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

16 December 1999 *

In Case T-158/96,

**Acciaierie di Bolzano SpA,** a company incorporated under Italian law, established in Bolzano (Italy), represented initially by Giulio Macrì, Bruno Nascimbene, of the Milan Bar, and Massimo Condinanzi, of the Biella Bar, then by Bruno Nascimbene, with an address for service in Luxembourg at the Chambers of Franco Colussi, 36 Rue de Wiltz,

applicant,

supported by

**Falck SpA,** a company incorporated under Italian law, established in Milan (Italy), represented initially by Giulio Macrì and Franco Colussi, of the Milan Bar, then by Giulio Macrì and Massimo Condinanzi, of the Biella Bar, with an address for service in Luxembourg at the Chambers of Franco Colussi, 36 Rue de Wiltz,

and

**Italian Republic,** represented by Umberto Colesanti, of the Department for Contentious Legal Affairs, acting as Agent, assisted by Aiello Giacomo, Avvocato

* Language of the case: Italian.

dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

interveners,

v

**Commission of the European Communities,** represented by Enrico Traversa and Paul Nemitz, of its Legal Service, and Enrico Altieri, Judge at the Corte di Cassazione, acting as Agents, and, at the hearing, by Tito Ballarino, of the Milan Bar, with an address for service in Luxembourg at the Chambers of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision No 96/617/ECSC of 17 July 1996 concerning aid granted by the Autonomous Province of Bolzano (Italy) to Acciaierie di Bolzano (OJ 1996 L 274, p. 30),

THE 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: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 25 March 1999,

gives the following

## Judgment

### Legal background, facts giving rise to the action and procedure

*Legal background*

1 Article 4 of the ECSC Treaty provides:

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

...

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

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

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

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

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

4 Commission Decision No 257/80/ECSC of 1 February 1980 establishing Community rules for specific aids to the steel industry (OJ 1980 L 29, p. 5) is the First Steel Aid Code. It was in force until 31 December 1981. It was replaced by Commission Decision No 2320/81/ECSC of 7 August 1981 establishing Community rules for aids to the steel industry (OJ 1981 L 228, p. 14), as amended by Commission Decision No 1018/85/ECSC of 19 April 1985 (OJ 1985 L 110, p. 5,

hereinafter referred to as the 'Second Code'), which remained in force until 31 December 1985.

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

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

*Background to the dispute*

7 The applicant, Acciaierie di Bolzano ('ACB'), is an undertaking manufacturing special-steel products, which are listed in Annex I to the ECSC Treaty under code No 4400 and are therefore covered by the rules laid down in that Treaty. Until 31 July 1995 ACB was controlled by the steel group Falck SpA, a company

incorporated under Italian law ('Falck'). At that date, however, the applicant company was sold to the company Valbruna Srl.

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

9 Article 1 of Commission Decision No 91/176/ECSC of 25 July 1990 on aid granted by the Province of Bolzano to the Bolzano steelworks (OJ 1991 L 86, p. 28, hereinafter 'Decision No 91/176') states that 'The interest subsidy on a loan [of ITL 6 billion] granted in December 1987 by the Province of Bolzano in Italy to the Bolzano steelworks under Provincial Law No 25 of 8 September 1981 is illegal State aid because it was made available without prior authorisation from the Commission and, furthermore, is incompatible with the common market pursuant to Commission Decision No 3484/85/ECSC [the Third Code]'. However, in this decision the Commission did not require repayment of the amounts already paid but confined itself to ordering the authorities of the Province of Bolzano to refrain from granting an interest subsidy on the annual instalments of the loan in question until the loan matured.

10 In the second paragraph of Part II of the grounds of this decision, the Commission states that on 25 May 1983 it had approved aid, under the Second Code, totalling ITL 40 billion for the restructuring of certain Italian firms in the

private sector, including an amount of ITL 2 billion for the Bolzano steelworks to be granted under National Law No 675/77. In particular, a project for improving the quality of the wire rod mill products at Bolzano was thereby to benefit from a subsidised loan of ITL 6 billion, *inter alia*. In the third paragraph of Part II of that said decision it states nevertheless that the Italian Government informed it that, because of the administrative structure in Italy, which confers considerable autonomy on the Provinces of Trentino and Bolzano in particular, National Law No 675/77 was not applicable in those territories and that it was Provincial Law No 25/81 which applied in the Province of Bolzano. This fact had delayed the actual granting of the aid. In the second paragraph of Part III of the decision, the Commission concludes from this that as the approved aid was not granted before the absolute deadline laid down for that purpose in the final subparagraph of the first paragraph of Article 2 of the Second Code, namely 31 December 1985, and as it was not renotified and approved by the Commission in accordance with the Third Code, it became an illegal aid.

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

12 By letter of 1 August 1995 the Commission notified the Italian Government of its decision to initiate the procedure provided for in Article 6(4) of the Fifth Code and requested it to submit its comments. The decision opening the procedure was published on 22 December 1995 in the *Official Journal of the European Communities* (OJ 1995 C 344, p. 8, hereinafter referred to as the 'decision to open the procedure') and the other Member States and other interested parties were invited to submit their comments.

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

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

14 The Association of German Steel Producers (the Wirtschaftsvereinigung Stahl) and the British Iron and Steel Producers Association submitted their comments to the Commission by letters dated respectively 19 and 22 January 1996. The Commission forwarded the letters in question to the Italian authorities by letter of 20 February 1996.

15 By letter of 27 March 1996 the Italian authorities submitted their comments to the Commission.

*The contested decision*

16 On 17 July 1996 the Commission adopted Decision No 96/617/ECSC concerning aid granted by the Autonomous Province of Bolzano to Acciaierie di Bolzano (OJ 1996 L 274, p. 30; hereinafter the 'contested decision').

17 The third paragraph of Part I of the grounds of the contested decision lists the state aid granted to the applicant by the Autonomous Province of Bolzano under Provincial Law No 25/81 in the period 1982-1990, as follows:

— by Decision No 784 of 14 February 1983:

— loan of ITL 5 600 million;

— non-repayable grant of ITL 8 000 million;

— by Decision No 3082 of 1 July 1985:

— loan of ITL 12 941 million;

— by Decision No 6346 of 3 December 1985:

— non-repayable grant of ITL 10 234 million;

— by Decision No 7673 of 14 December 1987:

— loan of ITL 6 321 million;

— by Decision No 2429 of 2 May 1988:

— non-repayable grant of ITL 3 750 million;

— by Decision No 4158 of 4 July 1988:

— loan of ITL 987 million;

— non-repayable grant of ITL 650 million.

18 The same paragraph of the decision states that these aids were granted partly in the form of 10-year loans totalling ITL 25 849 million (ECU 12.025 million) at 3%, i.e. about nine percentage points below the normal market rate in Italy at the

time (about 12%), and partly in the form of outright grants, in other words without an obligation to repay, totalling ITL 22 634 million (ECU 10.5 million).

19 The Commission considered that even if the aid granted before 31 December 1985 was to be examined in the light of the provisions of the Second Code, it would not be considered compatible with the common market. It pointed out in this regard that Article 2(1) of that Code provided that aid to steel could be considered compatible with the common market provided that, among other things, the recipient had initiated a restructuring programme capable of restoring its competitiveness and of making it financially viable without aid under normal market conditions and that the said programme resulted in an overall reduction in the undertaking's production capacity. However, neither of these two conditions was met in the case in question.

