OPINION OF ADVOCATE GENERAL ALBER

delivered on 21 February 2002 [1]

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1 — Original language: German.

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I — Introduction

1. In the present appeals Acciaierie di Bolzano SpA (hereinafter 'ACB') and Falck SpA (hereinafter 'Falck') challenge the judgment delivered by the Court of First Instance on 16 December 1999 in Case T-158/96. The Court dismissed ACB's application for the annulment of Commission Decision 96/617/ECSC of 17 July 1996 addressed to the Italian Republic (hereinafter 'the contested decision').[2] This decision required Italy to recover the aid granted by the Autonomous Province of Bolzano to the steel undertaking Acciaierie di Bolzano after 1 January 1986 (from the beginning of the 1980s) since it had not been notified and was incompatible with the common market. A further contentious issue is whether the aid should have been examined in accordance with the State aid codes applicable at the time when it was granted or at the time of the decision requiring its recovery.

2. As a manufacturer of special-steel products, ACB is an undertaking within the meaning of the ECSC Treaty. Until it was sold to Valbruna Srl on 31 July 1995, it had been controlled by the Falck steel group, which supported ACB as an intervener at first instance.

2 — OJ 1996 L 274, p. 30.

3. The appellants complain that the Court of First Instance did not evaluate accurately a number of errors in law in the decision. In particular, ACB's right to a fair hearing or rights of defence had been disregarded when the decision was adopted. In addition, the decision was not designed to abolish the effects of the aid, but was in the nature of a sanction. The interest had also been miscalculated. Furthermore, in requiring the recovery of aid granted up to 10 years previously, the Commission had infringed the time-bar rules, the prohibition of retroactive application and the principle of the protection of legitimate expectations.

4. While the Italian Republic sides with the appellants in its response, the Commission opposes the complaints. It also casts doubt on the admissibility of Falck's appeal (Case C-74/00 P) and requests the removal of a number of internal Commission documents from the papers submitted by other participants in the procedure.

II — Legal background

5. According to Article 4(c) of the ECSC Treaty, aid granted by the Member States is incompatible with the common market for coal and steel and prohibited. However, Article 95 of the ECSC Treaty authorises the Commission to adopt decisions (derogations) where it becomes apparent that they are necessary to attain, in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4.

6. It was on this basis that in 1980 the Commission adopted what was known as the First Steel Aid Code, [3] which departed from Article 4(c) of the ECSC Treaty in permitting State aid in certain cases for the restructuring of the steel industry within the framework of a common policy.

7. The First Code was applicable until 31 December 1981, when it was replaced by the Second Steel Aid Code, [4] which remained in force until 31 December 1985. It was superseded by the Third Steel Aid Code, applicable from 1 January 1986 until 31 December 1988, [5] the Fourth Steel Aid Code, applicable from 1 January 1989

3 — 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 (hereinafter the 'First Code').

4 — 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 the 'Second Code').

5 — 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').

until 31 December 1991,[6] the Fifth Steel Aid Code, applicable from 1 January 1992 until 31 December 1996[7] and, finally, the Sixth Steel Aid Code, which has been applicable since 1 January 1997.[8]

8. The codes provide for a special authorisation procedure for aid in the steel sector. The Member States are required to notify the Commission of any aid by a given date. The Commission decides on the authorisation after giving interested parties an opportunity to submit their comments.[9] All codes since the Second Code have contained a provision permitting the disbursement of authorised aid only during the life of the code in force at the time (last indent of Article 2(1) of the Second Code).

9. The definition of the circumstances in which derogations are permitted has become increasingly narrow with the passage of time. Under the First and Second Codes general investment aid and, with qualifications, operating aid could still be authorised provided that it was granted within the framework of a restructuring plan. The Third and Fourth Codes, on the other hand, permitted only aid for research and development, environmental protection and closures to be authorised. Other regional investment aid provided for in general schemes could be authorised only under restricted conditions (Article 5 of the Third Code and Article 5 of the Fourth Code). Under Article 5 of the Fifth Code regional investment aid is permitted only in Greece, Portugal and the territory of the former German Democratic Republic.

III — Facts and contested decision

A — *Facts*

10. In its judgment the Court of First Instance commented on the background to the dispute as follows:

'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

6 — 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 (hereinafter the 'Fourth Code').

7 — 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').

8 — 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 (hereinafter the 'Sixth Code').

9 — See, for example, Article 6 of the Third Code and Article 6 of the Fifth Code.

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) [10] 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

10 — Hereinafter 'Decision 91/176'.

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.'

B — *Contested decision*

11. On 17 July 1996 the Commission adopted the contested decision on the basis of the Fifth Code.

12. In Article 1 of the decision the Commission states that the aid granted under Provincial Law No 25/81 is illegal as it was not notified before being granted and is

incompatible with the common market pursuant to Article 4(c) of the ECSC Treaty.

13. Article 2 requires Italy to recover the aid paid under Provincial Law No 25/81 and Decisions Nos 7673 of 14 December 1987, 2429 of 2 May 1988 and 4158 of 4 July 1988 plus interest. The interest rate is to be 'that used by the Commission to calculate the net grant equivalent of regional aid in the period in question'.

14. What the Commission had to say in the grounds of the contested decision can be summarised as follows:

15. From 1982 until 1990 ACB received the following aid under Provincial Law No 25/81:

— by Decision No 784 of 14 February 1983:

a loan of ITL 5 600 million and a non-repayable grant of ITL 8 000 million;

— by Decision No 3082 of 1 July 1985:

a loan of ITL 12 941 million;

— by Decision No 6346 of 3 December 1985:

a non-repayable grant of ITL 10 234 million;

— by Decision No 7673 of 14 December 1987:

a loan of ITL 6 321 million;

— by Decision No 2429 of 2 May 1988:

a non-repayable grant of ITL 3 750 million;

— by Decision No 4158 of 4 July 1988:

a loan of ITL 987 million and a non-repayable grant of ITL 650 million.

16. This aid was granted partly in the form of 10-year low-interest loans at 3% interest, i.e. about nine percentage points below the normal market rate in Italy at the time (12%), and partly in the form of outright grants.

17. With the exception of the loan of ITL 5 600 million none of the aid had been notified and authorised. [11] Decision 91/176 had, however, declared this aid to be incompatible with the common market because of the delay in its disbursement. Despite this, the Commission had not ordered its recovery.

18. The Commission rejected the application of the Second Code to aid granted before 31 December 1985, but also emphasised that it could not have been authorised even under the provisions of that code.

19. The Commission refrained from ordering the recovery of the aid granted before 1 January 1986 on the ground that special circumstances might have caused the Italian authorities to make an error regarding the notification requirement.

IV — Procedure before the Court of First Instance

20. ACB brought an action on 12 October 1996.

21. Falck and the Italian Republic applied for leave to intervene in support of the form of order sought by the applicant. Explaining its interest in the outcome of the action, Falck stated that, although it no longer had a participating interest in ACB, having sold its shares to Valbruna Srl, it would be under a contractual obligation to refund the purchase price at an appropriate level to the acquirer of ACB if the aid had to be recovered. The Court of First Instance saw these circumstances as sufficient justifi-

11 — In its comments on the intervention documents at first instance (footnote 2) the Commission admitted that reference had mistakenly been made to the sum of ITL 5 600 million; the correct figure was ITL 6 500 million.

cation for the interest in the outcome of the action which an intervener must assert and granted Falck leave to intervene by order of 11 July 1997. Italy was granted leave to intervene by the same order.

22. Before the hearing the Court of First Instance put a number of questions to the parties for them to answer in writing. In particular, it asked the Commission to submit the letter of 27 March 1996 in which the Italian authorities had commented on the outcome of the hearing. The Commission refused to produce the letter since it contained confidential information on the recipient of the aid, arguing that its disclosure therefore required the approval of the Italian authorities. One of the documents attached to the letter was, moreover, an internal memorandum drawn up by the Commission's Legal Service. The Court then called on the Commission to produce the letter during the hearing without the internal memorandum, or possibly with some of the text obliterated.

23. The Commission submitted the letter without the memorandum of the Legal Service at the beginning of the hearing. However, initially only the letter and Annex 1 were distributed to the parties. Because of their volume the other annexes were deposited in the Registry for inspection. During the hearing, however, Table A of Annex 5 (list of aid paid to ACB) was, after all, handed to the parties, and the procedure was interrupted for 20 minutes. Subsequently, Annex 5, Tables B, C and D (showing ACB's investments), Annex 6 (ACB's exports to Germany and the United Kingdom) and Annex 7 (letter of 3 August 1995 from the Autonomous Province of Bolzano to the Italian authorities) were also distributed, and the procedure was again suspended for an hour.

V — Pleas at first instance and the judgment of the Court of First Instance

24. ACB essentially based its action on the following pleas:

First plea: The Commission had disregarded ACB's right to a fair hearing during the administrative procedure. After being informed of the opening of the procedure pursuant to Article 6 of the Fifth Code, ACB had applied to the Commission by letters of 18 January and 28 March 1996 for an opportunity to express its views and asked what stage the procedure had reached. The Commission had then adopted the decision without answering these letters.

Second plea: The Commission had wrongly applied the Fifth Code retroactively, rather than the codes in force at the time when the

aid was granted, and it had not observed limitation periods. This was incompatible with the principles of the protection of legitimate expectations and legal certainty.

