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

18 November 2004 *

In Case T-176/01,

Ferriere Nord SpA, established in Osoppo (Italy), represented by W. Viscardini Donà and G. Donà, lawyers,

applicant,

supported by

Italian Republic, represented initially by U. Leanza, acting as Agent, and subsequently by I. Braguglia and M. Fiorilli, avvocati dello Stato, with an address for service in Luxembourg,

intervener,

v

Commission of the European Communities, represented by V. Kreuschitz and V. Di Bucci, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for, first, annulment of Commission Decision 2001/829/EC, ECSC of 28 March 2001 on the State aid which Italy is planning to grant to Ferriere Nord SpA (OJ 2001 L 310, p. 22) and, second, compensation for the harm allegedly sustained by the applicant following the adoption of that decision,

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

composed of H. Legal, President, V. Tiili, A.W.H. Meij, M. Vilaras and N.J. Forwood, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 January 2004,

gives the following

Judgment

Legal framework

1 Article 87 EC provides that, save as otherwise provided, State aid is incompatible with the common market in so far as it affects trade between Member States and is anticompetitive in that it favours certain undertakings or the production of certain goods.

2 Article 88 EC governs cooperation between the Commission and the Member States as regards examination of existing aid systems and new aid systems. It authorises the Council to act in the event of aid which is incompatible with the common market and determines the powers of the Council.

3 Article 174 EC provides that Community policy on the environment is to have as its objectives, inter alia, the protection and improvement of the quality of the environment and the protection of human health.

4 Article 7 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), on the decisions taken by the Commission to close the formal examination procedure, provides:

'... The Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. This time limit may be extended by common agreement between the Commission and the Member State concerned.'

5 Article 6 of 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 was applicable until 22 July 2002, provided, in respect of the procedure:

'1. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid of the types referred to in Article 2 to 5. It shall likewise be informed of plans to grant aid to the steel industry under schemes on which it has already taken a decision under the EC Treaty. ...

2. The Commission shall be informed, in sufficient time for it to submit its comments, and by 31 December 2001 at the latest, of any plans for transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisition of shareholdings, provisions of capital, loan guarantees, indemnities or similar financing.

...

5. If the Commission considers that a certain financial measure may represent State aid within the meaning of Article 1 or doubts whether a certain aid is compatible with the provisions of this Decision, it shall inform the Member State concerned and give notice to the interested parties and other Member States to submit their comments. If, after having received the comments and after having given the Member State concerned the opportunity to respond, the Commission finds that the measure in question is an aid incompatible with the provisions of this Decision, it shall take a decision not later than three months after receiving the information needed to assess the proposed measure. Article 88 of the [ECSC] Treaty shall apply in the event of a Member State's failing to comply with that decision.

6. If the Commission fails to initiate the procedure provided for in paragraph 5 or otherwise to make its position known within two months of receiving full notification of a proposal, the planned measures may be put into effect provided that the Member State first informs the Commission of its intention to do so. ...'

6 The Community guidelines on State aid for environmental protection (OJ 1994 C 72, p. 3; 'the 1994 guidelines'), the period of validity of which expired on 31 December 1999 and was twice extended, until 30 June 2000 (OJ 2000 C 14, p. 8) and then until 31 December 2000 (OJ 2000 C 184, p. 25), were applicable in all the

sectors governed by the EC Treaty, including those subject to specific Community rules on State aid (point 2). Those guidelines stated, at point 3, the conditions for the application of the rules on State aid, in particular for investment aid:

'3.2.1. Aid for investment in land (when strictly necessary to meet environmental objectives), buildings, plant and equipment intended to reduce or eliminate pollution and nuisances or to adapt production methods in order to protect the environment may be authorised within the limits laid down in these guidelines. The eligible costs must be strictly confined to the extra investment costs necessary to meet environmental objectives. General investment costs not attributable to environmental protection must be excluded. Thus, in the case of new or replacement plant, the cost of the basic investment involved merely to create or replace production capacity without improving environmental performance is not eligible. ... In any case aid ostensibly intended for environmental protection measures but which is in fact for general investment is not covered by these guidelines. ...'

7 Point 3 of the 1994 Guidelines also defined the special conditions for authorisation of aid to help firms to adapt to new mandatory standards or to improve on mandatory environmental standards and also the conditions for the grant of aid in the absence of mandatory standards.

8 The Community guidelines on State aid for environmental protection (OJ 2001 C 37, p. 3: 'the 2001 Guidelines'), which replaced the 1994 Guidelines, provide at point 7 that they apply to aid to protect the environment in all sectors governed by the EC Treaty, including those subject to specific Community rules on State aid.

9 As regards the reference to environmental standards, points 20 and 21 of the 2001 Guidelines state that if environmental requirements are to be taken into account in the long term, prices must accurately reflect costs and environmental protection costs must be fully internalised; accordingly, the Commission takes the view that the grant of aid is no longer justified in the case of investment designed merely to held firms to comply with existing or new Community technical standards, except in favour of small and medium-sized enterprises (SMEs) in order to enable them to adapt to new Community standards, and that it may prove a useful incentive for firms to achieve levels of protection higher than those required by Community standards.

10 As regards the investments taken into consideration, point 36 (first sentence) of the 2001 Guidelines states:

'The investments concerned are investments in land which are strictly necessary in order to meet environmental objectives, investments in buildings, plant and equipment intended to reduce or eliminate pollution and nuisances, and investments to adapt production methods with a view to protecting the environment.'

11 As regards the eligible costs, point 37 provides, in the first three paragraphs:

'Eligible costs must be confined strictly to the extra investment costs necessary to meet the environmental objectives.

This has the following consequences: where the cost of investment in environmental protection cannot be easily identified in the total cost, the Commission will take account of objective and transparent methods of calculation, e.g. the cost of a technically comparable investment that does not though provide the same degree of environmental protection.

In all cases, eligible costs must be calculated net of the benefits accruing from any increase in capacity, cost savings engendered during the first five years of the life of the investment and additional ancillary production during that five-year period.'

12 The 2001 Guidelines state that they are to become applicable when they are published in the *Official Journal of the European Communities* (point 81), which they were on 3 February 2001. Furthermore, point 82 of those guidelines states:

'The Commission will apply these guidelines to all aid projects notified in respect of which it is called upon to take a decision after the guidelines are published in the Official Journal, even where the projects were notified prior to their publication. ...'

Background to the dispute

13 In 1978 the Italian Autonomous Region of Friuli-Venezia Giulia adopted a number of measures designed to encourage the initiatives of industrial undertakings for environmental protection. The scheme in question, which results from Article 15(1) of Regional Law No 47 of 3 June 1978, was amended by Article 7 of Regional Law

No 23 of 8 April 1982 and then by Article 34 of Regional Law No 2 of 20 January 1992. It was approved by the Commission (letter SG (92) D/18803 of 22 December 1992) and definitively adopted by Regional Law No 3 of 3 February 1993. Article 15(1) of Regional Law No 47 of 3 June 1978, as amended most recently by Regional Law No 3 of 3 February 1993, provides:

'The regional administration is authorised to grant to industrial undertakings which have been in operation for at least two years and which propose to introduce or alter processes and production plant in order to reduce the quantity or danger of discharges, waste and emissions produced or noise nuisance or to improve the quality of working conditions, in accordance with the new standards fixed by the legislation applicable to the sector, financial assistance up to a maximum of 20% in equivalent gross subsidy of the costs considered eligible.'

14 In 1998, the Italian Autonomous Region of Friuli-Venezia Giulia voted for new credits to finance the aid scheme approved by the Commission in 1992. Article 27(c)(16) of Regional Law No 3 of 12 February 1998 on the refinancing of Regional Law No 2 of 20 January 1992 provided budget credits of ITL 4 500 million per annum for the period 1998-2000. That refinancing measure was approved by Commission Decision SG (98) D/7785 of 18 September 1998.

15 Ferriere Nord SpA ('Ferriere') is an undertaking in the steel, mechanical and metallurgical industrial sector, situated in Osoppo, in the Autonomous Region of Friuli-Venezia Giulia. It makes steel products, some of which come under the ECSC Treaty while others come under the EC Treaty. The undertaking, which is one of the main European producers of electrowelded mesh, had a turnover of EUR 210 800 000 in 1999; of this, 84% was in Italy, 11% in the rest of the European Union and 5% in the rest of the world.

