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

29 June 2000 *

In Case T-234/95,

DSG Dradenauer Stahlgesellschaft mbH, formerly Hamburger Stahlwerke GmbH, established in Hamburg (Germany), represented initially by A. Löhde, Rechtsanwalt, Hamburg, and subsequently by W. Hofer, U. Theune, M. Luther and K. von Gierke, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the Chambers of L. Dupong, 4-6, rue de la Boucherie,

applicant,

supported by the

Federal Republic of Germany, represented by E. Röder, then by W.-D. Plessing, Ministerialrat at the Federal Ministry of Finance, acting as Agent, assisted by M. Schütte, Rechtsanwalt, Berlin, and also of the Brussels Bar, and by W. Mueller-Stöfen, Rechtsanwalt, Hamburg, Graurheindorferstraße 108, Bonn (Germany),

intervener,

* Language of the case: German.

Commission of the European Communities, represented by P. Nemitz, of its Legal Service, acting as Agent, assisted by M. Hilf, Professor at the University of Hamburg, and P. Hommelhoff, Professor at the University of Heidelberg, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by L. Nicoll, Treasury Solicitor, acting as Agent, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

APPLICATION for the annulment of Commission Decision 96/236/ECSC of 31 October 1995 concerning State aid granted by the City of Hamburg to the ECSC steel undertaking Hamburger Stahlwerke GmbH, Hamburg (OJ 1996 L 78, p. 31),

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

composed of: J.D. Cooke, President, R. García-Valdecasas, P. Lindh, J. Pirrung and M. Vilaras, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 18 March 1999,

gives the following

Judgment

1 The Treaty establishing the European Coal and Steel Community ('the ECSC Treaty') prohibits in general terms the granting of State aid to steel undertakings. Article 4(c) provides that 'subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever', are incompatible with the common market in coal and steel and are accordingly to be prohibited, as provided in the Treaty.

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 High Authority 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 needs of restructuring the steel sector, the Commission relied on the abovementioned 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 specific economic difficulties of the steel industry. The successive decisions adopted in that regard are commonly referred to as the 'Steel Aid Codes'.

4 Thus, the Community Steel Aid Code in force at the date on which the administrative procedure opened in this case was the fifth in the series [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; 'the fifth Steel Aid Code')].

5 The aim of the fifth Steel Aid Code is not to deprive the steel industry of aid for research and development or for bringing plants into line with new environmental standards. In order to reduce production overcapacity and restore balance to the market, it also authorised, under certain conditions, 'social aid to encourage the partial closure of plants or finance the permanent cessation of all ECSC activities by the least competitive enterprises'. Finally, it expressly prohibited operating or investment aid, with the exception of 'regional investment aid in certain Member States'.

6 Article 1(1) and (2) of the fifth Steel Aid Code provides:

'1. Aid to the steel industry, whether specific or non-specific, financed by Member States or their regional or local authorities or through State resources in any form whatsoever may be deemed Community aid and therefore compatible with the orderly functioning of the common market only if it satisfies the provisions of Articles 2 to 5.

2. The term "aid" also covers the aid elements contained in transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing (such as bonds convertible into shares, or loans, the interest on which is at least partly dependent on the undertaking's financial performance) which cannot be regarded as a genuine provision of risk capital according to usual investment practice in a market economy.'

7 Article 6(2) of the fifth Steel Aid Code provides:

'The Commission shall be informed, in sufficient time for it to submit its comments, and by 30 June 1996 at the latest, of any plans for transfers of State resources, by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisition of shareholdings or provisions of capital or similar financing.

The Commission shall determine whether the financial transfers involve aid elements within the meaning of Article 1(2) and, if so, shall examine whether they are compatible with the common market under the provisions of Articles 2 to 5.'

Background to the dispute

1. Facts prior to the disputed measures

8 Hamburger Stahlwerke GmbH (hereinafter 'the former HSW'), which is now DSG Dradenauer Stahlgesellschaft mbH ('Dradenauer'), was created in 1961. Since 1969, it has been making products listed in Annex I to the ECSC Treaty and therefore falls under Article 80 of that Treaty. Hamburgische Landesbank Girozentrale ('HLB') acquired shares in the former HSW in 1972. As from 1974, it continuously held 49% of the shares of HSW in a fiduciary capacity as security for liquidity and investment loans which it had granted to the company without guarantee or surety from the City of Hamburg.

9 The losses incurred by the former HSW between 1969 and 1981, amounting to DEM 204 million, were covered by the company's shareholders. Following losses in 1982 of DEM 172 million, which were not covered by the shareholders, composition and then liquidation proceedings were commenced on 9 December 1983.

2. Loan of equity capital

10 The German Government states that, in order to recover part of the sums owing to them from the former HSW, amounting to DEM 181 million at the date of commencement of the liquidation, the City of Hamburg (guaranteeing DEM 129 million of those debts) and HLB (assuming on its own the financial risk in respect of the remaining DEM 52 million) decided in 1984 to contribute financially to the running of the operation of the former HSW. The City of Hamburg thus placed DEM 20 million at the disposal of HLB, which the latter lent to the receiver and the manager of the former HSW ('the limited partners'). The limited partners then created Protei Produktionsbeteiligungen GmbH & Co. ('Protei'), themselves contributing DEM 200 000 to the equity capital in addition to the DEM 20 million borrowed.

11 Then, using its capital of DEM 20.2 million, Protei founded Neue Hamburger Stahlwerke GmbH, which in 1984 took over the activities and assets of the former HSW. The same year, Neue Hamburger Stahlwerke GmbH was renamed Hamburger Stahlwerke GmbH ('HSW').

12 It was agreed under the terms of the contract between HLB, Protei and the shareholders that repayment of the loan of DEM 20 million and the interest thereon (the relevant rate being the discount rate plus 7.5% subject to a minimum of 15% per annum) would be made only if HSW made a profit. It was also agreed that Protei would transfer to HLB its right to share in the profits of HSW in a proportion equivalent to that between the sum lent and the capital of HSW.

13 According to the German Government, the operation of the former HSW by HSW enabled the losses resulting from the financing of the former HSW to be reduced from DEM 52 million to less than DEM 5 million in the case of HLB's exposure and from DEM 129 million to DEM 52 million in the case of that of the City of Hamburg.

14 On 20 December 1984 and 9 December 1985, the Commission authorised the payment to HSW of direct aid amounting to DEM 46 million intended for investment, closure, research and development, and the covering of operating losses and also authorised a State guarantee covering DEM 40 million. However, only DEM 23.5 million of aid was paid and guarantees for an amount of DEM 27 million went unused.

15 On 19 September 1988, a judgment of the Bundesgerichtshof (Federal Court of Justice) held that, since HLB was both a member of the former HSW and the fiduciary company of the City of Hamburg, the loans in question should be classified as loans replacing capital. It followed that the corresponding debts could not be collected unless the liquidation of the former HSW gave rise to a surplus after satisfying all creditors, whether preferential or not.

3. The credit line of 1984

16 At the outset of HSW's activities in 1984, HLB granted the company a DEM 130 million credit line on the basis of regularly renewed yearly contracts, DEM 52 million being at the risk of HLB and DEM 78 million being granted by order of the City of Hamburg. In consideration of that credit line, collateral security was granted to HLB.

17 Between 1984 and 1993, HSW made losses for six years and profits for four. The credit line of DEM 130 million was not entirely used until 1992.

4. The credit line of December 1992

18 In 1992, HSW recorded losses of around DEM 20 million. It needed the renewal of the DEM 130 million credit line granted by HLB and also an extension to the credit line of DEM 20 million. HLB decided to renew the DEM 52 million of the credit line for which it bore the risk, but did not participate in the extension. The City of Hamburg decided to renew the order to open credit of DEM 78 million and also to order HLB to extend the credit line by DEM 20 million. However, HLB and the City of Hamburg made the grant of that credit subject to HSW adopting a restructuring plan.

5. The credit line of December 1993

19 In 1993, HSW incurred losses totalling DEM 24.4 million, requiring a further renewal and extension of the credit line. HLB having decided to stop financing the undertaking, the City of Hamburg ordered HLB to grant HSW a credit line (with effect from 1 January 1994) of DEM 150 million, with an extension of DEM 24 million and a swing of DEM 10 million. The City of Hamburg then assumed the whole of the economic risk arising from that total loan of DEM 184 million.

6. The sale of HSW

20 Before the grant of that loan, approved in December 1993, contacts had been made with a view to the sale of HSW. An expert study prepared at the request of the credit commission of the City of Hamburg recommended the privatisation of HSW. According to that report, dated 19 January 1994, (the 'MacKinsey Report'), the liquidation of HSW would cause the City of Hamburg to suffer losses of DEM 200 million.

21 In February 1994, Protei transferred its shareholding in HSW to the manager of the former HSW in consideration of a purchase price of DEM 275 000, financed through a HLB loan, and in consideration also of the manager assuming liability for the DEM 17.2 million still owing of the DEM 20 million loan granted on the creation of Protei.