20 The Commission then recalled that the Steel Aid Code in force when the decision was adopted explicitly listed the existing derogations from Article 4(c) of the ECSC Treaty, namely aid granted to defray expenditure on research and development projects, aid for environmental protection and aid for closures. It concluded that these derogations were not applicable in the case in point.

21 In the case of State aid granted before 1 January 1986, the Commission nevertheless took account of certain special circumstances which might have misled the Italian authorities as to the rules to be observed at that time for the notification of the aid in question. Consequently the Commission did not require recovery of the aid granted before 1 January 1986.

22 The contested decision provides as follows:

'*Article 1*

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

*Article 2*

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

...'

*Procedure*

23 The applicant brought this action by application lodged at the Registry of the Court on 12 October 1996.

24 By applications lodged at the Registry of the Court on 17 and 28 May 1997 respectively, Falck and the Italian Republic applied for leave to intervene in support of the form of order sought by the applicant.

25 Leave was granted by order of the President of the Fourth Chamber, Extended Composition, on 11 July 1997.

26 In statements lodged on 25 September and 27 October 1997 respectively, Falck and the Italian Republic submitted their observations. The applicant and the Commission submitted their observations on those statements in intervention on 16 March 1998.

27 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided first to adopt measures of organisation of procedure by requesting certain parties to answer a number of questions in writing and to produce documents and secondly to open the oral procedure.

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

## Forms of order sought by the parties

29 ACB, the applicant, claims that the Court should:

— annul the contested decision;

— in the alternative, declare non-existent the obligation to repay the aid granted after 1 January 1986, as provided for in Article 2 of the contested decision, and that therefore no debt has been incurred and, likewise, that no debt has been incurred in respect of the interest provided for in that article;

— order the Commission to pay the costs.

30 Falck and the Italian Republic, as interveners, support the form of order sought by the applicant and ask the Court to order the defendant to pay all the costs, including those incurred by the interveners.

31 The Commission, the defendant, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

## The admissibility of the intervention

32 The Commission, which initially did not oppose Falck's application to intervene, considers, in its observations on the statements in intervention, that Falck no longer has a direct, concrete and legally relevant interest in intervening. As a consequence, it contends that the Court should declare its application to intervene inadmissible.

33 Although the Court, having granted Falck leave to intervene in support of the form of order sought by the applicant, is entitled to review the admissibility of the intervention (see, to that effect, the judgment in Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333), the circumstances of the present case are not such as to require such a review.

34 On the one hand, the fact that Falck no longer owned the applicant company was known when its application to intervene was lodged, and the Commission raised no objections at that time. On the other, the order of 11 July 1997 of the President of the Fourth Chamber, Extended Composition, accepting Falck's intervention contains a statement of reasons which takes account of the fact that Falck no longer owned the applicant company. The order states:

'In support of its application, Falck SpA points out that at the time of the events at the origin of the Commission's decision it directly controlled the applicant, which in turn was the recipient of the aid declared incompatible with the common market by means of the said decision. On 31 July 1995 Falck SpA and the steel works Valbruna Srl signed agreements for the transfer of the share capital of the applicant. If the present action were not successful and, consequently, the sums paid as aid to the applicant were recovered in accordance with the Commission's decision, the steel works Valbruna Srl or the applicant

would be entitled, under the provisions of the said agreements, to bring an action for recovery against Falck SpA ...'.

35 There are therefore no grounds for the Court again to question Falck's interest in intervening.

**The claim for annulment**

36 In support of its claims for annulment, the applicant relies on six pleas in law alleging, in effect, infringement of its right to a fair hearing, retroactive application of Community rules, breach of the principles of sincere cooperation, of good faith, of the protection of legitimate expectations and of proportionality, error in law in the assessment of the compatibility of the aid with the common market in steel, erroneous assessment of the facts, error in setting the interest rate and finally defects in reasoning.

*The first plea, alleging infringement of the right to a fair hearing*

Arguments of the parties

37 The applicant states that as soon as it knew of the decision to open the procedure, published in the *Official Journal of the European Communities* on 22 December 1995, it told the Commission, by letters of 18 January and 28 March 1996, that it was essential that it be consulted and that its views be heard in the course of the

procedure. However, as both letters remained unanswered, it was only by means of the contested decision that it learned of the observations submitted by the Italian Government and by the two steel producers' organisations. In its reply the applicant points out that in its letter of 18 January 1996 it had expressly asked to participate in the procedure so that it would have a right of access to the documents in the case.

38 It notes that in order to comply with the right to be heard, a person against whom the Commission has initiated an administrative procedure must be afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law (see in particular the judgment in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 27).

39 The applicant claims that in the present case the infringement of these principles is particularly blatant, because far from remaining passive it twice demonstrated its interest in participating in the procedure.

40 The Commission points out that the applicant did not request access to the documents. In its two letters of 18 January and 28 March 1996 it merely enquired as to the stage reached in the procedure and confined itself to indicating that it was prepared to cooperate with the Commission in the course of its enquiries.

41 Moreover, according to the Commission, it did not disregard the applicant's procedural rights, as its obligation is merely to give notice to the parties concerned to submit their comments so that it has all the information needed in order to take its decision (see the judgment in Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19). In contrast to the Member State concerned, which is the sole addressee of the decision, third parties to the

procedure are granted neither access to the documents nor the right to a hearing (see the judgment in Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13).

Findings of the Court

42 The administrative procedure regarding aid is opened only against the Member State concerned. A recipient of the aid, such as the applicant, is considered only to be an 'interested party' in this procedure.

43 Article 6(4) of the Fifth Code provides as follows: 'If, after giving notice to the interested parties concerned to submit their comments, the Commission finds that aid in a given case is incompatible with the provisions of this Decision, it shall inform the Member State concerned of its decision.'

44 It does not follow either from the wording of that article or from any other provision regarding State aid or from Community case-law that the Commission is required to hear the views of the recipient of State aid on the legal assessment it makes on the aid in question.

45 Not having the same rights to a fair hearing as those which individuals against whom a procedure has been instituted are recognised as having, the recipient has only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (see, by analogy, the

judgment in Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 60).

46 In the present case the applicant was given notice to submit its comments on the facts ascertained and the assessments made by the Commission in the decision to open the procedure in question, even if it did not avail itself of that opportunity.

47 Consequently, the Commission did not infringe any procedural right of the applicant.

48 The first plea must therefore be rejected.

*The second plea, alleging retroactive application of Community rules*

Arguments of the parties

49 The applicant complains of the lack of clarity in the contested decision as regards the rules to be applied. It appears, according to the applicant, that while the decision was made under the steel aid code in force at the time of its adoption, the application of the code in force when the aid in question was granted was not ruled out. Moreover, it alleges that the considerations set out in Decision No 91/176, which distinguish artificially between the time of granting the aid and that of paying it, were not respected.

50 It contends that in the present case the application of the code in force when the contested decision was adopted is incompatible with the principles of the protection of legitimate expectations and legal certainty. In the field of State aid these principles limit the actions of the Commission (see the judgments in Cases 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 20 et seq., and 223/85 *RSV* v *Commission* [1987] ECR 4617, paragraph 15 et seq.). According to the applicant, the conduct of the Commission in the present case placed the interested parties in a position such that they were not able to determine which law was applicable to them.

51 According to the applicant, it is apparent from the administrative practice of the Commission that the applicable code is the one in force at the date on which the aid is granted, that being the date on which the effects of the aid on the common market must be assessed.

