JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
12 May 1999 *

In Joined Cases T-164/96, T-165/96, T-166/96, T-167/96, T-122/97 and T-130/97,

Moccia Irme SpA, a company incorporated under Italian law, established in Naples (Italy), represented by Emilio Cappelli, Paolo De Caterini and Andrea Bandini, all of the Rome Bar, with an address for service in Luxembourg at the Chambers of Charles Turk, 13A Avenue Guillaume,

Prolafer Srl, a company in liquidation incorporated under Italian law, established at Bergamo (Italy),

Ferriera Acciaieria Casilina SpA, a company incorporated under Italian law, established at Montecompatri (Italy),

Dora Ferriera Acciaieria Srl, a company in liquidation incorporated under Italian law, established at Bergamo,

Ferriera Lamifer SpA, a company incorporated under Italian law, established at Travagliato (Italy),

represented by Carmine Punzi and Filippo Satta, both of the Rome Bar, with an address for service in Luxembourg at the chambers of Charles Turk, 13A Avenue Guillaume,

Nuova Sidercamuna SpA, a company incorporated under Italian law, established at Berzo Inferiore (Italy), represented by Enrico A. Raffaelli, of the Milan Bar, Ivo

* Language of the case: Italian.

Van Bael, of the Brussels Bar, and Fabrizio Di Gianni, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Freddy Brausch, 11 Rue Goethe,

applicants,

v

Commission of the European Communities, represented by Paul Nemitz, Enrico Altieri and Laura Pignataro, of its Legal Service, acting as Agents, assisted by Massimo Moretto, of the Venice Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision 96/678/ECSC of 30 July 1996 concerning certain aid proposed by Italy as part of a programme for the restructuring of its private steel industry and Commission Decision 97/258/ECSC of 18 December 1996 concerning aid closures envisaged by Italy as part of the restructuring of its private steel industry (OJ 1996 L 316, p. 24 and OJ 1997 L 102, p. 42 respectively),

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

composed of: M. Jaeger, President, K. Lenaerts, V. Tiili, J. Azizi and P. Mengozzi, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 17 November 1998,

gives the following

Judgment

Legislative background

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

'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;

...'.

2 Under the first paragraph of Article 95 of the ECSC Treaty, the Commission, with the unanimous assent of the Council and having consulted the Consultative Committee, adopted Decision No 257/80/ECSC of 1 February 1980 establishing Community rules for specific aids to the steel industry (OJ 1980 L 29, p. 5), commonly referred to as 'the First Steel Aid Code'. According to the second paragraph of Part I of the preamble to that decision, the prohibition in the ECSC Treaty on subsidies or aid granted by States applies only to measures constituting purely national steel policy instruments and not to aid aimed at setting up a Community steel policy, such as the restructuring of the steel industry, which was the aim of Decision No 257/80/ECSC.

3 The First Steel Aid Code was subsequently replaced by successive codes, each establishing the rules applicable to State aid for the steel industry by laying down the criteria under which aid to the steel industry financed by a Member State in any form whatsoever may be deemed Community aid and therefore compatible with the orderly functioning of the common market.

4 In 1991 Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57, the Fifth Steel Aid Code, hereinafter 'the Fifth Code') laid down the new provisions on the grant of State aid in this field from 1 January 1992 to 31 December 1996. It was replaced as of 1 January 1997 by Commission

Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ 1996 L 338, p. 42), which constitutes the Sixth Steel Aid Code.

5 The Fifth Code provides:

— in Article 4(2):

aid 'to steel undertakings which permanently cease production of ECSC iron and steel products may be deemed compatible with the orderly functioning of the common market provided that the undertakings

— ...

— have been regularly producing ECSC iron and steel products up to the date of notification of the aid,

— ...'.

— in Article 6(1):

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid of the types referred to in Articles 2 to 5....';

— in Article 6(4):

— 'If, after giving notice to the interested parties concerned to submit their comments, the Commission finds that aid in a given case is incompatible with the provisions of this decision, it shall inform the Member State concerned of its decision....';

— in Article 6(6):

'All individual awards of the types of aid referred to in Articles 4 and 5 shall be notified to the Commission....'

Background to the applications

Notification by the Italian Government of Law No 481/94 and Decree No 683/94

6 In February 1994 the Italian Government notified to the Commission, pursuant to Article 6(1) of the Fifth Code, Decree-Law No 103 of 14 February 1994 introducing urgent measures for the implementation of its steel restructuring programme (hereinafter 'Decree-Law No 103/94'). That decree was reaffirmed by Decree-Law No 234 of 14 April 1994 and again by Decree-Law No 396 of 20 June 1994, which was definitively converted into Law No 481 of 3 August 1994 on the restructuring of the Italian private steel sector (GURI No 183 of 6 August 1994, p. 12, hereinafter 'Law No 481/94').

7 That Law makes provision *inter alia* for the grant of aid for the closure of steelworks on condition the plant and equipment is dismantled. In Article 1(3) it provides that 'requests for the grant of aid [...] must be submitted [...] before 30 July 1994 [...]', whilst 'plant and equipment is to be dismantled before 31 March 1995 and the aid is to be paid [...] by 31 December 1996.' Under Article 1(4), the technical rules for its implementation are to be laid down by decree of the Italian Minister for Industry, Trade and Craft Trades. The Italian authorities subsequently notified the measure implementing Law No 481/94, that is to say, Decree No 683 of 12 October 1994 of the Minister for Industry, Trade and Craft Trades (hereinafter 'the implementing measure'). Article 1(1) of that decree provides that, in order to receive the aid referred to in Article 1 of Law No 481/94, the undertakings concerned must comply *inter alia* with the following condition:

'(e) until the date of adoption of Decree-Law No 103 of 14 February 1994,... have been engaged in regular production, as certified by a report sworn by a

technical expert in the field, listed in the register of experts and appointed by the court within whose jurisdiction the company has its head office'.

Commission decision of 12 December 1994 authorising, in principle, the aid scheme notified by the Italian Government

8 By decision of 12 December 1994, the Commission authorised the aid scheme concerned as a matter of principle, subject to prior notice being given of all actual cases of application of aid, pursuant to Article 6(6) of the Fifth Code (OJ 1994 C 390, p. 20, hereinafter 'the decision of 12 December 1994').

9 The Commission stated that it would make its authorisation subject to compliance with certain conditions in each case. As regards the condition concerning regular production laid down in the second indent of Article 4(2) of the Fifth Code, the undertaking must have been in operation for on average at least one shift per day, that is to say, at least eight hours per day, five days per week for the whole of 1993 and until February 1994, when Decree-Law No 103/94 was notified to the Commission.

10 The Commission also stated that the Italian authorities could establish, however, on the basis of objective criteria, that an undertaking which did not satisfy that condition had regularly produced ECSC iron and steel products.

Notification by the Italian Government of the aid planned for the benefit of the applicants

11 On 8 September 1995, 23 November 1995 and 11 March 1996, the Italian Government notified the Commission, in accordance with Article 6(6) of the Fifth Code, of aid for the definitive closure under Law No 481/94 *inter alia* of the applicant undertakings in the six cases, T-164/96, T-165/96, T-166/96, T-167/96, T-122/97 and T-130/97, that is to say, Moccia Irme SpA (hereinafter 'Moccia'), Prolafer Srl (hereinafter 'Prolafer'), Ferriera Acciaieria Casilina SpA (hereinafter 'Casalina'), Dora Ferriera Acciaieria Srl (hereinafter 'Dora'), Ferriera Lamifer SpA (hereinafter 'Lamifer') and Nuova Sidercamuna SpA (hereinafter 'Sidercamuna') in the following amounts:

Case Number	*Applicant undertaking*	*Amount of aid (in ITL)*
T-164/96	Moccia	13 509 million
T-165/96	Prolafer	2 038 million
T-166/96	Casilina	2 908 million
T-167/96	Dora	3 438 million
T-122/97	Lamifer	4 889 million
T-130/97	Sidercamuna	16 127 million

12 The applicants are undertakings within the meaning of Article 80 of the Treaty producing steel or hot-rolled products. Their declared production capacity in

1993 and their actual production during the reference period, that is to say from 1 January 1993 to 28 February 1994, and the proportion the latter represents of the former expressed as a percentage, were as follows:

	Production capacity (in tonnes/year)	*Actual production* (in tonnes)
T-164/96 Moccia	288 000 crude steel 165 000 hot-rolled products	0
T-165/96 Prolafer	200 000 steel 150 000 hot-rolled products	0
T-166/96 Casilina	80 000 hot-rolled products	11 356 hot-rolled products (or 14.2%)
T-167/96 Dora	250 000 hot-rolled products	21 444 hot-rolled products (or 8.6%)
T-122/97 Lamifer	154 560 hot-rolled products	23 542 hot-rolled products (or 15.2%)
T-130/97 Sidercamuna	475 000 reinforcing rods and rolled products (flat)	36 002 reinforcing rods and rolled products (flat) (or 7.6%)

13 In total, 43 ECSC steel undertakings established in Italy submitted requests for aid under Law No 481/94.

Initiation by the Commission of the procedure provided for in Article 6(4) of the Fifth Code

14 On 15 December 1995, 2 February and 12 June 1996, the Commission, by letters essentially reproduced in Commission Notices 96/C 101/05, 96/C 121/03 and 96/C 215/03, addressed pursuant to Article 6(4) of the Fifth Code to Member States and other interested parties concerning aid that Italy decided to grant to Casilina, Acciaierie del Sud SpA, Officine Laminatoi Sebino SpA (OLS), Montifer Srl, Moccia et Mini Acciaierie Odolese SpA (MAO), Prolafer, Dora and Acciaierie San Gabriele SpA, Diano SpA, Lamifer, Ferriere Demafer Srl, Lavorazione Metalli Vari — LMV SpA and Sidercamuna (OJ 1996 C 101, p. 4, OJ 1996 C 121, p. 3 and OJ 1996 C 215, p. 3), informed the Italian Government of its decision to initiate the procedure provided for in Article 6(4) of the Fifth Code in respect of the aid envisaged for the benefit *inter alia* of the applicant undertakings.

15 The Commission explained in those notices that it was clear, from the information available to it, that none of the undertakings in question, and the applicants in particular, had been engaged in production for on average one shift per day, that is to say, at least eight hours per day, five days per week throughout the whole of 1993 and up to 28 February 1994.

16 As regards Moccia and Casilina, it stated in Notice 96/C 101/05:

'... [Casilina] (Case N777/95) produced only 11 356 tonnes of hot-rolled products, equivalent to 14.2% of its capacity;... [Moccia] (Case N793/95) was not in production.'

17 With regard to Prolafer and Dora, it stated in Notice 96/C 121/03:

'In Case 977/95... Prolafer [was] not engaged in production at all in 1993. In Case 978/95, Dora produced only 21 444 tonnes of hot-rolled steel, accounting for 8.6% of its capacity.'

18 Finally, as regards Lamifer and Sidercamuna, it stated in Notice 96/C 215/03:

'In Case 178/96 Lamifer... produced only 23 542 tonnes of hot-rolled steel (15.2% of capacity); in Case 182/96 Sidercamuna produced only 36 002 tonnes of hot-rolled steel (7.6% of capacity).'

Decisions of 30 July and 18 December 1996 declaring the aid incompatible with the common market

19 By Decision 96/678/ECSC of 30 July 1996 concerning certain aid proposed by Italy as part of a programme for the restructuring of its private steel industry (OJ 1996 L 316, p. 24, hereinafter 'Decision 96/678'), the Commission declared that the State aid which the Italian Republic planned to grant to eight of the nine undertakings in question, including Moccia, Prolafer, Casilina and Dora, was incompatible with the common market within the meaning of Article 4(c) of the Treaty.

20 By Decision 97/258/ECSC of 18 December 1996 concerning aid for closures envisaged by Italy as part of the restructuring of its private steel industry (OJ 1997 L 102, p. 42, hereinafter 'Decision 97/258'), the Commission also declared that the State aid which the Italian Republic planned to grant to four of the five undertakings in question, including Lamifer and Sidercamuna, was incompatible with the common market within the meaning of Article 4(c) of the Treaty.

21 The Commission gave the following reasons for those decisions (in Decision 97/258):

'The Commission concludes that the cases under consideration satisfy every requirement except the one — regarding regular production — that had led to the initiation of proceedings.

In this connection, although it states that, in order to be eligible for aid, a firm must be in regular production at the time of the closure, the Steel Aid Code does not give a precise definition of regular. Accordingly, in its decision authorising Italian Law No 481 of 3 August 1994, the Commission stated that the requirement concerned would be deemed to be met if the firm receiving the aid had been in production for on average at least one shift per day, i.e. at least eight hours per day, for five days per week for the whole of 1993 and up to 28 February 1994, when Decree-Law No 103/94, converted by the Italian Parliament into Law No 481/94, was notified to the Commission. The Commission decided, moreover, that the Italian authorities should be allowed to demonstrate on the basis of objective criteria that a firm which did not satisfy this requirement had regularly produced ECSC iron and steel products.

The Commission was then to examine the aid in the light of the particular circumstances of the case, in order to ensure that the criterion of regular production had been complied with.

The purpose of Article 4 of the Steel Aid Code and of the Commission decision of 12 December 1994 is clear: aid for closures may be granted only to firms that are significantly active, or whose production on the market in iron and steel products is regular. The Community legislator did not, however, feel it necessary or advisable to allow an exception to the general prohibition provided for in Article 4 of the ECSC Treaty in the absence of significant effects on the market resulting from the closure of a firm, as the latter is not in regular production.

It therefore follows that criteria could, provided they demonstrated the regularity of production, be accepted as an alternative to the one laid down by the Commission in its decision. The criteria put forward by the Italian Government (non-cancellation of the electricity-supply contract, continued employment of the workforce, investment in plant and equipment, maintenance of the facilities, etc.), however, demonstrate not that the firms in question were in regular production, but that they were capable of producing on a regular basis.

Article 4 of the Steel Aid Code is drafted in such a way as to rule out a broad interpretation which would allow aid to go to firms which, although they had not been in regular production, were merely capable of producing ECSC products on a regular basis.'

Procedure

22 By applications lodged at the Registry of the Court of First Instance on 19 October 1996, Moccia, Prolafer, Casilina and Dora brought the actions registered as Cases T-164/96, T-165/96, T-166/96 and T-167/96 respectively.

23 By application lodged at the Registry of the Court of First Instance on 18 April 1997, Lamifer brought the action registered as Case T-122/97.