Third plea: The Commission had infringed the principles of sincere cooperation and the protection of legitimate expectations by requiring the recovery of the aid many years after it had been granted, although there were numerous factors from which ACB might legitimately have deduced that the Commission would authorise the aid. The decision transformed the belated recovery of the aid into a sanction and infringed the principle of proportionality.

Fourth plea: The Commission had not considered how far the aid had affected trade among the Member States despite ACB's limited production capacity. It had assessed the facts wrongly by failing to classify the measures in question as aid that might be authorised within the meaning of the code.

Fifth plea: The interest rate set by the Commission was indeterminable and lacked any legal basis. In addition, the Commission should have taken Germany rather than Italy as the reference market for the interest rate to be applied since ACB was active predominantly in Germany.

Sixth plea: There was no statement of reasons explaining why the Commission regarded 1 December 1985 as the date for the repayment. Nor had a comprehensible explanation been given for the setting of the interest rate.

25. The Court dismissed the objections subsequently raised by the Commission to Falck's being granted leave to intervene and reaffirmed the grounds already stated in the order of 11 July 1997 for Falck's interest in intervening in the action in support of ACB. [12] However, it dismissed the application as such.

26. As regards the *first plea*, the Court stated that, as ACB was no more than an interested party in the procedure, it could not claim to have the same right to a fair hearing as the party against whom the procedure had been instituted. ACB had had an opportunity to comment on the facts ascertained and legal assessments made by the Commission in the notice of commencement of the procedure. [13]

27. The Court rejected the *second plea* on the ground that the power conferred by the codes on the Commission to declare aid

12 — Paragraphs 32 to 35 of the contested judgment.
13 — Paragraphs 42 to 47 of the contested judgment.

compatible with the common market was limited to the time the codes were in force. The Commission could not therefore authorise notified aid on the basis of a code that was no longer in force. In the absence of appropriate legislation no time-bar should be observed in recovering aid which had not been notified. [14]

28. The *third plea* was considered by the Court primarily from the angle of the protection of legitimate expectations. It argued that, as a general rule, a recipient of aid could not claim protection of legitimate expectations if the aid had not been notified. Neither the original authorisation of the regional aid regulations in Provincial Law No 25/81 nor Decision No 91/176/ECSC could justify a legitimate expectation on ACB's part that the aid was lawful. [15]

29. Where the *fourth plea* was concerned, the Court ruled that under Article 4(c) of the ECSC Treaty, unlike the aid provisions of the EC Treaty, affecting trade between the Member States was not the decisive factor. The Commission had assessed the aid correctly on the basis of the information available to it. It had been for the Italian Government and ACB to put forward, during the administrative procedure, any information needed to justify derogations from the prohibition of aid under the Fifth Code. Falck's additional argument that the contested decision also covered aid that had already been the subject of Decision No 91/176/ECSC was dismissed by the Court on the ground that it had not been advanced by Falck and the Italian Government during the administrative procedure. [16]

30. The Court also rejected the *fifth plea*, ruling that the Commission had the authority to set the interest rate in the way it had chosen in order to eliminate the effects of the aid. No facts had been submitted during the administrative procedure to show that the interest rate should have been based on the market rate in Germany. [17]

31. The *sixth plea* alleging the lack of a statement of reasons was similarly dismissed by the Court. [18]

VI — Appeal procedure before the Court of Justice

32. By documents recorded in the register of the Court of Justice on 2 March 2000, Falck (Case C-74/00 P) and ACB (Case

14 — Paragraphs 59 to 69 of the contested judgment.
15 — Paragraphs 83 to 99 of the contested judgment.
16 — Paragraphs 111 to 142 of the contested judgment.
17 — Paragraphs 148 to 161 of the contested judgment.
18 — Paragraphs 160 to 176 of the contested judgment.

C-75/00 P) brought appeals against the judgment of the Court of First Instance. One of their complaints is that the Court of First Instance committed a procedural error by failing to give them sufficient opportunity to examine the documents submitted during the hearing. They also enter other pleas which refer to errors by the Court in the legal assessment of the decision. The pleas are reproduced in conjunction with their legal assessment.

33. Falck claims that the Court should:

1. Set aside the judgment of the Court of First Instance of the European Communities in Case T-158/96 between Acciaierie di Bolzano SpA and Commission of the European Communities (Italian Republic and Falck SpA, interveners);

2. By so doing, annul Commission Decision No 96/617/ECSC.

In the alternative:

3. In the event that the Court should consider that it cannot make a decision as to the status of the measure, set aside the judgment of the Court of First Instance and refer the case to another Chamber of the Court of First Instance, indicating the points of law upheld in the present appeal.

In any event:

4. Make any other decision it may deem necessary.

5. Order the Commission to pay the costs.

34. ACB makes the same claims as Falck under 1 to 3 above and claims further that the Court of Justice should:

4. Make any other decision it may deem necessary, even in the context of the evidentiary procedure.

5. Order the Commission to pay the costs, including those incurred at first instance.

35. The Italian Republic supports the appellants in its response. It claims that the Court of Justice should:

1. Allow the appeals brought by ACB and Falck, in any event grant the forms of order sought by the Italian Government at first instance and annul the contested judgment in its entirety.

2. In the alternative, grant the alternative forms of order sought by ACB and Falck.

3. Order the Commission to pay the costs.

36. The Commission opposes the substance of the appeals. In addition, it expresses doubts about the admissibility of the appeal brought by Falck. It also asks the Court of Justice to remove from the papers two internal documents possibly prepared by its services and an internal memorandum drawn up by its Legal Service. The Commission claims that the Court should:

1. Dismiss the appeals of Falck and ACB.

2. Order the appellants to pay the costs.

VII — Legal assessment

A — *Admissibility of the appeal brought by Falck (Case C-74/00 P)*

37. The Commission expresses doubts about the admissibility of Falck's appeal on two grounds: firstly, it is questionable whether Falck was directly affected by the contested decision of the Court of First Instance within the meaning of the second sentence of the second paragraph of Article 49 of the ECSC Statute; secondly, it is doubtful that Falck was competent to bring an appeal since it was not an undertaking within the meaning of Article 80 of the ECSC Treaty.

(1) As regards Falck being directly affected

38. Pursuant to the second sentence of the second paragraph of Article 49 of the ECSC Statute, private individuals who were interveners at first instance may bring appeals only where the decision of the Court of First Instance directly affects them.

39. The Commission takes the view that the term 'directly affects' is similar in

meaning to the wording of Article 230 EC. Accordingly, the Court's contested decision should affect the appellant in the same way as anyone who might contest a decision addressed to a third party. A typical situation would be one in which a favourable decision was annulled by the Court; the party favoured by the decision, having been an intervener on behalf of the defendant at first instance, was directly affected by the Court's annulment of the decision and could bring an appeal. In this case the judgment intruded directly on the appellant's rights.

40. The Commission maintains, however, that Falck has been affected by the judgment no more than indirectly since the liability which Falck claimed it had to the company that had acquired ACB did not stem directly from the Court's judgment but from the private-law arrangements between the undertakings.

41. Falck objects that, as the Court had given it leave to intervene and so recognised its interest in the outcome of the action, it was directly affected by the judgment and might bring an appeal against it.

42. From the wording of the Statute it is very difficult to determine when a decision of the Court directly affects an intervener within the meaning of the second sentence of the second paragraph of Article 49 of the ECSC Statute. Nor, as far as can be seen, has the Court of Justice yet considered this question. In its judgment in Case C-265/97 P, [19] which is cited by the Commission, the Court of Justice ruled on the substance of the appeal brought by an intervener without considering the admissibility requirements in any greater detail.

43. Not every natural or legal person having an interest in the outcome of the action, as required for leave to intervene, is directly affected by the Court's decision. Otherwise, the additional restriction of the power of non-privileged interveners to bring appeals would be superfluous. [20]

44. It is evident from Articles 115 and 116 of the Rules of Procedure that an intervener at first instance is automatically a party to an appeal procedure before the Court of Justice and may seek orders of his own in the response. [21] In particular, he may, as in an appeal of his own, apply for the annulment of the Court's decision without having to demonstrate that that decision directly affects him. This shows, on the one hand, that a former intervener who has not brought an appeal himself has extensive

19 — Judgment in *VBA* v *Florimex and Others* [2000] ECR I-2061.

20 — See Dauses/Henkel, 'Streithilfe durch natürliche oder juristische Personen in Verfahren vor dem EuGH und EuG', *Europäische Zeitschrift für Wirtschaftsrecht 2000*, 581, 585.

21 — For a detailed discussion of the role of the intervener at first instance in the appeal procedure see the judgment in Case C-390/95 P *Antillean Rice Mills* v *Commission* [1999] ECR I-769, paragraph 20 et seq.

powers during the appeal procedure. On the other hand, he may assert these rights only if a third party has taken the initiative and brought an appeal.

45. The criterion of being directly affected thus helps to limit the power to take the initiative and so serves much the same purpose as the requirements set out in the fourth paragraph of Article 230 EC as regards the competence of private individuals to institute proceedings. It limits the circle of persons entitled to contest rulings to those who have some proximity to the Court's decision extending beyond the interest in the outcome of the action which is sufficient for leave to intervene.