16 By letter of 26 March 1997, Ferriere requested the Autonomous Region of Friuli-Venezia Giulia to make a financial contribution, under Article 15 of Regional Law No 47 of 3 June 1978, as amended, in order to ... a new plant for the production of electrowelded mesh, which was technologically innovative and of such a kind as to reduce polluting and noise emissions and to improve working conditions. The total investment came to ITL 20 000 million.

17 By Regional Decree of 8 October 1998, the Autonomous Region of Friuli-Venezia Giulia decided to grant Ferriere a contribution equal to 15% of the admissible cost, namely ITL 1 650 000 000 (EUR 852 154).

18 By letter dated 18 February 1999, received by the Commission's Directorate-General 'Competition' on 25 February, the Italian authorities notified the Commission, in the context of the procedure for systematic notification of projects involving the transfer of public resources for the benefit of steel industries provided for in Article 6(1) and (2) of Decision No 2496/96, of their intention to grant the steel undertaking Ferriere State aid for environmental protection, in application of Regional Law No 47 of 3 June 1978, as amended.

19 The notification related to State aid for investment in continuous flow plant and in a new rolling line for welded steel mesh. Payment of the aid in respect of the second investment was suspended by the Italian authorities in order to prevent the problems which might arise if it had to be reimbursed pursuant to a Community decision finding it incompatible with the common market.

20 By letter of 3 June 1999, the Commission informed the Italian Republic that it had decided to initiate the procedure provided for in Article 6(5) of Decision No 2496/96 concerning aid C 35/99 — Italy — Ferriere Nord (OJ 1999 C 288, p. 39).

21 The Italian authorities informed the Commission, by letter of 3 August 1999 from the Autonomous Region of Friuli-Venezia Giulia to the Permanent Representation of Italy to the European Union, that the investment in respect of the rolling line fell within the scope of the EC Treaty, since the welded steel mesh manufactured with that equipment is not an ECSC product; that it satisfied objectives aimed at protecting health and the environment; and that the measure came within the framework of point 3.2.1 of the 1994 Guidelines.

22 Ferriere and the European Independent Steelworks Association (EISA), by letters of 5 and 4 November 1999 respectively, also claimed that the relevant legal framework for the purposes of examining the aid measure was the EC Treaty.

23 By letter of 25 July 2000, the Italian authorities informed the Commission that, at Ferriere's request, they were withdrawing the part of the notification relating to the ECSC investment in respect of the continuous flow plant and confirmed the part of the notification relating to the investment in respect of the rolling line, which concerned non-ECSC steel products; and they requested the Commission to make a determination under Article 88(3) EC concerning the compatibility of the project with the common market.

24 By letter of 14 August 2000, the Commission informed the Italian Republic that it had decided to initiate the procedure provided for in Article 88(2) EC concerning aid C 45/00 — Italy — Ferriere Nord SpA, towards investments in a new rolling line for welded steel mesh (OJ 2000 C 315, p. 4). The Commission stated, inter alia, in that decision that as Ferriere was an undertaking which did not keep separate accounts for its activities according to whether they came under the ECSC Treaty or the EC Treaty, it had to ensure that the aid did not benefit the ECSC activities.

25 Ferriere submitted its comments in a letter of 13 November 2000, in which it emphasised the separation between its ECSC activities and its EC activities and stressed the importance of the environmental objective of its investment, stating that the aid came within the scheme approved in 1992 and that it was consistent with point 3.2.1 of the 1994 Guidelines.

26 By letter to the Commission of 4 December 2000, the UK Iron and Steel Association stated that the aid should be examined from the aspect of the ECSC provisions and that the proposed investment had a manifestly economic purpose.

27 In a letter dated 15 January 2001, the Italian Republic confirmed that the aid should be assessed in the light of the EC Treaty.

28 On 28 March 2001, the Commission adopted Decision 2001/829/EC, ECSC on the State aid which Italy [was] planning to grant to Ferriere Nord SpA (OJ 2001 L 310, p. 22; 'the contested decision').

29 The Commission states in the contested decision that the welded mesh, which will be manufactured in a separate unit of the undertaking using the new rolling line, is not an ECSC product and that the aid must therefore be assessed in the light of the EC Treaty. It states that the proposed financial assistance constitutes State aid.

30 The Commission considers that the investment, which is intended to improve the undertaking's competitiveness and to replace old equipment, is essentially based on economic reasons, that it would have been made in any event and that it does not justify the grant of aid for environmental protection. Its positive effects, from the

point of view of environmental protection and working conditions, would be inherent in a new plant. The Commission observes that, in the absence of mandatory ecological standards requiring the construction of the new rolling line, the aid cannot be regarded as an individual application of a scheme which has already been approved. Last, it states that, on the assumption that the environmental purpose was predominant, it would not be possible to distinguish, within the total cost of the investment, the part attaching to environmental protection, as required by the 2001 Guidelines.

31 Consequently, the Commission declares that the aid is incompatible with the common market and cannot be implemented. It orders the Italian Republic to comply with that decision. It terminates the procedure initiated in respect of aid C 35/99 — Italy — Ferriere Nord (see paragraph 20 above).

Procedure

32 By application lodged at the Registry of the Court of First Instance on 13 July 2001, Ferriere brought the present action on the basis of the fourth paragraph of Article 230 EC, Article 235 EC and the second paragraph of Article 288 EC.

33 On 22 November 2001, the Italian Republic sought leave to intervene in support of the form of order sought by the applicant. By order of 14 January 2002, the President of the First Chamber, Extended Composition, granted that application.

34 By decision of the Court of First Instance of 2 July 2003 (OJ 2003 C 184, p. 32), the Judge-Rapporteur was assigned, for the period 1 October 2003 to 31 August 2004, to the Fourth Chamber, Extended Composition, to which the case was consequently reallocated.

35 By a measure of organisation of procedure notified to the parties on 28 October 2003, the Court requested the Commission and the Italian Republic to produce certain legislative and administrative documents concerning the aid scheme approved in 1992 and to state whether it had subsequently been amended. The applicant was also requested to indicate the factors which in its view made it possible to isolate the investment cost associated with environmental protection.

36 By letters of 26 November 2003, the parties answered the Court's requests.

37 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 15 January 2004.

Forms of order sought by the parties

38 Ferriere claims that the Court should:

— annul the contested decision;

— order the Commission to make good the harm caused to the applicant by that decision, together with interest at the statutory rate applicable in Italy and a sum taking account of monetary revaluation, both to be calculated on the amount of the aid as from 26 April 1999;

— order the Commission to pay the costs.

39 The Italian Republic claims that the Court should annul the contested decision.

40 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

The lawfulness of the contested decision

41 In support of its action, Ferriere puts forward both procedural pleas and substantive pleas.

Procedure

42 The applicant develops six procedural pleas, alleging that the Commission was not lawfully entitled to initiate the formal aid examination procedure, that it did not observe the procedural time-limits and that it breached the rights of the defence, the principle of protection of legitimate expectations, the principle of sound administration and its obligation to state the reasons for its decision.

First plea: the Commission was not lawfully entitled to initiate the formal aid examination procedure

— Arguments of the parties

43 Ferriere maintains that the Commission unlawfully initiated the formal procedure, first on 3 June 1999 and then a second time on 14 August 2000, as the aid constitutes a measure for the application of the authorised scheme. The Commission should have closed the file, notified in error, after declaring that it was compatible with the approved scheme. The initiation of the formal procedure in the circumstances of the present case thus constitutes a breach of the principles of protection of legitimate expectations and legal certainty.

44 The Italian Republic, which alleges misuse of powers, claims that the Commission should have merely taken note of the notification and not examined it as an individual aid.

45 The Commission contends that it was justified in initiating the formal examination procedure. First, it states that the Italian authorities notified the aid at the request of the Autonomous Region of Friuli-Venezia Giulia, since the aid was not considered to be covered by the approved scheme; that, in the second notification, of 25 July 2000, the Italian Government asked it to adopt a position on a plan to grant new aid within the meaning of Article 88(3) EC; and that, since it was not maintained that the aid was covered by the approved scheme, it had no reason to carry out further investigations. Second, when notifying the aid, the Italian authorities stated that there were no mandatory standards, contrary to the requirements of the approved scheme. The Commission further contends that, after finding, following verification, that the planned aid was not covered by an existing scheme, it then examined it in the light of the legislation in force.