24 By application lodged at the Registry of the Court of First Instance on 22 April 1997, Sidercamuna brought the action registered as Case T-130/97.

25 By separate document lodged at the Registry of the Court of First Instance on 28 November 1996, Moccia submitted an application for the adoption of interim measures, under Article 39 of the Treaty, seeking suspension of the operation of Decision 96/678 and of the previous acts and requiring the Commission to call upon the Italian authorities to suspend payment of the State aid for closure referred to by Law No 481/94 until judgment is given on the merits of the case, and in the alternative to reopen the consultative procedure for examining the aid intended for it.

26 By order of the President of the Court of First Instance of 17 December 1996 in Case T-164/96 R *Moccia Irme* v *Commission* [1996] ECR II-2261, the application for interim measures was dismissed.

27 By order of the President of the Court of Justice of 30 April 1997 in Case C-89/97 P (R) *Moccia Irme* v *Commission* [1997] ECR I-2327, the appeal against that order was dismissed.

28 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedures without any preparatory measures of inquiry.

29 The parties presented oral argument and answered oral questions from the Court at the hearings in open court on 17 November 1998.

30 By order of the President of the Third Chamber, Extended Composition, of the Court of First Instance of 18 December 1998, the cases were joined for the purposes of the judgment.

Forms of order sought

31 Moccia claims that the Court should:

— annul Decision 96/678 pursuant to Articles 33 and 36 of the Treaty and, consequently and in so far as is necessary, rule that the other previous acts, whether associated or related, are wholly inoperative;

— order the Commission to pay the costs.

32 Prolafer claims that the Court should:

— annul Decision 96/678, the decision of 12 December 1994 and, in so far as is necessary, the second indent of Article 4(2) of the Fifth Code and all previous acts, whether related or subordinate, of whatever nature.

33 Casilina claims that the Court should:

— annul Decision 96/678, the decision of 12 December 1994 and all previous acts, whether related or subordinate, of whatever nature;

— order the Commission to pay the costs.

34 Dora claims that the Court should:

— annul Decision 96/678, the decision of 12 December 1994 and all previous acts, whether related or subordinate, of whatever nature;

— order the Commission to pay the costs.

35 Lamifer claims that the Court should:

— annul Decision 96/678, the decision of 12 December 1994 and all previous acts, whether related or subordinate.

36 Sidercamuna claims that the Court should:

— annul Decision 97/258;

— order any other measures required to protect the interests of the applicant, both in law and in equity;

— order the defendant to pay the costs.

37 The Commission contends in all the cases that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Admissibility

38 In the six cases, the Commission disputed the admissibility of the applicants' claims concerning both the Fifth Code and the decision of 12 December 1994.

The pleas alleging inadmissibility of the challenge to the Fifth Code

39 The Commission disputes, first, the relevance of the claims in certain applications in so far as they are expressly directed against the Fifth Code. Second, it considers the objection in Case T-130/97 that the Fifth Code is illegal to be out of time.

1. *The plea alleging that the claims in certain applications are irrelevant in so far as they are expressly directed against the Fifth Code*

40 The Commission points out that Prolafer, Casilina, Dora and Lamifer seek to plead, under the third paragraph of Article 36 of the Treaty, the illegality of any act prior to the decision of 12 December 1994 and Decisions 96/678 and 97/258, which would include the Fifth Code. However, the arguments of the applicants are intended merely to establish that the Commission infringed that code rather than to call it in question.

41 In that connection, the Court finds that this plea by the Commission regarding the admissibility of the applications, on which the applicants have not expressed a view, is unfounded. Whilst it is true that in those cases no argument is directed specifically at the Fifth Code, it being, rather, the basis for the criticisms levelled at the legality of the decision of 12 December 1994 and Decisions 96/678 and 97/258, that fact is in itself not such as to render the claims in question inadmissible.

2. *The plea of inadmissibility alleging that the objection of illegality raised against the Fifth Code in Case T-130/97 is out of time*

42 In the Sidercamuna case, the Commission contends that the objection of illegality raised against the Fifth Code is inadmissible as it was put forward for the first time at the stage of the reply and is thus a new plea.

43 The Court observes that, by virtue of Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

44 Here, the applicant in Case T-130/97 argues in the application that, given the primary objective of the steel aid programme, namely the reduction of production capacity, it would be unlawful to make the attainment of that objective subject to conditions bearing no relation to it, such as the level of regular production. In the reply it cites that argument as evidence that it raised an objection of illegality against the Fifth Code at the stage of the application.

45 However, in the view of the Commission, that argument raised at the stage of the application is not directed at the Fifth Code but is in fact a criticism of the breach or misinterpretation of that code by secondary measures.

46 The Court observes that the applicant's argument attacks the fact that the attainment of one of the objectives of the Fifth Code, namely the reduction of production capacity, is subject to a condition which is wholly unrelated to that objective, that is to say the existence of regular production. As pointed out above in paragraph 5, that condition is laid down by the second indent of Article 4(2) of the Fifth Code. That argument is therefore aimed at that provision of the Fifth Code.

47 Moreover, that argument is put forward in connection with the part of the first plea in the application relating to breach by the Commission of the principle of effectiveness and not in connection with the part which specifically criticises the breach of Article 4 of the Fifth Code by secondary measures.

48 The argument in question therefore constitutes an objection of illegality directed at the second indent of Article 4(2) of the Fifth Code. As the objection was raised at the stage of the application, it was not raised out of time. The plea of inadmissibility put forward by the Commission must therefore be rejected.

The pleas alleging inadmissibility of the challenge to the decision of 12 December 1994

49 The Court observes, first, that Prolafer, Casilina, Dora and Lamifer plead the illegality of the decision of 12 December 1994 and seek its annulment.

50 The Court considers that the applicants intend in fact to plead the illegality of the decision of 12 December 1994 as an ancillary issue at the same time as, and in support of, their applications for annulment of the decisions not to approve the aid, and thus in the form of an objection of illegality.

51 Moccia and Sidercamuna formally raised an objection of illegality to the decision of 12 December 1994.

52 The objections of illegality thus raised in the six joined cases to the decision of 12 December 1994 are all directed against the criterion laid down in that decision by the Commission by way of a definition of the requirement of regular production laid down by the second indent of Article 4(2) of the Fifth Code, that is to say the undertaking seeking aid for closure must have been engaged in production for on average at least one shift per day, that is to say, at least eight hours per day, five days per week for the whole of 1993 and until February 1994.

53 The Commission contends that those objections of illegality are inadmissible.

54 It puts forward two pleas in that connection. In the first, raised in all the cases, it is argued that Decisions 96/678 and 97/258 (hereinafter 'the contested decisions') are not based on the decision of 12 December 1994 but directly on the Fifth

Code. In the second, raised in the Lamifer and Sidercamuna cases, it is argued that the decision of 12 December 1994 constitutes at most the basis for the decision to initiate the procedure adopted on the basis of Article 6(4) of the Fifth Code but not for the later decision not to approve the aid, which merely constitutes a measure confirming the first decision.

1. *The plea alleging that the contested decisions are based not on the decision of 12 December 1994 but directly on the Fifth Code*

55 The Commission argues that, in the present case, there is no connection between the contested decisions and that of 12 December 1994. Article 6(6) of the Fifth Code provides that all individual awards of the types of aid referred to in Articles 4 and 5 are to be notified to the Commission so that it can make a decision on them independently of the adoption of a decision authorising a general aid scheme on the basis of those articles. Accordingly, the contested decisions cannot be deemed to have their legal basis in the decision of 12 December 1994, but solely, in so far as is relevant in the present case, on Article 6(6) of the Fifth Code.

56 The Court observes that, although in an action for a declaration that an individual decision is void the applicant may allege that certain provisions of the general decisions which the contested decision implements are illegal, the applicant may do so only if the individual decision is based on the rules alleged to be illegal (Joined Cases 275/80 and 24/81 *Krupp* v *Commission* [1981] ECR 2489, paragraph 32, Case 258/80 *Rumi* v *Commission* [1982] ECR 487,

paragraph 6, Joined Cases 140/82, 146/82, 221/82 and 226/82 *Walzstahl-Vereinigung and Thyssen* v *Commission* [1984] ECR 951, paragraph 20, and Case 151/83 *Alpa* v *Commission* [1984] ECR 3519, paragraph 9).

57 In the present case, the contested decisions refer expressly to the decision of 12 December 1994, which approves Law No 481/94 and thus forms the subject-matter of the objection of illegality. They note that although the Fifth Code makes the grant of aid subject to the requirement that the undertaking has been engaged in regular production until the time of closure, it does not contain a clear definition of the concept of regular production. They point out that it is for that reason that the decision of 12 December 1994 made the award of aid for closure subject to the requirement that the undertaking must have been engaged in production for on average at least one shift per day, that is to say at least eight hours per day, five days per week for the whole of 1993 and until February 1994. They state that although the applicants met the other conditions laid down in Article 4 of the Fifth Code, they did not meet that condition. They observe that, as a result of that finding, the procedure provided for in Article 6(4) of the Fifth Code was initiated. They consider that the Italian Government has failed to establish, in accordance with the decision of 12 December 1994, by means of other objective evidence, that the applicants had none the less regularly produced ECSC products.

58 It follows that the decision of 12 December 1994 laid down a criterion the application of which to the applicants entailed the initiation of the procedure provided for by Article 6(4) of the Fifth Code and pursuant to which the aid was finally declared incompatible with the common market, within the meaning of Article 4(c) of the Treaty.

59 The contested decisions are thus to that extent based on the definition given by the decision of 12 December 1994 of the requirement of regular production laid down by the second indent of Article 4(2) of the Fifth Code. That definition of the requirement of regular production forms, in its turn, the subject-matter of the objection of illegality raised against the decision of 12 December 1994.

Accordingly, the contested decisions are based on the rule which is alleged to be illegal. The plea of inadmissibility raised by the Commission is thus unfounded.

60 The Commission raises the objection, first of all, in the six joined cases, that, under Article 6(6) of the Fifth Code, all individual awards of aid must be notified to it, independently of the adoption of a decision authorising a general aid scheme, so that the contested decisions could be considered to have their legal basis not in the decision of 12 December 1994 but solely in Article 6(6) of the Fifth Code. Furthermore, even in the absence of the decision in question, the contested decisions could have been validly adopted and produced all their effects. However, that argument disregards the fact that the Commission, in considering specific cases of aid notified following approval of the general aid scheme by the decision of 12 December 1994, analysed compliance with the requirement of regular production by reference to the criterion laid down in that decision, so that, to that extent, it constitutes the legal basis for the contested decisions.

61 The Commission objects, second, in Cases T-164/96, T-165/96, T-166/96, T-167/96 and T-122/97, that the requirement of regular production laid down in the second indent of Article 4(2) of the Fifth Code was clarified in its decision of 12 December 1994 merely by way of example with the agreement of the Italian Government. However, that argument disregards the fact that the Commission, far from treating the criterion set out in the decision of 12 December 1994 simply as a non-binding illustration, applied it in initiating the procedure provided for by Article 6(4) of the Fifth Code and declared the planned aid incompatible with the common market.

62 The Commission objects, third, in Cases T-164/96, T-166/96, T-167/96, T-122/97 and T-130/97, that the decision of 12 December 1994, whilst laying down a criterion explaining the requirement of regular production provided for by the second indent of Article 4(2) of the Fifth Code, enabled the Italian Government to prove, on the basis of objective criteria, that an undertaking not fulfilling that criterion had none the less regularly produced ECSC iron and steel products, so

that the reference to that decision by the contested decisions was not a crucial factor. The aid could thus have been authorised despite the failure to fulfil the criterion laid down in the decision of 12 December 1994, with the result that the latter does not constitute the basis for the contested decisions. However, that objection disregards the fact that it is clear from the contested decisions that the Commission required the applicant undertakings to satisfy the criterion in question, that failure to satisfy that criterion resulted in the initiation of the procedure provided for by Article 6(4) of the Fifth Code and that, given the Italian Government's failure, in the view of the Commission, to furnish proof of the fulfilment of alternative objective criteria, the aid sought was declared incompatible with the common market. It follows that the refusal of the aid was in the end a result of failure to fulfil the criterion laid down by the decision of 12 December 1994, which constitutes a presumption that, in the event, was not rebutted by the Italian Government. To that extent, therefore, the contested decisions are based on the criterion in question.

63 The Commission objects, fourth, in Case T-164/96, that the mere reference in Decision 96/678 to the decision of 12 December 1994 is not in itself a determining factor, in that Moccia was not engaged in production during the reference period, with the result that the criterion laid down by the first decision was not applicable. However, that argument disregards the fact that, in formal terms, Decision 96/678 notes that the criterion was applied in the case of the applicant. Moreover, it was also applied in practice in that, in particular, the applicant's production was assessed solely by reference to the period stipulated by that criterion, that is to say, between January 1993 and February 1994, and not, for example, from 1 January 1992, the date of the entry into force of the Fifth Code.

2. *The plea alleging that Decision 97/258 is not a confirmatory measure*

64 In Cases T-122/97 and T-130/97, the Commission explains that the criterion defining the requirement of regular production, laid down by the decision of

12 December 1994, had already been applied in the applicants' case before the adoption of Decision 97/258 by the previous decision initiating the procedure for examining aid, provided for by Article 6(4) of the Fifth Code. That decision noted that the applicants did not fulfil the criterion in question and went on to seek proof from the Italian authorities, on the basis of other objective criteria, that the applicants were engaged in regular production. The purpose of Decision 97/258 was to conclude that the Italian authorities had not furnished such proof. It also pointed out that the applicants did not fulfil the criterion laid down by the decision of 12 December 1994, but in that respect it merely served to confirm the previous decision. Since the applicants did not contest the decision initiating the procedure provided for by Article 6(4) of the Fifth Code within the period prescribed and did not in that connection raise an objection of illegality against the criterion laid down by the decision of 12 December 1994, they are precluded from doing so in these proceedings.

65 The Court observes that the applicants plead the illegality of the decision of 12 December 1994 in support of their application for the annulment of Decision 97/258. In its plea of inadmissibility, the Commission disputes whether the applicants are entitled to close on the ground that they could have raised that plea in an application against the decision initiating the procedure for examining the aid. However, it is sufficient to note that Decision 97/258 produces legal effects of its own, including the definitive refusal of the aid, and that the applicants must therefore have a means of redress against that decision (see, by analogy, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 5, and Case C-188/92 *TWD Textilwerke Deggendorf* v *Germany* [1994] ECR I-833, paragraph 14), which implies that they must be able to rely, in support of an action for the annulment of that decision, on the illegality of the decision on which it is based, irrespective of whether or not the applicants have challenged the decision to initiate the procedure for examining the disputed aid (Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, paragraph 31).

