JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
12 July 2001 *

In Joined Cases T-12/99 and T-63/99,

UK Coal plc, formerly RJB Mining plc, whose registered office is in Harworth (United Kingdom), represented by M. Brealey, Barrister, and J. Lawrence, Solicitor, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by V. Kreuschitz and K.-D. Borchardt, acting as Agents, and N. Khan, Barrister, with an address for service in Luxembourg,

defendant,

supported by

Federal Republic of Germany, represented by W.-D. Plessing and T. Jürgensen, acting as Agents, and M. Maier, lawyer,

* Language of the case: English.

and by

RAG Aktiengesellschaft, established in Essen (Germany), represented by M. Hansen and S. Völcker, lawyers, with an address for service in Luxembourg,

interveners,

APPLICATIONS for annulment of Commission Decisions 1999/270/EC and 1999/299/ECSC of 2 and 22 December 1998 on German aid to the coal industry for 1998 and 1999 (OJ 1999 L 109, p. 14 and L 117, p. 44),

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

composed of: A.W.H. Meij, President, K. Lenaerts, A. Potocki, M. Jaeger and J. Pirrung, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 14 February 2001,

gives the following

Judgment

Legal context

Relevant legislation

ECSC Treaty

1 The Treaty establishing the European Coal and Steel Community prohibits, in principle, State aid granted to coalmining undertakings. Article 4 provides that the following are incompatible with the common market for coal and steel and are accordingly to be prohibited 'within the Community, as provided in [the ECSC] Treaty:... (c) subsidies or aids granted by States... in any form whatsoever...'.

2 By virtue of the first paragraph of Article 15 of the ECSC Treaty, all decisions of the Commission must state the reasons on which they are based.

3 The first paragraph of Article 95 of the ECSC Treaty states:

'In all cases not provided for in this Treaty where it becomes apparent that a decision... of the Commission is necessary to attain, within the common market in coal and steel and in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4, the decision may be taken... with the unanimous assent of the Council and after the Consultative Committee has been consulted.'

General Decision No 3632/93/ECSC

4 It was pursuant to the first paragraph of Article 95 of the ECSC Treaty that the Commission adopted the general Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry (OJ 1993 L 329, p. 12, hereinafter 'the Code').

5 Under Article 1(1) of the Code, 'all aid to the coal industry... granted by Member States... may be considered Community aid and hence compatible with the proper functioning of the common market only if it complies with Articles 2 to 9'.

6 Article 2(1) of the Code provides that 'aid granted to the coal industry may be considered compatible with the proper functioning of the common market provided it helps to achieve at least one of the following objectives:

— to make, in the light of coal prices on international markets, further progress towards economic viability with the aim of achieving degression of aids,

...'.

7 Article 3(1) of the Code states that 'operating aid' to cover the difference between production costs and the selling price resulting from the situation on the world market may be considered compatible with the common market on certain conditions. In accordance with the first indent of Article 3(1), the aid notified per tonne is not to exceed for each undertaking or production unit the difference between production costs and foreseeable revenue in the following coal production year; under the second indent, the aid actually paid is to be subject to annual correction, based on the actual costs and revenue, at the latest by the end of the coal production year following the year for which the aid was granted.

8 The first subparagraph of Article 3(2) of the Code provides that Member States which intend to grant operating aid for the 1994 to 2002 coal production years to coal undertakings are required to submit to the Commission in advance 'a modernisation, rationalisation and restructuring plan [designed] to improve the economic viability of the undertakings concerned by reducing production costs'. According to the second subparagraph of Article 3(2), the plan must provide for

appropriate measures and efforts to generate 'a trend towards a reduction in production costs at 1992 prices, during the period 1994 to 2002'.

9 Under Article 4 of the Code, 'aid for the reduction of activity', that is to say aid to cover the production costs of undertakings or production units 'which will be unable to attain the conditions laid down by Article 3(2)', may be authorised provided that it satisfies the conditions laid down in Article 3(1) and is the subject of a closure plan.

10 Section III of the Code, entitled 'Notification, appraisal and authorisation procedures', contains Articles 8 and 9. Article 8 reads as follows:

'1. Member States which intend to grant operating aid as referred to in Article 3(2)... for the 1994 to 2002 coal production years shall submit to the Commission, by 31 March 1994 at the latest, a modernisation, rationalisation and restructuring plan for the industry in accordance with Article 3(2)...

2. The Commission shall consider whether the plan or plans are in conformity with the general objectives set by Article 2(1) and with the specific objectives and criteria set by [Article] 3...

3. Within three months of notification of the plans, the Commission shall give its opinion on whether they are in conformity with the general and specific objectives, without prejudging the ability of the measures planned to attain these objectives....

4. If a Member State decides to make amendments to the plan which alter its general tendency in respect of the objectives pursued by this Decision, it must inform the Commission so that the latter may rule on the amendments in accordance with the procedures set out in this Article.'

11 Article 9 of the Code provides:

'1. By 30 September each year (or three months before the measures enter into force) at the latest, Member States shall send notification of all the financial support which they intend to grant to the coal industry in the following year, specifying the nature of the support with reference to the general objectives and criteria set out in Article 2 and the various forms of aid provided for in Articles 3 to 7 and its relationship to the plans submitted to the Commission in accordance with Article 8.

2. By 30 September each year at the latest, Member States shall send notification of the amount of aid actually paid in the preceding coal production year and shall declare any corrections made to the amounts originally notified.

...

4. Member States may not put into effect planned aid until it has been approved by the Commission on the basis, in particular, of the general criteria and objectives laid down in Article 2 and of the specific criteria established by Articles 3 to 7...

5. In the event of refusal, any payment made in anticipation of authorisation from the Commission shall be repaid in full by the undertaking that received it...

6. In its assessment of the measures notified, the Commission shall check whether the measures proposed are in conformity with the plans submitted in accordance with Article 8 and with the objectives set out in Article 2...'.

12 According to Article 12, the Code is to expire on 23 July 2002.

The contested individual decisions

Decision relating to 1998

13 By letter of 28 October 1997, the Federal Republic of Germany notified to the Commission, pursuant to Article 9(1) of the Code, aid which it intended to grant to the coal industry for 1998. That aid included, in particular, operating aid, within the meaning of Article 3 of the Code, of DEM 5 171 000 000 and DEM 81 000 000, the latter sum relating to the scheme for maintaining an underground labour force by means of extra payments to miners (known as the *Bergmannsprämie*, hereinafter 'the bonus'), and aid for the reduction of activity within the meaning of Article 4 of the Code totalling DEM 3 164 000 000. Following requests from the Commission, the German Government supplied

additional information by letters of 26 March, 28 April, 27 August, 23 October and 4 November 1998.

14 By its letter of 26 March 1998, the German Government in addition gave notice, in accordance with Article 8(4) of the Code, of the new general direction of its coal policy for the period ending in 2002, amending the former German plan for modernisation, rationalisation, restructuring and reduction of activity in the German coal industry in respect of which the Commission had given a favourable opinion in Decision 94/1070/ECSC of 13 December 1994 (OJ 1994 L 385, p. 18, hereinafter 'the original plan').

15 Commission Decision 1999/270/ECSC of 2 December 1998 on German aid to the coal industry for 1998 (OJ 1999 L 109, p. 14, hereinafter 'the decision contested in Case T-12/99', 'the contested decision' or 'the decision relating to 1998') authorises, in Article 1(a), (b) and (c) of its operative part, the operating aid and aid for the reduction of activity which are referred to above. In the final paragraph of Part III of the preamble to the decision, the Commission takes the view that the new plan submitted by Germany (hereinafter 'the amended plan') is compatible with the objectives and criteria of the Code.

Decision relating to 1999

16 By letters of 25 September, 2 December and 14 December 1998, the Federal Republic of Germany notified to the Commission aid which it intended to grant to the coal industry for 1999. That aid included, in particular, operating aid of DEM 5 141 000 000, operating aid of DEM 73 000 000 for the bonus and aid for the reduction of activity totalling DEM 3 220 000 000.

17 Commission Decision 1999/299/ECSC of 22 December 1998 on German aid to the coal industry for 1999 (OJ 1999 L 117, p. 44, hereinafter 'the contested decision' or 'the decision relating to 1999') authorised the abovementioned aid on the ground, *inter alia*, that it was consistent with the amended plan which the Commission had approved in its decision relating to 1998 (contested in Case T-12/99).

Facts and procedure

18 The applicant is a privately-owned mining company established in the United Kingdom, which took over the principal mining operations of British Coal. Since the appearance of substitute energy sources and the increase in imports of coal from outside the Community have caused a large reduction in demand for coal in the United Kingdom — the applicant's 'traditional' market — since 1990, the applicant has attempted to find a market for some of its surplus production, in particular in Germany.

19 By letter of 13 November 1997, Ruhrkohle AG, now RAG Aktiengesellschaft (hereinafter 'RAG'), notified the Commission of its intention to acquire the entire share capital of Saarbergwerke AG (owned by the Federal Republic of Germany and the Saarland) and of Preussag Anthrazit GmbH (owned by Preussag AG). The transaction was to lead to the merger of the three German coal producers (hereinafter 'the merger') and constitute a concentration between undertakings within the meaning of Article 66(1) of the ECSC Treaty.

20 The merger forms part of an agreement, the *Kohlekompromiß* (settlement concerning coal), concluded on 13 March 1997 between those three companies, the Federal Republic of Germany, the *Land* of North-Rhine Westphalia, the

Saarland and the German mining and power station workers' union. The *Kohlekompromiß*, which includes the merger and the promise of the grant of State aid, is designed to provide a socially acceptable framework for the adjustment of the German coal industry to a competitive environment by 2005.

21 Pursuant to Article 67(1) of the ECSC Treaty, the merger and the conditions relating thereto were notified to the Commission by the German Government on 9 March 1998. In that notification, the German Government explained that the sale of Saarbergwerke to RAG, for the token sum of DEM 1, was part of the policy for privatisation of the German coal industry.

22 By letter of 16 March 1998, the applicant submitted to the Commission its observations on the planned merger, which it clarified in a complaint of 1 May 1998.

23 By letter of 5 May 1998, the applicant lodged a formal complaint with the Commission relating to various State aid measures in favour of the German coal industry proposed for 1997, 1998 and beyond and to the alleged aid inherent in the planned merger, in particular the sale of Saarbergwerke for DEM 1 since that sale for less than the real value was liable to involve State aid. The complaint was registered by the Commission under No 98/4448.

24 The Commission authorised the merger by decision of 29 July 1998 (Case No IV/ECSC 1252 — RAG/Saarbergwerke AG/Preussag Anthrazit). It is stated in paragraph 54 of that decision, under the heading 'State aid', that the decision 'concerns only the application of Article 66 of the ECSC Treaty and does not prejudge any decision of the Commission relating to the application of other provisions of the EC Treaty or of the ECSC Treaty and of corresponding secondary law, in particular the application of provisions relating to State aid'.

25 Following that decision, the applicant, by letter of 9 September 1998, again wrote to the Commission to inform it of its concerns regarding, in particular, alleged aid inherent in the merger.

26 On 29 September 1998, the applicant brought an action before the Court of First Instance for annulment of the decision by which the Commission had authorised the merger. By judgment of 31 January 2001 in Case T-156/98 *RJB Mining* v *Commission* [2001] ECR II-337, the Court annulled that decision. On 12 and 19 April 2001, the Federal Republic of Germany and RAG, who had intervened in support of the Commission in that case, brought appeals against the judgment (Cases C-157/01 P and C-169/01 P).

27 On 3 March 1999, the applicant additionally brought an action before the Court of First Instance for a declaration that the Commission had unlawfully failed to examine the alleged aid linked to the merger. By order of 25 July 2000 in Case T-64/99 *RJB* v *Commission*, not published in the ECR, the Court decided that there was no need to proceed to judgment in that case.

28 Finally, by applications lodged at the Registry of the Court of First Instance on 18 January and 3 March 1999, the applicant brought the present actions.

