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

19 September 2006 *

In Case T-166/01,

Lucchini SpA, established in Brescia (Italy), represented by G. Vezzoli and G. Belotti, lawyers,

applicant,

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,

APPLICATION for the annulment of Article 1 of Commission Decision 2001/466/ECSC of 21 December 2000, in so far as it declares the State aid which Italy was planning to implement for the steel company Lucchini SpA amounting to ITL 13.5 thousand million (EUR 6.98 million) to be incompatible with the common market (OJ 2001 L 163, p. 24),

* Language of the case: Italian.

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

composed of P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 March 2004,

gives the following

Judgment

Legal framework

1 Article 4 CS states:

'The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:

...

(c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever;

...'

A — *Steel Aid Code*

2 In order to meet the restructuring needs of the steel industry, the Commission relied on the provisions of Article 95 of the ECSC Treaty to introduce, as from the early 1980s, a Community scheme authorising the grant of State aid to the steel industry in specific and limited cases. That scheme underwent a series of amendments in order to deal with the cyclical problems encountered by the steel industry. The decisions successively adopted for that purpose are commonly known as 'the Steel Aid Codes'.

3 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) ('the Code') is the sixth Steel Aid Code and was in force from 1 January 1997 until 22 July 2002. The Code lays down the conditions under which aid to the steel industry financed by Member States or their regional or local authorities or through State resources may be deemed compatible with the orderly functioning of the common market.

4 Article 1 of the Code states:

'1. Aid to the steel industry ... financed by Member States ... may be deemed Community aid and therefore compatible with the orderly functioning of the common market only if it satisfies the provisions of Articles 2 to 5.

...

3. Aid falling within the terms of this Decision may be granted only after the procedures laid down in Article 6 have been followed ...'

5 Article 3, entitled 'Aid for environmental protection', provides:

'Aid for environmental protection may be deemed compatible with the common market if it is in compliance with the rules laid down in the Community guidelines on State aid for environmental protection, as set out in *Official Journal of the European Communities* No C 72 of 10 March 1994, in conformity with the criteria for their application to the ECSC steel industry outlined in the Annex to this Decision.'

6 Paragraphs (1) and (2) of Article 6, entitled 'Procedure', state that any aid plans and any plans for transfers of State resources to steel undertakings must be notified to the Commission, which will determine their compatibility with the common market. By virtue of Article 6(4), the planned measures may be put into effect only with the approval of and subject to any conditions laid down by the Commission.

7 Article 6(5) of the Code states:

'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 Treaty shall apply in the event of a Member State's failing to comply with that decision.'

B — *Guidelines on environmental aid*

8 Point 3 of the Community guidelines on State aid for environmental protection (OJ 1994 C 72, p. 3) ('the Guidelines'), which apply to the EC Treaty, sets out the conditions which government financial assistance to specific enterprises for environmental protection must satisfy in order to be authorised.

9 Point 3.2 of the Guidelines concerns aid for investment. Point 3.2.1 states:

'Aid for investment in ... 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. Similarly, when investment in existing plant increases its capacity as well as improving its environmental performance, the eligible costs must be proportionate to the plant's initial capacity. In any case aid ostensibly intended for environmental protection measures but which is in fact for general investment is not covered by these guidelines. ...'

10 Point 3.2.3 of the Guidelines goes on to provide that aid for environmental investment can be authorised if it does not exceed certain levels. It distinguishes between, first (point 3.2.3.A), aid to help firms adapt to new mandatory standards, secondly (point 3.2.3.B), aid to encourage firms to improve on mandatory standards and, thirdly (point 3.2.3.C), aid in the absence of mandatory standards.

11 In the first case (Case A), aid for investment to comply with new mandatory standards or other new legal obligations and involving adaptation of plant and equipment to meet the new requirements can be authorised up to the level of 15% gross of the eligible costs. Such aid may be granted only in respect of plant which has

been in operation for at least two years when the new standards or obligations enter into force. In addition, firms which, instead of simply adapting existing plant which is more than two years old, opt to replace it by new plant meeting the new standards, may receive aid in respect of that part of the investment costs that does not exceed the cost of adapting the old plant.

12 In the second case (Case B), aid for investment that allows significantly higher levels of environmental protection to be attained than those required by mandatory standards may be authorised up to a maximum of 30% gross of the eligible costs. The relevant provisions state that 'the level of aid actually granted for exceeding standards must be in proportion to the improvement of the environment that is achieved and to the investment necessary for achieving the improvement' and that 'where a project partly involves adaptation to standards and partly improvement on standards, the eligible costs belonging to each category are to be separated and the relevant limit applied'.

13 In the third case (Case C), investment may benefit from aid at the same levels and subject to the same conditions as those laid down in the second case.

C — *Annex to the Code*

14 The Annex to the Code, entitled 'Criteria for the application of ... [the Guidelines] ... to the steel industry ...', states in its introduction that for all cases of State aid for

environmental protection the Commission is, as appropriate, to impose strict conditions and safeguards so as to avoid general investment aid for new plant or equipment being granted under cover of environmental protection.

15 That annex is divided into two parts. The first part, entitled 'Aid to help firms adapt existing installations to new mandatory standards', states at point (b):

'In relation to firms that, instead of adapting existing plant or equipment which is more than two years old, decide to replace such plant or equipment by new plant meeting the new standards, the following approach will be adopted:

...

(ii) the Commission will analyse the economic and environmental background of a decision to opt for the replacement of existing plant or equipment. In principle a decision to undertake new investment which would have been necessary in any event on economic grounds or due to the age of the existing plant or equipment will not be eligible for aid. The existing plant must have significant useful life left (at least 25%) for the new investment to be eligible for aid.'

16 The second part, entitled 'Aid to encourage firms to contribute to significantly improved environmental protection', provides:

'(a) In the case of firms which decide to improve significantly on mandatory standards, in addition to complying with the criteria [set out] in point (b)(ii) above, the investor will have to demonstrate that a clear decision was taken to opt for higher standards which necessitated additional investment, that is, that a lower-cost solution existed which would meet the new environmental standards. In any event, the higher aid level will only apply to the additional environmental protection achieved. Any advantage in regard to lower production costs resulting from these significantly higher levels of environmental protection will be deducted;

(b) in relation to firms which significantly improve on environmental protection, the criteria [set out in the first part at] point (b)(ii) above must be complied with and, in addition, any advantage in regard to lower costs of production from these significant improvements will be deducted;

(c) in conjunction with the above criteria, investments undertaken solely for environmental protection will be examined on the basis of their compliance with the criteria set out in [the Guidelines].'

Facts

17 The applicant, Lucchini SpA, is a steel company which manufactures products referred to in Annex I to the ECSC Treaty.

A — *Notifications relating to production investments*

18 On 10 December 1997, pursuant to Commission Decision No 3010/91/ECSC of 15 October 1991 on the information to be furnished by steel undertakings about their investments (OJ 1991 L 286, p. 20), the Italian authorities submitted two notifications to the Commission relating to production investment projects carried out at Lucchini's Piombino factory. According to the letter from the Italian authorities of 18 July 2000, those notifications related, first, to the replacement of the blast furnace with a new one in the pig-iron production installations (point 10 of the contested decision) and, secondly, to the replacement of existing converters with new ones in the steelworks.

B — *Notifications relating to environmental investment plans*

19 By letter of 16 March 1999, the Italian authorities notified to the Commission, for the purposes of Article 3 of the Code, a first plan for aid for environmental protection intended to be granted to Lucchini for investments in the Piombino factory ('the first aid plan'). The notified investments concerned environmental measures comprising the replacement of or additions to the coking plant, the blast furnace and the steelworks, and involved in particular the fume extraction equipment for the converters at the steelworks.

20 By letter of 19 April 1999, the Commission requested further information regarding the plan. That letter referred, first of all, to point (b)(ii) of the first part of the Annex to the Code, which provides that environmental investment in the steel industry made on economic grounds or due to the age or condition of the existing plant will not be eligible for aid where the useful life left of the plant is less than 25%. The letter requested the Italian authorities to produce a report from an independent expert as to the useful life left of the environmental equipment to be replaced in

order to determine whether the notified investments satisfied that condition. The letter also requested the Italian authorities to provide information as to the level of environmental contamination from the existing plant and expected to be emitted by the new plant on completion of the notified measures, together with the levels of contamination which were to be achieved under the standards currently in force.

21 By letter of 29 November 1999, the Italian authorities replied to the Commission's request for information. First, they provided an expert's report dated 30 September 1999 ('the expert's report'), which states that the plant to be replaced had a useful life left of at least 25%. Secondly, the Italian authorities submitted a fresh version of the first aid plan, incorporating minor changes, which included in particular an annex with comparative tables setting out information as to the contamination levels requested by the Commission (that is to say, the levels achieved before and after the measures, and the levels laid down under the mandatory standards) for each type of investment in the coking plant, the blast furnace and the steelworks.