46. However, the terminology of the second sentence of the second paragraph of Article 49 of the ECSC Statute differs from that used in the fourth paragraph of Article 230 EC. For one thing, the criterion of being directly affected is missing: the former intervener is sufficiently individualised by his participation in the procedure at first instance. For another, the decision taken at first instance must 'directly affect' the non-privileged intervener rather than 'be of direct and individual concern' to him. From this it can be inferred that the authors of the Statute did not want to attach the same importance to the criteria in each case.[22] It should also be remembered in this context that the admissibility of an action for annulment brought by a private individual pursuant to the second paragraph of Article 33 of the ECSC Treaty, which would be the correct standard for comparison in this case, does not in any way presuppose that the applicant is directly affected.[23] The difference in the terms used also demonstrates that what is important in determining whether an appeal is admissible is the effect of the contested judgment and not primarily whether the party concerned has been affected by the act of the body which is the subject of the dispute.

47. In the example given by the Commission the former intervener is undoubtedly directly affected by the decision of the Court of First Instance.[24] Where a favourable decision is annulled by the Court, a party benefiting from that decision who intervened in support of the defendant may appeal since the annulment pronounced by the Court results directly in the removal of the benefit enjoyed by that party.

48. The question is whether a judgment in which, as in the present case, the Court of First Instance dismisses an action against a disadvantageous decision is capable of having equivalent direct legal consequences for the party intervening in support of the applicant. It might be argued that it is not,

22 — See Dauses/Henkel (cited in footnote 20).

23 — See the judgment in Case 30/59 *Gezamenlijke Steenkolenmijnen v High Authority* [1961] ECR 1, 39.

24 — See, for example, Friden, 'Quelques réflexions sur la recevabilité d'un pourvoi contre un arrêt du Tribunal de première instance', *Revue des Affaires Européennes* 2000, 231, 233.

in this case, the judgment which affects the intervener but the still valid decision, which the intervener should have challenged with an action for annulment. [25]

49. Until the completion of the proceedings, however, the Court's decision is not legally enforceable. Even if it is assumed that the legislative measure is valid, all legal consequences of the decision are merely of a provisional nature until that stage. In this case, the judgment has the effect, on the one hand, of consolidating the legal situation created by the contested decision. In addition, the Court of First Instance makes statements of fact and in law which may constitute separate infringements of the former intervener's rights. This is especially true of the intervener's procedural rights in the procedure at first instance.

50. If, as a matter of principle, the intervener was denied the competence to appeal against a judgment dismissing an action on the ground that he could have eliminated the effects of the decision by bringing his own action for annulment, he would be deprived of the possibility of independently asserting these infringements of his rights. The decision confirmed by the Court would be conclusively incontestable, and no subsequent action could be taken to correct any procedural errors to the intervener's disadvantage.

25 — As Friden would probably agree (cited in footnote 24).

51. When the admissibility of the appeal is considered, account must thus be taken both of the effects which the decision at issue has already had and which have been consolidated by the judgment and of any separate infringements of rights due to the judgment at first instance. Falck's rights should have been affected directly, i.e. without the need for further intermediate steps or actions by third parties.

52. The contested decision is addressed to the Italian Republic. It requires that the aid granted to ACB be recovered by Italy in accordance with the legislation applicable in Italy concerning the collection of debts to the State, without granting Italy any discretion. As the recipient of the aid to be recovered, ACB is thus first affected and was therefore rightfully granted leave to bring an action before the Court of First Instance against the Commission's decision. [26]

53. It follows from Article 8.01(i) of the contract between Falck and Valbruna Srl

26 — The decision does not, however, provide from whom Italy must recover the aid. Depending on the form that national legislation takes, it would even be conceivable for a claim to be brought against Falck, since the aid might have increased ACB's value and, accordingly, the proceeds from the sale of Falck's shares. Ultimately, then, Falck would thus have been enriched by the aid. Falck also accepted liability to the acquirer for any changes to liabilities. For a similar set of circumstances see the judgment in Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 38 et seq. However, there are no indications in the documents in the case that the Italian authorities intend to make a claim directly against Falck.

that, as the vendor, Falck is liable for any changes to the liabilities as compared to the closing balance sheet. Before the adoption of the contested decision, Falck thus undertook to refund some of the purchase price if aid had to be repaid. This civil-law claim arises automatically with the occurrence of this eventuality. As the contested decision requires Italy to recover the aid, the eventuality can be deemed to have occurred. Nor is there any sign of factors — such as a time-bar — that might obstruct Valbruna's claim. The occurrence of the obligation to pay does not, after all, depend on further action by third parties, and especially not on Valbruna's assertion of the claim in or out of court, but follows directly from the contract. The judgment, which confirms that the decision has this effect, therefore affects Falck directly.

54. Falck further asserts among other things that the Court of First Instance infringed the principle of the right to a fair hearing by failing to give Falck sufficient opportunity to comment on the documents submitted by the Commission during the hearing. Assuming that the alleged infringement of procedural rights is correct and had an effect on the judgment, this alone would have constituted direct intrusion on Falck's rights, entitling it to bring an appeal.

(2) Absence of the quality of undertaking within the meaning of the ECSC Treaty

55. The Commission takes the view, secondly, that Falck is not competent to bring an appeal because it is not one of the economic operators on which rights are conferred by the ECSC Treaty. In particular, the second paragraph of Article 33 of the ECSC Treaty restricts the right to bring actions to undertakings and associations within the meaning of Articles 80 and 48 of the ECSC Treaty.[27] The competence to appeal could not go further.

56. The Court of Justice and the Court of First Instance have ruled in the decisions cited by the Commission that Article 33 of the ECSC Treaty provides an exhaustive list of those entitled to bring actions. An undertaking within the meaning of the ECSC Treaty is, pursuant to Article 80, any undertaking engaged in production in the coal or steel industry and, in the context of Articles 65 and 66 of the ECSC Treaty, trading firms in these sectors.

57. As already stated, the judgment of the Court of First Instance may entail intrusion on the intervener's rights, and especially his

27 — To this end, the Commission refers to the judgments in Case 12/63 *Schlieker* v *High Authority* [1963] ECR 187, Case 222/83 *Municipality of Differdange* v *Commission* [1984] 2889, paragraphs 8 and 9, and order of the Court of the Court of First Instance in Case T-70/97 *Région wallonne* v *Commission* [1997] ECR II-1513, paragraphs 22 and 23.

procedural rights. The competence to bring an appeal does not therefore necessarily depend on the appellant also being competent to bring an action pursuant to the second paragraph of Article 33 of the ECSC Treaty. In this respect, the second sentence of the second paragraph of Article 49 of the ECSC Statute gives a separate definition.

58. To the extent that Falck relies on the infringement of the principle of being given a fair hearing by the Court of First Instance, it is affected irrespective of whether it is a steel undertaking within the meaning of the ECSC Treaty. However, Falck does not confine itself to a complaint about this procedural error. It must therefore be considered whether Falck is also affected by the judgment of the Court of First Instance in so far as that judgment consolidates the effects of the Commission's decision.

59. Falck should in any case be deemed to have been affected if at the decisive time it was an undertaking within the meaning of the ECSC Treaty and was affected by the decision in that capacity. Although the papers relating to the case do not provide any clearer indication whether Falck is, or has been, engaged in production in the steel sector and so meets the requirements of Article 80 of the ECSC Treaty, the parties appear to agree that Falck should be deemed to have been a steel undertaking until the sale of ACB.

60. The Commission has stated without contradiction that Falck ceased to be a steel undertaking on the sale of ACB on 31 July 1995. It therefore needs to be asked when Falck must still have been a steel undertaking in order to be able to complain in its appeal about the Court's assessment of the decision.

61. The contested decision concerns aid which was disbursed when Falck still controlled ACB and was undeniably to be regarded as a steel undertaking. Falck's financial liability in the event of the aid being recovered results from its position at that time. The effects of the contested decision and therefore the effects of the Court's judgment confirming the decision are thus linked to Falck's position as a steel undertaking. The principle of comprehensive legal protection requires that Falck be able to oppose the continuation of these effects by bringing an appeal even though it has meanwhile ceased to be an undertaking within the meaning of Article 80 of the ECSC Treaty. [28]

B — *The Commission's application for the removal of internal documents from the papers of the proceedings*

62. The Commission opposes the disclosure of three documents copies of which

28 — See judgment of 10 January 2002 in Case C-480/99 P *Plant* v *Commission* [2002] ECR I-265, paragraph 44.

have been attached by ACB to its appeal as Annex B and by Falck to its appeal as Annex B 4, 5 and 6 and requests their removal from the papers relating to the case.

63. ACB had already introduced the same documents at first instance as an annex to its written answers to the Court's questions. One of these documents is an internal memorandum of 18 July 1990 from the Legal Service, which was also attached to the letter of 27 March 1996 from the Italian authorities to the Commission, while the other two are tables showing aid granted in the steel sector, their authors not being apparent from the documents themselves. The appellants maintain that the records originated from Commission services. In their view, the documents show in particular that the Commission has itself taken the position that the code applied to aid should always be that in force at the time it was granted.

64. The Commission is unable to confirm either the significance or the origin of the two 'anonymous' documents last referred to. It submits that, if, however, they were indeed internal Commission documents, the appellants had failed to explain, as in the case of the memorandum from the Legal Service, how they came into their possession. The documents should therefore be removed from the papers along with the references to them in the appeals.[29] The Commission could to this extent claim that its internal consultations were confidential.