22 By a contract of 27 December 1994, the Netherlands company Venuda Investments BV, belonging to the ISPAT Group ('ISPAT'), acquired HSW by paying, first, DEM 10 million to the manager, who immediately transferred the amount to HLB thereby satisfying its claims, and, secondly, by entering into a contract with HLB covering the sale of the claims of HLB arising from the credit line. A clause in the contract set out detailed rules for determining the purchase price of the claims. The contract required ISPAT to continue the operations of HSW, maintain 630 jobs, carry out investments of DEM 70 million, and inject DEM 30 million into the equity.

Administrative procedure

23 Having learned in the press that the City of Hamburg was supporting HSW financially, the Commission asked the German Government, by letters of 24 January and 2 February 1994, to provide it with information on the subject.

24 After examining the information provided, the Commission took the view that the financial measures enjoyed by HSW might constitute State aid incompatible with the ECSC Treaty and the fifth Steel Aid Code.

25 By letter of 14 July 1994, the Commission informed the German Government of its decision to initiate the procedure under Article 6(4) of that code. At the time that decision was published (OJ 1994 C 293, p. 3), the Commission gave notice to the other Member States and interested third parties to submit their observations on the measures in question within a month.

26 In a communication to the Commission of 8 September 1994, the German Government submitted its observations, maintaining that the financial measures in question were not State aid. Other Member States and interested third parties also submitted observations.

27 The German Government then sent a series of letters to the Commission and took part in several meetings organised by the Commission. It also requested, in a letter of 23 June 1995, that the adoption of the Commission's decision be deferred in order to permit it to demonstrate that HSW was capable of ensuring its own financing on the strength of its own sureties. The Commission acceded to that request.

28 By a communication of 18 August 1995, the German Government sent further information to the Commission.

The contested decision

29 On 31 October 1995, the Commission adopted its Decision 96/236/ECSC concerning State aid granted by the City of Hamburg to the ECSC steel undertaking Hamburger Stahlwerke GmbH, Hamburg (OJ 1996 L 78, p. 31; 'the contested decision'), which states:

'Article 1

The contribution to the equity capital of Hamburger Stahlwerke GmbH of DEM 20 million, in the form of a loan granted by [the city of] Hamburg acting through Hamburgische Landesbank Girozentrale, to the shareholders of Protei Produktionsbeteiligungen GmbH & Co. KG and to that company itself, constitutes State aid. That aid was approved by the Commission in 1984/85.

Article 2

The loans granted to Hamburger Stahlwerke GmbH on the basis of the DEM 20 million enlargement of the credit line, accorded by Hamburgische Landesbank Girozentrale on the instructions of [the City of] Hamburg in December 1992, and the loans granted on the basis of the credit line of DEM 174 million and the DEM 10 million swing accorded by Hamburgische Landesbank Girozentrale on the instructions of [the City of] Hamburg in December 1993 represent State aid incompatible with the ECSC Treaty and the Steel Aid Code.

Article 3

Germany shall recover the aid referred to in Article 2 from the recipient company. Repayment shall be made in accordance with the procedures and provisions of German law, with interest, based on the interest rate used as reference rate in the assessment of regional aid schemes and starting to run *pro rata temporis* from the date on which the aid was granted. Interest already paid pursuant to the credit line agreement shall be taken into account. The purchase price paid by Venuda Investments BV for the transfer of claims from Hanseatische Landesbank shall be treated as part of the aid recovered.'

30 The Commission's assessment may be summarised as follows (point IV of the recitals in the preamble to the decision).

31 The Commission points out at the outset that, since its creation in 1984, HSB has been a *de facto* public undertaking, the State having raised its entire equity and injected it into the undertaking through the intermediary of HLB, the receiver, the manager and Protei. It also considers that it is owing to the system of contracts signed in 1984 that the City secured control of HSW through the intermediary of HLB.

1. Loan of equity capital

32 The Commission finds that the loan of DEM 20 million of equity capital granted to Protei by the City of Hamburg through the intermediary of HLB in order to constitute the initial capital of HSW was equivalent to an injection of risk capital.

33 Contrary to the submission of the German Government, the Commission maintains that a private investor not in a special relationship with the former HSW would not have offered risk capital to finance an absorbing company. In support of that contention, it points out, first, that the administrator of the composition proceedings tried in vain for a year to find a private investor willing to take over the activities of HSW, and, secondly, that when, in 1984, it considered the aid connected to the restructuring plan presented by the Federal Government, its conclusion that HSW was viable was reached in the light of the presumed intention of the private investor, Protei, to contribute equity capital. The aid enabling HSW to be judged economically viable was regarded by the Commission as limited to the amount necessary for restructuring. The Commission therefore considers that the fact that it was impossible to find a private investor willing to take over the business of the former HSW, despite the prospect of obtaining considerable aid, demonstrates that a private investor would not have been prepared to inject risk capital.

34 The Commission considers that that analysis is not contradicted by the fact that HLB also provided some financing for the new HSW. The bank did not provide the loans in the framework of the credit line under conditions that would allow them to be regarded as comparable to equity capital from the outset. HSW had to pay interest, even in years in which it made no profits, and HLB received securities to cover its loan that were valuable at least as long as the loans did not have to be considered as representing capital-replacing loans.

35 The Commission concludes that the loan of DEM 20 million constituted State aid. However, that aid was covered by the previous authorisations which it had given in 1984 and 1985.

2. The credit line of 1984

36 Regarding the credit line granted by HLB and largely covered by a credit order of the City of Hamburg, the Commission considers that those financial measures

should be analysed in the light of the circumstances that surrounded the creation of the new HSW.

37 HLB and the City of Hamburg might reasonably have thought, when the winding-up proceedings in respect of the former HSW were initiated, that the debts owing to them of DEM 52 million and DEM 129 million respectively would not be capable of being honoured by reason of the fact that they might be classified as capital-replacing loans. Therefore, in order to obtain partial repayment of the debts owing to them, HLB and the City of Hamburg were prepared to place an amount corresponding to the debts at the disposal of HSW so as to allow the company to operate and avoid the costs connected with its closure.

38 The Commission finds that HLB finally obtained repayment of 90% of its claims on the former HSW, and that the City of Hamburg obtained repayment of 60% of its claim. The Commission draws a distinction between the attitude of HLB and that of the City of Hamburg, however, in that there was an essential difference between them inherent in the structure of the securities which they obtained. HLB agreed to grant the credit line on the strength of securities that would always allow it preferential status as creditor before the City of Hamburg could benefit from the securities.

39 During the period between 1984 and 1992, in which the credit line was regularly renewed, HSW was not in financial difficulties requiring a new injection of capital in order to avoid insolvency. Accordingly, the Commission considers that HLB had no reason to fear losing the securities due to the capital-replacing nature of the loans, even though the system of contracts set up for the continuation of HSW had been an attempt to circumvent that legal classification. HLB could therefore rely both on the system of contracts and on the intention of the City of Hamburg to keep HSW active in order to hope for a return on investment.

40 In conclusion, the Commission finds that the possibility that, between 1984 and 1992, the City of Hamburg acted in the same way as a private investor in a comparable situation cannot be totally excluded. Accordingly, it does not regard the credit line granted by HLB from 1984 until the end of 1992 and guaranteed in the amount of DEM 78 million by the City of Hamburg as State aid.

3. The credit line of December 1992

41 The Commission recalls that, as from 1992, HSW had financial difficulties requiring extra liquidity.

42 Having regard to the losses incurred in 1991 and 1992, HLB agreed to renew its commitment of DEM 52 million, but refused to increase it. The City of Hamburg agreed to renew and increase its commitment, thereby raising its coverage of the HSW risk from 60% to 65.4%. The Commission finds it understandable that, on the one hand, HLB agreed to renew its commitment, given that it had recovered 90% thereof, but on the other hand refused to increase it having regard to the market situation.

43 The Commission finds the German Government's argument that a private bank would have granted the enlargement of the credit line needed, because otherwise the entire loan would have been lost, unconvincing. The commitment of HLB to cover part of the credit line was not comparable to a loan from a private bank. The Commission points out in that respect that HLB acted in reliance on the intention of the City of Hamburg to keep HSW in operation. Similarly, the Commission regards the German Government's argument that HSW did not benefit from the credit line unsustainable, as HSW was facing the risk of being unable to pay its debts. Furthermore, HLB had already taken all available

securities, and the DEM 20 million extension of the credit line was indispensable to the survival of the business.

44 The Commission considers that, in agreeing to that extension of the credit line, the City of Hamburg risked an amount exceeding its initial claim over the former HSW, so that the particular economic motivations put forward to justify the continuation of the business cannot explain that behaviour. It therefore considers that that extension of the credit line constitutes State aid incompatible with Article 4(c) of the ECSC Treaty.

