OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 24 January 2002 [1]

1. The Federal Republic of Germany has brought an action under Articles 33(1) CS and 230(2) EC, claiming that the Court of Justice should:

(i) annul Articles 4 to 7 of Commission Decision 1999/720/EC, ECSC of 8 July 1999 on State aid granted by Germany to two undertakings ('the contested decision'); [2]

(ii) order the Commission, under Article 23 of the ECSC Statute of the Court of Justice, to transmit to Germany the documentation relating to the case which has been compiled since 1994, so that the applicant may inspect the file; and

(iii) order the defendant to pay the costs.

I — Background to the dispute

2. On 6 June 1997, the German Government informed the Commission, pursuant to Article 88(3) EC, of the privatisation of Gröditzer Stahlwerke GmbH ('Gröditzer') and its subsidiary Walzwerk Burg GmbH ('Walzwerk'), of the conditions governing the sale of the shares, and of the measures which preceded the privatisation. Only the production of molten steel and ingots is classed under the ECSC Treaty.

3. In 1990, Gröditzer had been taken over by the Treuhandanstalt (a body which was set up to ensure that the approximately 8 000 State undertakings of the former German Democratic Republic were made suitable for the market economy) in order to be restructured and, subsequently, privatised. [3] It was decided to continue production of the same type of steel, while reducing capacity from 285 000 to 150 000 tonnes per year and cutting 2 500 jobs, which reduced the number of employees from 5 200 to 2 700. It was felt that relatively modest investment would be

1 — Original language: Spanish.

2 — Notified under document number C(1999) 2264. The aid was granted to Gröditzer Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH (OJ 1999 L 292, p. 27).

3 — Under the arrangements governing the Treuhandanstalt, aid granted to undertakings under its management which operated in non-sensitive sectors, did not have to be notified, provided that, in the period 1992 to 1994, the undertaking concerned had fewer than 1 500 employees and the aid was less than DEM 150 million. In 1995, those thresholds changed to 250 employees and DEM 50 million.

required, although it soon became clear that the plan lacked a sound basis because the traditional consumer markets had disappeared and the price of simple alloys had fallen as a result of overcapacity.

In 1992, the Treuhandanstalt tried unsuccessfully to sell the undertaking. It assigned the shares to EREL Verwaltungs GmbH & Co. Management KG, a joint management company which acted as a holding company for a number of undertakings that were to be privatised following restructuring. The Treuhandanstalt was the sole proprietor of the holding company.

In January 1995, the proprietor of the holding company changed its name to Bundesanstalt für vereinigungsbedingte Sonderaufgaben and its activities were reduced to contractual management, while responsibility for the restructuring and privatisation of the undertakings was transferred to Beteiligungs-Management-Gesellschaft Berlin GmbH, another State organisation which was controlled by the federal government and which became the sole proprietor of Gröditzer.

4. At the beginning of 1997 the undertaking was sold to Georgsmarienhütte. Walzwerk is an independent undertaking which carries on non-ECSC activities and whose public shareholder sold it to Gröditzer as part of the privatisation process, since which time it has acted as a steel service centre for Gröditzer. [4]

5. On 6 June 1997 Germany notified the Commission that between 1992 and 1996 Gröditzer had received aid amounting to DEM 263.7 million, which was made up of DEM 207.3 million in loans from public shareholders, DEM 53.4 million in bank loans guaranteed by the Treuhandanstalt and the Bundesanstalt für vereinigungsbedingte Sonderaufgaben, and DEM 3 million as an outright grant. In addition, a further sum of DEM 8.4 million was paid under the German regional aid plan with the 'Community objectives: the improvement of regional economic structures'. The sale of the undertakings cost the proprietor a total of DEM 393 million, mainly as a result of the waiver of the shareholder loans and the repayment of bank loans.

6. After it had been notified, the Commission decided to initiate the procedure laid down in Decision No 2496/96/ECSC [5] (the Sixth Steel Aid Code). A letter was sent to Germany on 5 August 1997 and was published in the *Official Journal* in order to allow the other Member States and interested parties the opportunity to submit observations. [6]

4 — In the contested decision, the Commission assessed Walzwerk's position under the EC Treaty, but only in connection with the privatisation and in so far as it entered into the total cost of the liquidation.

5 — 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).

6 — OJ 1997 C 395, p. 5.

In the letter initiating the procedure, the Commission stated that the public shareholder loans of DEM 207.3 million, which had been granted free of interest and with no security at all given by the undertaking, and the guaranteed bank loans totalling DEM 53.4 million, the premium for which was 0.5%, both constituted aid. The Commission also decided to examine the compatibility of the DEM 8.4 million in regional aid. With respect to the privatisation, the Commission doubted whether the sale at a negative price was in accordance with the private investor principle, since the information provided showed that it would have been less costly to wind up Gröditzer. Nor was it clear whether the privatisation procedure had been open, transparent and unconditional. The Commission also noted that the privatisation agreement contained an express commitment on the part of the proprietor to grant investment aid to Gröditzer.

7. Germany commented on the initiation of the procedure and three undertakings (Max Aicher GmbH & Co, Neue Maxhütte Stahlwerke GmbH, and Lech Stahlwerke GmbH) also submitted observations. In their opinion, the sale at a negative price provided the purchaser with liquid assets which enabled it to improve its financial position and to finance acquisitions. They added that the conditions associated with the sale of Gröditzer had distorted competition.

II — The contested decision

8. On 8 July 1999 the Commission adopted the decision which Germany challenges in this action. The decision consists of a statement of reasons, containing 108 recitals, and 10 articles.

Articles 1, 2 and 3 are favourable to Germany and are not an object of this action.

9. Articles 4, 5 and 6, however, declare certain measures to be incompatible with Community law.

10. Article 4 states that investment aid to Gröditzer amounting to DEM 83.2 million, consisting of bank loans carrying a 100% guarantee from the Treuhandanstalt and the Bundesanstalt für vereinigungsbedingte Sonderaufgaben, of loans granted by Gröditzer's successive public shareholders from 1992 to 1996, and of aid granted under the joint programme 'Community objective: improvement of regional economic structures', paid in the years 1997 and 1999 is incompatible with the common market.

11. Article 5 states that measures taken by Germany in respect of Gröditzer totalling DEM 155.5 million, DEM 14.3 million of which was investment aid and DEM 141.2 million of which was operating aid (of which 17 million was a privatisation grant and 124.2 million was financed by means of bank loans carrying a 100% guarantee and by means of shareholder loans granted by public shareholders), constitute State aid incompatible with the common market in coal and steel.

12. Article 6 declares that the aid amounting to DEM 3.3 million, in the form of loans as advance payments against regional aid to be received, which Germany planned to grant to Gröditzer under Article 9(2) of the agreement of 27 February 1997 governing the sale of shares in Gröditzer to Georgsmarienhütte, is incompatible with the common market in coal and steel.

