# JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
25 March 1999 *

In Case T-37/97,

**Forges de Clabecq SA**, a company incorporated under Belgian law in receivership, established in Clabecq, Belgium, represented by Alain Zenner, Dominique Jossart, Gérard Leplat and Gilbert Demez, receivers, and represented in these proceedings by Pierre-Paul van Gehuchten, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Louis Schiltz, 2 Rue du Fort Rheinsheim,

applicant,

supported by

**Kingdom of Belgium**, represented by Jan Devadder, General Adviser in the Legal Service of the Ministry of Foreign Affairs, acting as Agent, assisted by Jean-Marie de Backer, Georges Vandersanden, Olivier Ralet and Laure Levi, of the Brussels Bar, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

**Région Wallonne**, represented by Jean-Marie de Backer, Georges Vandersanden and Olivier Ralet, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 30 Rue de Cessange,

and

**Société Wallonne pour la Sidérurgie SA (SWS)**, a company incorporated under Belgian law, established in Liège, Belgium, represented by Jean-Marie de Backer,

* Language of the case: French.

Georges Vandersanden and Olivier Ralet, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 30 Rue de Cessange,

interveners,

v

**Commission of the European Communities,** represented by Gérard Rozet, Legal Adviser, acting as Agent, with an address for service at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission's decision of 18 December 1996 declaring financial assistance granted to the applicant to be incompatible with the common market,

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

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

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 18 November 1998,

gives the following

## Judgment

### Legal background

1 The Treaty establishing the European Coal and Steel Community (hereinafter 'the Treaty' or 'the ECSC Treaty') prohibits State aid for the steel industry, declaring in Article 4(c) that 'subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever' are incompatible with the common market for coal and steel and therefore prohibited, as provided in the Treaty.

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

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

taken or the recommendation made with the unanimous assent of the Council and after the Consultative Committee has been consulted.

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

3 In order to meet the restructuring needs of the steel sector, the Commission relied on those provisions of Article 95 of the Treaty in order to introduce in the 1980s a Community aid scheme authorising the grant of State aid to the steel industry in specific and limited cases. The Community scheme for aid to the steel industry in force during the material period was that introduced by Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57, the 'Steel Aid Code').

4 Under Article 1(1) of the Steel Aid Code, 'aid to the steel industry, whether specific or non-specific, financed by Member States or their regional or local authorities or through State resources 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 Articles 2 to 5.' Under Article 1(2), 'the term "aid" also covers the aid elements contained in transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing... which cannot be regarded as a genuine provision of risk capital according to usual investment practice in a market economy.'

5 Articles 2 to 5 provide that the following aid may, under certain conditions, be deemed compatible with the common market: aid granted to defray expenditure by steel undertakings on research and development projects; aid for bringing into line with new statutory environmental standards plants which entered into

service at least two years before the introduction of those standards; aid to steel undertakings which permanently cease production of ECSC iron and steel and aid towards the costs of payments to workers made redundant or accepting early retirement, together with certain aid to undertakings located in Greece, Portugal, and the former German Democratic Republic. The Steel Aid Code does not permit the grant of operating or restructuring aid, except for aid granted for closure.

## Facts

6 The applicant is a steel company governed by Belgian law which, when operational, produced liquid steel and finished flat products, namely sheet and slabs.

7 The Société Wallonne pour la Sidérurgie SA (Walloon Steel Company — SWS) whose share capital is wholly-owned by the Region of Wallonia, is responsible under the economic policy of that region for the steel sector for representing the interests of private undertakings.

8 During the first half of the 1980s a recovery plan was drawn up for the applicant under which it was granted several investment loans. Essentially, those loans were covered by a State guarantee. An initial loan was in the amount of BEF 1 500 million, a second was for BEF 850 million, and a third was for BEF 1 500 million. The fourth and final loan in that series was granted in 1985 and amounted to BEF 650 million. This line of credit under State guarantee is commonly referred to as the 'SNCI loans' (loan agreements with the national company for loans to industry). By decisions of 16 December 1982 and 31 July 1985 the Commission authorised, subject to certain conditions, part of the recovery plan, including the portion relating to the first and fourth loans for BEF 1 500 million and BEF 650 million respectively.

9 The Compagnie Belge pour le Financement de l'Industrie (Belgian Company for Financing Industry, hereinafter 'Belfin'), which was set up in order to ensure the financing of investment for the restructuring of the Belgian industrial sector and belongs as to one half to the public sector, also granted the applicant several loans by means of capital borrowed from financial institutions: BEF 104 million in 1988 and BEF 196 million in 1989, those two loans being subsumed in lines of credit of BEF 300 million in 1991 and BEF 200 million in 1994 superseding a loan entered into in 1987.

10 By a letter dated 25 June 1996 the Belgian permanent representation to the European Union notified to the Commission, under Article 6(2) of the Steel Aid Code, a plan for the continuance of the applicant's activities. From a commercial point of view the plan amounted to retaining the integrated steel plant but at reduced capacity. From a financial point of view the plan, as notified, included, on the one hand, 'ancillary measures' comprising an injection by SWS of fresh capital amounting to BEF 1 500 million and a rescheduling of the debts of the undertaking with the agreement of the SNCI and Belfin and, on the other, the acquisition by SWS of 21.3% of the share capital of the undertaking previously held by Socindus, a company grouping together the interests of private family shareholder-managers. SWS therefore became the holder of 60.3% of the shares, the remainder being distributed amongst the public.

11 Before the abovementioned plan was drawn up, there had been several assessments of the state of the undertaking, including, at its own request, by the consultants Laplace Conseil and Davy Clecim. Furthermore, Mr Gandois, the most senior of the applicant's directors, had been asked by Mr Collignon, Prime Minister of the Wallonia region, to study the viability of the steel sector in Wallonia and the action to be taken in order to consolidate that viability, in particular that of the applicant undertaking. The three reports were unanimous that radical, swift measures were necessary to ensure the applicant undertaking's survival. When asked at that time by the Commission what its intentions were with regard to the applicant, SWS stated that its objective was to 'avert the failure of the undertaking by reaching as many agreements as possible with the creditors and bankers of Forges in order to head off a financial and social catastrophe' and that 'at the request of the President, SWS will take no definitive decision concerning Forges de Clabecq before the Walloon Government has been able to analyse the conclusions of the Gandois report.'

12 Following notification, the Commission wrote to the Belgian permanent representation to the European Union on 5 July 1996 requesting further information. In particular it wished to know whether measures other than those notified had been adopted, observing that the notification contained no information as to the conditions applicable to the rescheduling of the applicant's debts and on the state of a loan of BEF 500 million granted by the Wallonia region at the end of 1992 which it had decided would not be regarded as aid providing that certain conditions concerning, in particular, the rate of interest were observed. Furthermore, it pointed out that the Belgian press had carried reports of further measures, such as the grant to the applicant of fresh loans. The Belgian permanent representation forwarded that letter to the Wallonia region.

13 The Belgian authorities supplied additional information in a letter dated 23 July 1996. With regard to the loan of BEF 500 million dating back to 1992 it was stated that 'at the urgent request of the board of directors [of the applicant] and in order to secure the requisite support of bankers and suppliers for the conception and implementation of a recovery plan', SWS decided in 1996 to waive its debt amounting in total to BEF 555 million. The letter stated that that waiver of debt did not constitute aid because in any event the applicant would never have been able to repay it.

14 As to the debt rescheduling, appended to the letter were documents recording an agreement in principle between SNCI and Belfin to postpone repayment of the loans by three years. That agreement of principle was subject to several conditions, including a favourable opinion by the European Community on the applicant's recapitalisation.

15 It was then stated that the SWS had granted to the applicant a bridging loan of BEF 200 million as an advance on the projected recapitalisation. That advance was said to be essential to enable it to carry on its activities pending a Commission decision. The letter stated that other advances would doubtless be necessary.

