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

5 June 2001 *

In Case T-6/99,

ESF Elbe-Stahlwerke Feralpi GmbH, established in Riesa (Germany), represented by W.M. Kühne and S. Bauer, lawyers, with an address for service in Luxembourg,

applicant,

supported by

Federal Republic of Germany, represented by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

and by

Freistaat Sachsen, represented by J. Sedemund and T. Lübbig, lawyers, with an address for service in Luxembourg,

interveners,

* Language of the case: German.

Commission of the European Communities, represented by D. Triantafyllou and P. Nemitz, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision 1999/580/ECSC of 11 November 1998 concerning aid granted by Germany to ESF Elbe-Stahlwerke Feralpi GmbH, Riesa, Saxony (OJ 1999 L 220, p. 28),

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

composed of: J. Azizi, President, P. Mengozzi, K. Lenaerts, R.M. Moura Ramos and M. Jaeger, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 5 December 2000,

gives the following

Judgment

Legal and factual background to the case

1 The applicant is a steel undertaking governed by German law and controlled by the Italian group Feralpi, which is also a steel producer. Its registered office and production site are in Riesa (Saxony) in Germany.

2 By letter of 1 March 1993, the Commission approved, pursuant to the third indent of Article 5 of Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57, 'the fifth code on aid to the steel industry'), the grant to the applicant by the German authorities of an investment subsidy of DEM 19.55 million, an investment tax benefit of DEM 5.3 million and a State guarantee of DEM 60.8 million (N 351/92).

3 By letter of 13 January 1995, the Commission approved, pursuant to Article 5 of the fifth code on aid to the steel industry, the grant to the applicant by the German authorities of an investment subsidy of DEM 11.73 million, an investment tax benefit of DEM 4.08 million, a loan of DEM 6.215 million linked with a regional environmental protection programme and a State guarantee in respect of a loan of DEM 23.975 million (N 673/94).

4 In 1995 an investment subsidy of DEM 9.35714 million and an investment tax benefit of DEM 1.236 million were also granted to the applicant without being notified to the Commission beforehand. In 1997 the applicant was also granted, without prior notification to the Commission, a State guarantee of DEM 12 million to cover operating loans.

5 In May 1997, the Commission received information from external sources that the applicant had received other aid and that some of the authorised aid had been used for purposes other than those for which it had been allowed.

6 On 18 November 1997, the Commission decided to initiate the procedure provided for in Article 6(4) of Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ 1996 L 338, p. 42, 'the sixth code on aid to the steel industry'). By letter of 2 December 1997, the Commission informed the Federal Republic of Germany that it had decided to do so and asked it to submit its comments. That letter formed the subject-matter of a notice published in the *Official Journal of the European Communities* on 18 February 1998 (OJ 1998 C 51, p. 3, 'the notice of 18 February 1998'), in which the Commission invited interested parties to submit their comments.

7 By letter of 3 March 1998, the Federal Republic of Germany submitted its comments to the Commission. It submitted further comments in two letters dated 19 and 25 March 1998. In the second of these letters, it informed the Commission that an additional investment subsidy of DEM 1.35586 million, which it had presented in a letter of 13 October 1997 as a planned increase in the investment subsidy referred to in paragraph 4 above, had in fact already been paid at that time.

8 On 1 April 1998, the Commission forwarded to the Federal Republic of Germany the comments which it had received from the UK Steel Association on 17 March 1998. By letter of 22 April 1998, the Federal Republic of Germany informed the Commission of its comments on the stance taken by the UK Steel Association.

9 By letter of 24 April 1998, the Commission informed the Federal Republic of Germany of its provisional position. The Federal Republic of Germany responded by letter of 6 May 1998.

10 By letter of 12 October 1998, the Federal Republic of Germany informed the Commission that of the DEM 10.713 million representing the total amount of the investment subsidy referred to in paragraphs 4 and 7 above, DEM 2.54 million, corresponding to investments intended for the applicant's hot rolling mill, had been reimbursed by the applicant.

11 On 11 November 1998, the Commission adopted Decision 1999/580/ECSC of 11 November 1998 concerning aid granted by Germany to ESF Elbe-Stahlwerke Feralpi GmbH, Riesa, Saxony (OJ 1999 L 220, p. 28, 'the contested decision').

12 That decision contains the following provisions:

'*Article 1*

The investment grant of DEM 8.173 million, the investment premium of DEM 1.236 million and the guarantee (comprising an aid element) of DEM 12.0

million which Germany granted in 1995 in favour of ESF Elbe-Stahlwerke Feralpi GmbH, Riesa, are incompatible with Decision No 2496/96/ECSC and with the common market in coal and steel.

The aid element of the guarantees covering the operating loans of DEM 7.2 million and DEM 4.8 million granted at the end of 1994 was not authorised and is incompatible with Decision No 2496/96/ECSC and with the common market in coal and steel.

Article 2

Germany shall, acting in accordance with the provisions of German law relating to the recovery of amounts owed to the State, recover the aid paid to ESF Elbe-Stahlwerke Feralpi GmbH. In order to negate the effects of the aid, interest shall be charged on the amount of aid from the date of payment to the date of repayment. The rate shall be that used by the Commission during the period in question to calculate the net grant equivalent of regional aid.

Article 3

Germany shall inform the Commission, within two months of the notification of this Decision, of the measures taken to comply herewith.

Article 4

This Decision is addressed to the Federal Republic of Germany.'

Procedure

13 It was in those circumstances that, by application lodged at the Court Registry on 11 January 1999, the applicant brought the present action.

14 By document lodged at the Court Registry on 21 June 1999, the Freistaat Sachsen sought leave to intervene in support of the form of order sought by the applicant. The main parties did not comment on that application to intervene.

15 By document lodged at the Court Registry on 25 June 1999, the Federal Republic of Germany sought leave to intervene in support of the form of order sought by the applicant. In its letter of 5 July 1999, the Commission raised no objection. The applicant did not comment.

16 By order of 8 November 1999, the Present of the Third Chamber, Extended Composition, of the Court of First Instance granted the Federal Republic of Germany and the Freistaat Sachsen leave to intervene in support of the form of order sought by the applicant.

17 The Federal Republic of Germany and the Freistaat Sachsen lodged their statements in intervention on 24 and 26 January 2000 respectively.

18 On 13 March 2000, the Commission lodged its observations on those two statements in intervention.

19 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the oral procedure. In the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, the Court invited the parties to answer a number of written questions and to produce certain documents. Those requests were complied with within the time allowed.

20 The parties submitted oral argument and answered the questions put by the Court at the hearing on 5 December 2000.

Forms of order sought by the parties

21 The applicant claims that the Court should:

— order the Commission, pursuant to Article 23 of the ECSC Statute of the Court of Justice, to produce all the documents relating to the adoption of the contested decision;

— allow the applicant to consult the documents thus produced;

— annul the contested decision;

— order the Commission to pay the costs.

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

— order the Commission, pursuant to Article 23 of the ECSC Statute of the Court of Justice, to produce all the documents relating to the adoption of the contested decision;

— allow it and the applicant to consult the documents thus produced;

— annul the contested decision;

— order the Commission to pay the costs.

23 The Freistaat Sachsen claims that the Court should:

— order the Commission, pursuant to Article 23 of the ECSC Statute of the Court of Justice, to produce all the documents relating to the adoption of the contested decision;

— allow it and the applicant to consult the documents thus produced;

— annul the contested decision;

— order the Commission to pay the costs.

24 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Claim in respect of the production and consultation of the administrative file

25 Following the measure of organisation of procedure prescribed by the Court, which had been communicated to it on 22 October 1999, the Commission, pursuant to Article 23 of the ECSC Statute of the Court of Justice, lodged at the Court Registry, together with a letter dated 12 November 1999, the file relating to the administrative procedure leading to the adoption of the contested decision. In that letter, the Commission requested that all the documents in the file be treated as confidential, with the exception of its own communications and the documents originating from the applicant.

26 By fax of 16 November 1999, the Commission sent the Court Registry the list of documents making up the administrative file.

27 The letter and fax from the Commission referred to in the two preceding paragraphs were transmitted to the applicant by the Court Registry on 23 November 1999 and to the interveners on 28 March 2000.

28 None of those parties responded.

29 In those circumstances, and having regard to the fact that a reading of the applicant's written submissions gives no indication that the lack of access to the administrative file adversely affected the presentation of its arguments during the procedure before the Court, as the applicant alleges in its application but without supporting that allegation, the claim in question must be rejected.

Claim for annulment

30 In support of its claim for annulment, the applicant puts forward a number of pleas directed against the first paragraph of Article 1 of the contested decision. One plea seeks annulment of the second paragraph of Article 1 of that decision and one plea seeks annulment of Article 2 thereof.

The pleas seeking annulment of the first paragraph of Article 1 of the contested decision

31 These pleas are six in number. The first plea alleges misapplication of the ECSC Treaty. The second plea alleges an unlawful change of primary Community law. The third plea alleges misuse of powers. The fourth plea alleges infringement of the principles of legal certainty and protection of legitimate expectations. The fifth plea alleges infringement of the principle of non-discrimination. The sixth plea alleges infringement of Article 5 and the first paragraph of Article 15 of the ECSC Treaty.

32 While all the abovementioned pleas must be taken into consideration, it is appropriate to give priority to examining the first plea.

Arguments of the parties

33 The applicant claims, first of all, that the Commission ignored the fact that the final product concerned by the investment aid at issue, namely stretched concrete reinforcing bars in coils (*Gereckter Betonstahl in Ringen*), does not fall within the category of products defined in Annex I to the ECSC Treaty. Supported by the

Federal Republic of Germany and the Freistaat Sachsen, the applicant states that the wire rod with which the contested decision equates its final product comes under Code 4400 of that annex, which refers to '[h]ot finished products of iron, ordinary steel or special steel', in other words to products obtained by hot rolling.