65. As regards the two 'anonymous' documents, it should be said that it has not been made entirely clear whether they were in fact drawn up by the Commission's services. They reveal neither their authors nor their quality. Nor have the appellants provided any more accurate information as proof of their origin. The documents do not therefore allow of any conclusions with respect to any legal views which the Commission might have.

66. However, until it has been determined that they are in fact internal Commission documents, the Commission cannot claim that they are confidential and demand their removal from the papers. Nor is there any need at all for their removal since the unclear nature of their authorship means that they lack all validity.

67. The situation in the present case differs in this respect from the circumstances which the Court of Justice was required to assess in the *Ludwigshafener Walzmühle* case cited by the Commission, where there was no disputing that the document in

29 — The Commission refers in this context to the judgment in Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle* v *Council and Commission* [1981] ECR 3211, paragraph 16.

question had been drawn up by the Commission. All that was unclear was whether it was a draft or the final version of a report from the Commission to the Council. In this case the Commission was therefore able successfully to refer to the confidential nature of internal documents drawn up by its services and insist on their removal from the papers of the case, since the appellants were unable to demonstrate how they had come into their possession.

68. The memorandum from the Commission's Legal Service differs from the 'anonymous' documents in that the Commission may in principle require its removal from the papers relating to the case if it is not obliged to disclose it and if it was not published by the Commission itself or with its approval.

69. In the order he issued as an interim measure in the *Carlsen* case [30] on the obligation to grant access to opinions of the Council's Legal Service the President of the Court of First Instance stated:

'Consequently, given the special nature of the two documents in question, it prima facie appears that the grounds put forward by the defendant institution, namely, the requirement of ensuring "maintenance of legal certainty and stability of Community law" and also of ensuring that "the Council [is] able to obtain independent legal advice" must be regarded as legitimate...'

70. Advocate General Jacobs similarly took the view that opinions of the Council's Legal Service do not need to be disclosed because this would be inconsistent with the public interest in independent legal advice. [31]

71. The Court explicitly reaffirmed this legal view in the *Ghignone* case with a reference to the *Carlsen* order and to Advocate General Jacobs's aforementioned Opinion and ruled that the Commission may therefore require the removal of opinions of the Legal Service from the papers of the proceedings. [32]

72. This view is to be endorsed. As a rule, an opinion of the Legal Service is intended (only) to prepare the way for the decision to be taken by the institution concerned, indicating the legal risks inherent in the various options available. The Legal Service could no longer discuss these risks

30 — Order of 3 March 1998 in Case T-610/97 *Carlsen and Others* [1998] ECR II-485, paragraph 47.

31 — Opinion of 9 March 1995 in Case C-350/92 *Spain* v *Council* [1995] ECR I-1985, point 35, with reference to the judgment of the Court of Justice in Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, paragraph 18 et seq., which, however, concerned the confidentiality of the advice given to an undertaking by its lawyer.

32 — Judgment in Case T-44/97 *Piera Ghignone and Others* v *Council* [2000] ECR II-1023, paragraphs 47 and 48.

freely if its opinion had to be made accessible to the public. Only if the aim is to prove through an inspection of internal documents that the Commission has abused its discretionary powers, which has not, however, been argued in the present case, might the obligation to disclose internal documents exceptionally go further. [33]

73. In principle, the Commission may therefore require the removal of a document of this kind from the court papers. Other rules apply only where it has forgone confidentiality by itself publishing the document, for example, or by agreeing to its publication by a third party.

74. It may not be inferred solely from ACB's evident access to the document that the Commission has published the opinion or otherwise forgone confidentiality, since ACB has not explained how the document came into its possession. The possibility that it was made public without the Commission's consent — through the indiscretion of one of its officials, for instance — cannot therefore be ruled out. This is not to say, however, that ACB came by the document by dishonest means.

33 — See the order of 18 June 1986 in Joined Cases 142/84 and 156/84 *BAT* v *Commission* [1986] ECR 1899.

75. Although the Commission refused before the Court of First Instance to disclose the memorandum itself, it did not demand that the copy submitted by ACB be removed from the Court's papers despite having the opportunity to do so during the hearing. It thus accepted the fact that the memorandum had found its way into the papers of the proceedings at first instance. Even if this does not constitute explicit approval of publication by ACB, the Commission may no longer require during the appeal procedure the removal of a document which has already found its way into the papers of the proceedings at first instance without opposition and so become the basis of the judgment.

76. If subsequent removal from the papers of the proceedings at first instance is ruled out, there is no reason for the same document, submitted anew during the appeal procedure, now to be removed from the papers of the Court of Justice. Pursuant to Article 111(2) of the Rules of Procedure, the Registry of the Court of First Instance transmits to the Court of Justice the papers in the case at first instance after an appeal has been brought. It follows that the contents of these files and thus the opinion of the Legal Service contained therein already form part of the files relating to the proceedings before the Court of Justice.

77. The Commission's request that the opinion of the Legal Service submitted by ACB also be removed from the papers should therefore be rejected.

C — *The various pleas*

78. As the two appeals are essentially based on the same grounds, they can be discussed together. The pleas concerning the infringement of procedural rights during the hearing before the Court of First Instance and during the administrative procedure should be considered first. This will be followed by an examination of the pleas in which complaints are made about the choice of legal basis and the assessment of the facts with regard to the requirements set out in the aid legislation. Thirdly and finally, the pleas in which the appellants oppose the recovery of the aid need to be considered.

(1) Infringement of the right to a fair hearing during the oral procedure before the Court of First Instance

(a) Arguments of the parties

79. The appellants assert that the Court of First Instance committed a procedural error by not giving them sufficient opportunity to examine and comment on the letter and attachments of 27 March 1996 from the Italian Government, which were not disclosed until the hearing. The Court neither re-opened the hearing nor reproduced the appellants' views in this regard in the judgment. They therefore apply for the record of the hearing to be included in the papers of the proceedings by means of a measure of organisation of procedure.

80. The Commission points out that the appellants did not apply for the hearing to be re-opened. Such an application would, however, have had a chance of succeeding only if the applicants had advanced decisive arguments which they could not have advanced before the hearing was closed.

(b) Appraisal

81. Pursuant to the second sentence of Article 51(1) of the ECSC Statute, an appeal may be based on a procedural error which has an adverse effect on the appellant's interests. Of particular importance in this respect is whether the procedural error resulted in an infringement of the appellants' right to a fair hearing.[34] Although the Italian Government's letter of 27 March 1996 is mentioned in paragraphs 126, 131 and 138 of the contested judgment, the appellants have not shown how

34 — See the order of 25 January 2001 in Case C-111/99 P *Lechstahlwerke* v *Commission* [2001] ECR I-727, paragraph 36.

relevant the documents submitted during the hearing were to the Court's decision. Nor do they state what other arguments they could have advanced if they had been familiar with the documents in good time.

82. Article 62 of its Rules of Procedure permits the Court of First Instance to re-open a hearing. It has reason to do so, however, only if circumstances of vital importance for the outcome of the action become known so late that the parties are no longer able to comment on them during the hearing. As the Court did not see any obvious evidence of this, it did not re-open the hearing of its own motion. Nor did the appellants claim the existence of such circumstances by making an appropriate application.

83. The complaint about the infringement of the right to a fair hearing during the procedure before the Court should thus be rejected, there being no need for further consideration of whether the way in which the documents were disclosed during the hearing was consistent with the proper conduct of proceedings. There is consequently no need during the appeal procedure for any procedural measures to clarify further the course of the hearing before the Court of First Instance.

(2) Infringement of the right to a fair hearing during the administrative procedure before the adoption of the decision

(a) Arguments of the parties

84. The appellants are of the opinion that the Court of First Instance was wrong to rule that ACB's right to a fair hearing and the *audi alteram partem* rule had not been infringed during the administrative procedure. They maintain that it should have taken into account the fact that by letters of 18 January and 28 March 1996 ACB expressed the need to be consulted and had asked what stage the procedure had reached. The Commission had a duty to reply to these letters and to ask for information in order to fulfil its obligation to clarify the situation.

85. Although ACB had thus not been, in the appellants' view, properly involved in the administrative procedure, the Court of First Instance accused it and Falck of not providing the Commission with information on various points. If those concerned had been consulted, the Commission's decision would have taken a different form because ACB and Falck could then have commented on the points in question during the administrative procedure.

86. Italy submits that, although the administrative procedure was addressed to the Member State, the recipients of aid whose rights the procedure affected should also have an opportunity to comment. Provision was made for this in Article 6(4) of the Fifth Code and the corresponding provisions of the other codes. The right to a fair hearing would be eroded if in the order on the opening of the formal procedure the Commission was able to confine itself to calling on the parties to state their position. At all events, the Commission should have answered ACB's letters.

87. The Commission begins by stating in general terms that the appellants failed to take advantage of the opportunity to comment during the administrative procedure. In the proceedings before the Court of First Instance they could not therefore rely on facts which they might have submitted during the procedure before the Commission. The Commission was under no obligation to undertake an examination of its own motion of complaints which private individuals might have lodged. [35]

88. The only complaint voiced before the Court of First Instance had concerned the infringement of ACB's right to fair hearing. The complaint about Falck's rights, as well, which had been made only during the appeal procedure, was inadmissible.