16 It was stressed that, in any event, the measures in the plan did not constitute State aid, since they did not draw on public funds and merely reflected the conduct of a prudent private investor in a market economy. Moreover, the SWS did not intend to remain a majority shareholder in the applicant. Finally, the letter stated that the SWS was at the Commission's disposal to provide further particulars and to consider any adjustments which the Commission might propose.

17 By a communication under Article 6(4) of the Steel Aid Code published on 11 October 1996 (OJ 1996 C 301, p. 4), the Commission put the Belgian Government on notice and requested it, together with any other interested party, to submit its observations.

18 In Decision 97/271/ECSC of 18 December 1996, ECSC steel — Forges de Clabecq, concerning financial assistance granted by the Wallonia region to the steel undertaking Forges de Clabecq (OJ 1997 L 106, p. 30, hereinafter 'the contested decision'), the Commission decided as follows:

*'Article 1*

The measures taken by Belgium to assist Forges de Clabecq, namely:

— a capital injection of BEF 1 500 million,

— the provision of State guarantees in respect of loans granted by Belfin and SNCI,

— the waiver of claims amounting to BEF 802.3 million (BEF 302.2 million by SA Forges Finances and BEF 500 million by SWS),

— the grant of bridging loans totalling BEF 700 million,

constitute State aid within the meaning of Article 1(2) of [the Steel Aid Code].

*Article 2*

The aid measures referred to in Article 1 are incompatible with the common market since they do not satisfy the conditions laid down in Articles 2 to 5 of [the Steel Aid Code], as provided for in Article 1 (2) of [the Code], and are therefore prohibited by Article 4 (c) of the Treaty.

*Article 3*

Belgium is hereby required to abolish the aid measures referred to in Article 1 and demand that the illegal aid already paid be reimbursed, with interest from the date on which it was paid, within two months of the date of notification of this decision.

...'.

19 On 19 December 1996 the directors of Forges de Clabecq acknowledged that the undertaking was insolvent. By a judgment of the Tribunal de Commerce (Commercial Court), Nivelles, dated 3 January 1997, bankruptcy by acknowledgment was declared.

20 The contested decision was notified to the Belgian authorities by letter of 23 January 1997 and published in the *Official Journal of the European Communities* of 24 April 1997.

21 Later in 1997, the applicant's assets were bought by a new company called Duferco Clabecq, incorporated on the initiative of a private investor, the Duferco group. Under the Belgian legislation on bankruptcy, Duferco Clabecq was not obliged to take over the debts of the applicant. The Commission approved certain contributions by the SWS in favour of Duferco Clabecq on the ground that they constituted an injection of risk capital in accordance with the normal practice of companies in a market economy.

**Procedure and forms of order sought by the parties**

22 The applicant brought these proceedings by an application lodged at the Registry on 25 February 1997. The case was assigned to a chamber of five judges. In the application the applicant requested that the case be referred to the plenary Court. The Chamber refused that request.

23 By a separate document lodged at the Registry on 6 March 19977 the applicant applied for legal aid, which was refused by an order of 29 September 1997.

24 By a document lodged at the Registry on 21 March 1997 the defendant raised an objection of inadmissibility. On 2 May 1997 the applicant submitted its observations on the objection of inadmissibility. On 11 July 1997 the Court ordered joinder of the objection of inadmissibility with the substance of the case.

25 By applications lodged at the Registry on 24 June, 23 July and 25 July 1997 respectively, the SWS, the Kingdom of Belgium and the Wallonia region sought leave to intervene in support of the forms of order sought by the applicant. By order of the President of the Third Chamber (Extended Composition) of the Court of First Instance of 31 October 1997, the SWS, the Kingdom of Belgium and the Wallonia region were granted leave to do so.

26 In its reply the applicant proposed the adoption of certain measures of organisation of procedure and, in the alternative, of a measure of inquiry. The information in the case-file being deemed sufficient, the Court decided not to adopt any measures of organisation of procedure or inquiry.

27 On hearing the report of the Judge Rapporteur, the Court decided to open the oral procedure. At the hearing on 18 November 1998 the Court heard oral argument from the parties, together with their replies to questions put to them by the Court.

28 The applicant claims that the Court should:

— annul the contested decision;

— make an appropriate order as to costs.

29 The defendant contends that the Court should:

— dismiss the action as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

30 The interveners contend that the Court should:

— annul the contested decision;

— order the defendant to pay the costs.

## Admissibility

*Parties' arguments*

31 The defendant contends that the action was brought out of time. It does not dispute that the action was brought within one month of notification of the decision on 23 January 1997. However, it considers that the moment from which time for bringing an action started to run was not the date of notification of the decision to the Belgian State but rather the date on which the applicant learned of the decision. In the present case it is undisputed, the defendant contends, that that

date was well before 23 January 1997, as is borne out, in particular, by the fact that in its judgment of 3 January 1997 the Nivelles Commercial Court found that the applicant had acknowledged its bankruptcy on 19 December 1996 'on account of a decision taken on 18 December 1996 by the European Commission.'

32 The defendant takes the view that in those circumstances the one-month period must be taken to run from 18 December 1996. The action is therefore inadmissible because it is out of time.

33 In the alternative, the defendant submits that if the applicant felt that it was not fully apprised of the decision, it should have requested a copy of the decision within a reasonable period, which it failed to do.

34 In support of its arguments the Commission cites, *inter alia*, the judgments of the Court in Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, Case 236/86 *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761 and Case C-180/88 *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *Commission* [1990] ECR I-4413 and the order of the Court in Case C-102/92 *Ferriere Acciaierie Sarde* v *Commission* [1993] ECR I-801, also cited in the judgment in Case T-465/93 *Consorzio Gruppo di Azione Locale 'Murgia Messapica'* v *Commission* [1994] ECR II-361, paragraph 29.

35 The applicant points out that an action cannot usefully be brought until the person concerned is informed of the reasons for the decision adopted by the Commission. It was apprised of the text of the decision when the latter was notified to it. It states in that connection that shortly after the decision was adopted it contacted the Commission in order to obtain the text of the decision, but the Commission replied that it was not possible to send it before it had been formally notified to the Belgian State.

36 The applicant adds that the Commission's interpretation of the case-law is incorrect. The case-law in question relates to facts entirely different to those of the present case. The judgments and orders cited by the Commission in fact concern the situation where an ECSC decision is neither notified nor published and lay down that an action may be brought within one month of actual knowledge being gained of the decision, provided that the applicant asked for the decision within a reasonable period.

37 Finally, the applicant explains that it was in any event impossible to bring an action prior to notification owing to the fact that, pursuant to Article 15 of the ECSC Treaty, a decision cannot have legal effect prior to its notification.

38 The Belgian Government supports the applicant's arguments.

39 The Wallonia region and the SWS observe that the decision was notified and the action brought within one month, increased by the time allowed for distance, of the date of that notification. They conclude that the third paragraph of Article 33 of the Treaty was fully complied with and that the action cannot be out of time.

*Findings of the Court*

40 Under the third paragraph of Article 33 of the Treaty actions for annulment 'shall be instituted within one month of the notification or publication, as the case may be, of the decision or recommendation.' The Court considers that, under the principle of legal certainty, individuals must be in a position to rely on the clear wording of that provision. Accordingly, the time-limits for bringing actions must be calculated on the basis of the dates on which decisions and recommendations of the Commission are notified and published.

41 In the present case the contested decision was notified to the Belgian State by letter of 23 January 1997 published in the Official Journal on 24 April 1997. It follows that the action in the present case, which was brought on 25 February 1997, well before the end of the one-month period, increased by the two days allowed for distance in the case of actions brought by persons established in Belgium, as from the date of publication, is not out of time.