— Findings of the Court

46 It is not in dispute that two decisions to initiate the formal procedure were notified to the Italian authorities, on 3 June 1999 and 14 August 2000.

47 It follows from the Commission's letter of 22 December 1992, referred to at paragraph 13 above, approving the aid scheme in favour of environmental protection proposed by the Autonomous Region of Friuli-Venezia Giulia, that the Commission determined the matter within the framework of the provisions of the EC Treaty, under which the scheme in question had been notified to it by the Italian authorities on 23 January 1992, and not within the framework of the ECSC Treaty.

48 Also, in accordance with the requirements of Article 6(1) of Decision No 2496/96, which provides that the Commission is to be informed of plans to grant aid in respect of which it has already taken a decision under the EC Treaty, the Italian authorities on 18 February 1999 notified the planned aid in favour of environmental protection which they intended to grant to the applicant. The information given in that notification, to the effect that the aid was granted pursuant to Regional Law No 47 of 3 June 1978, as amended by Regional Law No 2 of 2 January 1992, 'notified at the time to the European Community with a favourable outcome', is immaterial, since approval had been given in the context of the EC Treaty and in such circumstances the abovementioned provisions of Decision No 2496/96 required the Member State to notified planned aid covered by the ECSC Treaty.

49 Upon being notified of such planned aid, the Commission, when it had doubts as to its compatibility with the provisions of Decision No 2496/96 on aid to the steel industry, could lawfully, pursuant to Article 6(5) of that decision, cited at paragraph 5 above, initiate the formal procedure, as it did on 3 June 1999.

50 Ferriere cannot therefore maintain that the Commission initially acted unlawfully in initiating the formal procedure.

51 As regards the second initiation of the formal procedure, it should be borne in mind that, when the Commission has before it a specific grant of aid alleged to have been made in pursuance of a previously authorised scheme, it cannot at the outset examine it directly in relation to the Treaty. Prior to the initiation of any procedure, it must first examine whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving it. If it did not do so, the Commission could, whenever it examined an individual aid measure, go back on its decision approving the aid scheme, which had already involved an examination in the light of Article 87 EC. This would jeopardise the principles of the protection of legitimate expectations and legal certainty. Aid which constitutes the strict and foreseeable application of the conditions laid down in the decision approving the general aid scheme is thus considered to be existing aid, which does not need to be notified to the Commission or examined in the light of Article 87 EC (Case C-321/99 P *ARAP and Others* v *Commission* [2002] ECR I-4287, paragraph 83, and the case-law cited).

52 In the present case, when the Italian authorities withdrew part of the first notification and confirmed the notification in respect of the aid relating to the rolling line, on 25 July 2000, as stated at paragraph 23 above, they expressly requested the Commission to adopt a position on the compatibility of the planned aid with the common market pursuant to Article 88(3) EC, which concerns new aid, and not in the context of the permanent cooperation between the Commission and the Member States established by Article 88(1) EC, which is concerned with existing aid.

53 Furthermore, while the letter from the Autonomous Region of Friuli-Venezia Giulia of 15 February 1999 attached to the notification of 18 February 1999, which remained valid for the part of the notification which was maintained, contained a reference to the approved scheme, the Italian authorities did not maintain that the

aid in respect of Ferriere's investment constituted a measure for the application of that scheme. Furthermore, and for the sake of completeness, although the approved scheme, cited at paragraph 13 above, concerns investments which bring improvements from the aspect of environmental protection or working conditions 'in accordance with the new norms fixed by the legislation in the sector', the abovementioned letter stated that Ferriere was not subject to mandatory norms or to other legal obligations, which on the face of it gave rise to doubt as to whether the notified project corresponded to the approved scheme.

54 In those circumstances, in the light of the ambiguity of the letter of 15 February 1999 and of the fact that the Italian authorities did not maintain at the time of their second notification that the aid measure granted to Ferriere constituted a measure for the application of the approved scheme even though they twice took the initiative to notify the impugned aid project to the Commission, notifying it for the second time on the basis of Article 88(3) EC, as new aid the compatibility of which they expressly requested the Commission, in their letter of 25 July 2000, to determine, it does not appear that the Commission acted unlawfully in initiating the formal procedure for a second time.

55 The reference which Ferriere and the Italian Republic make to the *Italgrani* and *Tirrenia* cases previously examined by the Court of Justice (Case C-47/91 *Italy* v *Commission* ('*Italgrani*') [1994] ECR I-4635 and Case C-400/99 *Italy* v *Commission* ('*Tirrenia*') [2001] ECR I-7303) is irrelevant. In those cases, the Commission had initiated the formal procedure following complaints and the Italian Government contended that the aid granted to the undertakings concerned fell, in *Italgrani*, within an approved scheme and, in *Tirrenia*'s case, within a public service contract, so that it constituted existing aid (*Italgrani*, paragraphs 6 and 12, and *Tirrenia*, paragraphs 8, 24 and 25). The Court of Justice stated in *Italgrani* that for the Commission to call in question 'aid in strict conformity with the decision approving the aid scheme' would jeopardise the principles of protection of legitimate expectations and legal certainty (*Italgrani*, paragraph 24).

56 The reasoning of the Court of Justice does not appear to be capable of being transposed to the present case, which concerns individual aid notified to the Commission as new aid pursuant to Article 88(3) EC.

57 It follows from the foregoing that Ferriere cannot argue that the formal procedure was initiated unlawfully or that there has been a breach of the principles of protection of legitimate expectations and legal certainty. The first plea must therefore be rejected.

Second plea: the Commission failed to observe the procedural time-limits

— Arguments of the parties

58 Ferriere claims that the Commission exceeded the procedural time-limits laid down in respect of State aid, from two aspects. First, the Commission initiated the formal procedure on 3 June 1999, more than three months after notification of the aid, when, according to the texts and the case-law, it ought to have adopted a decision within two months following notification of aid. Second, the Commission did not observe the period of 18 months prescribed by Article 7(6) of Regulation No 659/1999 within which it must take a decision after initiating a formal procedure, as 20 months elapsed before the contested decision was adopted. Ferriere further submits that while the 18-month period is not mandatory, it can be extended only by common consent between the Commission and the Member State concerned.

59 The Italian Republic maintains that the delay in adopting the contested decision constitutes a breach of Article 7(6) of Regulation No 659/1999 and that it did not

agree to an extension of the period for closing the formal procedure. The intervener further contends that the Commission failed to observe the principle of loyal cooperation by declaring, in Article 3 of the contested decision, that the procedure initiated under the ECSC Treaty following the notification of 18 February 1999 was closed.

60 The Commission contends that the plea alleging that the procedure was unduly long is unfounded. As regards the initiation of the formal procedure, it observes that the initial notification was effected on the basis of rules which proved to be irrelevant, so that it could not be compelled to react within the two-month period normally applicable, and that the Italian authorities had not informed it of their intention to implement the aid. As regards the duration of the formal examination procedure, the Commission claims that the period of 18 months in Article 7(6) of Regulation No 695/1999 is not mandatory. Furthermore, as the contested decision, dated 28 March 2001, was based on the second decision to initiate the formal procedure, dated 14 August 2000, the real duration of the procedure was seven and a half months.

— Findings of the Court

61 As regards the first decision to initiate the formal procedure, the relevant provisions, concerning a notification made under the ECSC Treaty, are those set out in Article 6(6) of Decision No 2496/96 and not, as the parties wrongly state, those of Article 4(5) of Regulation No 659/1999, which apply to the second notification.

62 Article 6(6) of Decision No 2496/96 mentions a period of two months beyond which, if a formal procedure has not been initiated, the planned aid measures may be put into effect provided that the Member State has first informed the Commission of

its intention. That provision does not impose on the Commission a period on pain of nullity but, in accordance with the principle of proper administration, invites it to act diligently and allows the Member State concerned to put the aid measures into effect once a period of two months has elapsed, subject to having previously informed the Commission that it intends to do so (Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 6, and Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 11).

