JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
25 September 1997 *

In Case T-150/95,

UK Steel Association, formerly British Iron and Steel Producers Association (BISPA), an association constituted under English law, whose head office is in London, represented by John Boyce and Philip Raven, Solicitors, with an address for service in Luxembourg at the Chambers of Wagener & Rukavina, 10a Boulevard de la Foire,

applicant,

v

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

defendant,

supported by

Grand Duchy of Luxembourg, represented by Georges Schmit, Premier Conseiller du Gouvernement in the Ministry of the Economy, acting as Agent, assisted by Bernard van de Walle de Ghelcke and K. Platteau, of the Brussels Bar, 13A Rue Bréderode, Brussels, with an address for service at the Ministry of the Economy, 19-21 Boulevard Royal,

* Language of the case: English.

and

Arbed SA, a company incorporated under Luxembourg law, established in Luxembourg, represented by Alexandre Vandencasteele, of the Brussels Bar, with an address for service at the office of Paul Ehmann, Legal Department, Arbed, 19 Avenue de la Liberté,

interveners,

APPLICATION for annulment of the decision reproduced in Commission notice 94/C 400/02 pursuant to Article 6(4) of Decision No 3855/91/ECSC to other Member States and interested parties concerning aid which Luxembourg plans to grant to ProfilARBED SA (Arbed) (State Aid C 25/94 (ex N 11/94), OJ 1994 C 400, p. 10), finding that the aid which the Grand Duchy of Luxembourg planned to grant to ProfilARBED SA conformed to Article 3 of Decision No 3855/91 and was thus compatible with the common market,

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

composed of: R. García-Valdecasas, President, V. Tiili, J. Azizi, R. M. Moura Ramos and M. Jaeger, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 11 March 1997,

gives the following

Judgment

Legislative background

1 Article 4(c) of the ECSC Treaty provides:

'The 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 granted by States, or special charges imposed by States, in any form whatsoever;

...'.

2 Under the first paragraph of Article 95 of the ECSC Treaty, the Commission, with the unanimous assent of the Council and having consulted the Consultative Committee, adopted Decision No 257/80/ECSC of 1 February 1980 establishing Community rules for specific aids to the steel industry (OJ 1980 L 29, p. 5),

commonly referred to as 'the first steel aid code'. According to the second paragraph of Part I of the preamble to that decision, the prohibition in the ECSC Treaty on subsidies or aid granted by States applies only to measures constituting purely national steel policy instruments and not to aid aimed at setting up a Community steel policy, such as the restructuring of the steel industry, which was the aim of Decision No 257/80/ECSC.

3 The first steel aid code was subsequently replaced by successive codes, each establishing the rules applicable to State aid for the steel industry by laying down the criteria under which aid could be found compatible. Those codes further specified that aid to the steel industry financed by a Member State in any form whatsoever may be deemed Community aid and therefore compatible with the orderly functioning of the common market only if it satisfies the provisions of the code in question.

4 In 1991, Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57, hereinafter 'the Fifth Code') laid down the new relevant provisions concerning the grant of State aid in this field. The Fifth Code was applicable when the contested decision was adopted and remained in force until 31 December 1996. Since 1 January 1997, it has been replaced by Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ 1996 L 338, p. 42), which forms the sixth steel aid code.

5 The following provisions of the Fifth Code are relevant to the present case:

— the fourth paragraph of Part I of the preamble, which states that the aim of the rules laid down by the code is

'firstly not to deprive the steel industry of aid for research and development or for bringing plants into line with new environmental standards';

— the second paragraph of Part II of the preamble, which states:

'In order to ensure that the steel industry and other industries have equal access to aid for research and development, in so far as this is permitted by the Treaties, the compatibility of these aid schemes with the common market will be assessed in the light of the Community framework on State aid for research and development. As the provisions on aid for environmental protection are identical to those contained in the framework on State aid in environmental matters, they have not been changed. If the rules laid down by these two general frameworks were changed substantially during the term of validity of this Decision, a proposal for an amendment would be presented'; and

— Article 3, which provides:

'1. Aid granted to steel undertakings for bringing into line with new statutory environmental standards plants which entered into service at least two years before the introduction of the standards may be deemed compatible with the common market.

2. The total amount of aid granted for this purpose may not exceed 15% net grant equivalent of the investment costs directly related to the environmental measures concerned. Where the investment is associated with an increase in the capacity of the plant, the eligible costs shall be proportionate to the initial capacity of the plant'.

6 In the light of developments in the Council's approach to environmental policy, and in the absence of any Community rules laid down in that regard by the provisions of the EEC Treaty concerning State aid, the Commission decided in 1974 to adopt a communication concerning the Community framework on State aid in environmental matters. The aim of the communication was to inform the Member States of the general criteria which the Commission would use in applying Article 92 et seq. of the EEC Treaty to existing or planned aid granted by the Member States on the basis of specifically environmental requirements (hereinafter 'the EC framework' or 'the EC guidelines').

7 The EC framework on State aid in environmental matters applicable when the Fifth Code was adopted had been defined in Commission communication SG (80) D/8287 of 7 July 1980 ('the 1980 EC framework') and extended by Commission communication SG (87) D/3795 of 23 March 1987 ('the 1987 EC framework'). The latter communication specified the criteria required in order for aid for environmental protection in the EC context to be found compatible with the common market. Those criteria, laid down in point 3 of the communication of 23 March 1987, were as follows:

'3.2.1 Aid may be given at a rate not exceeding 15% of the value of the investment aided. The amount of aid will be calculated as a net after tax subsidy in accordance with the methods of evaluation used by the Commission and described in its communication to the Member States on regional aid systems.

3.2.2 Only undertakings having installations in operation for at least two years before entry into force of the standards in question may qualify for assistance.

3.2.3 Investments made in order to comply with the standards may consist in either installing additional equipment to reduce or eliminate pollution and nuisances or adapting production processes for the same purpose. In the latter case

any portion of investment leading to an increase in existing production capacity will not qualify for the proposed assistance.