66 It follows that the second plea of inadmissibility relating to the objection that the decision of 12 December 1994 is illegal is unfounded.

Substance

67 The applicants have raised pleas relating to the substance of the contested decisions (I) and to breach of the obligation to state reasons for those decisions (II).

I — *The pleas relating to the substance of the contested decisions*

Preliminary observations

68 The Court observes that, under Article 33, first paragraph, second sentence, of the ECSC Treaty, in exercising its jurisdiction in actions for annulment of decisions or recommendations of the Commission, 'the Court of Justice may not... examine the evaluation of the situation resulting from economic facts or circumstances, in the light of which the Commission took its decisions or made its recommendations, save where the Commission is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application.'

69 That limitation of the Court's discretion also applies to the examination of decisions and recommendations whose legality is contested, by means of an objection, on the basis of the third paragraph of Article 36 of the Treaty. Under that article, legality must then be contested 'under the same conditions as in the first paragraph of Article 33' of the Treaty (see, to that effect, Joined Cases 154/78, 205/78, 206/78, 226/78, 227/78, 228/78, 263/78, 264/78, 31/79, 39/79, 83/79 and 85/79 *Ferriera Valsabbia and Others* v *Commission* [1980] ECR 907, paragraph 10).

70 So far as concerns the concept of manifest failure to observe legal provisions, the Court points out that the term 'manifest' presupposes that that failure is such that it appears to derive from an obvious error in the evaluation, having regard to the provisions of the Treaty, of the situation in respect of which the decision was taken (see Case 6/54 *Netherlands* v *High Authority* [1954-1956] ECR 103, at p. 115, Joined Cases 15/59 and 29/59 *Knutange* v *High Authority* [1960] ECR 1, at p. 10, and order of the President of the Court in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 62).

71 The Court observes, as regards the concept of misuse of powers, that a measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or of evading a procedure specifically prescribed for dealing with the circumstances of the case (see Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24, and Case T-57/91 *Naloo* v *Commission* [1996] ECR II-1019, paragraph 327).

The pleas alleging that the Treaty does not apply

72 The applicants raise pleas alleging that the Treaty does not apply in the present case.

A — The plea alleging that the applicants could not be classified as ECSC steel undertakings

73 Moccia and Sidercamuna submit that an undertaking which is planning to close its plant does not constitute an ECSC steel undertaking within the meaning of

Article 80 of the Treaty, with the result that the Treaty, including the prohibition laid down by Article 4(c) thereof, is not applicable to them.

74 The Court points out, however, that an ECSC steel undertaking seeking aid for closure retains that status as long as its production activity has not fully and finally ceased, possibly following the grant of such aid. In the present case, it is common ground that, at the time when the aid was requested, the applicants were either engaged in ECSC production, or, if not so engaged, had not definitively closed yet. The Commission was therefore entitled to treat the applicants as ECSC steel undertakings. This plea must therefore be rejected.

B — The plea alleging that aid for closure is not covered by the prohibition in Article 4(c) of the Treaty, inasmuch as it is not likely to distort competition

75 Moccia submits, essentially, that the Fifth Code, which constitutes a derogation based on Article 95 of the Treaty from the prohibition contained in Article 4(c) thereof, must respect the fundamental principles of the Treaty and, in particular, confine itself to what is necessary to prevent distortion of competition. Closure of an undertaking which is uncompetitive cannot distort competition. It follows that aid for closure awarded to such an undertaking is not prohibited and cannot therefore be covered by the Fifth Code.

76 Sidercamuna argues along the same lines that, for the reasons given above, aid for closure sought in those circumstances cannot be classified as aid within the

meaning of Article 4(c) of the Treaty. In the alternative, if it were so classified, the award of the aid would not be prohibited.

77 The applicants put forward three arguments in support of that plea.

78 Moccia argues that the definition of State aid under the ECSC Treaty is the same as that laid down by the EC Treaty, with the result that, even under the ECSC Treaty, if there are no unfavourable effects on competition, aid is compatible with the common market.

79 Sidercamuna refers to the judgment of the Court in Case T-244/94 *Wirtschaftsvereinigung Stahl and Others* v *Commission* [1997] ECR II-1963, which states, at paragraph 32:

'Article 4(c) of the Treaty prohibits, in principle, State aid within the European Coal and Steel Community to the extent to which it is liable to undermine attainment of the essential objectives of the Community laid down by the Treaty, in particular the establishment of conditions of free competition.'

80 It concludes that aid is prohibited under Article 4(c) only to the extent that it is likely to affect the balance of competition.

81 Sidercamuna also refers to the judgment in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, at p. 20, third paragraph, which, in explaining the definition of subsidy under the Treaty, refers

to the third indent of the second paragraph of Article 5, which lays down that the Communities' principal task is to ensure the establishment, maintenance and observance of normal competitive conditions.

82 The Court observes that the purpose of Article 4 of the Treaty is, as described above, to ensure 'the establishment, maintenance and observance of normal competitive conditions' (*De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited above in paragraph 81, at p. 22). Article 4(c) prohibits subsidies or aids granted by States 'in any form whatsoever'. That phrase does not appear in Articles 4(a), 4(b) or 4(d) and this gives an unusually wide meaning to the prohibition it describes (judgment cited above, at p. 21). The prohibition so expressed is formulated in exceptionally strict terms because it targets direct interference in the operation of the common market in coal and steel, which is considered, as such, to be contrary to the very conditions on which the common market was established. For that reason, such aid is deemed incompatible with the common market without the need to establish or even to consider whether there is, in actual fact, any interference with the conditions of competition or it is liable to occur (see the Opinion of Advocate General Lagrange in *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited above, [1961] ECR 34, at p. 41).

83 The system set up by Article 4(c) of the ECSC Treaty thus differs from that under Article 87(1) EC (ex Article 92). The former imposes a general and unconditional prohibition on all aid, which is in substance contrary to the very conditions in which the common market in coal and steel was established. The latter, on the other hand, only prohibits aid where it is such as to distort or threaten to distort competition by favouring certain undertakings or the production of certain goods.

84 It follows that aid for closure granted by a Member State to an ECSC steel undertaking falls within the prohibition in Article 4(c) of the ECSC Treaty, without its being necessary to establish that the conditions of competition have

been undermined. The Fifth Code, whose purpose is to provide for derogations from that prohibition, can therefore apply to such aid.

85 That finding is not called in question by the judgments in *Wirtschaftsvereinigung Stahl and Others* v *Commission*, cited at paragraph 79, and *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited at paragraph 81, on which the applicants seek to rely.

86 The judgment in *Wirtschaftsvereinigung Stahl and Others* v *Commission*, cited above at paragraph 79, does indeed state, as do two other judgments given the same day (Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839, paragraph 61, and Case T-243/94 *British Steel* v *Commission* [1997] ECR II-1887, paragraph 40), that Article 4(c) of the Treaty prohibits, in principle, State aid within the European Coal and Steel Community to the extent to which it is liable to undermine attainment of the essential objectives of the Community laid down by the Treaty, in particular the establishment of conditions of free competition. It also adds (see paragraph 33 of that judgment, and *EISA* v *Commission*, cited above, paragraph 62, and *British Steel* v *Commission*, cited above, paragraph 41) that the existence of such a prohibition does not mean that all State aid within the sphere of the ECSC must be regarded as incompatible with the objectives of the Treaty.

87 The purpose of those statements was, however, only to enable the Court to conclude that Article 4(c) of the Treaty does not prevent the Community institutions, which have exclusive jurisdiction as regards aid within the Community, from authorising, by way of derogation, aid envisaged by the Member States and compatible with the objectives of the Treaty, on the basis of the first and second paragraphs of Article 95 in order to deal with unforeseen situations (paragraphs 33 and 34 of the aforesaid judgment and *EISA* v *Commission*, cited above, paragraphs 62 and 63, and *British Steel* v *Commission*, cited above, paragraphs 41 and 42).

88 Thus, in the context of that judgment, those statements did not, contrary to Sidercamuna's claims, constitute a finding that aid which is compatible with the objectives of the Treaty is automatically exempted from the scope of the prohibition in Article 4(c) of the Treaty.

89 The judgment in *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited above in paragraph 81 (at p. 20, third paragraph, and p. 22, first paragraph), does indeed state, as noted at paragraph 82 above, that the purpose of Article 4 of the Treaty is, as confirmed by the third indent of the second paragraph of Article 5 of that Treaty, to ensure the establishment, maintenance and observance of normal competitive conditions.

90 However, in the context of that judgment, that point was not made to justify limiting the scope of the prohibition on aid, but, on the contrary, as a reason for extending it. The Court referred to that point in order to widen the interpretation of the concepts of subsidy or aid under Article 4(c) of the Treaty to include payment of a fraction of production costs by a party other than the purchaser or user, where such payment manifestly impedes the establishment of normal conditions of competition. Moreover, the Court was at pains to observe in that same judgment, as noted above at paragraph 82, that an unusually wide meaning is given to the prohibition described by that article. It follows that the reference in that judgment to the fourth indent of the second paragraph of Article 5 of the Treaty does not constitute a limitation of the scope of the prohibition on aid to the case where conditions of competition have actually been shown to be affected.

91 This plea must therefore be rejected.

The pleas alleging that the second indent of Article 4(2) of the Fifth Code is illegal

92 Moccia observes that a system of Community monitoring, intended to prevent abuses, in particular in the case of the closure of an undertaking, ought to be confined to laying down the essential preconditions for carrying out the monitoring in question and ought not to introduce pointlessly irksome conditions, such as the requirement in this case that an undertaking which may not be very competitive must have been engaged in regular production of ECSC steel products.

93 Sidercamuna observes that the principle of effectiveness requires the application of Community law to be subordinated to the achievement of its objectives. As the reduction of production capacity is the primary purpose of the programme of aid for the steel industry, it is unlawful to make the achievement of that purpose subject to conditions bearing no relation to it, such as compliance with a certain level of regular production.

94 The Court finds that the Commission, in adopting the Fifth Code, and the Council, in giving its assent, authorised aid in favour of undertakings which definitively cease their production of ECSC steel on condition that the recipient undertakings were engaged in regular production of ECSC steel products until the aid was notified. Their objective was, as is clear from the contested decisions (see paragraph 21 above), to award aid for closure only to undertakings with a certain level of activity. On the other hand, they did not consider it necessary or useful to grant a derogation from the general prohibition laid down by Article 4 of the Treaty in favour of undertakings not engaged in regular production, as their closure does not have significant effects on the market.

95 Under Article 4(c) of the Treaty, all aid for steel from the Member States in any form whatsoever is prohibited. Derogations from that prohibition, such as the Fifth Code, adopted on the basis of Article 95 of the Treaty, must be interpreted

strictly (Case T-150/95 *UK Steel Association* v *Commission* [1997] ECR II-1433, paragraph 114).

96 It follows that, having regard to the generally applicable prohibition on aid laid down by Article 4(c) of the Treaty and to the exceptional and limited nature of the derogations allowed, the Commission was entitled to consider, in exercising its discretion and without manifestly misconstruing the law or misusing its powers, that aid for closure would have significant effects on the market and therefore should only be granted to undertakings which, whilst less competitive, have none the less produced on a regular basis.

97 The pleas raised must therefore be rejected.

The pleas based on the Commission's interpretation in the present case of the requirement of regular production laid down by the second indent of Article 4(2) of the Fifth Code

98 It should be borne in mind, first of all, that in its decision of 12 December 1994 the Commission, whilst authorising in principle the aid scheme governed by Law No 481/94, made all specific awards of aid subject to prior notification and stated that in each case its authorisation would be subject to the fulfilment of certain conditions. One of those conditions, the requirement of regular production, laid down by the second indent of Article 4(2) of the Fifth Code, is interpreted by the Commission to mean that, in order to receive the aid, the undertaking must 'have been in production for on average at least one shift per

day, i.e. at least eight hours per day, for five days per week for the whole of 1993 and up to February 1994', when Decree-Law No 103 of February 1994 was notified to the Commission.

99 That criterion is based on the objective finding that, for technical reasons, steel is produced continuously, generally on the basis of three eight-hour shifts per day, seven days a week, and thus 168 hours per week. The minimum production required pursuant to that criterion is 40 hours per week, that is to say one quarter or 25% of the maximum production possible (or production capacity). In the decisions refusing aid, the Commission compares, for each applicant, the declared highest possible production with actual production during the reference period (from January 1993 to February 1994) and expresses that proportion as a percentage. The minimum threshold required is actual production amounting to 25% of the highest possible production.

100 In any event, the Commission took care, in its decision of 12 December 1994, to give the Italian authorities the opportunity to prove on the basis of other objective criteria that the steel undertaking had been engaged in regular production. The Commission added in that decision that the Italian authorities could, however, 'establish, on the basis of objective criteria, that an undertaking which did not satisfy that condition had regularly produced ECSC iron and steel products'.

101 It should be noted, finally, that the Commission chose the main criterion and the possibility of other objective criteria in close cooperation with the Italian authorities to whom the decision of 12 December 1994 was addressed. The letter from the Italian Minister for Industry, Trade and Craft Trades of 5 October 1994 to the Commission states: 'It would be reasonable to accept the Commission's suggestion that regular production within the meaning of Article 4(2) of the Aid Code means that an undertaking in receipt of closure aid must have been engaged

in production for on average one shift per day during 1993. That does not, of course, rule out the Commission's accepting the possibility of proving by other objective means that an undertaking which does not fully comply with that criterion might none the less have been engaged in regular production at the time of notification.'

102 It follows that, in providing in the decision of 12 December 1994 both for a main criterion raising a presumption of regular production within the meaning of Article 4(2) of the Fifth Code and for the possibility of proof by other objective criteria, the Commission has not misused its powers, nor has it manifestly failed to observe the provisions of the Treaty or any rule of law relating to its application.

103 However, in pleading that the Commission misused its powers or failed to observe the Treaty when it applied the main criterion to their actual circumstances, the applicants put forward arguments which essentially criticise, first, the choice of the main criterion and, second, the refusal by the Commission to take account of other objective criteria.