63 It is common ground that the Italian authorities did not inform the Commission of their intention to pay the aid. The intervener cannot claim that it did not grant an 'extension' of the period to the Commission, since such a mechanism is not provided for by Article 6(6) of Decision No 2496/96. Likewise, although the Commission, which had received notification on 25 February 1999, did not initiate the formal procedure until 3 June 1999, or three months and nine days later, that period, during which the Italian authorities did not contact the Commission according to the procedures laid down in the abovementioned provision, does not in the circumstances of the case appear excessive. In any event, it does not follow from the wording of Article 6(6) of Decision No 2496/96 that a formal procedure initiated more than two months after notification would for that reason be vitiated by nullity.

64 Ferriere cannot therefore validly maintain that the contested decision is unlawful owing to the belated initiation of the formal procedure.

65 As regards the time which the Commission took to adopt the contested decision, Article 7(6) of Regulation No 659/1999, cited at paragraph 4 above, which is applicable to the aid measure in question, provides that the Commission is as far as possible to endeavour to adopt a decision within 18 months from the opening of the procedure and that that period may be extended by common agreement between the Commission and the Member State concerned.

66 In the present case, that period applies to the procedure which followed the second notification, made under the EC Treaty, and not, as the applicant contends, to the procedure which followed the first notification, made under the ECSC Treaty.

67 Admittedly, the contested decision refers to both Treaties, mentions the first notification, effected on 25 February 1999 under the ECSC Treaty and, in Article 3, declares that the procedure initiated following that notification is closed. However, that first notification was withdrawn, as regards the planned ECSC aid which it mentions, on 25 July 2000, by the second notification. That second notification, which replaced the preceding notification, confirmed that the Commission was being requested to examine the impugned planned aid, this time by reference to the EC Treaty. On that point, the Italian authorities explained at the hearing the problems of characterisation which arise in the case of intervention in favour of steel undertakings such as the applicant, which operate within the sphere of both Treaties. Furthermore, the assessment of the time which elapsed with effect from the first decision initiating the formal procedure, taken on 3 June 1999, should be made in the light of Decision No 2496/96, which, however, does not specify a period within which a decision must be adopted following the opening of a formal procedure.

68 Consequently, it is with effect from the decision to open the formal procedure adopted on 14 August 2000, which followed the second notification of the planned aid, based on the EC Treaty, that the duration of that procedure must be assessed, in the light of the requirements of Regulation No 659/1999.

69 As the Commission adopted the contested decision on 28 March 2001, or 7 months and 14 days after initiating the formal procedure, the period of 18 months referred to at paragraph 65 above, which is indicative and can be extended, was complied with. The applicant is therefore not justified in maintaining that the Commission exceeded the periods laid down for adopting the contested decision. In any event, even on the assumption that the date initiating the formal procedure, namely 3 June

1999, were to be taken into consideration, the duration of the procedure would be a little under 22 months, which would not mean that the indicative period of 18 months mentioned above was unreasonably exceeded (Case T-190/00 *Regione Siciliana* v *Commission* [2003] ECR II-5015, paragraph 139).

70 Nor does it appear that the Commission failed to fulfil its duty of loyal cooperation with the Italian Republic, in the circumstances of the present case, characterised by the fact that the undertaking engaged in two categories of activities and maintained a single set of accounts, that two successive notifications were submitted, under the ECSC Treaty and then under the EC Treaty, and that the Commission was required to ascertain the exact nature — ECSC or EC — of the activity benefiting from the aid. Article 3 of the contested decision, which declares that the procedure initiated following the notification made under the ECSC Treaty is closed, is limited, in that context, to drawing the necessary formal conclusion from the procedure initiated on 3 June 1999.

71 It follows from the foregoing that Ferriere cannot validly maintain that the Commission failed to observe the procedural time-limits. The second plea must therefore be rejected.

Third plea: failure to observe the rights of the defence

— Arguments of the parties

72 Ferriere maintains that the Commission failed to observe the rights of the defence in applying the successive guidelines on State aid for environmental protection. After initiating the formal procedure in accordance with the 1994 Guidelines, it adopted

the contested decision on the basis of the 2001 Guidelines, without inviting the Italian Republic and interested parties to submit their comments in respect of the new guidelines.

73 The Commission claims that, in the procedure involving the examination of State aid, the only party with rights of defence is the Member State, to which the decisions are addressed. The defendant further states that the applicant was informed of the opening of the formal examination procedures, that it twice submitted comments which were taken into account and that it could have submitted new comments following publication of the 2001 Guidelines. Furthermore, the criteria for assessment remained substantially unaltered when the new guidelines were published.

— Findings of the Court

74 It should first of all be noted that Ferriere's plea must be examined not from the point of view of the rights of the defence, which only the States enjoy in State aid matters, but in consideration of the right which, pursuant to Article 88(2) EC, the 'parties concerned' have to submit comments during the review stage referred to in that provision (Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraphs 122 to 125).

75 It is common ground that, when the 2001 Guidelines were published, the parties concerned had already produced their comments, in consideration of the 1994 Guidelines. It follows from the 2001 Guidelines, and in particular from the introduction thereto, that they are intended to follow on from the 1994 Guidelines and define the Commission's new approach in the light of both national and international developments in the concepts, regulations and policies relating to environmental protection. On the assumption that the Commission, as it considered

it was entitled to do, could lawfully apply the new guidelines when it adopted the contested decision — a question which will be examined at paragraphs 134 to 140 below —, it would not have been able, without disregarding the procedural rights of the parties concerned, to have based its decision on new principles introduced by the 2001 Guidelines without inviting the parties concerned to submit their comments in that regard.

76 It follows from the contested decision that the Commission declared the aid incompatible with the common market on two types of grounds, namely that the main reason for the investment was economic (recital 31), the advantages in environmental terms being marginal consequences of that investment (recital 33), and that the extra investment cost incurred in order to meet environmental objectives could not be isolated (recital 32).

77 The principles laid down by the two sets of guidelines are, in the light of those grounds, substantially identical, as the Commission stated at recital 31 (footnote 3) to the contested decision. Like the 1994 Guidelines, the 2001 Guidelines provide that investment aimed at protecting the environment is eligible (point 3.2.1 of the 1994 Guidelines and point 36 of the 2001 Guidelines, cited at paragraphs 6 and 10 above respectively), the 1994 Guidelines expressly precluding the grant of aid ostensibly intended for environmental protection measures but in fact for general investment. Both sets of guidelines also contain the same method of calculating the cost eligible for aid (point 3.2.1 of the 1994 Guidelines and point 37, cited at paragraph 11 above, of the 2001 Guidelines).

78 The applicant claimed at the hearing that the deletion of certain details in the 2001 Guidelines is not inconsequential, particularly as regards the new plant for which, it contends, the 1994 Guidelines permitted aid to be granted provided that the plant had a positive impact on the environment. On that point, Ferriere maintains in its written submissions that, since the 1994 Guidelines, at point 3.2.1, excluded, in the

case of new or replacement investment, the cost of basic investment intended to create or replace production capacity without improving environmental performance, that meant, *a contrario*, that aid could be granted for new plant having a positive impact for environmental protection.

79 In reality, however, the applicant's observations concern the determination, envisaged at point 3.2.1 of the 1994 Guidelines, of the 'eligible costs' qualifying for an aid measure, which must be 'strictly confined to the extra investment costs necessary to meet environmental objectives'. The guidelines, cited at paragraph 6, above stated that '[t]hus, in the case of new or replacement plant, the cost of the basic investment involved merely to create or replace production capacity without improving environmental performance is not eligible'. The terms of the 2001 Guidelines cannot therefore be regarded as containing an amendment to the previous provisions. In effect, whether the investment concerns new plant or old plant, only the extra cost associated with environmental protection can benefit from an aid measure; and although the 2001 Guidelines do not contain the same stipulation as the 1994 Guidelines, that same condition of eligibility for aid remains applicable.

80 It therefore appears that the Commission did not derive from the new guidelines any principles or criteria for assessment which would have altered its analysis of the notified aid. In those circumstances, it was not required to consult the parties concerned again. The applicant was able to submit its comments, which are summarised in recitals 13 to 16 of the contested decision, on the principles and assessment criteria, substantially identical in both sets of guidelines, which led the Commission to declare the aid incompatible with the common market.