22 By separate letter of 29 November 1999, the Italian authorities notified to the Commission, for the purposes of Article 3 of the Code, a second aid plan for environmental protection granted to Lucchini for investments in the Piombino factory ('the second aid plan'). The notified investments involved additional environmental measures in the coking plant and the water supply and discharge system, with a view to further reducing contaminating emissions.

23 By two letters of 17 January 2000, the Commission requested additional information on the investments covered by each of the notified aid plans. With respect to the first aid plan, the Commission requested the Italian authorities to clarify the

relationship between the environmental investments notified in that plan and the production investments relating to the blast furnace and the steelworks which had been the subject of the notifications submitted in December 1997. In addition, the Commission asked for details of the estimated energy savings resulting from the measures in the steelworks. With respect to the second aid plan, the Commission requested the Italian authorities to provide details of the investments in the coking plant and the water supply and discharge system, as regards the previous levels of environmental contamination and the levels of contamination arising from the planned measures, by comparison with the legal requirements.

24 By two letters of 15 February 2000, the Italian authorities replied to the Commission's requests relating to each of the notified aid plans, by supplying the information requested, together with tables setting out the data requested for the various levels of environmental contamination.

C — *Decision to initiate the investigation procedure laid down under Article 6(5) of the Code and observations of the Italian authorities*

25 By letter of 26 April 2000, the Commission informed the Italian authorities of its decision to initiate the procedure laid down under Article 6(5) of the Code as regards each of the aid plans notified in favour of Lucchini for a total amount of ITL 13.5 thousand million (ITL 10.7 thousand million under the first aid plan and ITL 2.8 thousand million under the second aid plan), relating to the investments in the Piombino factory costing in total ITL 190.9 thousand million (ITL 152.5 thousand million under the first aid plan and ITL 38.4 thousand million under the second aid plan). The decision to initiate the investigation procedure was published on 1 July 2000 (OJ 2000 C 184, p. 2) ('the decision to initiate').

26 That decision stated, in particular, that an initial assessment of the information provided led to the conclusion that the investments had been made above all for economic reasons, that even if the notified investments were not directly linked to new production equipment they would have been necessary to ensure the modernisation and the extension of the production plant or to enable all the new production capacity installed to be utilised and that the Italian authorities had failed to prove that the investments had been made on environmental, as opposed to economic, grounds. The decision to initiate also stated that the Italian authorities had not shown that, when equipment or plant was being replaced, the investor had clearly taken a decision to opt for higher standards which necessitated additional investment, meaning that a lower-cost solution existed which would have met the legal standards.

27 In addition, the decision to initiate stated that it was not certain that all the notified investments had no effect on production.

28 By letter of 18 July 2000, the Italian authorities replied to the doubts expressed by the Commission in the decision to initiate by reaffirming the exclusively environmental, and not economic or productive, aim of the notified investments.

D — *Contested decision*

29 On 21 December 2000, the Commission adopted Decision 2001/466/ECSC on the State aid which Italy is planning to implement in favour of the steel companies Lucchini SpA and Siderpotenza SpA (OJ 2001 L 163, p. 24) ('the contested decision').

30 The Commission concludes as regards its assessment of the aid in the light of Article 3 of the Code and the provisions to which that article refers, namely the Annex to the Code and the Guidelines (see points 22 to 24 of the contested decision) that 'the aid notified ... for Lucchini ... in the coking plant, the steelworks and the blast furnace of ITL 13.5 [thousand million] is not eligible for environmental aid because the Italian authorities failed to demonstrate that the investments were not made for economic reasons'. It goes on to state that 'in any case, when assessed in the light of the detailed criteria, the notified aid does not meet the various requirements'. In particular, 'the notified costs do not refer only to the extra costs necessary for the additional improvement in environmental protection, not all costs have been deducted and, in some cases, the reduction in pollution levels does not allow such improvement to be considered "significant"' (point 39 of the contested decision).

31 Article 1 of the contested decision accordingly states:

'The State aid which Italy is planning to implement for Lucchini ..., amounting to ITL 13.5 [thousand million] (EUR 6.98 million) ... is incompatible with the common market.

The aid may accordingly not be implemented.'

Procedure and forms of order sought

32 By application lodged at the Court Registry on 23 July 2001, the applicant brought the present action.

33 The applicant has, by way of measures of inquiry, requested the Court to make an order pursuant to Article 23 of the ECSC Statute of the Court of Justice for the production of the Commission's administrative file and, in particular, the documents and technical information included in it pursuant to which the Commission found that the notified investments were not of an environmental nature. The Commission has lodged the file with the Court, asking that it should not be placed in the Court file and that, accordingly, it should not be passed to the applicant, and has lodged a request for confidential treatment in that regard.

34 Following an exchange of letters between the Commission and the Court, the Commission informed the Court, by letter of 14 November 2002, that the administrative file contained no technical material or reports apart from those supplied by the Italian authorities and already produced by the applicant in the annex to its application.

35 By letter of 7 February 2003, the applicant withdrew its request for access to the administrative file.

36 On receiving the report of the Judge-Rapporteur, the Court (Fifth Chamber, Extended Composition) decided to open the oral procedure.

37 At the hearing on 18 March 2004, the parties presented oral argument and replied to the questions put by the Court (Fifth Chamber, Extended Composition), composed of P. Lindh, President, R. García-Valdecasas, J.D. Cooke, P. Mengozzi and M.E. Martins Ribeiro, Judges.

38 The applicant claims that the Court should:

— annul Article 1 of the contested decision;

— order the production of such expert's report as may be necessary in relation to the category of investments notified to the Commission, for the purposes of demonstrating that the previous environmental protection plant was capable of operating in conjunction with the new production equipment;

— order the Commission to pay the costs.

39 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

40 The oral procedure was closed at the end of the hearing on 18 March 2004. Pursuant to Article 32 of the Rules of Procedure of the Court, as a member of the Chamber was prevented from taking part in the judicial deliberations following the expiry of his mandate on 3 May 2006, the most junior judge within the meaning of Article 6 of the Rules of Procedure accordingly abstained from taking part in the deliberations and the Court's deliberations were continued by the three judges whose signatures the present judgment bears.

Law

41 The applicant essentially puts forward three pleas in law in support of its application for the annulment of the contested decision. The first plea alleges an error as to the rules which are applicable to the case and infringement of the principle of sound administration. The second plea alleges that the Commission's findings as to the ineligibility of the notified aid were incorrect, infringement of the principle of non-discrimination, reversal of the burden of proof and failure to state adequate reasons. The third plea alleges that the Commission's findings that there had been a failure to comply with the conditions as to compatibility of the aid laid down by the relevant provisions were incorrect, infringement of the principle of non-discrimination, reversal of the burden of proof, failure to state adequate reasons and an inherent contradiction in the reasoning set out in the contested decision.

A — *The first plea, alleging an error as to the rules which are applicable to the case and infringement of the principle of sound administration*

1. *Arguments of the parties*

42 The applicant claims that the contested decision was adopted on an incorrect legal basis. It points out that, by way of exception to the general principle laid down by Article 4(c) CS that subsidies or aids granted by Member States are prohibited, Article 3 of the Code provides that aid for environmental protection may be authorised, subject to certain conditions, under the criteria set out in the Annex to the Code and in the Guidelines. The applicant distinguishes between three types of investment aid which is to be notified to the Commission by the Member States: first, general investment and investment which seeks to increase production capacity, which is not eligible as aid inasmuch as it is incompatible with the common market, and in respect of which the relevant provisions are those of the Annex to the Code, together with the third sentence and the remainder of point 3.2.1, and point

3.2.3 of the Guidelines; secondly, mixed investment, which seeks both to increase production capacity and to protect the environment, as regards which the national authorities are under a duty to distinguish between the costs connected with the increase in production capacity and those which relate to environmental protection, since only investment for environmental purposes may benefit from aid, with the relevant provisions in that case being those set out in the Annex to the Code; thirdly, purely environmental investment, which is eligible for aid where it complies with the conditions laid down in the first and second sentences of point 3.2.1 of the Guidelines, and to which the remainder of the Guidelines and the Annex to the Code do not apply.

