JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
31 March 1998 *

In Case T-129/96,

Preussag Stahl AG, a company incorporated under German law, established in Salzgitter (Germany), represented by Jochim Sedemund, Rechtsanwalt, Berlin, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue, Luxembourg,

applicant,

supported by

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in that Ministry, acting as Agents, assisted by Holger Wissel and Oliver Axster, Rechtsanwälte, Düsseldorf,

intervener,

v

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

defendant,

* Language of the case: German.

APPLICATION for the annulment of Commission Decision 96/544/ECSC of 29 May 1996 concerning State aid to Walzwerk Ilsenburg GmbH (OJ 1996 L 233, p. 24),

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

composed of: V. Tiili, President, C. P. Briët, K. Lenaerts, A. Potocki and J. D. Cooke, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 13 January 1998,

gives the following

Judgment

Legal background to the dispute

1 Article 4(c) of the ECSC Treaty (hereinafter 'the Treaty') prohibits all aids granted by Member States to the steel industry in any form whatsoever.

2 On the basis of the first and second paragraphs of Article 95 of the Treaty, having consulted the Consultative Committee and with the unanimous assent of the Council, the Commission adopted 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 so-called 'Fifth Steel Aids Code' (hereinafter 'the Code').

3 According to Article 1(1) of the Code, any aid to the steel industry financed by Member States or their regional or local authorities may be deemed compatible with the orderly functioning of the common market only if it satisfies the provisions of Articles 2 to 5.

4 According to Article 1(3):

'Aid coming within the terms of [the Code] may be granted only after the procedures laid down in Article 6 have been followed and shall not be payable after 31 December 1996.

The deadline for payments of aid falling under Article 5 is 31 December 1994 with the exception of the special fiscal concessions (Investitionszulage) in the five new Länder as provided for in the German "Tax amendment law 1991", which may be payable up to 31 December 1995.'

5 According to Article 5:

'Aid granted to steel undertakings for investment under general regional aid schemes may until 31 December 1994 be deemed compatible with the common market, provided that the aided undertaking:

— ...

— ...

— is located in the territory of the former German Democratic Republic and the aid is accompanied by a reduction in the overall production capacity of that territory.'

6 Furthermore, Article 6 provides that:

'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. It shall likewise be informed of plans to grant aid to the steel industry under schemes on which it has already taken a decision under the EEC Treaty. The notifications of aid plans required by the article must be lodged with the Commission at the latest by 30 June 1994 as regards aid covered by Article 5 and 30 June 1996 as regards all other aid.

...

3. The Commission shall seek the views of the Member States on plans ... for regional investment aid when the amount of the aided investment or of the total aided investments during 12 consecutive months is in excess of ECU 10 million, and on other major aid proposals notified to it before adopting a position on them. It shall inform the Member States of the position it has adopted on all aid proposals, specifying the form and volume of the aid.

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 [the Code], it shall inform the Member State concerned of its decision. The Commission shall take such a decision not later than three months after receiving the information needed to assess the proposed aid. Article 88 of the

Treaty shall apply in the event of a Member State's failing to comply with that decision. The planned measures falling within paragraph 1 ... may be put into effect only with the approval of and subject to any conditions laid down by the Commission.

5. If the Commission fails to initiate the procedure provided for in paragraph 4 or otherwise to make its position known within two months of receiving notification of a proposal, the planned measures may be put into effect provided that the Member State first informs the Commission of its intention to do so. Where the Commission seeks the views of Member States under the provisions of paragraph 3, the abovementioned time period shall be three months.

6. All individual awards of the types of aid referred to in [Article 5] shall be notified to the Commission in accordance with the procedure provided for in paragraph 1 ...'

7 Pursuant to Article 9, the Code entered into force on 1 January 1992 and was applicable until 31 December 1996.

Factual background to the dispute

8 Walzwerk Ilsenburg GmbH (hereinafter 'the Ilsenburg mill') was a State-owned undertaking established in Saxony-Anhalt in the former German Democratic Republic (hereinafter 'the GDR'). It was acquired by Preussag Stahl AG (hereinafter 'Preussag') in 1992 as a legally independent subsidiary. In 1995 the Ilsenburg mill merged with Preussag, which now holds the rights previously vested in the mill.

9 In order to ensure the viability of the undertaking under the new market conditions, Preussag had to carry out substantial rationalisation, including the transfer of production of heavy plates from its factory in Salzgitter in the former West Germany to the Ilsenburg mill.