81 The Commission did not therefore base its decision on grounds on which the applicant was unable to make known its comments and, accordingly, did not infringe Article 88(2) EC.

82 Ferriere cannot therefore validly maintain that there was a breach of the rights of the defence, understood here as the procedural rights which Article 88(2) recognises to the 'parties concerned'. Consequently, the third plea must be rejected.

Fourth plea: breach of the principle of protection of legitimate expectations

— Arguments of the parties

83 Ferriere maintains that the Commission failed to provide the protection which ought to be given to a legitimate expectation of a procedural nature. Since the Commission never asked the Italian authorities or the applicant to produce documents establishing the environmental objective of the investment, it could not lawfully state in its decision that no documents had been provided to it in that regard.

84 The Italian Republic submits that the Commission's criticism in the decision that proof of the environmental purpose of the investment was not provided fails to observe the rules on the burden of proof, since in a procedure involving a review of compatibility with the Treaty and not a procedure for the approval of aid, the burden of proof was borne by the Commission.

85 The Commission contends that it did not breach the principle of protection of legitimate expectations and that the Italian Government and the undertaking were clearly invited by the decisions initiating the formal procedure to adduce evidence of the environmental objective of the investment.

— Findings of the Court

86 This plea consists of two parts, concerning, first, the elements which the Commission should have requested from the parties concerned and, second, the rules on proof.

87 First, Ferriere criticises the Commission for not having asked it or the Italian Republic to provide documentation relating to the environmental purpose of the investment, then for having stated in its decision that no evidence on that point had been provided (recital 30).

88 The principle of protection of legitimate expectations on which the applicant relies means that in carrying out the procedure involving review of State aid, the Commission must take account of the legitimate expectations which the parties concerned may entertain as a result of what was said in the decision opening the procedure (Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v *Commission* [2001] ECR II-1523, paragraph 126) and, subsequently, that it does not base its final decision on the absence of elements which, in the light of those indications, the parties concerned were unable to consider that they must provide to it.

89 It is apparent from the decision of 3 June 1999 initiating the formal procedure, referred to at paragraph 20 above, that the Commission stated in that decision that it had doubts that the principal objective of the investment was environmental protection, that it considered at that stage that its effect in that regard would be very limited and that the alleged advantages for environmental protection seemed to it to be more connected with the protection of the workers, which did not come under

either the code on aid to the steel industry or the 1994 Guidelines. The Commission also pointed out that the decision to make the necessary investments for economic reasons owing to the age of the plant was not eligible for aid.

90 In the decision of 14 August 2000 initiating the formal procedure, referred to at paragraph 24 above, the Commission gave an indication of its initial assessment of the investment from the point of view of environmental protection. It stated that the Italian authorities had not proved that the acquisition of the rolling line had as its main objective to improve environmental protection or the working conditions of the workforce and that it appeared to the Commission, on the contrary, that Ferriere had essentially sought to replace or increase its production capacity by acquiring very productive equipment. The Commission concluded that at that stage of its review the effects of the investment on working conditions and the environment appeared to constitute only very marginal consequences of the investment.

91 Such reiterated information was sufficiently clear and precise for the Italian authorities and the applicant to consider that they were being invited to provide all the relevant evidence capable of showing that the investment had a principally environmental objective. Ferriere's complaint alleging breach of a legitimate expectation of a procedural nature cannot therefore be upheld.

92 Second, Ferriere claims that the Commission based its decision on presumptions without carrying out the specific checks which it was required to do. The Italian Republic further claims that proof of the non-environmental objective of the investment had to be adduced by the Commission and that the decision reverses the burden of proof.

93 When the Commission decides to initiate the formal procedure, it is for the Member State and the potential recipient of the aid to put forward the arguments whereby they seek to show that the planned aid corresponds to the exceptions provided for in application of the Treaty, since the object of the formal procedure is specifically to ensure that the Commission is fully informed of all the facts of the case (see, to that effect, *Germany* v *Commission*, cited above, paragraph 13).

94 Although the Commission is required to express its doubts clearly as to the compatibility of the aid with the common market when it opens a formal procedure in order to allow the Member State and other parties concerned to respond as fully as possible, the fact remains that it is for the applicant for the aid to dispel those doubts and to establish that its investment satisfies the condition on which it may be granted (see, to that effect, Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraphs 41 and 45 to 49). It was therefore for the Italian Republic and Ferriere to establish that the investment in question was eligible for aid for environmental protection and, in particular, that it had the environmental objective required by the two sets of guidelines applicable in turn (see, to that effect, Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 49, and Case C-113/00 *Spain* v *Commission* [2002] ECR I-7601, paragraph 70).

95 It is apparent from the case-file and, in particular, from the contested decision that the Commission, which had expressed its doubts as to the compatibility of the aid with the common market and received the comments of the interested third parties and the Italian Republic on the project in question, carried out a precise and properly reasoned analysis of the evidence submitted to it, at recitals 23 to 36 to the decision, as it was required to do.

96 It follows from the foregoing that Ferriere cannot validly maintain that the Commission failed to observe the principle of protection of legitimate expectations during the administrative procedure. The fourth plea must therefore be rejected.

Fifth plea: breach of the principle of sound administration

— Arguments of the parties

97 Ferriere maintains that the Commission failed to respect the principle of sound administration, by erring in its quest for the relevant legal basis — the ECSC Treaty and then the EC Treaty — and by embarking on a formal procedure in respect of a measure applying an authorised scheme.

98 The Commission claims that it did not fail to respect the principle of sound administration. As two notifications were submitted to it, on the basis of the ECSC Treaty and then on the basis of the EC Treaty, it was required, in a case involving a steel undertaking which did not keep separate accounts, to examine the aid from the aspect of both Treaties.

— Findings of the Court

99 It is apparent from the case-file that Ferriere is a steel undertaking manufacturing products which in some cases come under the ECSC Treaty and in others the EC Treaty; that the Italian authorities first notified the aid in question under the ECSC Treaty; that during the administrative procedure the Italian Republic and Ferriere then stated that welded steel mesh (to be manufactured in the rolling line for which the investment was planned) was not an ECSC product but an EC product; and that a new notification was made under the EC Treaty. In that regard, the intervener explained at the hearing that it was difficult to determine the relevant legal framework in the case of undertakings whose activities are covered by both Treaties.

100 Furthermore, in the case of a steel undertaking which, like Ferriere, does not keep separate accounts, the Commission was correct to ascertain that the aid in question would not be diverted to the ECSC activities (*ESF Elbe-Stahlwerke Feralpi* v *Commission*, cited above, paragraphs 74 and 125).

101 In those circumstances, the Commission cannot be imputed with alleged procedural errors, when it was not immediately certain whether the investment related to the ECSC Treaty or the EC Treaty; when the planned aid was notified to it successively under each of the two Treaties; and when in any event it was required to ascertain that the aid was not likely to benefit activities other than those in respect of which it would be granted. The Commission's need to ascertain the legal basis on which to found its decision clearly cannot constitute a breach of the principle of sound administration.

102 Furthermore, from a strictly procedural point of view, the fact of embarking upon two formal procedures does not in this case disclose a failure to observe the principle of sound administration when, as stated in response to the first plea (paragraphs 50, 54 and 57 above), both of those procedures were lawfully opened following the notifications submitted by the Italian authorities. As regards Ferriere's argument concerning breach of the principle of sound administration owing to the opening of a formal procedure when the case involved a measure for the application of an approved scheme, that goes to the substantive question, which is whether, as the applicant maintains, the aid measure in question constituted such a measure, and it will be examined together with the first substantive plea (see paragraphs 116 to 128 below).

103 It follows from the foregoing that Ferriere cannot validly maintain that the Commission failed to observe the principle of sound administration. The fifth plea must therefore be rejected.

Sixth plea: breach of the obligation to state reasons

— Arguments of the parties

104 Ferriere maintains that the Commission did not sufficiently state the reasons for its decision by merely stating, at recital 30 (footnote 1), that no specific legal limits existed for the type of plant concerned.