42 Moreover, as the applicant rightly stated, the case-law cited by the Commission in support of the objection of inadmissibility concerns the situation, essentially different from that in the present case, where the decision was neither notified nor published.

43 It follows that the objection of inadmissibility must be dismissed.

## Substance

44 The applicant and the interveners rely essentially on seven pleas in support of annulment. The first alleges infringement of Article 4 of the Treaty. The second alleges infringement of Article 95 of the Treaty. The third alleges infringement of the principle of legal certainty. The fourth alleges that the statement of reasons is inadequate; the fifth alleges infringement of the rights of the defence; the sixth alleges infringement of the fundamental right to work, of the preambles to and objectives of the ECSC and EC Treaties and of the principle of proportionality. Finally, the seventh alleges infringement of the principle of equal treatment.

45 The applicant also claims, in the context of this action for annulment and in the alternative, that the Steel Aid Code is unlawful. That claim is supported by three pleas. The first plea is infringement of Article 95 of the Treaty; the second, infringement of Article 67 of the Treaty and, if need be, infringement of

Articles 92 and 93 of the EEC Treaty. A third plea alleges abuse of power, a manifest error of appraisal, and breach of the principle of equal treatment.

*The first plea: infringement of Article 4 of the Treaty*

Parties' arguments

46 The applicant states that it was not the Wallonia region but the SWS which helped it. Consequently, the help cannot be described as State aid. In fact, SWS is a private company which, although wholly owned by the Wallonia region, is not subject to the exercise of any prerogatives of public power by the Wallonia region and receives no capital injection from it in order to meet its costs. The help given by SWS fell within its duties as majority shareholder and does not therefore constitute a contribution of public funds. The applicant adds that although the SWS has become its reference shareholder it holds only 40% of the voting rights.

47 The applicant goes on to state that it is not appropriate to apply the criterion of 'the private investor in a market economy' to the steel sector since that sector is in need of public funds in order to be able to survive. Nor, in the present case, did the Commission examine that criterion attentively and with specific reference to the individual case. The Commission has produced no document which would enable it or the Court to ascertain the manner in which the file was examined. It also points out that in its decision the Commission merely states that there is a 'presumption of State aid where, in undertakings whose capital is shared between private and public shareholders, the public contribution reaches a proportion which is considerably higher than at the outset and where the departure of private shareholders is essentially due to the undertaking's poor prospects of profitability'

(fifth paragraph of section V of the recitals in the preamble to the contested decision). There is no basis in Community law for any such presumption, however. Moreover, the Commission's presumption is based on incorrect assertions of fact. In particular, Socindus, the former reference shareholder, continued to maintain that it believed in the chances of restoring the undertaking's competitiveness. The withdrawal of that private shareholder was due simply to a lack of funds on its part for participating in the recovery plan.

48 The applicant adds that it is only where there are no objectively justified grounds for expecting intervention to be reasonably profitable that there may be said to be State aid. The factual assertion by the Commission in the contested decision to the effect that an independent expert advised against the recovery plan was incorrect. The Laplace Conseil and Davy Clecim reports had certified that there were ways in which the undertaking might be made profitable. The Gandois report was not impartial, given that Mr Gandois was at the time working for a Belgian competitor and a body representing the interests of French steel concerns. At the hearing the applicant also pointed out that the market believed in the profitability of the intervention measures. The fact that the stock exchange reacted favourably to those measures is significant evidence of that.

49 Finally, the applicant states that in any event the Commission's finding that 'the State has replaced the private sector' as regards the management and shareholders of the undertaking is without relevance since, under Article 83 of the Treaty, the establishment of the Community is in no way to prejudice the system of ownership of undertakings. The fact that the Commission placed reliance on that finding means that public undertakings are being discriminated against in relation to private undertakings.

50 The applicant concludes that for all those reasons the Commission erred in finding that the intervention at issue constituted State aid within the meaning of Article 4(c) of the Treaty.

51 According to the Belgian Government, the Commission was wrong to conclude that the loans granted to the applicant by Belfin were covered by a State guarantee. It points out in that regard that only borrowings by Belfin from banks are covered by such a guarantee and not loans by Belfin to undertakings. The existence of a State guarantee is precisely an essential difference between Belfin's contractual relations with the banks and its contractual relations with the undertakings.

52 In the alternative the Belgian Government observes that the State guarantee for amounts borrowed by Belfin is always further guaranteed by the beneficiaries of the loans and is therefore in the end private in nature. In fact, the beneficiaries contribute to a 'Guarantee Fund' to which the loans by Belfin are linked. Under Article 10 of the Belfin shareholders' agreement actions by the State against Belfin on the ground of calls against the guarantee for amounts borrowed are set against the amounts constituting the Guarantee Fund. The intervener concludes that even if the Court were to consider that the Belfin loans were covered by guarantee, that guarantee does not constitute State aid. It further adds that Belfin is not a public company since 50% of its shareholders are private.

53 For the rest the Belgian Government supports the applicant's arguments.

54 The Wallonia region and the SWS also support the arguments put forward by the applicant. They observe that the plan submitted to the Commission was essential and was intended to bring about within a relatively short space of time the applicant's profitability and an improvement in its financial situation. In particular, the capital contribution of BEF 1 500 million was intended to secure the profitability of the undertaking and its future development. The Wallonia region and the SWS also stress that the contributions by the SWS were limited to what was strictly necessary and that, consequently, the SWS conducted itself like a private investor in a market economy. At the same time, they go on to state that the criterion of the private investor in a market economy is unreasonable since in practice that criterion cannot be satisfied. In fact it is normal for a private investor to refrain from investing capital in an undertaking in difficulty. In

imposing that criterion on the Member States the Commission is ignoring their role as public authorities. Moreover, the Commission misapplied this criterion in the present case by failing to take account of the fact that the plan allowed the applicant to regain viability, in particular by means of a reduction in production capacity.

55 The defendant recalls at the outset that aid within the meaning of Article 4(c) of the Treaty includes any payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. The concept of aid comprises not only positive benefits but also intervention which in various forms alleviates the normal burdens on an undertaking's budget. The defendant also recalls that the concept of State aid covers both aid granted directly by the Member States or their local authorities and aid granted by public or private bodies set up in order to distribute and operate the aid.

56 In the light of that interpretation of Article 4 of the Treaty, the defendant refers to the articles of association of SWS. These show, *inter alia,* that SWS is a company whose capital is wholly owned by the Wallonia region; that its object, as 'a preferential policy instrument of the Wallonia region in the steel sector', is to manage public shareholdings and debts in the steel sector, to ensure that decisions by the Walloon Government to intervene are implemented, and to manage the shareholdings, debenture stock, advances or interest which the Wallonia region holds or will in the future hold in steel companies, as a result of such decisions. To that end SWS must ensure the implementation and review of decisions adopted in regard to undertakings which have been the recipients of assistance from the Wallonia region. The defendant adds that, again according to the articles of association of SWS, the Wallonia region is to appoint the president and vice-president of the company, make any alterations to its articles which may be necessary, and give its consent to the transfer of shares in it which, in any event, may be held only by the Wallonia region itself or by public-interest financial institutions designated by the Walloon Government.

57 The defendant concludes that the applicant's argument to the effect that SWS took the decision to assist Forges de Clabecq and that that assistance is not covered by State funds is completely false. The Commission refers in addition to press articles which appeared in Belgian newspapers expressly mentioning the decision of the Walloon Government and more specifically of the Prime Minister of the Walloon Government, Mr Collignon, to provide financial support of BEF 1 500 million to Forges de Clabecq. The information made available to the Commission by the Belgian authorities at the time of the notification in June 1996 also confirms that it was the Prime Minister of the Wallonia region who conducted the procedure with regard to decisions concerning Forges de Clabecq. Finally, the same conclusion may be drawn from the pleadings lodged by the Wallonia region in Case T-70/97, which was declared inadmissible by order of the Court of First Instance of 29 September 1997. In those pleadings the Wallonia region mentions 'its decision of June 1996' and confirms that 'it was the Wallonia region which piloted the project and stated its readiness to make the necessary investment.'