10 In order to finance the investment needed for that transfer, amounting to DM 29.5 million, it was agreed that Saxony-Anhalt would grant aid comprising an investment subsidy of DM 5.850 million and a special fiscal concession of DM 0.9505 million. That aid fell within two general regional aid schemes approved by the Commission in accordance with the relevant provisions of the EC and ECSC Treaties, namely the joint framework programme for the 'improvement of regional economic structures' and the Law on investment subsidies respectively.

11 The German Government notified the planned aid to the Commission by fax dated 24 November 1994, which was registered the following day by the Commission with the designation No 777/94. The fax referred expressly to the notification, on 10 May 1994, of another proposal for investment aid of DM 11.8 million to the Ilsenburg mill for the reconversion of energy sources and the improvement of environmental protection (hereinafter 'proposed aid No 308/94').

12 By letter dated 1 December 1994 the Commission invited the German Government to withdraw the notification of proposed aid No 777/94 in order to avoid having to open a procedure solely on the ground of failure to observe the time-limit for notification, which had expired at the end of June 1994. The Commission noted that the fact that the time-limit had not been observed did not preclude examination of the planned aid, provided that the institution was still in a position to adopt a decision before the end of 1994. However, as proposed aid No 777/94 had only been notified on 25 November 1994, that is to say, just 17 working days before the Commission's last meeting in 1994, the latter considered that, even by expediting the procedure as much as possible, it would be unable to give a decision

before the end of the year, since it was necessary to seek the views of the Member States because of the level of the proposed investments.

13 By letter dated 13 December 1994 the Federal Government informed the Commission that it would not withdraw the notification of proposed aid No 777/94 under any circumstances. The Federal Government informed Preussag of that decision.

14 In the meantime, Preussag had sent a letter to Commissioners Van Miert and Bangemann on 7 December 1994, explaining that the delay in notification had been due to the protracted and detailed discussions made necessary by the impact which proposed aid No 777/94 would have on employment in the region concerned. For that reason Preussag asked the two Commissioners to ensure that the Commission still examined the proposed aid under the provisions of the Code.

15 On 21 December 1994 Preussag received the following fax, confirmed by letter of the same date:

'Martin Bangemann

Member of the European Commission

Thank you for your letter dated 7 December 1994.

My colleague Karel van Miert and I share your view as to the urgency of adopting a decision on the aid to undertakings situated in the new German *Länder* so that their economic development is not hindered by excessively long administrative procedures.

For that reason I am pleased to be able to inform you that the European Commission today approved the aid to the Ilsenburg mill, pursuant to your request. I wish your undertaking every success.

Yours sincerely,

Signed: Martin Bangemann.'

16 By telex SG(94)D/37659 of 21 December 1994 the Commission informed the German authorities of the planned aids in respect of which it had no objections, including proposed aid No 308/94.

17 The amount of the investment subsidy, which the Landesförderinstitut Sachsen-Anhalt had granted to Preussag by decision of 20 October 1994 subject to notification to the Commission, was paid into the applicant's bank account on 23 December 1994.

18 By letter SG(95)D/1056 of 1 February 1995 to the Federal Government, the Commission confirmed that certain planned regional aids, including proposed aid No 308/94, were compatible with Article 5 of the Code.

19 On 15 February 1995 the Commission decided to open the examination procedure pursuant to Article 6(4) of the Code with regard to proposed aid No 777/94. That decision was notified to the German authorities by letter dated 10 March 1995, subsequently reproduced in a notice published in the *Official Journal of the European Communities* (OJ 1995 C 289, p. 11). The Commission pointed out in the letter that the extremely late notification of the planned aid had made it impossible to give a decision on its compatibility before 31 December 1994 and that, after that date, it was no longer competent to adopt a decision according to the wording of

Article 5 of the Code itself. In addition, the Commission invited other Member States and other interested parties to submit their comments on proposed aid No 777/94 within one month of the date of publication of the notice.

20 By letter dated 23 February 1995 Mr Bangemann informed Preussag that the authorisation referred to in his letter dated 21 December 1994 concerned proposed aid No 308/94 and not proposed aid No 777/94.

21 The special fiscal concession relating to proposed aid No 777/94 was granted by two decisions of the Finanzamt Wolfenbüttel of 26 October 1995 and 9 January 1996, for DM 428 975.70 and DM 190 052 respectively, and was paid to the applicant on those dates.