105 The Commission states that it could not rely on any grounds other than that it had found that no standards existed.

— Findings of the Court

106 It is settled case-law that the obligation to provide a statement of reasons laid down in Article 253 EC is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. The statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16, and Case C-114/00 *Spain* v *Commission* [2002] ECR I-7657, paragraphs 62 and 63).

107 In the light of that case-law, it does not appear that the Commission failed in the present case to fulfil its obligation to provide a sufficient statement of the reasons for the contested decision.

108 The contested decision cites, at recital 1 (footnote 3), Article 15(1) of Regional Law No 47 of 3 June 1978, as amended (cited at paragraph 13 above), which provides that aid may be granted to investments made by industrial undertakings which adapt their processes or plant to new standards fixed by the legislation applicable to the sector. The contested decision refers at recital 14 to the applicant's observations concerning the existence of mandatory limit values with which its plant complies and states in that regard, at recital 30 (footnote 1), that, contrary to the company's contentions, no specific legal limits are prescribed for this kind of plant. The reason based on the absence of binding norms applicable to Ferriere's plant is clearly stated in a legal and factual context which enabled the applicant to grasp its meaning.

109 Ferriere cannot therefore validly maintain that the contested decision is vitiated by a failure to state reasons. Consequently, the sixth plea must be rejected.

110 It follows from the foregoing that the six pleas relating to the procedure must be rejected in their entirety.

Substance

111 In support of its action, Ferriere develops substantive pleas of three types, alleging, first, that its investment constitutes a measure implementing an approved scheme

and not new aid; second, that the contested decision should have been adopted on the basis of the 1994 Guidelines and not the 2001 Guidelines; and, third, that its investment pursues an environmental objective which renders it eligible on that basis for aid for environmental protection.

First plea: Ferriere's investment constitutes a measure implementing an approved scheme and not new aid

— Arguments of the parties

112 Ferriere maintains that its investment came under the regional scheme approved by the Commission in 1992 and was merely an implementing measure, so that by the contested decision the Commission failed to take account of its own decision authorising the aid.

113 It submits that the Commission misinterpreted the aid scheme approved in 1992, as adaptation to 'standards established by the legislation' does not refer to adaptation to 'mandatory environmental standards' but may be understood as adaptation to purely indicative and therefore non-binding standards. That interpretation corresponds to the philosophy of the 1994 and 2001 Guidelines, which include that nature of the aid as an incentive. Furthermore, the 2001 Guidelines provide that aid may be authorised for investments carried out in the absence of mandatory standards. In addition, environmental standards concerning polluting emissions or sound nuisance and standards aimed at improving working conditions exist under national or Community provisions and were taken into account in the completion of the applicant's new plant.

114 The Italian Republic maintains that the aid comes under the scheme approved in 1992. In 1998, moreover, the Commission authorised the refinancing of that scheme in terms which show, as is also apparent from the 1994 and 2001 Guidelines, that the grant of aid is not subject to the existence of mandatory standards. The Commission therefore misinterpreted the approved scheme.

115 The Commission claims that the aid in question is not compatible with the scheme approved in 1992. That scheme lays down as a condition of eligibility for aid that the investment concerned is aimed at adaptation to new standards in the sector. In the Commission's submission, Ferriere's previous plant satisfied the existing standards and the new plant has no connection with the entering into force of new standards. The standards to which the applicant refers are neither new nor binding, or indeed are relied on for the first time in the present proceedings. The Commission further states that the improvement of working conditions and hygiene or security measures taken inside the factories are not environmental protection measures.

— Findings of the Court

116 The question whether the impugned aid constitutes a measure for the implementation of the scheme approved in 1992 or new aid depends on the interpretation of the provision establishing that scheme, cited at paragraph 13 above, according to which investments intended to introduce improvements from the point of view of the environment or working conditions 'in accordance with the new standards determined by the legislation in the sector' are eligible for aid.

117 It follows from the actual wording of that provision that standards must be applied in the sector in which the candidate for the aid is active, that they must have been

recently introduced and that in order to be eligible the investment must bring the plant into conformity with those standards.

118 That interpretation is corroborated by the circumstances in which, during the examination of the planned aid scheme, the condition relating to adaptation to new standards was introduced. It follows from two letters from the Commission to the permanent representation of Italy that in the first letter, dated 21 May 1992, the Commission had asked whether, according to the planned scheme, the grant of the aid was conditional upon conformity with new normative standards and that in the second, dated 9 September 1992, it stated unequivocally that 'the aid [must] have as its objective to facilitate the adaptation of undertakings to new obligations imposed by the public authorities relating to the elimination of pollution'.

119 No amendment was made to that scheme, particularly in the case of the condition concerning adaptation to new standards, when the Commission, by letter of 18 September 1998, gave its approval to the refinancing of the scheme approved in 1992. The summary of the authorised scheme in that letter cannot be interpreted as an amendment of the scheme. Incidentally, the Italian Republic and the Commission stated in their answers to the questions put by the Court, referred to at paragraph 36 above, that the procedure initiated in 1998 was aimed merely at the refinancing of the existing scheme and did not affect the content or the scope of that scheme.

120 Ferriere's request, dated 26 March 1997, to the Autonomous Region of Friuli-Venezia Giulia for aid did not mention any standard with which the plant sought to comply. Furthermore, the letter from the Region dated 15 February 1999 attached to the notification submitted by the Italian authorities on 18 February 1999, referred to at paragraphs 53 and 54 above, expressly states that there are no mandatory

standards or other legal obligations to which the undertaking would be subjected and further states that the investment, made in order to improve the results from the environmental aspect, goes further than the Community standards. As stated at paragraphs 53 and 54 above, moreover, the Italian authorities did not maintain, at the time of the second notification, that the aid granted to Ferriere constituted a measure implementing the approved scheme.

121 Admittedly, during the administrative procedure, Ferriere, in its letter of 13 November 2000, referred to at paragraph 25 above, made reference, without indicating the legal basis, to 'limit values' prescribed by the legislation in force, explaining that those values also complied with the guidelines in Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), which was transposed into domestic law by Legislative Decree No 372 of 4 August 1999, i.e. at a date later than its application for aid and the notification of February 1999. However, those documents, which do not themselves contain any value in figures, merely make recommendations for the issue of authorisation in connection with industrial plant which bears no relation to the aid case in issue here.

122 In its application, Ferriere also referred to Council Directive 86/188/EEC of 12 May 1986 on the protection of workers from the risks related to exposure to noise at work (OJ 1986 L 137, p. 28), implemented in Italy by Legislative Decree No 277 of 15 August 1991, and referred in a footnote to various measures of Community or national law laying down limit values with which its investment complies. The applicant refers, in Community law, to Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20), amended by Council Directive 94/31/EC of 27 June 1994 (OJ 1994 L 168, p. 28) and implemented in Italy by Legislative Decree No 22 of 5 February 1997. The applicant also mentions a number of measures of domestic law, namely Decree No 203 of the President of the Republic of 24 May 1988 on smoke and dust emissions in the atmosphere, Law No 447 of 26 October 1995 on emissions of noise nuisance outside industrial plant and one of its implementing regulations, Implementing Decree No 675900 of the President of the Council of Ministers of 14 November 1997.

123 However, irrespective of the fact that on the date of the application for aid, 26 March 1997, those requirements were for the most part not new, Ferriere has not identified, either during the administrative procedure or during these proceedings, the standards which, in its submission, were provided for by those provisions and to which its investment was intended to adapt the industrial plant. As that information was not produced and thus could not be taken into consideration in drafting the contested decision, it cannot be relied on to challenge the legality of that decision (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraphs 11 and 16). As regards, moreover, the provisions of Community law on which the applicant relies, first, it is apparent that Directive 86/188 was concerned with the provision of information to and the protection and medical supervision of workers exposed to certain noise levels at their place of work, but does not deal with standards to be complied with by undertakings. Second, there is no indication in the file that Ferriere produces hazardous waste such as that referred to in Directive 91/689 and is therefore affected by the provisions of that directive.

124 Thus, it must be held that Ferriere was not in a position to indicate, either during the administrative procedure or during the present proceedings, the precise new standards, applicable in the sector in which it is active, with which its investment was intended to comply. The arguments based on provisions of Community law or national law, which are not new or which have no connection with the grant of the aid in issue, are inadmissible in part, since they are raised for the first time before the Court, and unfounded in part, since they have no connection with the investment in question. The inevitable conclusion is that Ferriere has failed to establish the relationship between its investment and any new standards concerning its sector.