3.2.4 The undertakings themselves must bear the entire cost of normal replacement investment and operating expenses.'

8 On 10 March 1994, new Community guidelines on State aid for environmental protection (94/C 72/03) were published in the *Official Journal of the European Communities* (OJ 1994 C 72, p. 3, hereinafter 'the 1994 EC guidelines'). Those new guidelines define the criteria applicable to aid in all the sectors governed by the EC Treaty and point 2.2 sets out the approach followed by the Commission in the assessment pursuant to Article 92 of the EC Treaty of State aid for certain purposes in the environmental field. They amended the 1987 EC framework in existence when the Fifth Code was adopted, stating *inter alia* that, in certain circumstances, firms which decide to replace existing plant more than two years old by new plant meeting new environmental standards may receive aid in respect of that part of the investment costs that does not exceed the cost of adapting the old plant (see the third paragraph of point 3.2.3. A of the 1994 EC guidelines).

9 On 14 March 1995, the Commission presented a proposal to the Council amending the Fifth Code, in the form of a communication entitled 'Request for Council assent and consultation of the ECSC Committee, pursuant to Article 95 of the ECSC Treaty, concerning a draft Commission decision amending Article 3 of the Steel Aid Code' (SEC (95) 315 final).

10 Paragraph 5 of that communication explains that the new 1994 EC guidelines, which replaced the former 1987 framework in force when the Fifth Code was adopted and to which the Fifth Code referred, differ in at least five major respects from the former guidelines and thus from the Fifth Code. Those five aspects are

listed in paragraph 5. Paragraph 5(b) points out, in connection with one of those aspects, that although, in keeping with the 'polluter pays' principle, no aid should in general be given towards the cost of complying with mandatory standards in new plant, the new EC guidelines, in the penultimate paragraph of point 3.2.3. A, 'specifically state that firms which, instead of simply adapting existing plant more than two years old, opt to replace it by new plant meeting the new standards may receive aid in respect of that part of the investment costs that does not exceed the cost of adapting the old plant'.

11 Paragraph 6 of that proposal concludes:

'Consequently, in order to comply more fully with the conditions laid down in the preamble to the Steel Aid Code, and in particular with the principle that the steel industry and other industries must have equal access to the aid in question, it is both necessary and appropriate that the Commission should decide to amend Article 3 of the Aid Code in the manner set out in the attached draft Decision'.

12 Article 1 of the draft decision attached to the Commission's communication reads as follows:

'Article 1

Article 3 of Decision 3855/91/ECSC is replaced by the following:

"Aid for environmental protection

Aid for environmental protection may be deemed compatible with the common market if it is in compliance with the rules laid down

in the Community guidelines in force on State aid for environmental protection"'.

13 That Commission proposal did not receive the assent of the Council.

Facts

14 By letter of 29 December 1993, the Grand Duchy of Luxembourg informed the Commission, pursuant to Article 6(1) of the Fifth Code, of a plan to grant aid to ProfilARBED SA in the context of the construction of a new steel plant at Esch-Schifflange, Luxembourg.

15 By letter of 5 April 1994, in response to a request from the Commission, the Grand Duchy of Luxembourg provided further information concerning the planned aid.

16 On 1 June 1994, pursuant to Article 6(4) of the Fifth Code, the Commission initiated a procedure against the planned aid (Commission Notice 94/C 212/07, OJ 1994 C 212, p. 7). Following the opening of that procedure, it received a number of comments, and those submitted by the applicant, then named the British Iron and Steel Producers Association (BISPA), by British Steel plc and by the United Kingdom of Great Britain and Northern Ireland were forwarded to the Luxembourg Government to allow it to reply.

17 By letter of 17 November 1994, the Grand Duchy of Luxembourg submitted to the Commission its views on the comments made by BISPA, British Steel plc and the United Kingdom.

18 By letter of 19 December 1994, the Grand Duchy of Luxembourg informed the Commission that it was prepared to set the aid ceiling at 15% of the eligible investment, in accordance with the Community guidelines on aid for environmental protection.

19 On 31 December 1994, the Commission adopted the decision reproduced in its notice 94/C 400/02 pursuant to Article 6(4) of Decision No 3855/91/ECSC to other Member States and interested parties concerning aid which Luxembourg plans to grant to ProfilARBED SA (Arbed) (State Aid C 25/94 (ex N 11/94), OJ 1994 C 400, p. 10, 'the contested decision'). In that decision, the Commission terminated the procedure initiated on 1 June 1994 concerning that aid for environmental protection, without raising any objection. It found that the aid conformed to Article 3 of the Fifth Code and was thus compatible with the common market.

20 The contested decision authorizes payment of aid not exceeding LFR 91 950 000 to the Luxembourg steel undertaking ProfilARBED SA (Arbed), a wholly-owned subsidiary of Arbed SA, a public limited company incorporated under Luxembourg law. The aid in question represents 15% of the LFR 613 000 000 which Arbed has committed to spending on environmental protection in connection with the construction of a new electric steel plant in the Esch-Schifflange steel complex. The new steel plant will replace the existing LD-AC plants, which do not comply with the new Luxembourg environmental protection standards.

21 The applicant, named BISPA when it brought the action and now the UK Steel Association, is an association established in London representing United Kingdom undertakings which produce iron and steel products of the kind defined in Annex I to the ECSC Treaty and supply those products within the Community.

22 Although the issue of the Official Journal in which the contested decision is reproduced bears the date 31 December 1994, it was not in fact available from the Office for Official Publications of the European Communities until 27 May 1995.

Procedure and forms of order sought

23 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 19 July 1995.

24 By applications lodged on 21 December 1995, the Grand Duchy of Luxembourg and Arbed SA, the parent company of the recipient of the aid in issue, sought leave to intervene in support of the defendant.

25 By orders of the President of the Fifth Chamber, Extended Composition, of 1 March 1996, the Grand Duchy of Luxembourg and Arbed SA were granted leave to intervene in support of the form of order sought by the defendant.

26 The interveners' statements in intervention and the observations of the main parties on those statements were lodged on 9 April and 3 June 1996 respectively.

27 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber, Extended Composition) decided to take measures of organization of procedure under Article 64 of the Rules of Procedure by requesting the Commission to answer a written question, and to open the oral procedure.