89. As the decision concerning the aid was addressed to the Member States, the Commission had to conduct an inter partes procedure only with them. Nor did Council Regulation (EC) No 659/1999 of 22 March 1999 on detailed rules for the application of Article 93 of the EC Treaty (hereinafter 'Regulation No 659/1999') [36] provide for anything more than that parties other than the Member State concerned should be given an opportunity to state their position when the formal procedure was opened.

(b) Appraisal

(aa) Admissibility of the complaint about the infringement of Falck's right to a fair hearing

90. It should first be said that — contrary to the Commission's contention — Falck, following on from the corresponding complaint made by ACB, had already asserted in its statement in intervention at first instance (paragraph 1(a) on page 2) that its right to a fair hearing had been

35 — The Commission refers to the judgment in Case C-367/95 P *Commission* v *Sytraval and Others* [1998] ECR I-1719, paragraph 60.

36 — OJ 1999 L 83, p. 1.

infringed. This argument is therefore admissible.

(bb) Right to be heard [37]

91. The ECSC Treaty does not contain a provision equivalent to Article 88 EC on the procedure for the examination of aid, since Article 4(c) prohibits the grant of aid by the Member States without exception. Departing from this, the Steel Aid Codes permit aid under certain conditions. Pursuant to Article 1(3) in conjunction with Article 6 of the Fifth Code, any aid must be notified to and authorised by the Commission before it is granted. [38] Article 6 of the Fifth Code gives a more detailed definition of the authorisation procedure, including the consultation of the Member States and other interested parties. The first sentence of Article 6(4) reads:

'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.'

92. This provision, on which the Commission based its notice of commencement of the procedure (published in the Official Journal of 22 December 1995), defines the right of the parties to be heard in words similar to those used in Article 88(2) EC. The parties include, in particular, the recipient of the aid. [39] However, Article 6 of the Fifth Code primarily concerns the procedure for notifying and examining aid that has not yet been granted. It is not entirely clear how far this provision also applies to aid which has not been notified but has already been granted. [40]

93. This question can, however, be left unanswered at this stage, since the Court of Justice has ruled in settled case-law that 'observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which

37 — The parties and the Court of First Instance use the Italian term 'diritti della difesa'. The French and English versions of the contested judgment refer, respectively, to 'droits de la défense' and 'right to a fair hearing'. These terms are usually translated into German as 'Anspruch auf rechtliches Gehör', although the literal translation of the German term would actually be 'droit d'être entendu' or 'right to be heard'. In the German version of the contested judgment, however, the Court of First Instance considers an infringement of 'Rechte der Verteidigung'. It is not absolutely clear whether the different terms are also based on different substantive concepts of this procedural principle. In the following the wider term 'Anspruch auf rechtliches Gehör' in the sense of 'droit d'être entendu' or 'right to be heard' will be used.

38 — The Sixth Code and the earlier codes contain corresponding provisions.

39 — For rulings by the Court of Justice on Article 88(2) EC see the judgments in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16, and Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175, paragraph 31.

40 — See paragraphs 140 and 141 below.

must be guaranteed even in the absence of specific rules.' [41] Inasmuch as Article 6(4) of the Fifth Code represents an applicable provision of secondary law, it should at all events be interpreted in the light of the general principle of law.

94. In paragraphs 44 and 45 of the contested judgment the Court of First Instance, referring to its decision in Joined Cases T-371/94 and T-394/94 (*British Airways and Others*), [42] states, on the one hand, that no provision requires the recipient of aid to be consulted and that the recipient cannot claim the right to be heard which is enjoyed by individuals against whom a procedure has been instituted. On the other hand, the recipient has the right to be involved in the procedure to the extent appropriate in the light of the circumstances of the case.

95. Viewed together with the *British Airways* judgment, this statement might be taken to mean that only the party to whom the decision is addressed has a right to be heard, while informing other parties is a kind of investigative measure that helps the Commission to glean further information from the comments then made. If this approach is taken to its logical conclusion, the Commission might in certain cases refrain completely from informing the parties unless there were specific rules on the subject and if the Commission already had enough information. This view of the law would not, however, be consistent with the principle of a fair hearing.

96. The right to be heard is an individual right to which everyone whose rights or legally protected interests are affected by the planned decision is entitled. Thus the Court of Justice has ruled in the judgments cited [43] that a fair hearing is to be granted to those who may be affected by a disadvantageous decision adopted during the procedure. Although this ruling referred to the Member State to which such a decision was addressed, the recipient of aid considered by the Commission to be incompatible with the common market is also affected, for if the Commission's initial assessment is confirmed, the procedure usually culminates in a decision requiring the recovery of aid that leaves nothing to the Member State's discretion. It directly affects the legal position of the recipient of the aid, who is therefore entitled to bring an action pursuant to Article 33(2) of the ECSC Treaty or the fourth paragraph of Article 230 EC, even though the decision is not directed to him.

41 — Judgment in Case 142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 46, ('*Tubemeuse*'); see also the judgments in Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 27, and Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 99.

42 — Judgment in Joined Cases T-371/94 and T-394/94 *British Airways and Others* [1998] ECR II-2405, paragraph 60.

43 — See footnote 41.

97. The view taken by the Court of First Instance that the communication is merely of an informative nature and is not required by the principle of a fair hearing is based primarily on a statement by the Court of Justice in its judgment of 12 July 1973,[44] in which it adopted a position on the question whether a legitimate expectation that aid is lawful lapses at the time of the publication in the Official Journal of the notice of commencement of a procedure for the review of aid that has already been granted. It refused in effect to deduce such legal implications for the individual from the communication. The ruling cited thus arose in a completely different context and does not concern the right to be heard.

98. The right to be heard materialises in positive law in the fact that the recipient of aid concerned obtains the opportunity on the opening of the review procedure pursuant to Article 6(4) of the Fifth Code or of the procedure defined in Article 88(2) EC to comment on these circumstances. The Court of Justice refers explicitly to the procedural guarantees which Article 88(2) EC grants to the parties.[45] Advocate General Tesauro also points out in his Opinion in the *Cook* case[46] that the formal procedure under Article 88(2) EC is intended not only to ensure clarification but especially to give the parties a fair hearing.

99. If the recipient of aid is to be able to assert his position in relation to the Commission, he must be informed of the essential considerations which have led the Commission to open the procedure. He must be able to 'comment' on these considerations within a period specified by the Commission.

100. It does not follow from the principle of a fair hearing, on the other hand, that the recipient of aid enters into a dialogue with the Commission or that he may comment in *inter partes* proceedings on the arguments of the Member State which has granted the aid or of other parties. The Court of First Instance may be taking 'hear' in paragraph 44 of the contested judgment to mean precisely such wider involvement and therefore refusing to accept — rightly, if this is so — that the recipient of aid has any entitlement in this regard.

101. That a recipient of aid is not to be involved in the procedure in the same way as the Member State concerned follows, on the one hand, from the fact that the

44 — Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19.

45 — Judgment in *Commission* v *Sytraval* (cited in footnote 34, paragraph 40).

46 — Opinion of 31 March 1993 in Case C-198/91 on the essential facts and the Commission's legal considerations (*Cook* v *Commission* [1993] ECR I-2487, I-2502, paragraph 14).

subject-matter of the procedure is a measure taken by the Member State. [47] It is to be expected that the party who has granted the aid is most likely to be able to provide information on the factual and legal background and on his considerations as regards the support measure. It is therefore for him to explain and justify his actions in relation to the Commission, possibly cooperating in practice with the recipient of the aid. The Commission's decision is, after all, addressed to the Member State. [48]

102. On the other hand, there are also practical factors which argue against the Member State and the recipient of aid being placed on an equal footing in the procedure before the Commission. Frequently — and especially in the case of general aid schemes — a large circle of undertakings receive aid. Furthermore, not only the recipients of aid are to be heard as interested parties but also their competitors and associations. Finally, there may be lengthy negotiations between the Commission and the Member State. If all interested parties were to be given the right to be involved at any stage in the same way as the Member State concerned, considerable expense would be incurred and unacceptable delays in the procedure would result. The Court of First Instance therefore rightly ruled in the contested judgment that the recipient of aid does not enjoy the same procedural rights as the Member State concerned.

103. It follows from the same considerations that a recipient of aid cannot expect to be invited by the Commission to comment individually. It is enough for the Commission to publish a communication in the Official Journal setting out the main considerations that led it to initiate the procedure and giving those concerned an opportunity to comment. [49] This is true, at least, when the recipient of aid is an economic operator who can generally be expected to take note of relevant publications in the Official Journal.

(cc) Observance of the right to a fair hearing in the present case

104. The Commission observed the principles listed here when carrying out the procedure.

105. The communication printed in Official Journal C 344 of 22 December 1995

47 — With regard to Article 88(2) EC see the Opinion of Advocate General Lenz of 17 September 1993 in Case C-313/90 *CIFRS and Others* v *Commission* [1993] ECR I-1125, I-1148, paragraph 64. Article 6(4) of the Fifth Code does not, however, explicitly provide for the Member State's involvement (see paragraph 140 below). Nor does it contain general procedural rules for the ECSC sphere equivalent to those found in Regulation No 659/1999.