52 Finally, the applicant contests the Commission's argument first that it was subject to no temporal limit, such as a time-bar, on the exercise of its powers, and secondly that its powers of verification and control were dependent on, or limited to, the period during which the rule governing the aid system was in force. The Community system, which has the fundamental character of a 'Community based on the rule of law', would, it maintains, preclude such a view (see in particular the judgment in Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339).

53 The Italian Republic points out that the compatibility of notified aid with the common market is assessed in the light of the rules in force at the date on which the aid is to be granted. Hence, despite non-notified aid being illegal, an *ex post facto* assessment of the compatibility of such aid with the common market must also be carried out in the light of the rules in force at the date on which it was granted.

54 The Commission disputes the claim that it applied a new regime retroactively.

55 It states that the prohibition on aid imposed by Article 4(c) of the ECSC Treaty, in contrast to that provided for in the EC Treaty, is general and absolute. The steel aid codes admittedly establish derogations from Article 4(c) of the ECSC Treaty, opening up the possibility of obtaining a specific authorisation from the Commission in certain precise cases and for limited periods. However, it maintains that this authorisation is limited to the period during which the Commission deems it necessary to derogate from the absolute prohibition in entirely exceptional circumstances.

56 Once the period of applicability of the code has expired the Commission, in its submission, loses its power to authorise aid to the steel industry in derogation from the general prohibition. Subsequent exercise of this power depends on the adoption of new derogating measures, with which it has to comply. A Member State which fails to meet its obligation to notify aid within the time-limit laid down in the code can therefore not ask the Commission to exercise a power of control it does not possess. The Member State therefore exposes itself to the risk that the aid regime will be restricted, if not prohibited entirely. On the assumption that the disputed aid was assessed only in the light of the provisions of the Fifth Code, it would not be a question of applying retroactively rules which were not in force when the aid in question was granted but of applying only the rules permitting the Commission to derogate from the general prohibition on aid to the steel industry.

57 The Commission rejects the applicant's argument that the exercise of its powers was subject to a time-bar. In this regard it observed at the hearing that on 22 March 1999 the Council adopted Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), Article 15(1) of which provides that the powers of the Commission to recover illegal aid are to be subject to a 'limitation period' of 10 years. The absence of rules on the barring of action through lapse of time when the contested decision was adopted clearly means, in the submission of the Commission, that the condition relating to lapse of time did not exist at that time.

58 Lastly, the Commission disputes the applicant's argument that it is apparent from its administrative practice that the applicable code must be that in force at the date on which the aid is granted. According to the Commission, rules which are no longer applicable when it adopts a decision can play a role in the adoption of that decision only in very specific circumstances. In any case, it is not correct, in the Commission's submission, to consider that the date of payment of an aid influences the rules to be applied. At the hearing the Commission stated that Decision No 91/176 wrongly gave the impression that this was the case.

Findings of the Court

59 It must be pointed out that Article 4(c) of the ECSC Treaty provides that all subsidies or aids granted by Member States, in any form whatsoever, are prohibited.

60 It is true that certain derogations from this prohibition have been adopted under Article 95 of the ECSC Treaty, including in particular the steel aid codes. However, these codes are only intended to authorise, subject to certain conditions, derogations from the prohibition for certain categories of aid which it lists exhaustively. Aid not falling into categories which the applicable code exempts from that prohibition thus remains subject exclusively to Article 4(c) of the Treaty (see the judgment in Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839, paragraph 72).

61 Moreover, unlike the provisions of the EC Treaty on State aid, which empower the Commission to adopt decisions on its compatibility on a permanent basis, the derogations laid down in the codes to the principle of the absolute prohibition of aid in Article 4(c) of the ECSC Treaty can be granted only during a period which the codes determine (see the judgment in Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, paragraph 43).

62 Thus, once the period of applicability of the code has expired, the Commission is no longer empowered to authorise aid to the steel industry under the derogations provided if that aid has not been notified in accordance with that code (see, to that effect, the judgment in Case 214/83 *Germany* v *Commission* [1985] ECR 3053, paragraph 47).

63 In the present case, it is common ground that the aid in question was not notified.

64 In such circumstances a Member State which has disregarded its obligation to notify aid cannot demand that the Commission verify the compatibility of an aid with the common market in the light of an expired code. Similarly, such a State, having failed to comply with the conditions laid down by the said code, is not justified in pleading the principle of legal certainty in order to benefit from the derogations set out therein (see, to that effect, the judgment in Case T-331/94 *IPK-München* v *Commission* [1997] ECR II-1665, paragraph 45).

65 The same is true as regards the applicant. The applicant is not entitled to demand that the Commission verify whether aid granted to it is compatible with the common market in the light of an expired code. The Commission conducted its investigation in accordance with the only code authorising such an examination. The Commission is thus correct in stating that in the present case it did not apply retroactively rules which were not in force when the aid in question was granted.

66 The applicant also relies upon the principle of the protection of legitimate expectations.

67 It must be recalled in this regard that in exceptional circumstances the recipient of aid declared to be illegal or incompatible with the common market may rely on this principle in order to contest recovery of the aid. However, this issue has no bearing on the question as to which code was applicable in the present case and will be examined in the context of the third plea.

68 The Court therefore holds that the Commission was not obliged to refer to the earlier steel aid codes. The fact that it referred to them for the sake of completeness cannot alter the legal position.

69 Nor can the applicant's argument that the decision to recover the aid was unlawful because the Commission had not complied with a time-limit be accepted. When the contested decision was adopted, no time-bar had been laid down by the Community legislature as regards action by the Commission in respect of non-notified State aid. The Commission was therefore not obliged to comply with a time-limit when it adopted this decision (see in particular the judgment in Joined Cases T-126/96 and 127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 67).

70 It follows that the second plea must be rejected.

*The third plea, alleging infringement of the principles of sincere cooperation, good faith, protection of legitimate expectations and proportionality*

Arguments of the parties

71 The applicant claims that the contested decision must be examined together with Decision No 91/176, as the facts and elements relating to the latter are the same

as those covered by the contested decision. It states that the aid to which that decision relates was deemed incompatible with the common market in steel solely on the ground that the loan which constituted the aid had been paid after the period of applicability of the Second Code had expired on 31 December 1985. Hence, according to the applicant, a merely formal aspect had taken on substantive importance, because the aid in question was examined in accordance with the Third Code, which entered into force on 1 January 1986.

72 The applicant goes on to state that in 1982 it had prepared a restructuring plan under Provincial Law No 25/81. It points out that this plan was approved by the Commission in 1983. Moreover, according to the applicant, the Province of Bolzano asked the Commission whether it was necessary to notify planned aid under Provincial Law No 25/81. In the absence of a reply, the Province considered that notification was not necessary. This position was all the more understandable, in the submission of the applicant, first because the letter of 5 July 1982 from the Commission to the Italian Government indicated that the Commission reserved 'the right to lay down the conditions on which this regime can be applied to the Province of Bolzano, depending on the decision which it will adopt at the national level', and secondly because the Commission never laid down those conditions.

73 The applicant adds that by the date on which Decision No 91/176 was adopted, namely 25 July 1990, all the decisions of the Province of Bolzano had been taken and the aid which had been granted had been paid. In its submission, it would be strange if at that date, despite the time which had elapsed, that is to say seven years from the date of the first decision and two from that of the last, the Commission neither knew of the decisions in question nor took them into consideration.