A — The pleas criticising the choice of the criterion of minimum production of one eight-hour shift per day, five days a week

104 The applicants criticise both the circumstances in which the criterion was applied and its scope.

1. The pleas criticising the circumstances in which the criterion was applied

105 Moccia puts forward a plea alleging breach of the principles of publication and non-retroactivity of legal rules.

106 It argues, essentially, first, that the criterion in question constitutes a rule of law which was applied for the first time by Decision 96/678. It is applied to events which took place between January 1993 and February 1994. The principle that legal rules should not be retrospective has thus been infringed.

107 Second, that rule of law was not published prior to its application. The principle that legal rules must be published has thus been infringed as well.

108 The Court observes that this plea is aimed at the fact that the criterion laid down by the decision of 12 December 1994, for the assessment of the requirement of regular production provided for by the second paragraph of Article 4(2) of the Fifth Code, takes account of production during a period which came to an end when it was adopted and applied, that is to say, the period up to the date of notification to the Commission of the Italian aid scheme, in February 1994.

109 The establishment of the relevant period for the assessment of production merely constitutes the application of the second indent of Article 4(2) of the Fifth Code, which provides that aid for closure can be considered compatible with the

common market only if the undertaking seeking the aid has been regularly producing ECSC iron and steel products 'up to the date of notification of the aid'.

110 The Fifth Code was published in the *Official Journal of the European Communities* on 31 December 1991. Under Article 9 thereof, it entered into force on 1 January 1992.

111 The production period taken into consideration by the decision of 12 December 1994 for undertakings seeking closure aid pursuant to Law No 481/94 was from January 1993 to February 1994. It is therefore subsequent to the publication and implementation of the Fifth Code, which laid down the method of assessment in question.

112 The pleas raised must therefore be rejected.

2. The pleas criticising the scope of the criterion

113 The applicants criticise the actual scope of the criterion laid down by the decision of 12 December 1994 in three respects. First, in requiring an objectively high level of production, the criterion prevents aid from benefiting less competitive

undertakings. Second, the reference period set is insufficient and, third, the highest possible production is an arbitrary parameter.

(a) The plea alleging that the criterion, in requiring an objectively high level of production, prevents aid from benefiting less competitive undertakings

114 Moccia and Lamifer argue that, according to the fourth paragraph of Section I of the Fifth Code, aid for closure is intended to benefit the least competitive undertakings. In interpreting the criterion relating to regular production, the Commission required undertakings seeking such aid to have objectively high production thresholds. It thus failed to take account of the fact that closure aid is intended for less competitive undertakings.

115 The Court observes, as a preliminary matter, that the fourth paragraph of Part I of the preamble to the Fifth Code, to which the applicants refer, is intended to summarise the principles governing Commission Decisions No 3484/85/ECSC of 27 November 1985 and No 322/89/ECSC of 1 February 1989 establishing Community rules for aid to the steel industry, the Third and Fourth Steel Aid Codes. Its purpose is not to give specific reasons for the closure aid provided for by the Fifth Code. However, as the purpose of the Fifth Code is to replace the previous codes which had expired and no specific reason cited in that code expressly sets it apart from those principles, it cannot be ruled out that those principles should apply also to the Fifth Code. That interpretation is confirmed by the fact that the Sixth Steel Aid Code cites similar reasons in its third recital, referring to the Fifth Code which is at issue here.

116 However, such reasons must be considered in the light of the actual wording of the Fifth Code and the second indent of Article 4(2) in particular, which requires undertakings seeking closure aid to be engaged in regular production. It follows that the Community legislature did not intend to refer the category of less

competitive undertakings indiscriminately, but only to undertakings within that category which were engaged in 'regular production'. As demonstrated above (see paragraphs 94 to 96), the Commission did not commit a manifest error in limiting the aid in question to undertakings whose closure has a significant effect on the market.

117 This plea must therefore be rejected.

(b) The pleas alleging that the reference period is insufficient

118 Casilina, Dora and Lamifer claim, first, that the start of the reference period for regular production should have been set at 1 January 1991 and, second, that the insufficient length of the reference period made it impossible to assess whether the presence of an undertaking on the market was significant.

— The plea alleging that the start of the reference period for regular production should have been set at 1 January 1991

119 The applicants submit that the start of the reference period for regular production should have been set at 1 January 1991, the date appearing in the first and third indents of Article 4(2) of the Fifth Code.

120 The Court observes that Article 4(2) of the Fifth Code sets out the conditions which an undertaking must fulfil in order for closure aid for its benefit to be considered compatible with the common market.

121 The first indent of the paragraph requires the undertaking to have become a legal entity 'before 1 January 1991.' The second indent stipulates that the undertaking must have been regularly producing ECSC iron and steel products 'up to the date of notification of the aid.' The third indent provides that the undertaking must not have not reorganised its production or plant structure 'since 1 January 1991.'

122 It is clear from that list that each of those three conditions has its own time-limit. Moreover, those limits differ in each case, since the conditions are to be fulfilled before 1 January 1991, after 1 January 1991 and before the date of notification of the aid respectively. Purely from the point of view of the wording, therefore, there is no need to assume that the condition laid down in the second indent of the paragraph is less complete than the other two, nor that it must be supplemented by reference to them.

123 Next, it is true that the second indent of Article 4(2) of the Fifth Code does not specify any date from which regularity of production is to be assessed. If the Community legislature had intended to set 1 January 1991 as the date from which that condition is to be assessed, it is hard to believe that it would have failed to mention it, since that date is, moreover, earlier than that of the entry into force of the Fifth Code.

124 Finally, the Commission is right to point out that the objectives of the first and third indents of Article 4(2) of the Fifth Code and those of the second indent of that provision are different. The former are clearly intended to avoid fraud by preventing those concerned from being able to form a company, extend the structure of their production or add to their plant and equipment with no other

end in view than to benefit from aid. However, the primary purpose of the condition set out in the second indent of Article 4(2) is not the prevention of fraud. It is not fraudulent for an undertaking already in existence under the first indent of Article 4(2) of the Fifth Code before 1 January 1991, that is to say before the adoption of the Fifth Code, to seek closure aid when it is no longer engaged in regular production. The objective of the requirement of regular production is, rather, to ensure that the award of closure aid brings about an appreciable reduction in production, which implies that such aid is to be awarded only to undertakings which at the time of closure had a reasonable level of production.

125 It is true that the prevention of fraud is a factor incidental to the requirement that this condition must be complied with before notification of the aid, that is to say at a time which is in the past and is therefore not suspect, thereby preventing any increase in production aimed at satisfying the criterion of regular production. That requirement, however, which only concerns the rules for assessment of the relevant condition, has nothing to do with the purpose of the latter.

126 It follows that there is no crucial reason why regularity of production, provided for by the second indent of Article 4(2) of the Fifth Code, should be assessed from 1 January 1991 because that date appears in the first and third indents of that paragraph.

127 This plea must therefore be rejected.

— The plea alleging that the insufficient length of the reference period makes it impossible to assess whether the presence of an undertaking on the market is significant

128 The applicants point out that the aim of the criterion chosen was to allow only those undertakings whose presence on the steel market was significant to benefit from aid. They explain that the presence of an undertaking on a market cannot be assessed correctly on the basis of an objectively limited period, such as that in this case. The presence of an undertaking on the market is significant if it holds a certain share of the market on a lasting basis, that is to say, a market share viewed as part of a dynamic process and not limited arbitrarily to one year. The applicants refer by analogy to Commission Decision 89/467/EEC of 12 July 1989 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.566 — UIP) (OJ 1989 L 226, p. 25), adopted pursuant to Article 85 of the EC Treaty, which recognised that the considerable variations in the market share held by dealers from one year to the next do not necessarily reflect changes in their economic presence on the market, which should instead be assessed as part of a dynamic process.

129 The Commission observes that the Fifth Code does not specify from what point in time regular production must be assessed. It was therefore for the Commission to determine the starting point for such assessment and, consequently, the reference period to be taken into account. It resolved the question by starting with the objective of the provision in question, namely, to ensure that the closure aid will have a significant effect on the market. It explains that, to achieve that objective, it was necessary, first, to set a period as close as possible to the date of notification of the general scheme, so that aid is only awarded to undertakings which are actually in operation at that point in time. Second, the length of the period had to be sufficient to ascertain whether the presence on the market of the undertaking in question could be considered to be significant enough. To that end, the Commission considered it fair to fix as the reference period that running from the year before the date of notification of the general scheme to the date on which the scheme was implemented.

130 The Court concurs with the Commission in finding that, if undertakings which were not representative of the market in 1993 and in January and February 1994 but which had achieved a sufficient level of production during the two-year period from 1991 to 1992 had been able to benefit from the aid in question, the fall in production resulting from their closure would have been purely nominal, or, at least, markedly lower. Moreover, the result achieved would also have been contrary to the objectives pursued if the undertakings with a significant presence on the market in 1993 but insufficiently active during the period from 1991 to 1992 had been denied the benefit of the aid.

131 Furthermore, according to the information provided by the Commission, which is not disputed, closure aid was granted, in this case, to 33 of the 43 Italian steel undertakings which requested it, effectively reducing production of hot-rolled steel by more than 5 million tonnes, a quantity which meets the target set by the Italian Government in connection with the grant of the aid in question. Thus the choice made by the Commission regarding the reference period for the assessment of regularity of production not only made it possible to evaluate correctly the presence on the market of the undertaking intended for closure, but also enabled the reduction targets set by the Italian Government to be achieved in practice.

132 The applicants' argument based on Decision 89/467 of 12 July 1989, cited above, need not be taken into consideration either. In that decision, adopted on the basis of Article 81 EC (ex Article 85), the Commission recognised that the considerable variations in the market share held by dealers from one year to the next did not necessarily reflect changes in their economic presence on the market, which should instead be assessed as part of a dynamic process. On that point it suffices to observe, as the Commission does, that it is inappropriate to refer in this instance to that decision, which was adopted in the film distribution sector. There, it was a matter of assessing the economic power of undertakings destined to remain on the market and, in particular, to ascertain the effects of the agreement concluded between them, in the light of the possible elimination of competition for a significant number of the products in question. In the present case, however, it was a matter of assessing the presence of a steel undertaking on the market with a view to its definitive closure and thus on the basis of the fall in

production which might have ensued therefrom. The effect of such closure on overall production of steel products is all the more significant where the undertaking had a high level of production during a period as close as possible to closure.

133 Accordingly, it has not been shown that the Commission, in fixing the duration of the period within which regularity of production must be assessed, manifestly failed to observe the provisions of the Treaty or any rule of law relating to its application or misused its powers.

134 This plea must therefore be rejected.

(c) The pleas criticising the choice of the highest possible production as the frame of reference for the calculation of regular production

135 Casilina, Dora and Lamifer criticise the fact that the criterion devised by the Commission in its decision of 12 December 1994 refers to the highest possible production. First of all, the frame of reference should be actual production and, secondly, reliance on the highest possible production is inappropriate for the assessment of production of rolling mills, as opposed to steel mills.

— The plea alleging that regularity of production should be assessed on the basis of actual production

136 The applicants consider that it is arbitrary to rely on the concept of the highest possible production. The words 'regularly producing' used in the Fifth Code are intended to refer to production activity at the level achieved by the undertaking in the past. Production can be considered regular if it does not depart significantly from the trend observed in previous and subsequent years. This can only be evaluated on the basis of actual figures, that is to say production in previous years, and not on the basis of theoretical and potential data, such as production capacity.

137 The Court observes, with reference to the arguments which the Commission was right to put forward, that the second indent of Article 4(2) of the Fifth Code does not limit that institution's discretion in choosing the frame of reference for verifying whether the requirement of regular production has indeed been fulfilled. The only limitation arises from the need to fix parameters so as to ensure that the aim of the rule in question, namely to reduce production effectively, is achieved.

138 The applicants, rather than specifying in what way the criterion used by the Commission is manifestly in breach of the provisions of the Fifth Code or is contrary to its objectives, merely suggest an alternative criterion. That criterion, namely the actual production of an undertaking and its regularity from one year to the next, does not, however, take into consideration the production which the undertaking is capable of achieving and the ratio between production capacity and actual production. Accordingly, if that criterion were applied, closure aid might be awarded to an undertaking whose actual production, whilst regular, is only a tiny fraction of its production capacity. Consequently that interpretation, unlike the criterion used by the Commission, would surely result not in a rapid and sizeable fall in actual production but merely in a fall in production capacity. Moreover, as the Commission rightly argues, if account were taken simply of the

continuity of the level of production of an undertaking over a given period, as the applicants suggest, aid would ultimately be awarded even to undertakings which, although in irreversible crisis, none the less managed to survive on the market for some years with a level of production which is very low and thus irrelevant in terms of the achievement of the objectives pursued by such aid. As the purpose of the Aid Code is to bring about a significant fall in production by means of closure aid, that criterion appears manifestly less suitable for the achievement of that objective than that chosen by the Commission.

139 It has not been established, therefore, that the Commission, in adopting the criterion of the highest possible production, manifestly failed to observe the provisions of the Treaty or any rule of law relating to its application, or misused its powers.

— The plea alleging that the highest possible production is inappropriate as a criterion for assessing the production of rolling mills

140 The applicants consider that the highest possible production is inappropriate for assessing the production of rolling mills, as opposed to steel mills. That concept, as used by the Commission in the present case, is based on the assumption that production is organised on the basis of three shifts, each of eight hours' duration, three times per day. For technical reasons, in fact, those are the conditions of production in steel mills. However, rolling mills are usually run on the basis of a single shift, of eight hours' duration, per day.

141 The Court observes, first of all, that the applicants' claim that the production of rolling mills is, as a rule, organised on the basis of a single shift is expressly disputed by the Commission which argues that rolling mills normally operate on the basis of three shifts, *inter alia* for reasons relating to the efficiency of the heat

cycle, that is to say, the need to avoid the huge consumption of gas necessary to cool the furnace. It is also apparent from the file, more specifically from the expert's report of 16 January 1996, drawn up by R.D., an engineer, and lodged by Lamifer..., that the restriction of production in 1993 to Saturdays and Sundays led to a huge increase in the consumption of methane because of the greatly reduced efficiency of the heat cycle. Hence there is evidence that the organisation of production on a basis other than three shifts per day is not ideal, even for rolling mills.

142 Accordingly, the applicants' claim, which is unsupported by any objective evidence on the file, has not been established.

143 Moreover, as the Commission correctly submits, the parameter of the highest possible production calculated on the basis of three shifts has the advantage of ensuring objectivity and of being applicable in a general and uniform manner to all steel undertakings.