34 However, the applicant's final product acquires the characteristics essential to its use in reinforced-concrete structures only after undergoing a process of cold processing of wire rod. This process corresponds to a technical development in the classic procedure of transformation by drawing (*Ziehen*). Drawn products are excluded from the nomenclature of the ECSC products defined in Annex I to the ECSC Treaty. They are covered by the rules on the 'Framework for certain steel sectors not covered by the ECSC Treaty' (OJ 1988 C 320, p. 3, 'the non-ECSC framework'), which make express reference to the wire-drawing and rod-drawing of wire rod.

35 Relying on the report of Professor Hensel of the Montanuniversität of Freiberg, Germany ('the Hensel Report'), concerning its rolling mill and its cold drawing facilities, the applicant, supported by the Freistaat Sachsen, states that the manufacture of 'drawn' concrete-reinforcing steel rods requires that the wire rod which leaves the hot rolling mill undergoes a finishing process to provide it with a form allowing it to be cold-treated in the 'drawing' workshop. The cold 'drawing' process is based on new technology developed in 1990 and recognised by the European Patent Office in June 1994. It has replaced the long extrusion technique and is carried out in a separate workshop from the rolling and finishing workshops; from a technical and economic viewpoint it is a completely different operation from hot rolling. Furthermore, wire rod producers rarely have 'drawing' facilities. In the Commission's own words, the 'drawing' of wire rod is generally carried out in steel service centres.

36 The applicant and the interveners maintain that, by referring in the fifth paragraph of point IV of the preamble to the contested decision to the case of undertakings not falling within the scope of Article 80 of the ECSC Treaty which use stretching facilities to treat wire rod, the Commission itself implicitly admits

that the final product in question, the facilities used in its manufacture and the aid for such facilities do not fall within the scope of the ECSC Treaty. The Freistaat Sachsen further states that in that passage in the contested decision the Commission recognises that the applicant's final product constitutes a specific market which does not in principle fall within the scope of the ECSC Treaty.

37 Second, the applicant claims that the Commission's argument in the contested decision that State aid granted to undertakings whose activities fall in part within the scope of the ECSC Treaty must be assessed without distinction under the rules of the ECSC Treaty is completely new by comparison with the position it adopted during the administrative procedure.

38 The Federal Republic of Germany and the Freistaat Sachsen dispute that the rules of the ECSC Treaty on aid are applicable without distinction to all aid received by a steel undertaking. Investment aid for such an undertaking should be assessed under the EC Treaty where it is intended for activities not falling within the scope of the ECSC Treaty. Such an interpretation is consistent with the scheme of the aid rules of the EC and ECSC Treaties, which are intended to guarantee fair competition in the Community between undertakings active on the same product market. As a producer of 'drawn' concrete-reinforcing wire rods, the applicant is in competition not with undertakings coming within the scope of the ECSC Treaty but with steel service centres and concrete construction undertakings, which come within the scope of the rules of the EC Treaty. The latter rules should therefore also apply to the applicant in respect of that part of its production.

39 The Freistaat Sachsen further states that since the law on aid is an instrument to control competition, the compatibility of aid with the common market must be assessed in terms of the market on which the undertaking in receipt of the aid operates and not on the basis of a formal link to one particular Treaty. The approach which the Commission has adopted in the present case, and which is

based on the fact that the applicant is a steel undertaking within the meaning of Article 80 of the ECSC Treaty, is contrary to its own practice and to the case-law, which gives priority, in the law applicable to State aid, to the criterion associated with the nature of the product or of the production over that based on the description of the undertaking (see Case 14/59 *Société des fonderies de Pont-à-Mousson* v *High Authority* [1959] ECR 215, at 228, and the Opinion of Advocate General Lagrange in that case, [1959] ECR 235, at 239; see also Case 328/85 *Deutsche Babcock* [1987] ECR 5119, paragraph 9, and Case C-18/94 *Hopkins and Others* [1996] ECR I-2281, paragraph 14).

40 In its reply, the applicant claims, on the basis of supporting documents, that it keeps a separate set of accounts for each branch of its production, thus ensuring that aid for its non-ECSC activities will not be diverted to activities covered by the ECSC Treaty. The Federal Republic of Germany and the Freistaat Sachsen further state that whereas the applicant has shown that it keeps completely separate accounts for each type of activity, the Commission has not established either in the contested decision or in its written submissions that the applicant's ECSC activities benefited from the aid granted to its 'drawing' activities or that the applicant failed to take adequate measures to prevent such confusion. The Freistaat Sachsen also claims that the Commission, in its notice of 18 February 1998, had proposed a detailed examination of the matter. It infers from the fact that there is no reference to that examination in the contested decision that the outcome was favourable to the applicant.

41 The Commission states, first of all, that the applicant, which did not take part in the administrative procedure, has produced a series of documents which were never brought to its knowledge during that procedure. These documents, and the factual assertions made in respect of them, should therefore be regarded as having no relevance to the assessment of the legality of the contested decision (see, on that point, Case T-123/97 *Salomon* v *Commission* [1999] ECR II-2925, paragraph 55, and the case-law cited there).

42 The Commission claims that the arguments put forward by the applicant and the interveners are in any event unfounded.

43 First, it disputes their description of the process used to manufacture 'stretched' concrete steel rods. As stated in the contested decision, the 'stretching' or 'straightening' of steel is merely a technique used to improve the quality of the hot-rolled wire rod in order to satisfy the technical specifications of the construction sector. The operation does not alter the nature or properties of the product treated to the extent of transforming it into an EC product. It forms part of the production of wire rod and therefore of the applicant's ECSC activities, and does not equate to the activity of drawing (*Ziehen*), which alters the substance of the product.

44 This analysis is supported by the opinion of steel industry professionals, who associate the activity of stretching with steel production, and also by various documents which the applicant has placed on the file.

45 Thus, in the patent specification annexed to the application, stretching is described as a process of consolidating concrete-reinforcing steel and it is also explained there that the new technology developed by the applicant is designed to replace the old straightening process based on distortion by discontinuous torsion by a technique of continuous straightening which makes it possible to obtain a very uniform and very isotropic pluriaxial cold consolidation and to improve the extension, resistance and stretch limits of concrete-reinforcing steel. That technical description, in which the concept of drawing is systematically avoided, is corroborated by the Hensel Report, in which the process in question is consistently described as finishing and never as drawing (*Ziehen*). It is also confirmed by the document annexed to the application 'Stretched concrete steel — a simple standardised transformation process', which shows that the product in question is still steel within the meaning of the ECSC Treaty.

46 The information provided by these various documents is confirmed by the definitions of wire rod and concrete reinforcing bar in Statistical Questionnaire 2-71 which the Commission sent to undertakings falling within the scope of the ECSC Treaty in accordance with Decision No 4104/88/ECSC of 13 December

1988 amending the Questionnaires of the Annex to Decision No 1566/86/ECSC (OJ 1988 L 365, p. 1). It follows from those definitions that the regular cold distortion of those products, in particular by 'stretching' or straightening, does not prevent the products resulting from such operations from belonging to the category of steel products. Those definitions, which date back to 1986 (see note on the definition of wire rod in Commission Decision No 1566/86/ECSC of 24 February 1986 on iron and steel statistics (OJ 1986 L 141, p. 1, at p. 43)), were never questioned at the time in professional circles and are not disputed by the applicant or the interveners.

47 Second, and in the alternative, the Commission contends that even if straightened concrete-reinforcing steel were regarded as a product falling within the scope of the EC Treaty, the applicant could not in any event receive investment aid for a product of that type, since it is a steel undertaking.

48 The applicant's argument based on the nature of the product fails to take account of the scope of the prohibition on aid in Article 4(c) of the ECSC Treaty, which depends on the capacity of the recipient of the aid (see the Opinion of Advocate General Lagrange in Case 30/59 *De Gezamenlijke Steenkilenmijnen in Limburg* v *High Authority* [1961] ECR 1, at 34). Pursuant to Article 80 of the ECSC Treaty, the fact of manufacturing products in the sphere of coal and steel is sufficient for the undertaking concerned to be classified as a steel undertaking (see, on that point, Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraph 97). When applied to such an undertaking, the prohibition on aid set out in Article 4(c) of the ECSC Treaty is therefore aimed not only at aid to finance investments directly connected with the manufacture of steel products but also at aid allocated to activities not falling directly within the scope of the ECSC Treaty (see, on that point, *Société des fonderies de Point-à-Mousson* v *High Authority* and the Opinion of Advocate General Lagrange in that case, cited in paragraph 39 above, at 227 to 229 and 240 respectively). That interpretation is confirmed by Article 1 of the sixth code on aid to the steel industry, which refers to aid to the steel industry, whether specific or not.

49 Application of Article 4(c) of the ECSC Treaty based on the capacity of the undertaking to which the aid is granted also follows from the letter and structure of the provisions of that Treaty. It corresponds with the desire to ensure that aid granted to a steel industry for its non-ECSC production does not place it in a better financial position on the market covered by that Treaty and thus distort competition on that market. In the present case the risk of such an effect is twice as great. First, the applicant does not keep separate analytical accounts for each branch of its production, so that aid granted to it enables it to improve its overall financial situation and sell its ECSC products at a lower price; and, second, the aid in question allows the applicant to improve the quality of its concrete reinforcing bars, thus increasing its markets for its main production, which is covered by the ECSC Treaty.

50 In the observations which it submitted to the Commission by letter of 22 April 1998, referred to in paragraph 8 above, the Federal Republic of Germany claimed that the integration of subsequent stages of steel processing increased the undertaking's overall investment and operating expenditure. That assertion confirms that aid intended to finance such expenditure ultimately benefits all the activities of the undertaking concerned. A steel undertaking's ECSC production cannot benefit from aid disguised in the form of a production subsidy which is not covered by the ECSC Treaty, otherwise Article 4(c) of that Treaty, which prohibits the grant of aid in any form whatsoever on the market falling within the scope of that Treaty, would be deprived of all practical effect.