4. The credit line of December 1993

45 The Commission notes that, in 1993, HSW again recorded negative operating results of DEM 24.4 million in 1993 and that the experts instructed by the credit commission of the City of Hamburg concluded in December 1993/January 1994 (the MacKinsey Report) that HSW was close to insolvency and that privatisation would be the best way to limit the losses of the City of Hamburg and to safeguard jobs.

46 HLB decided not to continue the credit line granted at own risk and not to grant any further financing. By contrast, the City of Hamburg decided to take over the full economic risk relating to HSW and instructed HLB to grant a credit line of DEM 174 million plus an additional DEM 10 million swing as from January 1994.

47 The Commission is unconvinced by the German Government's argument that HLB's decision was mainly based on the fact that a recently published court

decision indicated that all HLB loans would have to be considered capital-replacing. The court decision referred to had already been published in a legal journal of wide circulation on 2 October 1992, that is to say even before HLB decided in December 1992 to extent the credit line of DEM 52 million. The Commission further maintains that HLB must have known that the system of contracts signed in 1984 was designed to circumvent the case-law on capital-replacing loans and that the hope that the City of Hamburg would bail out HSW had diminished following the conclusions of the MacKinsey Report.

48 The Commission therefore takes the view that HLB considered the particular background of the initial financing of the new HSW insufficient to justify the economic risk of keeping HSW in operation. That attitude was justified by HSW's closeness to insolvency, forecasts of further heavy losses, a market that had not improved, and the conclusions of the expert report. The Commission therefore concludes that no private investor would have granted HSW new capital, and that the credit line and the swing granted by order of the City of Hamburg constitute aid that is incompatible with Article 4(c) of the ECSC Treaty.

Procedure and forms of order sought by the parties

49 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 21 December 1995, the applicant brought the present action.

50 By order of 8 May 1996 the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by the applicant.

51 The contested decision also forms the subject-matter of an action before the Court of Justice, registered under Case number C-404/95. By order of 10 December 1996, the Court of Justice stayed the proceedings in that case pending the judgment of the Court of First Instance.

52 By order of 4 March 1997 the United Kingdom was granted leave to intervene in support of the form of order sought by the Commission. By that same order the Court of First Instance examined a request for confidential treatment submitted by the applicant and granted such treatment in respect of certain information on the file.

53 The Federal Republic of Germany and the United Kingdom, as interveners, submitted their observations by documents lodged at the Registry of the Court of First Instance on 31 July 1996 and 11 August 1997 respectively. The Commission commented on those observations by document of 4 December 1997.

54 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure. In accordance with Article 64(3) of the Rules of Procedure of the Court of First Instance, the parties, and HLB, were asked to reply to certain questions and to produce certain documents.

55 By letters of 12, 15 and 18 February 1999 respectively, the Federal Republic of Germany, the Commission and the applicant replied to those questions and produced the required documents. By a letter of 11 February 1999, HLB also replied to a question which had been put to it. The parties complied with those requests within the prescribed time-limit.

56 The main parties, and the Federal Republic of Germany as intervener, presented oral argument and replied to oral questions at the hearing on 18 March 1999.

57 At the hearing the Commission disputed the usefulness of the questions put by the Court of First Instance to the parties and HLB, and also objected to the new legal and factual matters contained in the replies being taken into account for the purposes of the present action.

58 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

59 The Federal Republic of Germany, as intervener, claims that the Court should annul the contested decision.

60 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

61 The United Kingdom, as intervener, contends that the Court should dismiss the application.

62 In its reply of 18 February 1999 to questions from the Court of First Instance, the applicant stated that it was discontinuing its action in so far as it was directed against Article 1 of the contested decision. It confirmed that discontinuance at the hearing.

The replies to the written questions from the Court of First Instance and the documents annexed to those replies

63 The Commission argued at the hearing that only the information sent to it in the context of the administrative procedure was to be taken into account by the Court of First Instance for the purposes of its review. That did not cover the complete restructuring plan of 1992 and the expert report of Susat & Partner of 23 November 1992 sent by the applicant as annexes to its replies to the Court's questions. Furthermore, it maintains that the replies to the Court's questions should not be a means for the parties to present facts subsequent to the contested decision, the administrative procedure leading to that decision having been closed, or be designed to raise arguments before the Court of First Instance that had not been submitted to it.

64 In accordance with Article 24 of the ECSC Statute of the Court of Justice, which applies to the Court of First Instance by virtue of Article 46 thereof, the Court may require the parties 'to produce all documents and to supply all information which the Court considers desirable'.

65 It is further provided in Article 64(2) of the Rules of Procedure of the Court of First Instance, which supplements the provisions of the Statute and makes them

more explicit, that measures of organisation of procedure are, in particular, to have as their purpose to clarify the forms of order sought by the parties, their pleas in law and arguments and the points at issue. In that respect, Article 64(3) of the same Rules of Procedure states that those measures may consist of:

'(a) putting questions to the parties;

[...]

(c) asking the parties or third parties for information or particulars;

(d) asking for documents or any papers relating to the case to be produced

[...]'.

66 In this case, the Court considered it necessary, first, to put written questions to the applicant, the Commission and the Federal Republic of Germany in order to obtain clarification of the pleas in law and arguments raised by them in their pleadings, and, secondly, to request those same parties to produce certain documents cited in those pleadings. A written question was also sent to HLB, not a party to these proceedings, in order to clarify a disputed point on which the applicant and the Commission are in disagreement, namely whether it granted the loans in dispute without an order to do so from the City of Hamburg.

67 In that respect, it is for the Court of First Instance to assess, in the context of the pleas in law raised by the parties, the relevance of the replies which they give to its questions and of the documents which they produce. In the context of that assessment, it is also for the Court of First Instance to take account of the observations of the Commission as to the extent to which those replies and documents may be taken into consideration in order to review the legality of the contested decision.

Substance

68 The applicant raises three pleas in law in support of its action. The first plea alleges infringement of essential procedural requirements, in that the contested decision was based on inaccurate facts and that the Commission did not examine certain arguments. The second plea alleges infringement of the ECSC Treaty and the rules of law for its application. The last plea alleges misuse of powers by the Commission.

69 It should be noted, however, that the first plea is closely linked to the second plea, alleging infringement of the ECSC Treaty. The complaint of the existence of factual errors has no independent content and cannot be classified as an 'infringement of an essential procedural requirement' within the meaning of Article 33 of the ECSC Treaty.

70 As for the factual findings of the Commission, it should also be pointed out that there is a divergence between the contested decision and the presentation of the facts by the intervener, the Federal Republic of Germany. The latter stated, in the context of its comments on the Report for the Hearing, that it is not true that the credit line of DEM 150 million granted in December 1992 was granted in the amount of 98 million by a credit order of the City of Hamburg (78 million to guarantee the existing credit line of 130 million and 20 million to cover the increase), whereas HLB always undertook to supply a credit without guarantee of DEM 52 million. In its submission, that description of the facts does not take

account of the fact that the credit order concerning the credit line of DEM 130 million was increased, in December 1992, from 78 to 97.5 million, thus taking the cover from 60 to 75% of that sum. To that cover was added the credit order for the increase of DEM 20 million, so that the total amount covered by credit orders of the City of Hamburg as from December 1992 was 117.5 million.

71 In that respect, it should be noted that the applicant has not raised that point as a ground for annulment of the contested decision and that, in its statement in intervention, the Federal Republic of Germany referred thereto in a section entitled 'By way of precaution: other corrections', dealing with corrections to the Commission's statement of its case on points which the intervener does not consider relevant for the decision of the Court of First Instance. In those circumstances, there is no need for the Court of First Instance to verify whether the contested decision is vitiated by a factual error on that point.

72 It is therefore appropriate to examine the first and second pleas in law jointly under a single plea in law alleging infringement of Article 4(c) of the ECSC Treaty and Article 1(2) of the Steel Aid Code inasmuch as the Commission is alleged to have wrongly categorised the disputed measures as State aid.

1. The plea alleging infringement of Article 4(c) of the ECSC Treaty and Article 1(2) of the Steel Aid Code

Arguments of the parties

73 The applicant accuses the Commission of wrongly categorising the financial measures in question as State aid and essentially maintains, as its primary

argument, that the measures could have been granted by a private investor in a market economy.

74 In that respect, it argues, first, that the City of Hamburg and HLB formed one economic entity. Secondly, it maintains that the credit lines granted in December 1992 and December 1993 could have been granted by a private investor. Thirdly, the applicant argues that it had sufficient sureties to obtain capital from third parties. Finally, it contends that, even if the Commission's argument that State aid existed were to be accepted, the amount of that aid did not correspond to that indicated by the Commission.

The economic unity between the City of Hamburg and HLB

75 The applicant, supported by the Federal Republic of Germany, argues that the City of Hamburg and HLB constituted an economic unit. The Commission was therefore wrong to distinguish between the conduct of HLB, on the one hand, as a State bank, and, on the other, as a commercial bank, and assess separately the amounts granted in those two capacities. It also follows, in the applicant's submission, that HLB could not be regarded as the reference private investor.