74 In view of these circumstances, the applicant claims that the Commission infringed, first, the principle of sincere cooperation (see Article 86 of the ECSC

Treaty, which corresponds in substance to Article 5 of the EC Treaty (now Article 10 EC)). The Commission failed to take the necessary action with respect to cooperation as provided for in the ECSC Treaty, not only by omitting to collaborate with the national authorities but also by delaying the opening of the procedure despite having knowledge of the facts which should have required this and by delaying the outcome of that procedure by adopting a negative decision of incompatibility.

75 Secondly, according to the applicant, the Commission infringed the principles of good faith and the protection of legitimate expectations. The Commission's conduct, and especially the prolonged nature of the procedure, gave rise to legitimate expectations on the part of the national authorities and the applicant as to the legality of the contested aid. They had acted in accordance with the principle of good faith, because they could not reasonably imagine that the Commission might contest the aid. The applicant maintains that not only had the Commission not objected when the matter had been raised with it but furthermore, for long after the grant of the aid, it had not considered it necessary to raise objections (see the judgments in Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 16, and in *RSV*).

76 Falck concurs with the applicant's submission, stating that it is apparent from the procedural documents presented by the applicant that once the restructuring plan had been notified and in the absence of any reaction from the Commission (despite the steps taken by the Province of Bolzano and the Italian Government) the applicant's confidence in the regularity of the aid that had been paid was entirely legitimate. According to Falck, the initial and supplementary restructuring plans were undoubtedly part of one continuous project and one programme of actions. As this plan was supplemented and executed under the 'existing' regime, it did not, in Falck's submission, need to be either communicated or notified, because it was not 'new' aid (see the judgment in Case C-44/93 *Namur-Les Assurances du Crédit* v *Office National du Ducroire and the Belgian State* [1994] ECR I-3829).

77 The applicant then maintains that it displayed diligence in verifying the aid it had received on several occasions. Moreover, the Commission adduces no evidence to

show that this was not the case. Hence, the legitimate expectations and good faith of the applicant must, in its submission, be taken for granted.

78 The applicant also maintains that the fact that such a long period elapsed between the grant of the aid and the adoption of the contested decision transformed the recovery of the aid into a penalty, for which Community law does not provide. In its submission, recovery no longer serves the purpose of restoring market equilibrium and eliminating the distorting effects of the aid granted, given that during this time market conditions and situations of fact and even of law have changed. Furthermore, recovery could have been time-barred under national law.

79 The effect of transforming recovery into a penalty is reinforced, according to the applicant, by the fact that interest is levied on the recovered amount as from the date of grant of the aid and not from the date on which the contested decision was adopted. According to the applicant, this is also contrary to the principle of proportionality, as even if recovery was regarded as an obligatory matter, the sacrifice imposed on the applicant would be excessive, and hence disproportionate, having regard to the circumstances of the case.

80 Lastly, the applicant submits that considerations of fairness, expediency and justice, which had led the Commission to refrain from ordering recovery of the three first amounts of aid, should also have led it to refrain from demanding recovery of the last three. Simply taking into consideration the time which had elapsed, that is to say 13 years from the first decision and eight from the last, should have led the Commission to adopt a different decision.

81 The Commission disputes all those arguments. It points out in particular that whereas in May 1983 it had authorised, on the basis of the Second Steel Aid Code, the investment aid granted to the applicant in the context of a restructuring

plan adopted under Provincial Law No 25/81 and notified in September 1980, that decision could not be considered as authorising the grant of all aid in implementation of that plan. It maintains that separate authorisation was required in each case.

82 Moreover, the Commission's 1983 decision set 31 December 1985 as the mandatory time-limit for the grant of the aid, a subsidised loan of ITL 6.5 billion including ITL 2 billion accounted for by the difference in relation to the market interest rate; failure to observe that time-limit rendering the aid liable to be regarded as incompatible with the common market. The delay in granting the loan led, according to the Commission, to the adoption of Decision No 91/176 declaring the aid to be incompatible with the common market. However, in view of the good faith of the Italian authorities and the operational difficulties due to the division of powers between provincial and national authorities, repayment was not demanded. It follows, in the submission of the Commission, that what was involved was a negative decision which authorised no aid and created no legitimate expectations as regards other support measures in the future in the absence of special circumstances justifying the decision not to proceed with recovery.

Findings of the Court

83 The applicant's argument alleging infringement of the principle of the protection of legitimate expectations will be examined first.

84 It is settled case-law that undertakings to which a State aid has been granted cannot entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure, as a diligent operator should be able to ascertain (see the judgments in Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14, and in *Preussag Stahl*, paragraph 77). Only in exceptional circumstances can recipients of unlawful aid assert a legitimate assumption as to the lawfulness of aid in reliance on this principle (see the judgment in Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 18).

85 In the present case the Court has found, at paragraph 63 above, that the aid in question was not notified and thus was not granted in compliance with the applicable procedure. Moreover, the applicant has not established that an exceptional circumstance existed, on the basis of which it could assume the aid to be lawful.

86 First, it is common ground that after the entry into force of the Third Code on 1 January 1986 the obligation to notify a financial measure was unconditional. Article 6 of that Code provided that the Commission was to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid and of any plans for transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings. Lastly, this article provided that all individual awards of aid were to be notified.

87 It follows that the applicant is not justified in alleging that it was not informed of the obligation for the State to notify the individual aid proposals contained in its restructuring plan after 1 January 1986, or that it would not be necessary to inform the Commission of developments in the restructuring of the undertaking, and in particular of the supplementary restructuring programme of 26 June 1986.

88 Secondly, it must be pointed out that the Commission indicated in its letter dated 5 July 1982 that it had yet to rule on the sectoral application of Law No 675/77 and that it reserved the right to lay down the conditions on which that regime would apply to the Province of Bolzano in the light of the decision it adopted at the national level. In that same letter the Commission also stated that the Bolzano authorities had also to comply in full with Community rules and codes on the grant of aid to the steel industry (see paragraph 8 above).

89 Furthermore, in its 1983 decision the Commission stated that authorisation of the aid covered by that decision was conditional on the results of checks which it had put in place and, moreover, that any payment of aid after 31 December 1984 was prohibited.

90 It follows that the Commission did not grant definitive authorisation for all the aid granted under the general regime in question and that the authorisation was limited in time. In those circumstances, the absence of a reply from the Commission to a letter from the Province of Bolzano cannot justify non-compliance with the notification requirement, particularly as the conditions for exempting aid to the steel industry had been altered in the meantime.

91 Thirdly, the time-limit within which the Commission was entitled to authorise aid under the Second Code was 31 December 1985. Hence the aid paid after 1 January 1986, which the Commission ordered to be recovered, was no longer covered by the Second Code, so that the applicant could not, under that Code, have a legitimate expectation of its legality.

92 Fourthly and lastly, it must be pointed out that Decision No 91/176 finds that the interest subsidy on a loan granted in December 1987 constitutes unlawful State aid because it was made available without prior authorisation from the Commission and, furthermore, is incompatible with the common market pursuant to the Third Code. There is therefore no contradiction between that decision and the contested decision so that the applicant is not justified in relying on the former decision in order to establish the existence of legitimate expectations. The fact that the Commission considered it equitable not to order the recovery of the aid covered by Decision No 91/176 because of the special circumstances described therein cannot mean that it was bound by these

considerations when examining the compatibility of the aid with the common market in the present case.

93 On the second issue, the applicant's argument as to its proven diligences must be rejected. It is sufficient to observe that the only evidence which it provides in this regard is a statement made on 2 February 1999 by its Managing Director, Mr Sergio Moresetti, from which it is apparent that contact had been established between him and the officials in Bolzano. By making contact with the local authorities, the applicant did not in any way, given the circumstances of the case, satisfy itself that the notification procedure had been complied with.