13. By virtue of Article 7 Germany is required to seek recovery from the recipient of the aid referred to in Articles 4 and 5, which was unlawfully granted. Recovery is to be made in accordance with the procedures of national law, in so far as national law does not render it impossible or unduly difficult. The sums to be recovered are to bear interest from the date on which they were made available to the recipient until their actual recovery, at the reference rate used for calculating the grant equivalent of regional aid. For the purposes of Article 7, the term 'recipient' refers not only to Gröditzer but also to any other undertaking to which assets have been transferred in order to obstruct the repayment of the aid.

III — The procedure before the Court of Justice

14. Germany's application was lodged at the Court Registry on 9 September 1999. The Commission lodged its defence on 29 November 1999. To those pleadings were added a reply lodged on 14 March 2000 and a rejoinder on 14 April 2000.

In accordance with Article 23 of the ECSC Statute of the Court of Justice, on 24 July 2001 the Court requested the Commission to transmit to it all the documents relating to the case, since Germany had applied to inspect them in the application and in the reply. On 3 October 2001, the Commission sent a list of the 48 documents in the file directly to the applicant which replied, on 19 October, that it did not need to inspect any of them.

Since Germany had made a formal application to present oral argument, the Court of Justice decided to hold a hearing, which took place on 27 November 2001.

IV — Pleas in law

15. Germany claims that, despite the fact that the measures taken to enable the privatisation of the undertaking qualify as State aid, Articles 4 to 7 of Decision 1999/720 should be annulled on the ground that they are unlawful, and puts forward six pleas in law in support of its application.

First, Germany submits that the Commission infringed Articles 213 EC and 215 EC, in that it adopted Decision 1999/720 at a time when the administrative status of one of its Members was irregular; second, that throughout the administrative procedure the Commission breached the duty to act within a reasonable time, the principles of sound administrative practice and legal certainty, and the duty to state reasons; third, that the Commission applied the rules of the ECSC Treaty to areas of Gröditzer's production which are not covered by that treaty; fourth, that the Commission erred in its assessment of the investment aid for Gröditzer's ECSC production under Decision No 3855/91/ECSC[7] (the Fifth Steel Aid Code); fifth, that the Commission incorrectly assessed the investment aid for the non-ECSC production; and, sixth, that the Commission did not sufficiently evaluate the circumstances surrounding the privatisation.

7 — 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).

V — Analysis of the action

A — *First plea in law: infringement of Articles 213 EC, 215 EC and 9 CS et seq., in that, at the time when the decision was adopted, the composition of the Commission was irregular*

16. The applicant submits that Decision 1999/720 must be annulled on the ground that it is vitiated by infringement of an essential procedural requirement in that, at the time when the decision was adopted, the composition of the Commission was irregular. On 1 July 1999 the institution had relieved Mr Bangemann of his duties as a Commissioner, at his own request, and had then transferred his responsibilities to another Member; consequently, the Directorate-General for Industrial Policy, of which Mr Bangemann had been in direct charge, did not take part in the procedure leading to the adoption of the decision. Germany states that, had the aforementioned Directorate-General been able to submit its views, it is possible that the contested decision might not have been adopted.

The Treaty makes no provision for cases where a Commissioner resigns and ceases to perform his or her duties. The Commission amended the number of its Members by its own authority, without waiting for another nomination to be made or for the Council to decide, as in fact it did, that it was not going to replace the Member due to the amount of his term of office that he had left to serve. For that reason, the applicant claims that the defendant, in addition to usurping the Council's decision-making powers, was also irregularly constituted.

17. The Commission states that the second paragraph of Article 215 EC provides that there may be a reduced number of Commissioners with the result that such an occurrence ought not to prevent the institution's functioning normally. In the case in question, the Council decided on 9 July 1999 that there was no reason to replace Mr Bangemann, upholding the Commission's decision to suspend Mr Bangemann from his duties because he had asked to be removed in order to take up a company appointment. In the light of Mr Bangemann's duty to respect the obligations arising from his office, in particular the duty to behave with integrity and discretion as regards the acceptance, after ceasing to hold office, of certain appointments or benefits, it was essential to relieve Mr Bangemann of his duties so that he would not be involved in the institution's decision-making process, since otherwise the lawfulness of the Commission's conduct could have been challenged.

18. The contested decision was adopted on 8 July 1999. Germany claims that there was an infringement of an essential procedural requirement in the adoption process, in that the Commission amended the number of Commissioners laid down in the Treaties, without having the authority to do so.

19. On 29 June 1999 Mr Bangemann, who was responsible for industrial affairs, information technology and telecommunications, wrote to the President of the Conference of the Representatives of the Governments of the Member States of the European Union, informing him that he intended to take up an appointment with Telefónica and asking the President to commence the procedure for appointing his successor as soon as possible.

As a result of that letter, the Commission issued a statement of acknowledgement, in which it also acceded to Mr Bangemann's request to be relieved of the duties of his office. In view of the fact that the company for which Mr Bangemann intended to work carried on business in the field of telecommunications, one of the sectors for which he had until then been responsible, there arose the possibility of a conflict of interests, in addition to the question whether Mr Bangemann had fulfilled his duty of integrity and discretion in relation to the acceptance of appointments or benefits after ceasing to hold office.

20. On 9 July 1999 the Council adopted Decision 1999/493/EC, ECSC, Euratom [8] on the composition of the Commission, in which it announced that Mr Bangemann's post would remain vacant pending the appointment of a new Commission. [9]

21. Articles 213 EC and 215 EC [10] provide that there are to be twenty Commissioners and that if a Commissioner resigns, he or she must remain in office until a replacement is appointed or until the Council decides that there is no need to appoint a successor, in which case the Commission will continue to operate, despite its not consisting of the original number of Members. [11] The Commission is entitled to play a significant role in the removal of one of its Members only under Article 216 EC, which did not apply to Mr Bangemann, and there are no legislative provisions governing the removal of a Commissioner from office.

The Commission has a duty to ensure that it operates continuously; even if a Commissioner has resigned, the Commission must continue with its business, rather than await the appointment of a replacement by the Council. The decision-making process of the Commission, which has the power to initiate legislation in numerous fields, can be halted only if there is no quorum. [12] In a situation such as that caused by Mr Bangemann's resignation, the Commission must act calmly and swiftly, in order not only to continue working normally but also to dispel at once any impending public mistrust as to the impartiality of those involved in the decision-making process.

22. In the light of the criticism aroused and of the predictable alarm which such an occurrence was liable to create in the Community, and since the individual in question had tendered his resignation, the Commission acted within its powers to organise its internal operations once it had suspended Mr Bangemann from his duties as a Member of the College of Commissioners, pending a decision from the Council regarding his replacement.

23. I do not share the applicant's view that the Commissioners' absence from the meet-

8 — OJ 1999 L 192, p. 53.

