only the economic 'situation' of the undertakings concerned, the legislature expressed the idea that a reduction in production costs which is insignificant, or indeed purely symbolic, is not sufficient to justify authorisation of operating aid to those undertakings. It is not possible seriously to imagine an improvement in the competitiveness of the Community coal sector (11th paragraph of point III in the preamble to the Code) if the reduction in production costs is insignificant in economic and financial terms.

107 That finding is not contradicted by the second subparagraph of Article 3(2) of the Code which states that a 'trend' towards a reduction by the year 2002 is deemed sufficient. Although that wording does not preclude the possibility that an undertaking, in particular at the beginning of the period 1994 to 2002, may fail, during a given year, to reduce its production costs for overriding reasons, without thereby losing the right to obtain operating aid, an improvement in viability requires that such an undertaking effect a reduction in production costs which is commensurately more sustained in the following years.

108 Contrary to the Commission's argument, reducing production costs is not sufficient to justify authorisation of operating aid. Article 2(1) of the Code posits, furthermore, the principle that only aid which helps to achieve at least one of the objectives specified can be considered compatible with the common market. Moreover, Article 9(4) and (6) of the Code requires the Commission to check whether any aid planned is in conformity with those same objectives.

109 It is clear from the very wording of Article 2(1) of the Code that the three objectives listed correspond to particular categories of aid. The objective of making, in the light of coal prices on international markets, further progress

towards economic viability with the aim of achieving degression of aid (first indent) refers to operating aid under Article 3 of the Code. In the light of that correlation between objectives and categories of aid, the Commission's argument that it is sufficient to pursue, in granting operating aid, any of the three abovementioned objectives, in particular that relating to problems created by reduction in activity, must be rejected.

110 As regards the determination of the scope of the objective defined in Article 2(1), first indent, of the Code, the legal, economic and historical analysis which has just been carried out in regard to the interpretation of Article 3 of the Code remains valid. It follows that making 'further progress towards economic viability in the light of coal prices on international markets' is virtually synonymous with 'improving economic viability', in the sense in which that phrase has been construed above, provided that the financial advantages obtained from reducing production costs result in 'degression of aids'.

111 As a result, if it appears that a significant reduction in production costs makes it possible to achieve a degression of aid, the Commission is entitled to consider that the undertakings concerned are capable of improving their economic viability.

112 It follows that undertakings, whose production costs are such that no real progress towards economic viability, as defined above, can be expected, can receive only aid for reduction of activity under Article 4.

113 Those conclusions are not contradicted by the passages in the communication of 27 January 1993 and in the Mid-Term Report which are relied on by the applicant. In those documents the Commission insists on the principle that the notion of economic viability must be 'in line with the objectives and criteria laid down in the Decision', stating that 'to phase out the aid by cutting production costs [is] the *sine qua non* for improving the international competitiveness of the Community's coal industry' (pp. 20 and 18 of the communication of 27 January 1993) and that undertakings 'capable of attaining the cost-cutting target... could aspire to a degree of competitiveness in the long term' (p. 4 of the Mid-Term Report).

114 Similarly, in the light of the Court's above analysis of the relevant provisions of the Code, the Guidelines relied on by the applicant cannot justify a different result, particularly because point 2.2 of those Guidelines limits their scope in that they apply to the coal sector only to the extent that they are consistent with the special rules governing that sector.

115 Finally, those conclusions on the wording, context and purpose of Articles 2, 3 and 4 of the Code are not at variance with the restrictive construction of Article 4(c) of the ECSC Treaty advocated by the applicant. As pointed out above (paragraph 111), authorisation of operating aid is subject to the condition that the recipient undertakings have achieved a significant reduction in their production costs, making degression of that aid possible.

116 It follows that the plea of infringement of Article 3 of the Code, as formulated in paragraph 30, second indent, above, must be dismissed.

Costs

117 It is appropriate to reserve the costs.

On those grounds,

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

ruling, as requested by the parties, on two of the pleas relied on by the applicant, as formulated in paragraph 30 above,

hereby:

1. Declares that the plea based on breach of the alleged prohibition on giving *ex post facto* approval to aid paid without prior approval is unfounded;

2. Declares that the plea of infringement of Article 3 of Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry is unfounded;

3. **Dismisses the application in so far as it is based on those two pleas;**

4. **Invites the parties to state their views, within a period to be fixed by the President of the Court of First Instance, on the further steps to be taken in the proceedings;**

5. **Reserves the costs.**

Vesterdorf Bellamy Pirrung

Meij Vilaras

Delivered in open court in Luxembourg on 9 September 1999.

H. Jung B. Vesterdorf

Registrar President