144 Finally, it must be observed that, as explained above in paragraph 131, and according to the information provided by the Commission, which has not been disputed, the contested criterion in fact enabled production of hot-rolled steel to be reduced by more that 5 million tonnes, and enabled the targets set by the Italian Government to be met. Thus that criterion clearly did not prevent the award, under reasonable conditions, of closure aid to rolling mills.

145 Accordingly, it has not been shown that the Commission, in deciding that the highest possible production must be calculated on the basis of three shifts even for

rolling mills, manifestly failed to observe the provisions of the Treaty or any other rule of law relating to its application, or misused its powers.

146 This plea must therefore be rejected.

B — The pleas criticising the Commission's refusal to consider other objective criteria

147 Moccia, Prolafer and Sidercamuna criticise the fact that the requirement of regular production laid down by the second indent of Article 4(2) of the Fifth Code was interpreted so as to exclude undertakings which, while not having a sufficient level of actual production, were none the less suitable for production.

148 The applicants submit, first, that rejection of the criterion of suitability for production was contrary to the objective of the Fifth Code, namely to reduce production capacity. Second, that criterion had already been accepted by the Commission in the decision of 12 December 1994. Third, in the contested decisions the Commission wrongly rejected the argument of the Italian Government justifying recourse to that criterion by the existence of a major

crisis on the Italian market. Fourth, in rejecting that criterion, the contested decisions did not take account of the specific circumstances of Moccia, Prolafer, Lamifer and Sidercamuna, which could have relied thereon.

1. The pleas alleging that rejection of the criterion of suitability for production is contrary to the objective of the Fifth Code

149 Sidercamuna explains that the denial of closure aid to steel undertakings which, whilst not regularly producing, were none the less suitable for doing so, is contrary to Article 4 of the Fifth Code. The objective of that provision was to eliminate surplus production capacity. It cannot be attained by denying the above category of undertakings the grant of aid. In particular, it cannot be ruled out that those undertakings might subsequently sell their production plant and equipment to other undertakings which are still in operation and thus return to the market in due course, thereby increasing production capacity in the long term.

150 It argues further that the grant of aid to that category of undertakings would have produced an effect which, whilst unpredictable, is far greater than the grant of aid only to undertakings fulfilling the criterion laid down by the decision of 12 December 1994 and the second indent of Article 4(2) of the Fifth Code. The Commission thus adopted a decision which blatantly contravened the principle of effectiveness.

151 It concludes that, in the decision of 12 December 1994 and Decision 97/258, the Commission not only made a manifest error of assessment and misused its powers

but also used its power of interpretation in a manner which was inappropriate for the application of the Treaty and the Fifth Code.

152 Similarly, Moccia considers that the Commission, in refusing aid for the closure of undertakings which, like the applicant, had to halt production because of the crisis on the market, misused its powers.

153 The Court observes that Article 4(c) of the Treaty prohibits State aid. As the rule is that aid is prohibited and the Fifth Code constitutes a derogation from that principle, it must be interpreted strictly (*UK Steel Association* v *Commission*, cited above in paragraph 95, paragraph 114). It follows that the second indent of Article 4(2) of the Fifth Code, which requires an undertaking seeking aid for closure to have been producing ECSC steel products on a regular basis, must be interpreted all the more strictly.

154 That condition shows that the objective pursued by the Fifth Code is not to encourage the closure of any undertakings, no matter which, and thereby achieve a reduction, however small, in production capacity. Instead its objective is to authorise only the grant of aid for undertakings with a significant presence on the market, the closure of which will bring about a commensurate decrease in actual steel production.

155 By adopting the requirement of regular production laid down by Article 4(2) of the Fifth Code, the Community legislature thus sought to increase the effectiveness of closure aid by ensuring, as the Commission rightly submits, that

it has sufficiently significant effects, not only in that plant and equipment is dismantled, but also in terms of reducing the current level of production.

156 That objective was achieved in that the interpretation of that requirement adopted by the Commission enabled closure aid to be granted to 33 of the 43 Italian steel undertakings which had applied for it, effectively reducing production of hot-rolled products by more than 5 million tonnes, as pointed out in paragraphs 131 and 144 above.

157 In contrast, the applicants' suggested frame of reference, that is to say, mere suitability for production, manifestly disregarded the aforesaid requirement, ignoring actual, and hence regular, production. Moreover, as the Commission is right to point out, it would inevitably have resulted in loss of, or at least a marked reduction in, the effectiveness of the objective pursued. On that basis, aid could have been granted to undertakings with plant and equipment which is no longer operational. It was possible to achieve the objective pursued only in so far as it was possible to award the aid in question to undertakings that were sufficiently active on the market.

158 It follows that the Commission, in rejecting suitability for production as a criterion, did not manifestly fail to observe the provisions of the Treaty or a rule of law relating to its application, nor did it misuse its powers.

2. The plea that the Commission should not, in Decision 97/258, have rejected suitability for production as a criterion, when it had already endorsed it in approving the Italian legislation by the decision of 12 December 1994

159 Sidercamuna argues that, in refusing the grant of closure aid to undertakings which are merely suitable for production, the Commission contradicts its decision

of 12 December 1994 to approve Law No 481/94 and the implementing measure, on the basis of which the aid at issue was requested, and thereby infringes the principles of legal certainty and protection of legitimate expectations. The implementing measure provides in Article 1(5) that the existence of insolvency proceedings or a scheme of arrangement or composition does not preclude the award of aid, given that the purpose of such aid is to encourage the physical destruction of the plant and equipment used to manufacture ECSC steel products. In approving that provision, the Commission at the same time approved the criterion of suitability for production.

160 The Court observes that Article 1 of the implementing measure, entitled 'Conditions for acceptance of the application', provides, in paragraph 1(e), that authorisation for aid for closure is subject without exception to the condition that it must be certified 'to have been engaged in regular production'.

161 In view of the wide scope of that provision, the purpose of Article 1(5) is clearly, as the Commission is right to point out, to state that the existence of insolvency proceedings does not preclude the award of closure aid, and thus does not constitute in itself a reason for exclusion from the benefit of the measure. On the other hand, it does not mean that an undertaking subject to insolvency proceedings could qualify for closure aid without being required to meet the condition laid down in Article 1(e) of the implementing measure that it must be certified to have been engaged in regular production.

162 It follows that, in accepting the Italian legislation, including the implementing measure, by its decision of 12 December 1994, the Commission did not endorse suitability for production as a criterion and thus did not infringe the principles of legal certainty and protection of legitimate expectations.

163 This plea must therefore be rejected.

3. The plea alleging that the Commission's rejection of the Italian Government's argument relating to the significant crisis on the Italian market is unjustified

164 Sidercamuna takes the view that, in Decision 97/258, the Commission was wrong to reject the argument of the Italian authorities attributing the fall in production to the particularly unfavourable economic situation and the significant crisis on the market in steel products.

165 The Commission failed to make a proper assessment of the market or, in particular, to take account of certain fundamental aspects of the situation such as the background, the lengthy crisis affecting the sector and the need for restructuring.

166 Finally, it was wrong to take into consideration production figures, rather than figures relating to consumption, as a parameter.

167 The Court observes that, in Decision 97/258 (Part III of the preamble), the Commission states that the claim made by the Italian authorities that the low output recorded by Italian steel firms in 1993 was due to particularly unfavourable cyclical conditions and to a major crisis on the market in long products is not founded. In fact production was only slightly down in the case of long products, in particular in the case of wire rod and other bars and sections. In support of its assertions, the Commission sets out a table from which it is clear that production of long products, in millions of tonnes, fell from 13.3 in 1991 to 13.2 in 1992 and to 12.5 in 1993, production of wire rod rose from 3 in 1991 to 3.2 in 1992 and fell to 3.1 in 1993 and production of other bars and sections fell from 3.5 in 1991 to 3.3 in 1992 and to 3.2 in 1993. The Commission adds that the same applies to the market in concrete reinforcing rods where there was a slight reduction in the rate of use of production capacity at both European and

Italian level. A second table shows that production of concrete reinforcing rods, in millions of tonnes, rose in Europe from 12.24 in 1991 to 12.53 in 1992 and to 12.92 in 1993. Finally, a third table shows that production of concrete reinforcing rods, in millions of tonnes, rose in Italy from 5.5 in 1991 to 5.7 in 1992 and fell to 5.4 in 1993. The Commission concludes that, on the basis of those figures, the argument put forward by the Italian authorities that the low level of production of the firms in question, including the applicant, was attributable to unfavourable market conditions in 1993, cannot be accepted.

168 In the light of that information, which is not disputed by Sidercamuna, the Commission was able to reach the above conclusion without making a manifest error.

169 It is also clear from the tables appearing in the body of the decision that the Commission compared data relating to production in Europe and in Italy in 1993 with data from the previous two years. It thus carried out an assessment of the market, which, inasmuch as it enabled an appropriate response to be made to the argument put forward by the Italian authorities, is not manifestly inadequate.

170 Contrary to the applicant's view, the Commission was not obliged to make an assessment also taking account of the duration of the crisis affecting the sector and the need to restructure the steel industry. First, such matters are not capable of justifying the absence of regular production on the part of the applicant. Second, they were the subject of an assessment by the Community legislature when it adopted the successive Steel Aid Codes. That assessment did not prevent the legislature from making authorisation for closure aid subject to the requirement of regular production.

171 As regards the applicant's argument that no figures for consumption were taken into consideration, it is sufficient to note that, as the undertaking in question is a producer, and not a consumer, operating on the market, and as closure aid is intended to reduce production and not consumption of the products in question,

the Commission did not make a manifest error of assessment in looking at steel production rather than steel consumption.

172 This plea must therefore be rejected.

4. The plea alleging that no account was taken of the specific circumstances of some of the applicants

173 Moccia, Prolafer, Lamifer and Sidercamuna refer, in support of their case, to specific circumstances said to justify non-compliance with the requirement of regular production.

(a) The case of Moccia

174 Moccia takes the view that the Commission, in refusing to allow the closure aid intended for the applicant, disregarded the fact that the latter had to halt production in order to adapt its plant and equipment in accordance with the rules relating to the protection of the environment.

175 However, the Court finds that only the documents produced by the applicant show on that point that it received, by decree of the Italian Minister for Industry, Trade and Craft Trades of 6 October 1992, an interest rate subsidy for the construction of new plant and equipment for the elimination and recycling of industrial waste. In contrast, there is nothing on the file to show that the

applicant was compelled to cease all production activity during the reference period in order to bring its existing plant and equipment into line with the rules on the protection of the environment.

176 This plea has thus not been substantiated and must therefore be rejected.

(b) The case of Prolafer

177 Prolafer, whilst accepting the requirement of regular production, none the less takes the view that an undertaking which was unable to produce regularly because it was forced to halt production for reasons beyond its control and unrelated to market conditions ought to qualify for aid. It explains that it had to halt production as a result of a court order sequestrating its plant and equipment. In support of that argument, it submits that, once the obstacle to production is removed, an undertaking in that situation could return to a market which has been artificially cleared by the departure of a number of competitors who received closure aid, an outcome which would be contrary to the spirit of the Treaty.

178 The Court finds that the documents supporting the application do indeed show that the court sequestrated the applicant's production plant and equipment on 9 January 1991 on grounds of environmental pollution. However, as a document attached to the defence shows, that sequestration order was lifted approximately one month later, on 15 February 1991, that is to say before the start of the reference period for verifying compliance with the requirement of regular production.

179 As this plea has not been substantiated, it must be rejected.

(c) The case of Lamifer

180 Lamifer argues that it was prevented from achieving the minimum level of production required during the reference period because measures adopted by the local authorities prohibited all production activity during the night, which was the most economical time to operate from the point of view of electricity costs.

181 However, the Court observes that it is clear from the documents produced by the applicant, namely the order by the Mayor of Travagliato (Italy) of 30 March 1989, attached to the application, that the measures in question, far from simply prohibiting production during the night, merely imposed on the undertaking concerned the obligation to adapt its plant and equipment so as to keep its noise level within acceptable limits. It is therefore not true that the applicant was obliged for that reason to limit its production cycle to one daytime shift.

182 This plea must therefore be rejected.

(d) The case of Sidercamuna

183 Sidercamuna criticises the Commission's refusal to take account of the alternative criteria proposed by the Italian Government, designed to establish suitability for production rather than actual production. That refusal meant that it was prevented from receiving closure aid, even though it continued to operate on the market and was managed with a view to regular production, despite the economic crisis of 1993.

184 As regards the legality of the Commission's rejection of suitability for production as a criterion, the Court refers to paragraphs 149 to 158.

185 As regards the applicant's production at its site in Berzo Inferiore (Brescia, Italy), the subject of the application for closure aid, the Court observes that the report on the budget by the applicant's board of directors adopted on 31 December 1992 (appendix 8 R) shows that, in view of the unsatisfactory financial situation and the consequent mistrust of suppliers, its production had gradually come to a halt. The accountant's report on the budget adopted on 31 December 1992 (appendix 8 R) shows that on 30 March 1993 an extraordinary meeting of partners decided to apply to the court in Brescia for *inter alia*, '(3) an order suspending the production of reinforcing rods and flat bars by the factory at Berzo Inferiore; (4) an order for the dismantling of the premises at Berzo Inferiore either as a result of measures to be taken by the EEC before September or by means of their sale to a third party'. Finally, on 5 April 1993, Sidercamuna made an application for the controlled management procedure to be set in motion, which was granted by the insolvency chamber of the Brescia court on 28 April 1993.

186 It follows that the applicant, faced with a serious financial situation, was planning as early as March 1993, that is to say well before the expiry of the reference period for verifying compliance with the requirement of regular production, to cease production definitively and sell its plant and equipment at the Berzo Inferiore site, which was the subject of the application for closure aid.

187 This plea must therefore be rejected.

Pleas alleging breach of the principle of non-discrimination

188 The Court points out that, for the Commission to be accused of discrimination, it must be shown to have treated like cases differently, thereby placing some traders at a disadvantage by comparison with others, without such differentiation being justified by the existence of substantial objective differences. It is therefore necessary *inter alia* to consider whether the difference in treatment is based on the existence of objective and substantial differences having regard to the aims which the Commission may lawfully pursue as part of its industrial policy in the European steel industry (Joined Cases 17/61 and 20/61 *Klöckner-Werke and Hoechst* v *High Authority* [1962] ECR 325 and Case 250/83 *Finsider* v *Commission* [1985] ECR 131, paragraph 8).