9 — OJ 1999 L 192, p. 55.

10 — These Articles correspond to Articles 9 CS and 12 CS.

11 — A situation which was not envisaged, but which, however, occurred on 16 March 1999, entailed the resignation of all the Members of the Commission. In the Declaration of 21 March 1999 on the resignation of the Commission, the Council of the European Union noted their decision, observed that it was necessary to renew the membership of the institution as soon as possible, and requested that, until such time, the Commissioners continued to carry out their duties in accordance with the Treaty.

12 — Under Article 5 of the Rules of Procedure of the Commission 93/492/Euratom, ECSC, EEC of 17 February 1993 (OJ 1993 L 230, p. 15), which were in force when the contested decision was adopted, the quorum required to adopt agreements was a majority of the number of Members specified in the Treaty.

ing which approved the contested decision means that the Directorate-General for Industrial Policy was not represented or that, if it had been, the decision might perhaps not have been adopted. First, during the drafting stage, the decision was submitted to the competent Directorate-General so that it could forward a written opinion; and second, the service in question was indeed represented at the meeting, since Commissioner Van Miert had taken over the responsibilities of the Commissioner who had resigned.

24. For the reasons given, it is my opinion that when the contested decision was adopted, there was no infringement of any essential procedural requirement as alleged by Germany. The first plea in law must accordingly be dismissed as unfounded.

B — *Second plea in law: infringement, throughout the administrative procedure, of the duty to act within a reasonable time, of the principles of sound administration and legal certainty, and of the duty to state reasons*

25. Germany divides this plea in law into three parts.

(i) The duty to act within a reasonable time and the principles of sound administration and legal certainty in relation to the subsidies already paid

26. The applicant explains that in 1994 and 1995 it notified details of the public financing measures it had adopted and that for three years the Commission allowed the applicant to believe that it would not raise any objections to the financial measures pertaining to the restructuring on the basis of the rules governing State aid. The applicant considers that such conduct, which lasted from the first notification until the decision to initiate the review procedure, in addition to the fact that the Commission failed to warn it that the information provided was insufficient, is contrary to the principle of protection of legitimate expectations. The Commission ought to have declared in 1994 and 1995 whether the financial measures, which had already been implemented and notified, constituted State aid and whether they were compatible with the common market. In the applicant's view, the Commission is therefore not entitled to seek recovery of the funding granted before the end of 1995.

The request for information which the Commission sent to the applicant on 16 July 1996 and the letter of 14 August 1997 relate to files which were opened in 1994. In addition, in the letter of 9 June 1994, the applicant refers to two previous letters from the Commission, one dated 21 April 1994 and the other dated 25 May 1994. In this case it is incorrect to speak of

informal notification, since those letters contain information provided by the competent department of the Ministry of Finance on behalf of the German Government, having regard to the fact that Community law does not regulate the manner in which Member States must notify plans to grant aid. The applicant points out that it withdrew the partial notification of 29 June 1994, by its letter of 2 December 1994, at the request of the Commission which had insisted on suspending the declaration procedure for a transitional period, because the undertaking was not immediately to be privatised. Those were the circumstances in which Germany continued to implement the restructuring measures for the undertaking.

27. In the Commission's view, only the letter of 6 July 1997 is material, since the steel industry aid amounting to DEM 133 million, granted up to the end of 1993, was notified — albeit informally — only in June 1994, contrary to Article 88(3) EC. The formal notification of DEM 79 million of investment aid, dated 29 June 1994, was withdrawn by the German authorities, not at the Commission's request as Germany alleges, but rather, as it emerges from the letter which the German authorities sent the Commission on 24 July 1998, so that, for the purpose of the privatisation, Germany would be in a position to notify complete and comprehensive details of the aid and so request a global assessment. Despite all the correspondence before June 1994, withdrawal of the formal notification meant that the Commission was unable to assess the aid. On learning that privatisation had taken place at the beginning of 1997, the Commission again requested formal notification, which it did not receive until 7 June, and as a result of which it initiated the review procedure in August 1997.

28. I do not agree with Germany's contention that the Commission ought to have taken a view as to whether the measures were compatible with the common market in 1994 or 1995. Moreover, the case-law which Germany cites in support of its argument is irrelevant. [13]

Had the final aim been to privatise Grödtzer, the information communicated before privatisation took place would have to have been sketchy and incomplete, which would have given the Commission reason to suppose that there had not been a full and formal notification, on which an assessment could be based. [14] The fact that until 1996 the Commission continued to receive information from the German authorities concerning the measures taken for the benefit of the undertaking in question and that, even after the Commission had

13 — The applicant refers to Case 223/85 *RSV* v *Commission* [1987] ECR 4617, in which the Court held that the Commission had infringed the rules of good administration by waiting 26 months before adopting a decision regarding aid. However, certain factors singled that case out from the vast majority of aid cases with which the Commission is required to deal, in that it was established that the contested aid concerned only the supplementary costs of an operation for which aid approved by the Commission had already been granted.

14 — Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 47.

initiated the review procedure, the information provided still required further clarification, further bolsters my opinion. [15]

In the absence of a full notification of the measures, the Commission did not have available to it all the information it needed in order to form a view on the compatibility of those measures with the common market, and, as a result, the two-month period within which the Commission was required to deliver its decision could not start to run. According to a recent judgment of the Court, for the purposes of the preliminary phase, in order for a notification to be regarded as complete and thus cause the two-month period to begin to run, it is sufficient if it contains, either from the beginning or once the Member State has replied to questions raised by the Commission, such information as will enable the Commission to form a *prima facie* impression of the compatibility of the aid with the Treaty. [16]

29. The principle of protection of legitimate expectations cannot be considered to have been breached so long as the Commission has not taken a view on measures which have been the subject of a complete, formal notification, following the established procedures. The Court of Justice has held that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 88 EC, undertakings to which aid has been granted may not entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article, and that is something which a diligent businessman should be able to determine. [17] Similarly, a Member State which has granted aid contrary to the procedural rules laid down in Article 88 EC may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 87 EC and 88 EC would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the Commission of their effectiveness. [18]

In the light of that case-law concerning recipients of aid, the Commission is correct in its observation that national authorities, with which it has direct contact, are better informed about the state and outcome of procedures; therefore, they will have fewer grounds than undertakings for claiming damage to their legitimate expectations, especially where, during the period in issue, they have continued to provide, either on their own initiative or at the Commission's request, additional information concerning that plan.

15 — Recital 3 of the contested decision states that Germany supplied the Commission with further information and papers by letters dated 23 September and 13 November 1997; 24 July, 14 August and 14 October 1998; and 7 and 20 January, 1 February and 29 March 1999. Meetings between the Commission and Germany took place in January 1998, on 1 December 1998, and on 11 March and 23 and 29 April 1999.

