JUDGMENT OF THE COURT

24 September 2002 *

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In Joined Cases C-74/00 P and C-75/00 P,

Falck SpA, established in Milan (Italy), represented by G. Macrì, M. Condinanzi and F. Colussi, avvocati, with an address for service in Luxembourg,

and

Acciaierie di Bolzano SpA, established in Bolzano (Italy), represented by B. Nascimbene, avvocato, with an address for service in Luxembourg,

appellants,

APPEALS against the judgment of the Court of First Instance of the European Communities (Fifth Chamber, Extended Composition) of 16 December 1999 in Case T-158/96 *Acciaierie di Bolzano* v *Commission* [1999] ECR II-3927,

the other parties to the proceedings being:

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

defendant at first instance,

and

Italian Republic, represented by U. Leanza, acting as Agent, assisted by D. Del Gaizo, avvocato dello Stato,

intervener at first instance,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric and S. von Bahr (Presidents of Chambers), D.A.O. Edward, A. La Pergola, J.-P. Puissochet (Rapporteur), M. Wathelet, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,

Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 4 December 2001, at which Falck SpA was represented by G. Macrì and M. Condinanzi, Acciaierie di Bolzano SpA by B. Nascimbene, the Italian Republic by M. Fiorilli, avvocato dello Stato, and the Commission by V. Di Bucci,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2002,

gives the following

Judgment

1 By applications lodged at the Registry of the Court of Justice on 2 March 2000, Falck SpA ('Falck') and Acciaierie di Bolzano SpA ('ACB') brought appeals under Article 49 of the ECSC Statute of the Court of Justice against the judgment of the Court of First Instance of 16 December 1999 in Case T-158/96 *Acciaierie di Bolzano* v *Commission* [1999] ECR II-3927 ('the contested judgment') in which it dismissed the application brought by ACB for the annulment of Commission Decision No 96/617/ECSC of 17 July 1996 concerning aid granted by the Autonomous Province of Bolzano (Italy) to Acciaierie di Bolzano (OJ 1996 L 274, p. 30, 'the contested decision').

2 By order of the President of the Court of 10 May 2000, Cases C-74/00 P and C-75/00 P were joined for the purposes of the written and oral procedure and judgment.

I — Legal framework and factual background

A — *Legal framework*

3 The contested judgment set out the legal background in the following terms:

'1 Article 4 of the ECSC Treaty provides:

"The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:

...

(c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever."

2 The first and second paragraphs of Article 95 of the ECSC Treaty provide as follows:

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

Any decision so taken or recommendation so made shall determine what penalties, if any, may be imposed."

3 In order to meet the restructuring needs of the steel sector, the Commission relied on the provisions of Article 95 of the Treaty in order to establish, from the beginning of the 1980s, a Community scheme under which the grant of State aid to the steel industry could be authorised in certain specific cases. That scheme has been subject to successive adjustments in order to deal with the economic difficulties of the steel industry. The series of decisions adopted in this regard are commonly termed "Steel Aid Codes".

4 Commission Decision No 257/80/ECSC of 1 February 1980 establishing Community rules for specific aids to the steel industry (OJ 1980 L 29, p. 5) is the First Steel Aid Code. It was in force until 31 December 1981. It was replaced by Commission Decision No 2320/81/ECSC of 7 August 1981 establishing Community rules for aids to the steel industry (OJ 1981 L 228,

p. 14), as amended by Commission Decision No 1018/85/ECSC of 19 April 1985 (OJ 1985 L 110, p. 5, hereinafter referred to as the "Second Code"), which remained in force until 31 December 1985.

5 The Third Steel Aid Code (Commission Decision No 3484/85/ECSC of 27 November 1985 establishing Community rules for aid to the steel industry (OJ 1985 L 340, p. 1, hereinafter the "Third Code") was applicable between 1 January 1986 and 31 December 1988. The Fourth Steel Aid Code (Commission Decision No 322/89/ECSC of 1 February 1989 establishing Community rules for aid to the steel industry (OJ 1989 L 38, p. 8)) was in force between 1 January 1989 and 31 December 1991.

6 The Fifth Steel Aid Code, established by Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57, hereinafter the "Fifth Code"), was in force from 1 January 1992 to 31 December 1996. It was replaced on 1 January 1997 by Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ 1996 L 338, p. 42), which constitutes the Sixth Steel Aid Code.'

B — *Factual background*

4 The matters which follow are taken from the findings of fact by the Court of First Instance in the contested judgment and from the case-file:

'7 The applicant, Acciaierie di Bolzano... is an undertaking manufacturing special-steel products, which are listed in Annex I to the ECSC Treaty under

code No 4400 and are therefore covered by the rules laid down in that Treaty. Until 31 July 1995 ACB was controlled by the steel group Falck SpA, a company incorporated under Italian law.... At that date, however, the applicant company was sold to the company Valbruna Srl.

8 By letter of 5 July 1982 the Commission notified the Italian Government that it had decided to authorise the system of regional aid created by Law No 25/81 of the Autonomous Province of Bolzano of 8 September 1981 on financial assistance for industry ("Provincial Law No 25/81"). In that letter the Commission pointed out, however, that it also had to rule on the sectoral application of National Law No 675 of 12 August 1977 adopting measures for the coordination of industrial policy and the restructuring, reconversion and development of the sector (1/a) (hereinafter "Law No 675/77"), which was applicable in this regard, and that it therefore reserved the right to determine the conditions on which that regime would apply to the Province of Bolzano in the light of the decision it adopted at the national level. It also stated that the authorities in Bolzano had to comply fully with the rules and Community codes on the granting of aid to the steel industry.

...'

5 In September 1982, a plan to restructure Falck was notified to the Commission. The plan provide for industrial investment in the order of ITL 40 000 million.

6 By letters of 3 November 1982 and of 5 November 1986, the Province of Bolzano notified to the Commission four cases in which it was granting aid under Provincial Law No 25/81 to the textile industry and asked whether it was necessary to notify the individual cases in which that Law was applied. The Commission did not reply to those letters.

7 On 14 February 1983, by decision no 784, the Province of Bolzano decided to grant to ACB a subsidised loan and a non-repayable grant, on the basis of Provincial Law No 25/81. That decision related to a loan of ITL 6 500 million and a non-repayable loan of ITL 8 000 million spread over 10 years.

8 By decision of 25 May 1983, approved under the Second Code, the Commission, following notification of the restructuring plan for Falck, approved aid amounting to ITL 2 000 million in the form of a subsidised loan of ITL 6 000 million to ACB to finance an investment of approximately ITL 23 000 million.

9 On 1 July 1985, by decision no 3082, the Province of Bolzano decided to grant to ACB, on the basis of Provincial Law No 25/81, a new loan of ITL 12 941 000 million. On 3 December 1985, by decision no 6346, it granted to ACB, on the same basis, a non-repayable grant of ITL 10 234 000 million.

10 On 14 December 1987 and on 2 May and 4 July 1988, by decisions nos 7673, 2429 and 4158 respectively, the Province of Bolzano decided to grant ACB, again on the basis of Provincial Law No 25/81:

— a loan of ITL 13 206 000 million, of which 6 321 000 million were paid in March 1988 and 987 million in January 1989;

— a non-repayable grant of ITL 6 919 000 million, of which only 3 750 000 million, according to the contested decision, were paid; and

— a loan and a non-repayable grant amounting, according to the contested decision, to ITL 987 million and 650 million.

11 On 26 July 1988, the Commission asked the Italian authorities for information on a loan which was allegedly granted to ACB in December 1987 amounting to ITL 6 000 million. By letter of 22 March 1989, the Commission informed the abovementioned authorities of its decision to initiate the procedure provided for by Article 6(4) of the Third Code and put them on notice to submit their comments.

12 On 25 July 1990, the Commission adopted, in connection with the aid deriving from that loan, Decision 91/176/ECSC on aid granted by the Province of Bolzano to the Bolzano steelworks (OJ 1991 L 86, p. 28). Article 1 of that decision provides:

'The interest subsidy on a loan granted in December 1987 by the Province of Bolzano in Italy to the Bolzano steelworks under Provincial Law No 25 of 8 September 1981 is illegal State aid because it was made available without prior authorisation from the Commission and, furthermore, is incompatible with the common market pursuant to Commission Decision No 3484/85/ECSC [the Third Code]'.

13 However, in that decision, the Commission did not require repayment of the amounts already paid but confined itself to ordering the authorities of the Province of Bolzano to refrain from granting an interest subsidy on the annual instalments of the loan in question until the end of the period of the loan. When the Italian authorities claimed that the loan had been authorised by the Commission's decision of 25 May 1983, the latter acknowledged that it had authorised, in that decision, under the Second Code, aid totalling ITL 2 000

million, in the form of a subsidised loan to ACB. However, as it was authorised under the Second Code, it was a mandatory requirement that the aid should have been paid before 31 December 1985 but, since it was paid after that date, it was no longer covered by that authorisation. Taking the view that it was obliged to refer to the aid code in force at the time when the aid was paid, namely the Third Code, the Commission concluded that it was no longer permissible under it to authorise the aid in question, which was thus incompatible with the common market for coal and steel (hereinafter 'the common market'). Furthermore, the Commission pointed out that its decision of 5 July 1982 on the application of the regional aid scheme established by Provincial Law No 25/81, clearly mentioned the need to notify the cases in which it was applied in favour of the steel industry. It nevertheless considered that the fact that the disputed aid was initially compatible with the common market and that it became incompatible only as a result of the delay in granting it, due to the division of competences between the national authorities and the Province of Bolzano, was justification for not requiring repayment of the aid received up to that point.

14 On 21 December 1994, having received a formal complaint, the Commission asked the Italian authorities for information on the public measures from which ACB had benefited. The Italian Government answered by letters of 6 April and 2 May 1995.

15 By letter of 1 August 1995 the Commission notified the Italian authorities of its decision to initiate the procedure provided for in Article 6(4) of the Fifth Code in connection with the measures resulting from the totality of the decisions adopted by the Province of Bolzano referred to in paragraphs 7, 9 and 10 of this judgment and requested it to submit its comments. That decision was published on 22 December 1995 in the *Official Journal of the European Communities* (OJ 1995 C 344, p. 8) and the other Member States and other interested parties were invited to submit their comments.

16 By letter of 18 January 1996 ACB, as an interested party, asked to be consulted by the Commission and to have its views heard in the procedure that had been

initiated. As this letter remained unanswered, ACB sent the Commission a second letter dated 28 March 1996 in which it asked what stage had been reached in the procedure and, in particular, whether the Commission considered it necessary to hear ACB's views or to obtain information from it.

17 Associations of steel producers submitted their comments to the Commission, which forwarded them to the Italian authorities by letter of 20 February 1996. The latter submitted their own comments to the Commission by letter of 27 March 1996. On 17 July 1996 the Commission adopted the contested decision.