43 The applicant states that such a categorisation does not mean that the purely environmental investments notified by the Italian authorities fall outside the scope of the Code. It argues that Article 3 of the Code makes reference both to the Annex to the Code and to the Guidelines, and that that double reference is not cumulative, but alternative. Accordingly, it is logical to take the view that the Annex to the Code applies to general investment and to mixed investment, while purely environmental investment is covered solely by the Guidelines, to the exclusion of the Annex to the Code. In support of its position, the applicant argues that the terms of the introductory paragraph to the Annex to the Code mean that its provisions apply solely where there is an overlap between environmental aid and aid for general investment and that point (c) of the second part of the Annex to the Code indicates that such investment falls to be analysed solely in the light of the additional criteria set out in the Guidelines.

44 In order to show that point 3.2.3 of the Guidelines does not apply to purely environmental investment, the applicant argues that the distinction made in that provision between aid to help firms to adapt to new mandatory standards, aid to encourage firms to improve on mandatory standards and aid in the absence of

mandatory standards is founded exclusively on the threshold which may be authorised and is relevant only where an application for authorisation of aid is made for a threshold which is between 16% and 30% of eligible costs. Thus, when the threshold is significantly lower than the ordinary threshold of 15% (in the present case it was 7%), the distinction made in point 3.2.3 becomes irrelevant and there is no need to carry out the further analysis set out there. Accordingly, in applying point 3.2.3 of the Guidelines to the environmental aid notified in the present case, the Commission confused the rules governing the compatibility of aid, which are limited to those contained in point 3.2.1 of the Guidelines, with those relating to its intensity.

45 The applicant accordingly contends that, since the notified investments had a purely environmental objective, the provisions on which the Commission should have based the contested decision were only those set out in the first and second sentences of point 3.2.1 of the Guidelines. The contested decision accordingly ought not to have taken into consideration the provisions of the Annex to the Code, together with the third sentence and the remainder of point 3.2.1, and point 3.2.3 of the Guidelines.

46 Lastly, the applicant maintains that the Commission's decision not to apply the relevant provisions of the Guidelines and to apply, in addition, the Annex to the Code, constitutes an infringement of the principle of sound administration.

47 The Commission argues that this plea is wholly unfounded. The applicant is distorting the relevant legal provisions by relying on partial and incorrect references to the rules which are relevant to the case and, in particular, the Annex to the Code. The contested decision is, moreover, based on the relevant legal provisions and there was accordingly no infringement of the principle of sound administration.

2. *Findings of the Court*

48 In the present case, the contested decision was adopted on the basis of Article 4(c) CS and took into account the rules set out in the Code. Having assessed the notified aid in the light of Article 3 of the Code and the provisions to which that article refers, namely the Annex to the Code and the Guidelines (see points 22 to 24 of the contested decision), the Commission reached the conclusion that the aid did not satisfy the conditions set out in those provisions in order for environmental aid to be authorised under the ECSC Treaty. As a consequence, that aid was declared incompatible with the common market and could not be implemented (see point 39 and Article 1 of the contested decision).

49 It should be pointed out first of all that, by derogation from the principle laid down under Article 4(c) CS, in terms of which subsidies or aids in any form whatsoever to the steel industry are prohibited, and in implementation of Article 95 CS, the Code sets out the conditions under which aid to the steel industry financed by way of State resources may be considered to be compatible with the proper functioning of the common market.

50 Aid which is not covered by the Code thus remains subject to Article 4(c) CS (Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839, paragraph 72, and Case T-158/96 *Acciaierie di Bolzano* v *Commission* [1999] ECR II-3927, paragraph 60). Similarly, the Code must be strictly interpreted, since it constitutes a derogation from a principle that something is prohibited (see, to that effect, Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 40, and Case T-150/95 *UK Steel Association* v *Commission* [1997] ECR II-1433, paragraph 114).

51 Next, it must be noted that Article 3 of the Code provides that aid for environmental protection granted to the steel industry may be deemed compatible with the common market 'if it is in compliance with the rules laid down in [the Guidelines], in conformity with the criteria for their application to the ECSC steel industry outlined in the Annex to [the Code]'.

52 That means that the provisions of the Guidelines, which apply under the EC Treaty, may be transposed to the steel industry, which falls under the ECSC Treaty, when those provisions satisfy the criteria for their application set out in the Annex to the Code. It is thus particularly significant that the heading to that Annex states that it establishes the 'criteria for the application of Community guidelines on State aid to the steel industry for environmental protection'. The Code accordingly does not provide for the automatic application of the Guidelines to the steel industry (*UK Steel Association* v *Commission*, paragraph 100), but specifies in its Annex the conditions which govern that application.

53 It follows that, applying Article 3 of the Code, the provisions which are relevant to the present case are those which are set out in the Annex to the Code and those laid down in the Guidelines, provided they comply with the criteria for application to the ECSC steel industry laid down in the Annex to the Code.

54 The Annex to the Code is in two parts. The first refers to aid to help firms adapt existing installations to new mandatory standards. The second covers aid to encourage firms to contribute to significantly improved environmental protection. The notifications of the aid plans submitted by the Italian authorities, the letters from the Italian authorities of 15 February 2000, and the observations of the Italian

authorities of 18 July 2000 on the decision to initiate state that the notified investments were intended to encourage the applicant to contribute to significantly improved environmental protection and to encourage it to improve on mandatory standards.

55 Thus, the observations of the Italian authorities on the decision to initiate indicated that the notified aid in favour of the applicant related to investments made by that company 'with a view to improving environmental protection compared with the results previously achieved, which, moreover, complied with the legislation in force'.

56 Those observations also stated that the replacement of the environmental equipment for the blast furnace and the steelworks '[had been] undertaken as a separate matter from the replacement of the means of production (blast furnace and steelworks converters), the sole purpose being to reduce emissions to a greater degree than required by the legislation in force, with which the previous plant had already complied'.

57 In addition, those observations stated that 'Lucchini [had] decided to opt for significantly higher levels of environmental protection, as a separate matter from the production investments, which did not require any investment in the form of an environmental protection system in order to comply with the emissions standards in force and [that], accordingly, all the notified investments should be treated as being additional investment'.

58 It follows that the applicant could not benefit from aid granted pursuant to the first part of the Annex to the Code, which covers 'aid to help firms adapt existing installations to new mandatory standards'. Similarly, and as the Commission rightly

argues, as the aid in question was intended to encourage the applicant to make a significant contribution to environmental protection and to improve on mandatory standards, the provisions which are relevant to the present case are those set out in points 3.2.1 and 3.2.3.B of the Guidelines, as defined and adapted for the purposes of the ECSC steel industry by the second part of the Annex to the Code.

59 Accordingly, the Commission was fully entitled to adopt the contested decision on the basis of Article 4(c) CS, taking into account Article 3 of the Code and the provisions to which that article refers, namely the Annex to the Code and the Guidelines.

60 As that is the context which is relevant, none of the arguments put forward by the applicant can be accepted.

61 First, the applicant's contention that the relevant provisions will vary depending on the three categories of investment which may be notified as State aid is not well founded. That argument is inconsistent with the wording of Article 3 of the Code, which provides for the Annex to the Code and the Guidelines to apply cumulatively in the manner described above, without making any distinction at that stage between different types of investment. It cannot therefore be accepted that the reference made by Article 3 of the Code to the Annex to the Code and the Guidelines is not cumulative but alternative.

62 Secondly, the applicant's assertion that the Annex to the Code does not apply to investment which is purely environmental lacks any basis in law. As stated above, Article 3 of the Code provides that environmental aid to the ECSC steel industry must comply with both the Annex to the Code and the Guidelines. Similarly, the

introduction to the Annex to the Code, which provides that 'the Commission will, as appropriate, impose strict conditions and safeguards so as to avoid general investment aid for new plants or equipment being granted under cover of environmental protection', cannot be relied on by the applicant in support of its contention that the Annex to the Code does not apply to purely environmental aid. In fact, that wording merely obliges the Commission to investigate, should the need arise, whether investment which is notified as being purely environmental in nature does not in truth permit other objectives prohibited by the relevant provisions to be achieved. Accordingly, the notified aid, which clearly falls under the ECSC Treaty, is covered in full both by the criteria set out in the Guidelines and by those laid down in the Annex to the Code.

63 Thirdly, the applicant's assertion that point 3.2.3 of the Guidelines does not apply to investment which is purely environmental also lacks any basis in law. That provision lays down criteria for compatibility of aid and sets a maximum level of intensity by reference to the purpose of the investment, namely adaptation to meet new mandatory standards (Case A), encouragement to improve on mandatory standards (Case B) or the protection of the environment in the absence of mandatory standards (Case C). Accordingly, the applicant's reliance on the fact that the intensity of the aid notified is lower than the threshold of 15% referred to in Case A does not of itself mean that Case B, which provides for a threshold of 30%, does not apply. The notified aid remains aid to encourage the applicant to improve on mandatory standards and must therefore be investigated under the provisions set out in point 3.2.3.B of the Guidelines.