16 — Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraph 56.

17 — Case C-24/95 *Alcan* [1997] ECR I-1591, paragraph 25.

18 — Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 17, and Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 48.

(ii) The duty to act within a reasonable time and the principles of sound administration and legal certainty, in relation to the financing measures planned and notified in 1994 and 1995

30. In the applicant's opinion, by failing to comment swiftly on the financing measures when it was informed of the plans, and by failing to make known its doubts regarding their lawfulness, the Commission acted in breach of Community law on State aid, since both Article 6(5) of Decision 3855/91 (the Fifth Code) and Article 6(6) of Decision 2496/96 (the Sixth Code) provide that the procedure to review the measures must commence within two months of receipt of the notification.

31. The Commission reiterates that, to its knowledge, the only complete notification was that sent in June 1997, and that, as it states in the third recital in the preamble to the contested decision, it was not in possession of all the additional information which it had requested from the German authorities until March 1999.

32. The Commission, like all public authorities, has a duty to act within a reasonable time but, for a claim of infringement of that duty to succeed, the Commission must have been in a position to fulfil it, which does not appear to have been the case in the administrative procedure at issue.

The Commission could scarcely have adopted a swift decision concerning the financing measures when it was notified of the plans, if it had not received formal notifications setting out all the relevant information. Evidence that it acted within the reasonable time required is to be found in the fact that, following the letter of 6 June 1997, it initiated the review procedure on 5 August, in other words within the two-month period which it is permitted under Article 6(5) of the Fifth Code and Article 6(6) of the Sixth Code. According to the Court's case-law, only after it has had the opportunity to form an opinion about the compatibility of the plans notified with the Treaty is the Commission bound to initiate, without delay, the contentious procedure provided for in Article 88(2) EC, giving notice to the Member State to submit its comments. [19] The maximum period granted to the Commission for deliberation is two months. [20]

(iii) The duty to state reasons

33. In the applicant's opinion, the contested decision is vitiated by a failure to state reasons, in that it makes no reference to the notification procedure which took place in 1994 and 1995. The way in which the decision is worded creates the impres-

19 — Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 3.

20 — Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 11; Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraph 18; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 38; and *Austria* v *Commission*, cited above, paragraph 74.

sion that Germany granted subsidies to the undertaking for years, without notifying the Commission.

34. The contested decision does not refer to information which the German authorities forwarded to the Commission before June 1997. As has been shown, the letter of 6 June 1997 is the only one that can be taken into account for the purposes of Article 88(3) EC and, when it was sent, most of the measures had been implemented.

The Court of First Instance has held that, in stating the reasons for the decisions it has to take in order to ensure that the rules of competition are applied, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision. [21] That ruling was upheld by the Court of Justice on appeal. [22]

In addition, it must be supposed that the formal notification of June 1997 included the incomplete information which the German authorities had provided over the years and then the Commission took that information into account in adopting the contested measure. The decision contains a clear, precise and detailed description of the reasons on which it is based and it is not therefore vitiated by a failure to state reasons.

At the hearing, it was my impression that the agent for the German Government was also submitting that the decision did not contain any reference to the effect on trade between the Member States of the aid granted to the undertaking, or to whether or not the aid had distorted, or was liable to distort, competition, following the judgment in *Sardegna Lines*. [23] That argument was not advanced in the written procedure and it must therefore be regarded as new and, as such, inadmissible under Article 42(2) of the Rules of Procedure. Despite the fact that the judgment in the case cited was delivered after the close of the written procedure it is not new case-law because it was based on several precedents.

35. For the reasons given, the second plea in law also is unfounded and must be dismissed in its entirety.

21 — Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 41, and Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 31.

22 — Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 16.

23 — Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855.

C — *Third plea in law: application by the Commission of the provisions of the ECSC Treaty to Gröditzer's non-ECSC production*

36. The applicant complains that the Commission has presented a distorted and contradictory account of the facts and has misinterpreted the rules on State aid. Gröditzer has only a very limited presence on the markets for the products listed in Annex I to the ECSC Treaty, since 90% of its commercial activities consists of the sale of products which are not governed by that treaty. Nonetheless, the Commission applied the steel aid rules in assessing the undertaking as a whole and, by extension, when assessing the effects on competition of the undertaking's non-ECSC operations, without proving that the subsidies defined as operating aid had been applied disproportionately to the undertaking's ECSC production.

The applicant believes that the Commission tried to justify its fear that funds might be diverted from one production sector to another by the fact that the undertaking carried on both ECSC and non-ECSC activities, with the result that the Commission's arguments are based on assumptions rather than on facts. However, it emerges from the report prepared by KPMG, which was submitted to the Commission in 1998, that Gröditzer had used separate analytical accounting for each organisational unit since 1990, thereby making it possible to identify exactly to which production facilities the funding was allocated.

The applicant claims that the greater part of the operating aid was assigned to the forge, the ring-rolling mill and the foundry, which do not come under the ECSC Treaty, and that, in order to apply the provisions of that Treaty governing State aid to non-ECSC production, the Commission relied exclusively on its definition of Gröditzer as a steelmaking undertaking under Article 80 CS, without examining the effects of its business activities on the market. That decision fails to take into account either the demarcation of the scope of the two treaties, or the general principles governing State aid.

37. The Commission points out that undertakings such as Gröditzer, which manufacture ECSC products for their own consumption, or which market only a small quantity of such products, are deemed to fall within the scope of the ECSC Treaty. Article 80 of the ECSC Treaty defines 'undertaking' as any undertaking engaged in production in the coal or the steel industry (terms which are defined in Annex I) and, in certain circumstances, any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries. In the case of integrated production processes, the factor which determines

whether an undertaking is subject to the ECSC Treaty is not the marketing but rather the production of intermediate products, since there is a danger that products intended for use in the undertaking will, in practice, be placed on the market. Accordingly, in so far as an undertaking manufactures ECSC products, the ECSC Treaty will apply regardless of whether those products are intended for sale in their current state or whether the undertaking intends to transform them into other, non-ECSC, products.

The Commission could have accepted that most of the aid granted was to be used to maintain the production of articles governed by the EC Treaty, had the undertaking's ECSC production been completely separate from its EC activities. Since it has not been proved that the two are separate, the Commission considers that there is a real risk of aids being diverted from one area to another, and the Commission explains that risk in detail before stating, in Recital 40 of the decision, that the steelmaking plant has enjoyed the benefit of the aid given to the downstream EC activities. Aid which was apparently intended for the main, loss-making EC production area was, in practice, used to benefit the downstream ECSC activities so that, using internal accounting, an artificially-fixed full price was obtained. In order for aid to be assessed under the EC Treaty, there must be no diversion of funds; furthermore, the burden of proof falls on the Member State.