18 The third paragraph of Part I of the grounds of the contested decision lists the State aid granted to ACB by the Province of Bolzano under Provincial Law No 25/81 in the period 1982-1990. It should be pointed out that the Commission stated, in the course of the proceedings before the Court of First Instance, that the loan granted under decision no 784 of 14 February 1983 of the Province of Bolzano was of ITL 6 500 million rather than ITL 5 600 million as erroneously stated in the contested decision. In any event, the Commission explained in the second paragraph of Part IV of the grounds of the contested decision that that measure was already covered by Decision 91/176 and was therefore unaffected by the contested decision. Part I of the grounds of the decision states that the aid in question was granted partly in the form of 10-year loans totalling ITL 25 849 000 million (ECU 12 025 million) at 3%, i.e. about nine percentage points below the normal market rate in Italy at the time, and partly in the form of outright grants, in other words without an obligation to repay, totalling ITL 22 634 000 million (ECU 10.5 million).

19 The Commission considered that even if the aid granted before 1 January 1986 were examined in the light of the provisions of the Second Code, it could not be

considered compatible with the common market. It pointed out in this regard that Article 2(1) of that Code provided that aid to steel could be considered compatible with the common market only provided that, among other things, the recipient had initiated a restructuring programme capable of restoring its competitiveness and of making it financially viable without aid under normal market conditions and that the said programme resulted in an overall reduction in the undertaking's production capacity. However, neither of these two conditions was met.

20 Furthermore, the Commission recalled that the Fifth Steel Aid Code, which applied when the contested decision was adopted, expressly listed the possible derogations from Article 4(c) of the ECSC Treaty, namely aid granted to defray expenditure on research and development projects, aid for environmental protection and aid for closures. It concluded that those derogations were not applicable in the present case to any of the aid measures examined.

21 In the case of State aid granted before 1 January 1986, the Commission nevertheless took account of circumstances which might have misled the Italian authorities as to the rules to be complied with in respect of the aid in question in the relevant period. In particular, the Commission mentioned the lack of reply on its part to the letters from the Province of Bolzano notifying the first four cases in which Provincial Law No 25/81 was applied as well as possible misunderstandings over the distribution of responsibilities between the national and the provincial authorities concerning the notification of aid to the steel industry. Consequently the Commission did not require recovery of the aid granted before 1 January 1986.

22 The contested decision provides:

'*Article 1*

The aid granted to Acciaierie di Bolzano under Provincial Law No 25/81 is illegal as it was not notified before being granted. Such aid measures are incompatible with the common market pursuant to Article 4(c) of the ECSC Treaty.

Article 2

Italy shall, acting in accordance with the provisions of Italian law relating to the recovery of amounts owed to the State, recover the aid paid to Acciaierie di Bolzano from 1 January 1986 under Provincial Law No 25/81 by Decisions Nos 7673 of 14 December 1987, 2429 of 2 May 1988 and 4158 of 4 July 1988. In order to abolish 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 to calculate the net grant equivalent of regional aid in the period in question.

...'

II — Procedure, forms of order sought and pleas in law raised before the Court of First Instance and the contested judgment

A — *Procedure before the Court of First Instance*

23 In those circumstances, by application lodged at the Registry of the Court of First Instance on 12 October 1996, ACB sought annulment of the contested decision. By order of the President of the Fourth Chamber, Extended Composition, of 11 July 1997, Falck and the Italian Republic were granted leave to intervene in support of the form of order sought by the applicant.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to adopt measures of organisation of procedure by requesting certain parties to provide written answers to questions and to produce documents. In particular, the Commission was requested to produce a copy of the letter of 27 March 1996, sent by the Italian authorities to the Commission in response to its decision to initiate the procedure.

25 The Commission informed the Court of First Instance that that letter was from the Italian authorities and that it contained sensitive information concerning the aid recipient. It considered that the abovementioned letter ought to be produced by the Italian Government or, at the very least, with its consent and stated that it was seeking the latter's agreement. The Commission added that the annexes to that letter included an internal memorandum to its services, drawn up by its legal service. It stated that it was making enquiries in order to determine the manner in which that memorandum had been distributed. The Commission further stated that it was opposed, in principle, to the production of internal documents by third parties where they have not been obtained by the proper channels.

26 The Court of First Instance then asked the Commission to produce at the hearing the letter of 27 March 1996, in full or in a non-confidential version, depending on the view taken by the Italian authorities. The Court of First Instance however excused the Commission from having to produce the annex containing the memorandum from the legal service.

27 The parties presented oral argument and replied to the questions put to them by the Court of First Instance at the hearing on 25 March 1999.

28 The Commission lodged at the start of the hearing the letter of 27 March 1996 and its annexes, except annex 3 containing the memorandum from its legal service. Owing to the size of the document produced, only the abovementioned letter and annex 1 thereto were, at first, distributed, the remainder of the document being available from the Registry of the Court of First Instance. After oral argument was presented, the hearing was adjourned for 20 minutes. Table A of Annex 5 to the letter was then distributed and the hearing resumed. After a further adjournment of the hearing of one hour, Tables B, C and D of Annex 5 and Annexes 6 and 7 were distributed. The hearing was resumed and the President of the Fifth Chamber, Extended Composition, then closed the oral procedure.

B — *Forms of order sought and pleas in law raised before the Court of First Instance and the contested judgment*

29 In substance, ACB sought the annulment of the contested decision and, in the alternative, a declaration that there was no obligation to repay the aid granted after 1 January 1986. The Commission contended that the Court should dismiss the application. Essentially, ACB put forward six pleas in support of its claims.

30 The first alleged infringement of the rights of the defence. ACB argued that, despite its letters of 18 January and 28 March 1996, in which it had asked to participate in the procedure, the Commission had not allowed it to do so and, in particular, had not allowed it access to the documents in the case.

31 The Court of First Instance rejected that plea on the grounds set out in paragraphs 42 to 47 of the contested judgment from which it is apparent that ACB's rights were not infringed.

32 The second plea for annulment relied on by ACB alleges an error of law committed as a result of the retroactive application of Community rules. ACB argued that, despite its lack of clarity, the contested decision appeared to be based on the steel aid code in force at the time of its adoption, whereas the applicable code should be the code in force when the aid in question was granted or, at the very least, the code in force when the aid was actually paid. ACB maintains in that regard that there is a lack of consistency between the contested decision and Decision 91/176, which was based on the code applicable when the aid was paid, and with the administrative practice of the Commission which, in State aid cases, allegedly applies the code in force at the date on which the aid is granted. ACB claims that the principles of the protection of legitimate expectations and legal certainty were thus infringed. Moreover, ACB essentially challenged the Commission's entitlement to seek recovery of the aid in question many years after the grant thereof.

33 The Court of First Instance rejected that plea on the grounds set out in paragraphs 59 to 69 of the contested judgment based on the view that, since the aid in question was not notified, only the code in force at the date on which the Commission took its decision could be applied, without that interpretation being contrary to the principles of legal certainty and the protection of legitimate expectations or to any limitation period, which was non-existent in this case.

34 By its third plea for annulment, ACB complained that the Commission, in view of the way in which the facts occurred, disregarded the duty to cooperate in good faith and the principles of the protection of legitimate expectations and proportionality. ACB claimed that the Commission's attitude could legitimately have led it to believe, along with the Italian authorities, that it was not necessary to notify the aid in question. Furthermore, the Commission had, for its part, been slow to act, regard being had, first, to the dates when the abovementioned aid was granted and, secondly, to the fact that Decision 91/176 had also been adopted even though the whole of the aid had already been paid. According to ACB, the claim for recovery of the aid, together with interest, so long after it had been paid constituted a penalty which was not intended simply to restore competitive equality.

35 The Court of First Instance rejected that plea on the grounds set out in paragraphs 83 to 98 of the contested judgment. It is apparent from them that, in the absence of any notification of the aid in question and in so far as ACB had not established that there were exceptional circumstances or given proof of its diligence, just as it had not established an infringement of the duty to cooperate and of the principle of good faith, the requirement that part of the aid in question be recovered, together with interest, was not contrary to the principles invoked by ACB and did not constitute a penalty.

36 Fourthly, ACB called in question the Commission's substantive assessment of the compatibility of the disputed aid with the common market. First, ACB argued that the Commission had erred in law by failing to ascertain whether such aid affected intra-Community trade. Next, ACB claimed that the aid did no more than partly offset the aid granted to the State-owned steel undertakings. Finally, it took the view that the Commission had made an error of assessment by not declaring the aid received by ACB compatible with the common market since that aid pursued, in its submission, objectives relating to energy saving and environmental protection and to improvement in safety, working conditions and the competitiveness of the undertaking.

37 Falck, for its part, produced a report drawn up by the firm Arthur Andersen seeking to demonstrate that a large part of the investment carried out was compatible with the aid codes. Moreover, it submitted that the Commission was making a fresh decision on aid already covered by Decision 91/176. According to Falck, the aid in question was attached by the Commission to Province of Bolzano Decision No 7673 of 14 December 1987 (loan of ITL 6 321 000 million) and Decision No 4158 of 4 July 1988 (loan of ITL 987 million), though the latter loan in actual fact came under the decision of 14 December 1987. Furthermore, Falck argued that the Commission had committed errors concerning the volume of aid paid under Decisions Nos 2429 of 2 May 1988 and 4158 of 4 July 1988.

38 The Court of First Instance dismissed those allegations on the grounds set out in paragraphs 111 to 141 of the contested judgment. It is clear from them that it is not necessary that aid should have an impact on intra-Community trade in order to fall within the scope of Article 4(c) of the ECSC Treaty and that the Commission was right to conclude, in light of the information available to it, that the aid in question was not compatible with the Fifth Code and to determine what part of it should be recovered.

39 Fifthly, ACB pleaded an error in law with regard to the fixing of the rate of interest to be applied to the recovery of aid. ACB argued that the contested decision had set a rate of interest which was unascertainable and devoid of any legal basis inasmuch as it was a rate used by the Commission to calculate the net grant equivalent of regional aid in the period in question. According to ACB, the rate should have been determined in accordance with national law or else have been the rate on the market in which it obtained finance, namely the rate in the German market in which it was very active.

40 The Court of First Instance rejected that plea on the grounds set out in paragraphs 148 to 161 of the contested judgment, from which it is clear that the Commission was right to set the rate of interest mentioned in the contested

decision, which is established on the basis of national data, rather than the German market rate, in the absence of any comments submitted by ACB to that effect during the administrative procedure.