58 In reply to the arguments of the Belgian Government, the defendant observes that SWS appended to its letter of 23 July 1996 certain documents drawn up by the Belgian Ministry of Finance and by SNCI and Belfin which show unequivocally that the SNCI and Belfin loans, together with their extended periods of currency, were covered by a State guarantee.

59 The defendant goes on to observe that the principle of the investor in a market economy appears in the Steel Aid Code. It stresses that this principle has been applied in numerous cases in order to determine whether there is State aid. In particular the Commission examines, in cases where an undertaking is in receipt of public funds, whether an investor in a market economy would have obtained those amounts on similar terms. That policy of the Commission has, moreover, been approved by the Court on several occasions.

60 Finally, the defendant stresses that it applied that principle having regard to the applicant's individual file, and that Article 83 of the Treaty, which the applicant relies on, specifically allows the criterion of the investor in a market economy to be used. As to the expert opinions, the defendant observes that they appeared in full in the notification file which the Commission received from the Belgian

authorities in June 1996, and that they were unanimous as regards the applicant's disastrous financial and trading situation. The Commission also observes that it took full account of all the matters revealed by those expert opinions.

61 In its reply the applicant states that the question is not whether the Wallonia region piloted the recovery plan but whether SWS, a company incorporated under private law, or its shareholder the Wallonia region, took a decision economically justified by market logic or whether it was a purely political decision bereft of rational economic justification. In other words, the applicant considers that 'the question is not whether the Wallonia region pilots the project but the manner in which it does so. The Wallonia region is the sole shareholder of the shareholder, which itself has minority voting rights, acting temporarily as the reference shareholder of the undertaking in difficulty.'

Findings of the Court

62 As a preliminary point the Court finds that neither the applicant nor the interveners challenge the accuracy of the amounts given for the contributions in the contested decision, some of which are clearly higher that those initially notified or otherwise declared by the Belgian authorities.

63 It should be noted, next, that aid for the purposes of Article 4(c) of the Treaty includes any payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces and also any intervention which alleviates the normal burdens on an undertaking's budget (Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority of the European Coal and Steel Community* [1961] ECR 1). Each of the measures contained in the contested decision falls within that definition.

64 First, it is common ground that the capital contribution in the amount of BEF 1 500 million and the advances made on that contribution did not constitute payment for goods produced by the applicant but measures to re-launch the undertaking. Those measures are therefore to be regarded as benefits in cash made in support of an undertaking and may therefore be termed aid within the meaning of Article 4(c) of the Treaty.

65 Next, it is clear that the other measures mentioned in the contested decision relieved the applicant of burdens which it would otherwise have had to bear. As a result of the waiver of loan debt the applicant was relieved of certain debts which were a burden on its budget. Similarly, the State guarantees for the SNCI and Belfin loans and the bridging loans were likely to reduce the pressure on the applicant's budget.

66 In any event, in order to justify the measures adopted in favour of the applicant, the Wallonia region and the SWS contended that those measures were essential to re-establish, or even to save, the undertaking (see paragraph 54 above). That demonstrates precisely that the contributions were intended to alleviate the applicant's financial problems, and that they therefore constituted aid.

67 As a result, the Commission was entitled to deem each of the measures mentioned in the contested decision to constitute aid.

68 As to whether that aid constitutes State aid it should be remembered that in determining whether aid constitutes State aid no distinction should be drawn between aid granted directly by the State or a local authority and aid granted by public or private bodies established or appointed by the State or the local authority to administer the aid (see, for example, Case 78/76 *Steinike & Weinlig* v *Germany* [1977] ECR 595, paragraph 21, and Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 11; see also Article 1(2) of the Steel Aid Code).

69 In the light of those decisions, the Court considers that the fact that the capital contribution of BEF 1 500 million, the advances made on that contribution and the waiver of loan debt constitute State aid is established, owing to the fact that the assistance was provided by the SWS, which is wholly owned by the Wallonia region and, under its own articles of association, serves as the 'privileged policy instrument of the Wallonia region' and was specifically set up in order to 'promote the setting up, reorganisation or extension of private undertakings in the interests of the regional economy, regard being had to regional economic policy' and 'in order to further public economic initiatives.' It also appears from the file the SWS's assistance to the applicant was directly linked to deliberations within the Walloon Government. Thus, in a letter addressed to the Commission, the Prime Minister of the Wallonia region stated that following the Commission's contested decision 'the Wallonia region considered that the conditions justifying its decision of June 1996 to participate in that recapitalisation project were no longer satisfied and, consequently, it was no longer able to instruct the SWS to lend its support to the undertaking' (Annex II to the rejoinder).

70 As to the SNCI and Belfin loans, it is clear, first, that it was not the loans as such but merely the State guarantees covering them which the Commission deemed to constitute aid. Next, it is clear that the Belgian Government's argument that there was no State guarantee for the Belfin loans is refuted by a letter of 25 June 1996 addressed by Belfin to the applicant and annexed by the SWS to its letter of 23 July 1996 to the Commission stating that the agreement of principle with a deferral of three years in the timetable for repayment of the principal sum of the loans granted to the applicant by Belfin was subject to the condition that 'the State agree (public loan) to extend its guarantee to cover that deferral.' The fact that State guarantees constitute State aid may also no longer effectively be denied.

71 As to the criterion of the private investor in a market economy, when assessing the compatibility with the common market of measures adopted by the public authorities in favour of an undertaking, the relevant criterion is whether the undertaking could have obtained the amounts in question on the capital market, that is to say, whether a private investor would have effected the transaction in question on the same terms and conditions (see, by analogy, C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 26, and Case T-16/96 *Cityflyer*

*Express* v *Commission* [1998] ECR II-757, paragraph 51). To challenge, as the applicants and interveners do, the relevance of this criterion in the steel sector on the ground that in practice this sector inevitably requires injections of public funds is tantamount to refuting the applicability in principle of the prohibition laid down in Article 4(c) of the Treaty, which specifically concerns subsidies or aids granted by States. The Court considers that the criterion of the private investor in a market economy is as relevant under Article 4 of the ECSC Treaty as it is under Article 92 of the EC Treaty, inasmuch as it serves to identify advantages which distort or threaten to distort competition. Moreover, the criterion appears in Article 1(2) of the Steel Aid Code, and the lawfulness of that code is not challenged in that regard by the applicant.

72 It is clear from the documents before the Court, in particular the letter of notification (Annex 3 to the application), that the measures in favour of the applicant were taken in order to 'ensure that it could continue its activities', and that the SWS had to implement those measures since Socindus, a company comprising the interests of private family shareholder managers and regarded as the private shareholder responsible for the management of the undertaking, withdrew from it. It is evident from the same document that, in spite of investment credits obtained by the applicant during the 1980s and 1990s (see paragraphs 8 and 9 above), its competitive and financial situation continued to deteriorate. There is every reason to believe that in those circumstances the chances of the applicant finding a private investor willing to inject into the undertaking amounts as large as the public funds mentioned in the contested decision were negligible, not to say non-existent. In that connection the fact that the stock exchange reacted favourably to the financial intervention in favour of the applicant does not amount to evidence that private shareholders would themselves have agreed to provide the undertaking with a capital injection of that magnitude. Further, the measures in favour of the applicant were not contributions of risk capital in accordance with the normal practice of companies in a market economy but constituted, on the contrary, emergency measures to ensure the survival of the undertaking. That assessment is corroborated, moreover, by the fact that the day after receiving notice of the Commission's refusal to authorise that intervention, the applicant declared itself bankrupt.