125 Accordingly, there is no need to determine whether the standards referred to by the approved aid scheme are to be understood as mandatory or indicative standards or to ascertain whether any standard introduced after the commissioning in the 1970s of the plant to be replaced should be characterised as aid, as Ferriere maintains, as the applicant has failed to identify any standards whatsoever to which it wished to adapt its plant. Likewise, the argument that the 1994 and 2001 Guidelines would allow aid to be granted, by way of incentive, in the absence of mandatory standards

or in circumstances where the investment goes beyond the standards to be complied with is of no relevance here, since the provision establishing the approved scheme requires that, in order to be eligible for aid, the investment must be aimed at the adaptation of the plant to new standards which apply to the sector.

126 It follows from the foregoing that the Commission was correct to consider that the impugned aid could not be regarded as a measure implementing the approved scheme but was a new measure.

127 It follows, moreover, that Ferriere's argument, referred to at paragraph 102 above, that the Commission infringed the principle of sound administration by initiating a formal procedure in respect of a measure implementing an approved scheme cannot be upheld either.

128 The first substantive plea must therefore be rejected.

Second substantive plea: the contested decision should have been adopted in the light of the 1994 Guidelines and not the 2001 Guidelines

— Arguments of the parties

129 Ferriere claims that its investment should have been examined in the light of the 1994 Guidelines. It submits that the contested decision has an incorrect legal basis.

The aid should have been evaluated on the basis of the criteria set out in the 1994 Guidelines and not by reference to those in the 2001 Guidelines. The Commission also failed to observe the principle of protection of legitimate expectations on that point.

130 The applicant submits that, as interpreted by the Commission, point 82 of the 2001 Guidelines (cited at paragraph 12 above) is illegal. The new guidelines could be applied to aid which had already been notified only in so far as a formal procedure had not yet been initiated in respect of that aid.

131 The Italian Republic claims that the aid should have been evaluated in the light of the 1994 Guidelines, which were in force when it was granted, on 8 October 1998, and not according to the law in force at the time of adoption of the contested decision.

132 The Commission contends that the planned aid was incompatible with the common market in the light of the 2001 Guidelines and that it could not have been authorised under the 1994 Guidelines either.

133 It further claims that the objection of illegality in respect of point 82 of the 2001 Guidelines was not raised in the application that that it is therefore inadmissible under Article 48(2) of the Rules of Procedure of the Court of First Instance. In any event, point 82 merely provides for the immediate application of the new system in accordance with the general principles of the application of the law *ratione temporis*, which does not breach the principle of protection of legitimate expectations.

— Findings of the Court

134 The compatibility with the common market of planned aid aimed at environmental protection is assessed in accordance with the combined provisions of Articles 6 EC and 87 EC and by reference to the Community guidelines which the Commission has previously adopted for the purposes of such an examination. The Commission is bound by the guidelines and notices that it issues in the area of supervision of State aid where they do not depart from the rules in the Treaty and are accepted by the Member States (Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 53). The parties concerned are therefore entitled to rely on those guidelines and the Court will ascertain whether the Commission complied with the rules it has itself laid down when it adopted the contested decision (Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, paragraphs 74 and 77).

135 In the present case, it must first of all be determined what Community guidelines on State aid in relation to environmental protection the Commission was required to apply when adopting its decision.

136 The objection of illegality expressly raised in the reply is admissible, contrary to the Commission's contention, since it constitutes the expansion, in paragraphs 12 to 18 of the reply, of a plea raised by implication in paragraph 54 of the application (see, to that effect, Case T-118/96 *Thai Bicycle* v *Commission* [1998] ECR II-2991, paragraph 142).

137 It follows from points 81 and 82 of the 2001 Guidelines (see paragraph 12 above) that those guidelines entered into force on the date on which they were published,

on 3 February 2001, and that the Commission was then required to apply them to all notified aid projects, even where they were notified prior to the publication of the Guidelines. Contrary to the applicant's interpretation, the immediate application of the new guidelines is not subject to any reservation, and therefore does not preclude a case, such as this, in which a formal procedure has been initiated.

138 First, what is stated at points 81 and 82, which are inspired by Article 254(2) EC on the entry into force of regulations and directives of the Council and of the Commission, proceeds from the principle that, subject to derogations, acts of the institutions are immediately applicable (Case 270/84 *Licata* v *ESC* [1986] ECR 2305, paragraph 31, and Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraphs 12 to 14).

139 Second, the principle of protection of legitimate expectations cannot be usefully invoked here, since, like the principle of legal certainty, it concerns situations existing before the entry into force of new provisions (Case C-34/92 *GruSa Fleisch* [1993] ECR I-4147, paragraph 22). Ferriere is not in such a situation, but in the temporary situation in which a Member State has notified a new aid project to the Commission and requested that it examine the compatibility of the aid with the Community rules, the grant of the aid being dependent on the outcome of that examination. Furthermore, and in any event, since the two successive sets of guidelines were essentially identical, as previously stated (see paragraph 77 above), the applicant's legitimate expectation cannot have been affected.

140 Consequently, the contested decision was adopted legally in application of the 2001 Guidelines, which entered into force on 3 February 2001.

Third plea: Ferriere's investment pursued an environmental objective which rendered it eligible on that basis for aid for environmental protection

— Arguments of the parties

141 Ferriere maintains that its investment was eligible for aid for environmental protection. It meets the objectives of the Community policy on the environment set out in Article 174 EC and satisfies the requirements of the Community directives and recommendations. The investment entails, in particular, improvements from the point of view of atmospheric pollution, the elimination of hazardous waste, noise nuisance and working conditions, the last two of which are expressly mentioned in the provision establishing the approved scheme.

142 The applicant also claims that it was possible to isolate from the total cost the cost corresponding to environmental protection, which the region evaluated at ITL 11 000 million out of a total investment of ITL 20 000 million.

143 The Commission failed to take account of the environmental purpose of the project and considered, arbitrarily, that the purpose of the investment was predominantly economic, whereas the objective of the new process was specifically to make the production system ecological. While it is logical that a new plant should be more economically efficient than an old one, the former rolling line was still perfectly satisfactory in functional and technological terms and was replaced by innovative equipment in order to eliminate the disadvantages which the old process represented for the environment.

144 The Italian Republic claims that the investment in question was determined principally on grounds linked with environmental protection.

145 The Commission contends that the aid was not justified in the present case, since the investment would have been made in any event for reasons unconnected with environmental protection; the reduction in nuisance and pollution was the necessary and intrinsic consequence of a predominant and inescapable economic and technological choice. Nor is it possible to isolate the additional costs associated with the environmental aspect. In addition, the documents produced for the first time at the stage of the reply, on the assumption that they are admissible, cannot have an impact on the legality of the contested decision, which was adopted in the light of the matters which came to its knowledge during the administrative procedure.

— Findings of the Court

146 The Commission declared the aid incompatible for the reasons stated at paragraph 30 above, namely that the investment, which was intended to replace old equipment by an innovative plant, was not based on environmental objectives but was being done for economic and industrial purposes, which precluded the grant of aid for environmental protection. It further considered that the advantages for environmental protection were inherent in the process, which did not make it possible to isolate from the total cost of the investment the part corresponding to environmental protection (recitals 29 and 31 to 33 to the decision).

147 The benefit of the Community provisions on State aid for environmental protection depends on the purpose of the investment in respect of which aid is sought. Thus the 2001 Guidelines (points 36 and 37, cited at paragraphs 10 and 11 above), which are identical in that regard to the 1994 Guidelines (point 3.2.1, cited at paragraph 6

above), mention investments intended to reduce or eliminate pollution or nuisances, or to adapt production methods, and state that only the additional investment cost linked with environmental protection is eligible for aid. The eligibility for aid for environmental protection of an investment which meets, inter alia, economic considerations assumes that those considerations are not in themselves sufficient to justify the investment in the form chosen.

148 It follows from the scheme of the 2001 Guidelines, which is identical in that regard to the scheme of the 1994 Guidelines, that any investment which adapts plant to standards, whether mandatory or not, national or Community, which exceeds such standards or which is carried out in the absence of any standards is not eligible for aid, but only investment whose very object is that environmental performance.