41 Sixthly and finally, ACB criticised the contested decision for lacking a statement of reasons. It claims that the Commission did not give any reasons why it regarded the date of 31 December 1985 as a determining factor in treating aid granted before that date differently from aid granted subsequently, or the reasons for applying the rate of interest laid down in that decision, in particular so far as concerns the proportionality of that rate in relation to the advantages which ACB allegedly enjoyed.

42 The Court of First Instance rejected that plea on the grounds set out in paragraphs 167 to 175 of the contested judgment, from which it is clear that the contested decision contained an adequate statement of reasons, regard being had to the context of the administrative procedure and the content of the contested decision.

III — The appeals

43 In their appeals, the appellants ask that the transcripts of the hearing before the Court of First Instance be produced to the Court of Justice and claim that the Court should make an order setting aside the contested judgment and annulling the contested decision and requiring the Commission to pay the costs, including those incurred at first instance. In the alternative, they seek annulment of the contested judgment and referral of the case back to the Court of First Instance and the adoption of any measure in consequence thereof or which the Court deems appropriate, including by way of a measure of inquiry.

44 The Italian Republic claims that the Court should uphold the appeals and set aside the contested judgment in its entirety, granting the forms of order sought by the Italian Government at first instance, and order the Commission to pay the costs. In the alternative, it asks the Court to uphold the claims submitted in the alternative by the appellants.

45 The Commission contends that three documents produced by the appellants should be removed from the case-file, that the appeals should be dismissed and that the appellants should be ordered to pay the costs.

A — *Admissibility of the appeal brought by Falck*

Arguments of the parties

46 The Commission points out that, under the second paragraph of Article 49 of the ECSC Statute of the Court of Justice, interveners other than the Member States and the Community institutions may bring an appeal only where the decision of the Court of First Instance directly affects them.

47 It notes that, by order of 11 July 1997 of the President of the Fourth Chamber, Extended Composition, Falck was indeed granted leave to intervene before the Court of First Instance on the basis of the first paragraph of Article 34 of the abovementioned Statute on the ground that Falck had an interest in the result of the case inasmuch as it might have to defend a recourse action by ACB or Valbruna Srl, under the guarantees which it provided to the latter on the sale of ACB, in relation to the amount of the aid to be repaid pursuant to the contested

decision. However, that does not mean that Falck is directly affected by the contested judgment for the purposes of the second paragraph of Article 49 of the ECSC Statute of the Court of Justice. The Commission claims that only where an action for recovery were actually brought by ACB or Valbruna Srl could the contested judgment affect Falck. Moreover, the only effect of the contested judgment is to confirm the preceding legal situation and it does not therefore of itself affect Falck. Furthermore, Falck does not have any interest distinct from that of ACB.

48 The Commission puts forward a second reason for challenging the admissibility of Falck's appeal. It observes that, save exceptions which are not relevant here, of all undertakings, only steel-producing undertakings are entitled to bring an action under Article 33 of the ECSC Treaty. Since Falck is no longer a steel-producing undertaking, it no longer has standing to challenge a judgment dismissing an action for annulment in which it was only an intervener.

49 For its part, Falck maintains that, in granting it leave to intervene at first instance, the Court of First Instance acknowledged that it had a real and current interest in the resolution of the dispute and that, accordingly, it is directly affected, within the meaning of the second paragraph of Article 49 of the ECSC Statute of the Court of Justice, which allows it to bring its appeal.

Findings of the Court

50 It is necessary first to examine the Commission's argument that, to bring its appeal, Falck must continue to fulfil the condition applicable to undertakings for initiating proceedings under the second paragraph of Article 33 of the Treaty, namely that it still has the status of an undertaking within the meaning of Article 80 of the ECSC Treaty, that is to say in the present case that it still carries on business as a steel producer within the Community.

51 Article 33 of the Treaty concerns actions for annulment brought against decisions or recommendations of the Commission. The second paragraph of that provision entitles undertakings, within the meaning of Article 80 of the Treaty, to institute proceedings against decisions and recommendations concerning them which are individual in character or against general decisions or recommendations which they consider to involve a misuse of powers affecting them. For its part, the fourth paragraph of Article 34 of the ECSC Statute of the Court of Justice provides that natural or legal persons establishing an interest in the result of any case submitted to the Court may intervene in that case.

52 The scope of the first paragraph of Article 34 of the ECSC Statute of the Court of Justice thus covers a larger category of persons than that covered by the second paragraph of Article 33 of the Treaty, and persons who may not institute proceedings against a decision or a recommendation of the Commission may in some circumstances be granted leave to intervene in such a case.

53 Under the second paragraph of Article 49 of the ECSC Statute an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions, but interveners other than the Member States and the Community institutions may bring such an appeal only where the decision of the Court of First Instance directly affects them.

54 Any natural or legal person who has been granted leave to intervene in a case at first instance under the first paragraph of Article 34 of the ECSC Statute of the Court of Justice does not therefore need to demonstrate that it is an undertaking, within the meaning of Article 80 of the Treaty, which could, if necessary, initiate proceedings under the second paragraph of Article 33 of the ECSC Treaty in order to appeal against a decision of the Court of First Instance in that case and, accordingly, the Commission is wrong to argue that Falck's appeal is inadmissible on the ground that it is no longer a steel producer.

55 However, under the second paragraph of Article 49 of the ECSC Statute of the Court of Justice parties other than the Member States and the Community institutions which have intervened at first instance must be directly affected by the decision of the Court of First Instance in order to be able to bring an appeal against it. The difference, in so far as intervention by natural or legal persons is concerned, between the wording of that provision and that of the first paragraph of Article 34 of the ECSC Statute, which requires a proven interest in the resolution of the dispute to be shown, means that it is not sufficient to fulfil that latter condition and to have been granted leave to intervene in the case at first instance in order to bring an appeal.

56 It is therefore necessary to ascertain, secondly, whether Falck is directly affected by the contested judgment.

57 As the President of the Fourth Chamber, Extended Composition, of the Court of First Instance held in the order of 11 July 1997 granting Falck leave to intervene at first instance and as is pointed out in paragraph 34 of the contested judgment, and regard being had to the undertakings given by Falck to Valbruna Srl and to ACB when it sold the latter, '[i]f the... action were not successful and, consequently, the sums paid as aid to the applicant were recovered in accordance with the Commission's decision, the steel works Valbruna Srl or [ACB] would be entitled, under the provisions of the said agreements, to bring an action for recovery against Falck SpA...'.

58 In the current situation, therefore, Falck could be rendered liable for the repayment in full of the amounts mentioned in Article 2 of the contested judgment and, until the case is definitively disposed of, it must, at the very least, make provision in order to be able to bear, if need be, the corresponding financial burden. By dismissing the arguments put forward by ACB and Falck, the

contested judgment maintained that situation and the constraints which they entail for Falck, whereas if the contested judgment had arrived at the opposite conclusion, those constraints could have been lifted. Falck is therefore directly affected by the contested judgment and may therefore bring an appeal against it.

B — *The request that certain documents produced by ACB and Falck be removed from the case-file*

Arguments of the parties

59 The Commission requests the removal from the case-file of three documents produced by ACB and Falck as annexes to the appeals (documents B6, B3 and B5). They are the memorandum from the Commission's legal service (annexed to the letter from the Italian authorities of 27 March 1996), which the Court of First Instance finally allowed the Commission not to produce, and two memoranda on unheaded paper, which ACB and Falck claim to be from the Commission, but in respect of which the latter says it is unable to verify nature or origin. The Commission claims that those three memoranda were produced at first instance as an annex to Falck's reply to the questions put by the Court of First Instance and that those documents — on the supposition that the unheaded memoranda are in fact from its services — are internal documents which should not be circulated outwith the institution. Invoking its interest in maintaining the confidentiality of its decisions and pointing out the doubts surrounding the nature of two of those three documents and the means by which they were obtained, the Commission seeks their removal from the case-file, and removal of the references made to them in the appeals.

Findings of the Court

60 The documents whose removal the Commission requests were in actual fact produced at first instance by ACB as an annex to its reply to the written questions put by the Court of First Instance. However, although the Commission itself signalled its reluctance to produce, at the request of the Court, the letter of the Italian authorities of 27 March 1996, to which was appended one of those documents — namely the letter from its legal service — and although it indicated that it was going to investigate how that document could have come into the possession of the Italian authorities, it is not apparent from the documents before the Court that the Commission requested the Court of First Instance to remove the three documents at issue after they were produced by ACB.

61 Therefore, those documents are part of the case-file at first instance transmitted to the Court of Justice pursuant to Article 111(2) of its Rules of Procedure and the Commission cannot request their removal on the ground that they are being produced again and relied upon on appeal. Such a request is inadmissible.

C — *The substance of the appeals*

62 ACB and Falck criticise the Court of First Instance concerning a procedural irregularity which adversely affected their interests. They also argue in essence that the Court of First Instance committed an error in law and an error of assessment in finding that the rights of the defence of ACB were observed during the administrative procedure; they also argue that the reasoning in that respect in the contested judgment is contradictory. As to the classification and assessment of

the measures in issue, ACB and Falck claim that the Court of First Instance also committed several errors in law and that the aforementioned judgment is based on an inadequate statement of reasons. They formulate the same type of complaint in relation to the examination by the Court of First Instance of the contested decision inasmuch as it requires repayment of part of the aid paid to ACB and the manner in which such repayment is to be effected.

1. The ground of appeal alleging a procedural irregularity adversely affecting the appellants' interests

Arguments of the parties

63 Referring to the circumstances in which the letter of the Italian authorities of 27 March 1996 and its annexes were produced at the hearing, ACB and Falck maintain that the principle of *audi alteram partem* was infringed. They also claim that, as the record of the hearing shows, their counsel had no time to examine those documents, which included, according to the appellants, many voluminous annexes, or to consult with them in that regard. The opportunity to examine those documents at the Registry on the day of the hearing was not sufficient to satisfy the requirements of the rights of the defence. Yet, following the hearing, the Court of First Instance did not deem it appropriate to reopen the oral procedure pursuant to Article 62 of its Rules of Procedure.

64 The appellants further complain that the contested judgment does not make any mention of the circumstances in which the abovementioned letter was produced and consider that the succinct nature of the minutes of the hearing does not enable that defect to be remedied. That is why they request the Court to order that the full transcript of the hearing be put in evidence before the Court.

65 The Commission considers that that plea is spurious. In its submission, the appellants were certainly familiar with all the documents in question transmitted in all likelihood to them by the Italian authorities, which would appear to be borne out by the fact that the memorandum from the Commission's legal service appended to the letter of 27 March 1996 was produced by ACB before the hearing.

66 The Commission adds that, in any event, neither during the course of the hearing nor afterwards, when reopening of the oral procedure could have been sought by the appellants, did the latter argue that their rights of defence had been infringed. In any event, it was necessary for them to prove that production of the abovementioned documents was likely to have had a decisive influence on the resolution of the dispute and that they were not in a position to raise relevant matters before closure of the oral procedure before the Court of First Instance.