73 Finally, contrary to the applicant's suggestion, neither the fact that the SWS was a shareholder of the company at the time when it put into operation the

abovementioned intervention measures in the applicant's favour, nor Article 83 of the Treaty, can preclude the intervention from being classed as State aid. Indeed the fact that Article 83 provides that 'the establishment of the Community shall in no way prejudice the system of ownership of... undertakings' does not preclude Article 4 of the Treaty from being relied on as against State authorities which, as shareholders of undertakings, adopt measures which are not contributions of risk capital in accordance with the normal practice of companies in a market economy. It is clear that the contested decision is directed against the financial assistance in favour of the applicant and not SWS's status as a shareholder (see paragraph 18 above).

74 In the light of those considerations, the Commission's conclusion that the measures concerned were not contributions of risk capital in accordance with the normal practice of investors in a market economy and were therefore to be regarded as State aid within the meaning of Article 1(2) of the Steel Aid Code and Article 4(c) of the Treaty cannot be regarded as manifestly wrong.

75 It follows that the Commission was entitled to deem each of the measures taken in the applicant's favour and referred to in the contested decision as a contribution of public funds. Accordingly, the first plea must be rejected.

*The second plea: infringement of Article 95 of the Treaty*

Parties' arguments

76 The Wallonia region and the SWS observe that, as the Commission itself acknowledged in its decision, the assistance given to the applicant did not come within the scope of Articles 2 to 5 of the Steel Aid Code. The Commission ought

therefore to have brought the matter before the Council in order to obtain its advice on possible approval of those measures, pursuant to Article 95 of the Treaty.

77 The defendant points out that under Article 95 of the Treaty it enjoys a discretionary power to be used in the interests of the common good. The exercise of that power can be penalised only if there has been shown to be a substantive inaccuracy or a manifest error of assessment. The interveners, it is contended, have not done that.

Findings of the Court

78 As a preliminary matter the Court notes that the parties have not denied that the measures at issue did not come within any of the categories of aid referred to in Articles 2 to 5 of the Steel Aid Code (see paragraph 5 above).

79 Next, Article 4(c) of the Treaty does not prohibit the Commission from authorising, by way of derogation, State aid which does not come within the categories mentioned in the Steel Aid Code, on the basis of the first and second paragraphs of Article 95 of the Treaty (Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839, paragraphs 63 and 72). None the less, contrary to what is suggested by the Wallonia region and the SWS, that is not an obligation for the Commission but merely a discretionary power which it exercises when it is of the opinion that the aid notified is necessary in order to achieve the aims of the Treaty, and particularly in order to deal with unforeseen situations (*EISA*, same paragraphs). It follows that the Commission, which must act in the interests of the Community, may use that power only in exceptional cases. That interpretation is corroborated, moreover, by the principle laid down in Article 1(1) of the Steel Aid Code that aid in favour of the steel industry 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 of the Steel Aid Code (Case T-150/95 *UK Steel Association* v *Commission* [1997] ECR II-1433, paragraph 95). Such a regime specifically seeks to ensure fair competition in the steel sector

(paragraph 118 of that judgment; and the fifth paragraph of section I of the recitals in the preamble to the Steel Aid Code).

80 Finally, there can be a finding that the Treaty has been infringed owing to a wrong assessment of the situation resulting from economic facts or circumstances only where the Commission is shown to have misused its powers or to have made an obvious error in the evaluation, having regard to the provisions of the Treaty, of the situation in respect of which the Commission's decision was taken (Joined Cases 15/59 and 29/59 *Knutange* v *High Authority* [1960] ECR 1; order in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraphs 61 and 62).

81 The Court considers that in the present case there is no reason to believe that the Commission made an obvious error in refraining from authorising the aid at issue by way of derogation. On the contrary, in the light of the fact that in spite of numerous generous measures to assist the applicant it was almost bankrupt, it was not unreasonable of the Commission to take the view that the fresh measures envisaged would not secure the undertaking's viability over any period, and that there was therefore no Treaty aim requiring authorisation of those measures. Furthermore, the situation in which the applicant found itself when the aid was allocated was foreseeable.

82 The expert reports drawn up in 1996 on the situation of the undertaking and the steps to be taken confirm those assessments. In the Laplace Conseil report it is stated that 'the cause of the serious situation in which the undertaking finds itself is to be found within Forges de Clabecq in the general demotivation of all those involved: shareholders, directors, senior and middle management, foremen and workers' representatives. That has impeded the evolution of staff management, and with it the competitiveness of the undertaking over the past twenty years.' The report goes on to state: 'Forges de Clabecq are in by far the most critical situation amongst Walloon steel-makers' and that being so 'the proposed restructuring is not a panacea' and would at most serve 'to give time to bring about the necessary social and industrial adaptation.' As part of such adaptation the report mentioned, *inter alia,* 'reducing staff by about 650 persons by the end

of 1996.' The Gandois report found the applicant to be 'moribund and surviving only due to the support of the Wallonia region', and considered that recapitalisation in the amount of BEF 4 500 million would be needed to give the undertaking a real chance of recovery. None the less, it advised against such recapitalisation on the ground that 'it would be a prohibited public aid which would create obvious discrimination in competition between the various operators on the steel market. It is evident that the market economy cannot function if each State is free to assist undertakings as it wishes.' It concluded in these terms: 'Les Forges de Clabecq continue in business today only as a result of the support of one of their shareholders, the Wallonia region. That situation cannot go on. On the best assumption it will be possible to maintain on site a facility employing between 600 and 700 persons.' Nor is there any reason to believe, moreover, that the report was not impartial.

83 It follows that the Commission cannot be held to have made a manifest error in deciding not to authorise the aid at issue on the ground that there was no Treaty aim requiring such authorisation. Accordingly, the second plea must also be dismissed.

*The third plea: infringement of the principle of legal certainty*

Parties' arguments

84 The Belgian Government emphasises that the State guarantees criticised by the Commission in the contested decision are in fact those which related, first, to a BEF 680 million instalment of the first investment credit granted to the applicant at the beginning of the 1980s and, secondly, to the last BEF 650 million loan granted to it in 1985. It observes that both those loans were authorised, subject to

certain conditions, by Commission decision of 16 December 1982 ('the 1982 decision') and Commission decision of 31 July 1985 ('the 1985 decision'). In 1986 the Commission even confirmed its authorisation, in spite of the fact that a financial threshold set by it had been exceeded.

85 The Belgian Government considers that in those circumstances the Commission was not entitled to examine the same measures in the light of the aid code currently in force and to conclude that they were unlawful and order repayment. It emphasises that it observed the conditions of approval laid down by the Commission in 1982 and 1985 and that, in any event, the Commission has never applied a sanction on the ground of their infringement.

86 The Belgian Government adds that its arguments are not called in question by the various repayment reschedulings which took place concerning the loans in question. In particular, the various postponements extended and therefore modified the State guarantees only to a minimal extent. Consequently, the Commission is not entitled to call in question again its approval of those guarantees. Its decision ought in any event to have addressed solely the extensions of the initial guarantees and not the guarantees in their entirety.

87 The defendant observes that the arguments put forward by the Belgian Government were not submitted by it either in reply to the formal notice served by the Commission in the context of the procedure under Article 6(4) of the Steel Aid Code, or in another phase of the pre-litigation procedure. The defendant recalls in that connection the principle that the pleas raised in the administrative procedure and those raised in the context of the originating application must be strictly the same. Moreover, the Commission's decision to initiate the procedure under Article 6(4) of the Steel Aid Code already clearly showed that the State guarantees for the SNCI and Belfin loans were not deemed to be covered by a prior authorisation of the Commission.