38. In my opinion, Germany's arguments in support of this plea in law cannot succeed. In 1959, the Court of Justice defined the scope of the ECSC Treaty,[24] laying down clear case-law of which the applicant appears to be aware, despite citing it in a biased fashion. In this judgment, having dismissed as contrary to the Treaty the concept of production which consists exclusively of the production of goods for marketing, the Court went on to state that Annex I contains a list of products which frequently are manufactured and then transformed, at separate sites having the same business name, into products which are technically or economically different, and which are not offered for sale. The exclusion from the jurisdiction of the Treaty of the products in question would be contrary to the intention of its authors, not to mention the fact that the question whether a product was included under the Treaty or not would depend on the legal structure of the producer undertaking, with the result that the production of large integrated undertakings would be excluded from the jurisdiction of the ECSC Treaty.[25]

The Court also considered whether the concept of production contained in Article 80 CS included the production of pig iron produced and transformed in works which together made up an integrated technical unit, in a situation where there was a very close economic and technical link between the blast furnaces and the foundries of the undertaking in question. The Court held that the authors of the Treaty had used the criterion of production

24 — Case 14/59 *Société des fonderies de Pont-à-Mousson* v *High Authority* [1959] ECR 215.

25 — Paragraph 1, p. 227.

in order to delimit its scope, conscious of the fact that producers of one ECSC product may at the same time be consumers of another and that molten pig iron produced in blast furnaces, in addition to being transformed immediately into pig iron castings, may also either be allowed to solidify in order to be sold as ingots or be sold in its molten state. [26] Advocate General Lagrange advanced the same point of view in the Opinion he delivered in that case. [27]

Nor does *Deutsche Babcock* [28] support the applicant's arguments. In that case, the Court was required to rule in relation to Regulation (EEC) No 1430/79 on the repayment of import or export duties, [29] and held that Article 305 EC extends the application of European Community rules to products covered by the ECSC Treaty where a specific matter is not governed by that Treaty or by provisions adopted for its implementation.

Therefore, in order to determine whether an undertaking falls within the scope of the ECSC Treaty, it is necessary to have regard to production alone, and not to marketing, bearing in mind that aid is prohibited by Article 4(c) CS, even if it entails only a slight distortion of competition. Moreover, in contrast to Article 87(1) EC, it is not apparent from the aforementioned provision that the Commission has a duty to establish that the aid in question distorts, or threatens to distort, competition, because the provision prohibits all aid, without restriction, and cannot, therefore, embody a *de minimis* rule. [30]

39. The Court of First Instance has recently held that it is inappropriate to assume that investment aid to an ECSC undertaking must always be assessed according to the State-aid rules of the ECSC Treaty; the same applies to aid granted to a steelmaking undertaking which carries on some activities which are governed by that Treaty and others which are not, even where the undertaking is in receipt of investment aid for its non-ECSC activities. [31] The Commission states as much in Recital 33 of the contested decision.

40. Recital 34 of the contested decision distinguishes the end products of the forge, ring-rolling mill and foundry, which are sold on other markets. Since those products are manufactured in dedicated facilities, the production processes are not integrated which means that, in the case of investment

26 — Ibid., Paragraph 2, p. 227 to 229.

27 — See, in particular, p. 240.

28 — Case 328/85 [1987] ECR 5119.

29 — Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1).

30 — Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraph 147. That finding was upheld by the Court of Justice in the order of 25 January 2001 in Case C-111/99 P *Lech-Stahlwerke* v *Commission* [2001] ECR I-727, paragraph 41.

31 — Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v *Commission* [2001] ECR II-1523, paragraphs 61 and 62.

aid, it is possible to distinguish clearly between ECSC and non-ECSC activities.

Conversely, as concerns operating aid, Recitals 35 to 41 of the contested decision explain that it is impossible to distinguish aid granted for ECSC activities from that granted for EC production, since the undertaking does not have separate accounting. Moreover, as the table in Recital 36 demonstrates, the accounting data contained in the report drawn up by KPMG, on which the German Government relies as proof that there is separate accounting, contradict the data contained in the notification of June 1997 for practically every heading, and confirm the Commission's assessment concerning diversion of funds, which is set out in Recital 39. I share the Commission's view that the risk of diversion is a cause for concern in undertakings which do not have separate accounting for each production activity. [32] I also subscribe to the view that, pursuant to paragraph 4 of Annex I, it must be borne in mind that some of the products in the list are linked to by-products which, although they are not listed themselves, are nevertheless capable of affecting the price; accordingly, the annex must be taken to include by-products, as well as other transformed ECSC products, when those products influence the normal conditions of competition which affect primary products.

That concern was raised in a 1988 document, the purpose of which was to delimit certain steelmaking sectors which are not regulated by the ECSC Treaty. [33] In the document, the Commission acknowledged that, in addition to the particularly sensitive competitive position of the sectors in question, there was also a danger that its aid policy to the steel industry could be circumvented by paying aid to subsidiary companies for activities which, although not within the ambit of the ECSC Treaty, might promote their development. It seems logical that the risk should be even greater in cases where ECSC steel is transformed by the same undertaking, rather than by a subsidiary.

41. The Court of First Instance recently confirmed that application of the ECSC Treaty to investment aid granted in respect of non-ECSC production cannot be justified, unless there are adequate guarantees removing any risk of diversion of the aid to ECSC production, it being the responsibility of the Member State, assisted by the recipient undertaking, to furnish the Commission with all the evidence necessary to verify the existence of those guarantees during the administrative procedure. [34]

32 — In paragraph 314 of Case T-371/97 *British Airways and Others* v *Commission* [1998] ECR II-2405, the Court of First Instance held that the mechanism of the holding company, in which the companies are independent of one another, in conjunction with the system of verification by independent consultants and the scheduling of payment of the aid in several tranches, could be treated as an adequate and appropriate means by which to guarantee that the nominal beneficiary would be the sole beneficiary of the aid.

33 — OJ 1988 C 320, p. 3.

34 — *ESF Elbe-Stahlwerke Feralpi* v *Commission*, cited above, paragraphs 125 and 126.

42. The Commission decisions on which the applicant relies to prove the alleged discrimination against it are also irrelevant, since they were adopted in response to different circumstances. [35] However, even if the circumstances had been comparable, it would still have to be borne in mind that respect for the principle of equal treatment must be reconciled with the principle of legality, according to which no person may rely, in support of his claim, on an unlawful act committed in favour of another. [36]

43. It follows from the reasoning set out above that this plea in law must also be dismissed as unfounded.

D — *Fourth plea in law: erroneous assessment of the investment aid for the undertaking's ECSC production, under the Fifth Steel Aid Code*

44. In Germany's opinion, the Commission cannot dispute that the investment aid granted to Gröditzer's ECSC sector, in the sum of DEM 13.3 million, is compatible with the Treaty and with the third indent of Article 5 of the Fifth Steel Aid Code, on the ground that it was not notified until 30 June 1994, when it was the Commission which requested the German Government to withdraw the notification it had sent on 29 June of that year. The contested decision does not record whether the lawfulness of the aid was assessed under the third indent of Article 5 of the Fifth Steel Aid Code and, in Germany's opinion, it does not follow from the fact that the notification period was not respected that the Commission is entitled to demand repayment of aid when it has not assessed, or challenged, the lawfulness of that aid.