94 On the third issue, it must be stated that it is of no avail to the applicant, in the circumstances in the present case, to plead infringement of the principles of sincere cooperation and good faith. The verification of aid presupposes that the Member States fulfil their obligation to notify. Hence the applicant is not justified in using as an argument the fact that the Commission had not previously discovered the existence of illegal aid. Otherwise, the effectiveness of the provisions of the ECSC Treaty on State aid would be rendered wholly ineffective. In any event, the assertion that the Commission should have known of the existence of the aid in question is not substantiated by any evidence.

95 Lastly, it must be borne in mind that according to settled case-law, the principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued; where there is a choice between several appropriate measures, the least onerous measure must be used (see, for example, the judgments in Cases 15/83 *Denkavit Nederland* v *Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR 2171, paragraph 25, and 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 21).

96 Since the withdrawal of unlawful aid by way of recovery is the logical consequence of the finding that it is unlawful (see the judgments in Cases C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 66, C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 41, and T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 96), such a measure cannot in principle be regarded as disproportionate to the objectives of the ECSC Treaty in regard to State aid. It also follows that such a measure, even if it is applied long after the aid was granted, cannot constitute a penalty for which Community law does not provide.

97 The same applies to the recovery of interest. As the ECSC Treaty would be rendered ineffective if recipient undertakings were permitted to benefit from the availability of the money during the period between the granting and the actual recovery of the aid (see, by analogy, the judgment in Case T-275/94 *CB* v *Commission* [1995] ECR II-2169, paragraphs 46 to 54), a decision of the Commission ordering the recovery of illegal aid may legitimately require interest to be recovered on the sums granted in order to eliminate any financial advantages incidental to such aid (see the *Siemens* judgment, paragraph 97).

98 Moreover, as regards the fixing of the date from which that interest is to be calculated, it must be noted that such interest is equivalent to the financial advantage arising from the availability of the funds in question, free of charge, over a given period. Consequently, the Commission correctly considered that such interest should start to run from the date on which the aid was paid (see the *Siemens* judgment, paragraph 101).

99 It follows from the foregoing that the third plea must be rejected.

*The fourth plea, alleging an error in law in assessing the compatibility of the aid with the common market in steel and an erroneous assessment of the facts*

Arguments of the parties

100 The applicant claims that the Commission committed an error in law in considering that the ECSC Treaty, unlike the EC Treaty, does not make provision, for its application, for any 'effect on Community trade'. According to the applicant, such a condition must of necessity be fulfilled for aid to be declared incompatible with the common market under the EC Treaty. Since the two Treaties pursue common objectives, it would be contrary to the spirit and rationale of Community law to interpret the ECSC rules as being distinct and separate from the EC rules (see the judgments in Cases 9/56 *Meroni* v *High Authority* [1958] English Special Edition 1958, p. 133, 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199, and C-221/88 *ECSC* v *Busseni* [1990] ECR I-495). In the applicant's submission, the Commission should therefore have taken into account the amount and impact of the aid, its scale in relation to the actual needs of the applicant, the fact that the effects of the aid do not cause distortions of competition and do not adversely affect trading conditions, and the conformity of those effects with the common objectives (see Article 2 of the Second Code).

101 In addition, according to the applicant, the Commission did not take account of the fact that the applicant was the victim of serious discrimination by comparison with the state-owned steel industry which had obtained aid in a much greater amount. The aid granted subsequently to the industries thus constitutes an inadequate attempt to restore equal treatment between the two categories of operator, which is also guaranteed by the Community rules.

102 The applicant, supported by the Italian Government, also pleads mistaken assessment of the facts. It points out in this regard that the investments were intended to save energy, improve the environment, safety and working

conditions, foster research and development and improve the profitability of the undertaking, as shown in the tables attached to the application. However, the Commission refused to consider these investments as aid compatible with the common market in steel, without comparing between total investment, investment carried out and investment attributable to the aid. According to the applicant, the Commission confined itself to stating in the contested decision that 'most' of the investment in research and development 'seems rather' to come under the heading of productive investment. The Commission committed an error in assessing the facts by considering as inadequate the information provided to establish the use of the investments for research and development and for environmental protection.

103 In order to show that the aid received by the applicant is compatible with the common market, the intervener Falck asked the company Arthur Andersen to draw up a report to be submitted to the Court (the 'Andersen report'). This report shows, according to the applicant, that a large part of the investment carried out by the applicant is compatible with the aid codes in that it was intended to cover the expenses incurred for research and development, environmental protection, energy saving, improvement of the quality of the products and/or production techniques, and the restoration of competitiveness and financial viability, partly by reducing production costs.

104 Falck next maintains that the Commission was wrong to take into account, and to declare incompatible, aid which it had already considered to be 'covered' by Decision No 91/176. According to Falck, this related mainly to aid granted under Decision No 7673 of 14 December 1987 (ITL 6 321 million) and Decision No 4158 of 4 July 1988 (ITL 987 million). The latter aid, which had been attached by mistake to the 1988 decision, in reality came under the decision of 14 December 1987. Finally, Falck claims that Decision No 2429 of 2 May 1988 was incorrectly assessed and submits that, ultimately, any recovery of aid should have been limited to ITL 4 400 million.

105 The Commission contests all those arguments.

106 First it denies having committed an error in interpreting the ECSC Treaty. It points out in particular that, unlike the EC Treaty, the ECSC rules regarding aid make no reference to the disturbance of trade or the distortion of competition, nor do they permit the Commission to weigh the effects of the disturbance of competition against the interests of the Community. Under the regime established by the ECSC Treaty, taking particular account of the sensitivity of the sector, the Commission had no discretion to assess the compatibility of aid flexibly.

107 The Commission considers, moreover, that the difference in treatment between the private and public sectors of the steel industry in Italy, if it exists, cannot be imputed to the Commission.

108 The Commission disputes that it committed an error in assessing the aid in question. It found that the aid was not intended to support research and development projects or environmental protection. In the absence of concrete evidence, it is pointless to assert that the aid was deemed to favour energy savings and an improvement in product quality.

109 In the submission of the Commission, this conclusion is not contradicted by the Andersen report. It points out in this regard first that the intervener must accept the case as he finds it at the time of his intervention. According to the Commission, there is nothing to suggest that the applicant sought an expert's report in order to produce evidence which would help its case. Furthermore, the production of the Andersen report did not constitute 'evidence offered' within the meaning of Article 116(4)(c) of the Rules of Procedure of the Court of First

Instance. The report contains a series of apodictic statements which purport to take the place of a finding which it is for the Commission to make.

110 Lastly, the Commission disputes Falck's assertion that the loan of ITL 6 321 million made in December 1987 was already covered by Decision No 91/176 and the other alleged errors of assessment on which Falck relies. It contends that it correctly assessed all the aid to which the contested decision relates. Furthermore, the Commission is surprised that neither the applicant nor the Italian Government ever raised this point during the administrative procedure, even though the matter was a subject of the decision to open the procedure.

Findings of the Court

111 It is necessary first to examine the applicant's argument that the Commission committed an error of law in considering that the ECSC Treaty did not make any provision for any 'effect on Community trade' in the Treaty's application.