22 By Decision 96/544/ECSC of 29 May 1996 concerning State aid to Walzwerk Ilsenburg GmbH (OJ 1996 L 233, p. 24; hereinafter 'the contested decision') the Commission found that the investment subsidy and the special fiscal concession constituted State aid incompatible with the common market and prohibited under the Treaty and the Code and ordered them to be repaid. That decision was notified to the Federal Government on 26 June 1996 and forwarded by it to Preussag on 9 July 1996.

Procedure before the Court

23 By application lodged at the Registry of the Court of First Instance on 15 August 1996, Preussag brought this action for the annulment of the contested decision.

24 By order of 11 December 1996 the Court of First Instance granted the application lodged by the Federal Republic of Germany on 31 October 1996 for leave to intervene in the dispute in support of Preussag.

Forms of order sought by the parties

25 The applicant claims that the Court should:

— order the Commission, pursuant to Article 23 of the ECSC Statute of the Court, to produce before the Court all the documents (proposals, minutes of meetings, etc.) which might clarify the circumstances leading to the adoption of the contested decision;

— grant the applicant access to the documents produced;

— annul the contested decision;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the application as inadmissible and unfounded;

— order the applicant to pay the costs of the proceedings.

27 The Federal Republic of Germany claims that the Court should:

— annul the contested decision.

28 In its observations on the Federal Republic of Germany's statement in intervention, the Commission claims that the Court should:

— dismiss the intervener's arguments;

— order the intervener to pay some of the costs.

The claim for annulment

Admissibility

29 The Commission submits that this action is out of time and constitutes an abuse, on the basis that by failing to bring an action challenging the decision of 15 February 1995 opening the procedure for examination of the aid in question, Preussag effectively permitted the consolidation of the breach of procedural requirements and infringement of the Treaty.

30 Preussag, supported by the intervener, contends that even though an action could have been brought for the annulment of the decision to open the procedure for examination of the aid in question, nothing in Article 33 of the Treaty indicates that the formal decision closing the file may not be challenged.

31 The Court considers it sufficient to note that the contested decision produces its own legal effects, including the obligation to repay the aid received, and Preussag

must therefore have the right to bring an action for the annulment of such a decision (Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 5, and Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraph 14) irrespective of whether or not it challenged the decision to open the procedure for examination of the aid in question.

32 It follows that the Commission's plea of inadmissibility cannot succeed.

Substance

33 In support of its application for annulment Preussag essentially raises seven pleas in law.

The first plea, concerning the scope of the Commission's powers *ratione temporis*

— Arguments of the parties

34 Preussag alleges, essentially, that there is no provision in the Code which prohibits the Commission from deciding, after 31 December 1994, that the regional investment aids referred to in Article 5 are compatible provided that the material conditions for their authorisation were satisfied before that date, as they were in this case. The deadline of 31 December 1994 laid down in the second paragraph of Article 1(3) of the Code is intended only to restrict the period for payment of those aids. Furthermore, the Commission is not released from its duty to adopt a decision on the material compatibility of aid paid without proper notification or before being authorised by the Commission (Case C-301/87 *France* v *Commission* [1990] ECR I-307). Finally, the Commission did not itself consider that it would be impossible to adopt a decision on the compatibility of proposed aid No 777/94 after 31 December 1994, having regard to the fact that it opened the examination procedure and sought the views of the Member States and other interested parties after that date.

35 The intervener adds that in Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 92 et seq., the Court held that the Commission had the power to authorise operating aid after the deadline laid down in Article 10a(2) of Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27). In any event, as the special investment concession could have been paid up to 31 December 1995, the Commission would, according to its own legal assessment, have been in a position to adopt its decision in sufficient time to enable payment to be made before that date.

36 The Commission contends, essentially, that 31 December 1994 is the deadline both for payment and for the adoption of a decision and that payment of the aid should follow authorisation and not precede it since, pursuant to Article 6(4) of the Code, Member States may not grant aid without the Commission's approval. From 1 January 1995, the absolute prohibition on aid laid down in Article 4(c) of the Treaty was restored and a decision adopted after that date could not have rendered aid already paid lawful. The procedural irregularity resulting from failure to respect the time-limit for notification therefore rendered the aid clearly incompatible with the Treaty and the Commission had no power *ratione temporis* to authorise it. The Commission was none the less required to open the examination procedure pursuant to Article 6(3) and (4) of the Code, which fell to be applied even if the aids were not compatible with the Code.