189 The applicants essentially raise seven pleas alleging breach of the principle of non-discrimination.

A — The pleas alleging discrimination against the applicants in comparison with certain other steel undertakings which also applied for the grant of aid for closure under Law No 481/94

190 The applicants consider that they suffered discrimination in comparison with other Italian steel undertakings. That discrimination lies, first, in the fact that certain undertakings which did not satisfy the criterion interpreting the requirement of regular production, laid down by the Commission in its decision of 12 December 1994 as one eight-hour shift five days a week, were none the less

deemed, unlike them, to have fulfilled that requirement. It lies, secondly, in the fact that certain undertakings were selected despite the fact that their total production was lower than that of the applicants. It lies, thirdly, in the fact that one of the applicants, which was actually producing during the reference period, was deemed not to have fulfilled the requirement of regular production in the same way as certain undertakings that were not producing at all.

1. The pleas alleging that certain undertakings which did not satisfy the criterion interpreting the requirement of regular production, laid down by the Commission in its decision of 12 December 1994, were none the less deemed, unlike the applicants, to have fulfilled that requirement

(a) The pleas raised

191 The applicants criticise the fact that the aid for closure requested by OLS, Diano and MAO was declared compatible with the common market by the Commission, whereas the aid requested by the applicants was not approved.

— The case of OLS

192 Decision 96/678 (Part III of the preamble) states:

'The Commission notes, however, that in the case of OLS... which in 1993 had produced 57 000 tonnes of hot-rolled products — equivalent to 21 % of its capacity — an overhaul of the electrical and electronic equipment of the mill

producing reinforced concrete bars had been undertaken in the first quarter of 1993. Production was completely halted by OLS during that period and subsequently became regular again. The annual production at OLS should have been at least 76 000 tonnes in 1993, equivalent to 28 % of capacity. In view of this and, in particular, the output that the firm would have been able to achieve had it not been for the abovementioned overhaul of its mill, the Commission has reason to believe that OLS was in regular production (in other words, that it was in production for at least one shift per day, five days per week), at the time of its closure.'

193 Prolafer and Casilina believe, in that connection, that they were the victims of discrimination.

194 Prolafer, which was not engaged in production during the reference period, argues in that regard that, if the Commission considered the facts cited by the undertaking in question to be relevant, it should *a fortiori* have taken account of the impact of the event affecting it, that is to say, the imposition of a sequestration order on its plant and equipment as a precaution.

195 Casilina, whose production during the reference period was 14.2% of capacity, observes that the case of OLS shows that, under certain conditions, the Commission considered proof of production capacity in the abstract to be sufficient. The Commission took the view that if certain steps had not been undertaken in respect of the undertaking's plant and equipment, that is to say, if production had not been interrupted for three months, the minimum level of production would have been attained. But then, similarly, if the applicant had not had recourse to temporary lay-offs for seven months in 1993, it too would have reached and even exceeded the 25% threshold. The difference between the two

undertakings cannot consist in the fact that production was interrupted in the case of OLS in order to modernise the plant and equipment and in the case of the applicant in order to deal with an economic problem. In both cases, production is lower than the minimum level because it was interrupted for some months in 1993. In both cases, the levels of production achieved during the months of activity demonstrate that, when fully operational, the undertakings concerned would achieve and even exceed the minimum level. There is no plausible reason for the less favourable treatment accorded to the applicant.

— The case of Diano

196 Decision 97/258 (Part III of the preamble) states:

'The Commission notes, however, that in the case of Diano, which in 1993 had produced 16 807 tonnes of hot-rolled products — equivalent to 21 % of its capacity — the firm carried out major maintenance work in the rolling mill during 1993, which had repeatedly involved halting production. In practice, output at Diano, taking account of annual production and the maintenance work described, should have been roughly the same as the figure for 1991, when the firm produced 24 765 tonnes, corresponding to 31 % of capacity. In view of this and, in particular, the capacity utilisation rate the firm would have been able to achieve had it not been for the abovementioned major overhaul of its mill, the Commission has reason to believe that the firm in question was in regular production (on average one shift per day, five days per week), at the time of its closure.'

197 Casilina, Dora, Lamifer and Sidercamuna believe, in that connection, that they were the victims of discrimination.

198 Casilina and Dora argue that, in the case of Diano, the Commission saw fit to take account of specific circumstances in reaching the conclusion that, if the undertaking had also been able to produce during periods when it suspended operations, it would have achieved a minimum level of production sufficient to enable it to obtain authorisation for the grant of the aid. They do not understand, therefore, why the favourable treatment reserved to Diano by the Commission was not applied to them as well. They had also shown that they were obliged by random factors beyond their control to reduce their production, whilst maintaining an objective level of productivity that was very substantial.

199 Lamifer, whilst acknowledging that the solution adopted in respect of the undertaking in question was a sensible one, considers that it deserved the same treatment, particularly in view of the assertion by the Commission in Decision 97/258 that the alternative criteria proposed by the Italian Government should not have been limited to demonstrating suitability for production in the abstract. The Diano case shows that, under certain conditions, the Commission considered proof of suitability for production in the abstract to be sufficient. It took the view that, if certain steps had not been undertaken in respect of the plant and equipment, that is to say if production had not been suspended several times, the minimum level of production would have been achieved. But then, similarly, if the applicant had not had to deal with difficult economic conditions and had been able to continue to produce during the week, it too would have reached and even exceeded the 25% threshold. The difference between the two undertakings cannot be the result of the different percentages of the highest possible production which their actual production represents (21% in the case of Diano, 15.2% in the case of the applicant). In both cases, the levels of production achieved during the months of activity show that, when fully operational, the undertakings concerned would achieve and even exceed the minimum level. There is no plausible reason for the less favourable treatment accorded to the applicant.

200 Sidercamuna explains, in that connection, that, given the crisis in the sector and the lack of sufficient outlets, Diano chose to carry out maintenance work, which,

apart from the fact that it might enhance potential competitiveness on the market, also had the advantage of curbing production and reducing stocks of unsold products. The applicant, which undertook maintenance and modernisation work in 1990 and 1991 in respect of production lines, chose to slow down production in 1993 so as to avoid a crisis due to overproduction. The applicant observes that in Case 234/82 *Ferriere di Roè Volciano* v *Commission* [1983] ECR 3921 the Court had already raised the question of the fairness of a decision affecting a trader who had chosen to reduce production during a given period by applying the principle of sound management to his undertaking. The Commission, in authorising the grant of aid to Diano and in refusing to grant such aid to the applicant, had thus treated two essentially identical courses of action differently.

— The case of MAO

201 By Decision 97/332/ECSC of 26 February 1997 concerning closure aid which Italy plans to grant to Mini Acciaieria Odolese as part of the restructuring of the private steel industry (OJ 1997 L 139, p. 27), the Commission declared closure aid of ITL 5 437 million requested by MAO under the Italian general aid scheme in question to be compatible with the common market. It points out that it initiated the procedure for examining that aid under Article 6(4) of the Fifth Code, on the ground that the undertaking did not fulfil the requirement of regular production laid down by the second indent of Article 4(2) of the Fifth Code, as interpreted by the decision of 12 December 1994. At the time of Decision 97/332, the Fifth Code had been replaced by the Sixth Code, which entered into force on 1 January 1997. That code incorporates in Article 4(2)(b) the requirement of regular production laid down by the second indent of Article 4(2) of the Fifth Code.

202 In Decision 97/332 the Commission justifies the declaration of compatibility of the aid requested by the undertaking (Part III, seventh paragraph in the preamble) as follows:

'From the additional information sent by the Italian authorities, however, the Commission concludes that:

— on the basis of a maximum possible production of 139 000 tonnes in 1993, MAO's capacity utilisation rate is 22.3 %,

— in July and August 1993, MAO invested heavily in its plant (construction of a new cooling bed for the hot-rolling mill) which involved an almost total shutdown of production during those two months,

— on the basis of the average monthly output for 1993 alone, lost output due to the building of the new cooling bed can be estimated at 5 166 tonnes,

— thus the capacity utilisation rate amounts to 26 % compared with its maximum possible production.

Accordingly, in view of the capacity take-up which the undertaking could have achieved without the major work on its rolling mill, it must be concluded that the

undertaking was in regular production (i.e. in production for at least one shift per day, five days per week) at the time of its closure.'

203 Casilina, Dora and Lamifer believe, in that connection, that they were the victims of discrimination.

204 They state that the utilisation rate of MAO's production capacity for the reference period was 22.3%, that is to say less than the required minimum threshold of 25%. The Commission, taking account of the specific circumstances, that is to say the existence of maintenance operations in the establishment, none the less approved the aid in question. The applicants observe that, in the case of that undertaking, the Commission saw fit to take account of specific circumstances in reaching the conclusion that if the undertaking had also been able to produce during the periods when it suspended operations, it would have achieved a minimum level of production sufficient to enable it to obtain authorisation for the grant of aid. They do not understand, therefore, why the favourable treatment reserved to MAO by the Commission was not applied to them as well. They had also shown that they were obliged by random factors beyond their control to reduce their production, whilst maintaining an objective level of productivity that was very substantial.

205 Lamifer adds, in the reply, that, by Decision 97/258, the Commission discriminated against it inasmuch as it rectified the figure for the highest possible production in the case of MAO, whilst failing to do so in the case of the applicant, despite the discrepancy between the highest possible production declared in the application for aid submitted (51 000 tonnes) and that subsequently established in an expert's report of 16 January 1996 (154 560 tonnes).

(b) Findings of the Court

206 It is clear from Decisions 96/678, 97/258 and 97/332 that OLS, Diano and MAO produced, during the reference period, 57 000 tonnes, 16 807 tonnes and 139 000 tonnes of hot-rolled steel respectively. That represents, in the case of the first two, 21% of their capacity, and in the case of the third, 22.3% of its capacity, in other words, production which is 4 and 2.7 percentage points lower that the minimum threshold set by the decision of 12 December 1994.

207 In contrast, Prolafer, Casilina, Dora, Lamifer and Sidercamuna only achieved production equivalent to 0, 14.2, 8.6, 15.2 and 7.6% of their capacity respectively during that period.

208 As the Commission is right to point out, given that, within the framework of the strict rules imposed by the Fifth Code, the purpose of the requirement of regular production is to ensure that aid for closure achieves maximum effectiveness on the market so as to reduce steel production as substantially as possible, the refusal to allow aid for Prolafer, Casilina, Dora, Lamifer and Sidercamuna, which recorded production during the reference period which fell short of the 25% minimum threshold by 25, 10.8, 16.4, 9.8 and 17.4 percentage points respectively, is perfectly justified.

209 Accordingly, the difference between the treatment of OLS, Diano and MAO and that of the applicants is thus based on objective factual criteria in line with the goals which the Commission is under a duty to pursue under its ECSC industrial policy.

210 It must, moreover, be borne in mind that failure to comply with the 25% criterion laid down by the decision of 12 December 1994 (see paragraph 99 above) is justified by the contested decisions and Decision 97/332 respectively on the basis of additional information given to the Commission by the Italian authorities:

— in the case of OLS, by an overhaul of the electrical and electronic equipment of the mill producing reinforced concrete bars, production having been suspended in the first quarter of 1993;

— in the case of Diano, by substantial maintenance work on its rolling mill, production having been suspended on several occasions during 1993;

— in the case of MAO, by considerable investment in its plant, namely the construction of a new cooling bed for the hot-rolling mill, production having been suspended during July and August 1993.

211 The applicants' failure to comply with the criterion is explained by them as follows:

— in the case of Prolafer, by a sequestration order imposed on its plant and equipment by a court, which was in force throughout the reference period; however the Court found at paragraph 178 above that, whilst the plant and equipment in question were placed under a sequestration order on 9 January 1991, that measure was lifted as early as 15 February 1991, in other words, a month later and thus well before the start of the reference period;

— in the case of Casilina, by recourse to temporary lay-offs for seven months in 1993, because of the unavailability of rolling billets at a price commensurate with the cost of the finished product;

— in the case of Dora, by recourse to temporary lay-offs because of economic conditions;

— in the case of Lamifer, by administrative measures adopted by the local authorities prohibiting any production activity at night; however, the Court found at paragraph 181 above that the measures at issue, far from prohibiting production activity at night, were confined to requiring the undertaking concerned to adapt its plant and equipment in order to keep the noise level within acceptable limits.

212 It follows that the reasons why the three undertakings in question, OLS, Diano and MAO, suspended production have been duly established, are the result of an objective situation, are limited in time and are justified by the need to continue production and by the intention to remain on the market.

213 In contrast, the alleged reason for the suspension of production by Prolafer and Lamifer has not been duly established. Moreover, none of the reasons alleged by the five applicants is justified by the need to continue production or, indeed, improve its efficiency.

214 It follows that the difference between the treatment of OLS, Diano and MAO and that of the applicants is also objectively justified therefore in terms of the reason for suspension of production.

215 Finally, as regards Lamifer's argument that the Commission rectified the highest possible production in the case of MAO, whilst refusing to do so in its case, it must be observed that, in his expert's report of 16 January 1996, sent to the Commission by the Italian Government, Renzo Dusi, an engineer, estimated the highest possible production of the applicant at 154 560 tonnes, on the basis of three shifts a day, and found that its production was organised on the basis of one shift per day, equivalent to production of 51 000 tonnes.

216 Unlike MAO, neither the Italian Government, nor the applicant, submitted any observations to the Commission disputing that official assessment while the procedure for examining the aid was in progress. The Commission therefore had no reason to question it or to consider any rectification of the applicant's highest possible production.

217 In any event, since the legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted (Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33, and Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 88), the complaint is unfounded.

218 The pleas raised must therefore be rejected.

2. The plea alleging that the aid requested by certain undertakings was declared compatible with the common market despite the fact that their production was equivalent in quantity to that of the applicants

219 Dora and Lamifer observe that Diano, whose actual production in 1993 amounted to 16 807 tonnes, corrected to 24 765 tonnes, taking account of periods of suspension of its activities due to maintenance operations, was granted aid by Decision 97/258. Dora, in contrast, whose actual production in 1993 amounted to 21 444 tonnes, and Lamifer, whose actual production in 1993 amounted to 23 542 tonnes, were refused aid. Thus, undertakings with levels of production in 1993 which were quantitatively equivalent had different assessment criteria applied to them.