112 In this regard, it is notable that Article 4(c) of the ECSC Treaty prohibits subsidies or aid granted by States 'in any form whatsoever'. Since these terms do not appear in subparagraphs (a), (b) and (d) of Article 4, this provision confers an unusually general scope on the prohibition which it describes (see the judgment in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, at p. 21).

113 In contrast to Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC), that prohibition is general and unconditional. Consequently, the aid covered by the ECSC Treaty is deemed incompatible with the common

market without there being any need to establish or even to consider whether there is, in actual fact, any interference with the conditions of competition or it is liable to occur (see the Opinion of Advocate General Lagrange in *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, [1961] ECR 34, at p. 41).

114 It follows that the Commission did not commit an error of law in considering that the aid in question comes within the scope of the ECSC Treaty without having previously ascertained whether it has an 'effect on Community trade'.

115 It is necessary to examine, secondly, the argument based on the claim that the Commission committed an error in applying the derogations in the Fifth Code, the only derogations from the prohibition on aid laid down in Article 4(c) of the ECSC Treaty which the Commission was authorised to apply in the present case (see paragraph 68 above).

116 In this regard, it must immediately be observed, first, that it is not disputed in the present case that the measures in question constitute aid which should have been notified to the Commission and, secondly, that they were granted between 1983 and 1988, in other words between eight and 13 years before the adoption of the contested decision. In these circumstances, it is evident that the applicant, the recipient of the aid, and the Italian Government were best placed to collect and check the necessary data showing that the aid met the conditions of the Fifth Code. Furthermore, in its decision to open the procedure the Commission emphasised that it was obliged to assess State aid on the basis of the provisions and of the interpretation criteria applying at the time it made its decision and on the basis of the data and information available to it at that time. It also concluded that the aid in question should be examined on the basis of the Fifth Code.

117 It therefore fell to the Italian Government and the applicant to produce, during the administrative procedure, evidence that the aid in question could benefit from

the derogations for which that code provided (see, to that effect, the judgment in Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraphs 35 and 36).

118 It should next be noted that in exercising its jurisdiction to hear and determine actions for annulment of decisions or recommendations of the Commission, the Community judicature may not, in accordance with the second sentence of Article 33(1) of the ECSC Treaty, 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 charged with having misused its powers or manifestly failed to comply with the provisions of the Treaty or any rule of law relating to its application.

119 In order to establish that the Commission manifestly infringed the provisions of the ECSC Treaty or the Fifth Code in such a way as to justify the annulment of the contested decision, the evidence adduced by the applicant must be sufficient to render the factual assessment in the decision implausible (see, by analogy, the judgment in Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 59).

120 It is in the light of those considerations that the arguments based on the error allegedly committed by the Commission in applying the derogations in the Fifth Code must be examined.

121 In so far as the applicant claims to have been the victim of serious discrimination by comparison with the State steel industry, which allegedly obtained aid in a significantly greater amount, its argument must be rejected as irrelevant to the present case. Even supposing that there were a difference in the treatment accorded to the private and public sectors of the steel industry in Italy, this could

not influence the Commission's assessment of the legality of aid granted by a Member State in a particular case.

122 It is true that in the contested decision the Commission simply stated that most of the applicant's investment costs and the relevant aid could not benefit from the derogation for research and development but seemed rather to constitute productive investments which did not as such qualify for exemption from the prohibition laid down in Article 4(c) of the ECSC Treaty in accordance with the Community rules in force on State aid for research and development.

123 However, this same finding was already to be found in the decision to open the procedure. It was for the Italian Government and the applicant therefore to present observations capable of invalidating that finding, failing which they had to expect it to be adopted by the Commission in the final decision.

124 It should be observed in this regard that the Community framework for State aid for research and development (OJ 1986 C 83, p. 2), to which the Fifth Code refers, states that the objectives to be achieved by a research and development programme must be clearly indicated. Moreover, all the different categories of costs which the aid is designed to reduce must be specified and they must be given in such a form that its impact in relation to these costs can be calculated (paragraph 4.3.1). It is also apparent from this text that the Commission will pay special attention to such aid to ensure that it does not become the equivalent of operating aid (paragraph 8.2).

125 The fact remains, however, that during the administrative procedure the Italian Government merely stated that the aid granted under Decisions Nos 7673 of 14 December 1987, 2429 of 2 May 1988 and 4158 of 4 July 1988 complied with

the provisions on research and development, without providing an explanation to justify the application of this exemption.

126 It follows that the Commission was justified, on the basis of the information at its disposal, supplemented especially by the letter from the Italian Government dated 27 March 1996, to conclude that there was no evidence that the aid in question could qualify for the derogation in favour of research and development for which the Fifth Code provided.

127 The argument put forward by the applicant cannot undermine that finding. It asserts, first, that a large part of the aid granted after 1 January 1986, although unlawful because it had not been notified to the Commission, must be regarded as compatible with the common market as it was intended for investment primarily in research and development, and secondly that the investment in research and development amounted to almost ITL 32 billion, in other words more than half of the total amount of aid granted (ITL 55 billion). In support of that assertion, the applicant merely produces its balance sheet, which contains a breakdown of its investment, indicating in particular investment in research and development.

128 Those factors do not in any way invalidate the Commission's assessment of the matter, to the effect that most of the applicant's investment spending on research and development seems to constitute productive investments which do not as such qualify for exemption from the prohibition in Article 4(c) of the ECSC Treaty.

129 In the contested decision, the Commission also found that the applicant had borne investment costs of around ITL 15 billion with repercussions in the field of environmental protection. Nevertheless, it emphasised that the Italian authorities

had failed to show that the conditions for the application of Article 3 of the Fifth Code were satisfied.

130 The applicant claims, in particular, that the Commission committed an error in the assessment of the facts by considering the information provided by the applicant and the Italian Government to be insufficient.

131 However, the information provided by the Italian Government at the time of the administrative procedure does not show that the conditions for the application of the derogation for environmental protection were satisfied. In its letter of 27 March 1996 the Italian Government merely listed the legislative measures implemented during the period preceding the grant of the environmental aid. That does not demonstrate that the primary purpose of the investments carried out was to protect the environment and that they were intended to bring the plant into conformity with new environmental protection standards introduced at least two years after the plant had come into operation. These conditions are set out in Article 3 of the Fifth Code and were recalled by the Commission in its decision to open the procedure, from which it is apparent that the Italian authorities had not up to that time demonstrated that they had been met.

132 Lastly, the Commission considered that the investments aimed at achieving energy savings and improved product quality could not, on the basis of the Fifth Code, enjoy any exemption from the provisions of Article 4(c) of the ECSC Treaty. The applicant has provided no evidence to contradict this finding by the Commission.

133 It is necessary, thirdly, to examine the arguments based on the expert's report submitted by Falck. In this regard, it must be held at once that, contrary to the

Commission's submission, Falck has not gone beyond the bounds of the case for the purpose of Article 116(3) of the Rules of Procedure.

134 Nevertheless, the fact remains that the Andersen report, entitled 'Report on the verification procedures adopted and implemented with regard to the analytical table of investments for the period from 1 January 1986 to 30 June 1988', comprises, in reality, a purely accounting confirmation of a table which Falck has produced and which lists certain investments. The Arthur Andersen company did not therefore analyse the investments as such. More particularly, it did not verify whether they were of a nature such that they could be exempted, under the Fifth Code, from the prohibition contained in Article 4(c) of the ECSC Treaty.