76 In support of that argument, the applicant points out, first, that HLB is a public-law institution by virtue of Paragraph 1(1) of the HLB-Gesetz (Law on the HLB). Secondly, the City of Hamburg has unlimited liability for the obligations undertaken by HLB and must guarantee the performance by HLB of the tasks entrusted to it (Paragraph 4(1) and (2) of the HLB-Gesetz). Thirdly, unlike an ordinary commercial bank, HLB does not have the making of profits as its main objective. Finally, the City of Hamburg appoints the members of HLB's board of management and supervisory board.

77 The Federal Republic of Germany fully endorses the above, and deploys numerous arguments to show that it is correct to speak of an economic unit in this case, pointing out in this respect that, although HLB is an independent legal person, that fact does not rule out the existence of an economic unit. It maintains that the existence of an institutional burden ('Anstaltslast') is decisive in determining the existence of an economic unit in this case. This involves a guarantee on the part of the institution assuming the burden that the institution to which it is linked is in a position to perform its function.

78 Moreover, the economic success of HLB, which depends largely on the professional management of credit risks, determines the amount of the profits distributed by HLB and thus its contribution to the budget of the City of Hamburg. The contribution of HLB to the budget of the City of Hamburg might amount to as much as 6% of its equity capital. Therefore, the loss of the credits granted by HLB to HSW would always have economic consequences for the City of Hamburg, whether or not the latter had issued credit-opening orders in favour of HLB.

79 Finally, the Federal Republic of Germany argues that the criteria for economic unity laid down by Community case-law, namely the holding of most of the capital (in this case, HLB is 100% owned by the City of Hamburg), the power to give instructions and the holding of dominant influence, are met in this case. The sums paid to HSW by the City of Hamburg and HLB should therefore be assessed as a whole in the context of the procedure for monitoring aid.

80 The Commission argues that, although a German court took the view that the City of Hamburg and HLB formed a unit, that conclusion must be regarded as concerning a legal context and interests that are distinct from those in this case. The assessment made by the German courts concerned the relationship between the City of Hamburg and HLB in the context of the liquidation of assets and not in the context of the monitoring of State aid. A distinction thus needs to be drawn between two situations justifying two distinct classifications of the relationship between the City of Hamburg and HLB. In the first, HLB granted the sum of DEM 129 million on the order of the City of Hamburg, thus constituting a single

economic act. However, in the second situation, interesting the Commission more particularly and concerning the sum of DEM 52 million granted to HSW, HLB did not benefit from the guarantee of the City of Hamburg and thus carried out an operation with no legal or economic link with the City. The Commission states that, at a meeting it held in Brussels on 22 May 1995 with representatives of the City of Hamburg and the German Government, and in the communication of the German Government to the Commission of 8 September 1994, the German Government confirmed that HLB and the City of Hamburg did not constitute an economic unit. The Commission concludes that its decision was not based on inaccurate facts.

81 The Commission also maintains that, according to the information supplied by the German Government, the City of Hamburg and HLB were independent legal persons, clearly distinct from one another, which took their own decisions on the subject of HSW, and that the German Government did not plead the existence of economic unity between the City of Hamburg and HLB during the administrative procedure. It points out that HLB must manage its operations in accordance with commercial custom, taking account of aspects of general economics, and draw up its annual balance sheet on that basis. Therefore, having regard to the economic sovereignty of HLB, it did not form an economic unit with the City of Hamburg, that argument being tenable only where HLB intervened on the orders of the City of Hamburg.

The Commission's examination of the credit lines granted in December 1992 and December 1993

— Increase of the credit line in December 1992

82 The applicant submits that the increase of the credit line by DEM 20 million in December 1992 does not constitute State aid.

83 It begins by complaining that the Commission based its assessment on the finding that, on account of that increase in the credit line, the City of Hamburg risked a higher amount than its initial claim against the former HSW.

84 In the first place, the Commission based that finding on incorrect data. In making that calculation, it should not have taken into account the DEM 23.5 million in aid granted in 1984, that amount having moreover been paid by the German Government and not by the City of Hamburg. In any event, the commitment in December 1992 of the City of Hamburg and HLB, which formed an economic unity, remained below the commitment they had made to the former HSW.

85 Secondly, even if the commitment of the City of Hamburg in December 1992 had been greater than that given to the former HSW, the applicant maintains that that does not demonstrate that the City of Hamburg did not behave like a private investor acting on the crisis-ridden European steel market. In the event of HSW's insolvency, the City of Hamburg and HLB, constituting an economic unity, would have lost between DEM 120 million and 150 million through HLB being prevented from realising the sureties granted to it by HSW on account of the application of the case-law on capital-replacing loans. Moreover, the increase in the credit line was justified by the favourable financial prospects resulting from the implementation of the restructuring plan, the latter having been monitored by experts, who concluded that results would improve with the business breaking even from 1994 onwards.

86 The applicant further argues, supported by the Federal Republic of Germany, that the Commission cannot deduce from the conduct of HLB, which asked the City of Hamburg to guarantee the increase in the credit line, that the conduct of the City did not conform to that of a private investor. The Commission has not

supplied any proof that HLB's decision would have been negative without the grant by the City of Hamburg of such a credit-opening order.

87 The applicant concludes that the City of Hamburg and HLB behaved as investors providing risk capital. The DEM 20 million increase in the credit line did not therefore constitute State aid, since the applicant would have been able to obtain that extra credit on the private capital market. The applicant further proposes that the Court of First Instance should order an expert report establishing that the conduct of the City of Hamburg and HLB corresponded in that respect to that of a private investor placed in an identical situation.

88 The Commission replies that the contested decision is intended to demonstrate that the financial commitment of the City of Hamburg in December 1992 cannot be motivated by the economic considerations which justified the decision, adopted in 1984, to continue operating the business. Having regard to the catastrophic situation of HSW and the attitude of HLB as a commercial bank basing its decisions on purely economic considerations of profitability, the City of Hamburg did not behave as a private investor.

89 In the first place, the situation at the end of 1992 was characterised by a worsening of the applicant's economic position, the pursuit by the City of Hamburg of objectives linked to the labour market and 'structural policy' and the extremely precarious state of the European steel market.

90 Moreover, contrary to what the applicant maintains, HLB was ready to increase the credit line by DEM 20 million only on condition that the City of Hamburg offered a guarantee and thus assumed the risk of that increase on its own. HLB was obliged to follow sound commercial practices which led it to demand 'still more firmly' an overall guarantee from the City of Hamburg.

— The credit line of December 1993

91 The applicant challenges the Commission's view that, in deciding in December 1993 to extend and increase the credit line granted in December 1992, the City of Hamburg did not behave like a private investor.

92 Despite positive implementation of the restructuring plan, the granting of fresh credit was made necessary by the catastrophic situation of the steel market. In that respect, the applicant complains that the Commission regarded the negative development of the market as resulting from structural rather than economic factors.

93 The applicant states that it was in that context that the MacKinsey Report was produced, and that the aim of that report has been misinterpreted by the Commission. According to the applicant, the purpose of the report was to assess the applicant's viability in order to judge the appropriateness of granting credits accompanied by extra sureties, and not to express a view on the interest of a regional government in granting those same credits, as the Commission alleges. Accordingly, the MacKinsey Report found that HSW was competitive and therefore proposed the alternative of either carrying on production with the help of new credits from HLB, or selling the business. Carrying on production, in conjunction with the restructuring of HSW and an increase in equity capital, would probably have brought positive results from as early as 1994 (the applicant achieved a cumulative profit of DEM 25.8 million for the years 1994 and 1996). The closure of HSW, although envisaged by the experts, was not adopted as the solution on account of the high liquidation costs that would thereby have been incurred (about DEM 200 million) compared with the overall profit derived from the sale of the business (between DEM 60 million and 80 million).

94 The applicant contends that is was those positive prospects envisaged by the MacKinsey Report, together with the firmer intention of HLB, concerned by the

hardening of the case-law on capital-replacing loans, which led the City of Hamburg to issue a general credit-opening order in December 1993.

95 It also maintains that a private investor would not have been dissuaded from participating in its financing, despite the prospect of its sale. On the contrary, the increase in the line of credit was motivated by the wish to make that sale possible. Moreover, the sale negotiations with various steel producers, which took place before the submission of the MacKinsey Report and decision of the City of Hamburg to increase the line of credit, confirmed that factual situation.

96 The City of Hamburg and HLB were therefore acting advisedly when, acting in the capacity of a normal investor in a market economy, they decided to increase the credit line in December 1993. The applicant maintains that extension and increase of the credit line in question were the only steps which a private investor in a market economy in a similar situation to the City of Hamburg and HLB could reasonably take. It contends that an expert report ordered by the Court of First Instance would confirm that. Moreover, subsequent events confirmed that the conduct of the City of Hamburg was in accordance with the principles of the market economy. Thus, of a total of DEM 184.975 million committed by the City of Hamburg and HLB, the latter have obtained, or will obtain, DEM 13.3 million in repayment of non-cash credits, DEM 54 to 58 million from the sale of cash credits and DEM 10 million from the sale of company shares, thus totalling DEM 81.3 million.