Findings of the Court

67 Under Article 51 of the ECSC Statute of the Court of Justice, an appeal may lie on the ground of a breach of procedure before the Court of First Instance which adversely affects the interests of the appellant.

68 In the present case, the appellants argue essentially that the rights of the defence and the principle of *audi alteram partem* were infringed as a result of the belated production, at the hearing, of voluminous documents and of the circumstances in which their counsel were permitted to examine them on the day of the hearing.

69 As a preliminary point, the appellants' request that the transcript of the hearing before the Court of First Instance should be put in evidence before the Court of Justice must be rejected. The circumstances in which the documents referred to in the preceding paragraph were produced by the Commission and examined by counsel for the appellants are not disputed. In that regard, the minutes of the hearing in any event provide sufficient information concerning those circumstances, which are set out in paragraph 28 of this judgment. Moreover, it is undisputed that the appellants did not state at the hearing that it was impossible to react appropriately to the production of the abovementioned documents. Accordingly, inclusion in the case-file of the transcript of the hearing would be of no utility in assessing the first ground of appeal raised by the appellants.

70 As to the substance, the appellants do not state how the production of the documents in question at the hearing before the Court of First Instance influenced the resolution of the dispute nor, *a fortiori*, do they put forward any argument concerning the content of those documents which, if it had been advanced at first instance, might have had such influence. Therefore, the appellants have not shown that the breach of procedure on which they rely adversely affected their interests and the ground of appeal must be rejected.

2. Breach of the rights of the defence by the Commission during the administrative procedure

Arguments of the parties

71 Falck and ACB claim that, during the administrative procedure, ACB asked the Commission on two occasions to be allowed to participate in that procedure, but that the Commission did not take any action on their approach. According to the

appellants, that fact constitutes an infringement of the rights of the defence. Contrary to the determination of the Court of First Instance in paragraphs 42 to 47 of the contested judgment, to be treated only as an 'interested party' in respect of the opening of the administrative procedure provided for by Article 6(4) of the Fifth Code, which does not afford a right to be heard to the recipient of State aid which is the subject of such a procedure, is inadequate to safeguard the rights of defence of the latter.

72 In that regard, the Italian Government maintains that the requirement for the interested parties to be put on notice to submit their comments cannot be satisfied by the formulation of such notice in the decision to open the procedure published in the *Official Journal of the European Communities*. The Italian Government claims that it is necessary that the principle of adversarial proceedings be actually observed and that, where the recipient of aid requests to be heard, the Commission should, at the very least, reply to that request.

73 Furthermore, the appellants point to contradictions in the grounds of the contested judgment with regard to observance of the rights of the defence. The Court of First Instance drew attention to the need to give notice to the interested parties to submit their observations, but did not penalise the Commission when it failed to do so. The Court of First Instance held that the recipient of aid has the right to be involved in the administrative procedure to the extent appropriate in light of the circumstances of the case, but did not ascertain whether that requirement had been satisfied in the present case. According to the appellants, if it had done so, it would have concluded that, as a result of that lack of involvement of ACB in the procedure, the Commission had examined the same aid in two different decisions and that it had not ascertained how the aid had been used, thus arriving at an erroneous decision. The Court of First Instance ought to have concluded that the Commission had not fulfilled the obligation of examining carefully and impartially all the matters relevant to the present case. The appellants submit that the contested judgment is also vitiated by contradictions on the following grounds:

— ACB was adversely affected by not having been able to raise certain matters during the administrative procedure, when it did not have the opportunity to do so;

— the evidence offered by ACB concerning the use made of the aid was accepted by the Court of First Instance, but the contested judgment found that, in any event, only the Commission may grant a derogation from the prohibition of aid provided for in Article 4(c) of the Treaty.

74 The Commission contends, first, that infringement of the right of the defence was pleaded at first instance only in regard to ACB and that, accordingly, on that point the appeals are not admissible in regard to Falck.

75 It points out that, in any event, the procedure for reviewing State aid is applied to the Member State concerned. That is the reason why the Commission is not obliged to engage in an adversarial debate with the interested undertakings, whether they be recipients of aid or complainants. The Commission's obligations towards those undertakings are limited to requesting their comments when the procedure is opened, which is done by means of publication of the decision adopted in that connection. The Commission refers in that regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1, hereinafter 'the regulation on procedure in State aid cases'), which reproduces the principles laid down in the case-law on review of State aid.

76 The Commission points out that the Court of First Instance found, at paragraph 46 of the contested judgment, that ACB was given notice to submit its comments when the procedure was opened, but that it did not avail itself of that opportunity. Such a finding of facts cannot be called in question in an appeal. In such circumstances, the Commission cannot be alleged to have failed to take into account any matters of fact or of law which could have been submitted to it

during the administrative procedure, but which were not, since the Commission is not obliged to imagine, of its own motion, what information might have been submitted to it. It refers in that regard to paragraph 60 of Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719.

Findings of the Court

77 The appellants are claiming, at the same time, an error in law, misappraisal of the facts and contradictions in the grounds of the contested judgment.

78 Essentially, the error of law is allegedly constituted by considering the notice given to the interested parties to submit their comments on the Commission's decision to open the procedure provided for by Article 6(4) of the Fifth Code to be sufficient to safeguard the rights of the defence of the recipient of the aid which is the subject of that procedure, even where the latter has expressly asked to be heard by the Commission and the latter has not responded in any particular way to that request.

79 During the examination stage provided for under Article 6(4) of the Fifth Code, governed by provisions similar to those of Article 93(2) of the EC Treaty (now Article 88(2) EC) as regards the participation of the interested parties in the procedure, the Commission must give notice to the interested parties to submit their comments.

80 The Court has held, in proceedings concerning the application of Article 93(2) of the Treaty, that publication of a notice in the *Official Journal of the European Communities* is an appropriate means of informing all the parties concerned that a procedure has been initiated (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 17). That communication is intended to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19). Such a procedure also guarantees to the other Member States and the sectors concerned an opportunity to make their views known (Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13). The same principles apply in regard to the Fifth Code.

81 However, the procedure for reviewing State aid, in particular that provided for by the Fifth Code, is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in light of its Community obligations, for granting the aid. Thus, in order to observe the rights of the defence, where the Member State concerned was not afforded an opportunity to comment on certain information, the Commission may not use it in its decision with regard to that State (see Case 234/84 *Belgium* v *Commission* ('*Meura*)' [1986] ECR 2263, paragraph 29).

82 In the procedure for reviewing State aid, interested parties other than the Member State concerned have only the role mentioned in paragraph 80 of this judgment and, in that regard, they cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to the abovementioned Member State (*Commission* v *Sytraval and Brink's France*, cited above, paragraph 59).

83 No special role is reserved to the recipient of aid, among all the interested parties, by any provision of the procedure for reviewing State aid. In that regard, it must be made clear that the procedure for reviewing State aid is not a procedure

initiated 'against' the recipient or recipients of aid entailing rights on which it or they could rely which are as extensive as the rights of the defence as such.

84 The Court of First Instance was therefore lawfully entitled to form the view that when the Commission caused the notice mentioned in paragraph 80 of this judgment to be published, that is to say when in particular it requested the recipient of aid to submit its comments and, as was found in paragraph 46 of the contested judgment, the said recipient failed to make use of that possibility, the Commission did not infringe any of its rights.

85 It must be pointed out that the finding that ACB did not make use of the opportunity to submit its comments is a matter of appraisal of the facts which it is not for the Court of Justice to review on appeal, save where the clear sense of evidence submitted to the Court of First Instance has been distorted (see, in particular, Case C-13/99 P *TEAM* v *Commission* [2000] ECR I-4671, paragraph 63). In the present case, no such distortion is apparent from the case-file.

86 The grounds of appeal alleging an error of law and misappraisal of the facts must therefore be rejected.

87 Nor, moreover, have the contradictions in the grounds of the judgment alleged by the appellants been established.

88 In fact, contrary to the assertions made by Falck and ACB, the Court of First Instance did not point to the requirement that notice had to be given to the interested parties to submit their comments but then failed to sanction the Commission for not doing so since, on the contrary, it held, at paragraph 46 of the contested judgment, that ACB had been afforded the opportunity of making its comments known to the Commission.

89 Likewise, the Court of First Instance in no way stated that the recipient of aid must be involved in the procedure to the extent appropriate in the light of the circumstances of the case, whilst omitting to ascertain whether that had been the case since, also at paragraph 46 of the contested judgment, it found that such a requirement had been fulfilled.

90 It is also clear from the fact that the Court of First Instance considered that ACB had been given an opportunity to submit its comments that that Court's reasoning was not vitiated by any contradiction when it found, at paragraph 117 of the contested judgment, that ACB had not produced evidence that the aid in question could benefit from the derogations for which the Fifth Code provided.

91 Nor, finally, is there any contradiction in the contested judgment between consideration of whether evidence relied upon by the appellants before the Court of First Instance in order to prove that the aid in question was compatible with the common market enabled the conclusion to be drawn that the Commission's appraisal in that regard was mistaken (paragraphs 120 to 132 of the contested judgment) and the finding that, essentially, distribution of the burden of expenditure on the purchase of equipment among various investments in accordance with domestic law cannot be required of the Commission, which must asses the compatibility of State aid with the common market in a Community context (paragraph 135 of the contested judgment).

92 It follows that the complaints relating to the alleged disregard for the rights of the defence must be rejected in their entirety.

3. Classification and assessment of the measures at issue

93 Falck and ACB claim that the contested judgment is vitiated by errors of law or by inadequate reasoning in various respects.

(a) Effect of the aid at issue on intra-Community trade and competition

Arguments of the parties

94 The appellants argue that the contested judgment is wrong to uphold the Commission's argument that, in the context of the ECSC Treaty, State aid does not necessarily have to have an effect on intra-Community trade and competition in order to be caught by the prohibition laid down in Article 4(c) of that Treaty. Yet, in the same way as the provisions of the EC Treaty on State aid, that provision of the ECSC Treaty concerns only aid having an effect on those matters. In that regard, the Court of First Instance ignored the guidelines laid down by the

Court of Justice concerning the need to interpret and apply the Community Treaties in accordance with common objectives, a common spirit and a common rationale, as laid down in Case C-221/88 *Busseni* [1990] ECR I-495.

95 The Italian Government adds that, in any event, the fact that Article 4(c) of the ECSC Treaty refers to aid granted 'in any form whatsoever' does not mean that it concerns aid which does not have, actually or potentially, an effect on intra-Community trade or competition. It points out that the Commission itself, in the first paragraph of Part IV of the grounds of the contested decision, stated that 'the Community Steel Aid Code... is justified by the serious distortions of competition which could be caused by aid that is incompatible with the common market' and that, accordingly, the Commission must examine whether there is an effect on competition and trade when determining the legality of aid granted to a steel undertaking and the necessity of recovering such aid.