149 The Commission was therefore entitled to declare the project incompatible with the common market in so far as it did not satisfy that requirement.

150 It is therefore irrelevant that the applicant maintains that its investment brings improvements from the point of view of environmental protection, as is the fact that the contested decision recognises the advantages of the investment from the point of view of environmental protection or of the health and safety of workers.

151 Admittedly, it is possible that a project should have an objective of improving economic productivity and at the same time an objective of environmental protection, but the existence of the second objective cannot be inferred from the mere finding that the new equipment has a less negative impact on the environment than the old equipment, which may be merely a collateral effect of a change in

technology for economic purposes or of the renewal of used equipment. In order that a partially environmental object of the assisted investment may be accepted in such a case, it is necessary to establish that the same economic performance could have been obtained by using less costly, but more environmentally harmful, equipment.

152 The outcome of the dispute therefore does not depend on whether the investment brings environmental improvements or whether it goes beyond existing environmental standards, but, primarily, on whether it was carried out in order to bring such improvements.

153 On this point, the applicant maintains that the objective of the new process was to render the production system ecological, as explained in detail in annexes B and C to its request for aid dated 26 March 1997. Those documents confirm the technological advance represented by the new, fully-automated process for the production of welded steel mesh, which has the consequences of reducing noise from the plant and eliminating dust emissions. They therefore confirm the interest of such a plant from an economic and industrial point of view, an interest which suffices to justify the decision to make the investment.

154 Ferriere also claims that its previous plant was still operating perfectly satisfactorily when it decided to replace it in order to acquire an innovative technique eliminating the environmental disadvantages of the old process. In that regard, the documents produced for the first time with the reply, which were therefore not communicated to the Commission during the administrative procedure, can have no impact on the lawfulness of the contested decision (see *Belgium* v *Commission*, paragraph 16). Incidentally, those documents show at the most that as early as 1993-1994 the undertaking was planning to acquire a new innovative plant. Furthermore, the fact, which seems to be accepted by the Commission at recital 29 to the contested decision, that the new rolling line did not entail an increase in production capacity does not establish the environmental objective of the investment.

155 It is apparent, in short, that Ferriere had equipment more than 25 years old which it wished to replace by a new plant using a technologically innovative process incorporating the performance for environmental protection of any modern equipment. The inevitable conclusion is that the investment follows on from a decision of the undertaking to modernise its production equipment and that it would in any event have been made in that form.

156 Consequently, the Commission did not make an error of assessment in taking the view that it was not established that the investment had a genuinely environmental purpose. The Commission was entitled to consider that the advantages of the investment for environmental protection were inherent in that innovative plant. Furthermore, the analysis of the advantages of the investment from the point of view of working conditions is not in contradiction with the grounds of which the applicant complains, since according to point 6 of the 2001 Guidelines actions aimed at safety and hygiene are not covered by those guidelines.

157 Second, apart from finding that the investment had no environmental purpose, the contested decision states that the cost of the investment intended to protect the environment could not be isolated from the total cost of the operation. That ground of the contested decision is not superfluous, since if the project chosen entailed an additional cost by comparison with a different, hypothetical, project offering the same economic performance in less environmentally favourable conditions, it might be inferred that the investment had an environmental object (see paragraph 151 above).

158 On that point, Ferriere claims that the environmental part of its investment corresponds to the part of the total costs of the investment which was recognised by the Autonomous Region of Friuli-Venezia Giulia as eligible for aid, namely ITL 11 000 million (EUR 5.68 million).

159 When invited in a written question put by the Court, referred to at paragraph 35 above, to specify the evidence on the basis of which the additional investment cost of environmental protection could be evaluated at ITL 11 000 million of the ITL 20 000 million representing the total cost of the investment, Ferriere merely referred to the assessment made by the region. At the hearing, the applicant acknowledged that it was difficult to draw distinctions in the case of a process which in itself improves environmental protection and it indicated that the region had excluded general expenditure.

160 The letters from Ferriere to the region, dated 26 May and 26 June 1998, which are on the file and which present the detailed budget of the investment broken down into its various components, do not answer the question. The Court has been given no further explanation which would enable it to understand the method followed and to conclude that the ITL 11 000 million correspond to the environmental cost of the investment. While it is possible to understand the difficulty in isolating the cost in a case such as this where the advantages for the environment are inherent in the process, the principles laid down in the 2001 Guidelines, which are similar to those in the 1994 Guidelines, preclude the total cost of an investment from being eligible for aid and require that the additional costs involved in attaining the objective of protecting the environment be identified.

161 However, neither the applicant nor the Italian Republic has provided any explanation on that point. In particular, they have not indicated the procedure followed by the Autonomous Region of Friuli-Venezia Giulia in arriving at a determination of the amount of the investment eligible for aid.

162 Consequently, the Commission could lawfully consider in the contested decision that it was not possible to isolate in the investment the expenditure specifically intended for environmental protection.

163 Accordingly, the Commission was entitled to consider that Ferriere's investment was not eligible for aid for environmental protection.

164 It follows from all of the foregoing that the Commission could lawfully declare the aid incompatible with the common market. Ferriere and the Italian Republic are therefore not entitled to request annulment of the contested decision. The submissions seeking annulment of that decision must therefore be rejected.

The application for compensation for the alleged harm

Arguments of the parties

165 Ferriere maintains that it suffered harm owing to the illegality of the contested decision, which impairs freedom of economic initiative and the right of property, to the initiation of the formal procedure and to the time taken to close it. As it was unable to have the aid which the region was prepared to grant it, it was required to borrow in order to finance the investment and was deprived of the possibility of using the amount advanced for other purposes.

166 The applicant claims compensation for the period during which it was unable to have the aid. The compensation should correspond to an amount allowing it to pay the statutory interest and compensation for monetary devaluation and should be calculated as from 26 April 1999, which corresponds to the end of the two-month period following receipt of the notification, on 25 February 1999, and is the date on which the Commission should have recognised that the aid was compatible with the common market.

167 The Commission contends that the conditions for engaging liability are not met. Among the fundamental rights, only those which protect legal certainty and legitimate expectations are in theory capable of being included in the category of rules whose breach may render the institutions liable. Furthermore, the serious and

manifest nature of the breach is in any event absent in the present case. Last, the applicant does not show the alleged interference with freedom of economic initiative and the right to property.

168 The Commission further contends that the alleged harm is neither certain nor determinable, as undertakings do not have a right to receive State aid, still less at a fixed date. Even on the assumption that the aid did come under an authorised scheme, the delay in paying it would not be imputable to the Commission but to the Italian authorities, who chose to notify the aid and then to suspend payment thereof. The claim for default interest is unfounded as regards reparation of harm. Last, as regards monetary depreciation, actual damage is not made out.

Findings of the Court

169 Ferriere's claim for compensation, submitted on the basis of Articles 235 EC and 288 EC, seeks to establish the non-contractual liability of the Community owing to the harm allegedly caused to it as a result of the unlawfulness of the contested decision.

170 According to established case-law, in order for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the alleged conduct of the institution concerned, actual damage and the existence of a causal link between that conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-40/01 *Scan Office Design* v *Commission* [2002] ECR II-5043, paragraph 18). If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraphs 19 and 81, and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37).

171 As the first condition of the which Community's non-contractual liability within the meaning of the second paragraph of Article 288 EC, relating to the unlawfulness of the contested measure, is not fulfilled, the claim for compensation must be rejected in its entirety and there is no need to examine the other conditions of that liability, namely actual damage and the existence of a causal link between the Commission's conduct and the damage pleaded.

172 It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

173 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if these have been applied for in the successful party's pleadings. Furthermore, Article 87(4) of the Rules of Procedure provides that the Member States are to bear their own costs when they have intervened in the proceedings.

174 Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission.

175 In accordance with Article 87(4) of the Rules of Procedure, the Italian Republic must be ordered to bear its own costs.

On those grounds,

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

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to bear its own costs and to pay those incurred by the Commission;**

3. **Orders the Italian Republic to bear its own costs.**

Legal Tiili Meij

Vilaras Forwood

Delivered in open court in Luxembourg on 18 November 2004.

H. Jung

Registrar

H. Legal

President