48 — Judgment in *Commission* v *Sytraval*, cited in footnote 35, paragraph 45.

49 — Judgment in *Intermills* v *Commission* (cited in footnote 39, paragraph 17).

reproduces the letter of 1 August 1995 addressed to Italy and specifies the considerations of fact and of law on which the Commission took as its basis. Interested third parties were unambiguously allowed a period of one month from the publication of the communication to comment on the measures in question. It can also be seen from the communication in the Official Journal that any opinions expressed by interested third parties would be brought to the attention of the Italian Government. From this it is also clear that comments were to be made in the form of written opinions and not through (oral) hearings.

106. As undertakings in the steel industry, both Falck and ACB have the necessary experience. In addition, they have previously been granted aid that was the subject of procedures before the Commission. ACB also learnt of the publication in good time, as is evident from its letter of 18 January 1996, in which it makes explicit reference to the communication. Despite this, both ACB and Falck failed to explain their positions to the Commission although they had the opportunity to do so.

107. However, ACB appears to have mistakenly assumed in its letters of 18 January and 28 March 1996 [50] that it was entitled to participate in the continuing procedure. The question is what consequences the Commission's failure to answer these letters has.

108. The principle of proper administration requires that authorities answer letters addressed to them. The Commission might, for example, have referred to the opportunity to comment already provided by the communication and explained to ACB that no provision was made for the continued involvement of the recipient of aid in the procedure. ACB could then have made its comments — possibly with apologies for the delay. The lack of courtesy in failing to answer the letter should undoubtedly be criticised.

109. However, the principle of proper administration does not extend so far as to impose on the Commission a legal obligation to explain a possible error in law to ACB. The general obligation to answer letters is not so closely linked to the procedural guarantees enjoyed by the recipient of aid that failure to fulfil it can lead to the annulment of the decision.

110. The Court of First Instance was therefore in the result right in finding that the Commission did not infringe ACB's and Falck's right to be granted a fair hearing. The first plea should therefore be rejected.

50 — See paragraph 13 of the contested judgment, quoted in paragraph 10 above.

(dd) Consequences for the Commission's obligation to provide information and the admissibility of the submission of new facts before the Court of First Instance

111. The procedure pursuant to Article 6(4) of the Fifth Code is intended to make the Commission familiar with all the elements of fact and all the legal arguments it needs to be able to take a decision impartially and with due regard for all points of view and to reason its decision accordingly. [51]

112. If, as the procedural rules provide, the Commission has given the parties concerned an opportunity to comment and they have failed to take advantage of this opportunity, it has fulfilled its obligation to investigate the matter. It is not in normal circumstances obliged to obtain further information from them. It can indeed infer that the assumptions of fact on which it has based its notice of commencement of the procedure are correct. Only if an interested party counters these assumptions with substantiated arguments is the Commission required to make further investigations. ACB's mere contention in its letter of 18 January 1996 that there was a need for it to be heard, without stating any specific reasons, is not capable of substantiating a need for further information.

113. The Commission's view is that the appellants ought to have contested before the Court of First Instance their non-participation in the administrative procedure. As the Court of Justice ruled in its judgment of 14 December 1994, [52] a Member State may not rely in court on elements of fact which it had not put forward during the administrative procedure. This is equally true of interested third parties.

114. Placing interested third parties on a par with the Member State concerned with respect to the exclusion of new submissions in court is not, however, justified since, as already explained, third parties do not enjoy the same rights during the administrative procedure as the party at whom it is directed. While the Member States may enter into a dialogue with the Commission and also comment on the opinions of other Member States and third parties, [53] other interested parties have only one opportunity to comment within a brief period (in this case, one month) after the opening of the procedure under Article 6(4) of the Fifth Code.

51 — With regard to Article 88 EC see the Opinion of Advocate General Tesauro in *Cook* v *Commission* (cited in footnote 46, paragraph 15) with reference to the judgment in Case C-269/90 *Technische Universität München* [1991] ECR I-5469.

52 — Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31.

53 — This appears, at least, to be the Commission's practice in the ECSC sphere, despite the absence of appropriate provisions in positive law.

115. Requiring them to explain themselves fully during the administrative procedure for the sole reason that they have this opportunity is unjustified. It must be remembered in this context that the only source of information available to interested third parties is the Commission's notice of commencement of the procedure. For this reason interested parties are not therefore in principle prevented from putting forward new facts in court. However, the principle is that the Commission should take its decision on the basis of the facts known to it at the time of the decision applies. [54] If the recipient of aid believes the facts on which the Commission bases the notice of commencement of the procedure to be incorrect, he has a duty to counter these assumptions with substantiated arguments during the administrative procedure. If he does not seize this opportunity, he cannot accuse the Commission during the court proceedings of basing the decision on erroneous facts.

(3) Legal basis of the contested decision

(a) Arguments of the parties

116. The appellants complain that the Court of First Instance did not object to the Commission's use, without further explanation, of the Fifth Code as the legal basis of the contested decision rather than the earlier codes in force at the time when the aid was granted. The Court had focused on the limited period the codes were in force and failed to recognise the fact that the system of the original prohibition under Article 4(c) of the ECSC Treaty had been transformed, following a practice of 20 years, into a lastingly regulated admissibility of certain kinds of aid. Regardless of the procedural rules applicable when a decision was adopted, the code to be referred to in terms of substantive law was the one in force at the time when the aid was granted. This was also the view of the law taken by the Commission's Legal Service in its internal memorandum of 18 July 1990. The retroactive application of the Fifth Code infringed the principles of legal certainty and of 'tempus regit actum'.

117. Falck points out that, while the Commission had not based Decision 91/176 on the code in force at the time when the aid was granted, it had at least based it on the code applicable when the aid was disbursed. The application of the code in force when the decision was adopted left it de facto to the Commission to choose the legal basis since it was able to determine the timing of its decision.

118. ACB finally cites a number of factors which had led it to expect the Commission

54 — Judgments in Case 234/84 *Belgium* v *Commission* (cited in footnote 41, paragraph 16) and Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33.

to apply the codes in force at the time when the aid was granted. This expectation stemmed, firstly, from the memorandum drawn up by the Commission's Legal Service and from the other documents emanating from Commission services, which it had submitted as an annex to its answer to the Court's questions. Secondly, the Commission had also proceeded in this way in the case of Decision 91/176.

119. The Italian Government endorses the appellants' reasoning.

120. The Commission, on the other hand, takes the view that its power to authorise aid stems solely from the code applicable at the time concerned. The application of a code no longer in force at the time of a decision was out of the question. Significantly, the codes did not even mention the possibility of non-notified aid being authorised.

121. The appellants could not rely on the principle of legal certainty if only because the aid had not been previously notified. Although it was indeed not entirely right for Decision 91/176 to consider applying the code in force at the time of disbursement, this error did not have any legal consequences since the rules applied were consistent with those contained in the code in force when the decision was adopted.

122. As the appellants had not participated in the administrative procedure, they could not now refer to the lack of a statement of reasons. The Commission denies that the conclusions drawn by the appellants can be drawn from the documents which it would like to see removed from the documents of the proceedings. Finally, the plea should be rejected if only because the aid could not have been authorised even if — as stated in the contested decision — the Second Code had been applied.

(b) Appraisal

123. Deciding which code should be applied is particularly difficult because the codes do not contain any explicit procedural rules for non-notified aid. The legislature apparently assumed that aid is always notified and examined while a code is in force. In this case, the question of the applicable code is not at issue. The codes do not therefore contain any transitional rules indicating which code is to be applied

to past situations. [55] Only Article 13 of the Second Code contains a transitional provision, although it is not relevant in the present case.

124. Before the question of the code to be taken as the legal basis of the decision is considered in greater depth, the final argument advanced by the Commission, in which it in effect denies that the appellants have an interest in this ruling, should be examined.

(aa) The appellants' interest in the application of the Second Code

125. The appellants could not indeed successfully claim that the code in force at the time when the aid was granted rather than the Fifth Code should be applied if the aid could not have been authorised under that code either.

55 — On the other hand, see, for example, Information from the Commission Community guidelines on State aid for environmental protection (OJ 2001 C 37, pp. 3-15), paragraph 82:
'In the case of non-notified aid, the Commission will apply:
(a) these guidelines if the aid was granted after their publication in the Official Journal of the European Communities;
(b) the guidelines in force when aid is granted in all other cases.'

126. It should first be pointed out that the decision concerns aid granted from 1983 to 1988 (although only aid granted from 1 January 1986 is to be recovered). With effect from 1 January 1986 the Third Code replaced the Second Code. The decision should thus be based — if the appellants' approach was accepted — not only on the Second Code but also on the Third Code.

127. It is not, however, for the Community judicature to consider whether the aid could have been authorised under earlier codes. Such a review, which necessarily entails an appraisal of some complex and interlinked economic factors, should rather be conducted by the Commission.

128. The Commission admittedly remarks in passing in Section III of the contested decision that the conditions for authorisation in accordance with Article 2(1) of the Second Code have not been met. This provision concerns restructuring aid. The Commission did not, however, undertake a comprehensive review of the aid on the basis of the provisions of the Second Code. It neither made a distinction between the Second and Third Codes nor applied the specific provisions of these codes that concern investment aid for energy and environmental protection measures (Article 3 of the Second and Third Codes),

operating aid (Article 5 of the Second Code) and aid for research and development (Article 7 of the Second Code and Article 2 of the Third Code), although they might have been relevant.