64 It follows from the above that, as the contested decision states, the relevant legal basis for assessing the aid in question in this case comprises Article 3 of the Code and the provisions to which that article refers, namely the Annex to the Code and the Guidelines.

65 The objection based on the application of the wrong legal framework and the objection based on infringement of the principle of sound administration are accordingly unfounded and the first plea must be rejected in its entirety.

B — *The second plea, alleging that the Commission's findings as to the ineligibility of the notified aid were incorrect, infringement of the principle of non-discrimination, reversal of the burden of proof and failure to state adequate reasons*

1. *Arguments of the parties*

66 By this plea, the applicant challenges the findings made in points 25 to 29, 35 and 39 of the contested decision that the notified aid was ineligible.

67 The applicant contends, first of all, that the Commission was wrong to state that the Italian authorities have not shown that the notified investments were intended to improve on environmental protection. The Commission was wrong to impose the burden of proof on the Italian authorities, since those authorities were never requested to provide evidence in that regard and the lack of any such evidence is a crucial factor in the contested decision. Unlike the expert's report produced by the Italian authorities in response to a request from the Commission, the latter never formally requested those authorities to provide evidence that the notified investments were intended to improve the environment, even after the Italian authorities had stated on several occasions that the aid was of an environmental nature. It is only where a specific request for clarification and additional information has been made and the national authorities have failed to respond to it that the

Commission is entitled to conclude that those authorities have failed to substantiate their assertions and have not provided the information necessary to enable the Commission to assess the matter in hand (see, to that effect and by way of analogy, Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraphs 36 and 37).

68 The Commission replies that the applicant fails to have regard to the obligation referred to in point (a) of the second part of the Annex to the Code, which requires the investor to demonstrate that a clear decision was taken to opt for higher standards which necessitated additional investment. That obligation is justified by the particularly strict framework applicable to environmental aid in the ECSC sector. In the same way, although the applicant is correct to refer to point 3.2.1 of the Guidelines, it then fails to provide any information whatsoever that might show that it was required to bear extra costs that are strictly necessary in order to achieve more ambitious environmental objectives. Accordingly, the Commission contends that it was for the applicant and the Italian authorities to prove that the company receiving the aid had decided to opt for higher environmental standards which necessitated additional investment, that the notified investments were not for production purposes, that it was technically possible to continue to use the old environmental equipment by adapting it to the new production installations and, in short, that the conditions for authorisation were satisfied. In the decision to initiate, the Commission referred to all of those doubts, thereby allowing both the Member State and the applicant to determine all the evidence to be supplied and without it being necessary to make an express request for the production of a particular expert's report.

69 The applicant next argues that the Commission was wrong to find that the notified investments were necessary by reason of the age of the existing environmental installations and the impossibility of adapting those installations to the new production equipment. The Commission made findings as to the age of that plant without basing them on objective factors and without having regard to the principle laid down in the Annex to the Code that, when assessing the condition of equipment, regard must be had to the useful life left of the plant. In the same way, the Commission failed to take into account the expert's report of 30 September

1999, provided by the Italian authorities at the Commission's request, which shows that the environmental installations had a useful life left equal to or higher than 25%. Furthermore, it is clear that, technically speaking, the old environmental plant was quite capable of bearing the pollution load of the new production equipment.

70 In that regard, the applicant requests the Court, by way of measures of inquiry and pursuant to Articles 65 and 66 of the Rules of Procedure and Article 25 of the ECSC Statute of the Court of Justice, to order that an expert's report be commissioned with a view to showing that the old environmental equipment was capable of operating in conjunction with the new production equipment, so that the validity of the contested decision may be assessed.

71 In reply to that argument, the Commission states that the applicant confuses the condition referred to in point (b)(ii) of the first part of the Annex to the Code, which requires that the existing plant must have a useful life left of at least 25%, with the obsolescence of the plant, which may encourage firms to replace it as a separate matter from the question of its useful life left. In the present case, the Commission did indeed take into account the expert's report of 30 September 1999 and does not question the findings that the useful life left of the plant was at least 25%. However, the contested decision is not based on a failure to comply with that requirement, but on the fact that that plant was obsolete and would have been replaced in any event as part of the renovation of the production plant. The contested decision does not accept that the company could renew all its production installations while maintaining the old environmental equipment in operation, as there was nothing to show that such an option was technically feasible.

72 In that regard, the Commission notes that the letter from the Italian authorities of 15 February 2000 states that the production investments had been decided upon for

reasons that did not involve the condition of the plant but its obsolescence, as that plant no longer met production requirements. Furthermore, the expert's report of 30 September 1999 shows that the environmental investments consisted in replacing, adding to or modifying part of the production plant. At no stage of the administrative procedure or the proceedings before the Court was the applicant able to explain the economic and production logic which would have led to the old environmental equipment being reused when the production plant to which it was linked was replaced.

73 As regards the applicant's request for measures of inquiry, the Commission takes the view that it is of no relevance to the resolution of the dispute, since the Court cannot substitute its own assessment for that of the Commission, given the wide powers of assessment the latter possesses, thereby altering the Commission's position (order of the President of the Fourth Chamber of the Court of First Instance (Extended Composition) of 2 April 1998 in Case T-86/96 R *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag Lloyd* v *Commission* [1998] ECR II-641, paragraph 74).

74 The applicant lastly argues that the Commission's finding in point 28 of the contested decision, that the investments were not eligible for aid since the company was required to undertake new environmental investments by reason of the location of the premises in a densely-populated area and, accordingly, that such investments were necessary from an economic perspective in order to allow the applicant to carry on its business, is also vitiated by serious errors and is discriminatory.

75 The applicant claims that that finding is unfounded, as any failure on its part to carry out the environmental works would not mean that it was legally obliged to cease carrying on its business, since it already complied with the environmental standards in force. In addition, the letter from the Italian authorities of 15 February 2000, which contained the information referred to by the Commission, was wrongly

interpreted, as that letter does not show that, were the notified investments not to have been made, it would have been impossible for the company to remain in the centre of Piombino, but only that the carrying out of the environmental investments might facilitate its remaining in that location thereafter.

76 In addition, the applicant questions whether other cases exist in which the principle on which the Commission based its finding in point 28 of the contested decision has been applied. According to the applicant, Commission Decision 2000/66/ECSC of 28 October 1998 on aid which Italy plans to grant to the steel company Acciaierie di Bolzano SpA (OJ 2000 L 23, p. 65) is the only previous example. That case was decided in a way which was contrary to that chosen by the Commission in the contested decision. Accordingly, the contested decision is vitiated by a serious discrepancy of treatment by comparison with other similar cases.

77 In reply, the Commission contends that the applicant confuses the principles applicable to aid to adapt existing installations to mandatory standards and those which apply to aid to encourage firms to improve on those standards. The present case involves no new mandatory standard and, accordingly, the decisive factor to be taken into consideration is the fact that the company was faced with very strong social pressure which obliged it to carry out the investments in question if it was to remain in operation in Piombino. Furthermore, the decision relating to the Acciaierie di Bolzano cannot be compared with this case, because, in that matter, the company had provided evidence that it had 'invest[ed] on a far larger scale' than that required by the standards in force in the environmental field.

78 In addition, the applicant maintains that the contested decision is vitiated by a failure to state adequate reasons, because the Commission has not set out either the reasons or the objective evidence which led it to conclude that the notified investments were production-related and were not for environmental protection. Thus, the contested decision merely contests the environmental objective of the notified investments put forward by the Italian authorities, without providing any reasons for the refusal to accept that objective and without providing other technical material to contest the expert's report produced by those authorities, which clearly

demonstrated the environmental nature of the notified measures. In the same way, the contested decision does not state the reasons why the old environmental equipment needed to be replaced in any event and the reasons why that equipment was not technically compatible with the new production equipment. Lastly, the contested decision does not state in what way the replies from the Italian authorities were inadequate. Since documents had been provided to the Commission, it was required to take them into consideration and should have adjudicated on them, either by accepting the views put forward by the Italian authorities or by formally rejecting them, pursuant to its duty to adopt a position on the objections and observations put forward by a Member State (Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 105).

79 The Commission argues that the obligation to provide reasons is not absolute and that it is not required to respond to all the issues of fact and law raised by the persons concerned, but solely to take account of all the relevant factors of the case in question. Furthermore, an error in the statement of reasons does not always lead to annulment, provided that the remainder of the statement provides a sufficient basis for the adoption of the measure (Case 119/86 *Spain* v *Council and Commission* [1987] ECR 4121). In the present case, the Commission cannot be criticised for not providing the material necessary to substantiate facts which do not fall within the regulatory framework or to substantiate facts which it is not for the Commission, but for the Member State and the company receiving the aid, to prove. In any event, the Commission provided a full and detailed statement of its concerns in the decision to initiate and indicated there the matters in relation to which the Italian authorities and the applicant were to provide the necessary evidence, which they failed to do.