29 By orders of 3 September 1999, the President of the First Chamber (Extended Composition) of the Court of First Instance granted the Federal Republic of Germany and RAG leave to intervene in Case T-12/99 in support of the Commission.

30 The composition of the Chambers of the Court of First Instance was altered from the beginning of the new judicial year and the Judge-Rapporteur was assigned to the Second Chamber (Extended Composition), to which the present cases were therefore allocated.

31 By orders of 19 October 1999, the President of the Second Chamber (Extended Composition) of the Court of First Instance granted the Kingdom of Spain, the Federal Republic of Germany and RAG leave to intervene in Case T-63/99 in support of the Commission. By order of 21 January 2000, the President of the Second Chamber (Extended Composition) of the Court of First Instance took formal note of the withdrawal of the Kingdom of Spain and ordered each party to bear its own costs in relation to the latter's intervention.

32 By pleadings of 19 November 1999 in Case T-12/99 and 28 January 2000 in Case T-63/99, the interveners submitted their observations.

33 By pleadings of 24 March 2000 in Case T-12/99 and 7 April 2000 in Case T-63/99 the applicant expressed its views on those observations. The Commission waived its right to respond to the observations.

34 By order of 10 April 2000, the President of the Second Chamber (Extended Composition) of the Court of First Instance, after hearing the parties in this connection, joined the two cases for the purposes of the oral procedure and judgment, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

35 With regard to the merger, it became apparent in the course of the present proceedings that, by letter of 4 February 2000, the Commission had initiated a

formal procedure with a view to obtaining information from the German Government on aid which may have been linked to the merger.

36 In that letter, published in the *Official Journal of the European Communities* on 8 April 2000 in the form of a notice pursuant to Article 88 of the ECSC Treaty (OJ 2000 C 101, p. 3), the Commission recalled that the German Government had provided it with information concerning the intended privatisation of Saarbergwerke, in particular the executive summary of a report completed in January 1996, an evaluation carried out in March 1996 and a short report of 9 July 1998, all of which were drawn up by the consultancy Roland Berger and Partner GmbH, and that the March 1996 assessment had indicated that the synergies achieved by merging the coal activities of Saarbergwerke and RAG could be worth roughly DEM 25 000 000 to DEM 40 000 000 per year in the medium to long term.

37 In the letter, the Commission also observed that the information presented to it by the German Government did not specify a value for Saarbergwerke's 'white sector' (its non-coal activities, that is to say all activities other than those related to indigenous coal). It pointed out, however, that in an action brought before the Court of First Instance on 25 January 1999 (Case T-29/99), the applicant in that case, the company VASA Energy, had included a part of the report by Roland Berger and Partner GmbH of January 1996 on a restructuring concept for Saarbergwerke; in that part, which had been presented to the German authorities but not passed on by the latter to the Commission, the value of the 'white sector' was estimated at around DEM 1 000 000 000.

38 The Commission concluded that there was reason to believe that the privatisation of Saarbergwerke might have involved non-notified aid in favour of RAG totalling up to DEM 1 000 000 000. It therefore called on the Federal Republic of Germany to produce several documents and invited the other Member States and interested parties to send their comments on the matter.

39 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure, requested the parties to reply in writing to certain questions before the date of the hearing. The parties met those requests.

Forms of order sought

40 The applicant claims that the Court should:

— annul the contested decisions;

— order the Commission to pay the costs;

— order RAG and the Federal Republic of Germany to pay the costs incurred by the applicant by reason of their intervention.

41 The Commission contends that the Court should:

— dismiss the actions;

— order the applicant to pay the costs.

42 RAG contends that the Court should:

— dismiss the actions as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs, including those incurred by RAG.

43 The Federal Republic of Germany requests the Court to dismiss the actions and order the applicant to bear the costs.

Admissibility of the actions

Arguments of the parties

44 RAG and the German Government contend that the actions are inadmissible, since the applicant has not established any proper interest in challenging the aid approved by the contested decisions. The applicant is not an actual, or even potential, competitor of RAG. Its costs for delivering coal to destinations outside

the United Kingdom consistently entail a final cost vastly exceeding market prices, since producers outside the Community have much lower production costs than the applicant. Consequently, the applicant has no realistic prospect of exporting coal from the United Kingdom, whether to Germany or elsewhere.

45 The interveners add that the applicant's difficulties in finding buyers for its coal are unrelated to any aid to the German industry. The ending of German aid and the subsequent reduction of the German supply of coal would not enable the applicant to attain the objective sought, namely the sale of its coal in Germany, given its lack of competitiveness.

46 The Commission states that it is for the Court to assess whether the actions are admissible. It points out that, even if the German subsidy system were abolished, the applicant would still face another insuperable barrier in the form of a glut of coal available at world market prices. Referring to figures provided by Eurostat, the Commission also notes that the German market is far from closed to foreign coal at competitive prices. Following an 84% increase in its imports between 1993 and 1998, Germany has become the Community's major coal importer.

47 The applicant counters that there can be no serious doubt that it is 'concerned' by the contested decisions within the meaning of the second paragraph of Article 33 of the ECSC Treaty. It is regularly engaged in the production of coal and its sale to industrial consumers. Thus, it is a competitor of the recipients of the aid at issue, particularly as the grant and approval of that aid affects its ability to sell coal in Germany and in its traditional market, the United Kingdom.

48 According to the applicant, it is not a requirement of the second paragraph of Article 33 of the ECSC Treaty that, in order for an undertaking to be 'concerned'

by a decision authorising aid, it must be in direct and actual competition with the undertaking receiving the aid. While it is true that, in Joined Cases 24/58 and 34/58 *Chambre syndicale de la sidérurgie and Others* v *High Authority* [1960] ECR 281, at p. 292, and in Case 30/59 *Steenkolenmijnen* v *High Authority* [1961] ECR 1, at p. 16, the Court of Justice in fact found such competition, it simply confined its analysis to the facts in issue in those two cases.

49 The applicant acknowledges that the recent drop in world market prices, particularly since 1998, makes it more difficult for it to compete on the international market, while pointing out that it continues progressively to reduce its costs — and significantly so. However, in October 2000 the price of coal had increased by some 48% compared with the low which it reached in 1999. In addition, the applicant's coal is produced from various sources with different production costs. Thus, part of its coal production is actually competitive in the international market.

50 The applicant adds that, by submitting complaints to the Commission on 1 and 5 May 1998, it participated in the administrative procedure which culminated in authorisation of the disputed aid. Furthermore, the applicant is expressly referred to in the final paragraph of Part I of the preamble to the decision relating to 1998.

Findings of the Court

51 The fact that the interveners alone have contested the admissibility of the actions, while the defendant has left the matter for the Court to decide, does not prevent the Court from considering of its own motion, pursuant to Article 113 of the

Rules of Procedure, the question of admissibility raised (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 19 to 23, and Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraphs 86 and 87).

52 Under the second paragraph of Article 33 of the ECSC Treaty, undertakings may institute proceedings for the annulment of decisions 'concerning them' which are individual in character. As the Court of Justice has acknowledged, in particular in *Chambre syndicale de la sidérurgie*, cited above, p. 292, in Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraphs 14 and 15, and in Case 236/86 *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761, paragraph 8, an undertaking is concerned, for the purposes of that provision, by a Commission decision which permits benefits to be granted to another undertaking where they are in competition with one another.

53 In deciding when an undertaking is 'concerned' because it is 'in competition' with another undertaking, it should be noted, first, that the conditions governing admissibility laid down by the second paragraph of Article 33 of the ECSC Treaty are less strict than those for an action for annulment brought under the second paragraph of Article 173 of the EC Treaty (now, after amendment, the second paragraph of Article 230 EC). Also, it is well-established case-law that the provisions of the ECSC Treaty concerning the right of individuals to bring an action must be interpreted widely in order to safeguard their legal protection (judgment in Case 66/76 *CFDT* v *Council* [1977] ECR 305, paragraph 8, and order in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 45).

54 Second, with regard specifically to the State aid rules in the ECSC Treaty, it is settled case-law that Article 4(c) of the Treaty lays down such a general, strict and unconditional prohibition on aid that it is unnecessary to examine whether, in point of fact, there is interference or potential interference with the conditions of

competition in order to be able to declare aid incompatible with the common market. That prohibition does not presuppose that the aid is such as to distort or threaten to distort competition by favouring certain undertakings or the production of certain goods (order in Case C-111/99 P *Lech-Stahlwerke* v *Commission* [2001] ECR I-727, paragraph 41, and judgment in Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraphs 98 and 99).

55 Moreover, Article 4(c) of the ECSC Treaty does not contain a *de minimis* rule under which aid entailing only a slight distortion of competition would escape from the prohibition laid down (*Lech-Stahlwerke*, cited above, paragraph 41, and *Neue Maxhütte Stahlwerke and Lech-Stahlwerke*, cited above, paragraph 147). Nor does the Code, on whose basis the decisions contested in the present case were adopted in the field governed by the ECSC Treaty, contain a *de minimis* rule, such as that laid down for the regime governing State aid falling within the EC Treaty in Commission notice 96/C 68/06 (OJ 1996 C 68, p. 9).

56 It follows that the admissibility of an action brought under the second paragraph of Article 33 of the ECSC Treaty by a Community coalmining undertaking, complaining of an infringement of Article 4(c) of that Treaty and directed against a decision by the Commission authorising the grant of State aid to another Community coalmining undertaking, cannot depend on actual or potential competition being proved. Having regard to the specific features of the ECSC regime which are mentioned above, it is sufficient to establish that there is a body of evidence supporting the conclusion that competition between the undertakings in question is not an unrealistic possibility.

57 The Commission has acknowledged that there is a degree of competition between the German and United Kingdom coal industries. In the contested decisions, it required Germany to take care to ensure that the aid at issue 'does not distort

competition or produce discrimination between coal producers... in the Community' (second paragraph of Part VIII of the preamble to the decision relating to 1998 and second paragraph of Part VI of the preamble to the decision relating to 1999).

58 Furthermore, Commission Decision 1999/184/ECSC of 29 July 1998 on aid granted by Germany to the companies Sophia Jacoba GmbH and Preussag Anthrazit GmbH for 1996 and 1997 (OJ 1999 L 60, p. 74) shows that such intra-Community trade may actually take place, since two German coalmining undertakings used State aid to reduce their prices and sell coal on the United Kingdom market. While the Commission and the interveners stated, in reply to a question from the Court, that that decision relates to a particular type of coal, sized anthracite, which the applicant has never produced, and that, at the material time, RAG had decided to cease all exports of German coal to the United Kingdom, it need merely be observed that that is a question of commercial choices freely made on the basis of short-term economic and financial interests which are liable to be changed when the underlying data also change. There is thus nothing to prevent intra-Community trade concerning the applicant from recurring.

59 Finally, it is not in dispute that, in the present case, the applicant lodged a complaint with the Commission on 5 May 1998 relating to various State aid measures in favour of the German coal industry proposed for 1997, '1998 and beyond', that is to say for the period covered by the contested decisions, and in particular to the alleged aid inherent in the merger. The applicant thus played an active part in the administrative procedure before the Commission with regard to both the contested decisions. However, neither decision upheld the claims formulated by the applicant in that complaint.

60 It follows from the considerations set out above that the applicant is concerned, within the meaning of the second paragraph of Article 33 of the ECSC Treaty, by the contested decisions.

61 The actions must therefore be declared admissible.

Admissibility of the claims allegedly directed against approval of the amended plan

62 According to RAG, it is not open to the applicant to challenge the contested decisions in so far as they approve the amendment of the original plan. Under the second paragraph of Article 33 of the ECSC Treaty, an action for annulment can be brought only against 'decisions' or 'recommendations', while opinions given by the Commission under Article 8(3) and (4) of the Code on plans submitted to it by Member States have no binding force but are measures of purely preparatory character with regard to aid in the proper sense. Purely preparatory measures cannot be challenged by an action for annulment. Finally, the applicant has no legitimate interest in challenging the amendment of the plan. The amended plan provides for deeper cuts in overall production than the original plan. Therefore, the amended plan could only improve whatever prospects the applicant has to sell coal in Germany.