45. The Commission points out that the contested decision refers not only to the failure to comply with the time-limit for notifying aid, but also to the fact that, as a result, the aid could not be assessed before the deadline of 31 December 1994, laid down in the Fifth Code for planned investment aid to undertakings established in the territory of the former German Democratic Republic.

46. Nor do I share Germany's view in that connection. The Fifth Code lays down a perfectly clear deadline by which aid may be assessed as compatible with the common market, and, once that deadline has passed, the Commission cannot approve such aid. That was the Court of Justice's interpretation concerning a provision of Decision

35 — The decision in question is Commission Decision 97/21/EC, ECSC of 30 July 1996 on State aid granted in favour of Compañía Española de Tubos por Extrusión SA, located in Llodio, Álava (OJ 1997 L 8, p. 14), which was adopted pursuant to the ECSC Treaty and the EC Treaty. The authorisation for State aid to Productos Tubulares (OJ 1998 C 409, p. 6) was granted because the undertaking had undergone a complete restructuring and its ECSC production, which was for internal consumption, was negligible and was not offered for sale.

36 — Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225, paragraph 14, and Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 334.

No 2320/81/ECSC, the Second Steel Aid Code, [37] in a case in which the Court held that the date in question was a deadline and that it therefore precluded the approval of any plans to grant aid which were notified subsequent to it. [38]

The Court of First Instance has also held that it follows from Articles 1, 5 and 6 of the Fifth Code that plans to grant aid could not be put into effect until the Commission had approved them, and that the deadline of 31 December 1994, laid down for the payment of regional investment aids, was necessarily the deadline imposed on the Commission for declaring whether that aid was compatible. [39] The Court of Justice upheld that interpretation on appeal, confirming that it was impossible to accept that the time-limit for notification laid down in the Fifth Code constituted a time-limit of an indicative nature, so that the Commission could not authorise aid if the plans to grant or alter it had not been notified before the time-limit specifically laid down, a finding that the Court had to raise of its own motion, even though none of the parties had asked it to do so. [40]

47. It was only to be expected that the contested decision would not assess the lawfulness of the aid under the third indent of Article 5 of the Fifth Code, since in 1999 the Commission was not entitled to adopt a measure pursuant to legislation which had ceased to be in force on 31 December 1996. The Court of First Instance has stated that the Member State which has failed to comply with its duty to notify aid cannot demand that the Commission should verify the compatibility of an aid with the common market in the light of an expired code and that, having failed to comply with the conditions laid down by the said code, it is not justified in pleading the principle of legal certainty in order to benefit from the derogations set out therein. [41]

48. Moreover, it has been established that the formal notification of 29 June 1994, concerning the DEM 79 million of investment aid, was withdrawn by the German authorities, which prevented the Commission from assessing it within the time-limit. Irrespective of the reason for taking such action, whether it was at the request of the Commission, or so that, with a view to privatisation, it would be in a position to notify complete and comprehensive details of the aid and so request a global assessment, the German Government must have known what the outcome of its action would be, both in the light of the current

37 — Commission Decision No 2320/81/ECSC of 7 August 1981 establishing Community rules for aids to the steel industry (OJ 1981 L 228, p. 14).

38 — Case 214/83 *Germany* v *Commission* [1985] ECR 3053, paragraphs 45 to 47.

39 — Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, paragraph 41.

40 — Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraphs 54 to 56.

41 — Case T-331/94 *IPK* v *Commission* [1997] ECR II-1665, paragraph 45, and Case T-158/96 *Bolzano and others* v *Commission* [1999] ECR II-3927, paragraph 64.

legislation and of the judgment which the Court delivered in 1985 in a case to which Germany had itself been a party. [42]

49. For the reasons set out, this plea in law is also unfounded and must be dismissed.

E — *Fifth plea in law: erroneous assessment of the investment aid to the non-ECSC production area*

50. This plea in law is subdivided into two parts:

(i) Application of the Fifth Steel Aid Code instead of the guidelines on restructuring aid

51. The applicant points out that there are contradictions in the Commission's reasoning in support of its decision that the investment aid, granted to the non-ECSC production area, cannot be authorised as restructuring aid under Article 87(3)(c) EC, but that, by applying by analogy the system of aid under the ECSC Treaty, only 35% of the total can be regarded as regional aid and receive authorisation. The applicant claims that the undertaking's activities in spheres governed by the EC Treaty do not form part of any of the economic sectors in relation to which the Commission has laid down criteria for the authorisation of State aid (sensitive sectors). It points out that a restructuring plan was submitted as part of the exchange of letters in 1994, 1995 and 1996, and that it was kept up to date until the undertaking was privatised.

52. The Commission submits that decisions relating to the Treuhandanstalt do not apply to ECSC steel production alone, but rather to the whole of the steelmaking sector, including products which are not regulated by the Treaty. The recipient of the aid manufactures both ECSC and other products. It belongs to a sensitive sector, in other words, it is liable to be affected by distortions of competition due to overcapacity in that sector. The fact that special rules exist is an indication that the sector is sensitive.

53. The second paragraph of Recital 56 in the preamble to the contested decision states that the concept of a sensitive sector encompasses not only ECSC steel production but also the preliminary processing, such as forging and casting. Since it operates in both production areas, Gröditzer must be deemed to be in a sensitive sector and, under the rules of the Treuhandanstalt, the aid ought to have been notified.

42 — Case 214/83 *Germany* v *Commission*, cited in footnote 38.

The specific exceptions laid down in the subsequent regulations of the Treuhandanstalt did not apply, wherefore, as the rules of the Treuhandanstalt expressly stipulate, the Commission had to assess the aid in accordance with provisions such as the Guidelines on State aid for rescuing and restructuring firms in difficulty [43] and the Guidelines on national regional aid. [44]

In Gröditzer's case, no restructuring plan showing a return to viability has ever been submitted. As the Commission points out, neither the brief description nor the summary of the investment projects notified amounted to a coherent and detailed restructuring programme. The Court of First Instance has indicated that a document cannot be considered to be a genuine restructuring plan if it contains no provision for any particular measure to remedy the specific problems of the undertaking. Therefore, in the case in question, the aid from public funds was thus not linked to actual restructuring measures provided for in a programme drawn up for that purpose, those being essential conditions for a restructuring plan. [46]

54. As regards aid for restructuring firms in difficulties, the recipient is an ECSC undertaking and the ECSC Treaty does not contain any legal basis for authorising aid for that purpose. Although the type of aid in question has been approved in respect of other ECSC undertakings by decisions adopted under Article 95 CS, they were all cases involving a return to viability following privatisation. In the Order in *Germany* v *Commission*, [45] the Court declared that the purpose of the strict system of aid to the steel sector is, *inter alia*, to prevent the effects particularly harmful to competition — and so to the survival of successful companies — of artificially maintaining undertakings which could not exist in normal market conditions.