2. *Findings of the Court*

(a) Preliminary observations

80 In proceedings for annulment brought against a Commission decision adopted on the basis of the ECSC Treaty, the second sentence of Article 33 CS provides that the

Court of First Instance 'may not ... examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the [decision was taken], save where the Commission is alleged to have misused its powers or to have manifestly failed to observe the provisions of [the ECSC] Treaty or any rule of law relating to its application.'

81 In point 24 of the contested decision, the Commission held that the present case fell to be assessed in the light of the criteria laid down in point (a) of the second part of the Annex to the Code, which also refers to the criteria set out in point (b)(ii) of the first part of the Annex to the Code. It should be noted in that regard that the criteria enshrined in those provisions are as follows. First, where firms decide to replace their plant, the investment in question cannot, in principle, benefit from environmental aid if the investment was necessary on economic grounds or due to the age of the existing plant. The useful life left of the existing plant must be at least 25% of its total life. Secondly, the aid in question must encourage the firm to contribute to 'significantly improved' environmental protection. Such significantly improved protection may be demonstrated where the investor can show that it has taken a clear decision to opt for higher standards which necessitated additional investment, that is, that a lower-cost solution existed which met the new environmental standards.

82 In addition, point 3.2.1 of the Guidelines establishes the principle whereby 'aid ostensibly intended for environmental protection but which is in fact for general investment' cannot be eligible under the Guidelines. That point thus adopts the same approach as that which is set out in the first criterion laid down in the Annex to the Code and described above.

83 It should also be noted that, when the Commission decides to initiate the formal investigation procedure, it is for the Member State and the potential recipient of the aid to put forward arguments to demonstrate that the planned aid meets the

exceptions specified in accordance with the Treaty, since the object of the procedure is precisely to ensure that the Commission is fully informed of all the facts of the case (see, by way of analogy, Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13).

84 Although the Commission is required to express its doubts clearly as to the compatibility of the aid when it initiates 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 provider of the aid and, where relevant, the recipient of it to dispel those doubts and to establish that its investment satisfies the condition which allows it to be granted (see, to that effect and by way of analogy, Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraphs 41 and 45 to 49). It was therefore for the Italian authorities and the applicant to establish that the investments in question were eligible for aid for environmental protection and, in particular, that they had the environmental objective required by the Guidelines and the Annex to the Code (see, to that effect and by way of analogy, 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).

85 In the contested decision, the Commission takes the view that the investments in environmental protection made by Lucchini in the coking plant, the steelworks and the blast furnace were ineligible for aid for environmental protection because they had been made as a condition or as a consequence of necessary production investments and because the Italian authorities had not demonstrated that the investments were the result of a voluntary decision by the company to improve on environmental protection (point 29). In so doing, the Commission relies on the following points: the investments were made because of the need to ensure that the company could carry on its business in a very densely-populated area (point 28) and, since the replacement of the production plant was made as a result of its technical obsolescence, it was difficult to accept that the old environmental equipment could have been retained in the circumstances and remained compatible with the new production equipment (points 26 and 29).

(b) Whether the notified environmental investments were intended to allow the company to continue to carry on its business by reason of its being located in a densely-populated area

86 The contested decision states that the Italian authorities indicated that it became apparent that the improvement in environmental protection was necessary, even before the investment plan for the modernisation and rationalisation of the production plant, because the factory is located in a densely-populated area. As a result, according to the contested decision, the Commission could only conclude that 'the environmental investments were necessary for the company to be allowed to continue to do business and hence that the decisive reason for the investments was of an economic nature' (point 28).

87 However, the fact that the applicant's premises are located in a densely-populated area did not oblige it in any way 'on economic grounds' to undertake the new investments, since the only obligation imposed on the applicant was to comply with the mandatory standards in force. That is the context in which it is necessary to interpret the statement by the Italian authorities to the Commission, made in the course of the administrative procedure, that the applicant wished to improve on mandatory standards in order to permit 'steelmaking reality and, accordingly, the related employment opportunities, to coexist with the corresponding social reality' (the first subparagraph of point 9 of the first notification of the first aid plan). It is not in dispute in that regard that the existing plant in the Piombino factory met the mandatory standards in force.

88 Accordingly, the Commission cannot infer from the applicant's wish to improve on the relevant mandatory standards by making a significant contribution to environmental protection, in order to respond to the concerns of those living near its premises, that that 'investment would have been necessary in any event on economic grounds' for the purposes of point (b)(ii) of the first part of the Annex to the Code.

89 Accordingly and without it being necessary to rule on the alleged infringement of the principle of non-discrimination by reference to the Acciaierie di Bolzano case, it must be held that, in stating in point 28 of the contested decision that, because of the location of the factory in a densely-populated area, the environmental investments were necessary for the applicant to be allowed to continue to do business and hence that the decisive reason for the investments was of an economic nature, the Commission wrongly relied on a criterion which is not included among the criteria which are relevant for this purpose. Point 28 is therefore vitiated by an error of law.

(c) Whether the investments in environmental protection were made as a condition or as a consequence of necessary production investments, the evidence provided by the Italian authorities and whether a lower-cost solution existed

(i) The investments in the coking plant

— Whether the investments in the coking plant were made as a condition or as a consequence of necessary production investments

90 It should be pointed out first of all that the investment programme for the modernisation and rationalisation of the production plant carried out at the Piombino factory in 1997 involved, as is mentioned in paragraph 18 above, first, the replacement of the blast furnace with a new one in the pig-iron production installations (point 10) and, secondly, the replacement of the existing converters by new converters in the steelworks (point 11). The coking plant was not included in the production measures made known to the Commission by letter of 10 December 1997 in connection with the two notifications from the Italian authorities relating to the production investment projects carried out in that factory.

91 In the decision to initiate, the Commission took the view that it was doubtful whether the notified investments involving the coking plant — namely the new environmentally-friendly conveyor system for moving coal, the loading systems for the furnaces, the sealing of the furnace using a special type of ceramic sintering, the new doors for the coking chambers, the additional electricity substation and the modifications to the loading arrangements for the series of 27 furnaces in the coking plant, amongst others — constituted investments which were targeted solely at environmental protection and had no effects on the production process (see the second sentence of the third subparagraph of the left-hand column of p. 9 of the decision to initiate). In so doing, the Commission did not claim that those investments were intended to replace the production installations in the coking plant, but none the less doubted that their purpose was solely environmental and that they had no impact on the production process.

92 However, such reasoning is irrelevant in the context of the relevant provisions given that, although the Annex to the Code prohibits investment aid which would have been necessary in any event on economic grounds or which is due to the age of the existing plant, that annex does not prohibit investment aid which is capable of having an effect on the production process. In such a case, the Annex to the Code requires only that any advantage in regard to lower production costs be deducted. Thus, in order to be eligible for environmental aid, it is not necessary for the notified investments to serve purposes that relate only to environmental protection, to the exclusion of all others, nor is it necessary for the investments to have no impact on production capacity. Investment made for environmental purposes cannot be declared ineligible by reason only of the fact that it may have an impact on production.

93 In any event, the contested decision did not adopt that line of reasoning, as it does no more than find that the investments in the coking plant — in the same way, moreover, as the other investments notified by the Italian authorities concerning the applicant — were made as a condition or as a consequence of necessary production investments. That reasoning can be further explained by the decision to initiate, which stated that even though the notified investments were not directly linked to new production equipment, they would have been necessary in order to ensure that

the investments for the modernisation and extension of the production equipment were of a long-term nature or for all the new production capacity to be utilised (see the second sentence of the penultimate subparagraph of the left-hand column of p. 3 of the decision to initiate).

94 None the less, the Court finds that the contested decision was wrong to hold that the investments in the coking plant were made as a condition or as a consequence of necessary production investments. It is clear from the notifications of the Italian authorities relating to the production investment projects at the Piombino factory that the coking plant was not included in those production investments, unlike the blast furnace and the steelworks. In doing so, the contested decision erred in that regard, as the coking plant was not the subject of production investments.

95 Furthermore, if the contested decision and the decision to initiate were to be interpreted as meaning that the investments in the coking plant were the condition or the necessary consequence of the renovation of production equipment in the blast furnace and the steelworks, it is plain that there is no explanation in either the contested decision or the decision to initiate which could provide a basis to support such a finding and that the contested decision would accordingly be vitiated by a failure to state adequate reasons.