28 In response to that request from the Court, the Commission indicated on 19 September 1996 that the proposal to amend the Fifth Code had not yet received the assent of the Council but that it had none the less submitted new draft Community rules for aid to the steel industry (sixth code) to replace the Fifth Code, and appended a copy thereof to its response. It drew attention to the fact that Article 3 of the draft sixth code was substantially similar to Article 3 of the proposed amendment. Under the draft, the 1994 EC guidelines would be automatically applicable to aid to the steel industry.

29 The abovementioned proposal did not receive the assent of the Council. Under the final text of the sixth steel aid code, adopted by Commission Decision No 2496/96/ECSC of 18 December 1996 (OJ 1996 L 338, p. 42), with the unanimous assent of the Council, the provision in the EC guidelines relating to aid for the steel industry is not to be applied automatically in the ECSC sector but criteria are laid down for the application of those guidelines in the ECSC sector.

30 The parties presented oral argument and replied to the questions put to them orally by the Court at the hearing on 11 March 1997.

31 The applicant claims that the Court should

— annul the contested decision; and

— order the defendant to pay the costs.

32 The Commission contends that the Court should

— dismiss the application; and

— order the applicant to pay the costs.

33 The Grand Duchy of Luxembourg claims that the Court should

— dismiss the application; and

— order the applicant to pay the costs, including those of the intervener.

34 Arbed claims that the Court should

— dismiss the application; and

— order the defendant *(sic)* to pay the costs of its intervention.

35 The oral procedure was closed by decision of the President of the Fifth Chamber, Extended Composition, on 25 March 1997.

The section of the contested decision entitled 'The Commission's assessment'

36 In the first paragraph of the section of the contested decision entitled 'The Commission's assessment', the Commission begins by recalling the terms of Article 3(1) of the Fifth Code. It goes on, in the second paragraph, to note that the aid envisaged is intended for the replacement of old plant by new facilities meeting the new Luxembourg environmental protection standards. The contested decision points out that the investment costs necessary to achieve such compliance would have been considerably higher if the existing facilities had been retained.

37 In the third paragraph, on the basis that 'Part II of the preamble to the steel aid code lays down the principle that the steel industry and other industries must have equal access to aid for environmental protection', the Commission derives the principle that 'the same provisions of Community legislation regarding aid for environmental protection should be generally applicable to all firms, whether steel firms or not' and goes on to conclude at the end of the same paragraph that 'unless otherwise provided for, the same principles of interpretation should be applicable to all forms of aid for environmental protection'.

38 Then, in the fourth paragraph of this part of the contested decision, the Commission points out that the Community guidelines on State aid for environmental protection make it possible to authorize aid to firms which, 'instead of simply adapting existing plant more than two years old, opt to replace it by new plant meeting the new standards ...'. It notes, in the following paragraph, that 'it would seem quite feasible to extend this general principle, as laid down in the aforementioned guidelines, to the steel aid code provided that it does not run counter to the wording of Article 3 of [that code]'.

39 The Commission then examines, in the sixth paragraph, whether the aid envisaged meets all the conditions set out in the Community guidelines, and concludes that it does, including the ceiling of 15% gross of the investment (seventh paragraph).

40 The contested decision concludes, in the ninth and tenth paragraphs, as follows: 'Accordingly, the Commission considers that it is possible, under Article 3(1) of the State aid code, to consider as compatible with the common market aid not exceeding 15% gross granted to firms which, instead of bringing into line with new environmental standards plants which entered into service at least two years before the introduction of the standards, decide to replace them by new facilities meeting the new standards provided that the aid does not exceed that which would have been granted for adapting the old steelworks. Since the aid conforms to Article 3 of [the Fifth Code], it may therefore be considered compatible with the common market.

The Commission has therefore decided to terminate the procedure initiated in respect of the aid granted to ProfilARBED for environmental protection'.

Substance

The single plea in law alleging infringement of the ECSC Treaty or any rule of law relating to its application, in particular Article 3(1) of the Fifth Code

41 The applicant puts forward a single plea in law in support of its application, alleging infringement of the ECSC Treaty or any rule of law relating to its application, in particular in that the contested decision contravenes Article 3(1) of the Fifth Code. It submits, essentially, that the aid authorized is intended for the construction of new plant complying with the new environmental protection standards rather than for the adaptation of existing plant to meet those standards.

42 In the light of the arguments put forward by the parties, the question whether the construction of a new electric arc furnace at Esch-Schifflange to replace the old LD-AC furnace is to be regarded as an adaptation of old plant to meet the new standards or the construction of new plant must be considered separately as a preliminary issue.

Whether the construction of a new electric arc furnace at Esch-Schifflange to replace the old LD-AC furnace is to be regarded as an adaptation of old plant to meet the new standards or the construction of new plant

Arguments of the parties

43 The interveners submit in their statements in intervention that the work in the present case does not involve constructing new plant meeting the new environmental protection standards but adapting existing old plant to meet those standards. The aid in issue therefore meets the criteria laid down by Article 3(1) of the Fifth Code and is thus compatible with the common market.

44 The Grand Duchy of Luxembourg explains that the plant in question comprises the liquid phase in the Esch-Schifflange steel production complex, the liquid phase being an integrated production tool composed of a ladle furnace, a steel furnace and two continuous casting units, with the steel furnace and the continuous casting units being unable to operate independently. The contested aid was intended for the replacement of the steel furnace — which was originally of the LD-AC oxygen-based design — by an electric arc furnace. The Grand Duchy emphasizes that the only part of the liquid phase to have been replaced is the steel furnace, a tool which cannot be viewed in isolation and which is only one of the sections in an integrated production complex for the manufacture of semi-finished steel products. Thus, despite the replacement of the steel furnace, the plant itself has remained in place and only been modernized.

45 Arbed too submits that the construction of a new electric arc furnace in the Esch-Schifflange complex does not amount to the construction of new plant but must be regarded as a modernization of that complex.

46 The applicant challenges that argument, stressing that it has been put forward by the two interveners, but not raised by the Commission. The applicant submits, in substance, that the Grand Duchy of Luxembourg had presented the same argument to the Commission following notification of the proposal to grant aid but that the Commission had rejected it in the contested decision.