129. The provisions of the Second and Third Codes referred to above differ appreciably from the corresponding rules of the Fifth Code. As regards aid for research and development and aid for environmental protection, the Fifth Code, unlike the Second and Third, refers to the pertinent Community framework. Operating aid may no longer be authorised. General investment aid may continue to be granted only in certain regions.

130. After briefly mentioning the Second Code, the Commission then passes on to the actual review of the aid on the basis of the Fifth Code with the words 'The aid in question is therefore to be examined in accordance with the Steel Aid Code then in force...'.

131. As the Commission has therefore based its decision mainly on the Fifth Code and considered the application of the Second Code only in the context of restructuring measures, it is not certain that the possibility of the aid being authorised under the Second and Third Codes was completely ruled out.

(bb) Application of the code in force when the aid was granted

132. To answer the question whether the Commission should have based its decision on the code in force when the aid was granted even though it was no longer in force at the time of the decision, the system of aid rules contained in the ECSC Treaty must be recalled.

133. The Court of First Instance has explained the foundations of this system correctly in paragraph 59 et seq. of the contested judgment. The point of departure for the system is the general prohibition of aid enshrined in Article 4(c) of the ECSC Treaty. The codes based on Article 95 of the ECSC Treaty permit derogations provided that the aid granted by the Member States is consistent with the objectives of the Community steel policy. [56] The codes even go so far as to designate aid that complies with their provisions as Community aid. [57] The Community adopted the codes in response to the specific situation in the steel industry in the 1980s, which was characterised by a considerable need for restructuring.

134. The successive codes, each one replacing its predecessor, did not in any way lead to a reversal of this rule-and-exception

56 — See under I of the recitals of the First Code.

57 — See Article 1(1) of the Fifth Code and the corresponding provisions of the other codes.

principle, as the appellants believe. Each code in fact entailed a new version of the rules on derogations adapted to the technical and economic trend in the steel industry at the time. The legislature's specific intention was to ensure through the wording of the codes that the granting of aid would not be permanent but remain a temporary exception tailored to a given situation.

135. The validity of the codes was limited from the outset to five and a half years. Since the Second Code they have specified notification periods, which the Court of Justice designated in Case 214/83 as time-limits precluding any further notification of aid. [58] The time-limits are meant to ensure that the Commission is notified of aid plans early enough for authorisation and disbursement to occur while the code is still in force. If the time-limit is not observed, the Commission loses the power to authorise the aid concerned.

136. Since the Second Code the codes have also specified that aid authorised under the pertinent code may no longer be disbursed after the code expires. This rule ensures that aid which the legislature deems compatible with the competitive situation in a given period is not disbursed at a later time, when the situation may already have changed. For certain types of aid the codes even set, in some cases, time-limits for disbursement, which end before the code expires. [59] If not even the disbursement of aid which has already been authorised is permissible after the expiry of a code, authorisation under a code which is no longer in force is certainly not permitted.

137. The appellants' and Italian Government's argument that the Commission's procedural powers should be based on the code in force and that only the substantive-law requirements should be derived from the Second or Third Code is unacceptable. The procedural rules and substantive provisions of the various codes form a unit. The legislature did not intend to introduce a general aid authorisation system which departed from Article 4(c) of the ECSC Treaty and in which only different substantive provisions in each case are to be applied. The codes confer on the Commission no more than temporary powers in both substantive and procedural terms. If a code is no longer in force, the Commission cannot derive any powers from it.

138. The Court of First Instance has therefore correctly ruled that, once a code's period of validity has expired, the Com-

58 — Judgment in Case 214/83 *Germany* v *Commission* [1985] ECR 3053, paragraphs 45 to 47; confirmed by the judgment in Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraphs 49 to 55.

59 — See Article 5(1), second indent, of the Second Code for operating aid and Article 1(3), second sentence, in conjunction with Article 5(1) of the Fifth Code for regional investment aid.

mission is no longer empowered to authorise aid to the steel industry under the derogations provided.

(cc) Application of the code in force at the time of the Commission's decision

139. The Commission based its decision on the Fifth Code, which was in force when the decision was adopted. It thus applied this code to aid which had not been notified before it was disbursed or before the expiry of the time-limit specified in the third sentence of Article 6(1) or in Article 6(2) of the Fifth Code.

140. The wording of Article 6 of the Fifth Code reveals that, like the previous codes, it assumes the Member States will notify any measure before it is undertaken and before the expiry of the time-limit precluding further notifications. This also explains why Article 6(4) does not itself provide for the Member State granting the aid to be consulted. Such consultation is superfluous if the Member State has itself notified the aid. As the Commission rightly emphasises, the codes make no explicit provision for non-notified aid.

141. It cannot be inferred from this, however, that any aid must be declared incompatible with the rules of the code solely because it has not been notified in time. It would be inconsistent with the basic idea of the Communities' aid legislation for the incompatibility of a measure with the aid rules to be deduced solely from its formal unlawfulness. [60] That compatibility with the substantive rules is ultimately the decisive factor is evident from Article 1(1) of the Fifth Code, according to which aid '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.'

142. The fact that each code is linked to a given situation might, however, argue against the retroactive application of the Fifth Code. As stated above, the codes represent a temporary response to a given economic situation in the steel industry. If a later code is applied retroactively, rules based on a situation other than that obtaining when the aid was granted come into play.

143. It must be remembered, however, that the effect of unlawful aid persists until the

60 — Judgments in the *Tubemeuse* case (cited in footnote 41, paragraph 20) and Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* [1990] ECR I-5505, paragraph 13; for a detailed discussion of the parallel question where the coal aid code applies see the judgment of the Court of First Instance in Case T-110/98 *RJB Mining* v *Commission* [1999] ECR II-2585, paragraph 65 et seq. (not yet legally binding).

aid is recovered. Even if the advantage is not directly reflected in the undertaking's balance sheet years after aid is granted, it nonetheless permanently strengthens the competitive position of the recipient as compared to other undertakings which have not received any aid. [61]

144. It is not the Commission's task to cast its mind back to the time when the aid was granted and to assess only its effect at that time. The Commission must rather protect current competition by measuring the (continuing) effect of the aid against the yardstick that applies when the decision is adopted.

(dd) Protection of legitimate expectations

145. In principle, the protection of a legitimate expectation in a particular practice of the Commission comes into consideration only if the Commission, through that practice, exercises a discretionary power conferred on it. Which code should be applied is, however, a question of law that must be conclusively assessed by the Court of Justice without the Commission having any discretion in this respect.

61 — See the judgment in Case C-24/95 *Alcan* [1997] ECR I-1591, paragraphs 51 and 52.

146. Thus, even if the Commission has taken the view in the past that the code in force when aid is granted or disbursed applies, [62] the appellants may not deduce from this legitimate expectations worthy of being protected, all the more so as this view of the law is incorrect.

147. The appellants cannot, after all, deduce any legal positions at all from the internal memorandum drawn up by the Legal Service. For one thing, the memorandum was not brought to the appellants' attention or published by the Commission. Even if this had been the case, it is clear from the document that it is not a conclusive opinion addressed to the public at large, but merely the expression of an expert legal opinion by the Legal Service to the Commission services responsible for the adoption of the decision.

62 — It is indeed not only Decision 91/176 that the Commission has based on this view. See also, for example, Commission Decision 1999/720/EC, ECSC of 8 July 1999 (Groditzer Stahlwerke), OJ 1999 L 292, p. 27, paragraph 46: 'The investment aid relating to ECSC plant has to be assessed under Article 4(c) of the ECSC Treaty and the Steel Aid Code applicable at the time it was granted.' The Commission's approach is not uniform, however. It proceeded in Decision 1999/227/ECSC of 29 July 1998 (Georgsmarienhütte), OJ 1999 L 83, p. 72 and Decision 1999/196/ECSC of 14 July 1998 (Stahlwalzwerke Rotzel), OJ 1998 L 63, p. 63, as it has done in the contested decision.

(ee) Lack of a statement of reasons for the legal basis chosen

148. There is no need to consider further whether this argument, which the appellants did not present during the administrative procedure, may be advanced by them in the procedure before the Court of Justice. The Court of First Instance has correctly stated in paragraph 167 et seq. of the contested judgment, that the statement of reasons for the decision satisfies the requirements in this respect.

149. In particular, sufficient grounds for the application of the Fifth Code can be deduced from the decision itself and from the context, which, according to the case-law of the Court of Justice, is similarly important. [63] It is, for example, evident from the decision on the initiation of the procedure that the Commission has taken the Fifth Code as its basis because it was the only legal basis applicable at the time when the decision was adopted.

150. Although the Commission's other consideration that the Second Code is irrelevant because its provisions similarly ruled out authorisation seems substantively somewhat superficial, [64] this does not constitute a lack of a statement of reasons justifying the annulment of the decision.

(ff) Conclusion

151. As the Commission has rightly based its decision on the Fifth Code rather than codes applicable when the aid was granted, the plea should be rejected.