51 The Commission contends that its argument is supported by point 4 of Annex I to the ECSC Treaty. Concern with the effects of aid granted for activities not falling within the scope of the ECSC Treaty has also been taken into consideration, in the non-ECSC framework, in regard to parent/subsidiary relations in steel groups.

52 The fact that there is no effective separation between the applicant's subsidised activities and its other activities, and the corresponding risk that the aid will be

diverted and have an effect on the market falling within the scope of the ECSC Treaty, provide a further reason for rejecting the applicant's argument that it is technically possible to straighten wire rod in separate workshops from the hot-rolling mill, or indeed in separate undertakings, such as steel service centres.

53 In its observations on the statements in intervention, the Commission emphasises that the abovementioned risk of effects on the ECSC market is not as great in the case of a steel service centre when the latter does not belong to a production undertaking falling within the scope of the ECSC Treaty and when the production subject to that Treaty which the steel service centre processes into products governed by the EC Treaty has been purchased from a steel undertaking on normal market terms. It further states that where, as in the present case, an undertaking's various production branches are technically integrated, the Commission is not required to provide evidence that the aid in question has been unlawfully diverted, since, in the absence of proof to the contrary, such industrial integration gives rise to a presumption to that effect (see, on that point, *Société des fonderies de Pont-à-Mousson* v *High Authority*, cited in paragraph 39 above, at 445). On the contrary, it is for the Member State concerned to show the compatibility of the aid in question (Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 33), which the Federal Republic of Germany has not done in the present case; in fact it did not produce any evidence during the administrative procedure capable of rebutting the abovementioned presumption.

54 As regards the accounts joined to the reply, the Commission maintains that they are inadmissible, under Article 48(2) of the Rules of Procedure of the Court of First Instance. Nor can those documents influence the examination of the legality of the contested decision, since they were not brought to the Commission's knowledge during the administrative procedure. In any event, they do not permit the view that any danger associated with the effects of the aid granted in respect of non-ECSC activities is precluded in the present case. The applicant's final accounts are consolidated accounts, so it cannot be ruled out that a subsidy intended for the final stage of its production may benefit the earlier stages.

Findings of the Court

55 First of all, it should be borne in mind that in the first paragraph of Article 1 of the contested decision, to which the pleas in law being examined refer, the investment grant of DEM 8.173 million and the investment premium of DEM 1.236 million granted to the applicant in 1995, and also the State guarantee of DEM 12 million granted to the applicant not in 1995, as stated in that provision, but in 1997, as may be seen from point II of the preamble to the contested decision and from the Commission's answers to the written questions put by the Court, are declared incompatible with the sixth code on aid to the steel industry and with the common market in coal and steel.

56 In answer to a written question put by the Court, the applicant confirmed that, as indicated in its written submissions, its pleas seeking the annulment of the first paragraph of Article 1 of the contested decision relate solely to the grant and the investment premium and not to the State guarantee of DEM 12 million which it was granted in 1997 to cover operating loans.

57 In those circumstances, it is necessary to consider whether the Commission was justified in applying the ECSC Treaty to that investment aid and in declaring it incompatible with the rules on State aid laid down in that Treaty.

58 Article 4(c) of the ECSC Treaty, which is the basis for the legal rules governing State aid covered by that Treaty, declares subsidies or aids granted by States in any form whatsoever to be incompatible with the common market for coal and steel and, accordingly, prohibited, as provided for in that Treaty.

59 That article does not state whether the principle of prohibition which it lays down supposes solely, for its application, that the undertaking receiving subsidies or aids is a steel undertaking within the meaning of the ECSC Treaty, namely, as provided for in Article 80 of that Treaty, an undertaking engaged in production in the coal or steel industry, or whether the activity in respect of which the subsidies or aid are granted must also be a production activity falling within the scope of the ECSC Treaty.

60 The fact that the undertaking in question is engaged, as in the present case, in production in the steel industry and is therefore a steel undertaking in terms of Article 80 of the ECSC Treaty does not mean — nor does Commission claim that it does — that all its activities are to be regarded as activities falling within the scope of the ECSC Treaty.

61 Nor does that fact give reason to conclude that the investment aid intended for such an undertaking must be considered, in all circumstances, under the rules on State aid falling within the scope of the ECSC Treaty.

62 In that regard, it does not follow from the case-law on which the Commission relies in its written submissions (see paragraph 48 above) that a steel undertaking which is engaged partly in activities falling within the scope of the ECSC Treaty and partly in activities not covered by that Treaty is in all circumstances subject to the application of the ECSC Treaty rules on State aid, including where it receives investment aid in respect of activities which do not fall within the scope of that Treaty.

63 In *Société des fonderies de Pont-à-Mousson* v *High Authority*, cited in paragraph 39 above, the question was whether the fact that the applicant manufactured molten pig iron meant that it was an undertaking engaged in production within

the meaning of Article 80 of the ECSC Treaty for the purposes of the application of a financial equalisation measure referred to in Article 53 of that Treaty. The applicant claimed that it did not, on the ground, first, that manufactured molten pig iron was not a product mentioned in Annex I to the ECSC Treaty and, second, that the pig iron was intended for its production of iron castings, which were outside the scope of the ECSC Treaty. That argument was rejected by the High Authority.

64 The Court followed the Opinion of Advocate General Lagrange and, after finding that the molten pig iron manufactured by the applicant fell within the category 'foundry and other pig iron' in Code 4200 of Annex I to the ECSC Treaty, held that the fact that the applicant did not place its molten pig iron on the market, but consumed it immediately in its works in the manufacture of products outside the jurisdiction of the ECSC Treaty was not of such a kind as to preclude the application of that Treaty to the pig iron. It therefore concluded that the applicant, as a producer of pig iron, was an undertaking engaged in production in the steel industry within the meaning of the provisions of the ECSC Treaty and had therefore correctly been made subject by the High Authority to the equalisation scheme in question in respect of its production of molten pig iron (at 225 to 229).

65 Nowhere in that judgment is there any support for the Commission's argument that the fact that the recipient of the aid is a steel undertaking is sufficient for it to be subject, in all circumstances, to the ECSC Treaty rules on State aid. On the contrary, it follows from that judgment that one and the same undertaking may come under the ECSC Treaty in respect of certain of its products, in that particular case molten pig iron, and the EC Treaty in respect of other products, in that particular case iron castings. In that regard, the judgment lends force to the applicant's and the interveners' argument that the Commission's contention should be rejected.

66 Nor does it follow from that judgment, which did not concern State aid, that where a steel undertaking is engaged partly in activities covered by the ECSC Treaty and partly in activities not covered by that Treaty there is a presumption

that aid intended for activities not covered by that Treaty will be diverted to those which are so covered and that it is for the Member State concerned, assisted where appropriate by the undertaking receiving the aid, to produce evidence to rebut that presumption.

67 The Opinion of Advocate General Lagrange in *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited in paragraph 48 above, concerns questions of no relevance to the present case, which relate, first, to the meaning of subsidy in Article 4(c) of the ECSC Treaty and, second, to the delimitation of the scope of that provision and of Article 67 of the ECSC Treaty.

68 In *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission*, cited in paragraph 48 above, the Court of First Instance held that the applicants were covered by Article 80 of the ECSC Treaty, because they manufactured products listed in Annex I to that Treaty, and therefore concluded that the provisions of the ECSC Treaty applied (paragraph 97). However, the Court was not required to determine whether such a conclusion was valid in respect of a steel undertaking's non-ECSC production activities.

69 Both in the decision opening the administrative procedure and in the contested decision, the Commission itself accepts that the mere fact that the undertaking in receipt of the investment grant is a steel undertaking within the meaning of Article 80 of the ECSC Treaty is not sufficient to make it subject, in whatever circumstances, to the ECSC Treaty rules on State aid.

70 In its notice of 18 February 1998 (p. 5), the Commission states:

'An unknown portion of the investment aid may be compatible with the common market in so far as it concerns strictly non-ECSC investments and as long as any spillover to the ECSC activities of ESF [Elbe-Stahlwerke Feralpi GmbH] is excluded...'.

71 In the third paragraph of point IV of the preamble to the contested decision, the Commission states:

'... [A]id for certain investments that may be used also for activities not covered by the ECSC Treaty is caught by [Article 4(c) of the ECSC] Treaty if granted in favour of an ECSC undertaking and if no clear distinction is made between ECSC and non-ECSC activities'.

72 In the fifth paragraph of point IV, the Commission states:

'... [A]id to cover part of the cost of investment in stretching facilities in the case of [undertakings not falling within the scope of Article 80 of the ECSC Treaty] would be examined in the light of the EC Treaty and might be regarded as regional investment aid under Article 92(3)(c) of the EC treaty. This, however, does not mean that investments by ECSC undertakings in assets that would also meet the needs of non-ECSC undertakings are, in principle, to be scrutinised in the light of the rules of the EC Treaty. The prohibition of State aid under Article 4(c) of the ECSC Treaty aims at ensuring fair competition between

undertakings which manufacture ECSC products. Generally speaking, and in the present case too, these undertakings are eligible for investment aid only if the activity carried out with the assets financed is totally separate from the remaining ECSC activities'.

73 It follows from these extracts that the Commission itself does not rule out non-application of the principle of prohibition of aid laid down in Article 4(c) of the ECSC Treaty and applying instead the rules on State aid laid down in the EC Treaty to investment aid granted to a steel undertaking for its non-ECSC activities, provided that the undertaking completely separates its subsidised activities from its production activities which fall within the scope of the ECSC Treaty, thus removing any risk that the aid will be diverted to the latter activities.