88 Moreover, the contested decision is an act confirming the decision to initiate the investigative procedure, which is an actionable measure.

89 Finally, the intervener, in raising these arguments, has altered the terms of reference of the dispute, thus not accepting the dispute in the state in which it was when it made its intervention.

90 For all those reasons the plea is inadmissible.

91 At the hearing the Belgian Government emphasised that, in its capacity as intervener in the dispute, it has the right to submit any plea in law in support of the form of order sought by the applicant. The fact that it did not submit certain arguments in reply to the formal notice served on it by the Commission is irrelevant.

Findings of the Court

92 It should be noted at the outset that, contrary to the Commission's assertion, the Belgian Government has not altered the context of the dispute by raising a plea of annulment not raised by the applicant. As indicated by Article 116(4) of the Rules of Procedure, an intervener may not go beyond the form of order sought by the party in support of whom it is intervening, but it may freely choose its pleas and arguments in support of that form of order.

93 Nor, moreover, is that freedom of choice limited to the arguments relied on at the stage of the administrative procedure. The Belgian Government cannot, of

course, rely on matters of fact not known to the Commission and which it would not have wished to divulge to the Commission during the administrative procedure (Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31), but there is nothing to prevent it from raising against the final decision a plea in law not raised in the administrative procedure.

94 Contrary to the Commission's suggestion in its pleadings, the rule applied by the Community judicature concerning the requirement that pleas raised in legal proceedings be the same as those raised in the administrative procedure (see, for example, Case T-57/89 *Alexandrakis* v *Commission* [1990] ECR II-143, paragraphs 8 and 9 and Case C-105/91 *Commission* v *Greece* [1992] ECR I-5871, paragraph 12) is not a general rule. It does not apply beyond what is necessarily to be inferred from certain provisions such as, in civil service matters, Article 91(2) of the Staff Regulations of Officials of the European Communities and, as regards infringement proceedings, Article 169 of the EC Treaty. Moreover, even under the specific rules introduced by Article 169 of the EC Treaty, the rule does not apply against Member States, which are not therefore obliged to restrict their arguments before the Court to those submitted in its observations during the pre-litigation phase.

95 Finally, it should be remembered that the final decisions taken by the Commission in matters of State aid produce their own legal effects, and that the persons concerned therefore have the right to bring an action challenging such a decision irrespective of whether or not they challenged the decision to open the procedure for examination of the aid in question (Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, paragraph 31). Consequently, contrary to the Commission's contention, the fact that the Kingdom of Belgium did not bring an action to challenge the Commission's decision to initiate the procedure to examine the assistance given to the applicant does not preclude it from intervening in the proceedings brought to challenge the Commission's final decision.

96 It follows from all those preliminary considerations that the merits of the plea must be examined.

97 It is settled case-law that the principle of legal certainty aims to ensure that situations and legal relationships governed by Community law remain foreseeable (Case C-63/93 *Duff and Others* v *Minister for Agriculture and Food, Ireland, and the Attorney General* [1996] ECR I-569, paragraph 20). To that end, it is essential that the Community institutions observe the principle that they may not alter measures which they have adopted and which affect the legal and factual situation of persons, so that they may amend those acts only in accordance with the rules on competence and procedure (Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 113).

98 However, breach of that principle cannot effectively be pleaded if the person whose legal and substantive position was affected by the decision in question did not observe the conditions laid down in it (Case T-331/94 *IPK-München* v *Commission* [1997] ECR II-1665, paragraph 45).

99 In the present case it is clear that in 1996 none of the State guarantees of the SNCI and Belfin loans still came within the terms of the authorisation given by the Commission in its decisions of 1982 and 1985. In fact in the years following those decisions the Belgian authorities made certain major modifications to the conditions under which those loans were to be repaid, and these were particularly favourable to the applicant. It is clear in particular from the explanations given in that connection by the Belgian Government (paragraph 12 of the statement in intervention) that the Belgian State took over the sum of BEF 198 million out of the total loan of BEF 680 million and allowed the expiry dates on various SNCI loans and the relevant State guarantees to be deferred by several years.

100 These modifications were not notified to the Commission and cannot be regarded as compatible with the conditions to which the 1982 and 1985 authorisations were subject. In the 1982 decision the Commission had stated to the Belgian Government that authorisation of the measure notified was to be the applicant's final chance of seeking solutions for its problems in financial assistance from the State. That condition was clearly disregarded by the modifications subsequently made by the Belgian authorities to the measure authorised. In the 1985 decision the Commission stated that the aid authorised was to be put in place by

31 December 1985; that precluded the substantial modifications made subsequently in the applicant's favour to the loan arrangements which had been authorised. In any event, it is plain that Commission authorisations in matters of State aid can relate only to the measures as notified and cannot be regarded as retaining their effects beyond the period initially laid down for implementation of those measures.

101 In those circumstances the third plea, alleging infringement of the 1982 and 1985 decisions, cannot be upheld.

*The fourth plea: inadequacy of the statement of reasons*

Parties' arguments

102 The applicant observes that the contested decision rests on false statements and that the Commission has failed to explain why it did not deem the arguments refuting those statements to be relevant. For example, the Commission stated in the decision, without giving any reasons whatsoever, that the Wallonia region had decided to take control of the undertaking, that an independent expert had advised against the recovery plan and that the departure of the independent shareholder Socindus was attributable to the undertaking's poor prospects of profitability.

103 The applicant concludes that the decision is vitiated by an inadequate statement of the reasons on which it is based.

104 The Belgian Government states that the decision is vitiated by an inadequate statement of reasons inasmuch as the Commission criticises the SNCI and Belfin loans without stating which precise loans it is referring to or what the aid element

is in the State guarantees attaching to those loans. It considers that in those circumstances it is impossible to grasp the scope of the operative part of the decision, which states that 'Belgium is... required to abolish the aid measures referred to in Article 1 and demand that the illegal aid already paid be reimbursed, with interest from the date on which it was paid.'

105 The Wallonia region and the SWS are of the opinion that the Commission gave an inadequate statement of the reasons for its decision, inasmuch as it applied Draconian theoretical precepts without regard for the economic and social consequences of its decision.

106 In reply to the applicant's arguments concerning essentially the accuracy of certain statements of fact in the contested decision the Commission refers to the arguments used by it to refute the first and second pleas.

107 For the rest, it stresses that its legal and economic analysis of the applicant's case is set out adequately in the decision.

Findings of the Court

108 The first paragraph of Article 15 of the Treaty provides that the decisions of the Commission are to state the reasons on which they are based. According to settled case-law, the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure so as to defend their rights and to enable the Community judicature to carry out its review. It is not necessary for the reasoning to go into all the relevant facts and points of law, however, inasmuch as it must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case T-243/94 *British Steel* v *Commission*

[1997] ECR II-1887, paragraphs 159 and 160; *Hoogovens Groep*, cited above, paragraph 24).

109 The applicant's arguments alleging that the statement of reasons was inadequate essentially criticise the Commission for not correctly assessing certain facts, whilst the arguments of the Wallonia region and the SWS seek to criticise the Commission for not having regard in its decision to the economic and social consequences of its assessment. Plainly those arguments concern not the absence of the statement of reasons but its accuracy. They are therefore not really concerned with the duty to provide a statement of reasons (see, in that regard, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraphs 66 and 67, and Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, paragraph 45). They are in fact subsumed under the first and sixth pleas respectively.