97 The applicant further criticises the Commission for having deduced from HLB's request to the City of Hamburg to supply it with a credit-opening order that no private investor would have provided it with fresh capital at the end of 1993. It maintains, first, that it would have been able to obtain the extension and increase of that credit line from a third party, since any private investor would agree to

carry out such an operation having regard to the positive prospects announced by the MacKinsey Report, and, secondly, that those sums constitute only loans granted at an ordinary interest rate.

98 Moreover, the judgments cited in the contested decision do not, in the applicant's submission, support the classification of the financial measures of December 1993 as State aid. First, the judgment in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103 is not relevant to this case, since the loss which would be incurred in the event of HSW's closure would be far higher than that foreseeable in the event of a renewal of the credit line. By contrast, the principles in the judgment of the Court of Justice in Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433 are applicable to this case. The applicant points out in particular that, in accordance with that judgment, a parent company may bear the losses of its subsidiary for a limited period in order to allow it to close down its operations under the best possible conditions, and that that may be done with the prospect of the parent company deriving an indirect material profit, protecting the group's image or redirecting its activities. The applicant states however, that, unlike itself, ENI-Lanerossi (the company in joint in *Italy* v *Commission*) was not capable of being restructured and had incurred uninterrupted losses from 1974 to 1987. Finally, the applicant maintains that the principle arising from the judgment of the Court of Justice in Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 20, concerning the Alfa Romeo company, is applicable to itself.

99 The Commission contends that no private investor would have agreed to risk a sum of DEM 76 million, having regard to the decline of the steel market and the state of HSW's capital.

100 Concerning the MacKinsey Report, the Commission maintains that its forecasts did not concern the profitability of the financial aid from the City of Hamburg, but only the losses which the latter risked suffering in the event of HSW being privatised. As for the expected 1994 results, the Commission states that the MacKinsey Report qualified its position by indicating that it was not certain that HSW would reach that 'profit area' and that it was possible that greater or more lasting aid would be necessary.

101 The Commission contends, moreover, that the MacKinsey Report was designed not merely to assess the economic viability of HSW but also to judge the appropriateness of keeping the company in business, bearing in mind the risk to employment, and of granting extra aid. Moreover, the report did not take into account the medium- to long-term prospects of profit that would interest a private investor. The United Kingdom points out in that respect that the prospect of a privatisation removed all hope of long-term profitability for the creditors.

102 The Commission also challenges the applicant's interpretation of the case-law, arguing that it is only where an injection of capital opens up the prospect of profit at least in the long term, with an acceptable risk of loss, that the intervention in question may escape being classified as aid. In this case, the risk of losses was very high and the prospect of profitability non-existent.

The possibility of obtaining loans on the private capital market in reliance on the sureties

103 The applicant claims that it held sureties which would have enabled it to obtain loans from third parties amounting to between DEM 135 million and 156.8 million.

104 In any event, it could have obtained loans on the capital market corresponding to the increases in the credit lines (DEM 20 million at the end of 1992 and DEM 24.4 million at the end of 1993). In that respect, the Federal Republic of Germany states that the proof that HSW was capable, thanks to its sureties, of arranging its financing with other banks is contained in its communication to the Commission of 18 August 1995, and that account should be taken of the possibility of HSW financing itself outside the circle of its members.

105 The applicant indicates, moreover, that the national case-law on capital-replacing loans could only have been applied to the credits granted by a third party not connected with the applicant if the City of Hamburg and HLB had guaranteed those loans or if that third party had granted to it rights greater than those conferred by the usual sureties, thereby holding the position of a member.

106 In that context, it accuses the Commission of errors in calculating the sureties.

107 Thus the loans granted by HLB had always been sufficiently secured by its fixed and liquid assets, and the reference by the Commission to variable release clauses was in error. According to the applicant, its calculations show that it could constitute sureties of a sufficient amount to guarantee the credits it needed. In that respect, it invites the Court of First Instance to order an expert report in order to establish that the Commission should have based its assessment on Annex 2 to the communication of the Federal Government of 18 August 1995, in which the percentages of the sureties guaranteeing the credit line were determined by reference to the use of that credit line, which would have enabled it to conclude that higher surety percentages existed than those which it had determined.

108 The Commission states that, in the event of a complete release of sureties, the applicant's former manager had found that the company would have been able to obtain on the private capital market only 60% of the maximum of the line of credit guaranteed by the City of Hamburg. Even if, on release of the sureties, the applicant would have been able to obtain credits on the private capital market up to the normal bank value of those sureties, such financing would have been on conditions completely different from those obtained from the City of Hamburg, since it would not have been a capital-replacing loan.

109 The Commission also argues, concerning the method of calculating the sureties, that it is entitled, in determining their value, to base its assessment on their amount by reference to the credit line granted and not by reference to the actual use of that line.

The amount and the repayment of the alleged aid

110 In conclusion, the applicant contends that, if the Commission's argument that State aid existed were to be accepted, the amount of that aid would amount at most to the difference between the interest actually paid by the applicant for the credits obtained at the end of 1992 and the end of 1993 and the interest due on the basis of a higher market interest rate. In that respect, it states that it paid HLB the agreed interest at market rates.

111 The applicant also complains of unlawful double counting by the Commission, claiming repayment both of the DEM 20 million corresponding to the increase in the DEM 130 million credit line in 1992 and of the full amount of DEM 150 million corresponding to the credit line extended in 1993, increased by DEM 24 million. The applicant and the Federal Republic of Germany emphasise in particular that the renewing of the credit line granted in December 1993 cannot be classified as aid. HSW had already obtained that amount, which, by reason of its character as a capital-replacing loan, could not be satisfied in the event of insolvency. In that respect, the applicant's obligations arising from the credits granted to it by HLB were not extinguished by its sale. The applicant states that it is still repaying the amount of those credits to Picaro Ltd, to which ISPAT transferred its credits.

112 Finally, the applicant contends that repayment of the alleged aids in question is vitiated by a procedural defect. It argues that the Commission is not competent to demand repayment of unlawful aid without ratification of that decision by the Council by a two-thirds majority, as provided by Article 88 of the ECSC Treaty.

113 The Commission maintains that the amount of aid in question is represented not by the difference between the interest rates for those credits and the normal market interest rate, but by the amount of the loans granted. The aid element arose from the granting, thanks to the credit-opening orders of the City of Hamburg, of capital-replacing loans, by their nature devoid of any real security, given that HSW was in a disastrous situation.

114 The Commission also observes, concerning the DEM 20 million increase in the credit line, that the latter, corresponding to the decision to grant the credit line in December 1992, was repaid at the end of 1993 by reason of the particular nature of the credit line. Repayment of the value of that loan was therefore not demanded. However, that increase was capable of containing aid elements from the point of view of interest rates, which should be taken into account by the Federal Republic of Germany when calculating the amount repayment of which must be demanded.

Findings of the Court of First Instance

Preliminary observations

115 It should first be observed that the Community judicature has clarified the concepts referred to in the provisions of the EC Treaty relating to State aid. That clarification is relevant when applying the corresponding provisions of the ECSC Treaty to the extent that it is not incompatible with that Treaty. It is therefore permissible, to that extent, to refer to the case-law on State aid deriving from the EC Treaty in order to assess the legality of decisions regarding aid covered by the ECSC Treaty (Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraph 100).

116 Next, it follows from the second sentence of the first paragraph of Article 33 of the ECSC Treaty that in exercising its jurisdiction over actions for annulment of decisions or recommendations of the Commission, the Community judicature may not examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the Commission took its decisions or made its recommendations, save where the Commission is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application.

117 In that respect, the case-law of the Court of Justice shows that the term 'manifestly' presupposes that the failure to observe provisions of the Treaty is of such an extent that it appears to derive from an obvious error in the assessment, in the light of the provisions of the Treaty, of the situation in respect of which the decision was taken (order in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraphs 61 and 62).

118 Finally it should be noted that in the context of an action challenging legality, the function of the Community judicature is to ascertain whether the contested decision is vitiated by one of the grounds of unlawfulness referred to above, without however being able to substitute its own assessment of the facts, especially in the economic sphere, for that of the author of the decision (see, by analogy, *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 101).

119 As regards the classification of the disputed measures by the public authorities — acting as an economic operator or through the intermediary of an economic operator — in favour of an undertaking, it should be noted that the Commission is entitled to use the private-investor test, which consists in determining whether the undertaking which benefited from the measure in question could have obtained the same economic advantages from a private investor operating under market conditions (see, by analogy, Case C-305/89 *Italy* v *Commission*, cited above, paragraph 19). That criterion is, moreover, contained in Article 1(2) of the fifth Steel Aid Code.