74 Consequently, the Court must examine whether the Commission was justified in taking the view that the investment grant referred to in the first paragraph of Article 1 of the contested decision concerned production activities of the applicant that are covered by the ECSC Treaty. Should that prove to be so, it may be concluded that the Commission properly applied the ECSC Treaty in the present case. If not, it will be necessary to ascertain whether the application of the ECSC Treaty is none the less justified by the fact that the organisation of the applicant's activities does not provide sufficient guarantees to prevent diversion of the investment grant at issue to its ECSC production activities and thus an effect on competition on the market to which the ECSC Treaty applies.

75 In answer to the written questions put by the Court, the Commission produced a copy of the letter of 12 October 1998 from the Federal Republic of Germany (see paragraph 10 above), which shows that the grant at issue was awarded to the applicant for investment for its finishing and 'stretching' works. The analysis described in the preceding paragraph must therefore be applied, first, to the part of the investment grant relating to the applicant's finishing activity and, second, to that relating to its 'stretching' activity.

76 As regards, first, the part of the investment grant associated with the applicant's finishing activity, it follows from the Hensel Report that that activity is aimed at preparing the wire rod leaving the hot rolling mill for the 'stretching' operation.

77 In that report, products of the finishing operation are placed in the group of hot finished products of iron, ordinary steel or special steel referred to under code 4400 of Annex I to the ECSC Treaty. Since the applicant and the interveners put forward no argument in their written submissions to call into question the classification of ECSC products used in the report, they were invited at the hearing to express their views on the observations on those products in the Hensel Report. They confirmed that those observations were accurate.

78 Even though the description of the applicant's manufactured product range which it provides in its answers to the written questions put by the Court gives the impression that the wire rod leaving its finishing workshop is not a product which it puts on sale, as such, on the market, that fact is not in any event of such a kind as to exclude its finishing activity, and the product of that activity, from the scope of the ECSC Treaty (see, on that point, *Société des fonderies de Pont-à-Mousson* v *High Authority*, cited in paragraph 39 above, at 227 to 228).

79 As regards the grant for the finishing activity, it is necessary to reject the Freistaat Sachsen's argument that the investment grant at issue is associated with regional aid programmes previously approved by the Commission on the basis of the EC Treaty.

80 When the Freistaat Sachsen was invited in a written question to identify those programmes, it referred, in regard to the subsidy and the investment premium respectively, to the *24. Rahmenplan der Gemeinshaftsaufgabe 'Verbesserung der*

regionalen Wirtschaftsstruktur' (24th Framework plan of general interest for the improvement of regional economic structures) and a German law of 1991 on investment premiums. However, as the Freistaat Sachsen itself states in its answer to that written question, both the Commission decisions authorising those aid schemes contain a reservation in respect of the sector covered by the ECSC Treaty. Consequently, the investment aid relating to the applicant's finishing activity cannot be regarded as being covered by those approval decisions.

81 It follows from the analysis carried out in the four preceding paragraphs that the Commission was justified in examining the aid in the light of the ECSC Treaty.

82 Without its being necessary to rule on their admissibility under Article 48(2) of the Rules of Procedure of the Court of First Instance, the applicant's arguments set out in its reply, to the effect that Article 67 should apply instead of Article 4(c) of the ECSC Treaty, cannot be upheld.

83 Article 67 of the ECSC Treaty is intended to prevent the distortion of competition which exercise of the residual powers of the Member States inevitably entails (see *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited in paragraph 48 above, at 25). To that end, paragraph 2 of that provision allows the Commission to authorise a Member State to grant aid to its national steel industry where the aid is intended to counterbalance the harmful effects for that industry, in terms of conditions of competition, of another State measure (see, on that point, Opinion of Advocate General Jacobs in Case C-210/98 P [2000] ECR I-5843, at I-5845, paragraph 3).

84 However, neither the applicant nor the interveners have adduced the slightest evidence that such was the aim pursued in the present case by the award of the investment grant in question.

85 Article 67(3) of the ECSC Treaty is aimed at a measure adopted by a Member State which confers an advantage on its steel industry compared with other national industries. It implicitly recognises the legality of such an advantage, and at the same time empowers the Commission to make the necessary recommendations to the Member State concerned (*De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited in paragraph 48 above, at 21). However, as the Commission emphasises in its written submissions, that provision is aimed solely at advantages in favour of the steel industry arising from the application of national legislation or regulations connected with the general economic policy of the Member State concerned, not public subsidies granted specially to the coal and steel industry or, as in the present case, to a specific steel undertaking, which come under Article 4(c) of the ECSC Treaty (see, in that regard, Opinion of Advocate General Roemer in Case 59/70 *Netherlands* v *Commission* [1971] ECR 639, at 662 to 664; see also Case T-37/97 *Forges de Clabecq* v *Commission* [1999] ECR II-859, paragraph 141).

86 In the light of the foregoing considerations (paragraphs 76 to 85), the Commission was justified in examining the compatibility of the portion of the investment grant in question relating to the applicant's finishing activity in the light of Article 4(c) of the ECSC Treaty and the sixth code on aid to the steel industry, which lays down the general derogations from the principle of prohibition of aid set out in Article 4(c) (Case T-243/94 *British Steel* v *Commission* [1997] ECR II-1887, paragraph 49, and Case T-244/94 *Wirtschaftsvereinigung Stahl and Others* v *Commission* [1997] ECR II-1963, paragraph 37). In that regard, it should be emphasised that the applicant and the interveners have not challenged the Commission's analysis of that point in the sixth and seventh paragraphs of point IV of the preamble to the contested decision.

87 In conclusion, the first plea in law, alleging misapplication of the ECSC Treaty, must be rejected in so far as it concerns the portion of the investment grant referred to in the first paragraph of Article 1 of the contested decision, relating to the applicant's investment in its wire rod finishing workshop.

88 The second, third and fourth pleas in law, alleging, respectively, an unlawful change of primary Community law, misuse of powers and infringement of the principles of legal certainty and protection of legitimate expectations, must also be rejected as regards the grant referred to in the preceding paragraph, in so far as they are based on the premiss, unfounded in the case of the applicant's finishing activity, that the activities subsidised in the present case are activities not covered by the ECSC Treaty.

89 In those circumstances, and having regard to the fact that it follows from the written submissions of the applicant and the interveners that their fifth and sixth pleas in law, alleging, respectively, infringement of the principle of non-discrimination and infringement of Article 5 and the first paragraph of Article 15 of the ECSC Treaty, relate exclusively to the applicant's 'stretching' activities, it must be concluded that the first paragraph of Article 1 of the contested decision is lawful in so far as the Commission there declares the portion of the investment grant awarded to the applicant in 1995 relating to the applicant's investment in its wire rod finishing workshop to be incompatible with the sixth code on aid to the steel industry and with the common market in coal and steel.

90 As regards, second, the other portion of the investment grant referred to in paragraph 75 above, the Commission states in the fourth paragraph of point IV of the preamble to the contested decision:

'... Stretching of steel is simply a technology to improve the quality of the hot-rolled wire rod so that it meets the technical specifications prevailing in the construction sector. The final product, stretched wire rod, is an ECSC product according to Annex I [to] the ECSC Treaty that falls under code 4400 "wire rod" as well as under CN code 7213, which relates to ECSC products. The view of Germany that stretching of steel is not related to the production of ECSC products cannot therefore be shared.'

91 It is common ground that, in the context of the present case, the term '*Richten*' (straightening), used by the Commission in the contested decision, and the term '*Recken*' ('stretching'), used by the applicant and by the interveners in their written submissions, must be regarded as equivalent, as must the words derived from those two terms. It is also common ground that in the present case 'stretched'/(re)straightened wire rod and 'stretched'/(re)straightened concrete reinforcing steel, used without distinction by the parties at the hearing, both designate the final product of the applicant's straightening ('stretching') activity. In the following evaluation, the word 'straightening' will be used to designate the activity under consideration and the expression 'straightened wire rod' will be used to identify the final product in question.

92 In that context, it is necessary, following the procedure described in paragraph 74 above, to ascertain whether the Commission was justified in taking the view that the applicant's straightening activity and the final product of that activity were covered by the ECSC Treaty.

93 In that regard, it must be borne in mind that, in an action for annulment under Article 33 of the ECSC Treaty, the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (see, by analogy, Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, 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 81). Thus, the complex assessments made by the Commission must be examined solely on the basis of the information available to the Commission at the time when those assessments were made (see, by analogy, Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16, Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33, and *British Airways and Others and British Midland Airways* v *Commission*, paragraph 81).

94 The validity of the analysis carried out by the Commission in the passage from the contested decision set out in paragraph 90 above must be examined in the light of those principles.

95 On that point, it should be observed, first, that Article 81 of the ECSC Treaty provides that the expressions 'coal' and 'steel', which delimit the material scope of that Treaty, are as defined in Annex I thereto. Code 4400 in that Annex, under which the Commission classifies the applicant's final product, designates '[w]ire rod' among a series of '[h]ot finished products of iron, ordinary steel or special steel'. Code 7213 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1, 'the combined nomenclature'), to which the Commission also refers in the contested decision, includes '[b]ars and rods' among the products covered by the ECSC Treaty.

96 However, it is common ground that the applicant's final product is the outcome of an operation involving the cold straightening of wire rod. Neither code 4400 nor any other code in Annex I to the ECSC Treaty, nor the classification of products covered by the ECSC Treaty contained in the combined nomenclature, refer to cold-straightening wire rod. On the contrary, the fact that wire rod is designated under code 4400 of Annex I as a hot finished product means that, in the absence of any indication to the contrary, that product cannot be classed as the product of a cold treatment operation.

97 Relying on point 4 of Annex I to the ECSC Treaty, the Commission advocates a broad interpretation of the concept of wire rod in code 4400 of that Annex, which would allow the cold-straightened wire rod produced by the applicant to be classed as such.

98 According to that provision the Commission must take account of the fact that the production of some of the products on the list in that Annex is directly linked with the production of by-products which are not listed, but whose selling prices may influence those of the principal products.