96 The appellants add that the mandatory nature of the prohibition on State aid laid down in Article 4(c) of the Treaty, on which the Court of First Instance principally based itself, is negated by the adoption, since 1980, of the six steel aid codes which established derogations from the principle of the prohibition on such aid. The ability of Member States to grant aid under certain conditions henceforth brings this matter under Article 67 of the ECSC Treaty, which applies only where the actions to which it refers are liable to have appreciable repercussions on conditions of competition. Accordingly, since the action of the Commission under Article 67 of the abovementioned Treaty is intended to restore competition, the Court of First Instance should have ascertained whether the aid in question had any repercussion whatever on intra-Community trade and whether its recovery could have an effect on competition, taking into account the lapse of time since it was granted. Moreover, the Court of First Instance has acknowledged that Article 4(c) of the Treaty is not absolute in nature. The appellants refer in that regard to Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839, paragraph 62.

97 In support of the interpretation adopted in the contested judgment, the Commission relies on the order of the President of the Court of Justice in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441 in order to illustrate the mandatory nature of the aid rules in the context of the ECSC Treaty, and on the judgment of the Court of First Instance in *EISA* v *Commission*, cited above.

98 The Commission adds that Article 232 of the EC Treaty (now Article 305 EC), which provides that the EC Treaty can be applied to products covered by the ECSC Treaty only to the extent that the matters raised are not the subject of provisions of the ECSC Treaty, means that the rules of the system put in place by the ECSC Treaty cannot be assimilated to those of the EC Treaty in matters of State aid. The judgment in *Busseni*, cited above, which pushes application of that principle to its limit is to be viewed in isolation and the Court of Justice has on many occasions rejected arguments seeking to demonstrate the primacy of the EC Treaty. The Commission refers in that regard to Case 36/83 *Mabanaft* v *Hauptzollamt Emmerich* [1984] ECR 2497, Case C-128/92 *Banks* [1994] ECR I-1209 and Case C-18/94 *Hopkins and Others* [1996] ECR I-2281.

Findings of the Court

99 According to Article 232(1) of the EC Treaty,

'The provisions of this Treaty shall not affect the provisions of the Treaty establishing the European Coal and Steel Community, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down by that Treaty for the functioning of the common market in coal and steel.'

100 It follows that the rules of the ECSC Treaty and all the provisions adopted in implementation of that Treaty remain in force as regards the functioning of the common market, notwithstanding the supervening EC Treaty (see Case 239/84 *Gerlach* v *Minister van Economische Zaken* [1985] ECR 3507, paragraph 9). Indeed, in so far as matters are not the subject of provisions in the ECSC Treaty or rules adopted under it, the EC Treaty and the provisions adopted for its implementation can apply to products covered by the ECSC Treaty (Case 328/85 *Deutsche Babcock* [1987] ECR 5119, paragraph 10).

101 However, grants of State aid are covered by the provisions of Article 4(c) of the ECSC Treaty. Contrary to Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC), which, only in so far as it affects trade between Member States, concerns aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, Article 4(c) of the ECSC Treaty purely and simply concerns aid granted by States in any form whatsoever.

102 That clear difference between the wording of Article 4(c) of the ECSC Treaty and that of Article 92(1) of the EC Treaty suffices to show that, so far as concerns State aid, the Member States did not seek to adopt the same rules or the same scope of action for the Communities and that, in order to be caught by the provisions of Article 4(c) of the ECSC Treaty, an aid measure does not necessarily need to have an effect on trade between Member States or on competition (see Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraphs 32 and 33).

103 The fact that, on the basis of Article 95 of the ECSC Treaty, the Commission, with the unanimous assent of the Council of the European Union and after

consultation with the Consultative Committee, adopted provisions for the authorisation of certain aid within the scope of that Treaty is not such as to alter the definition of aid as laid down in Article 4(c) of the ECSC Treaty.

104 It follows that the Court of First Instance correctly held, at paragraph 114 of the contested judgment, that the Commission was not required to ascertain whether the aid mentioned in the contested decision had an effect on trade between Member States and on competition. The ground of appeal alleging the existence of an error of law in that respect must therefore be rejected.

(b) The applicable Steel Aid Code

Arguments of the parties

105 The appellants maintain that the Court of First Instance committed an error of law, by holding that, once the period of applicability of a steel aid code has expired, the Commission is no longer empowered to authorise under that code aid that has not been notified and must apply the code in force on the date on which its decision was adopted.

106 Falck points out that ACB and itself argued at first instance that such an approach gives rise to the application to facts of rules which were not in force at the material time, contrary to the principle of the protection of legitimate expectations and of the maxim *tempus regit actum*. ACB reproduces those arguments in its appeal, adding that that approach also infringes the principle of legal certainty. Falck and ACB maintain essentially that subsequent codes

established a permanent system of derogations from the prohibition of aid and that the code in force at a given time gives the Commission the power to authorise aid at that time, but that, in using that power, the Commission must apply the substantive rules of the code in force on the date on which the aid is granted. Otherwise, the result would be retroactive application of substantive rules.

107 In that regard, Falck and ACB consider that the judgment in Case 214/83 *Germany* v *Commission* [1985] ECR 3053, on which the Court of First Instance based itself, does not concern the problem of the application in time of subsequent codes, in particular in so far as substantive rules are concerned. Falck also points out that the view taken by the Court of First Instance is contradicted by Decision 91/176, in which the Commission applied the code in force on the date on which the aid was actually paid. It contends that that solution is also incorrect because only the code in force on the date on which the decision to grant the aid was adopted should be applied, but that it at least has the merit that it avoids too great uncertainty as regards the rules to be applied, whereas the solution adopted by the Court of First Instance results in authorising the Commission to choose the regime to be applied on the basis of the timing of its decision.

108 Moreover, ACB considers that the documents forming annexes 3, 4, 5 and 6 to the reply to the questions put to it by the Court of First Instance, including the memorandum from the Commission's legal service, support the conclusion that the Commission and its services had already adopted a position favouring the application of the aid code in force on the date on which the aid itself was granted (as acknowledged in several Commission decisions). ACB criticises the Court of First Instance for failing to take any account of those factors and accepting the argument which had the effect in the present case of justifying the application of the Fifth Code.

109 In that regard ACB also claims that there was an inadequate statement of reasons in the contested judgment. In its view, the Court of First Instance did nothing more than state that the Commission had indicated clearly which were the applicable provisions.

110 The Italian Government considers that, like the Commission, the Court of First Instance confused the aspects relating to the legality of unnotified aid with those relating to its compatibility. The relevant legislation when assessing the compatibility of such aid is that in force on the date on which it is to be granted, even if failure to notify it in due time results in the aid being considered illegal. Indeed, the principle of legal certainty prohibits the application to aid of a code which entered into force after the aid was granted.

111 On the other hand, the Commission subscribes to the reasoning set out by the Court of First Instance in paragraphs 59 to 65 of the contested judgment. It points out that it is significant that the codes do not even mention the possibility of authorising unnotified aid and observes that, in the judgment in Case 214/83 *Germany* v *Commission*, cited above, the Court of Justice held that the Commission was not entitled to authorise aid to the steel industry if the plan to grant or alter the aid has not been notified to it before the end of the period laid down in each code. It follows that the only legal basis for examining such aid is the code in force at the date on which the Commission decision is adopted. The distinction drawn by the appellants between rules as to competence and substantive rules is entirely without foundation, since that power may be used only to give a decision on compatibility in light of the substantive rules.

112 The Commission likewise maintains that the Court of First Instance did not disregard the principle of legal certainty nor that of protection of legitimate expectations, nor, moreover, the maxim *tempus regit actum*. According to the Commission, so far as concerns the first principle, the Court of First Instance did indeed point out, in paragraphs 64 and 65 of the contested judgment, that, in cases where aid is not notified, neither the Member State nor the recipient undertaking may demand that the Commission review compatibility of aid in the light of an expired code. So far as concerns the second of the abovementioned principles, the Commission observes that, as a general rule, undertakings in receipt of aid cannot have a legitimate expectation that the aid is lawful unless it has been granted in compliance with the proper procedure. That principle, enshrined in the rules provided for by the EC Treaty, applies even more strictly in the context of the rules laid down by the ECSC Treaty. As regards the maxim

tempus regit actum, it confirms, at most, that a measure adopted by the Commission can be based only on the rules in force on the date on which it is adopted.

113 Finally, the Commission maintains that the opinion of the legal service does not deal with the question of the applicable law *ratione temporis* and that the memoranda allegedly emanating from its services refer to decisions entirely unrelated to that question since they were adopted with regard to projected aid duly notified under the ECSC Treaty or to projected aid under the EC Treaty. Nor does Decision 91/176 support the appellants' arguments, since it expressly excludes, in Part V of the grounds, the application of the code in force on the date on which the aid was granted. That decision nevertheless contains a defect in that it considers to be applicable the code in force on the date on which the aid is actually paid rather than that in force when the Commission makes a determination in respect of that aid. That, however, is an error of no consequence given that, as Decision 91/176 itself states, the two codes in question contained the same rules.

114 In replying to ACB's criticisms of the grounds of the contested judgment concerning the applicable code, the Commission points out that, at paragraphs 170 and 171 of that judgment, the Court of First Instance stated that the Commission had clearly stated the reasons which had led it to apply the Fifth Code. The ground of appeal relied on is in any event of no avail since the contested decision also established the incompatibility of the aid in question with the Second Code.

Findings of the Court

115 The Court of First Instance correctly considered, at paragraph 61 of the contested judgment, that, unlike the provisions of the EC Treaty on State aid, which

permanently empower the Commission to adopt decisions on its compatibility, the aid codes confer such power on the Commission only for a specified period.

116 Accordingly, where aid which a Member State wishes to authorise under a code is not notified during the period laid down by it for such notification, the Commission can no longer give a decision on the compatibility of that aid under that code (see the judgments in Case 214/83 *Germany* v *Commission*, cited above, paragraphs 40 to 47, and Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraphs 49 to 55). The fact that the Commission or its services were able, where appropriate, to take a different position in certain cases is not such as to call in question that conclusion.

117 Moreover, the compatibility of aid with the common market can be assessed, in the context of steel aid codes, only in the light of the rules in force on the date on which it is actually paid.

118 It must be noted in that regard that, contrary to what was held by the Court of First Instance at paragraph 65 of the contested judgment and is argued by the Commission, applying the rules of the code in force on the date on which the Commission makes a determination on the compatibility of aid paid under an earlier code does indeed result in the retroactive application of Community rules.