120 In that respect, the conduct of the private investor, with which that of a public investor pursuing public policy objectives is to be compared, is not necessarily that of an ordinary investor laying out capital with a view to realising a profit in the medium- to long-term, but must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy, whether general or sectoral, and guided by prospects of profitability in the longer term (see, by analogy, Case C-305/89 *Italy* v *Commission*, cited above, paragraph 20).

121 The Court of Justice has also held that 'a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganisation. It must therefore be accepted that a parent company may also, for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions. [...] However, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid within the meaning of Article 92 of the [EEC] Treaty' (see, by analogy, the judgment in Case C-303/88 *Italy* v *Commission*, cited above, paragraphs 21 and 22).

122 It is in the light of those considerations that the arguments put forward by the applicant in this case must be considered.

Economic unity between the City of Hamburg and HLB

123 The applicant essentially argues that the Commission disregarded the existence of economic unity between HLB and the City of Hamburg, and that it was therefore wrong, first, to draw a distinction between the amounts of the loans granted by HLB at its own risk and those covered by a credit order, and, second, to hold that the conduct of HLB could be an indicator of the conduct of a private investor.

124 Where legally distinct natural or legal persons constitute an economic unit, they must be treated as a single undertaking for the purpose of applying the Community competition rules (Case 170/83 *Hydrotherm* v *Compact* [1984] ECR 2999, paragraph 11). In the area of State aid, the question whether an economic unit exists arises primarily where the beneficiary of aid needs to be identified (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraphs 11 and 12; Joined Cases T-371/94 and T-394/94 *British Airways* v *Commission* [1998] ECR II-2405, paragraph 313). In that respect, it has been held that the Commission has a wide discretion in determining whether companies forming part of a group must be regarded as an economic unit or as legally and financially independent for the purposes of applying the State aid rules (*British Airways*, paragraph 314).

125 Similarly, the Commission has a wide discretion in determining whether HLB and the City of Hamburg must be regarded as a single entity for the purposes of applying the private-investor test in this case.

126 It is therefore necessary to examine the question whether the Commission made an obvious error in its assessment of the links between HLB and the City of Hamburg. In carrying out that examination, only matters of which the Commission could have been aware during the administrative procedure may be taken into consideration.

127 It should be noted in that respect that, in reply to a question by the Commission concerning the legal relations between HLB and the City of Hamburg in the context of the granting of loans to HSW, the German Government stated in its communication of 8 September 1994:

'[HLB] is a public-law body with legal personality, 100% owned by the City of Hamburg. Its legal bases are the Law on the Hamburgische Landesbank Girozentrale and the charter of the latter.

In relation to the credits granted to HSW, the relations between the City of Hamburg and HLB do not arise either from the legal form mentioned above or from the City's status as owner, but solely from separate contractual relations, namely credit opening orders passed each time by the city, which are described in the context of the presentation of each of those credit decisions.'

128 Furthermore, it is apparent from the detailed explanations provided by the applicant and the Federal Republic of Germany before this Court that the functioning guarantee, whereby the City of Hamburg assumes responsibility for ensuring that HLB is able to fulfil its functions, does not imply that every credit loss suffered by HLB affects the budget of the City of Hamburg immediately and in full. It is only where HLB can no longer fulfil its obligations towards its creditors that the liability of the City of Hamburg is engaged. By contrast, losses incurred on account of an individual loan initially affect only the commercial results of HLB. Whilst profits or losses from HLB's operations do have repercussions on the budget of the City of Hamburg, those repercussions depend on the overall result of the management of HLB. Losses arising from an individual credit operation are therefore neither directly nor fully borne by the budget of the City of Hamburg.

129 It is otherwise in respect of loans for which the City of Hamburg has issued a credit order. In the event of non-repayment, those amounts affect the city's budget directly and in full.

130 In those circumstances, the Commission cannot be said to have made an obvious error in assessing the legal and economic links between HLB and the City of Hamburg by drawing a distinction, for the purposes of applying the private-investor test, between loans granted to the applicant by HLB at its own risk and those granted pursuant to a credit order of the City of Hamburg.

131 Nor, therefore, has it been established that the Commission made an obvious error in holding, despite the links between HLB and the City of Hamburg, that, in refusing to increase or extend the credit lines at its own risk, HLB adopted a line of conduct which might have been that of a private investor in a similar situation.

The Commission's analyses concerning the credit lines granted in December 1992 and December 1993

— Increase of the credit line in December 1992

132 The applicant contends that the increase, in December 1992, of the credit line which had been granted in 1984 does not constitute State aid. It maintains, essentially, that the increase in question had been made imperative by the risk incurred by HLB and the City of Hamburg of losing all the sums invested by reason of their classification as a capital-replacing loan, and was justified by the favourable prospects of the restructuring plan. It further argues that the Commission's decision is vitiated by errors which made it incorrect to apply the private investor criterion.

133 More particularly, the applicant criticises the passage of the decision summarised above at paragraph 44. Taken in isolation, the language used by the Commission at that point might indeed be understood as meaning that the Commission considered that the granting of loans of the amount which the City of Hamburg had lent to the former HSW and which it had hoped to recover by granting new loans in 1984 might be justified in relation to the private-investor test, whereas that would not have been the case with a larger loan. The applicant correctly points out that that reasoning in itself does not justify the conclusion that the City of Hamburg did not behave like a private investor.

134 The applicant disregards the fact, however, that the passage referred to in its arguments does not constitute the essential basis of the assessment made by the Commission concerning the increase in the credit line. Read in its context, it is merely intended to support the statement that the economic motivations which justified the continuation of HSW is 1984 were no longer relevant in December 1992.

135 It therefore needs to be examined whether the Commission made an obvious error of assessment in taking the view that a private investor would not have agreed to grant the increase in the credit line in question in the same circumstances.

136 In December 1992, the applicant's financial position had significantly worsened, it having made losses of DEM 8.5 million and 19.8 million in 1991 and 1992. The applicant has, moreover, stated in its application that it would have been declared insolvent if the increase in the credit line had not been granted. The communication from the German Government to the Commission of 8 March 1994 also shows that, if the credit line in question were not increased, the applicant's insolvency was inevitable.

137 That increase therefore constituted an emergency measure to keep HSW afloat, with no prospect of profitability even in the long term.

138 It is also undisputed that the steel industry was in a crisis situation. The forward programme for steel for the first half of 1993 (OJ 1993 C 36, p. 2) states that, since 1991, the industry had been going through a downturn marked by excess supply, a decline in demand, a fall in prices and increased international

competition. Moreover, in its communications to the Commission of 8 March and 8 September 1994, the German Government stated:

'Consequently, operating losses were made in 1991 and 1992 in the context of a steel market continuing to deteriorate.'

139 It follows from the above that the Commission did not make an obvious error of assessment in holding that the increase in the credit line in December 1992 could no longer be justified by the circumstances to which the applicant referred and which motivated the support for continuing the business in 1984. Similarly, it was entitled to find that a private investor would not have agreed to that increase in similar circumstances, namely an extremely deteriorated financial position of HSW and unfavourable economic conditions in the European steel market.

140 Nor has the Commission made an obvious error in holding that the conduct of HLB, which was not ready to grant the DEM 20 million increase in the credit line in question without having the benefit of a credit order of the City of Hamburg, constitutes an additional indicator of the fact that a private investor would not have been willing to invest such a sum in HSW.

141 The applicant itself has stated: '[A]s we have already said, HLB was demanding, even more pressingly than in 1992, to be exonerated from any risk on account of the development of the law on capital-replacing loans'. The German Government's communication of 8 September 1994 also shows that, on account of the risk connected with the case-law on capital-replacing loans, HLB was not willing to increase the credit without a credit-opening order.

142 It is also apparent from HLB's answer to the question put by the Court of First Instance on the subject that it effectively refused to grant the credits in dispute without a prior credit-opening order of the City of Hamburg, by reason of the intervention of financial authorities seeking to see HLB preserve a positive balance sheet. In that respect, HLB states in that answer:

'In view of the liquidity position of HSW, a credit extension at the end of 1992 and the end of 1993 would have made sense only if HSW received fresh liquidity. An extension of credit on its own would not have been enough to maintain liquidity. In deciding on a credit increase, we therefore took as our basis the alternative scenario of insolvency proceedings with HSW, which was to be expected in the event of our refusal to extend the credit.'

143 Furthermore, it is not necessary for the Commission to prove that HLB's decision would have been negative in the absence of a credit-opening order. Having regard to the applicant's financial position and the situation of the steel market, the applicant has, on any view, not established that the Commission made an obvious error of assessment in holding that a private investor placed in a situation identical with that of the City of Hamburg would not have consented to the increase of the credit line in question, knowing that the latter would be classed as a capital-replacing loan.

144 Concerning, finally, the allegedly favourable prospects of the restructuring plan, it should be remembered that HSW was on the edge of insolvency and operating in an unfavourable economic environment. The Commission was therefore entitled to find that a private investor would not have consented to the increase of the credit line in question, notwithstanding that it held a summary of that plan.