99 However, the Commission has not explained either in the contested decision or during the proceedings before the Court how the price of cold-straightened wire rod produced by the applicant is in itself capable of influencing the price of wire rod and the other steel products manufactured upstream by the applicant.

100 In its written submissions, the Commission states that the grant awarded to the applicant for investment associated with its straightening activity allows it to improve its overall financial situation and to sell its products covered by the ECSC Treaty at a lower price. The grant is also alleged to enable the applicant to improve the quality of its concrete reinforcing steel rod, which increases its openings for its principal ECSC production (see paragraph 49 above). Such allegations tend to show, however, that, even supposing that the cold-straightened wire rod produced by the applicant cannot be regarded as a product referred to in Annex I to the ECSC Treaty, the investment grant relating to that product may in the present case have an impact on the market falling within the scope of the ECSC Treaty which justifies their being assessed under the relevant rules of that Treaty. They do not establish, on the other hand, that, as point 4 of Annex I to the ECSC Treaty requires, the price of the cold-straightened wire rod produced by the applicant can, as such, influence the price of the steel products which it markets.

101 In those circumstances, the Commission cannot rely on that provision to justify its decision in the present case to apply the ECSC Treaty rules to the applicant's final product.

102 It should further be pointed out that, under the second paragraph of Article 81 of the ECSC Treaty, it is for the Council, acting unanimously, to add to the lists of products in Annex I to the ECSC Treaty. Since the Council has not made use of that provision to include cold-straightened wire rod in that Annex, the Annex cannot be read as extending to that product, as such a reading would ignore the fact that, pursuant to Article 232(1) of the EC Treaty (now Article 305(1) EC), the ECSC Treaty constitutes a *lex specialis* in derogation from the *lex generalis* represented by the EC Treaty (Case 239/84 *Gerlach* [1985] ECR 3507, paragraphs 9 to 11, and Opinion of Advocate General VerLoren van Themaat

in that case, point 3.1.; see also Opinion 1/94 of the Court of Justice of 15 November 1994 concerning the competence of the Community to conclude international agreements concerning services and the protection of intellectual property [1994] ECR I-5267, paragraphs 25 to 27) and that, consequently, the terms used to delimit its scope must be given a strict interpretation.

103 Second, since, in relation to the straightening activity carried out by the applicant, the Commission merely refers to the Hensel Report when presenting the arguments put forward by the Federal Republic of Germany during the administrative procedure (third paragraph of point III of the preamble to the contested decision), without specifying how that report supports the analysis set out in paragraph 90 above or stating whether, and to what extent, other factors were taken into consideration in that analysis, the Court was obliged to ask the Commission, in a written question, to identify the factors supporting that analysis.

104 In its reply to that written question, the Commission stated that its analysis was based on the Hensel Report, on the observations received from the UK Steel Association on 17 March 1998 (see paragraph 8 above), on the definitions of wire rod and concrete reinforcing bars in Statistical Questionnaire 2-71 annexed to Decisions No 1566/86 and No 4104/88, cited in paragraph 46 above, which put those products into the category of cold-straightened wire rod and concrete reinforcing bars, and also on in-depth interviews with experts from the sector.

105 In accordance with the case-law referred to in paragraph 93 above, it is necessary to ascertain whether those various factors support the Commission's analysis relating to the applicant's straightening activity.

106 As regards the Hensel Report, the Commission claims in its written submissions, first, that it may be seen from that report that the wire rod straightening carried

out by the applicant may be distinguished from drawing. The author of the report systematically avoids using the term 'drawing' to describe the applicant's straightening activity.

107 However, point 6 of the Hensel Report states:

'For that reason, a measure of investment, intended for the manufacture of cold stretched (drawn) concrete reinforcing rod, may continue to receive aid in all cases. The ribbed concrete reinforcing rod is cold drawn by a specific process of flexing and stretching, since traction in a normal drawing tool, as for smooth rods, would lead to an unacceptable distortion of the ribs.'

108 In point 7.2. of the report, stretching is described as 'cold working as in the classic cold drawing of smooth rods'.

109 On two occasions in the Hensel Report, therefore, the cold straightening carried out by the applicant is classed as drawing, which the parties are agreed does not fall within the scope of the ECSC Treaty (see note 5, on code 4500, in Annex I to the ECSC Treaty, and also the non-ECSC framework).

110 At the hearing, the Commission was unable to explain its failure during the administrative procedure to take into consideration the observations in the Hensel Report set out in paragraphs 107 and 108 above.

111 Second, the Commission's written submissions reveal that it inferred from the Hensel Report that the straightening carried out by the applicant corresponds to finishing of hot rolled wire rod.

112 However, it is clear merely upon reading the table of contents of that report that, as the content of the report unequivocally confirms, finishing, in the new technological process developed by the applicant, constitutes a separate operation from straightening (see points 7.2. and 7.4.), intended to cool down and prepare the wire rod leaving the hot rolling mill for straightening.

113 Point 6 of the report thus states that, in the finishing workshop, 'the sections of rod are cooled down, gathered in bundles, and in the cold state are transported bundled, tested, labelled and weighed'. Then, 'the concrete reinforcing rod prepared according to a high quality and tied in coils in the mill's new finishing workshop is taken in an increasingly high proportion to a level of resistance increased to narrow-width tolerance in the flexing-rolling and cold straightening installation and delivered in the form of bobbins' (point 7.2. of the report).

114 It follows from the foregoing considerations (paragraphs 106 to 113 above) that the Commission's reading of the Hensel Report was cursory, since it disregarded passages in the Report in which the cold straightening process carried out by the applicant was compared to a drawing process, and inaccurate, since it confused the finishing and straightening stages which follow one another in the manufacturing process of the applicant's final product.

115 As regards the UK Steel Association, its observations do not express any views on the technical and legal description of the applicant's straightening activity. It has merely stated that if the aid is found to have benefited the applicant's ECSC activities then it must automatically follow that the aid is incompatible with the sixth code on aid to the steel industry.

116 In its observations, in which the aid was assumed to be intended for the applicant's non-ECSC activities, the UK Steel Association stressed the high degree of integration of the applicant's activities and the corresponding risk that the aid would be diverted to the applicant's ECSC activities. It therefore proposed that in this case the applicant's ECSC and non-ECSC activities be regarded as an integrated whole, subject to ECSC aid disciplines.

117 It follows from the considerations set out in the two preceding paragraphs that there is nothing in the observations in question to support the Commission's analysis in the fourth paragraph of point IV of the preamble to the contested decision.

118 The definitions of wire rod and concrete reinforcing bars in Statistical Questionnaire 2-71 cannot conceal the fact that neither code 4400 of Annex I to the ECSC Treaty nor code 7213 of the combined nomenclature, referred to in the contested decision, classes cold-straightening wire rod as wire rod (see paragraphs 95 and 96 above). Nor can they override the observation in the Hensel Report that the cold straightening of wire rod carried out by the applicant is the consequence of a technological development at the beginning of the 1990s, that is to say, after the adoption of the Commission decisions referred to in paragraph 46 above, and must be compared to the classic cold drawing of wire rod.

119 Furthermore, the lack of reaction from professional circles and, during the present proceedings before the Court, from the parties and the interveners, to the classification, for statistical purposes, of cold-straightening wire rod as wire rod, clearly cannot be interpreted as recognition by those parties of the classification of the applicant's final product as an ECSC product for the purpose of the application of the rules on State aid.

120 As regards the meetings which the Commission held with experts from the steel industry, neither in the contested decision nor in its written submissions, nor in its answers to the written questions put by the Court, does the Commission provide the slightest information as to the content of those meetings. They cannot therefore be taken into account in order to support its analysis.

121 At the hearing, the Commission also claimed that in the past the Federal Republic of Germany had itself compared the applicant's cold-straightening activity to production coming under the ECSC Treaty. It referred in that regard to communications of 26 May 1992 and 29 June 1994 whereby the Federal Republic of Germany had notified to the Commission, pursuant to the fifth code on aid to the steel industry, proposed investment aid in favour of the applicant.

122 However, it is clear upon reading those two communications that the Commission's allegations must be dismissed. The communications give no indication that the proposed aid notified to the Commission related to the applicant's cold-straightening activity.

123 Admittedly, as the Commission stated at the hearing, the communications refer, among the investments to which the aid projets relate, to those linked with the applicant's cold distortion activities. However, there is nothing to support the assertion that the reference is to its cold drawing activity. On the contrary, the table annexed to the communication of 26 May 1992 gives the impression that the reference is to its cold rolled products activity.

124 Following the foregoing examination (paragraphs 90 to 123 above), it must be concluded that the Commission incorrectly regarded the activity of cold straightening of wire rod carried out by the applicant as a production activity covered by the ECSC Treaty and wrongly classified the final product of that activity as a product coming within Annex I to the ECSC Treaty and the combined nomenclature.

125 In accordance with the analysis set out in paragraph 74 above, the application of the ECSC Treaty to the aid granted to the applicant for its investments connected with its straightening activity can in those circumstances be justified only if there are insufficient guarantees to prevent diversion of the aid to its production activities that fall within the ECSC Treaty.

126 In that regard, it should be emphasised that it is indeed for the Member State concerned, assisted where necessary by the undertaking in receipt of the aid, which has the relevant figures at its disposal, to provide the Commission with all the evidence which should enable it to check during the administrative procedure whether or not such guarantees exist. However, the Commission is under a duty to carry out that procedure diligently and in accordance with the principle of protection of legitimate expectations, which is one of the fundamental principles of the Community (Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 52) and by virtue of which it is necessary, in this case, to take into account the legitimate expectation of a procedural nature which the parties concerned may have entertained owing to what was said in the Commission's decision to open the procedure for the examination of the aid in question.