119 Although, as a general rule, the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (Case 98/78 *Racke* [1979] ECR 69, paragraph 20). In that regard, in order to ensure observance of the principles of legal certainty and the protection

of legitimate expectations, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to them (see, in particular, Case 234/83 *Gesamthochschule Duisburg* v *Hauptzollamt München-Mitte* [1985] ECR 327, paragraph 20, and Case C-34/92 *GruSa Fleisch* [1993] ECR I-4147, paragraph 22).

120 The Fifth Code contains no provision which provides that it may be applied retroactively. Moreover, it is clear from the general scheme and the objectives of successive aid codes that each of them lays down rules for the adaptation of the steel industry to the objectives laid down in Articles 2, 3 and 4 of the ECSC Treaty according to the needs existing at any given period. Accordingly, application of rules adopted at a particular period, according to the then prevailing situation, to aid paid in the course of an earlier period does not correspond to the general scheme and objectives of that type of rules.

121 It follows that the Fifth Code could not be applied retroactively to the aid covered by the contested decision and that, accordingly, in view also of the fact that the Second Code could not be applied, as held in paragraph 116 of this judgment, the Commission could not, in any event, declare the aid compatible with the common market, under either one code or the other. The abovementioned aid was thus prohibited by Article 4(c) of the ECSC Treaty.

122 Accordingly, the errors of law committed in that respect in the contested decision and in the contested judgment cannot have any effect on their validity. Even without such errors of law, the operative part of the contested decision, so far as concerns the compatibility of the aid in question with the common market, would have been the same and the Court of First Instance would have been obliged, in any event, to confirm that decision in that respect. The ground of appeal alleging an error of law as regards the choice of applicable code must therefore fail (see, in that connection, Case 150/84 *Bernardi* v *Parliament* [1986] ECR 1375,

paragraph 28, and *Commission* v *Sytraval and Brink's France*, cited above, paragraphs 47 to 49 and 78).

123 As regards the alleged defective reasoning, mentioned in paragraph 109 of the present judgment, no such defect has been established. Contrary to what ACB maintains, by no means did the Court of First Instance do nothing more than state that the Commission had indicated clearly which was the applicable aid code; rather it set forth, in paragraphs 59 to 68 of the contested judgment, legal reasoning arriving at the conclusion that the Commission was not obliged to refer to the earlier aid codes.

(c) The Commission's obligations as regards information to be obtained before determining the compatibility of aid

124 As part of a more general ground of appeal seeking to show that the Court of First Instance infringed a principle prohibiting decisions in the nature of a penalty, Falck and ACB essentially argue that the contested judgment is vitiated by a third error of law in so far as it states that the Commission was entitled to base itself solely on information in its possession when it adopted the contested decision in order to determine the compatibility of the aid in question.

125 That complaint must be rejected as immaterial, without its being necessary to rule on whether it is well-founded, in view of the fact that, as stated in paragraph 121 hereof, the Commission could not declare the aid in question compatible with the common market.

4. The Commission's decision requiring repayment of part of the aid paid to ACB and the manner of such repayment

(a) Observance of the principles of protection of legitimate expectations, good faith and sincere cooperation

Arguments of the parties

126 Falck and ACB claim that, by failing to acknowledge the legitimate expectations enjoyed by ACB, the Court of First Instance disregarded, despite the facts of the case which had been presented at first instance, the principles of protection of legitimate expectations, good faith and sincere cooperation, the application of which would have precluded repayment of the aid in question.

127 They adduce in that regard various factual elements which were capable, according to them, of giving rise to a legitimate expectation that the aid had been lawfully granted. In particular, Falck and ACB consider that the periods of time which elapsed between the various events justified such expectation. However, in that respect, the Court of First Instance allegedly did nothing more than state that a recovery measure is lawful even if it is implemented long after the aid has been granted.

Findings of the Court

128 As observed in paragraph 85 of this judgment, it is not for the Court of Justice to review on appeal the assessment of the facts by the Court of First Instance, save where the clear sense of evidence submitted to the Court of First Instance has been distorted.

129 However, with the exception of the allegation that the Court of First Instance was not entitled simply to state that recovery of State aid is lawful even if it is implemented long after the aid in question has been granted, which concerns a point of law which it is appropriate to examine together with the next ground of appeal relating to the Commission's delay in taking action, all the other complaints raised by Falck and ACB criticising the Court of First Instance for disregarding the principles of protection of legitimate expectations, good faith and sincere cooperation, call in question the assessment of the facts by the Court of First Instance. Thus, since examination of the case-file has not revealed any distortion of those facts, those allegations must be rejected as inadmissible.

(b) The Commission's delay in taking action

Arguments of the parties

130 Falck and ACB maintain that, by confirming the Commission's decision requiring repayment of certain aid, the Court of First Instance infringed rules on limitation and thus committed an error of law. They criticise the contested judgment in that regard for relying on a partly implied *a contrario* argument only, namely that, since the Community legislature has provided for a limitation period in matters of State aid only in the context of 'the regulation on procedure in State aid cases', which entered into force on 16 April 1999, a situation not falling within the scope *ratione materiae* of that regulation cannot be subject to a limitation period with regard to a requirement to repay State aid.

131 However, the reference to the regulation on procedure in State aid cases is immaterial because the latter concerns the scope of application of the EC Treaty.

In any event, that regulation is merely a codification of pre-existing rules and, as is stated in its 14th recital, the limitation period it lays down is justified by the principle of legal certainty, which is common to the scope of the EC and the ECSC Treaties.

132 The appellants point out that it is true that, in certain fields, there are provisions which lay down precise limitation periods; however, the Court of Justice has held that, in the absence of any provisions in that regard, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its power to impose fines (Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraphs 20 and 21). They also refer to the judgment of the Court of First Instance in Joined Cases T-194/97 and T-38/98 *Branco* v *Commission* [2000] ECR II-69, paragraphs 90 and 91, in which it was held that an unreasonable delay between the date on which the Commission became aware of certain facts and that on which the decision based on those facts was adopted — in the present case a delay of more than 16 months — may justify annulling such a decision for breach of the principle of legal certainty.

133 According to the appellants, if it were necessary to determine in the present case a limitation period by analogy, it should be by reference to the limitation periods of three or five years provided for in Article 1 of Commission Decision No 715/78/ECSC of 6 April 1978 concerning limitation periods in proceedings and the enforcement of sanctions under the Treaty establishing the European Coal and Steel Community (OJ 1978 L 94, p. 22), rather than to the period of 10 years mentioned in the regulation on procedure in State aid cases.

134 The appellants maintain that they had already put forward those arguments at the hearing before the Court of First Instance and that the Commission was aware of the mechanisms which had been operated since 1983 in favour of ACB, that is to say after the plan for its restructuring was notified to the Commission. They express surprise at the absence of any reference to those arguments in the contested judgment and perceive that as an absence of reasons or inadequacy of the reasons on which it is based. They consider that the Court of Justice should, if the state of proceedings permits, give a final judgment on the dispute by applying a five-year limitation period.

135 The Italian Government essentially supports the position of the appellants.

136 The Commission submits, first of all, that, although the regulation on procedure in State aid cases is admittedly not applicable to aid granted under the ECSC Treaty, it does not see why it should not be legitimate to refer to that regulation.

137 Next, the Commission acknowledges that the Community legal system admits of limitation periods of varying duration and subject to different rules, but argues that there is no instance of a limitation period having been laid down by the Community judicature. The judgment in *Geigy* v *Commission*, cited above, far from confirming the appellants' arguments, in fact invalidates them, since the Court held at paragraph 21 of that judgment that, in order to fulfil their function, limitation periods must be fixed in advance, the fixing of their duration and the detailed rules for their application coming within the powers of the Community legislature. According to the Commission, where such provisions are laid down *ex ante* by the legislature, they ensure legal certainty whereas, on the contrary, where they are laid down *ex post* by the Community judicature, they are by no means foreseeable, so that interested parties are unable to take them into account when deciding on a course of action, thus undermining legal certainty.

138 Finally, the Commission argues that the application by analogy of Decision No 715/78 cannot be accepted. It claims that that decision concerns the power of the Commission to impose fines and periodic penalty payments in cases where such fines and periodic penalty payments are provided for by the ECSC Treaty. Given that the recovery of aid is not a penalty, there is no warrant for applying that decision by analogy. Furthermore, that decision lays down three different limitation periods and establishes two different sets of rules regarding the interruption and suspension of the limitation period for bringing legal proceedings. The Commission is unable to discern by what criteria it would be appropriate to choose between those different sets of rules, none of which is appropriate for the recovery of aid.

Findings of the Court

139 As the Court held in paragraph 21 of the judgment in *Geigy* v *Commission*, cited above, in order to fulfil their function, limitation periods must be fixed in advance, the fixing of their duration and the detailed rules for their application coming within the powers of the Community legislature. However, the latter has not taken steps to prescribe a limitation period concerning the review of aid granted under the ECSC Treaty.

140 None the less, as the Court also held in the same paragraph in *Geigy* v *Commission*, cited above, in the absence of any provision in that regard, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its powers.

141 Accordingly, the Court of First Instance committed an error of law by restricting its examination of the complaint that the Commission had delayed in taking action to the finding that there was no limitation period in the field under consideration and by failing to ascertain whether the Commission had acted in an excessively belated manner. The contested judgment must be set aside in that regard.

142 Under the first paragraph of Article 54 of the ECSC Statute of the Court of Justice, where the Court of Justice quashes a decision of the Court of First Instance, it may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

143 In the present case, the state of the proceedings does permit final judgment to be given on this point and it is appropriate for there to be an immediate examination of the plea alleging that the Commission delayed in taking action in order to ascertain whether it justifies upholding the claims submitted at first instance by ACB or whether it must be rejected and the remaining grounds of appeal considered.

144 On an examination of the case-file the complaint raised at first instance that the Commission delayed excessively in taking action must be rejected. The oldest aid whose repayment is sought was the subject of a decision adopted in December 1987 by the Province of Bolzano which was not paid by the latter until March 1988 and January 1989. However, as from July 1988, the Commission asked the Italian authorities for information on similar aid paid to the same undertaking in December 1987. It initiated the procedure provided for by Article 6(4) of the Third Code in respect of that aid in March 1989 and, in July 1990, in Decision 91/176, it clearly stated that that aid was illegal, having been granted without prior authorisation, and incompatible with the common market, although, for very specific reasons, it did not require repayment of the aid. So far as concerns the aid in issue in the present case, the Commission began to question the Italian authorities in December 1994, after learning of the existence of that aid as a result of a complaint, initiated the procedure provided for by Article 6(4) of the Fifth Code in August 1995 and adopted the contested decision on 17 July 1996. It is apparent from all those facts that the appellants cannot rely on the principle of legal certainty to claim that the Commission acted with excessive delay.