110 In the context of this plea it is sufficient to find that the applicant was in a position to ascertain whether the measure was well founded and to defend its rights, and that the Court is able to exercise its power of review in that respect (see, in that connection, *Preussag Stahl*, cited above, paragraph 93). In the contested decision the Commission gave a full account of the facts of the case and of the arguments of the Belgian authorities as it understood them, together with its legal assessment of each of the measures taken in the applicant's favour. It fully explained why it considered that they constituted State aid and were incompatible with the common market. As to the SNCI and Belfin loans, the Belgian Government cannot claim that it is unable to ascertain which loans are concerned. The contested decision clearly refers to all the guarantees attaching to all the Belfin and SNCI loans.

111 It follows from the foregoing that the fourth plea must be rejected.

*The fifth plea: infringement of the rights of the defence*

Parties' arguments

112 The applicant, the Wallonia region and the SWS observe that the Commission failed to consult SWS before adopting its decision, even though the SWS had said it was prepared to give further information or partly to recast the recovery plan. The applicant is particularly surprised that the Commission asked no questions concerning the Laplace Conseil and Davy Clecim reports or on the alleged involvement of the Wallonia region in the project.

113 The applicant also explains that where the investigation does not relate to direct intervention by the Member State but rather to the involvement of another body, it is essential that not only the Member State but also that other body should be allowed to put its views adequately.

114 In those circumstances the rights of the defence were not adequately observed.

115 The Belgian Government supports that argument.

116 The Commission explains that, in the context of a procedure under Article 6(4) of the Steel Aid Code, the Member State concerned is the Commission's main partner in dialogue, given that the decision adopted by the latter will be addressed to the Member State. As for interested third parties, they must be put on notice to submit their observations. The defendant emphasises that, in the present case, it fully observed those principles.

Findings of the Court

117 Under Article 6(4) of the Steel Aid Code the Commission must put those concerned on notice to submit their observations before finding aid incompatible with the common market. In the present case the Commission satisfied that requirement. On 11 October 1996 it published in the Official Journal a communication in which it put the Belgian Government on notice to submit its observations and requested other Member States and interested parties to submit their observations within one month (see paragraph 17 above). After expiry of that period the Commission forwarded the observations received to the Belgian authorities.

118 The Court considers that in those circumstances the applicant and the interveners cannot claim that the procedural rights of the SWS were not observed. In particular, there is no reason to criticise the Commission for requesting further information from the Belgian authorities and not from the Wallonia region or the SWS. As the Commission correctly observed in its pleadings, its manner of proceeding was fully justified given that the final decisions in matters of State aid must be addressed to the Member States. It is also clear from the file that the SWS and the Wallonia region participated in the administrative procedure which preceded the contested decision. For example, several documents made available to the Commission by the Belgian permanent representation to the European Union were drawn up by the SWS.

119 Apart from that it is sufficient to state that the SWS and the Wallonia region had the opportunity, as interested parties, to submit observations in reply to the communication published by the Commission in the Official Journal.

120 For the reasons stated above the fifth plea must likewise be rejected.

*The sixth plea: infringement of the fundamental right to work, of the preambles and objectives of the ECSC and EC Treaties and of the principle of proportionality*

Parties' arguments

121 The applicant, the Wallonia region and the SWS maintain that the statement of reasons for the contested decision infringes fundamental principles, in particular the right to work.

122 In that connection the Wallonia region and the SWS explain that the Commission wholly ignored the effect that its decision could have as regards redundancy for the applicant's workers and the social situation in the region. The Commission thus infringed the right to work which is recognised by the European Council and in several international instruments, such as the Universal Declaration on Human Rights, the International Pact concerning economic, social and cultural rights, and the European Social Charter. The right is a fundamental one and therefore forms part of the Community legal order. In their view, decisions on State aid must not only satisfy criteria concerning freedom of competition but also be based on humane and social considerations.

123 Owing to its refusal to have regard for the serious social consequences of its decision, the Commission also failed to observe the principle of proportionality which demands that where there is a choice between several appropriate measures, recourse should be had to the least stringent measure and care should be taken to ensure that the burdens imposed are not out of proportion to the objectives pursued.

124 Finally, by causing redundancy, the Commission failed to observe the preamble to the ECSC Treaty in which the Member States express their concern 'to help, by

expanding their basic production, to raise the standard of living and further the works of peace,' and Article 2 of the ECSC Treaty under which the Community is to safeguard 'continuity of employment' whilst ensuring that they do not 'provoke fundamental and persistent disturbances in the economies of Member States', as well as analogous objectives in the preamble to, and in Article 2 of, the EC Treaty.

125 The Belgian Government supports this plea.

126 The Commission observes that in the application the plea is couched in entirely abstract and ill-defined terms. Consequently, it requests the Court to declare it inadmissible on the ground that it was not given the opportunity to defend its interests.

127 As for the arguments raised by the Wallonia region and the SWS, the Commission observes that they are irrelevant given that it is in no position to depart from the provisions of the Treaty, the Steel Aid Code and the case-law of the Community judicature. Moreover, it observes that the interveners have not challenged the lawfulness of the Steel Aid Code.

Findings of the Court

128 In view of the precarious situation of the undertaking concerned, it was foreseeable that the contested decision would lead to its bankruptcy and have serious social consequences. None the less, as has been held in the context of the second plea, the Commission was entitled to conclude that the aid contemplated could not, in any event, secure the undertaking's viability. Plainly, neither the right to work nor Article 2 of the Treaty can be interpreted as placing the Commission under an obligation to authorise public aid to an undertaking which

is not commercially or financially viable, merely to secure, by artificial means, continued employment in that undertaking. Such an interpretation would not be consonant with the principle of proportionality which, in matters of State aid, demands, *inter alia*, that healthy competition be maintained on the common market (see, by analogy, *Cityflyer Express*, cited above, paragraph 55). As the ECSC has the task of establishing a harmonious common market (Article 2 of the Treaty) and must as a matter of principle regard State aid in whatever form as incompatible with that common market (Article 4 of the Treaty), the Commission cannot authorise aid to an undertaking with no prospects of viability, thus disturbing the equilibrium of the common market and placing competing steel undertakings at a disadvantage without any economic justification.

129 It follows that the sixth plea must be rejected.

*The seventh plea: infringement of the principle of equal treatment*

Parties' arguments

130 The Wallonia region and the SWS observe that the EC Treaty and the guidelines drawn up by the Commission in matters of State aid are much more flexible than the rules on State aid laid down in the ECSC Treaty and the Steel Aid Code. In their view it is likely that the measures in the applicant's favour would have been authorised if they had come within the purview of the EC Treaty. Thus, by declining to interpret ECSC rules in light of the EC rules and to have regard for the fact that the ECSC Treaty will no longer be in force in a few years' time, the Commission disregarded the principle of equal treatment.

131 The Commission observes that that argument infringes Article 232 of the EC Treaty.

Findings of the Court

132 Article 232 of the EC Treaty states that the provisions of that Treaty are not to affect the provisions of the ECSC Treaty, which consequently retain their own sphere of application (Case 239/84 *Gerlach* [1985] ECR 3507, paragraph 9; order in Case T-4/97 *D'Orazio and Hublau* v *Commission* [1997] ECR II-1505, paragraph 18). Consequently, the plea based on the principle of equal treatment and alleging that the EC rules on State aid are more flexible than those laid down in the ECSC Treaty and the Steel Aid Code adopted by the Commission must be held to be unfounded.

133 The seventh plea must therefore be rejected.

*The first plea of illegality: infringement of the third and fourth paragraphs of Article 95 of the Treaty*

Parties' arguments

134 The applicant submits that the adoption of an aid code entails a major alteration of the Commission's powers by authorising the Commission to examine aid, to open adversarial proceedings in that connection and, in an appropriate case, to authorise aid and monitor its implementation. However, any alteration of or adjustment to the Commission's powers falls within the scope of the third and fourth paragraphs of Article 95 of the Treaty. The Commission failed to observe

those provisions by basing the adoption of the code on the other provisions of Article 95 of the Treaty. Moreover, the applicant considers that the aid code does not concern 'cases not provided for in [the] Treaty'. In fact, Community financial aid and action to be taken with regard to production are expressly provided for in Articles 54 and 57 of the Treaty.