127 In the present case, it follows from the notice of 18 February 1998 (p. 5, first paragraph) that:

'An unknown portion of the investment aid may be compatible with the common market in so far as it concerns strictly non-ECSC investments and as long as any spillover to the ECSC activities of ESF [Elbe-Stahlwerke Feralpi GmbH] is excluded. The submitted study concerning the attribution of costs does not identify sufficiently that portion. The issue therefore has to be examined in more detail.'

128 It follows from that statement that at the time of opening the administrative procedure the Commission had envisaged carrying out a detailed examination in

order to determine whether, and to what extent, a portion of the investment aid in issue related exclusively to investments carried out by the applicant outside the sector covered by the ECSC Treaty and, if necessary, to establish that that aid could not be diverted to activities covered by that Treaty. Contrary to what the Commission maintained at the hearing, such a statement was not an invitation to the parties concerned to communicate to it the evidence which would enable it to carry out that check. On reading that statement, the parties were entitled to expect that the Commission would request them, in the context of the examination which it envisaged in the abovementioned notice, to provide it with that evidence.

129 However, the Commission stated in its answers to the written questions put by the Court and at the hearing that it had considered throughout the administrative procedure that the cold-straightening wire rod produced by the applicant was a product falling within the scope of the ECSC Treaty, so that it was necessary to take the view that all the investment aid in question related to activities covered by the ECSC Treaty. It further stated that in any event the degree of integration of the applicant's activities precluded outright any possibility that they might be completely separate from one another, so that any investment aid granted to the applicant must necessarily be evaluated in the light of the ECSC Treaty.

130 It follows from that statement, therefore, that the Commission did not carry out the examination to which it referred in its notice of 18 February 1998 and that it did not invite the parties concerned to send it the evidence which would enable it to ascertain whether or not the investment aid intended for the applicant's straightening activity might be diverted to the ECSC activities carried out upstream by the applicant.

131 In those circumstances, the passages from the contested decision set out in paragraphs 71 and 72 above, referring to a hypothetical lack of complete separation, within the undertaking in receipt of the aid, between its ECSC and its non-ECSC activities cannot be regarded as reflecting the outcome of a specific

examination which involved the participation of all those concerned and revealed in sufficient guarantees to prevent such diversion of aid in the present case.

132 As the Commission was not justified in classifying the applicant's straightening activity as an activity falling within the scope of the ECSC Treaty, its failure to carry out such an examination precludes the conclusion that that Treaty applied to the aid in question.

133 The task of carrying out the examination envisaged by the Commission in its notice of 18 February 1998 does not fall to the Court, which could not carry out such an examination without encroaching on the powers of the Community institution concerned (see, in particular, Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 83).

134 In those circumstances, it is appropriate, in the light of the foregoing considerations (paragraphs 90 to 133 above), to uphold the plea based on misapplication of the ECSC Treaty, in so far as that plea relates to the aid granted to the applicant for investments connected with its cold-straightening wire rod facilities.

135 In the light of all the foregoing, and without there being any need to examine the other pleas and arguments directed by the applicant and the interveners against the first paragraph of Article 1 of the contested decision, it must be concluded that that provision, to the extent to which the Commission therein declares the investment grant made to the applicant in 1995 for investments in its cold-straightening wire rod facilities incompatible with the sixth code on aid to the steel industry and with the common market in coal and steel, is illegal and must therefore be annulled. The remainder of the claims for annulment directed against that provision of the contested decision must be dismissed.

The plea alleging infringement of the principle of legal certainty and seeking annulment of the second paragraph of Article 1 of the contested decision

Arguments of the parties

136 The applicant pleads infringement of the principle of legal certainty. It maintains that the Commission had authorised the partial use of the State guarantees relating to cases N 351/92 and N 673/94 to cover operating loans. As regards the first of these, the Federal Republic of Germany sent the Commission official dealing with file N 315/92 a fax on 17 December 1992 stating that DEM 18 million of the 80% guarantee to ensure completion should serve to cover the losses sustained in making the investments and the interest payable. As regards the second State guarantee, the Federal Republic of Germany informed the Commission in a letter of 26 September 1994 that of the total amount of that guarantee, DEM 4.8 million, was earmarked to cover operating loans.

137 The Commission refers to its detailed analysis of that question in point IV of the preamble to the contested decision and states that each of the State guarantees in issue had been declared as investment aid. During the administrative procedure, however, the Federal Republic of Germany had on 17 December 1992 and 26 September 1994 sent the Commission documents showing that the guarantees had been in part earmarked to finance operating loans before they had been approved by the Commission.

138 Such aid was not only illegal, since it was granted without the Commission's agreement, but also incompatible with the code on aid to the steel industry, which provides that only aid for research, development, the protection of the environment and closure can be approved. As it is clearly incompatible with the common market, operating aid cannot be among the aims of that code, which

must be interpreted restrictively in so far as it derogates from the principle that aid is prohibited (see, on that point, *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission*, cited in paragraph 48 above). In the present case, the allocation of aid for purposes other than investment was therefore prohibited.

139 The Commission further states that it cannot accept explanations, after the event, which change the nature of the aid concerned (see, on that point, Case 304/85 *Falck* v *Commission* [1987] ECR 871, paragraph 16, and the precedents cited there). It was for that reason that in the present case it had regard solely to the information initially provided by the Federal Republic of Germany and authorised the aid as investment aid.

Findings of the Court

140 As regards, first of all, file N 351/92, it is common ground that the Federal Republic of Germany notified to the Commission on 26 May 1992, by letter of 2 June 1992, a proposed grant to the applicant of a subsidy and an investment premium for investments totalling DEM 85 million.

141 On 15 July 1992, the Federal Republic of Germany notified the Commission of its intention to grant the applicant a State guarantee amounting to 80%, or DEM 68.8 million, 'for the costs incurred in establishing the undertaking' (see letter from the Federal Republic of Germany to the Commission dated 3 March 1998 and referred to in the second paragraph of point I of the preamble to the contested decision). On 13 October 1992, the Federal Republic of Germany informed the Commission that the abovementioned amount had been reduced to DEM 60.8 million (see the letter referred to above).

142 On 17 December 1992, the Federal Republic of Germany sent the Commission a fax ('the fax of 17 December 1992') containing the following information:

'The sum of the investments mentioned in the notification relates only to the allowable costs for the subsidy and the investment premium. As regards the State guarantee, other investment costs have been taken into consideration:

Cost of land	DEM 8 million
Losses incurred up to commencement of operation	DEM 8 million
Accrued interest	DEM 10 million
Investment costs already mentioned	DEM 85 million
	DEM 111 million
Less subsidy and investment premium	DEM 24.85 million
Less own capital	DEM 10 million
Amount to be guaranteed	DEM 76.15 million
Rounded down	DEM 76 million
80% thereof	DEM 60.8.'

143 According to its letter of 1 March 1993 the Commission authorised, *inter alia*, the grant to the applicant of 'a State guarantee amounting to 80% in connection with the costs necessitated by the establishment of the undertaking and estimated at DEM 76 million', or, as indicated in the summary table in point II of the preamble to the contested decision, a State guarantee of DEM 60.8 million (80% of DEM 76 million).

144 Then, as regards case N 673/94, it is common ground that, by a communication dated 29 June 1994, the Federal Republic of Germany informed the Commission of a proposed grant to the applicant of a subsidy and an investment premium for further investments estimated at DEM 51 million. That communication contains the following information:

'...

The financing of the further investments of DEM 51 million is made up as follows:

— Own funds (increase of share capital)	DEM 5.4 million
— Investment subsidy	DEM 11.73 million
— Investment premium (8%)	DEM 4.08 million
— Loan at current market rate	DEM 30.19 million
(it may be necessary to provide an additional guarantee, in respect of which a decision will be taken during the coming months)	
Total:	DEM 51.00 million.

The Federal Government notifies the following measures of support in favour [of the applicant]:

Investment subsidy	DEM 11.73 million
Investment premium	DEM 4.08 million'.

145 By a communication of 26 September 1994 ('the communication of 26 September 1994'), the Federal Republic of Germany 'notifie[d]... a further State guarantee of DEM 24 million, consisting of DEM 19.2 million for investments and DEM 4.8 million for operating loans'.

146 It follows both from the communication of 18 February 1998 (see summary table on page 4) and from the contested decision (see summary table at the end of point II of the preamble thereto) that, by its letter of 13 January 1995, the Commission approved, *inter alia*, the grant to the applicant of a State guarantee amounting to DEM 23.975 million.

147 It follows from the foregoing (paragraphs 140 to 146) that, as regards both the State guarantee relating to file N 351/92 and the guarantee relating to case N 673/94, the Federal Republic of Germany had, in its fax of 17 December 1992 and in its communication of 26 September 1994, provided the Commission, before the latter approved the aid elements inherent in the grant of guarantees to the applicant, with precise information on the breakdown of the costs to which they related. In its answers to the written questions put by the Court, the Commission states that it did not register the fax of 17 December 1992 and that the communication of 26 September 1994 merely constituted further information relating to case N 673/94, so that neither document was regarded as a formal notification. However, it does not deny having received the documents and does not dispute their connection with cases N 351/92 and N 673/94.

148 In each case the Commission adopted a position on the State guarantees in question. The letter of 1 March 1993 refers to the 'State guarantee amounting to 80% in connection with the costs necessitated by the establishment of the undertaking and estimated at DEM 76 million' (see paragraph 143 above). When that extract is compared with the statement in the fax of 17 December 1992 concerning an overall amount of DEM 76 million, 80% of which was to be guaranteed, it may be concluded, and the Commission does not dispute this, that

the Commission made a ruling on the State guarantee relating to file N 351/92 in the light of the information provided in that fax. As regards the letter of 13 January 1995, the Commission does not deny that the reference in that letter to the 'commercial loan with a State guarantee' amounting to DEM 23.975 million represents its taking into consideration of the information set out in the communication of 26 September 1994 concerning the proposal to grant the applicant a State guarantee in connection with case N 673/94.