96 Lastly, if the contested decision and the decision to initiate were to be interpreted as meaning that the investments in the coking plant were the condition or the necessary consequence of the renovation of the production equipment in general, it must be observed that throughout the administrative procedure the Commission received detailed explanations from the Italian authorities as to the environmental nature of the various investments in the coking plant, in particular as regards the way in which those investments would reduce gas and dust emissions, and that, given those explanations, the Commission was not entitled merely to state that the investments in the coking plant had been made as a condition or as a consequence of necessary production investments, without providing any reasons for doing so. It

should be pointed out in that regard that the Annex to the Code provides that the Commission is to make use of independent expertise in examining State aid for environmental protection. Had it done so, the Commission might have been in a position to substantiate its reasoning in that respect.

— The evidence provided by the Italian authorities

97 The Court further finds that the contested decision is wrong to state that the Italian authorities provided no evidence to show that the reason for environmental investments in the coking plant was a voluntary decision by the company to improve on environmental protection. A number of documents provided by the Italian authorities in the course of the administrative procedure show that those authorities on a number of occasions supplied material to the Commission which demonstrated that the applicant wished to opt for environmental standards in the coking plant that were higher than the mandatory standards, and thereby to make a significant contribution to environmental protection.

98 Thus, the notifications of the first and second aid plans made by the Italian authorities on 16 March and 29 November 1999 included a description of the investments planned for the coking plant (see paragraph 9 of the letters of 16 March and 29 November 1999) and an analysis of the environmental benefits that might be achieved as a result of those investments (see paragraph 10 of the letter of 16 March 1999 and paragraph 10 of the letter of 29 November 1999).

99 In the same way, in response to the express request made by the Commission on 19 April 1999 for information to be provided to it regarding the levels of environmental contamination arising from the existing plant, together with the levels of contamination which would result from the planned measures by

comparison with the mandatory standards in force, the Italian authorities provided the necessary information in the annex to their letter of 29 November 1999. That annex comprised a table setting out for the coking plant and for each investment envisaged for that installation, first, the level of contaminating emissions which would satisfy the mandatory standards, secondly, the level of contaminating emissions arising from the existing equipment and, thirdly, the level of contaminating emissions which was expected to be achieved as a result of the notified investments. That information is set out in the decision to initiate. The table shows, in the first place, that the existing equipment in the coking plant complied with the mandatory standards relating to polluting emissions and, in the second place, that the levels achieved as a result of the planned measures were lower than the levels arising from the existing equipment, and accordingly also lower than the levels laid down under the mandatory standards.

100 In addition, in reply to another request, made by the Commission on 19 April 1999, for an independent expert's report to be provided in order to establish that the notified aid did not relate to investments which would have been necessary in any event due to the age of the existing equipment and that the useful life left of that equipment remained significant (at least 25%, according to the Annex to the Code), the Italian authorities provided the expert's report. That report specifies that the useful life left of the equipment to which the notified aid relates is higher than 25%. The report also examines all the planned works in order to determine the position before the measures were implemented and the position thereafter. In undertaking that examination, it provides a clear description of each measure and specifies the improvement that might be expected to result from the investments.

101 Lastly, in reply to a subsequent request, made by the Commission on 17 January 2000, for details to be provided to it regarding the levels of environmental contamination expected to result from the planned measures in the coking plant under the second aid plan, by comparison with the mandatory standards and by comparison with the investments made previously, together with particulars of the changes made to each item of equipment, the Italian authorities provided the information required in their letter of 15 February 2000. The decision to initiate ('Effects of the investment on the environment', Table 1) sets out in respect of the

different types of investments planned for the coking plant, first, the level of contaminating emissions to be met to satisfy the mandatory standards; secondly, the level of contaminating emissions prior to the investments covered by the first aid plan; thirdly, the level of contaminating emissions achieved as a result of the investments covered by the first aid plan; and, fourthly, the level of contaminating emissions which should be achieved as a result of the investments notified in the second aid plan. The table shows that there was a reduction of approximately 25% as between the level of contaminating emissions prior to the first plan and those expected as a result of the second plan.

102 Neither in the decision to initiate nor in the contested decision did the Commission put forward arguments to refute the evidence provided by the Italian authorities, which specified in a detailed and quantifiable manner the various environmental improvements which would result from the planned investments in the coking plant.

103 Accordingly, the contested decision is inadequately reasoned when it states, without analysing the information referred to above, that the Italian authorities provided no evidence to show that the reason for the environmental investments in the coking plant was a voluntary decision to improve on environmental protection.

— Whether a lower-cost solution existed

104 As regards the question whether a lower-cost solution existed or whether the old environmental equipment might have been compatible with the 'new production plant', suffice it to note that the production investments notified by the Italian authorities to the Commission on 10 December 1997 did not include the coking plant, unlike the blast furnace and the steelworks.

105 As there were no production investments of that kind and having regard to the useful life left of the old environmental equipment in the coking plant, as shown by the expert's report provided at the Commission's request, together with the information provided by the Italian authorities in order to compare the levels of environmental contamination prior to and after the notified investments, those authorities were therefore fully entitled to maintain that the environmental equipment in the coking plant was still capable of operating and that it accordingly represented the lowest-cost solution which would meet the environmental standards in force. In those circumstances, it was for the Commission to show that the old environmental equipment was unable to operate.

106 The contested decision is accordingly inadequately reasoned when it states that 'no proof was provided that ... the old equipment could indeed have been compatible with the new production equipment' (contested decision, point 26) and that 'it is therefore difficult to believe that once the main production equipment was replaced because it was technologically obsolete, the environmental protection equipment that went with it might have stayed in place' (point 27).

— Whether the investments in the coking plant allowed for a significant improvement in environmental protection

107 The contested decision (point 35) states that the environmental improvements arising from the second investment project notified in November 1999 fall to be compared with those arising from the first project notified in March 1999 and not with the levels which existed prior to the first project. The contested decision states that 'the Italian authorities did not notify the second part of the investments as an addendum to the first notification' and that the Italian authorities themselves 'considered as departing pollution levels the ones that had been obtained as a result

of the investments notified in March [1999]'. On that basis, the decision finds that the improvements achieved as a result of the second aid plan are not significant, and accordingly that the investments notified in the second aid plan are not eligible for environmental aid.

108 That reasoning is factually incorrect. It is wrong to say that the Italian authorities did not notify the second part of the investments as an addendum to the first part, as the first aid plan was first notified on 16 March 1999 and resubmitted on 29 November 1999, together with the second aid plan. The two plans are inherently connected. The purpose of both the first aid plan and the second aid plan is to eliminate emissions of dust from coal and gas. In order to eliminate dust, each of the plans provided for the installation of new environmental equipment for the oven and the hopper (action A.4 in the first aid plan and action A.1 in the second aid plan). Similarly, in order to eliminate gas emissions, both plans provided for the installation of new environmental equipment for the doors of the coking chambers (actions A.6 to A.8 in the first aid plan and actions A.3 to A.6 in the second aid plan).

109 In addition, in reply to the questions put by the Commission on 17 January 2000 regarding the measures planned for the coking plant in the second aid plan, the Italian authorities clearly stated in their letter of 15 February 2000 that 'the work to the coking plant which it is intended to carry out under the plan concerned represents a continuation of the work previously notified (No 145/99)' and that, although that work had been decided upon subsequently and as part of a separate exercise, its 'purpose is to optimise the results achieved from the previous measures, by further reducing the pollution levels resulting from emissions that cannot be discharged'. In the same way, in their observations on the decision to initiate, the Italian authorities stated that 'although notified in two stages, the environmental investments in the coking plant were subsequently made under a single programme; accordingly, the results as to emission limits to be compared with the previous

situation are those which are given in relation to the position which applies on completion of the last investment' (letter of 18 July 2000, page 5).

110 In addition, the contested decision cannot maintain that the Italian authorities saw the original pollution levels as being those which had been achieved with the investments notified in March 1999, without having regard to the fact that, in doing so, the Italian authorities were merely supplying to the Commission the information that the latter had requested. In their letter of 15 February 2000, the Italian authorities provided a table which gave details of the level of contaminating emissions to be met in order to comply with the mandatory standards, the level subsequent to the first plan and that subsequent to the second plan, in each case in order to reply to the questions put by the Commission in its letter of 17 January 2000.

111 It follows that the contested decision is vitiated by a failure to state adequate reasons in that it simply takes the view that the results of the investments relating to environmental improvement achieved in the second aid plan are to be compared with the results achieved on completion of the first plan and to the situation which existed prior to the first plan, without setting out the factors which led the Commission to oppose the reasoning put forward by the Italian authorities in the course of the administrative procedure.