47 That argument, the applicant submits, questions the legality of the contested decision. It is, however, well established under Article 33 of the ECSC Treaty that the grounds on which a decision may be challenged are confined to those susceptible to judicial, not economic, review (Joined Cases 154/78, 205/78, 206/78 226/78 to 228/78, 263/78, 264/78, 30/79, 31/79, 83/79 and 85/79 *Ferriera Valsabbia and Others* v *Commission* [1980] ECR 907, paragraph 11) and that the Commission has a discretion in the assessment of the facts. The applicant considers that in the absence of any allegation that the Commission misused its powers or made a manifest error, the Court's examination may not extend to the evaluation of the situation resulting from economic facts or circumstances.

48 The applicant concludes that the interveners' argument is irrelevant to the present proceedings and inadmissible.

49 It points out, furthermore, that, as is clear from the explanations appended to its observations on the statements in intervention, the aim of Arbed's planned investment was to replace the present production process, based on the traditional 'molten iron route' in which basic oxygen, or LD-AC, converters are used, by an electric arc process, which would enable Arbed to use scrap steel as its main raw material and no longer be dependent on iron ore and coking coal, which were traditionally mined in the vicinity of the Esch-Schifflange steel complex but supplies

of which will soon be exhausted. The applicant stresses that, without such a replacement, Luxembourg's geographical position would have entailed an increase in Arbed's production costs due to the incorporation of the transport costs for the raw materials. The replacement of the old LD-AC furnace by the new electric arc furnace, which is the essential element of the new production process, cannot be regarded as an adaptation of an existing production process but must be regarded as the replacement of one process by another. Finally, the applicant points out that the existing LD-AC plant will be definitively shut down by the end of 1997 once the changeover between production processes has been completed, as stated by Arbed in its newsletters, appended by the applicant to its observations on the statements in intervention.

Findings of the Court

50 In the light of the specific circumstances of the case and of the fact that the arguments put forward by the interveners as to whether or not the purpose of the aid in issue was to adapt existing plant are closely bound up with the applicant's single plea in law alleging infringement of Article 3(1) of the Fifth Code, the Court considers it appropriate to examine the interveners' arguments, without there being any need to rule on their admissibility.

51 According to the contested decision (see paragraph 36 above), the aid in issue is intended for the replacement of old plant by new facilities meeting the new Luxembourg environmental protection standards.

52 In the penultimate paragraph of the section of the contested decision entitled 'The aid in question', the Commission states: 'In view of the heavy investment needed to bring the existing LD-AC steel plants into line with the environmental protec-

tion standards and in order to avoid losing much of that investment when the existing steel plants are replaced, Arbed decided to speed up the programme for replacing its steel mills by facilities meeting the environmental protection requirements. The cost of Arbed's investment in environmental protection for the new steel plant totalled Lfrs 613 million'.

53 At a further stage in its analysis, in the second paragraph of the section entitled 'The Commission's assessment', it states: 'It transpires that, rather than adapting its old plant to the new provisions, Arbed decided to speed up its programme of replacing old plant [by new] facilities meeting the new standards. The electric steel plant is the replacement, conforming to the new standards, for the old LD-AC steel plants, which were built in the 1960s and 1970s. Assuming the existing facilities are retained, the estimated total investment cost to Arbed would have been Lfrs 1.5 billion, of which Lfrs 750 million for primary dust extraction (Lfrs 150 million for a converter upstream of the dry electrostatic filter and Lfrs 600 million for a new furnace chimney-stack) and Lfrs 750 million for secondary dust extraction in the steel plant. Consequently, the investment costs connected with environmental protection will not exceed the amounts that would have been involved in adapting the old plant'.

54 It is also clear from the documents before the Court that the Grand Duchy of Luxembourg notified the planned aid in the context of investment intended to speed up the programme for replacing the existing steel plant facilities. The Luxembourg Ministry of the Economy sent the Commission a memorandum dated 29 December 1993, forwarded by letter from the office of the Permanent Representative of the Grand Duchy of Luxembourg of 30 December 1993 and headed 'Memorandum concerning investments for environmental protection made by ProfilARBED SA in the context of the installation of an electric arc furnace at Esch-Schifflange', the first paragraph of which refers to 'the construction of a new electric arc furnace at Esch-Schifflange'.

55 That representation is corroborated by a letter of 31 March 1994 from the Luxembourg Ministry of the Economy, forwarded to the Commission by letter from the office of the Permanent Representative of the Grand Duchy of Luxembourg of 5 April 1994, which specifies, in the last paragraph on page 2: 'In the light of the major investment costs entailed by bringing the existing LD-AC furnaces into line with the environmental protection standards and in order to avoid losing a large part of that investment when the existing furnaces are replaced over the next few years, ProfilARBED has decided to speed up the programme for replacing its steel plant by facilities reflecting current technology as regards both steel production and environmental protection'.

56 Arbed further stated at the hearing that the new electric arc furnace was the most important, although not the only, element of the complex.

57 In reply to a question put by the Court at the hearing, the Grand Duchy of Luxembourg also confirmed that, whilst the production process set up using the existing basic oxygen or LD-AC plant can use up to 30% to 40% scrap as raw material, the electric arc production process resulting from the investment for which the aid is intended makes it possible to use 100% scrap as raw material. It is therefore clear that both the production process and the composition of the raw materials have in fact changed as a result of the investment for which the aid was intended.

58 It must further be noted that the applicant has asserted, without being contradicted by either the interveners or the Commission, that the existing LD-AC plant will be definitively shut down by the end of 1997. The replacement of existing plant to be covered by the investment for which the aid was intended will therefore have been completed by that date.

59 In the light of all the foregoing, the Court considers that the importance of the facilities replaced, the scale of the changes to the production process and the substantial change in the composition of the raw material following completion of the investment for which the aid was intended amount to more than the adaptation of existing facilities. The Commission could thus rightly conclude, in the contested decision (see paragraphs 51 to 53 above), that the investment for which the aid was intended consisted not in adapting old facilities to meet new requirements but in replacing old plant by new facilities meeting the new environmental standards.