135 The Commission observes that the first and second paragraphs of Article 95 of the Treaty enable the means of action at its disposal to be complemented by making it possible, with the assent of the Council, for it to take a decision which appears to it necessary in order to attain one of the aims of the Community laid down in Articles 2, 3 and 4 of the Treaty, whilst the third and fourth paragraphs of Article 95 of the Treaty enable the Treaty rules concerning the exercise of its powers to be amended. In its view, the aid code comes within the first and second paragraphs of that article, inasmuch as it seeks to put in place, in order to ensure the proper functioning of the common market, a Community system enabling certain types of aid to the Community steel industry to be granted.

Findings of the Court

136 Under the first and second paragraphs of Article 95, the Commission has power to adopt, in all cases not provided for in the Treaty, any general or individual decision which is necessary for the attainment of the Treaty objectives. Under those provisions the Commission has the power to adopt a decision or a recommendation with the unanimous assent of the Council and after consulting the ECSC consultative committee, in all cases not provided for in the Treaty in which such decision or recommendation appears 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. It follows that since the ECSC Treaty, unlike the EC Treaty, confers on the Commission or the Council no specific power to authorise State aid, the Commission has power under the first and second paragraphs of Article 95 to take all the measures necessary to attain the objectives of the Treaty and, accordingly, to authorise, in accordance with the procedure laid down therein, such aid as appears to it to be necessary in order to attain those objectives. The Commission therefore has competence, in

the absence of any Treaty provision, to adopt any general or individual decision which may be necessary for the attainment of the Treaty objectives. The first and second paragraphs of Article 95 give no particulars as to the scope of the decisions which that institution is empowered to adopt (*EISA*, cited above, paragraphs 64 and 65). The adoption of an aid code comes precisely within that competence conferred on the Commission by the first and second paragraphs of Article 95 of the Treaty (same judgment, paragraphs 66 and 72).

137 It follows that the first plea of illegality must be rejected.

*Second plea of illegality: infringement of Article 67 of the Treaty, and if need be, of Articles 92 and 93 of the EC Treaty*

Parties' arguments

138 The applicant observes that the aid code relates not only to aid granted to specific recipients but also to non-specific aid such as that intended for research, development, protection of the environment or aid to certain less favoured regions. Those items do not come within the scope of the ECSC Treaty, but fall instead within the terms of Articles 92 and 93 of the EEC Treaty.

139 The applicant also considers the aid code to be incompatible with Article 67 of the ECSC Treaty. It considers that 'general aid likely to have appreciable repercussions on competition in the common markets for coal and steel was not significantly affected by the ECSC Treaty.... At most Article 67 of the Treaty empowered the Commission, after consulting the consultative committee and the Council, to... address recommendations [to the Member States] where their actions were likely to bring about a serious imbalance.'

140 The Commission recalls that Article 4(c) and Article 67 of the Treaty relate to two distinct areas, the former prohibiting certain intervention by Member States in the area which under the Treaty is subject to Community competence, the latter seeking to avert prejudice to competition in the exercise of the powers retained by the Member States.

Findings of the Court

141 As has been held in the context of the first plea of illegality, the first and second paragraphs of Article 95 of the Treaty constituted the proper legal basis for the adoption of the aid code. Plainly, a code establishing certain general rules on aid to the steel industry could not be adopted under the EC Treaty. Nor could Article 67 serve as the legal basis since that article does not deal with State aid (*De Gezamenlijke Steenkolenmijnen in Limburg*, cited above, pp. 42 and 43).

142 It follows that the second plea of illegality must likewise be rejected.

*The third plea of illegality: abuse of power, manifest misappraisal and infringement of the principle of equal treatment*

Parties' arguments

143 The applicant submits that the powers conferred on the Commission are to organise the market and to 'determine for the benefit of traders the most favourable conditions for enabling them to prosper in the context of legal

certainty.' In adopting the aid code the Commission acted *ultra vires* since the code 'had perverse economic effects', in particular a 'wait-and-see situation which industrial operators were forced into.' In that connection the applicant explains that between 1991 and 1996 the Commission allowed great uncertainty to prevail. In particular it failed to react to the crisis in the steel sector.

144 The applicant also considers that the aid code created discrimination by requiring as a condition for closure aid the closure of a complete industrial plant. In fact, the effect of that condition is that undertakings with industrial plant on separate operating sites may decide to close a complete industrial plant more easily than those which, like the applicant, have only a single industrial complex. That is a misappraisal by the Commission which it impliedly acknowledged when it removed that discrimination on adoption of a new code in 1996.

145 The defendant observes that the aid code provided in unequivocal terms that it was to enter into force on 1 January 1992 and was to be applicable until 31 December 1996. Accordingly, it considers that the aid code cannot have been a source of uncertainty as regards the future of aid to the steel industry.

146 It goes on to stress that its conduct from 1991 to 1996 is not pertinent to an examination of the legality of the aid code.

147 Finally it maintains that the applicant's argument as to discrimination between undertakings with separate operating sites and those operating on a single

industrial complex must be rejected on the basis of the fourth indent of Article 4(2) of the aid code, according to which authorisation of closure aid is subject to the condition that the recipient undertaking not be controlled directly or indirectly by a steel undertaking and not itself control such an undertaking.

Findings of the Court

148 The arguments submitted by the applicant to demonstrate an abuse of power on the part of the Commission essentially amount to saying that the Commission did not have sufficient regard to the crisis in the steel sector and that it made a manifest error of assessment in considering that it was not necessary to adopt a more flexible aid code.

149 In the words of the preamble to the Steel Aid Code, the Commission's aims were on the one hand 'not to deprive the steel industry of aid for research and development or for bringing plants into line with new environmental standards' and to 'authorise social aid to encourage the partial closure of plants or finance the permanent cessation of all... activities' and, on the other hand, to 'prohibit the grant of any other operating or investment aid to steel firms..., albeit with an exemption regarding regional investment aid in certain Member States' in order to continue to 'ensure fair competition in the industry'. The Court considers that that reconciling of objectives is not unreasonable, especially as the code does not preclude aid permitting restructuring which seems promising from being authorised under Article 95 of the Treaty in unforeseen and exceptional

situations (see paragraph 79 above). In light of that finding it is clear that the principles laid down by the Commission in the aid code are not negated by a manifest misappraisal or '*ultra vires*'.

150 As to the alleged infringement of the principle of equal treatment, it is sufficient to state that in light of Article 4(2) of the aid code, which indicates that closure aid necessarily refers to closures of steel plants in their entirety, the applicant has not explained in what way closure would in fact be easier for undertakings with industrial plant on separate operating sites than for undertakings which do not have plant on separate operating sites.

151 It follows that the third plea of illegality must likewise be rejected.

152 On all those grounds the action must be dismissed.

## Costs

153 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, having regard to the

form of order sought by the Commission, be ordered to pay its own costs as well as those incurred by the Commission.

154 The Kingdom of Belgium is to bear its own costs, in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure.

155 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener other than the Member States, the States party to the EEA Agreement, the institutions and the supervisory authority of EFTA to bear their own costs. In this case, the Wallonia region and the SWS, interveners in support of the applicant, are to bear their own costs.

On those grounds,

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

hereby:

**1. Dismisses the action;**

**2. Orders the applicant to pay its own costs as well as those incurred by the defendant;**

**3. Orders the interveners to pay their own costs.**

Moura Ramos García-Valdecasas

Tiili Lindh Mengozzi

Delivered in open court in Luxembourg on 25 March 1999.

H. Jung R.M. Moura Ramos

Registrar President