145 Since the ground of appeal alleging that the Commission was excessively late in demanding recovery of the aid in question has no prospect of success, the remaining grounds of appeal must be considered.

(c) Bases for calculating the interest to be applied

Arguments of the parties

146 Falck and ACB claim that the Court of First Instance wrongly confirmed the bases for calculating the interest to be applied to the amounts to be repaid, which

they consider to be unlawful. In their view, the Commission arbitrarily applied the 'rate used by the Commission to calculate the net grant equivalent of regional aid in the period in question' by reference to its Communication of the Commission on regional aid systems (OJ 1979 C 31, p. 9) which, under paragraph 14 of the annex thereto, is the 'average reference rate applicable to payments by central Government of interest subsidies to credit institutions' as regards the Italian Republic.

147 Falck and ACB claim that the rate of interest to be applied in circumstances such as these should simply aim to eliminate all the financial advantages deriving from the aid, which was acknowledged by the Court of First Instance at paragraph 149 of the contested judgment. Essentially, they argue that the rate of interest under the contested decision is not the market rate which would simply aim to eliminate the financial advantages deriving from the aid granted to ACB. Referring to various Commission communications and decisions, they point out that, depending on the circumstances, the latter uses different rates of interest, but that the Commission communication 95/C 156/05 to the Member States published in the Official Journal of 22 June 1995 (C 156, p. 5), supplementing its letter to the Member States No SG(91) D/4577 of 4 March 1991 concerning the procedures for the notification of aid plans and procedures applicable when aid is provided in breach of the rules of Article 93(3) of the EC Treaty, legalises use of the reference market rate, which in this case is the German market in which ACB was seeking refinancing.

148 In view of the range of rates applied by the Commission, there is no way of foreseeing what rate is likely to be used. In that respect, paragraph 155 of the contested judgment states, erroneously and without explanations, that the rate used was based on information received from the Bank of Italy whereas in actual fact the Italian authorities had in no way determined the applicable rate. On the contrary, if they had been involved in the fixing of the rate, they could have lent it a certain degree of foreseeability. However, according to the appellants, it is apparent from the case-law cited at paragraphs 96 to 98 of the contested judgment, and in particular from Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, that although the Commission has the power to determine the date from which interest must run, the fixing of the rate itself is a matter for the

competent national authorities. The Court of First Instance thus, with no justification, endorsed a method for determining interest rates which is vitiated by an error in law in that it is arbitrary and unforeseeable. The Commission itself, in the contested decision, did not give reasons for its choice of interest rate.

149 The Italian Government, for its part, considers that the Court of First Instance gave not the slightest ground to justify the reference to the Communication of the Commission on regional aid systems in determining the appropriate rate of interest. It points out in that regard that there is no way of verifying the relevance of the rules laid down in that field concerning aid under the ECSC Treaty.

150 Moreover, according to the appellants and the Italian Government, the Court of First Instance was wrong to consider that, since ACB had not itself informed the Commission that it was seeking refinancing on the German market, the Commission could not be criticised for not having taken account of that fact.

151 The Commission maintains that the complaint that it did not have competence to determine the applicable rate of interest was raised for the first time by the Italian Government at the hearing at first instance, which, it says, is sufficient ground for regarding it as inadmissible and explains why the Court of First Instance did not consider it.

152 In any event, since it has the aim of restoring the situation which would have prevailed but for the aid, the rate of interest is an element which is linked to the extent of the competitive advantages enjoyed by the undertaking concerned, so that its determination is a matter for the Commission and not for the national authorities. Moreover, discussion of this matter serves no purpose since Article 14(2) of the regulation on procedure in State aid cases states that interest is to be calculated on the basis of an appropriate rate fixed by the Commission.

153 There is no contradiction, the Commission adds, between its various communications regarding repayment of State aid, even though, in order to reflect the economic advantages which the interested parties enjoyed, following the letter of 22 February 1995 regarding the rate of interest to be used in cases of repayment of illegal and incompatible aid, it is the reference rate used for calculating the net grant equivalent of regional aid which is adopted as the basis for the commercial interest rate and no longer the rate applied for late-payment interest on debts owed to the State, as previously. That information confirms the reasoning set out in paragraphs 154 to 157 of the contested judgment, according to which the rate of interest ought to ensure that the advantage which the undertaking unlawfully enjoyed is eliminated; that result is obtained by the application of the reference rate, essentially a market rate, which the Commission is entitled to impose on the Italian Government.

154 The Commission considers, moreover, that the contested decision gives adequate reasons for the choice of rate in that it is set in a context which is well-known to the Italian Government, which is the addressee of the decision, and is in line with long-established decision-making practice.

155 Finally, in regard to failure to apply the rates in force on the German market, the Commission endorses the reasoning of the Court of First Instance as set out in paragraphs 158 to 160 of the contested judgment in so far as, since ACB did not submit any comments on that point, it cannot criticise the Commission for not having considered its activity on the German market. The finding at paragraph 161 of that judgment is also quite correct since the Commission has not been shown to have committed a manifest error of assessment. The Commission adds that, in any event, if it had applied the rate in force on the German market, it would have been to the detriment of ACB in view of the trend in the exchange rate between the German and Italian currencies during the period in question.

Findings of the Court

156 At the outset, it is necessary to reject the objection of inadmissibility by the Commission alleging that the Italian Government raised the claim that the Commission did not have competence to determine the rate of interest applicable to amounts whose repayment is required under Article 2 of the contested decision for the first time at the hearing before the Court of First Instance. As a matter of fact, ACB argued as early as at the stage of its application at first instance that the abovementioned interest rate had no legal basis. Moreover, the intervener may put forward its own arguments, since Article 34 of the ECSC Statute of the Court of Justice states only that submissions made in an application to intervene may only support or request the rejection of the submissions of one of the parties (see Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, paragraphs 37 and 38). In the present case, the argument that the Commission has no such power, relied upon by the Italian Government, was intended to support the plea in law alleging lack of legal basis of the interest rate applied, which had previously been put forward by ACB, and the intervener was justified in developing such a plea at any stage of the proceedings.

157 As to substance, the Court of Justice has consistently interpreted Article 93(2) of the EC Treaty as giving the Commission, when it has found that aid is incompatible with the common market and decides that the State concerned must cancel or alter it, the power to require its repayment where such aid has been granted in breach of the Treaty, which makes it possible for such cancellation or modification to be of practical effect (*Commission* v *Germany*, cited above, paragraph 13). The recovery of State aid unlawfully granted seeks to restore the previously existing situation and cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aid (Case C-142/87 *Belgium* v *Commission* ('*Tubemeuse*') [1990] ECR I-959, paragraph 66).

158 It should be borne in mind in that connection that, by a communication published in 1983 (OJ 1983 C 318, p. 3), the Commission drew the attention of potential beneficiaries of State aid to the precarious nature of any aid granted unlawfully in that they may be called upon to repay it.

159 However, the previously existing situation cannot of necessity be restored unless repayment of the aid bears interest running from the date of payment of the aid and the interest rates applied are representative of the rates of interest charged on the market. Otherwise, the recipient would at the very least retain an advantage amounting to an interest-free government advance or subsidised loan.

160 Thus, the recipients of State aid incompatible with the common market cannot claim that it is unexpected of the Commission to ask for repayment of that aid together with interest as representative as possible of that sought on the capitals market.

161 In that regard, the procedure provided for under domestic law is applicable to the recovery of amounts unduly paid only in the absence of Community provisions. Having the power to order that the previous situation be restored, the Commission, subject to review by the Community judicature as to any manifest error of assessment, has power to determine the rate of interest enabling such restoration to be effected.

162 Accordingly, the appellants and the Italian Government cannot validly argue that the Commission does not have power to determine the rate of interest applicable to repayment of aid incompatible with the common market.

163 Nor, moreover, is the appellants' argument that the rate adopted by the Commission in the contested decision was unascertainable, arbitrary and unrelated to the market rates well founded.

164 The bases for calculating the rate of interest applicable to repayment of aid incompatible with the common market under the contested decision were set out in each of the Commission's letters to the Member States No SG(91) D/4577, of 4 March 1991, cited above, and of 22 February 1995, mentioned in Communication 95/C 156/05, published in the Official Journal of 22 June 1995, cited above.

165 In the first letter mentioned in the preceding paragraph, the Commission pointed out to the Member States that recovery was to be 'effected in accordance with national law, including the provisions concerning interest due for late payment of amounts owing to the government, interest which should normally run from the date of the award of the unlawful aid in question'. In the second letter, the Commission informed the Member States that it 'found that in practice such interest is calculated on the basis of a legal rate which usually differs widely from commercial rates'. It went on to state that 'for the purpose of restoring the status quo commercial rates provide a better measure of the advantage improperly conferred on the recipient' and informed the Member States 'that in any decisions it may adopt ordering the recovery of aid unlawfully granted it will apply the reference rate used in the calculation of the net grant equivalent of regional aid measures as the basis for the commercial rate'. The lack of a statement of reasons complained of as regards the use of the latter rate is, accordingly, unfounded.

166 The Member States, to which Commission decisions on matters of State aid are addressed, were thus fully informed of developments concerning the interest rate used by the Commission and it was open to it to alter the bases for calculating that rate in order to adjust it in line with market trends in order better to reflect

them. In view of those considerations and of those set out in paragraph 160 hereof, the complaint that the rate of interest applied in the contested decision was unforeseeable is unfounded.

167 As to the charge that the reference rate used to calculate the net grant equivalent of regional aid granted in Italy is arbitrary and unrelated to the market rates applied in that Member State, neither the Italian Government nor the appellants have put forward the slightest argument in support of such an allegation, either at first instance or before the Court of Justice. Indeed, the only argument put forward at first instance regarding the inappropriateness of the rate adopted relates to the fact that the Commission should have applied the German market rate on the basis of which ACB was refinancing itself. Nor is it apparent from the case-file that, after it received the Commission's letter of 22 February 1995, the Italian Government challenged the Commission over the bases for the calculation of the rate of interest adopted for the recovery of the aid granted to undertakings established in Italy. In the appeal, the appellants and the Italian Government merely call in question the error of law allegedly committed by the Court of First Instance when it considered that, since ACB had not itself provided the Commission with information regarding its refinancing on the German market, the Commission cannot be criticised for not taking account of that fact.

168 As the Court of Justice has previously held, the legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted (*Meura*, cited above, paragraph 16, and Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33).

169 It must be pointed out that where the Commission has initiated the procedure provided for by Article 6(4) of the Fifth Code, even if it is only the Member State concerned which has submitted information to the Commission for assessment

while the recipient of the aid has not made use of that possibility, all the interested parties have been in a position to provide all relevant information to the Commission (see paragraphs 77 to 84 of the present judgment).