149 For that reason, the approach adopted in *Falck* v *Commission* (cited in paragraph 139 above), on which the Commission relies in its written submissions, cannot be applied in the present case. The Court of Justice held in that judgment, in regard to aid to the steel industry which, under the code on aid to the steel industry then applicable, had to be notified to the Commission by 31 May 1985, that the Commission was not required to accept further information provided after that date which would have altered the nature of the aid envisaged so that the plan implemented did not correspond with that notified. In the present case, it is not disputed that the fax of 17 December 1992 reached the Commission in time and the analysis set out in the two preceding paragraphs shows that the information in that fax was taken into account by the Commission in the context of the final decision contained in its letter of 1 March 1993. As regards the communication of 26 September 1994, the Commission has itself stated, in its answers to the written questions put by the Court, that that communication was 'regarded as merely providing further information in case [N] 673/94' and that it was therefore placed on the notification file which the Federal Republic of Germany had sent it on 29 June 1994 and which had declared a possible proposal to grant a further State guarantee to the applicant (see paragraph 144 above). Furthermore, the analysis set out in the two preceding paragraphs shows that the information in that communication was taken into account by the Commission in the context of the final decision contained in its letter of 13 January 1995.

150 It is clear from the letter of 1 March 1993 that the proposed grant of the State guarantee in question is designated, on the same basis as the other aid elements relating to case N 351/92, as proposed investment aid and was examined and approved in the light of the third indent of Article 5 of the fifth code on aid to the steel industry, concerning regional investment aid for undertakings established on

the territory of the former German Democratic Republic. The letter of 13 January 1995 also states that the proposed grant to the applicant of a State guarantee in connection with a commercial loan was, like the other aid elements concerned by case N 673/94, examined and approved on the basis of the same provision of the code on aid to the steel industry.

151 In the eleventh paragraph of point IV of the preamble to the contested decision, the Commission none the less states that '[the Federal Republic of Germany] gave notification of general operating aid in favour of an ECSC steel undertaking'. In its answers to the written questions put by the Court and at the hearing, the Commission confirmed that that assertion, as may be seen from its position in the contested decision, refers to the fax of 17 December 1992 and the communication of 26 September 1994. In the light of those factors, it is permissible to think that the Commission understood at the material time, on reading those documents, that the State guarantees described therein contained elements of general operating aid. The Commission's assertion in its written submissions that the fax of 17 December 1992 and the communication of 26 September 1994 disclosed that those State guarantees were in part earmarked to cover operating loans (see paragraph 137 above) confirms that analysis.

152 In those circumstances, it must be concluded that, by approving, in the context of cases N 351/92 and N 673/94, and with full knowledge of the facts, the State guarantees up to the full amounts mentioned by the Federal Republic of Germany in its fax of 17 December 1992 and its communication of 26 September 1994, to within DEM 25 000 in the second case, the Commission authorised the partial use of those State guarantees as operating aid, as declared in those two documents.

153 It is not possible to accept the Commission's argument that the lack of any reference in its letters of 1 March 1993 and 13 January 1995 to the proposed

partial allocation of the State guarantees to cover operating loans must necessarily have made the Federal Republic of Germany aware that no operating aid had been authorised.

154 If the Commission had any objection to the German authorities' intention to allocate part of the State guarantees to cover such loans, it should at the material time, and in accordance with the procedure laid down for that purpose, have adopted a decision either authorising the grant of those guarantees only up to the amount needed to cover the investment costs, or approving those guarantees in their entirety only on condition that they were wholly allocated to cover investment costs. However, the two letters in question clearly convey no such meaning.

155 Nor can the Commission rely on manifest incompatibility of the operating aid with the common market in coal and steel to support its argument that the Federal Republic of Germany must necessarily have suspected that the partial allocation of the State guarantees to cover operating loans had not been approved.

156 Apart from what has been stated in paragraphs 152 and 154 above, in the 11th paragraph of point IV of the preamble to the contested decision the Commission states that '[it] did not as a matter of course approve operating aid that did not conform to well-known principles'. The Commission itself therefore does not rule out authorisation of such aid. In those circumstances, it cannot plead that the Federal Republic of Germany could not reasonably interpret its letters of 1 March 1993 and 13 January 1995 as approving the elements of operating aid contained in the State guarantees in question.

157 In accepting that at the material time, in spite of what the Commission states in the contested decision and in its written submissions (see paragraph 151 above), it viewed the proposed grant of the State guarantees in issue as corresponding in full to proposed investment aid, it must be emphasised that it formed that view, and also examined and approved the State guarantees as investment aid, in the light of the information provided by the Federal Republic of Germany in its fax of 17 December 1992 and in its communication of 26 September 1994 concerning the costs relating to those guarantees (see paragraphs 147 and 148 above). In that regard, the Federal Republic of Germany cannot in the light of that information be accused of having sought to conceal the purposes of the guarantees in question and thus to secure the Commission's approval of an allocation of those guarantees different from that notified to it.

158 In those circumstances, the authorisation as investment aid, set out in the letters of 1 March 1993 and 13 January 1995, of the State guarantees up to the full amount — within DEM 25 000 in the second case — of the overall sums indicated by the Federal Republic of Germany in its fax of 17 December 1992 and in its communication of 26 September 1994 must be regarded as approval of the use of those State guarantees to cover the respective amounts of the various types of costs indicated in those two documents.

159 It is not for the Court to speculate on the Commission's reasons for approving, at the material time, the grant to the applicant of the State guarantees in question without the slightest reservation in regard to the information provided by the Federal Republic of Germany in its fax of 17 December 1992 and in its communication of 26 September 1994 concerning the allocation of the guarantees envisaged in the two documents. Clearly, following the foregoing analysis (see paragraphs 140 to 158 above), the letters of 1 March 1993 and 13 January 1995 must be read as authorising the grant to the applicant of State guarantees of DEM 60.8 million and DEM 23.975 million respectively, as described in detail, as regards their allocation, by the Federal Republic of Germany in its fax of

17 December 1992 and its communication of 26 September 1994, the relevant passages of which were set out in paragraphs 142 and 145 above.

160 Neither in the contested decision nor in its written submissions does the Commission dispute the link established by the Federal Republic of Germany during the administrative procedure between the State guarantee of DEM 7.2 million referred to in the second paragraph of Article 1 of the contested decision, granted to the applicant at the end of 1994 to cover operating loans, and the allocation, described in the fax of 17 December 1992 relating to case N 351/92, of the State guarantee referred to in that fax to cover the losses sustained during the implementation of the investment and the accrued interest, evaluated together at DEM 18 million. Nor is it disputed that the amount of DEM 7.2 million referred to above does not exceed the allowable limit, having regard to the level of the various types of costs to which the Sate guarantee in question related, of the part of that guarantee allocated to cover operating loans.

161 Nor does the Commission refute in the contested decision or in its written submissions the link established by the Federal Republic of Germany during the administrative procedure between the State guarantee of DEM 4.8 million referred to in the second paragraph of Article 1 of the contested decision, granted to the applicant at the end of 1994 to cover operating loans, and the allocation, described in the communication of 26 September 1994 relating to case N 673/94, of the State guarantee referred to in that communication to cover operating loans amounting to DEM 4.8 million.

162 In those circumstances, it must be concluded that the aid element contained in the State guarantees granted to the applicant at the end of 1994 to cover operating loans amounting to DEM 7.2 million and DEM 4.8 million respectively had been approved by the Commission in its letter of 1 March 1993 relating to case N 351/92 and in its letter of 13 January 1995 relating to case N 673/94.

163 It is still necessary to ascertain whether the Commission was justified in finding, in the second paragraph of Article 1 of the contested decision, that that aid element is incompatible with the sixth code on aid to the steel industry and with the common market in coal and steel.

164 In that regard, the classification as general operating aid which the Commission conferred on that aid element in the contested decision (eighth and eleventh paragraphs of point IV of the preamble) is not disputed by the applicant or the interveners. General operating aid does not come within any of the categories of aid defined in the sixth code on aid to the steel industry, applicable since 1 January 1997, which are covered by a general derogation from the principle laid down in Article 4(c) of the ECSC Treaty that aid is prohibited. Furthermore, both during the administrative procedure and during the judicial procedure the parties concerned merely maintained that the State guarantees of DEM 7.2 million and DEM 4.8 million granted to the applicant at the end of 1994 to cover operating loans had been approved by the Commission. They did not put forward any arguments intended to show that those guarantees were compatible with the common market in coal and steel.

165 In those circumstances, it must be concluded that the Commission was justified in declaring in the second paragraph of Article 1 of the contested decision that the aid element of the guarantees covering the operating loans of DEM 7.2 million and DEM 4.8 million granted to the applicant at the end of 1994 is incompatible with the sixth code on aid to the steel industry and the common market in coal and steel.

166 In the light of all the foregoing (paragraphs 140 to 165 above), the second paragraph of Article 1 of the contested decision must be annulled in so far as it provides that the aid element of the State guarantees covering the operating loans of DEM 7.2 million and DEM 4.8 million granted to the applicant at the end of

1994 had not been authorised. The remainder of the plea under consideration must be dismissed.

The plea alleging infringement of the principle of protection of legitimate expectations and seeking annulment of Article 2 of the contested decision

Arguments of the parties

167 The applicant claims that it could legitimately believe that aid for its plant not allocated as such to an activity coming within the scope of the ECSC Treaty would be examined in the light of the EC rules on State aid, even if a separate undertaking was not involved in the operation of that plant (Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, paragraph 77, and the case-law cited there).

168 As regards the State guarantees, the applicant states that it believed that the Federal Republic of Germany had complied with the notification obligation by means of its communications to the Commission. Furthermore, by approving those guarantees, the Commission gave rise to justified hopes on the applicant's part (Case T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 51).

169 The applicant states that it made irreversible investments, using to a very large extent the resources which it had been granted. Had it been informed of the risk of a demand for repayment of the aid in question, it would not have made such investments and would not now be faced with the problems caused by such a demand.