— Conclusion as regards the coking plant

112 It follows from the above that, as regards the investments notified by the Italian authorities in relation to the coking plant, the contested decision is flawed for the reasons set out below.

113 In the first place, the statement that the environmental investments were made as a condition or as a consequence of necessary production investments is incorrect as

regards the coking plant, because the Italian authorities did not refer to production investments in relation to that installation, , and inadequately reasoned for the purposes of Article 15 CS in that the contested decision does not disclose in what way, having regard to the explanations provided in that regard by the Italian authorities, the investments in the coking plant could have been made as the condition or the necessary consequence of the renovation of the production equipment in the blast furnace and the steelworks or as a condition or as a consequence of necessary production investments in general.

114 In the second place, the statement that the Italian authorities provided no evidence to show that the reason for the environmental investments in the coking plant was a voluntary decision to improve on environmental protection is inadequately reasoned for the purposes of Article 15 CS, in so far as the contested decision does not consider the information provided in that regard by the Italian authorities in the course of the administrative procedure.

115 In the third place, the statements that 'no proof was provided that ... the old equipment could indeed have been compatible with the new production equipment' and that 'it is therefore difficult to believe that once the main production equipment was replaced because it was technologically obsolete, the environmental protection equipment that went with it might have stayed in place' are inadequately reasoned for the purposes of Article 15 CS, in so far as the contested decision does not set out the reasons why it was appropriate to disregard the information provided in that respect by the Italian authorities in the course of the administrative procedure.

116 Finally, in the fourth place, the statement that the result of the investments as regards the environmental improvement achieved with the second aid plan relating to the coking plant is to be compared with the result achieved on completion of the first plan and with the situation which existed prior to the first plan is incorrect, in

that the Commission does not set out the reasons why it took the view that it had to disregard the information provided in that regard by the Italian authorities in the course of the administrative procedure.

(ii) The investments in the blast furnace and the steelworks

117 As regards the investments notified by the Italian authorities with respect to the blast furnace and the steelworks, the applicant's argument that the Commission was wrong to state that the Italian authorities did not provide proof that the reason for those investments was a voluntary decision by the company to improve on environmental protection cannot be accepted.

118 Unlike the investments relating to the coking plant, where no new production installations were involved, it was essential to show that there were no economic reasons underlying the investments in the environmental equipment relating to the blast furnace and the steelworks, since changes were made to the production equipment at those installations.

119 Admittedly, it is true that, in the same way as with the coking plant, the Italian authorities provided information to the Commission to show that the new environmental equipment in the blast furnace and the steelworks improved on environmental protection. Thus, the notification of the first aid plan made by the Italian authorities on 16 March and 29 November 1999 also included a description of the investments proposed for each of those installations and a description of the advantages which might be achieved as a result of those investments. Similarly, in reply to the Commission's request of 19 April 1999 with respect to the levels of

environmental contamination produced by the existing plant and those which would arise from the planned measures in comparison with the mandatory standards in force, the Italian authorities set out two tables in their letter of 29 November 1999 providing the required information as regards both the blast furnace and the steelworks. Those tables show that the existing equipment in each of those installations also complied with the levels of contaminating emissions to be met in order to comply with the mandatory standards and that the levels achieved after the measures were put in place were lower than the previous levels. Furthermore, the expert's report produced by the Italian authorities also examined the investments relating to the blast furnace and the steelworks, in order to establish the position prior to and after the measures and set out details of the improvement to be achieved as a result of the proposed investments in the equipment in each of those installations.

120 However, while it is true that that information demonstrates the applicant's willingness to adopt higher environmental standards and thereby to make a significant contribution to environmental protection, the Italian authorities have not shown that the reason for the notified investments relating to the blast furnace and the steelworks was a voluntary decision by the company to improve on environmental protection and that the investments were not made for economic reasons.

121 In the decision to initiate, the Commission clearly set out its doubts as to whether the reason for the notified investments in those installations was environmental or economic and as to the failure to provide evidence in that regard on the part of the Italian authorities.

122 Thus, the decision stated first of all that the reason why the investor had decided to undertake those investments was determinative, since the Annex to the Code for aid to the steel industry excluded investments that were made for economic reasons. The decision went on to state that an initial assessment of the information provided led to the conclusion that the investments had been made above all for economic reasons.

123 The decision to initiate also stated that the Italian authorities had not demonstrated that the investments had been made on environmental, and not on economic, grounds. That decision further stated that the Italian authorities had not proved that, where equipment or installations were replaced, the investor had clearly decided to opt for higher standards which necessitated additional investment, meaning that a lower-cost solution, which would have met the legal standards, existed.

124 The Italian authorities replied to the concerns expressed in the decision to initiate by the letter of 18 July 2000, where they simply stated once again that the purpose of the notified investments in the blast furnace and the steelworks was environmental and not economic, without providing any additional explanation or evidence in support of that statement.

125 Thus, the Italian authorities stated that 'it is clear from what was mentioned above that the environmental investment plan notified was carried out in order to achieve a significant improvement in environmental protection, as a separate matter from the investments in production ...' and 'that it is clear from what was mentioned above that Lucchini decided to opt for significantly higher levels of environmental protection, as a separate matter from the production investments which did not require any investment in the form of systems of environmental protection in order to comply with the emission standards in force and, accordingly, that all of the notified investments fall to be treated as additional investment'.

126 Those replies were not accompanied by further information which might have shown that a lower-cost solution existed and that, as a result, the company had

clearly opted for the application of higher standards which necessitated additional investment. In such circumstances, those assertions cannot override the doubts expressed by the Commission in the decision to initiate as to the economic, and not environmental, grounds for the notified investments in the two installations in question.

127 In addition, as regards the question whether the existing environmental equipment would, or would not, have been compatible with the new production installations, the contested decision states that the Italian authorities provided no evidence to support the statement that the old environmental equipment could indeed have been compatible with the new production equipment, on the grounds that the former equipment was not obsolete and could have continued to be used with the new production equipment and still have complied with the environmental standards (points 25 and 26).

128 Following the same approach, the contested decision states, first, that that statement by the Italian authorities is even less credible, since it is difficult to accept that the environmental equipment could have been kept in service in conjunction with the new production installations when account is taken of the age of the equipment, which dated from 1971 and 1978, secondly, that the expert's report states that the useful life left of the environmental equipment is the same as that of the whole plant, of which it constitutes a component, and, thirdly, that, having regard to the need to replace the production equipment because it was obsolete, it is difficult to believe that the environmental protection equipment that went with it might have stayed in place (point 27).

129 If the old environmental equipment for the blast furnace and the steelworks had been compatible with the new production plant and if that equipment could thus

allow the mandatory standards in force to be met, the reason for the notified investments would have been a voluntary decision of the company to improve on environmental protection, as that would necessarily involve additional investments allowing even higher standards to be adopted than the mandatory standards in force, which the previous equipment already met. It is however clear that the Italian authorities provided no evidence as to the purported compatibility of the old environmental equipment for the blast furnace and the steelworks with the new production equipment at those installations. In those circumstances, the Commission was not required to provide further reasoning on the point.

130 Lastly, as regards the objection put forward by the applicant alleging a lack of adequate reasons for the Commission's finding that the notified investments relating to the blast furnace and the steelworks were ineligible, the case-law regarding Article 253 EC, which also applies to Article 15 CS, provides that the statement of reasons required by the latter article must be appropriate to the measure 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 Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 15 CS 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 (see, by way of analogy, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 72).

131 It is clear from those parts of the contested decision referred to above that the Commission had set out its doubts in detail as to the investments in the blast furnace and the steelworks. In the absence of any explanations on the part of the Italian authorities, the contested decision was fully entitled to find that the Italian authorities had not proved that the investments in the blast furnace and the steelworks had been made for reasons of environmental protection. Since the

burden of proof rested on Italy, the contested decision was entitled to do no more than find that those explanations had not been provided.

132 Accordingly, the objection alleging a lack of adequate reasoning in the contested decision as regards the Commission's finding that the notified investments relating to the blast furnace and the steelworks were ineligible is unfounded.

133 It follows that the contested decision is not flawed when it states that the Italian authorities provided no evidence in support of the assertion that the reason for the investments made in the environmental equipment for the blast furnace and the steelworks was the voluntary decision of the applicant to improve on environmental protection and concludes as a result that the notified aid is ineligible.

(d) Conclusion on the second plea

134 It follows from the above that, as regards the environmental investments in the blast furnace and the steelworks and notwithstanding the fact that the contested decision is incorrect to state that those investments were necessary by reason of the fact that the factory is located in a densely-populated area, the failure of the Italian authorities

to prove that the company receiving the aid had made a voluntary decision to improve the environment is sufficient to justify the conclusion reached in the contested decision that the notified investments relating to each of those installations were ineligible as aid for environmental protection.