60 The interveners' argument on this point is therefore unfounded.

Infringement of Article 3(1) of the Fifth Code

Arguments of the parties

61 The applicant states that the interpretation set out in the contested decision that Article 3(1) of the Fifth Code (see paragraph 5 above) allows aid to qualify as environmental aid when it is to be used for the *construction of new plant* is contrary to the plain and unambiguous wording of that article, which refers only to aid for bringing into line with new statutory environmental standards *plant which entered into service at least two years* before the introduction of the standards.

62 In the applicant's submission, the Commission deduced from the second paragraph of Part II of the preamble to the Fifth Code (see paragraph 5 above) that the rules in the EC guidelines relating to State aid could be applied automatically in the ECSC sector. Such automatic application, it submits, constitutes an infringe-

ment of the Fifth Code, since it runs counter to Article 3 and to the very wording of the second paragraph of Part II of the preamble, which expressly requires a proposal for an amendment to be presented in the event of a divergence between the EC guidelines and the Fifth Code, as has happened in the present case. It points out that such a proposal was presented by the Commission after the adoption of the contested decision and states that, in presenting that proposal, the Commission has recognized that its broad interpretation of Article 3(1) of the Fifth Code was legally flawed.

63 The applicant further submits that the Commission's broad interpretation of Article 3(1) of the Fifth Code is contrary to the provisions applicable to State aid in the ambit of the ECSC and to the principles underlying them.

64 It points out that the provisions concerning State aid in the ECSC Treaty differ from those in the EC Treaty. Whilst Article 4(c) of the ECSC Treaty provides that all subsidies or aids granted by States in any form whatsoever are to be prohibited, Article 92 of the EC Treaty allows aid to be granted from public sources in the circumstances therein defined.

65 Due to the severe problems faced by undertakings operating within the ECSC, the applicant states, the Commission adopted, in accordance with the very rigorous procedure laid down in Article 95 of the ECSC Treaty, a derogation from the general principle that aid is prohibited in the ECSC field, in the form of the first steel aid code, subsequently replaced by various successive versions.

66 The applicant concludes that the steel aid code must be interpreted narrowly and by reference only to its express wording, because it is an overriding principle of law that derogations from a Treaty principle should be interpreted strictly.

67 The Commission points out, first of all, that the applicant does not contest that the aid was in line with the 1994 EC guidelines. Nor, it stresses, does the applicant contest that the costs for adapting the existing plant to the new environmental standards would have been significantly higher than the expenditure necessary for the new plant to comply with those standards and that consequently the maximum aid that could have been approved on the basis of Article 3(1) of the Fifth Code was significantly more than the aid approved in the contested decision.

68 As regards the applicant's claim that it followed an excessively broad interpretation of Article 3 of the Fifth Code, the Commission replies that this was not the case but that, on the contrary, it interpreted it in line with the purpose of the Fifth Code and its obligations under the ECSC Treaty.

69 The Commission submits that the contested decision is entirely consistent with the wording and purpose of Article 3(1) and of the Fifth Code in general, as it provides for the most efficient solution to bring the recipient's production into line with the new environmental standards. A proper understanding of the terms of Article 3(1) of the Fifth Code requires an examination of the wider background to the purpose of the code as well as a full appreciation of the growing importance of environmental concerns in the application of Community policy. It maintains that, in taking the contested decision, it acted in line with Article 3(d) of the ECSC Treaty, which requires it to ensure, in the common interest, the maintenance of conditions which will encourage undertakings to expand and improve their production potential and to promote a policy of using natural resources rationally, avoiding their unconsidered exhaustion. The Commission concludes that the ECSC Treaty itself obliges it to take action to protect the environment in the common interest.

70 The Commission points out that the Single European Act strengthened the importance of the Community powers in the environmental field. In particular, the last line of the first subparagraph of Article 130r(2) of the EC Treaty provides: 'Environmental protection requirements must be integrated into the definition and implementation of other Community policies'.

71 The Commission notes that the purpose of Article 3(1) of the Fifth Code coincides with the corresponding provision in the 1994 EC guidelines. In its view, the reference in the preamble to the Fifth Code to the two general frameworks on State aid (the EC framework and the ECSC framework, the latter being established by the Fifth Code itself) confirms that the steel industry and other industries are to be given equal treatment with regard to aid for environmental protection.

72 The Commission explains that the principles underlying the rules in the Fifth Code on State aid for environmental protection, which have not been changed, are even better explained in Part II of the preamble to the fourth code, which states: 'It would be unjustified ... to deny the Community steel industry aid ... for bringing plants into line with new environmental standards. Aid for these purposes which is in the public interest and satisfies the conditions laid down in this Decision should be available to the steel industry, just as similar aid is permitted to other industries under Article[s] 92 and 93 of the EEC Treaty'.

73 The Commission submits that it is possible to grant aid to firms which, instead of simply adapting existing plant more than two years old, opt to replace it by new plant meeting the new standards, and states that such an interpretation is confirmed by Article 3(2) of the Fifth Code. That provision sets a ceiling of 15% net grant equivalent of the investment costs directly related to the environmental measures concerned and expressly states that where the investment is associated with an increase in the capacity of the plant, the eligible costs are to be proportionate to the initial capacity of the plant.

74 The Commission considers that the facts do not support the applicant's argument that the proposal presented to the Council confirms that the Commission's

interpretation of Article 3(1) is flawed. It maintains that, whilst it set out in its request for Council assent the differences in wording between the Fifth Code and the EC guidelines, that is because it considers that the proposed amendment would be of a confirmatory nature, increasing the transparency of the Fifth Code without, however, modifying its substance and meaning.

75 The Commission states that it also took into consideration the specific environmental benefits provided by the planned investment, having regard to the stringency of the Luxembourg standards, and the fact that the amount of aid was smaller than it would have been had the facilities been adapted. It submits that it would have been against the spirit of the Fifth Code to punish a Member State which imposes higher environmental standards than other Member States.

76 The Commission also points out that, 'infringement of this Treaty' being one of the grounds for annulment provided under Article 33 of the ECSC Treaty, this cannot involve a review of the merits of the economic analysis on which the contested decision is based, since the grounds on which a decision may be challenged are expressly confined in Article 33 to those susceptible to judicial, not economic, review. It submits that, in the context of reviewing the legality of decisions based on Article 95 and the Fifth Code, such review must be confined to examining whether it has committed a manifest error in its appreciation of the necessity of the aid authorized for the furtherance of the aims of the Treaty.