37 Furthermore, this dispute differs considerably from that in *Skibsværftsforeningen*, cited above. Finally, the reference to Article 5 of the Code in the second paragraph of Article 1(3) confirms that the time-limit for adopting a decision expired on 31 December 1994, even in respect of the special fiscal concessions.

— Findings of the Court

38 The Court notes that Article 1(1) of the Code states expressly that aid to the steel industry coming within the terms of the Code may be deemed compatible with the orderly functioning of the common market only if it satisfies the provisions of Articles 2 to 5.

39 According to Article 5 of the Code, the aid in question, as regional investment aid, could be deemed compatible with the common market until 31 December 1994; according to the second paragraph of Article 1(3), the deadline for payment was, in principle, the same date.

40 Furthermore, the first paragraph of Article 1(3) of the Code stated that aid coming within the terms of the Code could be granted only after the procedures laid down in Article 6 had been followed. Article 6(1) provided that the Commission was to be informed of any plans to grant aid and the last sentence of Article 6(4) stated that the planned measures could be put into effect only with the approval of and subject to any conditions laid down by the Commission.

41 It must follow that aid coming within the terms of the Code could be put into effect only with the prior approval of the Commission. To that extent, as is clear from the reference to Article 5 of the Code in the second paragraph of Article 1(3), the deadline of 31 December 1994 laid down for the payment of regional investment aids was necessarily the deadline imposed on the Commission by Article 5 for adopting decisions on the compatibility of that category of aid.

42 Contrary to the intervener's assertions, the same is true in respect of the special fiscal concessions, even though they could be put into effect until 31 December

1995 pursuant to the second paragraph of Article 1(3) of the Code. That deferral of the deadline for payment resulted solely from the condition, to which the right to special fiscal concessions was subjected, to the effect that the aided investments had already been made. It could not operate so as to extend the deadline imposed on the Commission for adopting decisions on the compatibility of that type of aid.

43 Nor can the applicant rely on the Commission's obligation to adopt a decision on the compatibility with the EC Treaty of aid paid without proper notification or before being authorised by the Commission. Unlike the EC Treaty, which empowers the Commission to adopt decisions on the compatibility of State aids on a permanent basis, the derogation laid down in the Code to the principle of the absolute prohibition of aid in Article 4(c) of the Treaty was limited in time. In this case the derogation must be interpreted even more strictly since, according to the 11th recital in the preamble to the Code, 'as regional investment aids are exceptional in nature, there would be no justification in maintaining them beyond the appropriate period for the modernisation of the steel plants concerned, which is set at three years'.

44 As the Commission correctly pointed out, this dispute differs significantly from that in *Skibsværftsforeningen*, cited above, where the Commission effectively authorised operating aid in May 1994 even though Article 10a of Directive 90/684 provided that those aids could be deemed compatible with the common market until 31 December 1993 on condition, *inter alia*, that no other production aid was granted for contracts signed between 1 July 1990 and 31 December 1993.

45 It is clear from that provision that the Commission was required to adopt a decision on the need for and compatibility of operating aid connected to specific contracts which could be signed until the end of the reference period, rather than investment aids, as in this case. The Court also concluded that the Commission had the power and the duty to consider the need for and hence the compatibility with the common market of operating aid paid in respect of contracts concluded

until the end of that period, which meant that the Commission had the power to adopt a decision on them after 31 December 1993 (paragraphs 95 and 96). The Court also pointed out that in the case of operating aid, that is to say, in particular, production aid resulting from specific contracts, it is only the time when the contract is signed which is material as regards the effects of the aid at issue on competition (paragraph 96). Finally, the Court expressly stated that, in contrast to the Code, Article 10a of Directive 90/684 did not lay down any time-limit for notification (paragraph 99).

46 The decision to open the procedure for examination of proposed aid No 777/94 was adopted in accordance with the procedural provisions in Article 6 of the Code, which was applicable until 31 December 1996, and cannot therefore be taken to mean that the Commission considered it still had the power to take a decision on the substantive compatibility of the aid with the Code.