170 In that connection, since the decision to initiate the procedure provided for by Article 6(4) of the Fifth Code contains an adequate preliminary analysis by the Commission setting out the reasons for the doubts it entertains regarding the compatibility of the aid in question with the common market, it is for the Member State concerned and, where appropriate, the recipient of the aid, to put forward arguments to show that the aid is compatible with the common market and, if necessary, plead special circumstances relating to recovery of the aid already paid should the Commission require such repayment. It must be pointed out in that respect that, at first instance, neither ACB, nor Falck and the Italian Republic, which intervened in its support, claimed that the reasons for the decision to initiate the procedure were insufficient to enable them to exercise their rights effectively.

171 The Court of First Instance has thus not committed any error in law in that regard. In those circumstances, the appellants and the Italian Government have not established that the Court of First Instance allowed a rate of interest which is arbitrary and unrelated to the applicable market rate.

172 Accordingly, the complaint that the wrong bases were used for calculation must be rejected.

(d) Application of a penalty and breach of the principle of proportionality

173 Falck and ACB maintain that the Court of First Instance infringed a principle prohibiting the adoption of decisions in the nature of a penalty and the principle

of proportionality. They make a number of complaints in that connection. First, the contested judgment did not take a view on ACB's argument that, in view of changes in the legal and factual situation since the aid was granted, the requirement to repay it was transformed into a penalty. In this case, the penalty was imposed on Falck. Secondly, by not requiring that the Commission actually ascertain whether the aid in question was compatible with the common market, and by not verifying this itself, the Court of First Instance allowed the Commission to adopt a decision which sought only to penalise a possible failure to notify. Thirdly, the Court of First Instance reinforced the nature of a penalty of the contested decision in that it did not accept that the same aid had been dealt with twice, by two contradictory decisions, or that the amounts to be repaid were excessive. Fourthly, Falck claims that, by approving the method for fixing the rate of interest applicable to the repayment of such amounts, the Court of First Instance endorsed an excessive rate amounting to a penalty. It is appropriate to examine in order whether those arguments are relevant.

(i) The complaint that changes in the situation transformed the requirement to repay into a penalty

Arguments of the parties

174 With regard to the first complaint, ACB and Falck argue that, in view of the obligations incumbent on the latter *vis-à-vis* ACB and Valbruna Srl, it will be Falck which in the end will have to honour the repayments. Such a situation would not have any impact on the restoration of competition since, at present, Falck is no longer active in the steel sector. Consequently, the contested decision constitutes a penalty so far as it is concerned. According to Falck and ACB, those arguments were advanced at first instance and particularised at the hearing. However, the Court of First Instance entirely omitted to rule on them and thus unlawfully confirmed the imposition of a penalty.

175 In that connection, the Commission points out that the Court of First Instance ruled on the arguments relating to the existence of a penalty as set out in paragraph VI(e) of ACB's application at first instance and referred to in paragraph 78 of the contested judgment. The argument that the contested decision amounted to a penalty inasmuch as Falck no longer pursued an activity in the steel sector was not submitted before the Court of First Instance, ACB having done no more, according to the Commission, than state in its application that 'situations of fact and even of law (applicable legislation, legal person) have changed'. The Commission adds that, even if the arguments in question had been put forward at the hearing, they would have been ruled out of time and would accordingly have been inadmissible at the appellate stage pursuant to Article 113(2) of the Rules of Procedure of the Court of Justice.

176 As regards substance, the Commission considers that in any event it is not obliged to take into account any sales agreements between individuals. Otherwise, it would suffice to sell an undertaking which has benefited from illegal aid by concluding agreements such as those entered into in the present case in order to evade any attempt to recover aid. The Commission points out, moreover, that it was not aware of the existence of the agreement between Falck, on the one hand, and ACB and Valbruna Srl, on the other, when it adopted the contested decision.

Findings of the Court

177 First of all, that complaint must be held to be admissible. Article 113(2) of the Rules of Procedure of the Court of Justice does indeed provide that the subject-matter of the proceedings before the Court of First Instance may not be changed in the appeal and that the jurisdiction of the Court of Justice is confined to review of the findings of law on the pleas argued before the Court of First Instance (Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59).

178 However, in the present case, ACB did in fact submit in its application before the Court of First Instance that, in view of the changes in market conditions and in situations of fact and of law since the aid was granted, the recovery ordered by the Commission did not pursue the aim of restoring the equilibrium of the aforementioned market and eliminating distortions in competition but rather was in the nature of a penalty. The argument that such recovery would have no effect on competition since Falck, which would in actual fact bear the burden of it, is no longer a company which is active in the steel sector, is an argument intended to elucidate the plea in law put forward in the aforementioned application. Accordingly, that argument could, if necessary, without disregarding the provisions of the first subparagraph of Article 48(2) of the Rules of Procedure of the Court of First Instance, be formulated at a stage in the procedure subsequent to lodgment of the application before the Court of First Instance and, since it forms part of a plea in law submitted at first instance, its inadmissibility cannot be established for the first time at the appellate stage. Furthermore, failure to rule on an argument such as that put forward by Falck is, in certain circumstances, such as to lead the Court of Justice to uphold an appeal (Case C-68/91 P *Moritz* v *Commission* [1992] ECR I-6849, paragraphs 21 to 25 and 37 to 39).

179 None the less, in this case, there is no need to examine whether that argument had or had not been clearly formulated at the hearing or whether the Court of First Instance was wrong not specifically to form a view on it since, in any event, such an argument could not result in the latter upholding a plea in law alleging the existence of a penalty.

180 Where a company in receipt of aid is sold at a market price, the purchase price reflects in principle the advantages corresponding to the aid paid previously and it is the seller of that company that keeps the benefit of the aid through the price received (see, to that effect, Case C-390/98 *Banks* [2001] ECR I-6117, paragraphs 77 and 78).

181 In those circumstances, it is not aberrant that, in a proper case, liability to repay aid incompatible with the common market paid to a company which was subsequently sold should, in the end, attach to the vendor, in respect of whom such a situation cannot be said to be in the nature of a penalty.

182 In the present case, Falck and ACB have not adduced any evidence to prove that the latter was not sold at a price reflecting the value of its assets and, in any event, Falck agreed to accept the consequences of any legal problems arising prior to the sale and which were neither pointed out nor taken into account when it was sold. The allegation that the Court of First Instance did not rule on the existence of a penalty even though Falck could be held liable to repay the aid found to be incompatible with the common market can therefore be of no avail.

(ii) The complaint that the lack of a genuine examination of the compatibility of the aid transforms the requirement to repay into a penalty

Arguments of the parties

183 The second of the appellants' complaints, relating to the existence of a penalty as a result of the alleged absence of a genuine examination of the compatibility of the aid at issue with the common market, corresponds to the argument referred to in paragraph 124 of the present judgment regarding the ground of appeal alleging an error of law stemming from the finding that the Commission was right to base itself solely on the information in its possession when deciding on the abovementioned compatibility.

Findings of the Court

184 Without there being any need to rule on the substance of that complaint, it must be rejected as irrelevant in view of the fact that the Commission was obliged to declare the aid incompatible with the common market, as stated in paragraph 121 of the present judgment.

(iii) The complaint that errors and confusion over the various aids and the amounts to be repaid transformed the requirement to repay into a penalty

185 It must be observed at the outset that the third complaint put forward by the appellants to show that the Court of First Instance wrongly concluded that there was no penalty as a result of a 'duplicate assessment' of the same aid amounts to calling in question the finding of facts made by the Court of First Instance. As pointed out in paragraph 85 of the present judgment, it is not for the Court of Justice to review the appraisal of the facts made by the Court of First Instance in an appeal, save where the clear sense of the evidence submitted to it has been distorted. That complaint is therefore inadmissible on appeal.

(iv) The complaint that the application of an excessive rate of interest for the repayment of the aid transformed the requirement of such repayment into a penalty

Arguments of the parties

186 Falck's detailed arguments with regard to the complaint that there was a penalty as a result of the application of an excessive rate of interest on the amounts to be repaid correspond to those previously summarised in paragraphs 146 to 150 of the present judgment in the context of the pleas in law alleging that the bases of the calculation of interest were unlawful and the reasons given in that regard inadequate.

Findings of the Court

187 Falck's arguments concerning the unlawfulness of the rate of interest applied in paragraph 2 of the operative part of the contested decision have already been rejected in paragraphs 156 to 171 of the present judgment which make it clear that no penalty arises from the application of such a rate.

188 It follows that the ground of appeal alleging infringement of a principle prohibiting penalties and the principle of proportionality must be rejected.

189 It follows from all the foregoing that the appeals can be entertained only to the extent that as a result of an error of law the Court of First Instance rejected ACB's plea in law alleging that the Commission's belated claim for repayment entailed an infringement of the principle of legal certainty. The remainder of the appeals must be dismissed.

190 However, on the substance of the case, pursuant to the first paragraph of Article 54 of the ECSC Statute of the Court of Justice, the latter finds that the Commission, in view of the circumstances of the present case, did not delay in taking action and that, therefore, the principle of legal certainty was not infringed. It follows that ACB's appeal must be dismissed.

IV — Costs

191 Under the first paragraph of Article 122 of the Rules of Procedure, where an appeal is well founded and the Court of Justice itself gives final judgment in the

case, the Court is to make a decision as to costs. Under Article 69(2) of those Rules, rendered applicable to appeal proceedings by Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, the first subparagraph of Article 69(3) of those Rules provides that, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs. The first subparagraph of Article 69(4) provides that Member States which intervene in the proceedings are to bear their own costs.

192 In the present case, since the appellants, so far as each is concerned, essentially failed in their pleas and the Commission applied for costs against them, they must be ordered to pay the costs and the Italian Republic must be ordered to bear its own costs.

On those grounds,

THE COURT

hereby:

1. Sets aside the judgment of the Court of First Instance of 16 December 1999 in Case T-158/96 Acciaierie di Bolzano v Commission in so far as it rejected the plea alleging that the Commission's belated claim for repayment entailed an infringement of the principle of legal certainty;

2. **Dismisses the remainder of the appeals;**

3. **Dismisses the action for annulment brought by Acciaierie di Bolzano SpA before the Court of First Instance;**

4. **Orders Falck SpA and Acciaierie di Bolzano SpA to respectively pay the costs in Cases C-74/00 P and C-75/00 P;**

5. **Orders the Italian Republic to bear its own costs in Cases C-74/00 P and C-75/00 P.**

Rodríguez Iglesias Jann Macken

Colneric von Bahr Edward

La Pergola Puissochet Wathelet

Skouris Cunha Rodrigues

Delivered in open court in Luxembourg on 24 September 2002.

R. Grass G.C. Rodríguez Iglesias

Registrar President