77 The Grand Duchy of Luxembourg points out that Article 3 of the Fifth Code lays down three conditions to be met before aid can be declared compatible with the orderly functioning of the common market: (i) the aid must be granted for bringing existing plant into line with new environmental standards; (ii) the plant in question must have been in service for at least two years; and (iii) the aid must not exceed 15% net of the amount of the investment. In the Grand Duchy's opinion, those three conditions are met in the present case.

78 The first condition — that the aid must be granted for bringing existing plant into line with new environmental standards — is met in the present case, the Grand Duchy of Luxembourg notes, following the adoption of two ministerial decrees laying down the operating conditions imposed on ProfilARBED SA, relating in particular to dust and noise emissions.

79 The Grand Duchy also considers that the second condition — that the plant in question must have been in service for at least two years — is met. The plant in question here is that of the liquid phase of the Esch-Schifflange production complex comprising, in addition to the liquid phase, a walking beam furnace and two rolling mills, and it is not in dispute that the production complex was in existence over two years before the new environmental standards entered into force.

80 As regards the third condition — the ceiling of 15% net of the investment — the Luxembourg Government submits that the aid as approved by the Commission falls far below the upper limit set in Article 3(2) of the Fifth Code, since it amounts to 15% gross of ProfilARBED SA's investment, whereas Article 3 imposes a ceiling of 15% net, which is equivalent to some 25 to 30% gross.

81 The Grand Duchy of Luxembourg further points out that the wording of Article 3 of the Fifth Code is identical to that of the 1987 EC framework, which was applicable when the Fifth Code was adopted. It adds that, unlike the Fifth Code, that framework does not refer exclusively to plant but also refers to the installation of additional equipment and the conversion of production processes. The provisions of the Fifth Code, it submits, being based on the concept of equal access to aid for environmental protection irrespective of the sectors in which the undertakings concerned operate, must be interpreted in the light of the EC framework. Aid may be granted, therefore, for adapting a production process. In the present case, the investments made by ProfilARBED SA led specifically to a modification of the production process.

82 Arbed submits that the only question open to interpretation as regards Article 3(1) of the Fifth Code is whether there is any limitation on the extent of the modernization necessary for the plant to meet the new environmental protection standards. As long as the aid authorized contributes to the achievement of the objective pursued by Article 3 of the Fifth Code, it considers, there is nothing in that article to require the Commission to take into account the nature and extent of the modernization.

83 Arbed therefore submits that, even if the replacement of the LD-AC steel converters by electric arc furnaces is regarded as the replacement rather than the adaptation of existing plant, the Commission correctly applied the Fifth Code when it considered that such replacement was covered by Article 3(1).

84 Arbed also challenges the alleged need for a formal amendment of the Fifth Code to bring it into line with the evolution of the regime for environmental aid under the EC Treaty since, when the Fifth Code was adopted, the Community (EC) rules on environmental protection already made it possible to authorize State aid granted to undertakings for adapting their existing activities to new environmental standards, the only condition required being the existence of a polluting activity for at least two years before the entry into force of those standards, as was made clear in the 1974 EC framework and confirmed in the 1987 EC framework.

85 Arbed also submits that the applicant's reasoning concerning the alleged need for a narrow interpretation of Article 3(1) of the Fifth Code fails to take account of the specific nature of the ECSC Treaty and its limited scope. In its view, when Article 4(c) of the ECSC Treaty prohibits subsidies or aids granted by States or special charges imposed by States in any form whatsoever, this must be understood, in view of the limited scope of the Treaty, as referring to aid to production and/or distribution and cannot concern aid for environmental protection, since environmental policy is not covered by the ECSC Treaty. Arbed points out that it is

precisely because environmental policy is not covered by the ECSC Treaty that the Commission was entitled to rely on the first paragraph of Article 95 of the ECSC Treaty to adopt Article 3 of the Fifth Code, since that paragraph applies only to 'cases not provided for in this Treaty'. If the rules laid down by the steel aid codes had constituted a derogation from Article 4 of the ECSC Treaty, as the applicant maintains, the Commission would have had to rely on the third paragraph of Article 95.

86 The applicant rejects Arbed's argument: the reason the Commission was entitled to rely on the first paragraph of Article 95 of the ECSC Treaty to propose a decision authorizing the payment of aid for environmental purposes to steel undertakings was that the granting of State aid to steel producing undertakings is not provided for in the ECSC Treaty. The applicant concludes that Article 3(1) of the Fifth Code is a derogation from Article 4 of the ECSC Treaty and is thus subject to a regime requiring a narrow interpretation.

Findings of the Court

87 It is necessary to examine whether the assumption underlying the contested decision, that Article 3(1) of the Fifth Code allowed aid to be granted for replacing existing plant by new facilities meeting environmental protection standards, is correct in the light of the wording, context and purpose of that article.

88 As regards wording, Article 3(1) refers only to 'bringing into line with new ... standards plants which entered into service at least two years before the introduction of the standards'. A purely literal interpretation of Article 3(1) therefore excludes any investment not intended to bring facilities already in service into line with new standards by, for example, replacing them by new facilities, even if they meet the environmental protection standards.

89 The Commission expressly found in the contested decision that in this case existing plant was not being adapted but was being replaced by new facilities. It has submitted, however, that an interpretation of Article 3(1) in the light of its context and purpose leads to the conclusion that such a possibility is consistent with Article 3(1).

90 That reasoning must therefore be examined to determine whether it is well founded.

91 On the basis of the principle set out in Part II of the preamble to the Fifth Code, that the steel industry and other industries must have equal access to aid for environmental protection, the contested decision states, in the third paragraph of the section entitled 'The Commission's assessment', that the same provisions of Community legislation regarding aid for environmental protection should be generally applicable to all firms, whether steel firms or not.

92 It goes on to note, in the fourth paragraph of that section, that the Community guidelines on State aid for environmental protection, published in the Official Journal C 72 of 10 March 1994, expressly stipulate that firms which, instead of simply adapting existing plant more than two years old, opt to replace it by new plant meeting the new standards may receive aid in respect of that part of the investment costs that does not exceed the cost of adapting the old plant.