135 By contrast, as regards the environmental investments relating to the coking plant, the contested decision is inadequately reasoned and sometimes incorrect.

136 It follows from the above that the second plea is well founded as regards the coking plant and that it must be rejected as regards the blast furnace and the steelworks.

C — *The third plea, alleging that the Commission's findings that there had been a failure to comply with the conditions as to compatibility of the aid laid down by the relevant provisions were incorrect, infringement of the principle of non-discrimination, reversal of the burden of proof, failure to state reasons and an inherent contradiction in the reasoning set out in the contested decision*

137 In the third plea, the applicant contests the validity and the reasoning of the findings set out in points 30 to 32 of the contested decision and restated in the third sentence of point 39 and argues that they are vitiated by an error of assessment of the facts, an incorrect allocation of the burden of proof, an infringement of the principle of non-discrimination, a failure to state adequate reasons and an inherent contradiction in the reasoning.

138 The Court notes that point 39 of the contested decision states that the aid notified by the Italian authorities does not meet the various requirements imposed by the relevant provisions since, first, 'the notified costs do not refer only to the extra costs necessary for the additional improvement in environmental protection' and, secondly, 'not all cost advantages have been deducted'. Similarly, the Commission states in point 32 that 'the investment costs notified by the Italian authorities do not represent only costs related exclusively to environmental protection' and that 'the cost of equipment that can be used for production has not been deducted accordingly'. The latter findings are based on points 30 and 31 of the contested decision, in which the Commission replies to the arguments put forward by the Italian authorities in their observations on the decision to initiate.

139 Accordingly, as the Court has rejected the applicant's arguments seeking the annulment of the contested decision as regards the aid relating to the blast furnace and the steelworks, the applicant's objections regarding those installations put forward under the third plea are irrelevant. Since the Commission was correct to find, in points 25 to 29 of the contested decision, that the investments in relation to the blast furnace and the steelworks are ineligible for aid for environmental protection, that is sufficient to show that the application is without merit as regards those installations, without it being necessary to consider the validity of the arguments put forward under the third plea.

140 By contrast, as regards the aid relating to the coking plant, the Court has held that the second plea was well founded in so far as the contested decision was incorrect in certain respects and inadequately reasoned in others. Accordingly, the Court finds that the Commission cannot properly contend, on the basis of the reasons set out in the contested decision, which are analysed in relation to the second plea, that the

environmental investments notified by the Italian authorities with respect to the coking plant were ineligible for environmental aid.

141 In those circumstances, the Court cannot consider the third plea and the question whether the Italian authorities correctly distinguished between the costs connected with production investments and those connected with environmental investments. Such a distinction can, in fact, be undertaken only after the Commission has analysed the eligibility of the aid for the coking plant by taking into account the findings made by the Court in this judgment and once the Commission has determined, in the light of the points set out in paragraph 107 et seq. above, whether or not that aid enables significantly higher levels of environmental protection to be achieved.

142 Accordingly, in order to enable the parties to give due effect to the annulment pronounced under the second plea, and thus to recommence the procedure at the stage at which it was flawed, that is to say at the point where the environmental investments for the coking plant were analysed, there is no need to examine the arguments of the parties set out under the third plea in relation to the distinction between production and environmental costs, which presupposes that the aid in question does indeed have an environmental objective, in the terms of the Annex to the Code and the Guidelines. Thus, the Commission will be able to clarify the issues relating to the eligibility of the aid for the coking plant and, if necessary, to ask the Italian authorities to deduct the costs relating to the effect on production.

143 It follows from the above that the arguments put forward under the third plea are irrelevant as regards the blast furnace and the steelworks, since the correctness of the Commission's finding, set out in points 25 to 29 of the contested decision, that the aid for those installations is ineligible, is sufficient to establish the validity of the

contested decision in that regard and that it is unnecessary to consider the third plea in so far as it relates to the coking plant, given the effect of the annulment pronounced by the Court under the second plea regarding the procedure under which the aid relating to that installation was investigated.

D — *The reasons set out in the contested decision in relation to the amount of the aid declared incompatible with the common market*

144 It should be noted that an insufficiency or a lack of reasoning constitutes an infringement of essential procedural requirements within the meaning of Article 33 CS and is a matter of public policy which the Community judicature must raise of its own motion (see, by way of analogy, Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 24; *Commission* v *Sytraval and Brink's France*, paragraph 67; Case T-206/99 *Métropole télévision* v *Commission* [2001] ECR II-1057, paragraph 43; and Case T-102/03 *CIS* v *Commission* [2005] ECR II-2357, paragraph 46).

145 It should also be recalled that, according to settled case-law, the statement of reasons for an individual decision adversely affecting a person must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure 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 (see, by way of analogy, *Commission* v *Sytraval and Brink's France*, paragraph 63; *Métropole télévision* v *Commission*, paragraph 44; and *CIS* v *Commission*, paragraph 47).

146 Point 39 of the contested decision states that 'the aid notified ... for Lucchini ... in the coking plant, the steel works and the blast furnace, of ITL 13.5 [thousand

million] is not eligible for environmental aid because the Italian authorities failed to demonstrate that the investments were not made for economic reasons'. That conclusion follows on from point 29 of the contested decision, in which the Commission indicates that 'as regards the primary reasons for the investments ... in the coking plant, the steel works and blast furnace, [it] considers that the Italian authorities have not demonstrated, as required by the Annex to the [Code], that a clear decision was taken to invest for environmental reasons'.

147 However, it is clear from the decision to initiate (the section entitled 'Description of the aid') and from point 6 of the contested decision that the investments made by the applicant and notified as qualifying as environmental aid, for a total of ITL 190.9 thousand million, for which aid of a total of ITL 13.5 thousand million was requested (that is to say an aid intensity of 7%), relate to the following four installations: the coking plant, the steelworks, the blast furnace and the water and sewerage network.

148 Accordingly, in so far as points 29 and 39 of the contested decision do not refer to the equipment for the water and sewerage system and there is nothing in the contested decision to show how the State aid intended for that equipment is incompatible with the common market, it must be held that the statement of reasons in the contested decision is inadequate for the purposes of Article 15 CS in relation to the amount of aid declared incompatible with the common market in Article 1 of the contested decision.

149 The decision to initiate (the section entitled 'Description of the aid') shows that the amount of the investments corresponding to the water and sewerage system was ITL 19.7 thousand million and, accordingly, that the aid requested for that equipment was ITL 1.38 thousand million.

150 Article 1 of the contested decision must accordingly be annulled in so far as it includes within the amount of the State aid in favour of the applicant declared to be incompatible the sum of ITL 1.38 thousand million which corresponds to the notified investments relating to the water and sewerage system.

E — *General conclusion*

151 It follows from all of the above that the action must be dismissed as regards the environmental investments in the blast furnace and the steelworks.

152 With respect to the aid for the coking plant, the Court has accepted the second plea and the contested decision must therefore be annulled as regards the environmental investments in the coking plant.

153 The contested decision must likewise be annulled as regards the environmental investments relating to the water and sewerage system, since there is nothing in the contested decision to show how the State aid intended for that equipment is incompatible with the common market.

154 Article 1 of the contested decision must accordingly be annulled in so far as it includes in the declaration of incompatibility of the State aid in favour of the

applicant the sum of ITL 2.7 thousand million which corresponds to the notified environmental investments relating to the coking plant and the sum of ITL 1.38 thousand million which corresponds to the notified environmental investments relating to the water and sewerage system.

Costs

155 Pursuant to Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 87(3) of the Rules of Procedure provides that the Court may order that the costs be shared or that each party is to bear its own costs where each party succeeds on some and fails on other heads.

156 In the present case, the action has been upheld in part. The Court considers on a fair assessment of the circumstances that each party must be ordered to bear half the costs.

On those grounds,

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

hereby:

1. **Annuls Article 1 of Commission Decision 2001/466/ECSC of 21 December 2000 on the State aid which Italy is planning to implement in favour of the**

steel companies Lucchini SpA and Siderpotenza SpA in so far as it includes, in the amount of the State aid granted to Lucchini SpA and declared incompatible with the common market, the sums of ITL 2.7 thousand million (EUR 1.396 million) and ITL 1.38 thousand million (EUR 713 550) which correspond to the environmental investments notified by the Italian authorities for the coking plant and the water and sewerage networks respectively;

2. **Dismisses the remainder of the action;**

3. **Orders each party to bear half the costs.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 19 September 2006.

E. Coulon P. Lindh

Registrar President

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