220 The Court observes that this plea is based on the premiss that, in order to verify compliance with the requirement of regular production, the Commission should have applied a purely quantitative criterion, in other words one based solely on tonnes of rolled products produced in absolute terms. As the Commission rightly submits, reliance on the criterion of eight hours a day, five days a week, differs from that approach in its greater objectivity. It makes it possible to avoid any discrimination between undertakings on the ground of their specific production capacity and, in particular, to avoid placing smaller steel undertakings at a disadvantage without justification.

221 Thus, in the present case, Diano's production, as corrected to 24 765 tonnes, corresponds to 31% of its capacity. By contrast, Dora's production of 21 444 tonnes and Lamifer's of 23 542 tonnes only correspond to 8.6% and 15.2% respectively of their production capacity, because of the proportionately greater size of those undertakings. In accordance with the criterion in question, which

only refers to undertakings whose production is equal to 25% or more of their capacity, Diano's application was granted while those of Dora and Lamifer were rejected.

222 The Commission therefore opted for an objective parameter of general application, specifically taking account of the size of each of the undertakings, in order to prevent discrimination on the basis of different production capacities.

223 This plea must therefore be rejected.

3. The plea alleging that the applicants, which were actually engaged in production during the reference period, were treated in the same way as certain undertakings which were not so engaged during that period

224 Sidercamuna argues that, in implementing the requirement of regular production, the Commission treated different situations in the same way. In Decision 97/258 the Commission compares the situation of the applicant to that of two other steel undertakings amongst the potential recipients of closure aid, that is to say Demafer Srl and Lavorazione Metalli Vari SpA, whose requests for aid were also refused. The Commission itself points out in the decision in question that neither of those two undertakings had any production activity in 1993. It was therefore placing the situation of those undertakings, whose production was nil, on a par with that of the applicant, which in 1993 recorded production assessed at 36 002 tonnes of hot-rolled products. That approach amounted to blatant discrimination against the applicant.

225 The Court observes, as the Commission rightly submits, that in terms of the parameter used to verify compliance with the requirement of regular production,

the circumstances of the three undertakings which were thus refused aid were exactly the same since none of them was engaged in regular production during the reference period, nor did any of them justify on objective grounds its inability to produce on a regular basis. The applicant was thus in a situation comparable to that of the other two undertakings and could therefore be treated in the same way. That conclusion is based on objective reasons, in particular, the need to rely on a uniform criterion to verify compliance, in this case, with the requirement of regular production.

226 This plea must therefore be rejected.

B — The plea alleging discrimination against undertakings with a single site compared to those with several sites

227 Moccia explains that in Article 1(2) the implementing measure defines the term 'production site' as a 'production unit capable of executing'. In authorising the aid scheme in question by its decision of 12 December 1994, the Commission also implicitly approved that definition. It follows that, in the event of closure of one of an undertaking's sites, closure aid could be granted to that site, which is merely suitable for production, whereas an undertaking with only one site could be granted aid only on condition that it could prove that it had been regularly producing ECSC steel products until the date of notification of the aid scheme. The condition relating to regular production is thus not applicable to undertakings in the first category, whereas it does apply to those in the second category. Hence there is discrimination between those two types of undertaking.

228 The Court observes that Article 1(1) of the implementing measure provides that, in order to receive aid, steel undertakings must, until the date of adoption of Decree-Law No 103 of 14 February 1994, have been engaged in regular

production, as certified by a report sworn by a technical expert in the field, listed in the register of experts and appointed by the court within whose jurisdiction the company has its head office. Articles 1(2) and 4 provide:

'Production site must be understood to mean a production unit capable of executing a complete rolling cycle and a complete crude steel production cycle, or one of those two cycles, on a single industrial site.'

...

'Undertakings in receipt of aid to reduce production capacity must petition for voluntary liquidation in accordance with the following rules:

...

(b) if a company belonging to an industrial grouping or an independent company proposes to dismantle one or more production sites, it shall set up a new legal entity to assume ownership of all remaining plant and equipment and take over liabilities relating to such plant and equipment.'

229 It follows that the purpose of Article 1(1) of the implementing measure is to lay down the conditions which a steel undertaking must meet if it wishes to receive

closure aid. One of those conditions, set out in Article 1(1)(e), is that it must have been engaged in regular production.

230 The purpose of Article 1(2) of the implementing measure is to define the term 'production site', used in Article 4 of the measure, concerning the legal reorganisation to be effected by an undertaking with several production sites, one or more of which are dismantled following the award of closure aid.

231 The two articles serve different purposes. In particular, Article 1(2) of the measure is not formally intended to provide for an exception to the conditions, laid down in Article 1(1), which steel undertakings seeking closure aid must meet. In particular, the terms used in Article 1(2) do not imply that an undertaking contemplating the closure of one of its production sites need not fulfil the requirement of regular production, laid down by Article 1(1)(e).

232 Rather, it follows from the above provisions, including Article 4 of the implementing measure, read in conjunction with one another, that closure aid may be granted, not only in the event of total closure of an undertaking, but also, where an undertaking has several production sites, in the event of closure of one of those sites. In the latter case, however, the aid can be granted to that undertaking only if that site, viewed in isolation, was engaged in regular production and such production was effected independently and entirely by that site, which presupposes that a complete rolling cycle or a complete crude steel production cycle is capable of being carried out there.

233 Article 1(2) of the implementing measure, far from constituting a derogation from the requirement of regular production in the assessment of aid sought by an

undertaking in connection with the closure of one of its production sites, is intended to ensure that the site's regular production is not confined to one part only of a full rolling or crude steel production cycle.

234 This plea must therefore be rejected.

C — The plea alleging discrimination against undertakings which have had to halt production during the reference period in order to comply with new statutory provisions on environmental protection

235 Moccia claims that Decision 96/678 discriminated against it. That decision required the criterion relating to regular production to be fulfilled even in a case where an undertaking was, like itself, compelled to halt production during the reference period in order to comply with new statutory provisions on environmental protection, and where that interruption is thus the result of conversion work on its plant and equipment. It takes the view that, under Article 4 of the Fifth Code, production capacity should be treated in the same way as regular production in a case where the interruption of production is dictated by statutory requirements. In socio-economic terms, an undertaking which has halted production for those reasons and is denied closure aid will remain on the market once the interruption is over.

236 The Court observes (see above, paragraph 175) that there is nothing on the file to show that the applicant was forced to cease production during the reference

period in order to bring its existing plant and equipment into line with new rules on the protection of the environment. The applicant has thus failed to demonstrate that the plea it relies on is well founded.

237 Furthermore, according to statements made by the Commission, which are not disputed, in the course of the procedure initiated under Article 6(4) of the Fifth Code, neither the Italian authorities nor the applicant have ever cited reasons based on the alleged need to halt production so as to carry out conversion work on plant and equipment in order to comply with new statutory provisions on protection of the environment, to justify the applicant's lack of production.

238 This plea must therefore be rejected.

D — The plea alleging discrimination against undertakings which were unable to market larger quantities as production costs were no longer competitive, compared with more astute or more fortunate undertakings

239 Moccia considers that the requirement of regular production laid down by the Fifth Code should be interpreted and applied in accordance with the rules of the market economy. The first of those rules requires an undertaking to modulate its production by adjusting it to demand and taking account of production costs. The applicant thus halted production in 1993 because it was unable to market larger quantities of products and because its production costs were not

competitive. It is discriminatory to treat the applicant on the same footing as undertakings which were engaged in regular production because they were more astute or simply more fortunate or, on the other hand, less prudent.

240 The Court observes that this plea is based on the premiss that closure aid should also benefit those undertakings which, while suitable for production, were not engaged in regular production during the reference period. That premiss is erroneous, as stated at paragraphs 149 to 158 above.

241 This plea must therefore be rejected.

E — The plea alleging that the undertakings whose requests for closure aid were not approved by Decision 96/678 had an aggregate production capacity greater than that of undertakings whose requests for closure aid were approved by earlier Commission decisions

242 Moccia observes that Decision 96/678 states that the closure of an undertaking which is not engaged in regular production does not have a significant effect on the market. In refusing, by that decision, to grant aid to the applicant and to five other undertakings, the Commission at the same time refused to reduce an overall annual production capacity of 908 000 tonnes of crude steel and 950 000 tonnes of hot-rolled products. However, the Commission did not refuse to grant aid for partial closure to undertakings with a considerably smaller production capacity than theirs (Commission Decisions 94/258/ECSC, 94/260/ECSC and 94/261/ECSC of 12 April 1994 concerning aid to be granted, respectively, by Spain to the

public integrated steel company Corporación de la Siderurgia Integral (CSI), by Germany to the steel company Sächsische Edelstahlwerke GmbH, Freital/Sachsen and by Spain to the special steel company Sidenor (OJ 1994 L 112, pp. 58, 71 and 77)).

243 The Court notes that the Commission, as it correctly maintains, is not empowered to authorise the award of closure aid where the criterion is only fulfilled by aggregating the capacities of several steel undertakings. Article 6(6) of the Fifth Code provides that all individual awards of aid are to be notified and assessed. Moreover Article 4(2) of the Fifth Code lists exhaustively a series of conditions which can only be assessed in relation to each undertaking concerned. Furthermore, the three decisions cited by the applicant were adopted not on the basis of the Fifth Code but directly on the basis of the first and second paragraphs of Article 95 of the Treaty, so that the conditions laid down in the Fifth Code did not apply.

244 This plea must therefore be rejected.

F — The plea alleging discrimination against Italian undertakings compared with other Community undertakings

245 Sidercamuna considers that the Commission practised discrimination on the basis of nationality. It points out that the Fifth Code is confined to laying down the general principle that, in order to qualify for closure aid, a steel undertaking must have been regularly producing ECSC steel products until the date of notification of the aid. The Commission, in its decision of 12 December 1994, raised no objections and authorised *de facto* the award of closure aid in accordance with

Law No 481/94, but introduced an additional condition relating to the maintenance of production for at least one shift per day, which corresponds to at least eight hours per day, five days a week.

246 The applicant observes in that connection that this particular condition is only applicable to Italian undertakings, the only ones eligible for the aid provided for by Law No 481/94. That condition, which constitutes a positive obligation, has no equivalent in the general scheme of rules applicable to undertakings from other Member States, to which the general requirement of regular production laid down by the Fifth Code is applicable without further qualification.

247 The applicant adds that, in that same decision, the Commission admittedly conceded that the Italian authorities could prove, on the basis of objective criteria, that an undertaking which does not satisfy that criterion could none the less be considered to fulfil the requirement of regular production, in which case the Commission examines the aid concerned in the light of its specific characteristics. It considers, however, that this concession is of no value. In the present case, the Commission took no account at all of the arguments put forward by the Italian authorities on that point but took refuge in a formality, the sole outcome of which was the application to Italian undertakings of different criteria from those applied to undertakings from other Member States.

248 The Court points out that whilst the second indent of Article 4(2) of the Fifth Code lays down the requirement of regular production, it does not define that requirement. It follows that the Commission, in approving a general aid scheme notified by a Member State, is of necessity bound to define in abstract terms the criteria for the application of that requirement so as to enable it to then make a uniform and predictable assessment of individual requests for aid notified under

Article 6(6) of the Fifth Code, in compliance with the principles of legal certainty and protection of legitimate expectations.

249 Thus, once the criteria have been specified and the general scheme has been approved, the Commission must, when aid granted on the basis of the previously authorised scheme is notified, confine itself to checking that the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving it. Were it not to take that approach, the Commission could, whenever it examined any individual cases notified, reconsider its decision approving the general aid scheme. This would jeopardise the principles of legal certainty and the protection of legitimate expectations from the point of view of both the Member States and traders since individual aid in conformity with the decision approving the general aid scheme could thus at any time be called in question by the Commission in breach of those principles (see, by analogy, Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, paragraph 24, and Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 31).

250 The criterion laid down by the decision of 12 December 1994 does not therefore constitute a new condition in addition to that relating to regular production laid down by the Fifth Code, but a necessary criterion designed to ensure a uniform and predictable application of that condition to individual applications for aid notified by the Italian authorities.

251 Moreover, contrary to the applicant's claims, the criterion in question was not the only one chosen by the Commission to assess compliance with the requirement of regular production: the Commission was at pains to make clear in the decision of 12 December 1994 that the Italian Government could always demonstrate, on the basis of objective criteria, that an undertaking, although not fulfilling that criterion, had regularly produced ECSC steel products. Contrary to the applicant's assertion, that concession was not devoid of value, since, as explained

above at paragraphs 191, 195, 200 and 201, the Commission had found, on the basis of alternative criteria of that kind proposed by the Italian authorities, the aid sought by OLS, Diano and MAO to be compatible with the common market.

252 Finally, the applicant has failed to establish whether, or to what extent, the Commission, in applying the criterion laid down in the decision of 12 December 1994, treated the undertakings subject to the general aid scheme notified by the Italian authorities less favourably than undertakings in a comparable position that were subject to a general aid scheme notified by the authorities of another Member State.

253 This plea must therefore be rejected.

G — The plea alleging discrimination by reason of failure to apply Article 95 of the Treaty

254 Sidercamuna argues that the Commission's conduct was discriminatory in treating its case differently from other comparable situations occurring in the past.

255 It points to the general prohibition on subsidies or aids laid down by Article 4(c) of the Treaty. It observes that there are two types of exception to that prohibition, that is to say, first, the successive steel aid codes, and second, the *ad hoc* decisions adopted by the Commission on the basis of Article 95 of the Treaty, which enable

it to use its powers of decision or recommendation to fill any gaps left by the Treaty.

256 It adds that, in the past, on the basis of Article 95 of the Treaty, the Commission authorised aid to the steel sector which it justified, as in the present case, by the definitive and irreversible closure of plant, that is to say by the fall in production. That was the case in Decision 94/261 of 12 April 1994, cited above (see paragraph 242 above), and Commission Decision 89/218/ECSC of 23 December 1988 concerning aid that the Italian Government proposed to grant to the public steel sector (OJ 1988 L 86, p. 76). In Commission Decision 96/315/ECSC of 7 February 1996 concerning aid to be granted by Ireland to the steel company Irish Steel (OJ 1996 L 121, p. 16) the Commission even adopted a decision under Article 95 of the Treaty pointing out that, for exceptional reasons of a technical nature, it was not possible to reduce overcapacity by requiring the closure of production lines as a counterpart for the aid, but that it was none the less important for the Irish steel industry to undertake not to increase its production capacity.