145 It therefore follows from all the foregoing considerations that the applicant has not established that the Commission made an obvious error of assessment in holding that a private investor would not have consented to the increase in the credit line of December 1992.

146 Moreover, in the context of an action for annulment, the Community Court's function is solely to determine whether the contested decision is vitiated by one of the grounds of illegality set out in Article 33 of the ECSC Treaty; it cannot substitute its own assessment of the facts for that of the deciding authority, especially in the economic sphere (see, by way of analogy, Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 101). It is therefore not for the Court of First Instance to order an expert report designed to show that the City of Hamburg and HLB behaved like a private investor in a market economy.

— The credit line of December 1993

147 The applicant claims, essentially, that the Commission should have held that the City of Hamburg behaved like a private investor by ordering the extension and the increase of the credit line in December 1993.

148 The Commission stated in the contested decision that HLB had considered that the particular circumstances in which the initial financing of the new company took place were no longer sufficient to justify the economic risk involved in continuing to operate the business. Accordingly, the financial situation of HSW, the situation of the steel market and the conclusions of the MacKinsey Report led HLB to refuse to continue any financial involvement in HSW.

149 It therefore falls to be considered whether the Commission made an obvious error in applying the private investor test to that measure.

150 At that time, the financial position of HSW had worsened considerably, as the Federal Government states in its communication to the Commission of 8 September 1994, which shows that, if credit were terminated, the insolvency of HSW would have been the inevitable consequence. Similarly, the MacKinsey Report refers to an insolvency situation, putting at risk the credits granted by the City of Hamburg.

151 It should also be noted that the situation of the European steel market was characterised by an extremely difficult competitive environment, on account of subsidised rivals and surplus production capacity (see the MacKinsey Report and the forward programme for steel for the first half of 1994 (OJ 1994 C 10, p. 2).

152 That is the context in which the applicant's argument, essentially based on the allegedly favourable prospects announced by the MacKinsey Report, should be examined. The applicant argues that the report found HSW to be in a competitive situation which would have led to positive results from 1994 onwards.

153 However, the Mackinsey Report states in its introduction:

'This report assesses the viability of HSW on the basis of our knowledge of the steel market and the competitive environment and of our assessment of the technologies introduced by HSW. It is designed as an instrument to assist the

decision of the economic authorities concerning the granting of other credits/ guarantees (assessment of risks, alternatives, etc.).'

154 By way of the measures that might be envisaged, the report states:

'[In] the decisions which it has to take as to the continuation of the business, the City of Hamburg must make a choice between, on the one hand, its inclination to maintain jobs, and, on the other, its duty to avoid further capital losses (diagram 8).'

155 It is thus apparent that, contrary to what the applicant maintains, the MacKinsey Report takes into consideration both economic factors connected with the viability of the applicant and social factors.

156 The applicant also claims that its economic viability is established by the MacKinsey Report, which indicates that it is competitive. However, the report merely states that 'the basic technical structure [of HSW] is competitive', and that that assessment does not apply to the latter's financial situation. On the contrary, the report states:

'[H]aving suffered losses of about DEM 15 million in 1993, however, [HSW] is on the edge of insolvency. The company's capital currently amounts to just DEM 10 million, and will probably be reduced by further losses in the course of the year (diagram 5). That situation places in peril the credits of the City of Hamburg, granted through the intermediary of [HLB], the current amount of which is about DEM 140 million; moreover, the increase in the credit line is likely to take the financial risk of the city to DEM 174 million (forecast) in the course of the year (diagram 6). In order to arrive at a profitability allowing credits to be

repaid, the annual result of HSW must improve by about DEM 20 million (diagram 7).'

157 It is therefore clear from the MacKinsey Report that HSW's financial situation was highly precarious, and moreover formed part of an extremely difficult competitive environment, characterised by the presence of subsidised competitors and surplus production capacity.

158 The applicant therefore has no basis for arguing, on the strength of the MacKinsey Report, that it was a competitive company.

159 The MacKinsey Report further envisages four options for the City of Hamburg, distinct from the financial point of view but also socially. Each of those options (continuing the business in accordance with the HSW concept, continuing with the 'reinforced concrete' or the 'quality' strategy, or selling and closing HSW) entails a consequent increase in the financial risk run by the City of Hamburg, save for the sale option. Thus, the report considers: '[I]n every case, continuing to support [HSW's] business is very risky. Since there is no certainty of a return to profit, continued financial support by the City of Hamburg may prove necessary in order to ensure the continuity of [HSW] (diagram 15)'. Sale thus constituted the most advantageous solution for the City of Hamburg, since it allowed it, *inter alia*, to transfer the risks and put an end to capital losses.

160 However, whilst the MacKinsey Report indicates that the City of Hamburg might limit its losses by selling HSW, it sees no prospect of profitability for the capital invested. That assessment is moreover confirmed by the claims of the German Government, which show that the City of Hamburg resolved to increase credit in order to limit losses, to ensure the continuation of the business during the search for an industrial buyer and to allow an organised transfer.

161 The argument which the applicant draws from the favourable prospect of its sale is therefore inoperative.

162 Moreover, the MacKinsey Report was drawn up at a time when the City of Hamburg had already granted unlawful aid. The risks incurred by the City of Hamburg in breach of Community law on aid cannot therefore be invoked in order to maintain that further measures intended to limit the financial consequences thereof were economically reasonable.

163 Having regard to the financial situation of the applicant, its urgent need of financing, and the highly precarious state of the European steel market, it has to be concluded that, in those circumstances, the possibility of the applicant finding a private investor willing to grant the credit line and a swing were negligible or even non-existent.

164 That conclusion is unaffected by the applicant's argument that the Commission was wrong to claim that HLB, unlike the City of Hamburg, behaved like a private investor in refusing either to renew the credit line previously granted or to increase it. The applicant maintains in that respect that HLB's conduct results from the tightening of the case-law on capital-replacing loans.

165 The Commission has indeed stated, without being contradicted by the applicant, that the judgment of the Bundesgerichtshof had been published on 2 October 1992, that is to say even before the first increase in the credit line was granted in December 1992.

166 Moreover, it is hardly likely that a private investor would have carried out the operation in question on the same conditions as the City of Hamburg, that is to

say with the certainty that the sums injected would be classified as capital-replacing loans. That assessment is all the more plausible because that private investor would have had to have been prepared to grant and renew a credit line from 1984 onwards, and increase it in 1992.

167 The Commission was therefore entitled to take the view that a private investor would not have granted the credits in question and that they constituted State aid. The applicant has not adduced any evidence to demonstrate that that assessment is obviously incorrect.

168 Having regard to the wide discretion which the Commission has in factual, and particularly economic, matters (see paragraph 146 above), it is not the duty of the Court to order an export report for the purpose of establishing that, in similar circumstances, a private investor would have granted the credits in question.

169 The Commission was therefore right to classify each of the financial measures taken in favour of the applicant in December 1992 and December 1993 as State aid.

170 It remains to be determined, however, whether that conclusion may be invalidated by the applicant's argument that the Commission's assessment is obviously defective for failure to take account of the fact that a private third party would have been able to obtain sufficient securities to cover the increase of the credit line granted in December 1992 and the credit line and the credits granted in December 1993.

The possibility of obtaining loans on the private capital market, thanks to the sureties

171 The applicant claims, essentially, that it could have obtained capital from third parties, thanks to its sureties.

172 The Court considers, however, that the Commission did not make an obvious error of assessment in taking the view that the possibility of HSW obtaining loans from third parties thanks to its sureties does not prevent the measures in question from being classified as aid.

173 First, that is only a hypothesis, given that the applicant's sureties were engaged in favour of HLB.

174 Moreover, even if the sureties had been entirely freed in order to obtain corresponding loans from third parties, it may properly be considered that such loans would not have been comparable with those granted by HLB on the orders of the City of Hamburg, given that loans from third parties unconnected with HSW would not have been classified by German case-law as capital-replacing loans.

175 The Commission rightly emphasises, moreover, that the fact that the applicant might have been able to obtain loans from third parties which would not have been classified as State aid does not mean that the credits which it actually obtained on the orders of the City of Hamburg are not aid.

176 Next, it should be noted that, in the contested decision, the Commission held that HSW would only have been able to cover part of its financing in the event of the total freeing of the sureties held by HLB.

177 It has indeed not been established that the sureties covered the increase of the credit line in 1992 and the credit line and the credits granted in 1993.

178 On the contrary, the German Government stated in its communication to the Commission of 8 September 1994:

'The readiness to increase the credit line by DEM 20 million existed because the prospects of results were favourable. Since, however, the amount of the sureties, mainly linked to the circulating capital, had not grown in the same proportion but had, on the contrary — according to a banking assessment — diminished by reason of the fall in prices due to the crisis, it was necessary to guarantee those prospects of results by an increase in the credit opening order, taking account of the lesser amount of the sureties, raising it from 60 to 75% in relation to the credit line of DEM 130 million (apart from the increase of DEM 20 million).'