55. According to Recital 52 et seq. in the preamble to the contested decision, the investment in the non-ECSC area amounted to DEM 96.9 million and that aid amounting to a total of DEM 96.1 million was granted. Of that sum, DEM 8.4 million corresponded to regional aid, DEM 3.6 million to investment allowances, while the remainder was financed through shareholder loans and guaranteed bank loans. The latter were granted under the general provisions of the Unification Treaty and the Treuhand Act. In October 1998, Germany informed the Commission that, in the period under consideration, the joint Federal Government/*Länder* regional development scheme did not apply to Treuhand companies, meaning that, when granting

43 — OJ 1994 C 368, p. 12.

44 — OJ 1998 C 74, p. 9.

45 — Order of the President of the Court of 3 May 1996 in Case C-399/1995 *Germany* v *Commission* [1996] ECR I-2441, paragraph 80.

46 — *BFM and EFIM* v *Commission*, cited above, paragraph 88.

and guaranteeing the loans, the Treuhandanstalt and its successors were acting as a *de facto* regional aid authority, and the loans were a substitute for regional investment aid.

56. To my mind, the Commission was right to consider that the Guidelines on national regional aid, in force when the aid was granted, were the only legal basis applicable to assessment of the investment aid. The undertaking's EC activities are carried out in a sensitive sector and, under the legal framework for certain steel sectors not covered by the ECSC Treaty, the regional aid ceilings likewise apply.

57. I agree with the Commission that a return to viability has not been proved and does not appear very plausible, since it could simply be owed to exeptional income, in the form of the subsidies, and cannot be accepted as proof that the undertaking has become viable. The Court of First Instance has held that the existence of a positive cash flow is not sufficient to indicate the financial position of an undertaking, in particular where its liquidity is the result of massive subsidies. [47]

47 — *BFM and EFIM* v *Commission*, cited above, paragraphs 83 and 84.

(ii) Failure by the Commission to apply Article 87(2)(c) EC

58. Germany claims that the restructuring of the undertaking, together with the associated measures taken by the Treuhandanstalt and other public bodies, are a typical example of the application of Article 87(2)(c) EC, in particular because Gröditzer, as a steelmaking site, was seriously affected by the repercussions arising from the socialist regime's economic planning and by the problems it had in overcoming them, and because, as a result of the division of Germany, the region's average economic level is far from attaining that of the old *Länder*.

59. There are two reasons why I am unable to agree with the applicant's attempts to rely on Article 87(2)(c) EC in support of its claim that the aid granted to boost the economies of certain regions of the Federal Republic of Germany, which were affected by the division of the country, is compatible with the common market provided that it is required to compensate for the disadvantages caused by that division.

The first reason is that, even if Article 87(2)(c) did apply, as the Commis-

sion has pointed out, the German authorities did not plead it at the correct time; nor did they adduce evidence that the conditions which are necessary for the provision to apply to an undertaking had been met.

The second is based on the Court's interpretation of Article 87(2)(c) in *Germany* v *Commission*,[48] where, having confirmed that that article had not been repealed by either the Treaty on European Union or the Treaty of Amsterdam, the Court pointed out that, since it constitutes a derogation from the general principle that State aid is incompatible with the common market, Article 87(2)(c) must be construed narrowly, adding that the economic disadvantages caused by the division of Germany can mean only the economic disadvantages caused in certain areas of Germany by the isolation which the establishment of that physical frontier entailed, such as the breaking of communication links or the loss of markets as a result of the breaking off of commercial relations between the two parts of German territory. However, the geographical rift is not the direct cause of those disadvantages suffered by the new *Länder* as a whole, but rather the different politico-economic systems set up in each part of Germany.[49]

48 — Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraphs 46 to 56. The Court of First Instance gave a similar interpretation in its judgment in Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraphs 136 and 137.

49 — In reply to a question I asked at the hearing, the agent for the Federal Government acknowledged that, in the light of that judgment, which was delivered while the written phase of these proceedings was in progress, this head of claim had little chance of success.

60. For the reasons stated, this plea in law must also be dismissed in its entirety as unfounded.

F — *Sixth plea in law: erroneous assessment of the circumstances in which privatisation took place*

61. This plea in law is subdivided into two parts.

(i) Inaccurate interpretation of German law and erroneous application of the private investor criterion

62. The Federal Republic of Germany is of the opinion that, in Recital 75 et seq. in the preamble to the contested decision, the Commission has based its assessment of the cost of liquidation on incorrect figures. Germany claims that the distinction, drawn in Recital 80(a), between the obligations of federal institutions owned by the State and those of shareholders, is misleading, since guarantees are not forms of aid laid down in a State guarantees programme, but instead are comparable to declarations issued by holding companies, normal in the private economy, or to guarantees granted by subsidiaries. In respect of a subsidiary's liquidation costs, a private holding company governed by private law must bear in mind its obligation to act as

guarantor of the subsidiary's debts if it has guaranteed its loans in the normal course of business. Likewise, under German law, where an undertaking goes into liquidation, the owner of the capital must bear the costs of site clearance, which in this case are estimated at DEM 87 million. In such circumstances, the shareholders would have had to meet costs of DEM 445 million to wind up the undertaking, and privatisation at a negative sale price of DEM 340 million was, without question, the cheapest option, thereby fulfilling the private investor criterion applicable to systems of aid.

63. The Commission states that, according to the report, the liquidation value of the assets amounted to DEM 94 million, a sum which has to meet the undertaking's liabilities in the order of priority stipulated by German insolvency legislation. Accordingly, the costs of liquidation are limited to that sum alone and, if the Member State were to include higher amounts arising from other obligations, it would be acting not as the owner but as a public authority, which would mean that those amounts could not be taken into account when applying the private investor criterion.

64. To my mind, for the purpose of reviewing the criteria used by the Commission to assess the privatisation procedure, it must be assumed that, as is stated in Recital 44 in the preamble to the Decision, the undertaking in question has been in difficulties since it was set up and has received, from several State shareholders, interest-free loans which it is not obliged to repay, which a private investor would never have granted.

Germany calculates that the cost of liquidation would have been DEM 475 million, which breaks down into DEM 418 million (196 million in respect of shareholder loans, 49 million in respect of guaranteed bank loans, 26 million in respect of other liabilities, and 147 million in respect of provisions for miscellaneous costs) and 57 million for the cost of the liquidation itself, in particular, the operating and running-down costs incurred during that period.