63 In that regard, suffice it to state that the claims for annulment made by the applicant are directed at the contested decisions and not at the Commission's positive opinion on the amended plan, which appears only in the preamble to the decision relating to 1998. The plea of inadmissibility raised by RAG must therefore be rejected.

64 In so far as RAG disputes the applicant's legitimate interest to put forward a submission challenging that positive opinion, on the ground that the amended plan is in actual fact favourable to the applicant, the Court observes that, by virtue of Article 9(6) of the Code, the aid contested in the present actions must be

in conformity with the plan upon which the Commission has given a positive opinion satisfying the criteria of Article 8 of the Code. Accordingly, the applicant is entitled to put forward, in the form of a plea of illegality (Case 9/56 *Meroni* v *High Authority* [1958] ECR 133, at pp. 139, 140), a submission which seeks to cast doubt on the approval of the amended plan.

Substance

65 In support of its actions, the applicant puts forward a series of pleas in law, of which several overlap in the two cases and some have already been put forward in Case T-110/98 between the same parties, disposed of by the interlocutory judgment of the Court of First Instance of 9 September 1999 in Case T-110/98 *RJB Mining* v *Commission* [1999] ECR II-2585 (hereinafter 'the interlocutory judgment') and the subsequent order of the Court of 25 July 2000 in Case T-110/98 *RJB Mining* v *Commission* [2000] ECR II-2971 (hereinafter 'the order of 25 July 2000'). It appears appropriate to consider those latter pleas first.

The plea alleging that the Commission lacked competence to approve, in the decision relating to 1998, aid already paid

66 The applicant points out that the aid approved by the Commission on 2 December 1998 had already been granted to the recipient undertakings and maintains that the Code does not allow aid already granted to be authorised *ex post facto*. The system for approval of aid to the Community coal industry is a system of prior authorisation. Accordingly, the Commission lacked competence to adopt the contested decision.

67 The Court notes that a similar plea, put forward with regard to the aid in favour of the German coal industry for 1997 approved by the Commission, was rejected by the interlocutory judgment (paragraphs 65 to 83). For the reasons set out in that judgment, the present pleas should also be rejected.

68 No provision of the Code prohibits the Commission from examining the compatibility of planned aid with the common market solely because the Member State which notified that aid has already paid it without waiting for prior authorisation. On the contrary, in so far as Article 9(5) of the Code makes the repayment of aid paid in anticipation expressly subject to the condition that the Commission must have refused authorisation, it necessarily implies that the Commission has the power to grant authorisation in such a situation. Finally, at a more general level, the substantive and procedural provisions in the Code and the system established by Articles 92 and 93 of the EC Treaty (now, after amendment, Articles 87 and 88 EC) do not differ on points of principle, so that it would not be justified to interpret the provisions of the Code, in relation to Article 4(c) of the ECSC Treaty, more restrictively than paragraphs 2 and 3 of Article 92 of the EC Treaty in relation to paragraph 1 thereof, and the Court of Justice has consistently held that the Commission is obliged, under Article 92 of the EC Treaty, to make an *ex post facto* assessment of aid already paid (see the case-law cited in paragraph 77 of the interlocutory judgment).

69 Consequently, the Commission had the power in the present case to approve *ex post facto* aid paid before it had been authorised.

70 In the same context, the applicant has also contended, for the first time at the hearing, that the aid planned for 1998 was not notified by the German Government to the Commission until 28 October 1997 whereas, under Article 9(1) of the Code, that notification should have taken place by 30 September 1997 at the latest. Referring to the judgment in Case C-210/98 P

Salzgitter v *Commission* [2000] ECR I-5843, at paragraphs 49 to 56, which concerns Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57, hereinafter 'the Fifth Steel Code'), it has submitted that that time-limit for notification operated as a time-bar such as to preclude the approval by the Commission of aid proposals notified subsequent to it.

71 As was stated in *Salzgitter*, cited above, at paragraph 56, the Community judicature must raise of its own motion any lack of Commission competence. Accordingly, the applicant cannot be barred from raising this new complaint.

72 However, the judgment in *Salzgitter* concerned regional investment aid, whose approval under the Fifth Steel Code is entirely by way of exception and which is to be phased out quickly within three years, while important investment aid projects are subject to prior consultation with other Member States (Opinion of Advocate General Jacobs in *Salzgitter*, paragraphs 86, 87 and 88). Specific features of that kind requiring the time-limit for notification to be interpreted strictly under the Fifth Steel Code are absent from the coal code.

73 Furthermore, in *Salzgitter* the planned aid had been notified approximately five months after the final date set by the Fifth Steel Code and approximately five weeks before the expiry of the period within which it could be authorised; thereafter the absolute prohibition on State aid laid down by Article 4(c) of the ECSC Treaty again applied. In the present case, by contrast, the time-limit for notification was exceeded by only four weeks and the subsequent period during which aid may be authorised extends to 2002.

74 It should be noted that the Commission's power to authorise *ex post facto* aid already paid was justified, in the interlocutory judgment, by the wording, the general logic and the specific nature of the Code. Thus, it was held at paragraph 80 of that judgment that the coal sector has been marked, since 1965, by the need of the Community's industry to obtain constant financial support and by the structural uncompetitiveness of that industry, whereas the State aid regime in the steel sector — a sector particularly sensitive to interference in its competitive operation — is stricter, for which reason the case-law concerning the Fifth Steel Code cannot simply be transposed to the coal sector.

75 The Fifth Steel Code established a regime for the authorisation of State aid which is more restrictive than that established by the code governing the authorisation of State aid in the coal sector. In contrast to the former, the latter is marked by the repetitive, annual nature of the State aid; the aid must, furthermore, fall within multiannual plans covering the period from 1994 to 2002.

76 In this light, having regard to the structural uncompetitiveness of the German coal industry and to the German plan covering the period to 2002, it was objectively foreseeable that the German Government would, in 1997, notify State aid for 1998 of roughly the same amount as the previous year. Such a situation, inherent in the coal sector, is comparable to that declared lawful by the Court of Justice in Case 214/83 *Germany* v *Commission* [1985] ECR 3053, paragraphs 50 and 51, relating to programmes of aid to the steel industry the precise amount of which to be authorised had been notified out of time.

77 In those circumstances, the time-limit for notification prescribed by Article 9(1) of the Code — which, moreover, does not merely set the time-limit at 30 September of each year but allows the more flexible alternative of sending notification of financial support 'three months before the measures enter into

force' — must be regarded as being a purely procedural time-limit of an indicative nature, the exceeding of which cannot as such deny the Commission the power to authorise planned aid notified late.

78 Consequently, the complaint founded on the judgment in *Salzgitter* must be rejected.

The pleas alleging misapplication by the Commission of the criterion of economic viability of the undertaking receiving the aid and breach of the obligation to state reasons in this regard

79 The applicant alleges that the Commission failed to comply with Article 2(1) of the Code in conjunction with Article 3 thereof, requiring it to assess whether undertakings in receipt of operating aid have a reasonable prospect of becoming economically viable. Notwithstanding that obligation, the Commission failed to consider whether the amended plan requires the relevant undertakings to be capable of becoming economically viable within the foreseeable future. In the applicant's submission, none of those undertakings can ever become viable. Consequently, the Commission manifestly erred in its assessment in that regard. Finally, the Commission failed to comply with its obligation to state reasons, since the contested decisions are silent on the question.

80 The Court notes that similar pleas, put forward with regard to the aid to the German coal industry for 1997 approved by the Commission, have already been rejected by the interlocutory order (paragraphs 97 to 116) and by the order of 25 July 2000 (paragraph 45). For the reasons set out in that judgment and that order, the corresponding arguments advanced here must likewise be rejected.

81 No provision in the Code states expressly that operating aid must be strictly reserved for undertakings with reasonable chances of achieving economic viability in the long term, in the sense that they must be capable of meeting competition on the world market on their own merits. The relevant provisions of the Code do not require that the undertaking in receipt of operating aid achieve viability by the end of a fixed period. They require only that economic viability 'improve', the reason for that open-ended formulation being the structural uncompetitiveness faced by the Community coal industry because most of its undertakings remain uncompetitive in relation to imports from non-member countries. It follows that improvement in the economic viability of a given undertaking necessarily means no more than a reduction in the level of its non-profitability and its non-competitiveness.

82 Finally, given that the plea alleging infringement of Articles 2(1) and 3 of the Code, founded on the lack of prospects of viability for the undertakings in receipt of the aid at issue, must be rejected, the Commission was not required to include in the contested decisions specific reasoning concerning the prospects of a return to financial stability for the undertakings in receipt of the aid. The plea alleging breach of the obligation to state reasons must therefore also be rejected.

The pleas alleging misapplication by the Commission of the criterion of a reduction in production costs in the decision relating to 1999 and breach of the obligation to state reasons in this regard

Arguments of the applicant

83 In the reply lodged in Case T-63/99, the applicant contends that, in the light of the interlocutory judgment, it is apparent that the Commission erred in law, so that

the decision relating to 1999 must be annulled. First, the Commission approved the operating aid solely on the basis that there had been a reduction in production costs. However, the test of a simple reduction in production costs was rejected in the interlocutory judgment (paragraph 108). Second, the Commission failed in particular to consider the significance of any reduction in production costs. It also referred to the average production costs for the mining industry as a whole, without examining specifically the position of each undertaking or mine, as required by the interlocutory judgment (paragraph 111). Furthermore, it failed to assess whether the test set out in paragraph 107 of the interlocutory judgment was satisfied, namely whether the recipient undertakings were effecting reductions in production costs which were 'commensurately more sustained' when the undertakings had not effected such reductions previously, and it appears that it did not check the figures put forward by Germany. Finally, the Commission took account of an irrelevant consideration, namely the alleged need to mitigate the social and regional consequences of the restructuring of the German coal industry. The Court confirmed in the interlocutory judgment (paragraph 109) that operating aid could not be justified on that basis.

84 In any event, the historic reduction in production costs noted by the Commission (8.2% in real terms, at 1992 prices, over a four-year period, that is to say 2.05% per year) was not, on any view, significant. It is not clear from the decision relating to 1999 how that figure of 8.2% is derived and it is not explained precisely how the figures relating to the average cost of a tonne of coal of DEM 264 and DEM 268, put forward by the Commission in support of the abovementioned rate of reduction, were calculated, since the Commission gave no inflation figures. In all events, even a reduction of DEM 18 over four years — assuming that amount to be correct — represents a mere DEM 4.5 per year. With German domestic coal costing DEM 246 and world prices of around DEM 60 in 1999, it would take at least 40 years for the German coal industry to become competitive, by which time the mines will be exhausted. Such a reduction cannot therefore be regarded as more than symbolic within the meaning of the interlocutory judgment (paragraph 106).

85 The applicant adds that, in the light of the criteria established by the interlocutory judgment, the Commission should have indicated in the decision relating to 1999

the reasons why it appeared that a significant reduction in production costs had been and would continue to be achieved in each undertaking concerned. However, the Commission merely concluded that there had been a reduction in production costs of 2.05% per year at constant 1992 prices and it used that conclusion alone to justify its approval of the operating aid in question (paragraph 4 of Part II of the preamble to the decision relating to 1999). Furthermore, the Commission took the average production costs of the undertakings in question, without indicating how each mine taken individually had significantly reduced its production costs. It would be entirely impermissible for the Commission to authorise aid to ten mines where only one of them achieves a significant costs reduction and the other nine do not reduce their costs at all, with the result that the mean average may show a reduction. In addition, the Commission should have indicated, first, the basis for the inflation-related adjustments in production costs and, second, the level of inflation taken into account.