135 It must be stated in this regard that the fact that expenditure on the purchase of equipment is shown in the balance sheet in accordance with national legislation and is described there as investment in research and development, or in other areas, does not demonstrate, in itself, that the aid in question is capable of qualifying for exemption under the ECSC Treaty. The granting of exemptions from Article 4(c) of the ECSC Treaty presupposes an examination entailing assessments to be made by the Commission in a Community context (see, by analogy, the judgments in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 24, and in *Siemens*, paragraph 53).

136 It follows that the Andersen report has not provided evidence showing that the investments in question are such as to qualify for exemption from the prohibition laid down in Article 4(c) of the ECSC Treaty and that the report does not therefore provide any ground for departing from the finding made above, that the Commission did not make a manifest error of assessment in concluding that the aid in question was not capable of benefiting from the derogations provided for in the Fifth Code.

137 Fourthly, with regard to Falck's arguments alleging errors of assessment in that, first, the Commission should not have required recovery of the aid in point in the 1987 decision because that aid was covered by Decision No 91/176 and, secondly, that the Commission did not correctly assess the aid covered by the 1988 decisions, it should be noted that the list of all the aid involved in the present case was already contained in the decision to open the procedure and accordingly that Falck was put on notice to submit its criticism at that stage.

138 Moreover, both in its letters of 6 April and 2 May 1995 in reply to the request for information from the Commission and in its letter of 27 March 1996 subsequent to the decision to open the procedure, the Italian Government referred to Decisions Nos 7673 of 14 December 1987, 2429 of 2 May 1988 and 4158 of 4 July 1988 without giving the slightest indication that the aid referred to in the 1987 decision was already covered by Decision No 91/176 or showing that the aid referred to in the 1988 decisions was not correctly assessed. In its letter of 27 March 1996 (p. 4) the Italian Government even recognised that part of the aid covered by those decisions could legitimately be recovered, stating that:

'The complaints which have rightly been raised and in regard to which explanations should be given, concern solely the measures taken by the Autonomous Province of Bolzano after 1985 relating respectively to Decisions Nos 7673 of 14 [December] 1987, 2429 of 2 May 1988 and 4158 of 4 July 1988, which show a total benefit, taking account of the interest difference between the reference rate and the rate of 3%, equal to 8.704 billion as regards the loans'.

139 Falck's criticism is therefore irrelevant, in that it is for the Court to examine whether the Commission based its decisions on correct material facts and whether there has been a manifest error in assessing those facts in the context of

the situation as it existed at the date on which the contested decision was adopted, and solely on the basis of the information available to the Commission at that time (see the judgments in Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, paragraph 87, and in *British Airways and Others and British Midland Airways*, paragraph 81).

140 There is therefore no need to consider Falck's arguments based on alleged errors in the assessment of the aid granted under the 1987 and 1988 decisions.

141 It is necessary to add that, even supposing that Falck were right in claiming that the aid to which the 1987 decision related was already covered by Decision No 91/176, the fact remains that in Decision No 91/176 the Commission took as its starting point the fact that a loan for ITL 6 billion, although approved in 1983, was not paid until 1987 and, under successive Steel Aid Codes, became incompatible from the time of its award. However, it is apparent from Falck's assertions that Decision No 7673 of 14 December 1987 granted aid and that that decision was recognised by an act of acknowledgement dated 10 March 1988. Falck's argument thus suggests that the 'grant' of aid in 1987, referred to in Decision No 91/176, was in reality a new autonomous decision and accordingly that that aid did not become incompatible solely by reason of the delay in its allocation. Such a proposition suggests that the Commission was not correctly informed at the time of the adoption of Decision No 91/176 and cannot, for that reason, be relied upon by Falck in support of the form of order sought by the applicant in the present proceedings.

142 It follows from the foregoing that the fourth plea must be rejected.

*The fifth plea, alleging an error of law committed in setting the interest rate*

Arguments of the parties

143 The applicant maintains that the interest rate set by the Commission is, on the one hand, indeterminable and, on the other, lacking in any legal basis.

144 The applicant states that a decision ordering the recovery of unlawful aid can require the recovery of interest on the sums paid solely for the purpose of eliminating any financial advantages incidental to such aid and that such recovery must be strictly in proportion to the advantages which the undertaking in question unlawfully enjoyed (see the *Siemens* judgment, paragraph 95 et seq.). Thus, according to the applicant, the Commission should have set the rate of interest on the basis of the provisions of national law or on the basis of the market rate which the applicant would have had to pay if the aid had not been granted.

145 In its reply, it maintains that the Commission cannot lay down obligations on the basis of a communication, which is not an act named in or an obligatory act under Articles 14, 15 and 33 of the ECSC Treaty. According to the applicant, it is in any case contradictory on the one hand to refer by analogy to Community criteria and on the other to refer to national laws. Cooperation between the Community system and the national system requires that, in the absence of a Community rule, the task of determining and applying the interest to be paid be left to the national court in accordance with the national rule.

146 Lastly, in response to a written question from the Court, the applicant indicated that the interest rate which should have been applied was that which it would

have been able to obtain in Germany at the time in question. Since it was very active in Germany at that time, the German market was the real reference market.

147 The Commission states that in the context of regional aid the interest corresponds to the cost of money in the Member State during the period in question, as explained in the Communication of the Commission of 21 December 1978 on regional aid systems (OJ 1979 C 31, p. 9). The annex to that Communication establishes the methods for implementing the principles of coordination of regional aid systems. Under paragraph 14 of that annex, the reference rate applicable to Italy was the 'average reference rate applicable to payments by central Government of interest subsidies to credit institutions'. The merits of the criterion applied were acknowledged by the Italian authorities themselves, which, in the request for repayment of the aid, calculated the interest on the basis of the rates notified by the Bank of Italy for the different periods under consideration.

Findings of the Court

148 In the absence of provisions of Community law governing the recovery of amounts unduly paid, the recovery of aid improperly granted must, in accordance with settled case-law, be carried out in accordance with the rules and procedures laid down by national law. However, the application of national law must not undermine the scope and effectiveness of Community law. In other words, the application of the national provisions must not make it impossible in practice to recover the sums improperly granted or be discriminatory in relation to

comparable cases which are governed solely by national legislation (see the judgments in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* v *Germany* [1983] ECR 2633, paragraphs 18 to 25, in Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 12, and in *Siemens*, paragraph 82).

149 Moreover, the purpose of the recovery of State aid that is incompatible with the common market is to restore the previous situation, which presupposes that all of the financial advantages resulting from the aid which adversely affect competition in the common market have been eliminated. A decision of the Commission ordering the recovery of unlawful aid may therefore also require interest to be recovered on the sums granted in order to eliminate any financial advantages incidental to such aid (see the *Siemens* judgment, paragraph 97).

150 To refrain from claiming, in addition to the recovery of the aid, the payment of interest on the sums unlawfully granted, would be tantamount to enabling the undertaking in receipt of those sums to retain financial advantages resulting from the grant of the unlawful aid in the form of an interest-free loan. That in itself would therefore constitute aid which would distort, or threaten to distort, competition (see the *Siemens* judgment, paragraph 98).

151 However, interest may only be recovered in order to offset the financial advantages actually arising from the grant of the aid to the recipient, and must be in proportion to the aid (see the *Siemens* judgment, paragraph 99).

152 It is in the light of those considerations that the applicant's argument as to the Commission's error in setting the interest rate in the present case must be examined.