That calculation cannot be accepted as correct in the light of the Court's case-law, according to which a private investor pursuing a structural policy — whether general or sectoral — guided by prospects of viability in the long term, could not allow itself, after years of continuous losses, to make a contribution of capital which proves to be costlier than selling the assets, and which is, moreover, linked to the sale of the undertaking, which removes any hope of profit, even in the longer term. [50]

Moreover, Germany has included in the total cost of the liquidation a series of costs

50 — Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 26.

to the shareholder which are in fact costs that the State has to bear in its capacity as a public authority; thus, the reimbursement of DEM 49 million in bank loans guaranteed by the Treuhandanstalt and other public bodies; a provision of DEM 15 million for long-standing debts; DEM 22 million for costs arising out of a social plan that are not required by any binding obligation; and a provision of DEM 87 million for the cost of site clearance, which includes the demolition of buildings, total clearance of the site, and the sale of the site, which would not have fetched more than DEM 9 million.

65. The Commission rightly asserts that, in the light of the undertaking's financial situation, it is unlikely that a private investor would have provided additional funding for a redundancy and early retirement scheme. Similarly, if the sale value of the site was only 9 million even if the undertaking was under an obligation to clear it, a private investor would not have injected any additional funding at its disposal in the event of winding up, since costs of that kind would have been borne by the State as the guarantor of environmental protection.

In addition, if, in accordance with German law, in the case of insolvency, shareholder loans are to be considered as shareholder equity which cannot be claimed back from the assets and, if those loans were included in the cost of the liquidation, that cost would only amount to DEM 292 million. A comparison of that figure with the cost of privatisation, which totalled DEM 340 million, reveals that it would have been cheaper to wind up the undertaking than to privatise it, from which it follows that a private investor would have chosen liquidation.

(ii) Failure to understand the bidding procedure

66. In connection with the objections raised by the Commission to the sale of the undertaking by competitive tender, Germany points out that in 1992 it had instructed an investment bank to start an international bidding procedure for the sale of the undertaking, to be open to all potentially interested parties, and free from any conditions governing the submission of tenders. It decided to sell the undertaking to Georgsmarienhütte because it had made the most favourable financial offer. Germany considers that the Commission's conduct amounts to unjustified interference with the autonomy of the Member States, since there are no provisions of secondary Community legislation governing the procedure for privatisation of undertakings or stipulating that sales must be conducted through a bidding procedure, the only criterion which can be inferred from the Treaty being that, as the owner of the capital, the State must conduct itself in the same manner as a private investor. Germany claims that the Commission has also failed to prove that other potentially interested parties would have paid more for the undertaking, or that different privatisation procedures would have led, in this case, to a more promising outcome.

Finally, the German Government states that it is aware that the Commission has laid down a number of general principles governing procedures for the privatisation of undertakings,[51] under which Member States are released from the duty to notify. According to those principles, where privatisation is carried out through a transparent and unconditional sale by public auction, as a result of which the contract is awarded to the highest bidder, it will be deemed that no aid was granted. That does not mean, however, that other bidding procedures are not capable of ensuring that the Member State, as owner of the capital, conducts the sale in the best conditions possible, even if it is not exempt from the duty to notify, a duty which the German Government carried out. The price cannot be the sole deciding factor in determining whether the sale involves aid in favour of the buyer; instead, there must be an evaluation of all the circumstances surrounding the contract, which ought, in addition to the nominal price, including the assumption of liabilities, also to cover such matters as the acquisition of the undertaking's debts by the investor, and the guarantees and obligations entered into by the buyer. Under the agreement for the privatisation of Gröditzer, the buyer undertook to invest DEM 39.6 million, which was the amount of the 100% penalty for non-compliance with obligations, by 31 December 2002; 717 jobs were guaranteed, together with 45 training posts; and a penalty of DEM 40 000 per job per year was stipulated until 31 December 2002.

67. The Commission considers that it follows from the fact that in this case there was no open, transparent and unconditional tendering procedure, leading to the award of the contract to the highest tenderer, that the procedure entailed the grant of aid. Indeed, neither the involvement of private banks, using customary business media, nor the actual notification of the measures is sufficient to rule out the existence of the aid.

68. Once again, I endorse the Commission's arguments in support of its conclusion that the procedure was not unconditional, open or transparent.

First, the memoranda from the investment banks, which expressly mentioned the possibility that State aid might be granted, did not call for any binding bid; instead, bidders were asked to submit a business plan, setting out detailed commitments regarding the creation or saving of jobs, future investment, and financing. The undertakings selected were invited to take part in bilateral negotiations; and the commitments entered into would have had a decisive influence on the purchase price. No concrete tender was sought, nor were any parameters or ceilings fixed for the assessment of tenders. In addition, the procedure took place without an open invitation to tender, meeting clear requirements, but rather with an invitation to open individual negotiations regarding

51 — *XXIII Report on Competition Policy*, 1993, point 403.

commitments to be entered into by both seller and buyer, which were to be finalised in a process which was not clearly defined. It can therefore be inferred that the obligations entered into influenced the price stipulated.

Second, the differences between positions in the final negotiations were necessarily due to the procedure chosen and the purchasing company, Georgsmarienhütte, had the opportunity to adapt its final position to the seller's requirements, so that, in the absence of genuine competition, there was no guarantee that the consideration paid for the commitments entered into, which had not been notified to all the tenderers in advance, reflected the normal market price. That lack of transparency is confirmed by Article 6 of the contested decision, which states that, under Article 9(2) of the agreement of 27 February 1997 governing the sale of shares in Gröditzer to Georgsmarienhütte, Germany planned to grant to the undertaking a loan amounting to DEM 3.3 million by way of an advance against regional aid to be received.

69. Finally, I do not accept Germany's contention that the Commission's complaints about the privatisation procedure amount to interference with a Member State's autonomy. While Article 259 EC lays down safeguards for the system of private ownership of property, Article 87 EC and Article 4(c) CS prohibit the grant of State aid where property is transferred from public to private ownership. I agree with the Commission that the fact that the undertaking was sold to the highest bidder in an auction, because the other bidders were not prepared to purchase it unless the State provided more funds, does not prove that the terms agreed with the successful bidder did not include aid.

70. For the reasons given, this plea in law also must be dismissed in its entirety as unfounded.

VI — Costs

71. Under Article 69(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 other party's pleadings. Since I propose the dismissal of Germany's application, and since the Commission has applied for an order for costs, the applicant Member State must be ordered to pay the costs.

VII — Conclusion

72. In view of the foregoing considerations, I propose that the Court of Justice should:

(1) dismiss in its entirety the application brought by the Federal Republic of Germany for the annulment of Articles 4 to 7 of Commission Decision 1999/720/EC, ECSC of 8 July 1999 on State aid granted by Germany to Gröditzer Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH;

(2) order the applicant to pay the costs.