Findings of the Court

86 By submitting, in its reply, that the Commission misapplied the test of a reduction in production costs in the decision relating to 1999, the applicant acts as it did in Case T-110/98 where it put forward for the first time in its pleading of 1 March 2000 arguments which had not been relied on either directly or by implication in the application. Thus, those arguments, supposed to expand on paragraph 4.2.14 of the application in Case T-63/99 — which is indeed similar to paragraph 4.3.24 of the application in Case T-12/99 and is drafted in essentially the same terms as paragraph 4.5.7 of the application lodged in Case T-110/98 — and put forward in the reply, are to be characterised as new pleas in law within the meaning of the first subparagraph of Article 48(2) of the Rules of Procedure for the reasons already set out in paragraphs 23 to 40 of the order of 25 July 2000 in Case T-110/98.

87 On reading the application in Case T-63/99, in particular paragraphs 3.2.17 to 3.2.19, 4.1.1(b) and 4.2.14 to 4.2.16, it becomes apparent that the only argument

displaying the requisite clarity and precision which is raised in support of the plea put forward in those paragraphs is that relating to the absence of prospects of viability for the undertakings in receipt of the aid at issue. That plea has been rejected as unfounded (see paragraphs 80 and 81 above).

88 The sentence at paragraph 4.2.14 of the application according to which a mere reduction in production costs is not sufficient to justify the authorisation of operating aid cannot be interpreted, in the light of its context, as constituting an argument which is distinct and separate from that relating to the lack of a prospect of viability. The criticism levelled in that sentence at the test of a reduction in production costs serves merely to illustrate the allegedly essential nature of an assessment of the recipient undertaking's chance of achieving viability. The content of paragraph 4.2.14 of the application does not therefore constitute an argument which is separate from that rejected in paragraphs 80 and 81 above.

89 Consequently, the arguments raised by the applicant in its reply (see paragraphs 84 and 85 above) constitute pleas which were not relied on either directly or by implication in the application, nor are they closely connected with the plea based on the lack of prospects of viability for the undertakings in receipt of the aid at issue. They cannot therefore be regarded as amplifying that plea. They are thus pleas which are to be characterised as new pleas in law within the meaning of the first subparagraph of Article 48(2) of the Rules of Procedure and which must be dismissed as inadmissible. There would have been nothing to prevent the applicant from raising them in its application. Accordingly, it cannot be allowed to put them forward for the first time in its reply.

90 With regard to the plea alleging breach of the duty to state reasons, it is again appropriate to recall the order of 25 July 2000, whose reasoning set out at paragraphs 44 to 51 also covers the present circumstances.

91 While it is true that the applicant cannot be barred from criticising an inadequate statement of reasons for the first time in its reply, the arguments raised in that context in fact merely repeat, in the context of the adequacy of the statement of reasons, the arguments put forward in support of the substantive pleas dismissed above as inadmissible. The arguments in question do not therefore relate to the issue whether the contested decision contains an adequate statement of reasons but to the issue whether that statement is accurate.

92 It should be added that the Commission provided a series of indications in the contested decision (Part II of the preamble) which would have enabled the applicant to contest, at the appropriate time, the legality of that decision on the points raised for the first time in the reply. Consequently, the plea alleging breach of the obligation to state reasons cannot be upheld either.

The pleas alleging mischaracterisation of the bonus scheme as operating aid and breach of the obligation to state reasons in this regard

Arguments of the parties

93 Noting that the bonus is intended to provide an incentive for qualified staff to work underground and that the Commission approved aid of that kind under Article 3 of the Code as operating aid, the applicant points out that the contested decisions expressly state that the bonus is 'not part of the production costs' of the coalmining undertakings. Thus, the bonus is apparently funded in its entirety by the German State with no cost at all to the coalmining undertakings, circumstances which should increase the production of those undertakings. There is no evidence that an undertaking's costs would increase if Germany did not pay the bonus.

94 According to the applicant, the criterion applied by the Commission is wrong and makes a nonsense of the aid regime. The objective of operating aid is to reduce production costs in absolute terms and not to increase production in an oversupplied market. A direct hand-out cannot lead to an improvement in the undertaking's economic viability, nor can it reduce the real production costs. To accept the Commission's approach would mean that any form of cash payment could be characterised as operating aid.

95 The applicant adds that the Commission, in its assessment of the bonus, also relies on the second indent of Article 2(1) of the Code, which is concerned with minimising the social and regional impact of restructuring. However, that indent refers to the social and regional problems 'created by total or partial reductions in the activity of production units'. Therefore, the Commission cannot rely on it as a basis for approving a measure which is aimed at increasing production.

96 In so far as the Commission relies on *Steenkolenmijnen* v *High Authority*, cited in paragraph 48 above, at p. 27, the applicant states that that judgment merely describes the effect of the bonus, without addressing the question whether a bonus of that kind may be approved under the Code. Furthermore, the judgment is concerned with a situation back in 1959, at which time miners would have sought more lucrative work elsewhere if the bonus had not been paid to them. The present situation is totally different.

97 In the reply lodged by it in Case T-63/99, the applicant submits that, even if the bonus were a payment in respect of a production cost of the relevant undertakings, the Commission has not applied Article 3 of the Code properly. In particular, the Commission does not examine whether the reduction in production costs resulting from its payment would be significant, nor its impact

on the undertakings individually. The Commission merely states, in both contested decisions, that it helps to improve slightly the insufficient competitiveness of the undertakings concerned. There is no suggestion that it may produce a 'significant' reduction in production costs.

98 Finally, the applicant alleges that the Commission failed to explain, in the statements of reasons for the contested decisions, how the bonus, described as 'not part of the production costs of the coalmining undertakings', meets the objective of Article 3(2) of the Code of reducing production costs.

99 The Commission claims that the quotation from the contested decisions stating that the bonus is 'not part of the production costs' is taken out of context. As it is paid by the State as aid to underground mineworkers in the form of a tax deduction, the resulting higher net wage is not part of the wage costs, and thus the production costs, of the mining undertakings. However, if those undertakings were to increase wages to cover the amounts of the bonus currently paid as State aid, that expenditure would increase their production costs. They would have to pay those increased wages, as otherwise they would not be able to maintain the qualified workforce necessary in order for mines to operate as efficiently as possible.

100 In support of its argument, the Commission refers to *Steenkolenmijnen* v *High Authority*, cited above, where the Court of Justice held that the bonus relieved the undertakings of costs which they would otherwise inevitably have incurred.

101 RAG states that Article 3 of the Code is a valid basis for the bonus, which is approved separately from general operating aid only because it is paid in a different form, namely directly to miners through a tax reduction, rather than to the undertakings.

Findings of the Court

102 First of all, according to the details which the German Government has provided at the Court's request concerning the relevant legislation, the bonus, introduced in 1956 to improve miners' pay, is not to be regarded either as taxable income or as remuneration for the purpose of social security. It is paid together with wages; the employer deducts the amount of bonus payable from the sum which he withholds from his employees in respect of income tax and pays only the resulting reduced amount of income tax to the tax authorities. The bonus is therefore paid by the employer, financed by income tax revenue which must normally be paid over by him: if the total amount of the bonuses exceeds the revenue to be paid over, the tax authorities pay the difference directly to the employer.

103 Even though the bonus is not borne directly by the coalmining undertakings concerned and cannot, on that basis, be characterised as a production cost, in the strict sense, borne by them, it relates objectively to an element of the production costs, in the broad sense, of the undertakings concerned. The economic result obtained by its method of grant in fact corresponds to the result which would be achieved if the undertakings first paid their workers the corresponding sum and were then refunded that sum by means of operating aid in the strict sense, in conformity with the principle governing operating aid in the field under consideration, namely that of covering the difference between production costs and the selling price on the world market.

104 It follows that the bonus mechanism does not constitute an abuse of the operating aid regime established by the Code. Accordingly, the Commission cannot be

considered to have manifestly erred in its assessment by taking the view that the mechanism corresponded in reality to the grant of operating aid.

105 Nor can the Commission be considered to have erred in its assessment by invoking, in the context of the bonus, the second indent of Article 2(1) of the Code. Since the bonus was not authorised solely on the basis of the regard had to social and regional problems, there was nothing to prevent the Commission from mentioning, among other considerations founded on the operating aid regime in the strict sense, the social and regional issue which it invoked.

106 In so far as the applicant further submits that the bonus as such does not contribute to a reduction in production costs, it must be stated that, as the Commission has correctly argued, while the eligibility of an undertaking to receive operating aid depends on a reduction in its production costs, it does not, however, follow that every component of that aid, such as for example the bonus, must contribute to that objective. Reducing production costs is a condition for receiving aid and not the aid's purpose.

107 The applicant pleads, finally, that there is no 'significant' reduction in production costs: that argument, based on the interlocutory judgment and put forward for the first time in the reply, must be dismissed as inadmissible under Article 48(2) of the Rules of Procedure (see paragraphs 87, 88 and 89 above).

108 So far as concerns the plea alleging an inadequate statement of reasons, suffice it to state that each of the contested decisions contains six paragraphs setting out the amount of the bonus and explaining its operation and effects. Consequently, the statements of reasons for the contested decisions cannot be considered insufficient in that regard.

The pleas alleging failure by the Commission to assess the degression of aid and breach of the obligation to state reasons in this regard

Arguments of the parties

109 In Case T-63/99, the applicant contends that the Commission manifestly erred in failing to consider whether the reduction in production costs of the undertakings in receipt of the aid is likely to allow a degression of aid, as required by Article 2(1) of the Code. Article 9 of the Code, in conjunction with Article 2(1), requires the Commission to ensure that aid granted to each undertaking is decreasing year on year or to conclude, at least, that the continued payment of aid is likely to lead to such a degression. The degression of aid cannot be assessed by merely analysing whether production costs have decreased. As operating aid is intended to cover the difference between production costs and the price of coal on international markets, an annual reduction in production costs can result in increasing, and not decreasing, aid payments, at a time when international coal prices are falling, as is currently the case.

110 In the decision relating to 1999 (fourth paragraph of Part II of the preamble), the Commission cites information supplied by Germany according to which the average costs of the mines receiving operating aid 'should in real terms be 8.2% lower in 1999 than in 1995 at 1992 prices'. By way of comparison, the import prices of coal entering Germany decreased by 38.9% over the period from 1995 to the third quarter of 1998. In that context, a minimal decrease of 2% per year in constant prices and about 1% per year in current prices has no impact whatsoever on the competitiveness of the Community coal industry and should

therefore be disregarded. Any such reduction would not enable a real degression of aid to be achieved.

111 The applicant states that any decrease, in recent years, in operating aid paid to the German industry is irrelevant. Any proper assessment of a reduction in operating aid must involve consideration of the reduction in terms of costs per tonne of coal produced and whether *that* is leading to a degression of aid. The figures relating to a degression of aid cannot be manipulated by having regard to total aid figures which ignore the downward trend in the quantities of coal produced.

112 In its reply, the applicant refers to the interlocutory judgment. As is apparent from paragraph 111 thereof, the Commission must assess any significant reduction in production costs independently of price movements. It must also determine, on the basis of an assessment of the relationship between the reduction in production costs and world prices, whether that significant reduction is likely to achieve a degression of aid. The degression must occur in terms of current prices and not in relation to 1992 prices. That being so, the actual costs of production of German coal must be analysed in the light of the actual price of coal on the world markets in order to assess the degression of aid.

113 The applicant adds that the Code does not in any way allow degression of aid to be constituted by an increase in aid if world market prices fall. If they fall, particularly significant reductions in production costs are required in order that those reductions might result in a degression of aid. The contrary conclusion would provide the German Government with the opportunity of increasing aid where the competitiveness of the undertakings concerned is decreasing by reference to the world market.

114 Finally, the applicant submits that it was incumbent on the Commission to set out, in the reasoning for the decision relating to 1999, its conclusions concerning the achievement of a degression of aid following an assessment of the reduction in production costs in relation to world market prices. The Commission does not in fact even address the issue of a degression of aid. The contested decision contains no attempt at all to analyse the reductions in production costs in relation to movements in the price of coal on world markets, nor any conclusion that the amount of aid granted is likely to comply with the condition relating to the degression of aid.