153 Article 2 of the contested decision provides as follows:

'Italy shall, acting in accordance with the provisions of Italian law relating to the recovery of amounts owed to the State, recover the aid paid to Acciaierie di Bolzano... In order to abolish the effects of the aid, interest shall be charged on the amount of aid from the date of payment to the date of repayment. The rate shall be that used by the Commission to calculate the net grant equivalent of regional aid in the period in question'.

154 As the applicant enjoyed an advantage by having the use of a certain sum interest-free for a given period, the payment of interest which is imposed on it meets the requirement to eliminate the financial advantage which is incidental in relation to the amount of the aid initially granted.

155 It must be observed that, although the contested decision suggests that the interest rate to be applied in order to eliminate this advantage is fixed directly by the Commission, it is none the less the case that, in reality, the rate referred to is the average reference rate applicable to payments by central Government of interest subsidies to credit institutions in Italy. The reference in the contested decision to the rate 'used by the Commission to calculate the net grant equivalent of regional

aid' has its origin in the Communication on regional aid systems. Under paragraph 14 of the annex to that Communication, the reference rate applicable in Italy consists of the 'average reference rate applicable to payments by central Government of interest subsidies to credit institutions'. In any event, it is not disputed that the rate applicable in the present case was calculated on the basis of information from the Bank of Italy.

156 That being so, the Commission did not prescribe the manner in which the State's obligation to claim interest was to be discharged, the procedure for the recovery of amounts unduly paid being always governed by national law. The reference to the interest rate applicable for calculating the net grant equivalent of regional aid in Italy merely serves to ensure that a rate representing the equivalent of the financial advantage stemming from the interest-free provision of the capital in question is applied while respecting the conditions in the Italian market and the principles of Italian law on the recovery of amounts unduly paid.

157 Consequently, the Commission was justified in requiring the Italian Government to use the interest rate applicable for calculating the net grant equivalent of regional aid.

158 Lastly, with regard to the applicant's assertion that the German market was the real reference market, it should be pointed out that the legality of a decision on

aid must be assessed on the basis of the information available to the Commission at the time when the decision was taken (see paragraph 139 above).

159 In the present case the applicant was put on notice to submit its comments on the facts found and the assessments made by the Commission in the decision to open the procedure. In that decision the Commission indicated that the applicant had received public assistance in the form of loans with a duration of 10 years at an interest rate some 10 percentage points below the market rate. It was therefore evident to the applicant that the Commission had based its calculation of the amount of aid in question on the market rate in Italy. It was therefore legitimate for the Commission to make reference to the rate on the Italian market for the recovery of this aid as well.

160 In those circumstances, and as the applicant did not submit comments to the Commission on this matter, it cannot criticise the Commission for not having assessed the possibility of using the German market as the reference market.

161 In any event, the applicant has not, in its argument, shown that the Commission committed a manifest error of assessment in referring to the Italian market rate for the recovery of the aid in question.

162 It follows that the fifth plea must be rejected.

*The sixth plea, alleging lack of a statement of reasons*

Arguments of the parties

163 The applicant claims that the contested decision contains no statement of reasons explaining why the Commission regarded the date of 31 December 1985, corresponding to the expiry of the period of applicability of the Second Code, as a determining factor for the repayment of the aid or why it considered that the Fifth Code was applicable to Decisions Nos 7673, 2429 and 4158 of the Province of Bolzano.

164 Furthermore, according to the applicant, the Commission set the interest rate according to a puzzling formula and without giving any statement of reasons regarding the proportionality of the rate in relation to the advantages which the applicant had allegedly enjoyed.

165 The Commission maintains that the date of 31 December 1985 was not chosen arbitrarily, because it is the day before the entry into force of the Third Code on 1 January 1986, as is clear from the contested decision. According to the Commission, that code expressly provides that notification in respect of any public intervention in favour of steel undertakings is obligatory, which explains why, again in the context of unlawful and incompatible aid, it considered that as from that date, the reasons put forward by the Italian authorities to establish the alleged good faith of the provincial administration and the undertaking were unfounded and considered that the aid should be recovered. As to the criteria used for calculating the interest, the Commission points out that, in the absence of specific rules in this regard, it chose to apply the rate set for regional aid. No

rule or principle requires the determination of the interest to be left to the national court.

Findings of the Court

166 The fourth indent of Article 5(2) of the ECSC Treaty provides, in particular, that the Community is to 'publish the reasons for its actions'. Article 15(1) of that Treaty states that the 'decisions, recommendations and opinions of the Commission shall state the reasons on which they are based and shall refer to any opinions which were required to be obtained'.

167 It is settled case-law that the statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Community judicature to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law. It must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see the judgments in Cases C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86, and T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 230).

168 In the present case, it is clear from the contested decision that the date of 31 December 1985 was chosen because of the entry into force of the Third Code expressly laying down the obligation for any aid granted to steel undertakings to

be notified in advance. On this point there is therefore no lack of a statement of reasons.

169 Although it is true that in the contested decision the Commission did not indicate the reasons for applying the Fifth Code, it nevertheless stated that 'the question raised by the Italian authorities concerning the rules applicable to the aid in question, in particular that granted prior to 1985, is not relevant in this case. Even if Decision No 2320/81/ECSC [the Second Code] were to be applied to the aid granted before 31 December 1985, the measures in question would not be considered compatible with those provisions in view of the conditions set out therein.'

170 Furthermore, in the decision to open the procedure, it was stated that 'the Commission considers itself obliged to assess State aid, whether individual aids or aid schemes, on the basis of provisions and interpretation criteria applying at the time it makes its decision ... It follows that the aid in question should be examined under the Steel Aid Code at present in force, i.e. Decision No 3855/91/ ECSC [the Fifth Code]'.

171 As the contested decision must be assessed with regard not only to its wording but also to its context, it is clear that the Commission adopted the decision on the basis of the Fifth Code.

172 It is also clear from the contested decision that the interest rate 'shall be that used by the Commission to calculate the net grant equivalent of regional aid in the period in question.'

173 That manner of calculating the rate is provided for in the Communication on regional aid systems, published in the *Official Journal of the European Communities*. In addition, the decision to open the procedure states that 'reimbursement of illegal aid includes the payment of interest at the rate laid down for the assessment of regional aid, from the date on which the aid was granted to the recipient undertaking, in order to counteract any advantage which the firm might derive from the illegal granting of the aid'.

174 In those circumstances, the Commission was not required to detail its assessments on the applicable interest rate in the contested decision in order to give the applicant the possibility of examining its validity.

175 It follows that the Commission set out adequately and fully the elements of fact and law which played a fundamental role in the adoption of the contested decision. That decision therefore provided the information necessary for the applicant and enabled the Community judicature to exercise its power of review.

176 Consequently the sixth plea must be rejected.

177 It follows from all the foregoing that the application must be dismissed in its entirety.

## Costs

178 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked 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 Commission's costs.

179 In accordance with Article 87(4) of the Rules of Procedure, the Italian Republic, which has intervened, must bear its own costs.

180 Pursuant to the third subparagraph of Article 87(4) of the Rules of Procedure, the Court of First Instance may order an intervener other than the Member States, the States which are parties to the Agreement on the European Economic Area (EEA), the institutions and the Surveillance Authority of the European Free Trade Association (EFTA) to bear its own costs.

181 In the present case, Falck, which has intervened in support of the applicant, must be ordered to bear its own 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 of the Commission;**

3. **Orders the intervening parties to bear their own costs.**

Cooke García-Valdecasas Lindh

Pirrung Vilaras

Delivered in open court in Luxembourg on 16 December 1999.

H. Jung J.D. Cooke

Registrar President