93 Finally, in the fifth paragraph of the same section, the contested decision notes that it would seem quite feasible to extend this general principle, as laid down in the EC guidelines, to the steel aid code provided that it does not run counter to the wording of Article 3 of the Fifth Code, and concludes in the ninth paragraph that the aid in question is compatible with the common market.

94 That reasoning cannot be upheld.

95 Firstly, the Fifth Code introduced rules which allow aid to be granted to the steel industry in a limited number of specified cases, and Article 1(1) thereof posits the principle that such aid 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. The compatibility of aid must therefore be assessed in the light of those provisions.

96 Secondly, the automatic application of the EC guidelines to the steel sector is not provided for in the Fifth Code. Such automatic application cannot be inferred from the principle stated in the preamble to the Fifth Code, that the steel industry and other industries must have equal access to aid for environmental protection. That preamble merely notes that the rules governing aid for environmental protection laid down by the two frameworks were identical at the time when the Fifth Code was adopted. However, the second paragraph of Part II of the preamble (see paragraph 5 above) states that it would be necessary to present a proposal for an amendment to the Fifth Code if the rules laid down by the two general frameworks were changed substantially during the term of validity of the Fifth Code. The application of the EC guidelines to the steel sector is therefore not automatic.

97 Thirdly, the EC framework in force when the Fifth Code was adopted — the EC framework adopted in 1980 and extended in 1987 — was in fact amended in 1994. The penultimate paragraph of point 3.2.3. A of the new guidelines provides for the possibility of granting aid for investment intended to replace existing plant by new plant. That possibility was not expressly provided for in the 1987 EC framework, which was in force when the Fifth Code was approved.

98 The eventuality envisaged in the second paragraph of Part II of the preamble to the Fifth Code has therefore occurred, since the rules laid down by the 1987 EC framework were changed substantially by the 1994 EC guidelines during the term of validity of the Fifth Code. Consequently, application to the ECSC sector of the principle established by the new 1994 EC guidelines was conditional on the presentation of a proposal for the amendment of the Fifth Code to bring it into line with the new guidelines.

99 A proposal for such an amendment was in fact presented by the Commission on 14 March 1995 (see paragraphs 9 and 10 above), after the adoption of the contested decision. That proposal was specifically intended to amend Article 3 of the Fifth Code. At point 5 of the proposal, the Commission noted that the new 1994 EC guidelines on State aid for environmental protection differed in at least five major aspects from the former guidelines and thus from the Fifth Code. Among those five aspects, it specifically mentioned the possibility provided for in the penultimate paragraph of point 3.2.3. A of the new EC guidelines of granting aid in certain circumstances to firms which, instead of simply adapting existing plant more than two years old, opt to replace it by new plant meeting the new standards. The presentation of that proposal confirms, as the applicant rightly submits, that the Commission considered it necessary to amend Article 3 of the Fifth Code in order to be able to apply the principle contained in the EC guidelines to the ECSC sector, and therefore contradicts the Commission's interpretation of Article 3(1) of the Fifth Code in the contested decision. The Commission cannot, therefore, claim that the proposal for an amendment was intended solely to increase the transparency of the Fifth Code, without, however, modifying its substance and meaning.

100 Nor does the sixth steel aid code, approved by Commission Decision No 2496/96/ECSC of 18 December 1996, provide for the automatic application to the ECSC sector of the provision in the 1994 EC guidelines relating to aid for environmental protection; instead it defines the criteria for the application of those guidelines in the ECSC sector.

101 In the light of all the foregoing, it is clear that Article 3 of the Fifth Code does not provide for the possibility of granting aid to firms which, instead of simply adapting existing plant, opt to replace it by new plant meeting the new environmental standards. Consequently, the assumption in the contested decision, that it is possible to extend that provision of the EC guidelines to the steel aid code because it does not contradict the wording of Article 3 of the Fifth Code, must be rejected, since it does run counter to the clear wording of that article.

102 That conclusion cannot be altered by the fact that the national environmental standards in question are more stringent than in other Member States, by the fact that the amount of aid authorized is at least one-third lower than the amount which it might have been possible to authorize, or by the fact that the aid does not exceed the limit of 15% of the investment costs directly related to the environmental measure concerned, since those considerations cannot justify granting aid to the steel industry which does not meet the conditions laid down in Article 3(1) of the Fifth Code.

103 Consequently, the argument put forward by the Grand Duchy of Luxembourg, that the contested aid meets the three conditions laid down by Article 3 of the Fifth Code, cannot be accepted, since the first condition — that the aid must be intended to bring existing plant into line with new environmental protection standards — is not met in this case. That being so, no purpose can be served by analysing the Grand Duchy of Luxembourg's arguments concerning the other two conditions.

104 With regard to the interveners' argument that a formal amendment of the Fifth Code was unnecessary since the 1987 EC framework, and even the earlier 1974 framework, allowed aid to be authorized for the replacement of old plant by new plant meeting new environmental protection standards, it must be made clear at the outset that reference to the 1974 EC framework is irrelevant in the present

case, since the framework which was in force when the Fifth Code was adopted, and to which the Fifth Code refers, was the 1980 EC framework, extended in 1987. It is thus in the light of the Fifth Code and the 1987 EC framework that it must be determined whether aid for the replacement of old plant by new plant meeting new environmental protection standards may be found compatible with the common market.

105 The EC framework adopted in 1980 and extended in 1987 provided: 'Investments made in order to comply with the standards may consist in either installing additional equipment to reduce or eliminate pollution and nuisances or adapting production processes for the same purpose. In the latter case any portion of investment leading to an increase in existing production capacity will not qualify for the proposed assistance. ... The undertakings themselves must bear the entire cost of normal replacement investment and operating expenses' (points 3.2.3 and 3.2.4).

106 As is clear both from the contested decision and from the letters sent to the Commission by the Luxembourg Government (see paragraphs 54 and 55 above), the investment for which the aid was intended forms part of a programme for replacing existing plant, of which the electric arc furnace forms the essential element. It is therefore clear that the investment for which the aid was intended cannot be regarded as additional equipment to reduce or eliminate pollution and nuisances.