47 In view of all the foregoing, the plea must be rejected.

The second plea, alleging that the time available for examining proposed aid No 777/94 was sufficient

— Arguments of the parties

48 According to Preussag, supported effectively by the Federal Republic of Germany, the mere fact that the time-limit for notification was not observed should not have precluded examination of proposed aid No 777/94, since the Commission still had some six weeks within which to adopt a decision before 31 December 1994. The consultation of the other Member States pursuant to Article 6(3) of the Code required only a short notice pointing out that the planned aid satisfied the material conditions for authorisation.

49 In order to assess the compatibility of proposed aid No 777/94, the Commission could simply have established that, as is apparent from the notification of proposed aid No 308/94, the recipient of the aid was located in the territory of the former GDR and the aid was accompanied by a reduction in the overall production capacity of that territory.

50 The Commission contends that, even if the deadline for notification of aid which expired on 30 June 1994 was not mandatory, the extent to which it was exceeded by the German Government meant that it was no longer possible for it to adopt a decision before 31 December 1994, because of its duty to seek the views of the Member States.

51 Article 5 of the Code gave the Commission a discretion which precluded any automatic decision, because it was obliged to confirm the whereabouts of the undertaking, the fact that the aid was to be used for the purposes of modernisation, the relationship of the aid to the objective of the relevant regional schemes and the reduction in the overall production capacity of the territory in question.

— Findings of the Court

52 Article 6(1) of the Code expressly provided that the Commission was to be informed, in sufficient time to enable it to submit its comments, of any plans concerning aid of the types referred to by the Code.

53 In that respect, the Court notes that the general scheme of the procedural provisions of the Code indicates that it was designed to afford the Commission a period of at least six months within which to give a decision on the compatibility of planned aid notified to it.

54 The deadline laid down by the second paragraph of Article 1(3) for the payment of aid granted for investment under regional aid schemes within the meaning of Article 5 of the Code was 31 December 1994, subject to the derogation in respect of special fiscal concessions referred to above. Notification of that aid had to be made before 30 June 1994 pursuant to the last sentence of Article 6(1). In contrast, aids falling within the other categories to which the Code applied and which might be paid until 31 December 1996 pursuant to the first paragraph of Article 1(3) of the Code could validly be notified until 30 June 1996, pursuant to the last sentence of Article 6(1).

55 Furthermore, when, as here, the Commission was required by Article 6(3) of the Code to seek the views of the Member States on the notified planned aid before adopting a position in that respect, in the first place Member States could not put the planned measures into effect before the expiry of three months from the date of receipt of notification of the planned aid, according to the second sentence of Article 6(5), and in the second place the second sentence of Article 6(4) allowed the Commission a period of three months after receiving the information needed to assess the proposed aid in order to take a decision.

56 It follows that, in this case, the Commission needed at least six months before the deadline of 31 December 1994 in order to open and close the procedure before that deadline (*Skibsværftsforeningen*, cited in paragraph 44 above, paragraph 99).

57 Accordingly, since proposed aid No 777/94 was notified after 30 June 1994, the Commission was no longer required to adopt a decision on its compatibility before 31 December 1994.

58 Even if, as Preussag asserts, there was no doubt as to the compatibility of the aid in question and consultation of the Member States necessitated only a short time, the Commission was in any event under no obligation to inform the German Govern-

ment of any decision not to raise objections to the planned aid before the expiry of the three-month period, commencing with the notification of proposed aid No 777/94, laid down by the second sentence of Article 6(5) of the Code and still less to do so before 31 December 1994.

59 Therefore, by maintaining, against the advice of the Commission (see paragraph 12 above), notification of proposed aid No 777/94 on a date which left the institution substantially less than the six-month period required by the Code, the German authorities took the risk of making it impossible for the Commission to examine the planned aid before its powers in that respect expired. In the absence of any proof of a manifest negligence on its part, the Commission cannot be criticised for the fact that that risk materialised.

60 In those circumstances, the plea must be rejected.

The third plea, alleging infringement of Article 6(4), first and second sentences, of the Code

61 According to Preussag, the contested decision is illegal in that the Commission relied on a simple procedural provision to declare the aid incompatible with the common market and to order repayment, even though it was established from the outset that it was materially valid and the first and second sentences of Article 6(4) of the Code empower the Commission to take a negative decision only in the event of material incompatibility of the aid.

62 The Commission contends that this dispute does not relate to a simple infringement of an internal time-limit but to the fact that it lacked any substantive competence as from 1 January 1995.