257 The applicant takes the view that, in the present case, the Commission chose, first, not to make use of the measures available to it under the Fifth Code, in stating that closure aid is not permissible on a strictly formal interpretation of the conditions for awarding it. Second, whilst conceding that those measures did not provide sufficient legal protection, thus leaving a gap, it did not make use of Article 95 of the Treaty either. The Commission had thus treated similar situations differently and thereby penalised the applicant.

258 The Court observes that, in the scheme of the Treaty, Article 4(c) does not prevent the Commission from authorising, by way of derogation, aid envisaged by the Member States and compatible with the objectives of the Treaty, on the basis of the first and second paragraphs of Article 95, in order to deal with unforeseen situations (see *EISA* v *Commission*, cited at paragraph 86 above,

paragraph 63; *British Steel* v *Commission*, cited at paragraph 86 above, paragraph 42; and *Wirtschaftsvereinigung Stahl and Others* v *Commission*, cited at paragraph 79 above, paragraph 34) and on condition that the aid is necessary to attain one of the objectives laid down by Articles 2 to 4 of the Treaty.

259 Without it being necessary even to consider whether steel aid which does not comply with the conditions laid down by the Fifth Code for that category of aid may be authorised by an individual decision adopted directly on the basis of Article 95 of the Treaty, it is sufficient to note that, in any event, the applicant has failed to establish that the aid at issue fulfils the conditions for the implementation of that article. The applicant, in seeking closure aid under the Fifth Code but failing to comply with one of the conditions laid down therein for that category of aid, that is to say the existence of regular production, has failed to establish the existence of specific circumstances which make a decision necessary, within the meaning of Article 95, to attain one of the objectives set out in Articles 2 to 4 of the Treaty.

260 Finally, it must be stated that the applicant has failed to provide the Court with sufficient information to enable it to rule on the question whether its specific circumstances are comparable to those of the undertakings that were the subject of the decisions to which it refers.

261 This plea must therefore be rejected.

II — *Pleas relating to breach of the obligation to state reasons*

262 The Court observes that the fourth indent of the second paragraph of Article 5 of the Treaty provides that the Community is to 'publish the reasons for its actions'. The first paragraph of Article 15 states '[d]ecisions, recommendations and

opinions of the Commission shall state the reasons on which they are based and shall refer to any opinions which were required to be obtained'. It is clear from those provisions, and from the general principles of the Treaty, that the Commission has an obligation to state reasons when adopting general or individual decisions, whatever the legal basis chosen for that purpose (*British Steel* v *Commission*, cited at paragraph 86 above, paragraph 159).

263 It has been consistently held that the statement of reasons must be appropriate to the measure concerned 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 Community Court to carry out its review. It is not necessary for the reasoning to go into all the relevant facts and points of law. It must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723 and Case T-266/94 *Skibsvaerftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 230). Furthermore the requirement of a statement of reasons laid down by Articles 5 and 15 of the Treaty must be assessed in the light of the circumstances of the case, in particular the content of the measure, the nature of the reasons relied upon and the interest which the addressees or other persons concerned by the measure, for the purposes of the second paragraph of Article 33 of the Treaty, may have in obtaining an explanation. On that point, it should be noted that, in the case of a measure which is intended to be of general application, the requirements laid down in Articles 5 and 15 of the Treaty oblige the Commission to mention in the reasons on which its decision is based the situation as a whole which led to the adoption of the decision and the general objectives which it seeks to attain (Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraphs 24 and 25).

264 The applicants complain that no reasons are stated for the decision of 12 December 1994 or for the contested decisions.

The pleas alleging failure to state reasons for the decision of 12 December 1994

265 Casilina, Dora and Lamifer consider that the use of the highest possible production as a parameter is unjustified, with the result that the decision of 12 December 1994 is insufficiently reasoned on that point.

266 The Court observes that the purpose of the decision of 12 December 1994 was to take formal note of the scope of the general aid scheme provided for by the Italian Government, to verify compliance with the conditions laid down, *inter alia*, in Article 4(2) of the Fifth Code, and to declare that the scheme was in principle compatible with the rules laid down by that code. As regards, in particular, the requirement of regular production, the Commission stated that it must be considered to have been fulfilled, since, on the basis of the information provided, it appeared that to qualify for aid an undertaking had to have been engaged in production for on average at least one shift per day, for five days a week for the whole of 1993 and up to February 1994, when Decree Law No 103 was notified to the Commission. The decision, moreover, made plain that the Italian authorities could establish, on the basis of objective criteria, that an undertaking which did not satisfy that condition had regularly produced ECSC iron and steel products.

267 That decision was addressed to the Italian Government. The Commission's interpretation therein of the requirement of regular production was only adopted with the agreement of that Government, expressed in the letter of 5 October 1994 to the Commission from the Italian Minister for Industry, Trade and Craft Trades. In the circumstances, as the addressee of the decision had been informed of that interpretation and had given its express agreement thereto before its adoption, the Commission was not obliged specifically to state reasons for it in the decision of 12 December 1994.

268 In the present case, however, the Commission was bound, in deference to the interests of the undertakings seeking closure aid, to give reasons for the interpretation which it adopted of the requirement of regular production in the decisions not to approve individual applications for aid, which were considered under a procedure for examining aid.

269 In those decisions, the most important passages of which are set out in paragraph 21 above, the Commission observes that the Steel Aid Code does not define regular production and goes on to point out that the purpose of that condition is

to ensure that closure aid is granted only to firms with a certain level of activity whose closure would thus have a significant effect on the market. It notes, moreover, that Article 4 of the Steel Aid Code is drafted in such a way as to rule out a broad interpretation which would allow aid to go to firms which, although they had not been engaged in regular production, were simply suitable for production of ECSC products on a regular basis.

270 In those decisions, the Commission thus provided a sufficient statement of reasons for the interpretation which it used of the requirement of regular production set out in the decision of 12 December 1994.

271 This plea must therefore be rejected.

The pleas alleging failure to state reasons for the contested decisions

272 The applicants put forward pleas alleging respectively failure to state reasons for the Commission's disregard of their observations, failure to state reasons for the rejection of the alternative criteria proposed by the Italian Government and inaccuracy of Decision 96/678 as regards steel production in 1993.

1. The plea alleging disregard of the applicant's observations

273 Moccia, Casilina, Dora and Lamifer state that, before and during the examination procedure, they submitted written observations, setting out the

reasons which prevented them from attaining the minimum level of production required. The Commission also received, either directly or through the intermediary of the Italian Government, both the documentation attached to the application for aid and the observations made by the undertakings during the examination procedure. It was thus also aware of the specific arguments put forward by the applicants. However, the contested decisions make no reference whatsoever to those observations. It follows that the Commission manifestly failed to fulfil the obligation incumbent upon it to state reasons.

274 The Court finds, first of all, that the Commission was required to give reasons in the contested decisions only for the rejection of the alternative criteria proposed by the Italian Government. However, it was not obliged to give reasons for its position on the arguments submitted by interested third parties.

275 The Fifth Code constitutes a derogation from the categorical prohibition on aid laid down by Article 4(c) of the Treaty. It follows that proposed aid can only be approved if it fulfils in every respect the conditions for the derogation to apply. In the present case, the question to be resolved by the contested decisions was whether the applicants fulfilled the requirement of regular production laid down by the second indent of Article 4(2) of the Fifth Code. As that requirement was not defined by the Fifth Code, the Commission interpreted it in its decision of 12 December 1994, defining the main criterion and allowing the Italian authorities to suggest other objective criteria. Since it found that the applicants did not fulfil the main criterion as defined, the Commission decided to initiate the procedure for examining aid under Article 6(4) of the Fifth Code, inviting the Italian Government to submit its observations.

276 In the examination procedure the Commission's role was solely to examine whether the Italian Government had succeeded in demonstrating, on the basis of objective criteria, that the applicants, whilst not fulfilling the main criterion as

defined, had none the less regularly produced ECSC steel products. Accordingly, and subject to the arguments put forward in paragraph 268 above, there was no need for a statement of the reasons other than the assessment of the arguments put forward to that end by the Italian Government (see, by analogy, Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission* [1993] ECR I-2323, paragraph 36).

277 It is true that the Commission also informed the other Member States and interested third parties by publishing in the *Official Journal of the European Communities* the decision to initiate the examination procedure, inviting them, pursuant to Article 6(4) of the Fifth Code, to submit their observations. However, the sole aim of this was to obtain from the persons concerned all the information required for the guidance of the Commission with regard to its future action and thus to enable it to be fully informed of all the facts of the case before taking its decision (see, by analogy, *Skibsvaerftsforeningen and Others* v *Commission*, cited at paragraph 263 above, paragraph 256). The Commission was not therefore obliged to give them reasons for its position.

278 It follows that the Commission was not required to give reasons for its response to the observations which the applicants had communicated to it directly or through the intermediary of the Italian Government.

279 The Court observes, secondly, that in stating reasons for the contested decisions, the Commission was not obliged to adopt a position on all the arguments relied on before it by the Italian Government and it was sufficient if it set out the facts and the legal considerations having decisive importance in the context of those

decisions (see, by analogy, Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 31, upheld on that point by the Court on appeal in Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraphs 10 to 19).

280 In the contested decisions the Commission referred to the main arguments put forward by the Italian Government (see Part II of the preamble to the contested decisions). It stated the reasons which led the Community legislature not to accept any derogations from the general prohibition laid down by Article 4(c) of the Treaty in respect of closure aid which is not likely to have a significant effect on the market in question (see Part III of the preamble to the contested decisions). It conceded that criteria other than those set out in its decision of 12 December 1994 could be allowed, provided that they demonstrated the regularity of the undertaking's production. It noted that the criteria proposed by the Italian Government were not suited to demonstrating that the undertakings were engaged in regular production but merely that they could have been. It pointed out that Article 4 of the Fifth Code was drafted in such a way as to preclude too broad an interpretation which would allow aid to go to firms which, although they had not been engaged in regular production, were merely suitable for production. It concluded that the way in which the criterion of regularity had been interpreted by the Italian authorities was not founded in law and could not, therefore, be accepted.

281 It follows that, in the decisions in question, the Commission provided a full and adequate explanation of the facts and pleas in law which played a fundamental role in their adoption.

282 It was therefore under no obligation to respond specifically to the observations of the applicants which were communicated to the Italian Government and incorporated in that Government's own observations.

283 This plea must therefore be rejected.

2. The plea alleging failure to state reasons for the rejection of the alternative criteria proposed by the Italian Government

284 Moccia considers that Decision 96/678 does not state why suitability for production, the alternative criterion suggested by the Italian Government, is not sufficient to allow an assessment to be made of the compatibility of the aid in question. That criterion, it argues, appears entirely suitable for assessing the circumstances of undertakings, like itself, which are compelled, for objective and inescapable reasons, to halt their production temporarily in order to restructure their plant and equipment. That alternative criterion, in a case such as its own, where the suspension of production arose from the need to comply with binding rules, is such a crucial argument that it should have been specifically, exhaustively and expressly refuted when the grant of aid was refused.

285 Sidercamuna argues that insufficient reasons were given, in breach of Article 15 of the Treaty, for the Commission's decision not to accept the criterion proposed by the Italian authorities. The Commission had failed to show that, in the relevant economic context, that is to say, on the Italian market, the criterion of eight hours per day was the only possible one and was crucial for ascertaining whether an undertaking was engaged in regular production.

286 The Court considers, referring to paragraphs 279 to 281 above, that, given the reasons stated in the contested decisions (see Parts II and III of the preamble), summarised in paragraph 280 above, it must be held that the Commission provided a full and adequate explanation of the facts and legal considerations which played an essential role in their adoption as regards the rejection of the criterion of suitability for production proposed by the Italian authorities.

287 This plea must therefore be rejected.

3. The plea alleging that the reasons stated for Decision 96/678 were inaccurate as regards steel production in 1993

288 Moccia claims that the reasons stated for Decision 96/678 were inaccurate. The Commission had refuted the argument of the Italian Government that poor production in 1993 by certain Italian steel undertakings was due to a downturn in the economy and a serious crisis on the market. It had pointed out, as regards concrete rods, that only a slight drop in the rate of capacity utilisation could be observed, either in Italy or at European level. It had submitted an explanatory statistical table in support of that assertion.

289 The applicant argues in that connection, first, that the table misrepresents the trend in capacity utilisation rate for concrete rods, which shows the ratio between actual production and the highest possible production in Europe and Italy between 1992 and 1993. In fact that utilisation rate fell by 10% at European level and by 11.55% in Italy.

290 The applicant maintains, secondly, that the instrument used by the Commission to assess trends in the economy, that is to say, the utilisation rate of production capacity, is of little relevance with regard to the assessment of economic trends on the market and their impact on a minor undertaking, such as itself, which, because of its size, can only operate on the local market, or, at most, on a small section of the domestic market. A more realistic assessment would instead be based on trends in data for consumption during the period under consideration, as such data make it possible to ascertain possible sales of the products of the undertaking in question. On the basis of that method, the applicant submits a table showing trends in demand for concrete rods on the Italian market, according to which demand fell by 1.7% in 1992, by 20% in 1993 and by 7% in

1994, which accordingly reveals the existence of a serious crisis, particularly for smaller undertakings.

291 The Court observes that failure to state reasons, or inadequate statement of reasons, constitutes a plea alleging infringement of an essential procedural requirement, which, as such, differs from a plea alleging that the grounds of the decision are inaccurate; the latter plea is subject to review by the Court when it examines the substance of that decision (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 47, Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, paragraph 45, Case T-310/94 *Gruber and Weber* v *Commission* [1998] ECR II-1043, paragraph 41, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1229, paragraph 66).

292 It is clear from the arguments set out at paragraphs 279 to 281 above that the reasons stated for the contested decisions indicate clearly and consistently the considerations of fact and of law which justify for legal purposes the rejection of the alternative criteria proposed by the Italian Government and the declaration that the aid is incompatible with the common market, irrespective of the merit of such considerations, which, as has been stated, is a matter to be reviewed by the Court not in the context of the adequacy of the reasons stated but when it examines the substance of the case.

293 This plea must therefore be rejected.

Costs

294 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and jointly and severally to pay those of the Commission.

On those grounds,

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

hereby:

1. **Dismisses the applications;**

2. **Orders the applicants to bear their own costs and jointly and severally to pay those of the Commission.**

Jaeger Lenaerts Tiili

Azizi Mengozzi

Delivered in open court in Luxembourg on 12 May 1999.

H. Jung
Registrar

M. Jaeger
President

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