107 As regards the adaptation of the production process for the same purpose, it must be borne in mind that, as held in paragraph 59 above, the investment for which the aid was intended concerns the replacement of the existing LD-AC plant by a new electric arc furnace and, whilst the production process developed using the old plant could use up to 30% to 40% scrap as raw material, the electric arc production process resulting from the investment for which the aid was intended makes it

possible to use 100% scrap as raw material. The LD-AC plant will, moreover, be definitively shut down at the end of 1997. The basic oxygen or LD-AC process has in fact been replaced by an electric arc production process. Consequently, the investment made by Arbed clearly does not constitute the adaptation of a production process but the replacement of one such process by another.

108 In any event, moreover, it must be noted that, under point 3.2.4 of the 1987 EC framework, in force when the Fifth Code was adopted, the entire cost of replacement investment should be borne by the undertakings.

109 The interveners' argument is therefore unfounded.

110 As regards the question whether Article 3(1) of the Fifth Code must be interpreted strictly, it has been held (see paragraph 101 above) that the clear wording of Article 3 does not provide for the possibility of granting aid to firms which, instead of simply adapting existing plant, opt to replace it by new plant meeting the new environmental standards. In the light of that finding, the arguments of the defendant and of the interveners cannot lead to a different interpretation.

111 With regard to Arbed's argument relating to the legal basis for the Fifth Code, it must be pointed out that the first paragraph of Article 95 of the ECSC Treaty, whilst it refers to 'cases not provided for in this Treaty', still clearly provides that the measures to be adopted in such cases must be in accordance with Article 5 thereof and must be necessary to attain one of the objectives of the Community set out in Articles 2, 3 and 4 of the Treaty. The first paragraph of Article 95 thus does

not authorize the adoption of measures which are inconsistent with the objectives set out in those articles. Similarly, Part I of the preamble to the Fifth Code specifies that recourse is to be had to the first paragraph of Article 95 of the Treaty, so as to enable the Community to pursue the objectives set out in Articles 2 to 4 thereof. Consequently, the Fifth Code and the environmental concerns to which it responds, *inter alia*, must be interpreted in the light of the objectives and principles set out in those articles.

112 Even if, as Arbed submits, the Commission was entitled to take the first paragraph of Article 95 of the ECSC Treaty as its basis on the ground that environmental policy is not dealt with in that Treaty, it would still not be permissible to conclude that the Fifth Code does not constitute a derogation from Article 4 of the Treaty and that it must not be interpreted strictly.

113 Arbed's argument is, moreover, contradicted by the Commission itself, which notes that it is obliged by the ECSC Treaty itself and in particular by Article 3(d) to take measures to protect the environment in the common interest.

114 In the light of the foregoing considerations, it is clear that the rules to be applied in the ECSC sector in order to ensure that such concerns are addressed are those laid down in the Fifth Code, account being taken of the objectives set out in the Treaty and in particular the prohibition in Article 4(c) of any State aid in any form whatsoever. Since the Fifth Code constitutes a derogation from Article 4 of the ECSC Treaty, it must be interpreted strictly.

115 The need for a strict interpretation is confirmed by the very wording of the preambles to the fourth and fifth codes, in which the Council and the Commission clearly stated their intention that the steel aid codes should be interpreted strictly

and solely by reference to their express terms. The fifth paragraph of Part I of the preamble to the fourth code stated:

'It is emphasized that any subsidies in any form whatsoever and whether specific or non-specific, which Member States might grant to their steel industries, other than aid expressly provided for and duly authorized under this Decision, [are] prohibited under Article 4(c) of the Treaty.'

116 Consequently, the argument which the Commission derives from Part II of the preamble to the fourth code, that the steel industry must be treated in the same way as other sectors as regards aid for environmental protection, must be rejected, since it is clear from that part of the preamble that, in the context of the fourth code, the principle of equal treatment for the steel industry and other sectors as regards aid requires, in any event, that the aid be 'in the public interest and satisf[y] the conditions laid down' in the code in question.

117 The wording of the second paragraph of Part I of the preamble to the Fifth Code is equally clear and confirms the need for strict interpretation: 'As from 1 January 1986, Commission Decision No 3484/85/ECSC ... established rules authorizing the grant of aid to the steel industry in certain cases expressly provided for.'

118 That interpretation is further corroborated by the fifth paragraph of the same part of that preamble, which states: 'The strict regime thus established ... has ensured fair competition in this industry in recent years'.

119 The Court therefore considers that Article 3(1), having regard to the context of the Fifth Code in which it occurs and the objective which it pursues (see Case C-99/94 *Birkenbeul* v *Hauptzollamt Koblenz* [1996] ECR I-1791, paragraph 12), must be interpreted with the greatest possible regard to its wording.

120 The arguments of the Commission and the interveners are therefore not such as to invalidate the Court's conclusion that Article 3 of the Fifth Code does not provide for the possibility of granting aid to firms which, instead of simply adapting existing plant, opt to replace it by new plant meeting new environmental standards.

121 In the light of all the foregoing, the contested decision must be held to infringe Article 3(1) of the Fifth Code and must therefore be annulled.

Costs

122 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. Since the Commission has been unsuccessful and the applicant has applied for costs, the Commission must be ordered to pay the costs.

123 Under the first subparagraph of Article 87(4), Member States which have intervened in the proceedings are to bear their own costs. Under the third subparagraph of that provision, the Court may order an intervener other than a State which is a party to the EEA Agreement, a Member State, an institution or the EFTA Surveillance Authority to bear its own costs. In the circumstances of this case, the intervener Arbed must bear its own costs.

On those grounds,

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

hereby:

1. **Annuls the decision reproduced in Commission notice 94/C 400/02 pursuant to Article 6(4) of Decision No 3855/91/ECSC to other Member States and interested parties concerning aid which Luxembourg plans to grant to ProfilARBED SA (Arbed) (State Aid C 25/94 (ex N 11/94));**

2. **Orders the Commission to pay the costs;**

3. **Orders the Grand Duchy of Luxembourg and Arbed SA to bear their own costs.**

García-Valdecasas Tiili Azizi

Moura Ramos Jaeger

Delivered in open court in Luxembourg on 25 September 1997.

H. Jung R. García-Valdecasas

Registrar President