179 Moreover, by letter of 23 June 1995, the German Government asked the Commission to defer the closure of the administrative procedure so as to enable it to establish that possibilities of financing by third parties existed, and, more specifically, to enable it to establish to what extent HSW was capable of ensuring its own financing, thanks to its own sureties, even without an agreement between HLB and the Government of the Land.

180 However, the communication of 18 August 1995 sent by the German Government to the Commission does not show that third parties would have been able to benefit from sufficient sureties in order to consent to the granting of the necessary loans.

181 The applicant's criticisms of the Commission's assessment of the sureties in the contested decision are therefore of no consequence, and the Court has no duty to order an expert report on the point.

The amount and the repayment of the alleged aid

182 The applicant challenges the legality of Article 3 of the contested decision. It maintains, first, that the Commission wrongly assessed the amount of the aid to be recovered and, secondly, that it was not competent to require the Federal Republic of Germany to make repayment.

183 It should be noted, first, that the applicant is wrong in claiming that the extensions of the credit line could not constitute State aid, since they were to be regarded as a 'maintenance of capital' or 'long-term credits'. It is clear from the facts of this case that those extensions had to be negotiated each year, whereupon it was for the City of Hamburg and HLB to decide whether or not to renew their agreement as to their extension and increase. The Commission did not therefore make an obvious error of assessment by holding that the extension of the credit line of 1993 constituted a State aid as such.

184 The Court therefore considers that the Commission was entitled to take the view that the amount of the aid corresponded to the amount of the loans granted, and not just to the difference between the rate which HSW would have obtained from a commercial bank and that which was actually granted to it.

185 As for the applicant's argument that the Commission did not have the power to require the repayment of aid, it should be noted, first, that aid which is not compatible with the common market must, as a matter of principle, be repaid by

the recipient and that recovery of such aid is a consequence inherent in the strict system of aid for the steel industry, and, secondly, that that argument is based on an incorrect interpretation of Article 88 of the Treaty.

186 Article 88 of the Treaty provides, *inter alia*:

'If the Commission considers that a State has failed to fulfil an obligation under this Treaty, it shall record this failure in a reasoned decision after giving the State concerned the opportunity to submit its comments. It shall set the State a time limit for the fulfilment of its obligation.

[...]

If the State has not fulfilled its obligation by the time limit set by the Commission, or if it brings an action which is dismissed, the Commission may, with the assent of the Council acting by a two thirds majority:

(a) suspend the payment of any sums which it may be liable to pay to the State in question under this Treaty;

(b) take measures, or authorise the other Member States to take measures, by way of derogation from the provisions of Article 4, in order to correct the effects of the infringement of the obligation.

[...]'

187 It is clear from that article that the assent of the Council is required only if the State has not fulfilled its obligation, which has not been found to be the case here. The Commission was entitled therefore, under Article 3 of its decision, to require the German Government to order HSW to repay the aid in question.

188 This complaint must therefore be dismissed.

189 It follows from all the foregoing considerations that the Commission did not commit an obvious error in holding that a private investor would not have granted the sums in question, holding that those sums had to be classified as State aid, and requiring that they be repaid. This plea must therefore be dismissed.

2. The plea alleging misuse of powers

Arguments of the parties

190 The applicant complains of the Commission's failure to refer for an expert report the question whether an investor in a market economy would, in identical circumstances, have behaved like the City of Hamburg and HLB, and of its

failure to take into consideration the arguments concerning the closure of the Euskirchen plant, with a capacity of 80 000 tonnes per year, which in the applicant's submission constitutes compensation for the aid granted. On that latter point, the Federal Republic of Germany adds that it has shown that all the conditions required by the Commission in other cases, such as the closure of capacity, were met in this case, and that the declaration of the Council on the reorganisation of the steel industry in Europe did not exclude the possibility of granting public aid to promote the closure of unprofitable businesses. In that respect, the Commission did not seek to obtain the assent of the Council referred to in Article 95 of the ECSC Treaty. The Commission's failure to state its reasons constituted a misuse of powers in that respect.

191 The Commission refers to the absence of any direct link between the reduction of steelmaking capacity and the assessment made of the credits, and argues that it was for the German Government to request the Council to rule on the authorisation of the aids to HSW, pursuant to Article 95 of the ECSC Treaty.

192 Furthermore, the Commission contends that any further expert report would have been of no use, since it had the relevant economic data and was aware of the conduct adopted by HLB.

Findings of the Court of First Instance

193 According to consistent case-law, a measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to

have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or of evading a procedure specifically prescribed for dealing with the circumstances of the case (see Case T-57/91 *NALOO* v *Commission* [1996] ECR II-1019, paragraph 327).

194 The applicant's argument that the Commission should have used an outside expert's report in order to determine what the conduct of a private investor would have been cannot be accepted.

195 First, there is no provision of Community legislation imposing such an obligation on the Commission.

196 Secondly, it has already been found that the Commission did not make any obvious error of assessment in holding that a private investor would not have granted the loans in dispute having regard to the financial structure of the business, its need for investment, and the situation of the market for the products concerned.

197 It is clear from the documents before the Court that the Commission had the information necessary for its assessment. In particular, amongst the documents available and admissible at the time of the administrative procedure, it had the MacKinsey Report concerning HSW's financial situation and future prospects. Moreover, the successive Commission decisions establishing Community rules for aid to the steel industry (including the fifth Steel Aid Code) demonstrate its knowledge of the industry in question.

198 Therefore, and given that the applicant has not provided any further explanation of the factors for assessment that it maintains the Commission should have had at its disposal, the absence of a further export report is not capable of establishing that the Commission misused its powers.

199 The applicant's argument that the Commission should have taken account, as compensation for the aid, of the closure of production capacity at the Euskirchen site, even outside the procedure under Article 95 of the ECSC Treaty, cannot be accepted either.

200 The applicant's arguments concerning events subsequent to the granting of the aid are irrelevant in that respect, since the comparison with a private investor had to be made only on the basis of information that was in the possession of the City of Hamburg in December 1992 and December 1993.

201 Thus, the beneficial consequences flowing from the closure of the Euskirchen subsidiary after the purchase of HSW by ISPAT, even if established, cannot be taken into consideration when examining the contested decision. *A fortiori*, the argument of the Federal Republic of Germany, to the effect that, by reason of that closure, the conditions imposed by the Commission when examining aid for the restructuring of steel businesses are fulfilled, is irrelevant.

202 The Court of First Instance has moreover held that, under the scheme of the Treaty, Article 4(c) does not prevent the Commission from authorising, by way of derogation, aid envisaged by the Member States and compatible with the objectives of the Treaty, on the basis of the first and second paragraphs of Article 95, in order to deal with unforeseen situations. Those provisions of Article 95 empower the Commission to adopt a decision or a recommendation, with the unanimous assent of the Council and after the ECSC Consultative Committee has been consulted, in all cases not provided for by the Treaty in

which such a decision or recommendation appears necessary in order 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 (Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839, paragraphs 63 and 64).

203 Thus the Commission has, first, adopted the codes for aid to the steel industry, establishing a general derogation for certain specified categories of aid, but has also, secondly, adopted individual decisions authorising certain types of specific aid on an exceptional basis (*EISA*, paragraphs 65 and 66).

204 Aid not falling within the categories specially referred to by the provisions of the fifth Steel Aid Code, as is the case here, may benefit from an individual derogation from that prohibition if the Commission considers, in the exercise of the discretion which it enjoys under Article 95 of the Treaty, that such aid is necessary for attainment of the objectives of the Treaty (*EISA*, paragraph 72).

205 In this case, the applicant has not demonstrated that the Commission committed a misuse of powers or an obvious error in assessing, in the light of the provisions of the Treaty, the situation in response to which the contested decision was taken (see Joined Cases 15/59 and 29/59 *Knutange* v *High Authority* [1960] ECR 1).

206 The applicant has adduced no evidence to show that it was confronted with an exceptional situation not specifically envisaged by the Treaty and that, all things considered, the aid in question was necessary for the purposes of attaining the objectives of the Treaty.

207 Thus, the closure of the Euskirchen subsidiary is unrelated to the granting of the aid in question. Nor, moreover, was that aid notified.

208 It follows that the applicant has no grounds in this case for claiming that the Commission has misused its powers.

209 This plea is therefore unfounded.

Conclusion

210 It follows from all the foregoing considerations that the pleas must be rejected in their entirety. Since the applicant has not demonstrated that the contested decision is vitiated by illegality, this action for annulment must be dismissed.

Costs

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

On those grounds,

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

hereby:

1. **Dismisses the application;**

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

3. **Orders the Federal Republic of Germany and the United Kingdom, which have intervened in the dispute, to bear their own costs.**

Cooke García-Valdecasas Lindh

Pirrung Vilaras

Delivered in open court in Luxembourg on 29 June 2000.

H. Jung

Registrar

J.D. Cooke

President

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