115 According to the Commission, there is no need to achieve a real degression of aid if world coal prices are falling. The whole system of the Code is built upon the degression of costs as a means of reducing State aid whatever the short-term trends in import prices. Since the Code recognises the uncompetitiveness of Community coal mines in the world market, there is nothing to support the assertion that it was intended under the Code that cost reductions should be regarded as satisfactory only if they matched the fluctuations of world market prices.

116 The Commission maintains that the interlocutory judgment is not to be interpreted as making the authorisation of operating aid conditional upon cost reductions outstripping any fall in world market prices. The judgment recognises the structural uncompetitiveness of the Community coal industry *vis-à-vis* world markets and the difficulty of setting a competitiveness target (paragraphs 101 and 103). Therefore, the phrase 'in the light of coal prices on international markets' in Article 2(1) of the Code is to be construed as recognition of the fact that any progress towards long-term viability through cost reductions is dependent on movements on world markets and that, despite the reductions, the aim of degression of aid may not be achieved, due to a greater fall in world market prices.

Findings of the Court

117 It should be remembered first of all that, as provided in Article 3(1) of the Code, operating aid is intended solely to cover the difference between production costs and the selling price on the world market. By virtue of Article 3(2), that aid may be authorised only if there is at least a trend towards a reduction in the production costs of the undertakings receiving it. In that context, the first indent of Article 2(1) sets as 'one of the... objectives' to be attained that of 'achieving degression of aids', an aim to be achieved 'in the light of coal prices on international markets'.

118 It is in the light of those provisions of the Code that the applicant contends, in its application, that the degression of operating aid must be achieved in absolute terms and in a continuous fashion from 1994 to 2002, irrespective of prevailing market conditions. In the applicant's submission, it is absurd to be willing to accept that there was both a reduction in production costs of 8.2% over four years and a related degression of aid, when world prices decreased by 38.9% over the same period. The result, in the applicant's submission, is not a degression of aid but an increase. While the applicant mentions, in this context, a 'small annual reduction in production costs' (paragraph 4.2.18 of the application) when referring to the reduction in production costs of 8.2% accepted in the contested decision (paragraph 4.2.19 of the contested decision), no criticism based on concrete evidence is, however, levelled at that figure as such. The applicant's argument essentially comes down to the complaint that the Commission accepted a degression below 38.9%.

119 However, the rigidity of that argument ignores the economic realities — namely the structural unprofitability of the Community coal industry — in the light of which the Code was laid down and which must be taken into account when interpreting Article 2(1) of the Code.

120 Since operating aid is intended to cover the difference between production costs and selling prices at world level, the amount of that difference, which thus determines the amount of aid, does not depend solely on the volume of the reduction in production costs but also on the world market price.

121 As neither the Community institutions, the Member States or the undertakings concerned have a significant influence on that last factor, the Commission cannot be reproached for having attached overriding importance, in terms of a degression of aid to the coal industry, to reducing production costs, since any reduction necessarily means that the volume of aid is smaller than if the reduction had not occurred, irrespective of movements in world market prices. It should be added that, in the present case, the overall amount of operating aid authorised in fact decreased from 1997 to 1998 and from 1998 to 1999. Therefore, the applicant's argument cannot be upheld.

122 The same is true of the argument that the degression must occur in terms of current prices. Under Article 3(2) of the Code, the plans of the Member States are to provide for measures 'to generate a trend towards a reduction in production costs at 1992 prices' and Article 9(6) of the Code requires the Commission to 'check whether the measures proposed are in accordance with the plans submitted' before authorising aid. It follows that the degression of aid must be calculated by reference to 1992 prices.

123 Nor does any provision of the Code support the applicant's proposition that the degression of aid must necessarily be measured solely on the basis of an amount of aid per tonne and per undertaking. As RAG has pointed out, undertakings in receipt of operating aid must be able at any time to close individual mines or reduce their mining activity, with a corresponding decrease in coal production

eligible for aid. Such reductions in the production of structurally unprofitable undertakings are compatible with the objectives of the Code and offset sufficiently any increase in aid per tonne.

124 Finally, the applicant pleads that the lack of a 'significant' reduction in production costs necessarily resulted in an insufficient degression of aid. That argument, based on the interlocutory judgment and put forward for the first time in the reply, must be declared inadmissible under Article 48(2) of the Rules of Procedure (see paragraphs 87, 88 and 89 above). In this argument, the applicant is no longer complaining that the degression was insufficient in relation to the huge decrease in world prices, but contests, for the first time, the figures related to the German coal industry and therefore to the factual, economic and financial data connected with that industry. A new plea *vis-à-vis* the plea raised in the application is therefore involved. Furthermore, there would have been nothing to prevent the applicant from developing such a factual argument in its application.

125 The plea alleging a lack of degression of aid and the abovementioned new plea must therefore be rejected.

126 It follows that, so far as concerns the statement of reasons, the Commission was not required to include in the contested decision the detail demanded by the applicant, given that it was not required by the Code and had not been invoked by the applicant in the course of the administrative procedure. Therefore, the plea alleging a breach of the obligation to state reasons cannot be upheld either.

The plea alleging that the Commission infringed its obligations with regard to the amendments made to the original plan

127 The plea alleging that the Commission infringed its obligations with regard to the amendments made to the original plan has been raised in Case T-12/99 and repeated in Case T-63/99. The applicant states, however, that the fate of the latter case is linked, as regards this plea, to the outcome of the former. The plea is subdivided into two parts.

First part of the plea: infringement of Article 8(4) of the Code

— Arguments of the parties

128 Recalling that the Commission approved amendments to the original plan (see paragraphs 14 and 15 above), the applicant submits that, by 'ruling' on an amendment of the plan, pursuant to Article 8(4) of the Code, the Commission affects the rights of every competitor of the undertakings in receipt of the aid at issue. As a result of a favourable ruling from the Commission, aid which would otherwise have been unlawful under the original plan may lawfully be paid. Therefore, the principle of legal certainty requires that any decision concerning such amendments must appear in the operative part of the measure in question. The Commission cannot rule on the amendments to the plan by simply referring to them in the statement of grounds. In this instance, the Commission adopted no formal administrative measure under Article 14 of the ECSC Treaty in relation to

the amendment of the original plan. The comments of the Commission in the preamble to the decision relating to 1998 are not an administrative act at all. The preamble is neither a decision nor an opinion.

129 In that regard, the applicant relies on Decision No 22/60 of the High Authority of 7 September 1960 on the implementation of Article 15 of the Treaty (OJ, English Special Edition, Second Series VIII, p. 13) which lays down in a binding manner the form of decisions and provides in Article 3 that decisions and recommendations 'shall be set out in Articles'. One of the principal purposes of Decision No 22/60 is to require the Commission to act clearly and unequivocally in providing a statement of reasons for each act and to set out the binding provisions in the operative part of the decision. The Commission did not rule on the amendments to the plan by devoting to them one of the articles in the operative part of the decision relating to 1998.

130 According to the applicant, the Commission's argument that the amended plan was implicitly approved by the approval of the sum of aid for 1998 is misconceived. Article 1 of the decision relating to 1998 makes no reference whatsoever to the amended plan, but merely authorises certain aid for 1998 pursuant to Article 9 of the Code. Furthermore, the obligation on the Commission to rule, pursuant to Article 8(4) of the Code, on any amendments to the plan is distinct from approval of the annual grant of aid under Article 9.

131 The applicant points out that the amended plan deals with restructuring of the undertakings concerned until 2002. It must therefore be considered separately and beforehand, since it constitutes the general framework within which each annual grant of aid will be examined. The mere approval of amounts of aid for 1998 gives no indication that the Commission 'ruled' on a plan which also

extends to 1999, 2000 and 2001. Furthermore, an applicant wishing to challenge the amended plan but not the specific aid granted for 1998 could not have done so by challenging Article 1 of the decision relating to 1998. This shows that the ruling on the amended plan and the decision relating to the State aid for 1998 must be two entirely separate matters.

132 The Commission counters that it 'ruled on' the amendments to the plan, pursuant to Article 8(4) of the Code. Following a very detailed analysis of the German coal industry, the decision relating to 1998 clearly states, at the end of Part III of the preamble, that 'in the light of the above, the Commission takes the view that the [amended plan] is compatible with the objectives and criteria of [the Code]'. Given that unequivocal formulation, the authorisation of the aid in Article 1 of the contested decision necessarily implies endorsement of the amended plan, in implementation of which aid was granted for 1998.

133 Contrary to the applicant's affirmations, Decision No 22/60 does not require the 'decision itself' to be set out in articles. It is not mandatory for a matter determined by a decision to be in an article; it may be elsewhere in the pertinent measure. Furthermore, Article 9(6) of the Code merely requires the Commission to 'check whether the measures proposed are in conformity with the plans submitted in accordance with Article 8 and with the objectives set out in Article 2', which the Commission did here.

134 The Commission adds that Article 8(3) of the Code, which governs the initial approval of plans, merely provides for the Commission to 'give its opinion' on the plans. It would be surprising if the formalities laid down for the amendment of a plan were more stringent than those for its initial approval.

— Findings of the Court

135 It should be noted first of all that the amended plan forms an integral part of the legal framework for the annual grant of State aid to the coal industry and that the positive opinion given by the Commission on that plan constitutes a basis for the authorisation by it of State aid which Germany proposes to pay in the sector in question, in each of the years covered by the plan. Within that framework, the applicant seeks to challenge the legality of the contested decisions in that the amendment of the original plan was approved in a formally incorrect manner.

136 In that regard, nothing in Articles 8 and 9 of the Code requires the Commission to adopt, first, a general decision approving the plan and, next, an individual decision authorising, on the basis of that general decision, the State aid proposed for a year covered by the plan. On the contrary, Article 9(4) and (5) uses the formal terms 'approved', 'authorisation' and 'refusal' only with regard to the annual aid itself. As regards the plans constituting the framework for the aid, Article 8 requires the Commission to give its 'opinion' as to conformity (Article 8(3)) and, where a plan is amended, to 'rule' on that amendment (Article 8(4)).

137 Since an amended plan is at issue here, it should be made clear that the term 'rule on' used in the English version of Article 8(4) of the Code cannot be interpreted as requiring the Commission to adopt a formal decision. The French version ('se prononcer') and the German ('Stellung nehmen'), Italian ('si pronunci') and Dutch ('zich uitspreken') versions show that the English text does not have such a strict meaning. In addition, even the English version of Article 8(3) of the Code — relating to the Commission's assessment of the original plan — uses the words 'give its opinion', which certainly does not mean 'adopt a formal decision'. It would be inconsistent if the formalities laid down for the amendment of a plan were stricter than those prescribed for its initial approval.

138 Here, the decision contested in Case T-12/99 sets out the amended plan in Part II of its preamble, analysing mine by mine the amendments made. Then, in Part III of the preamble, the Commission proceeds to assess the reduction in production costs envisaged by the amended plan, comparing the reduction with the original plan. The same exercise is carried out with regard to the level of production and the number of employees. At the end of Part III, it is stated that 'in the light of the above, the Commission takes the view that the plan submitted by Germany is compatible with the objectives and criteria of [the Code]'. The Commission thus validly ruled, within the meaning of Article 8(4) of the Code, on the amendment of the plan.

139 In so far as the applicant further submits that an economic operator wishing to challenge solely the amended plan, approved in the preamble to a decision, and not the aid authorised in the operative part of that decision, could not do so by challenging the operative part, it should be stated that, even if the opinion by which the Commission rules on a plan appears only in the preamble to a decision, it does not necessarily follow that it is devoid of binding legal effects capable of affecting the interests of a given economic operator. To determine whether a measure produces such effects, it is necessary to look to its substance (see Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraphs 77, 78 and 79). In the present case, however, there is no need to determine whether the approval of the amended plan, given in the preamble to the decision relating to 1998, constitutes a measure which is open to challenge in a separate action, given that the applicant has not formulated claims to that effect.