63 It should be recalled that the time-limit for the Commission to adopt a decision on the compatibility of the aid in question expired on 31 December 1994. In those circumstances the aid could no longer be deemed compatible with the common market on the basis of Article 1(1) of the Code and was thus prohibited pursuant to Article 4(c) of the Treaty.

64 It follows that the plea must be rejected.

The fourth plea, alleging infringement of the principle of non-discrimination

65 Preussag considers that it has been the victim of unjustified discrimination in that the Commission has authorised a whole series of aids which were notified well after the time-limit for notification had expired.

66 The Commission contends that the principle of non-discrimination does not preclude different treatment for cases which are not similar. Furthermore, no notice to the Member States was necessary in the cases referred to by Preussag.

67 It is sufficient to note that, as is apparent from the file, the planned aid to which Preussag referred was either notified earlier than proposed aid No 777/94 or did not require consultation of the Member States.

68 The plea must therefore be dismissed.

The fifth plea, alleging infringement of the principle of protection of legitimate expectations

— Arguments of the parties

69 Preussag, supported by the Federal Republic of Germany, submits that the payment of the aid in question is entirely a consequence of the Commission's administrative error in which the letter dated 21 December 1994 had its origin (see paragraph 15 above). Preussag considered the fax of the same date, which reproduced that letter, simply to be written communication of the decision of the Commission, adopted that day, to authorise proposed aid No 777/94, and consequently commenced the tender procedures necessary to carry out its proposed investment on 28 December 1994.

70 The case-law according to which an undertaking must duly ascertain that the procedure for notification of aid has been observed does not apply in this case. The Commission was notified of proposed aid No 777/94 and, by its very nature, the letter signed by a Member of the Commission concerning the closure of an administrative procedure creates legitimate expectations.

71 The Commission was not entitled to adopt the contested decision without taking into account the fact that, on the basis of the Commission's conduct, Preussag had definitively ceased yearly production of 480 000 tonnes at its factory in Salzgitter and had made investments in the Ilsenburg mill which could no longer be recovered.

72 The principles of legal certainty and protection of legitimate expectations on the one hand, and the principle of legality on the other, are to be accorded equal weight when a balance is to be struck between them (Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 30). In this case, the contested decision was based solely on an argument relating to a question of time-limits and took no account whatsoever of the substantive compatibility of the aid with the common market. There is no public interest to be served by remedying economic consequences brought about by the creation of legitimate expectations.

73 The Federal Republic of Germany adds that the time-limit for notification in the Code could not under any circumstances have upset Preussag's expectations, since it was purely an administrative provision.

74 The Commission recalls that an undertaking to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the appropriate procedure, which a diligent businessman should be able to determine. The fact that the time-limit for notification had been considerably exceeded, as those involved were aware, should, in itself, have prevented Preussag from forming any legitimate expectation.

75 If Preussag and Saxony-Anhalt had taken the necessary steps, they would have become aware that the Commission had sent telex SG(94)D/37659 on 21 December 1994, stating that the institution had no objections in respect of a number of planned aids, including proposed aid No 308/94, and from which it was clear that the procedure for examination of proposed aid No 777/94 was still pending. Furthermore, the letter from Mr Bangemann dated 21 December 1994 did not correspond to any step in the procedure for examination of aid.

76 The fact that the proposed investments were put into effect (the Commission denies that that commenced on 28 December 1994) cannot, in any event, change the legal situation, since Preussag should not have done so if it was acting in good faith.

— Findings of the Court

77 It should be recalled that, according to settled case-law, undertakings to which State aid has been granted may not entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the appropriate procedure, something which a diligent businessman ought to be able to ascertain (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14).

78 Furthermore, an individual may rely on the principle of protection of legitimate expectations only in so far as the Community administration has led him to entertain justified hopes by giving him specific assurances (Case T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 51).

79 By letter dated 1 December 1994 the Commission invited the German Government to withdraw the notification of proposed aid No 777/94. The exceptional delay in notifying it precluded the adoption of a decision on compatibility before the deadline of 31 December 1994 laid down by Article 5 of the Code, which is binding in its entirety pursuant to the second paragraph of Article 14 of the Treaty. Furthermore, it is common ground that Commission decisions authorising State aids are notified by the Commission to the Member State concerned. Thus, by telex SG(94)D/37659 of 21 December 1994, referred to above, the Commission officially informed the German authorities that it had decided not to raise any objections in respect of 26 proposals which were listed and clearly identified by number; they did not include proposed aid No 777/94. Finally, the facts show that on 21 December 1994 the Commission had not yet sought the views of the Member States on the proposal in accordance with Article 6(3) of the Code.