170 The applicant observes that Community case-law endeavours to strike a balance between the principle of legality on the one hand and the principles of legal certainty and the protection of legitimate expectations on the other hand (Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 30).

171 The Freistaat Sachsen maintains that the investment aid in question consisted of a number of individual measures taken to implement regional aid programmes which had been authorised by the Commission under Article 93 of the EC Treaty (now Article 88 EC). It is therefore to be regarded as existing aid, which is exempt from the obligation to give prior notification to the Commission.

172 The Commission asserts that, apart from the fact that the applicant incorrectly classes the straightening operation, it is settled case-law that undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down, something which a diligent businessman should normally be able to determine (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14). In that regard, a Commission notice (OJ 1983 C 318, p. 3) warned potential recipients of illegally-granted aid to beware of the risk that such aid would have to be repaid.

173 Nor, as regards the aid referred to in the first paragraph of Article 1 of the contested decision, could the applicant rely on any approval decision capable of giving rise to its legitimate expectation. The argument that its investments were irreversible is irrelevant. The Commission is not demanding that the applicant cancel the investments but only that it repay the funds illegally received. Such a recovery measure is the logical consequence of the finding that the aid is

incompatible with the common market, as it seeks to re-establish the previously existing situation (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959).

174 The State guarantees relating to cases N 351/92 and N 673/94 were used in breach of the fifth code on aid to the steel industry. They were allocated to purposes other than those declared to the Commission and were prohibited by that code. Furthermore, they were granted to the applicant before the Commission adopted a position in regard to them. In those circumstances, the applicant was not entitled to claim that the approval of those guarantees as investment aid legitimately led it to consider that the guarantees were authorised as operating aid (see, in that regard, Case 236/86 *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761, paragraph 14, and Case C-180/88 *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *Commission* [1990] ECR I-4413, paragraph 22).

175 The Commission further argues that Community case-law requires recovery of illegal aid even if the national authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient, since the recipient could not have had a legitimate expectation that the aid was lawful because the procedure laid down had not been followed (Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 43). Recovery of the aid is required all the more when, as in the present case, the national authorities sought *ex post facto* approval of an allocation of the aid different from that initially notified to the Commission.

Findings of the Court

176 It should first of all be recalled that the first paragraph of Article 1 of the contested decision must be annulled, in so far as the Commission declares the part

of the investment grant made to the applicant in 1995 for investments in its cold-stretched wire rod facilities to be incompatible with the sixth code on aid to the steel industry and with the common market in coal and steel (see paragraph 135 above).

177 The obligation to recover aid which the Commission can impose on a Member State is the consequence of the aid's incompatibility with the common market. Recovery cannot be justified on the sole ground that the aid in question was not notified to the Commission (see, to that effect, Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 11 to 22, *Belgium* v *Commission*, cited in paragraph 173 above, paragraphs 15 to 20, Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 43, and Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, paragraph 85).

178 Accordingly, the Commission is not justified in requiring the Federal Republic of Germany, in Article 2 of the contested decision, to recover the investment grant referred to in paragraph 176 above.

179 Second, as regards the other aid referred to in the first paragraph of Article 1 of the contested decision, it should be recalled that the Commission rightly declared the part of the investment aid granted to the applicant in 1995, for investments in its finishing workshop (see paragraph 89 above), incompatible with the sixth code on aid to the steel industry and with the common market in coal and steel. As regards the State guarantee of DEM 12 million granted to the applicant in 1997, the applicant and the interveners did not call into question during the procedure before the Court the finding made by the Commission in that provision of the contested decision that the aid element of that guarantee is incompatible

with the sixth code on aid to the steel industry and with the common market in coal and steel (see paragraph 56 above).

180 Furthermore, the applicant does not deny having been aware, at the material time, of the elements of public aid contained in the investment grant and in the State guarantee referred to in the preceding paragraph.

181 In its answers to the written questions put by the Court, the applicant did not dispute that, as may be seen from the information in the communication of 18 February 1998 (see, in particular, the table on page 4) and in the contested decision (see, in particular, the summary table at the end of point II of the preamble), those aid elements were granted to it without first being notified to the Commission. The prior notification procedure is binding generally on Member States in respect of any proposed financial intervention by the public authorities in favour of steel undertakings (see, to that effect, order of the President of the Court of Justice in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraphs 50 and 54). Having regard to the findings made in paragraph 80 above the Freistaat Sachsen's argument set out in paragraph 171 above must be dismissed.

182 According to settled case-law, undertakings to which State aid has been granted may not entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the appropriate procedure, something which a diligent businessman ought to be able to ascertain (*Preussag Stahl* v *Commission*, cited in paragraph 167 above, paragraph 77, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 121).

183 The recipient of illegal aid may, in order to challenge its repayment, plead exceptional circumstances which legitimately give rise to a legitimate expectation that the aid was lawful (*CETM* v *Commission*, cited in the preceding paragraph, paragraph 122).

184 However, it must be pointed out that in the present case the applicant does not even rely on such circumstances.

185 Nor does the applicant maintain that the Commission gave it specific assurances of such a kind as to give rise to justified hopes on its part that the aid concerned was lawful.

186 In those circumstances, the applicant cannot criticise the Commission for not having balanced the requirements of the principles of legal certainty and protection of legitimate expectations, on the one hand, and the principle of legality, on the other (see, in that regard, *Preussag Stahl* v *Commission*, cited in paragraph 167 above, paragraph 84).

187 The Commission is therefore entitled to order repayment of the aid elements referred to in paragraph 179 above.

188 As regards, third, the aid element referred to in the second paragraph of Article 1 of the contested decision, contained in the State guarantees covering the operating loans of DEM 7.2 million and DEM 4.8 million granted to the applicant at the end of 1994, it should be observed that the Commission had authorised those guarantees in its letters of 1 March 1993 and 13 January 1995 (see paragraphs 140 to 166 above). In doing so, the Commission provided specific assurances at

that time which allowed the parties concerned, in particular the applicant, to have justified hopes as to the lawfulness of the aid element in those guarantees (*Unifruit Hellas* v *Commission*, cited in paragraph 168 above, paragraph 51, and *Preussag Stahl* v *Commission*, cited in paragraph 167 above, paragraph 78).

189 In those circumstances, the principle of protection of legitimate expectations prevents the Commission from ordering recovery of that aid element, whose compatibility with the common market in coal and steel it re-examined several years after approving the guarantees in question, following information from external sources (see notice of 18 February 1998, p. 3), and which it found to be incompatible with the common market in coal and steel.

190 In that regard, the Commission's argument that the State guarantees in question were granted to the applicant before it had adopted a position in respect of the aid must be rejected. In the case of the State guarantee of DEM 7.2 million granted in the context of case N 351/92 (see paragraph 160 above), it follows from the very words of the second paragraph of Article 1 of the contested decision that that guarantee was granted to the applicant 'at the end of 1994', or subsequent to the letter of 1 March 1993 approving that case. In any event, that argument cannot override the fact that by approving the State guarantees in question on 1 March 1993 and 13 January 1995 the Commission gave the applicant precise assurances of such a kind as to give it legitimate expectations as to the lawfulness of the aid element in those guarantees, which prevent the Commission from ordering recovery after a subsequent finding that the guarantees are incompatible with the common market.

191 It follows that the Commission was not justified in requiring the Federal Republic of Germany, in Article 2 of the contested decision, to recover the aid element of the State guarantees covering the operating loans of DEM 7.2 million and DEM 4.8 million granted to the applicant at the end of 1994.

192 In the light of all the foregoing (paragraphs 176 to 191 above), Article 2 of the contested decision must be annulled, in so far as it orders the Federal Republic of Germany to recover the part of the investment aid granted to the applicant in 1995, for investments in its cold-drawn wire rod facilities, and also of the aid element of the State guarantees covering the operating loans of DEM 7.2 million and DEM 4.8 million granted to the applicant at the end of 1994. The remainder of the plea under consideration must be dismissed.

Costs

193 Under Article 87(3) of its Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. In the present case, although, admittedly, the applicant has been unsuccessful in part, a significant part of the form of order which it sought has been granted.

194 The Court therefore decides, on a proper assessment of the circumstances of the case, that the applicant is to bear two thirds of its costs and that the Commission, in addition to bearing its own costs, is to pay one third of the applicant's costs.

195 Under Article 87(4) of the Rules of Procedure, the interveners must pay their own costs.

On those grounds,

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

hereby:

1. Annuls the first paragraph of Article 1 of Commission Decision 1999/580/ECSC of 11 November 1998 concerning aid granted by Germany to ESF Elbe-Stahlwerke Feralpi GmbH, Riesa, Saxony, in so far as the part of the investment grant awarded to the applicant in 1995 for investments in its cold-stretched wire rod facilities is declared incompatible with Commission Decision No 2496/96/ESC of 18 December 1996 establishing Community rules for aid to the steel industry and with the common market in coal and steel;

2. Annuls the second paragraph of Article 1 of Decision 1999/580, in so far as it states that the aid element of the guarantees covering the operating loans of DEM 7.2 million and DEM 4.8 million granted at the end of 1994 was not authorised;

3. Annuls Article 2 of Decision 1999/580, in so far as the Federal Republic of Germany is required to recover from the applicant the part of the investment grant awarded to the applicant in 1995 for investments in its cold-stretched wire rod facilities and the aid element of the guarantees covering the

operating loans of DEM 7.2 million and DEM 4.8 million granted at the end of 1994;

4. Dismisses the remainder of the application;

5. Orders the applicant to pay two thirds of its costs;

6. Orders the Commission, in addition to bearing its own costs, to pay one third of the costs incurred by the applicant;

7. Orders the interveners to bear their own costs.

Azizi Mengozzi Lenaerts

Moura Ramos Jaeger

Delivered in open court in Luxembourg on 5 June 2001.

H. Jung J. Azizi

Registrar President