140 It follows that the first part of the plea must be declared unfounded.

Second part of the plea: assessment of the amendments to the plan founded on an incomplete basis

141 In this part of the plea, presented in both actions in a similar form, the applicant essentially alleges that the Commission failed to have regard to the impact of the merger which took place in the German coal industry (see paragraphs 19 to 27 above). It is appropriate to consider it together with part of a separate plea put forward in Case T-12/99 alleging that Article 3 of the Code was infringed, the part in question concerning the Commission's failure to have regard to the merger in the German coal industry.

— Arguments of the parties

142 According to the applicant, the amendments to the plan, as set out, were incomplete since they made no reference to the merger, which constitutes one of the most fundamental restructurings in the history of the German coal industry. The contested decisions continue to treat each of the merged undertakings separately, as if each received State aid independently. However, the Commission was well aware of the merger as it approved it by decision of 29 July 1998. It was also aware of the considerable sums of State aid inherent in the merger, in the light of the notification which was sent to it by the German Government under Article 67 of the ECSC Treaty (see paragraph 21 above).

143 It points out that the Commission was required, under Article 3(1) of the Code, to limit the approval of aid to an amount not exceeding the difference between production costs and foreseeable revenue in the following coal production year. Those costs and that revenue were assessed without reference to the merger or the inevitable economies which would arise from pooling the cost base of the independent undertakings. The Commission simply approved the amounts already paid by the German Government. Accordingly, the Commission erred in its assessment.

144 The applicant submitted, in its applications, that the notification from the German Government set out the following elements of aid as linked to the merger:

— the cancellation of DEM 4 000 000 000 of debt owed by RAG and Saarbergwerke to the German Government and the Saarland;

— the guarantee by the German Government of an annual DEM 200 000 000 cross-subsidy from RAG's 'white sector' to its coal business;

— the payment of DEM 2 500 000 000 of aid as a condition of the merger taking place;

— the sale of Saarbergwerke to RAG for DEM 1, a price which represented a gift of substantial assets.

In the course of the proceedings, the applicant has abandoned the claims challenging the contested decisions as to their substance with regard to the cancellation of DEM 4 000 000 000 of debt and the payment of DEM 2 500 000 000, while maintaining the claims founded on inadequate reasoning in that regard.

145 In reply to the questions put by the Court, the applicant stated that the legality of the elements of aid complained of is immaterial in the present proceedings. However, their existence is relevant to an analysis of the production costs of German mines.

146 Since the Commission failed to refer to the merger or the abovementioned aid, the applicant considers that the contested decisions were, to the Commission's knowledge, not based on the actual position. Its economic analysis of the aid authorised in the contested decisions was thereby necessarily flawed.

147 The Commission's attempt to rule, in December 1998, on the amended plan without making the slightest reference to the fundamental restructuring of the German coal industry which took place in the course of 1998 highlights the absurdity of its attempt to grant *ex post facto* approval. Since the aid for 1998 had already been paid on the date of the decision relating to that year, the Commission could not lawfully step back in time to when the aid was notified and ignore the significant changes which would necessarily have an impact on the lawfulness of the aid proposed in the amended plan and on its own economic analysis.

148 The applicant submits that, in those circumstances, the Commission misused its powers. The Commission deliberately chose not to address the aid element of the merger because of internal departmental squabbles as to competence for the matter — infighting which inevitably favoured the German coal industry given that the aid was granted to the new merged entity to the detriment of other participants in the coal industry. It thus seriously infringed the principle of good administration, a breach which should be regarded as a misuse of powers.

149 It was all the more necessary to take account of the merger because the German Government itself maintains, in the statement in intervention lodged by it in Case

T-12/99, that the amended plan was drawn up on the basis of the merger and that possible synergies and other economic effects were already incorporated into the proposals of each of the undertakings.

150 The applicant adds that a fundamental objective of any merger is to reduce costs through economies of scale. The German Government itself recognised in its notification under Article 67 of the Treaty that the future joint management of the mines of the Ruhr and the Saarland would allow 'supra-regional rationalisation'. The reduction in production costs through joint management and rationalisation causes the gap between such production costs and the world market price to shrink. That reduction in costs will benefit each mine individually and collectively. Consequently, the Commission approved too much aid on the basis of incorrect production cost figures for the individual mines. In any event, in admitting that it ignored all synergies, the Commission failed to carry out the analysis required by the Code.

151 The Commission maintains that the merger is irrelevant to the examination of whether the State aid at issue is compatible with Articles 2, 3 and 4 of the Code since that examination must relate to the mines and not the undertakings. Whether the Commission thus authorised aid for the newly merged company or for the three separate entities is not a matter of substance.

152 The Commission submits that the criticism that the contested decision does not take account of the synergies resulting from the merger does not vitiate the assessment as to the compatibility of the aid. The merged collieries are located in separate basins, so that geographical barriers will severely limit the scope for synergies. If synergies were in fact generated by the merger, they might influence the quantities produced and costs of production, but that would take some time and the effects would not be felt immediately after the approval of the merger by the Commission. In any case, if by reason of the merger the parameters

determining the amounts of aid compatible under Articles 2, 3 and 4 of the Code changed, the German Government would be obliged, in accordance with Articles 2 and 3 of the contested decision, to demand repayment of the sums overpaid.

153 RAG states that the events which actually occurred in 1998 could not have had any significant impact on production costs when the Commission, on 2 December 1998, adopted the decision relating to that year. So far as Preussag Anthrazit is concerned, RAG did not acquire legal ownership until 1 January 1999, thus after the contested decisions were adopted. As regards Saarbergwerke, its merger with RAG became effective on 1 October 1998. Therefore, at the time when the Commission adopted its decision, it could have taken account only of synergies which had taken place in October and November 1998. Moreover, synergies could have been achieved only by reducing overheads, which, in RAG's submission, are insignificant when compared to the marginal costs of producing coal.

154 In any event, cost savings achieved in those two months are irrelevant to the legality of the aid authorised. It is in the very nature of the system of prior approval established by the Code that prior approval of aid cannot involve a verification of actual (as opposed to projected) production costs. Actual production costs can be verified only subsequently, as provided for in Article 9(2) and (3) of the Code. If that subsequent verification shows that production costs in the year in question were lower than anticipated (for example, because of synergies due to a merger) and that this has resulted in an overpayment of aid, the recipient must repay the excess.

155 RAG further submits that, since the obligation on the Commission to vet production costs in advance is very limited, the approval of aid must not be delayed by an excessively long examination. Otherwise, the Commission would be forced to merge the two stages of its examination — scrutiny in advance on the basis of projected costs and scrutiny after the event of the aid actually paid — into a single verification procedure.

156 The German Government states that the amended plan was drawn up on the basis of the anticipated merger. Thus, possible synergies and other economic effects were already incorporated into the proposals of each of the undertakings concerned. However, no new, unnotified, aid was paid in connection with the merger.

157 The Commission adds that, at the time of the initial notification by the German Government of the aid proposed for 1998, the merger had not yet been approved and the notification concerning the aid granted by that government for the year in question broke the information down by undertaking. The Commission thus followed the same approach in its decision. To have done otherwise would have impeded understanding of the decision and affected its transparency, in particular when comparing the decision relating to 1998 with the decisions in preceding years.

— Findings of the Court

158 First of all, in so far as the applicant alleges that the Commission misused its powers in failing to take account of the impact of the merger when it adopted the contested decisions, it need only be recalled that, in accordance with the case-law, a decision amounts to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken to achieve an end other than that stated (see, for example, Case T-254/97 *Fruchthandelsgesellschaft Chemnitz* v *Commission* [1999] ECR II-2743, paragraph 76, and the case-law cited). The applicant has merely complained of quarrels as to competence within the Commission without adducing a shred of evidence in that regard. Thus, in the absence of objective, relevant and consistent evidence from the applicant, this ground of challenge must be rejected.

159 In so far as the applicant complains that the Commission manifestly erred in its assessment by authorising the State aid falling within the plan without having

considered whether the merger involved unnotified State aid, it should be recalled, first of all, that, in accordance with settled case-law, where the Court conducts a review under the first and second paragraphs of Article 33 of the ECSC Treaty, it must, as regards the assessment of complex economic facts or circumstances carried out by the Commission which supports a decision contested before it, confine itself to ascertaining whether the institution which took that decision manifestly failed to observe the provisions of the ECSC Treaty or any rule of law relating to its application, the term 'manifestly' in Article 33 presupposing a breach of the legal provisions so serious that it appears to derive from a manifest error in the assessment, having regard to the provisions of the ECSC Treaty, of the situation in respect of which the decision was taken (see the judgments in Case 6/54 *Netherlands* v *High Authority* [1954-1956] ECR 103, at p. 115, and in Joined Cases 15/59 and 29/59 *Knutange* v *High Authority* [1960] ECR 1, at p. 10, and the order in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraphs 61 and 62). The Court's review of the contested decisions in the present case is therefore limited to the matters envisaged by the abovementioned case-law.

160 Next, by virtue of Article 3(1) of the Code, operating aid and aid for the reduction of activity are intended 'to cover the difference between production costs and the selling price freely agreed between the contracting parties in the light of the conditions prevailing on the world market'. It follows that any matter of a financial nature which — by reducing costs or increasing revenue — causes the aid notified to exceed that difference, results in the corresponding fraction of aid being no longer covered by that basic rule and therefore incapable of authorisation, as operating aid or aid for the reduction of activity, under the Code. Accordingly, such aid not covered by the Code is, in principle, caught by the absolute prohibition laid down by Article 4(c) of the ECSC Treaty.

161 Compliance with the basic rule set out above is ensured by two levels of scrutiny. First, Article 9(1), (4) and (6) of the Code has established a system of advance scrutiny of the proposed financial support. This system is designed to ensure compliance with the first indent of Article 3(1) of the Code, according to which

'the aid notified per tonne shall not exceed for each undertaking or production unit the difference between production costs and foreseeable revenue in the following coal production year'. Second, Article 9(2) of the Code has established a system of scrutiny after the event of the amount of aid actually paid, since the Member States are required to send notification, by 30 September each year at the latest, of the amount of aid actually paid in the preceding coal production year and to declare any corrections made to the amounts originally notified. This system is designed to ensure compliance with the second indent of Article 3(1) of the Code, according to which 'the aid actually paid shall be subject to annual correction, based on the actual costs and revenue, at the latest by the end of the coal production year following the year for which the aid was granted'.

162 If financial support granted by the State to the coal industry outside the framework marked out by the Code has not been authorised by a Commission decision founded directly on the first paragraph of Article 95 of the ECSC Treaty (see, in this regard, the judgment in Case T-37/97 *Forges de Clabecq* v *Commission* [1999] ECR II-859, against which an appeal is pending before the Court of Justice, paragraph 79), it remains subject exclusively to Article 4(c) of the ECSC Treaty (Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839, paragraph 72). The Commission, which has the duty of ensuring that the objectives of the Treaty are attained and of carrying out the tasks assigned to it (Article 8 and the first paragraph of Article 14 of the ECSC Treaty), takes the measures that are necessary in relation to such aid paid in breach of that provision. It may, in particular, adopt a decision under Article 88 of the ECSC Treaty recording a failure by a Member State to fulfil its obligations, and any failure by the Commission to adopt such a decision may be challenged by an action for failure to act under Article 35 of the ECSC Treaty.