80 It follows that the German authorities, the only party with which the Commission, as an institution, had a duty to communicate, must have been aware that the latter had not approved proposed aid No 777/94. The same is true of Preussag, which had even greater reason to ascertain from those authorities that the planned aid had been authorised, given that it was aware of the Commission's negative position with regard to it.

81 In those circumstances, the reply given as early as 21 December 1994 in the letter signed by Mr Bangemann to the request for intervention submitted by Preussag on 7 December 1993 could not have given the applicant an assurance that the Commission had altered its position.

82 Furthermore, that letter was a response to an unofficial request by Preussag for intervention outside the procedure for examination of aids laid down by the Code.

83 It follows that Preussag cannot validly claim that that letter led it to entertain a legitimate expectation that the aid in question would be approved.

84 Accordingly, Preussag cannot reasonably criticise the Commission for not having balanced the requirements of the principles of legal certainty and protection of legitimate expectations, on the one hand, and the principle of legality, on the other.

85 It follows from those considerations that the plea must be dismissed.

The sixth plea, alleging infringement of Article 6(5) which assimilates silence by the Commission to authorisation

— Arguments of the parties

86 Preussag points out that proposed aid No 777/94 could lawfully be granted because more than three months elapsed between its notification and 10 March 1995, when the Commission informed the Federal Government that it had opened

the examination procedure pursuant to Article 6(4) of the Code. The German Government was not required to inform the Commission in advance of its intention to put that planned aid into effect, since the Commission had itself informed Preussag of the authorisation of the aid by letter dated 21 December 1994.

87 The Commission contends that it was not informed that the aid had been put into effect and that it was granted within a month of its notification.

— Findings of the Court

88 It is common ground that the aid in question was granted even before expiry of the three month period from notification of the proposal laid down by the second sentence of Article 6(5) of the Code.

89 Furthermore, the German Government failed to inform the Commission in advance of its intention to put proposed aid No 777/94 into effect, contrary to the requirement in the first sentence of Article 6(5) of the Code, even though, as is clear from the examination of the previous plea, it could not have considered that it was exempt from such a formality.

90 In those circumstances, the plea must be dismissed.

The seventh plea, alleging breach of the duty to state reasons

91 In Preussag's view, the contested decision does not set out the reasons which led the Commission to rely solely on the alleged failure to observe the time-limit for notification to order recovery of the aid, to consider that it lacked power to declare the aid compatible after 31 December 1994 and not to take into account Preussag's legitimate expectation that the aid in question would be authorised.

92 The Commission replies that the contested decision was properly based on the limited period of validity of the Code and that the absence of legitimate expectations was dealt with equally explicitly.

93 As is apparent from the examination of the preceding pleas, the statement of the reasons on which the contested decision was based clearly and unequivocally reveals the Commission's reasoning, in accordance with the requirements of the first paragraph of Article 15 of the Treaty, enabling the applicant to know the reasons for the measure adopted so that it could defend its rights and ascertain whether or not the decision was well founded and the Court to exercise its power of review in that respect (Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 17; Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraph 161).

94 The plea must therefore be dismissed.

95 It follows that the application for annulment must be rejected in its entirety.

The application for production of documents

96 In view of all the considerations set out above it is clear that the Court has been able to rule on the application on the basis of the forms of order sought, the pleas in law and the arguments put forward during both the written and the oral procedure and in the light of the documents lodged by the parties during the proceedings.

97 The applicant's request that the Commission should be ordered, pursuant to Article 23 of the ECSC Statute of the Court, to produce all the documents relating to the case which clarify the circumstances leading to the adoption of the contested decision and that the applicant should be granted access to those documents must therefore be rejected.

Costs

98 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, having regard to the form of order sought by the Commission, be ordered to pay the costs. Under Article 87(4) of the Rules of Procedure, the Federal Republic of Germany, which has intervened, is to bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to bear its own costs and those of the Commission;

3. Orders the Federal Republic of Germany to bear its own costs.

Tiili Briët Lenaerts

Potocki Cooke

Delivered in open court in Luxembourg on 31 March 1998.

H. Jung V. Tiili

Registrar President