163 It should be added that, in the absence of more specific rules, the absolute prohibition in Article 4(c) of the ECSC Treaty applies alone (see, regarding the principle, Case C-128/92 *Banks* [1994] ECR I-1209, paragraph 11, regarding the relationship between Articles 4(c) and 67 of the ECSC Treaty, *Steenkolenmijnen* v *High Authority*, cited in paragraph 48 above, p. 47, and, regarding the relationship between Articles 4(c) and 95 of the Treaty, *Neue Maxhütte*

Stahlwerke and Lech-Stahlwerke, cited at paragraph 54 above, paragraph 148). That provision is capable of having direct effect (point 36 of the Opinion of Advocate General Fennelly in Case C-390/98 *Banks*, pending before the Court of Justice). It follows that, as long as the Commission has not adopted a decision on such support prohibited by Article 4(c), individuals who consider themselves prejudiced by the support may bring proceedings before the national courts. As the Court of Justice pointed out in its order in Case C-301/99 P *Area Cova and Others* v *Council and Commission* [2001] ECR I-1005, at paragraph 46, the possibility for individuals to assert the rights which they derive from Community law before the national courts, which have the power to grant interim relief and, where appropriate, to make a reference for a preliminary ruling, constitutes the very essence of the Community system of judicial protection.

164 Since the decisions contested in the present case are covered only by the system of scrutiny in advance established by the Code, it should be considered, in the light of the foregoing legal framework, whether the Commission was permitted to exclude from the advance monitoring of aid notified within the framework of the amended plan matters concerning the merger, in particular the alleged State aid and related synergies, or whether its choice of making those matters subject only to subsequent separate scrutiny must be characterised as a manifest error of assessment.

165 In that context, the fundamental proposition advanced by the Commission and the interveners supporting it is that advance monitoring concerns only duly notified annual aid proposals, while any event alien to that normal process, such as the merger, can be considered only separately, where appropriate within the framework of monitoring carried out after the event whose aim is to compare the amount of aid notified with the amount actually paid.

166 While it is true that the Commission enjoys a margin of assessment in conducting its scrutiny (see paragraph 159 above), the fundamental proposition of the Commission and the interveners goes too far. By excluding from the advance

review the very case of improper, unnotified, aid of which the Commission was certainly aware when it adopted a view on aid proposals duly notified under Articles 3 and 4 of the Code, that proposition would allow the Commission deliberately to forgo checking to what extent the improper aid could reduce, by a decrease in production costs or an increase in foreseeable revenue, 'the difference between production costs and foreseeable revenue in the following coal production year' within the meaning of the first indent of Article 3(1) of the Code. To seek to await the stage of scrutiny after the event in such a situation would have the effect of improving the liquidity of the undertaking in receipt of the improper aid, contrary to the Code.

167 It follows that, when the Commission conducts its advance scrutiny designed to ensure compliance with the basic rule referred to at paragraph 160 above, it must, if it is not to exceed its wide power of assessment, take into consideration any matter brought to its attention which in all probability has a direct influence on production costs and/or revenue within the meaning of the first indent of Article 3(1) of the Code, in so far as it results in manifestly improper State aid of a precise and not insignificant amount. While the Commission is also obliged to check any reliable information brought to its attention as to the possible existence of such aid, it is, on the other hand, required to consider such information within the procedural framework of Articles 8 and 9 of the Code only in so far as that consideration does not risk undermining, because of its complexity or duration, the operation of the system involving notification of annual aid falling within a multiannual plan and subsequent decisions of authorisation or refusal.

168 It is in the light of the foregoing considerations that it should be established, for each of the matters complained of by the applicant with regard to the merger, whether the Commission manifestly erred in its assessment by deciding to restrict the scope of its advance scrutiny. It is appropriate to consider first the quantified elements of aid complained of by the applicant in the context of the merger.

Possible aid constituted by the sale of Saarbergwerke for DEM 1

— Arguments of the parties

169 The applicant submitted, initially, that the actual gain resulting from the acquisition of the shares in Saarbergwerke for DEM 1 is in the region of DEM 7 000 000 000 to DEM 8 000 000 000. The total aid package required by RAG for the acquisition of Saarbergwerke must be assessed as a whole. In any event, it is the duty of the Commission to review and take a decision on all State aid of which it is informed. The Commission had sufficient time to consider the purchase price of DEM 1, since it was brought to its attention by the complaints made by the applicant in May 1998.

170 The applicant adds that more than half of Saarbergwerke's turnover comes from the 'white sector', which is highly profitable and may be used to cross-subsidise the mine sector. At the end of 1997, for example, Saarbergwerke had assets of DEM 4 000 000 000. In the light of the purchase price of DEM 1 for the shares, RAG has clearly received a gift of valuable assets given that the payment of State aid effectively covers the production costs of the coal business.

171 The Commission points out that its staff are currently continuing investigations into whether the purchase price for Saarbergwerke involves State aid. However, it did not have an obligation to rule on that question either when it took its decision on the merger or when it adopted the decision contested in Case T-12/99. The German Government disclosed to it, on 9 March 1998, the details of how the price for Saarbergwerke had been calculated. By letter of 15 April 1998, the German Government produced additional information requested by the Commission on how the purchase price had been determined. On the basis of that substantial information, the Commission adopted the decision approving the

merger and the decision contested in Case T-12/99. Given the substantial body of information supplied by the German Government justifying the purchase price and the need to allocate limited resources to examination of the merger and to the examination necessary for adoption of the contested decision, the Commission could not also give priority at that time to a decision as to whether there was any aid inherent in the merger.

172 The applicant replies that a large amount of aid was involved and that the implementation of the merger was an irreversible step in the restructuring of the German coal industry. In those circumstances, for the Commission to suggest that the effects of the merger had to be wholly ignored because of 'issues of resourcing' represents a flagrant dereliction of duty on its part. The Commission must review all aid, and all its elements, in order to assess their impact.

— Findings of the Court

173 First, the figure of between DEM 7 000 000 000 and DEM 8 000 000 000 initially alleged by the applicant to constitute the real value of Saarbergwerke must be reduced to DEM 1 000 000 000 as it has in the meantime abandoned its claims alleging, in this context, unlawful State aid amounting to DEM 4 000 000 000 and DEM 2 500 000 000.

174 Secondly, it should be noted that the merger became effective on 1 October 1998 and that, for accounting purposes, retroactive legal effect as from 1 January 1998 was stipulated. It is therefore justified to conclude that the State aid complained of by the applicant amounting to a maximum of DEM 1 000 000 000, if its

existence were to be established, should be considered to have been received by RAG during 1998. In any event, there is nothing in the file indicating that that sum would be imputable, wholly or partly, to a year before or after 1998.

175 Consequently, the Commission cannot be criticised for a manifest error of assessment in this regard as far as its decision relating to 1999 is concerned.

176 Third, as to the decision relating to 1998, it is to be noted that in the notification of 9 March 1998 which it sent to the Commission (see paragraph 21 above), the German Government did not mention the figure of DEM 1 000 000 000 as a possible financial contribution from Saarbergwerke's 'white sector' in favour of RAG; it explained, however, why it considered that the sale price of DEM 1 did not result in any State aid. It was only through the applicant's complaints of 1 May, 5 May and 9 September 1998 that the Commission's attention was drawn to the fact that the sale of Saarbergwerke may have been for less than the real value of the undertaking, but without the applicant putting a figure of DEM 1 000 000 000 on the alleged State aid.

177 It is true that the German undertaking VASA Energy, the applicant in Case T-29/99 (see paragraph 37 above) lodged complaints with the Commission in July, August and September 1998 in which it contended that Roland Berger and Partner GmbH, instructed by the German Government to assess the value of Saarbergwerke, had, in its report, valued Saarbergwerke's 'white sector' as constituting State aid of approximately DEM 1 000 000 000 in favour of the RAG group. However, the passage which appears at page 63 of the report, dating from January 1996, of that consultancy merely states that 'the adjusted business plans show overall, even after investments, a positive available *cash-flow*; the overall value of the portfolio amounts to approximately DEM 1 000 000 000'.

178 In those circumstances, it cannot be found that the Commission received, at the material time, precise information to the effect that RAG had obtained manifestly improper aid amounting to exactly DEM 1 000 000 000. The Commission possessed only certain indicia in that regard, which were still vague in nature, contradicted the information supplied by the German Government and were unaccompanied by any detailed analysis of the economic situation.

179 Furthermore, the contested decision, authorising aid to the German coal industry, concerned only RAG's 'black sector', the coal production sector governed by the ECSC Treaty, whereas the alleged State aid of DEM 1 000 000 000 came from Saarbergwerke's 'white sector' and therefore constituted, first and foremost, a contribution to RAG's white sector, governed by the EC Treaty. Consequently, it was not evident that that contribution would have a direct influence on RAG's 'black sector' by reducing production costs and/or increasing revenue from that sector.

180 Finally, the issue relating to the DEM 1 000 000 000 raised complex economic and financial questions that called for an examination of undoubted duration and could not be resolved before the adoption of the decision relating to 1998, which was already 'late' in that it authorised *ex post facto*, at the end of 1998, aid already paid in the course of the same year. It need merely be observed that the investigation which the Commission in fact initiated on 4 February 2000 in order to obtain information from the German Government on this issue (see paragraphs 35 to 38 above) had still not been concluded at the date of the hearing in the present proceedings, namely 14 February 2001. That finding shows that the inclusion of such an investigation in the advance scrutiny leading to the decision relating to 1998 would have undermined the normal operation of the system, specific to the coal regime, of annual notification of aid and subsequent authorisation.

181 The Commission thus did not manifestly err in its assessment in the present case by considering that scrutiny in advance did not constitute the most appropriate

procedure for examining the impact of any elements of aid contained in the sale price for Saarbergwerke on the examination of the aid duly notified within the framework of the amended plan.

Possible aid constituted by the guarantee of DEM 200 000 000

— Arguments of the parties

182 The applicant submits that in 1998 the German Government guaranteed any shortfall between 2001 and 2005 in the annual cross-subsidy of DEM 200 000 000 from RAG's 'white sector' to its mining activities. The Commission's reasoning that the guarantee, which has already been granted, is of no value to RAG until 2001 is contrary to its recent notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ 2000 C 71, p. 14). In that notice the Commission itself stated, at point 2.1.2, that 'the aid is granted at the moment when the guarantee is given, not the moment at which the guarantee is invoked or the moment at which payments are made under the terms of the guarantee'. That reasoning holds true in the context of the ECSC Treaty.

183 The applicant states that it is therefore the grant of the guarantee by the German Government which constitutes the aid in question. The fact that the guarantee represents an immediate advantage for RAG is borne out by the statement of the German Government that RAG pays a commitment fee every six months. Inasmuch as the guarantee was given and is being paid for at less than an open

market price, State aid was already granted in 1998. The only relevant test is how much RAG would have had to pay for such a guarantee on ordinary commercial terms in 1998. The price has no doubt been set below the market rate. In any event, the Commission has not even investigated the position.

184 The Commission states that the guarantee is not aid since it will not come into effect until 2001 and the Commission will consider the case again in 2000, in the context of its decision on aid proposed for 2001. At present, the guarantee is not available to be drawn on. In addition, RAG is paying a fee for the guarantee and any payments under the guarantee will have to be refunded from future profits made by RAG on its 'white sector' activities. The German Government explains that every six months RAG pays a commitment fee equal to 0.125% of the maximum guarantee sum provided for. That fee constitutes appropriate consideration for possible benefits which it could derive from the guarantee.

— Findings of the Court

185 The Court notes, first, that the parties are in agreement that the guarantee will not come into operation until 2001; in addition, RAG stated at the hearing that it had decided in the meantime not to assert its rights to the guarantee. Second, in reply to the Court's questions, the applicant, after taking cognisance of the information provided by the Commission, RAG and the German Government concerning the way in which the guarantee operates, stated that it abides by its argument that the Commission should have taken account of the guarantee, whether lawful or not, and was unable to ignore the guarantee's existence when conducting its annual advance scrutiny.

186 The only element capable of being classified as State aid in 1998 and 1999 is any difference there may be between the commitment fee actually paid by RAG,

namely 0.125% of the maximum guarantee sum provided for, and the fee which should be paid on normal market terms in so far as such a guarantee is obtainable on the market by the undertaking concerned. In that regard, it need merely be observed that the applicant, far from adducing specific evidence to establish that such a difference exists and, in particular, to call into question the figure of 0.125% referred to by the German Government, and far from claiming that RAG would not have obtained a guarantee of that kind in the market, merely maintained that the price paid by RAG had without doubt been set below the market rate. Accordingly, the applicant has not proved to the requisite legal standard that the Commission erred in its assessment by not evaluating in the specific context of the advance scrutiny any State aid granted.

The unquantified complaints

187 So far as concerns the fact that the contested decisions — and, the applicant suspects, the amended plan — do not mention the merger and do not describe the German coal industry as it is following the merger, it is to be noted that the merger forms part of the *Kohlekompromiß* of 1997 (see paragraph 20 above) upon which the amended plan, approved by the decision relating to 1998, is founded. That decision describes fully, in Part II of its preamble, the *Kohlekompromiß* and the measures for modernisation, restructuring, rationalisation and closure envisaged for the period from 1998 to 2002. The mere fact that that description — and the analysis of the planned measures in Part III of the preamble — refer to the various mines of RAG, Saarbergwerke and Preussag Anthrazit, and not to the entity resulting from the merger, cannot be characterised as a manifest error of assessment. Nothing in the ECSC Treaty or the Code precluded the Commission, in the particular circumstances of the case, from setting out a description and undertaking an analysis 'mine by mine'.

188 So far as concerns, finally, the synergies allegedly achieved by the merger, the Court notes first, that, as the Commission and RAG stated in reply to its

questions, the merger did not become effective until 1 October 1998, even though the merger agreement, purely for accounting purposes, provided for retroactive legal effect as from 1 January 1998. Second, as is clear from paragraph 18 of the Commission's letter of 4 February 2000 (see paragraphs 35 to 38 above) put in evidence by the applicant, the Commission was informed by the German Government on 10 July 1998 of a report drawn up by Roland Berger and Partner GmbH, according to which the synergies achieved by merging the coal activities of Saarbergwerke and RAG could be worth roughly DEM 25 000 000 to DEM 40 000 000 per year 'in the medium to long term'.

189 Therefore, the figure brought to the Commission's attention was vague, of uncertain relevance for the years 1998 and 1999, and rather insignificant in size compared with the amount of aid authorised under Articles 3 and 4 of the Code. In those circumstances, it may properly be accepted that, when in December 1998 the Commission approved both the aid for 1998 and 1999 and the amended plan, it did not have sufficient information to the effect that the synergies at issue were going to have a direct impact on RAG's production costs or revenue in 1998 and/or 1999 and result in manifestly improper State aid of a precise and not insignificant amount. Nor was the Commission confronted with reliable information on the basis of which it should have checked, when conducting its annual advance scrutiny, whether there might be such aid.

190 Furthermore, the applicant has not succeeded in demonstrating before the Court that the argument that synergies such as those at issue here are in fact achieved only in the medium term, that is to say following the internal restructuring decided on within the new merged entity, is manifestly incorrect. In such a context, the Commission did not manifestly err in its assessment by considering that, when conducting its annual scrutiny in advance, it did not have to rule on such factual matters whose classification as State aid could be established only following a detailed analysis, taking into account, if appropriate, a subsequent and more definitive assessment of the advantages, such as economies of scale, which the merger was going to bring to the new merged entity.

191 The Commission could therefore, without manifestly erring in its assessment, reserve for subsequent scrutiny the question of any synergies achieved by the merger.

The pleas alleging breach of the obligation to state reasons with regard to the merger in the German coal industry

Arguments of the parties

192 The applicant alleges that the Commission provided no reasoning at all concerning the merger, in particular the related synergies, and the purchase price for Saarbergwerke, or concerning the extent to which the merged entity could receive aid after the date of the merger.

193 It also complains that the Commission failed to reply, or even refer, to its complaints of 1 and 5 May 1998 and the issues raised in its letter of 9 September 1998. The contested decisions reject those complaints by implication, without giving any reasoning at all. In so doing, the Commission failed to fulfil its obligation to state reasons, as laid down by the Court of Justice in Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, at paragraph 64.

194 Finally, while the applicant no longer alleges that the Commission erred in its assessment by not examining State aid of DEM 4 000 000 000 and

DEM 2 500 000 000 granted in the context of the merger, it pleads that the Commission failed to comply with its obligation to state reasons on those two points.

195 The Commission replies that it had no reason to refer expressly to the merger in the contested decisions. Given the annual nature of this type of decision, they were not the right place to deal with the special and complex problems which might arise in a one-off transaction such as the merger.

Findings of the Court

196 The first paragraph of Article 15 of the ECSC Treaty provides that decisions of the Commission are to state the reasons on which they are based. According to settled case-law, the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure so as to defend their rights and to enable the Community judicature to carry out its review. It is not necessary for the reasoning to go into all the relevant facts and points of law, however, inasmuch as it must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*Forges de Clabecq*, cited at paragraph 162 above, paragraph 108, and the case-law cited).

197 It should be added that, in accordance with case-law developed in the context of the EC Treaty, where the Commission finds that State aid alleged by a complainant does not exist or is compatible, it must explain to the complainant, in the statement of reasons for the decision in question, the reasons why the matters put forward by it have not been sufficient for its complaint to be allowed, but the Commission need respond only to contentions which are fundamental to an assessment of the aid plan in issue and is not obliged to define its position on

matters which are manifestly irrelevant or meaningless or plainly of secondary importance (*Sytraval*, cited above, paragraph 64, and Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 106).

198 It is true that neither the ECSC Treaty nor the Code contains a provision comparable to Article 93(2) of the EC Treaty, in relation to which the foregoing case-law has developed and which obliges the Commission to give 'notice to the parties concerned to submit their comments'. However, that case-law has established the right of the complainant to be sent an express reply to its complaint, not as an interested party, but as a person directly and individually concerned by the decision in which its complaint has not been upheld (*Sytraval*, paragraphs 47, 48, 59 and 63, and *British Airways*, paragraphs 90, 91, 92 and 94). In the present case, it has been held above that the applicant is concerned within the meaning of the second paragraph of Article 33 of the ECSC Treaty, so that that case-law in principle applies here by analogy.

199 Finally, it is settled case-law that an absence of reasons or inadequacy of the reasons stated goes to an issue of infringement of essential procedural requirements and, involving a matter of public policy, must be raised by the Community judicature of its own motion (*Sytraval*, paragraph 67, and the case cited).

200 It is in the light of the foregoing considerations that it should be examined whether the Commission failed to comply with its duty to state reasons.

201 It should be remembered that the contested decisions set out sufficiently the reasons for which the aid actually notified by Germany for the years 1998 and 1999 was authorised.

202 On the other hand, the contested decisions are silent on the merger, in particular the aid allegedly linked to it. It is clear that that silence should be declared unlawful for failure to state reasons if the contested decisions authorised that aid without providing reasons in that regard. However, that is not the case. As is clear from the text of the decisions, they contain approval only for the aid formally notified by Germany.

203 As regards the question whether the Commission should have given express reasons for excluding from the contested decisions consideration of the questions of aid linked to the merger, it is to be remembered that the substantive pleas raised by the applicant on those aspects have all been rejected, so that none of the rules of law pleaded by it could have been regarded as obliging the Commission to examine the merger in the present context. It has not become apparent in the course of the proceedings before the Court — nor has the applicant claimed — that the presentation of those pleas was impeded by the Commission's silence or that the applicant could have raised other pleas if the contested decisions had expressly stated that the Commission proposed to exclude examination of those questions from the present context.

204 In that respect, the present case is fundamentally different from *British Airways*, where the grounds of the decision which authorised aid for modernisation of the Air France fleet did not make it clear that the Commission had in fact examined the relevant case-law and its own decision-making practice which both opposed such authorisation (paragraph 114 of the judgment). In addition, that decision had remained totally silent on the competitive position of Air France on the most lucrative network of routes (paragraph 280 of the judgment) even though the Commission was required to consider, in a Community context, all matters relevant to whether the planned aid at issue was compatible with the common interest within the meaning of Article 92(3)(c) of the EC Treaty. In the circumstances of that case, since the Court considered that those two points were of fundamental importance, it annulled the contested decision for insufficient reasoning.

205 Here, on the other hand, the particular features of the *British Airways* case are missing: neither the ECSC Treaty nor the Code provides for a criterion comparable to those in Article 92(3)(c) of the EC Treaty and no case-law or decision-making practice obliged the Commission to include in the contested decisions consideration of the complaints raised by the applicant. In addition, consideration of the substantive pleas put forward in the present proceedings has shown that it was reasonable for the Commission not to examine, in the context of the contested decisions, any impact of the merger from the point of view of State aid law.

206 Furthermore, the contested decisions' silence in that regard clearly told the applicant that the Commission had not examined, in the present context, the aid complained of. Faced with the Commission's approach, the applicant could bring an action under Article 35 of the ECSC Treaty for a declaration that the Commission had unlawfully failed to act by not examining that aid. On 3 March 1999, it indeed brought such an action (see paragraph 27 above). In addition, it could apply to the national courts, as long as the Commission had not decided that question, in order to contend that the aid was caught by the prohibition on State aid laid down by Article 4(c) of the ECSC Treaty (see paragraph 163 above). The applicant was not therefore placed in a situation where the Commission's silence denied it adequate judicial protection.

207 In so far as the applicant also refers to the judgment in *Sytraval*, it must be stated that its complaints of 1 May, 5 May and 9 September 1998 alluded only vaguely to the sale price for Saarbergwerke (see paragraph 176 above). Therefore, a fundamental contention for the purposes of that judgment was not involved. In those circumstances, the Commission was not obliged to respond thereto in the context of the contested decisions and could take the view that those decisions did not constitute the appropriate framework for giving a reply to the complaints.

For the same reasons, and given that the complaints equally did not contain sufficiently precise information with regard to the State guarantee of DEM 200 000 000 or to the alleged synergies, the Commission was not required to include, in response to the complaints, specific reasoning on those points in the decisions.

208 As regards, finally, the State aid of DEM 4 000 000 000 and DEM 2 500 000 000 allegedly granted to RAG in the context of the merger, it need merely be observed that, in its statement in intervention lodged in Case T-12/99, the German Government specified the individual amounts comprised in the sum of DEM 4 000 000 000, the dates of its grant and the recipient undertakings. It concluded that the financial measures which had already come into effect had been duly submitted to the Commission and approved by it, while the amounts which remained outstanding could be covered only by future approvals. Since the applicant has not challenged those statements, the issue of the sum of DEM 4 000 000 000, which is imputable to other periods of grant, is irrelevant to the contested decisions. Accordingly, they did not have to give reasons in that regard.

209 The same is true of the sum of DEM 2 500 000 000. The Commission explained to the Court that payment of that sum formed part of the total aid envisaged in the *Kohlekompromiß* and only a tranche of DEM 500 000 000 had been included in the amount of aid approved by the decision relating to 1998 under Article 4 of the Code. That statement was not challenged by the applicant. Nor has it given rise to a substantive challenge by the applicant in that regard. Consequently, the decision's silence as to the DEM 500 000 000 concerns neither a substantial element of the contested decision nor a point material to its substantive legality.

The silence therefore cannot warrant annulment of that decision (see, to that effect, Case 119/86 *Spain* v *Council and Commission* [1987] ECR 4121, paragraph 52).

210 It follows from all the considerations set out above that, in the circumstances of the present case, the contested decisions are not vitiated by an inadequate statement of reasons.

211 Since none of the pleas raised against the contested decisions has been upheld, the actions must be dismissed.

Costs

212 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Commission and the intervener RAG.

213 In accordance with Article 87(4) of the Rules of Procedure, the Federal Republic of Germany is to bear its own costs.

On those grounds,

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

hereby:

1. **Dismisses the actions;**

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

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

Meij Lenaerts Potocki

Jaeger Pirrung

Delivered in open court in Luxembourg on 12 July 2001.

H. Jung

Registrar

A.W.H. Meij

President