(4) Clarification of the facts and scale of the review

152. In connection with various pleas the appellants complain about the clarification of the facts by the Commission and the Court of First Instance and the extent to which the facts were assessed. They submit, firstly, that, in the contested decision, the Commission classified as incompatible with the common market a measure on which it had already ruled favourably in Decision 91/176. Secondly, the appellants complain that the existence of derogations from the prohibition of aid had not been adequately examined.

63 — Judgments in Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86, and Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 97.

64 — See paragraphs 128 to 131 above.

(a) Inclusion of aid already covered by Decision 91/176

(aa) Arguments of the parties

153. With regard to the first aspect, the appellants claim that the Commission took two contradictory decisions on the aid granted by Decision No 7673 of 14 December 1987 of the Autonomous Province of Bolzano. The loan of ITL 6 321 million referred to in the contested decision had already been the subject of Decision 91/176. The amount to be recovered had been miscalculated: it should have been only ITL 4 400 million. The Court of First Instance had not queried this, merely pointing out that the Commission must take account only of the information available at the time of the adoption of the decision.

154. The Commission takes the view that the complaint is inadmissible because it was not lodged during the administrative procedure. Furthermore, it was a question of fact on which the Court of First Instance ruled. As to the substance, the Commission is of the opinion that the appellants had not shown how far the two decisions concerned the same aid. Decision 91/176 concerned a 12-year loan of ITL 6 500 million at an interest rate of 4.5%, for which the application was made on 2 January 1982 and which was granted on 14 February 1983 by Decision No 784. It was not clear how far this measure corresponded to a 7-year loan of ITL 13 306 million at an interest rate of 3%, for which the application was made on 3 July 1986 and which was granted on 14 December 1987 by Order No 7673 and was disbursed in two instalments, one of ITL 6 321 million on 10 March 1988 and the other of ITL 987 million on 30 January 1989.

(bb) Appraisal

155. The complaint is admissible. The appellants were not formally excluded from making this complaint before a court.[65] Nor does the restriction of the appeal to points of law stand in the way of the complaint, since points of law are in any case raised.

156. The Court of First Instance did not itself rule on the facts, merely pointing out that the Commission did not make an obviously erroneous assessment of the facts from the information with which it was familiar when the decision was adopted. As the Italian Government and the appellants had not come forward with any information to the contrary during the administrative procedure, there had been no indi-

65 — See paragraph 115 above.

cation that the facts presented were not accurate. Whether this allocation of the burden of explanation was lawful is a point of law.

157. Only in paragraph 141 of the contested judgment does the Court of First Instance reflect in the context of an *obiter dictum* on how the facts in the two decisions might be reconciled, but it does not base its judgment on this.

158. The uncertainty as to whether the Commission decided on the same aid twice is due, among other things, to the not entirely clear description of the subject-matter of Decision 91/176, which reads, in Section I:

'In December 1987, the authorities of the Province of Bolzano granted the Bolzano steelworks (Falck Group) a subsidised loan of Lit 6 billion... towards an investment of Lit 23 billion...

The 11-year loan carries an interest rate of 3,5%....'

159. It is explained later that the Bolzano provincial authorities had decided to grant the loan on 14 February 1983 and, although they had notified the Commission in good time, the loan had inadmissibly been granted only after the Second Code had expired in 1987.

160. The contested decision lists this aid under I(a) and other, different aid under I(b), which is based on Decision No 7673 of 14 December 1987. The measure to which Decision 91/176 relates is thus regarded in the contested decision and in the notice of commencement of the procedure as not being identical with one of the aid measures decided on 14 December 1987.

161. The appellants maintain, on the other hand, that Decision 91/176 concerns the aid referred to in Decision No 7673. They do not, however, provide any explanation for the nature of the aid referred to in I(a) of the contested decision. Various hypotheses are conceivable in this respect. Firstly, it might be exactly the same aid as that referred to under (d). If so, the decision contains an inconsistency in that, while excluding the aid from its scope, it orders its recovery. [66] The second possibility would be that there are in fact two different

66 — Should this hypothesis prove to be correct in the context of the recovery of the aid by the national authorities, it would be necessary to find an interpretation of the decision that comes closest to conforming to its sense and purpose. As it did not want take up again the aid covered by Decision 91/176, the arrangement made in this decision is that the normal market rate of interest would apply from the time of its delivery.

measures. Finally, the Court of First Instance might be right in its hypothesis that the Commission was not correctly informed at the time of the adoption of Decision 91/176 and had been wrong to assume that the aid granted in December 1987 was the same as the measure already planned in 1983, but was a completely new measure with a completely different objective.

162. Unfortunately, the Italian Government did not take a position on this point in its response and did not contribute to clarifying it. Nor do the Commission's comments before the Court of Justice improve understanding of the complexities of the situation. It had begun by putting the total aid covered by Decision 91/176 at ITL 5 600 million, correcting this later to ITL 6 500 million. The loan is meant to run for 12 years at an interest rate of 4.5%. [67] The decision itself, on the other hand, gives completely different figures (6 000 million, 11 years and 3.5% interest).

163. What is decisive, however, is that, when adopting the decision, the Commission assumed from the information available to it that two different measures were involved. As neither the Italian Government nor the appellants referred during the administrative procedure to the possibility of the Commission being mistaken, although it was obvious from the notice of commencement of the formal procedure what facts the Commission had taken as its basis, the decision cannot be annulled on this ground.

164. The appellants have not even attempted to explain the further complaint made in this connection that the Commission miscalculated the amounts to be recovered. In particular, they have failed to explain the extent to which the judgment of the Court of First Instance is defective in this respect.

165. The first part of the complaint should therefore be rejected as a whole.

(b) Deficient examination of the derogations from the prohibition of aid

(aa) Arguments of the parties

166. The appellants claim that, as the Commission did not consult them, it was only in court, rather than earlier, during the administrative procedure, that they had

67 — These conditions appear to be the same as those actually referred to in Decision No 784 of the Autonomous Province of Bolzano.

been able to explain that the aid did indeed satisfy the authorisation requirements. The Court of First Instance should therefore have annulled the decision either because of the infringement of the right to a fair hearing or — after appraising the evidence submitted by ACB and Falck — because the Commission had assessed the aid incorrectly.

167. The Court of First Instance had noted the evidence submitted, but it had not drawn the necessary conclusions from it. If the evidence had been inadequate, the Court should have obtained an expert opinion. The Court had also failed to take account of the arguments advanced by Falck during the hearing.

168. The Italian Government objects to the Court's finding that the Italian Government should have put forward during the administrative procedure all the elements that demonstrated the admissibility of the aid. It should rather have been for the Commission, which had opened the procedure, to ascertain the facts of the case.

169. The Commission takes the view that the Court had correctly indicated the limits to judicial review and correctly appraised the evidence submitted.

(bb) Appraisal

170. In the second part of this plea the appellants essentially complain that both the Commission and the Court did not adequately clarify and incorrectly assessed the facts as regards the satisfaction of the authorisation requirements.

171. As already pointed out, the appellants had sufficient opportunity during the administrative procedure to present the facts which, as they saw it, proved the compatibility of the aid with the code. In the notice of commencement of the review procedure the Commission made it clear that, according to the information before it, the aid did not meet the requirements for admissible research and development aid or for measures to protect the environment, conserve energy or improve product quality. Italy and the appellants should have presented their contrary view at that stage and rendered it credible through additional information, as the Court rightly states in paragraph 116 of the contested judgment. Unless the Commission is advised that the information available to it is incorrect or incomplete, it has no need officially to examine the facts further.

172. It is clear that the Commission did not assess the facts incorrectly. The Court of First Instance arrives at this conclusion by

taking the following steps in its examination without committing any errors in law. It begins by noting that the judicial review of the appraisal of complex economic circumstances is confined to detecting abuse of discretion or obvious errors, [68] it being for the applicant to submit elements that make the Commission's assessment of the facts seem implausible. The Court then considers whether the Commission has not committed any obvious errors in its assessment of the facts presented by Italy during the administrative procedure. It includes in this process the evidence submitted in court, and especially the 'Andersen report'.

173. It must first be emphasised that the lawfulness of the decision in the context of an action for annulment pursuant to Article 33 of the ECSC Treaty must be assessed on the basis of the information available to the Commission when the decision was adopted. [69]

174. The Commission was familiar with a number of factors from earlier procedures concerning aid granted to ACB and Falck. It was able to glean further information from the data provided by the Italian Government and the German and British associations of steel producers during the administrative procedure. The facts and evidence which the appellants did not produce until the court proceedings had begun are, however, significant only inasmuch as they indicate obvious errors by the Commission in its assessment of the facts of which it was aware at the time the decision was adopted.

175. As appeals brought pursuant to Article 32(d) of the ECSC Treaty in conjunction with Article 51(1) of the ECSC Statute are restricted to points of law, the Court of Justice may not consider in its proceedings whether the Court of First Instance was correct in its appraisal of the facts which the appellants submitted to it as evidence of obvious errors in the Commission's assessment. Quite apart from this, the appellants have not complained about any specific errors of assessment by the Court of First Instance. Nor have they explained what elements allegedly put forward by Falck during the hearing the Court of First Instance failed to take into account.

176. If the Court of First Instance has no doubts about the Commission's assessment after considering these facts, it is not itself required to investigate the circumstances further and, for example, to obtain an expert opinion.

177. Thus the second part of the plea should also be rejected.

68 — This view is also taken in the settled case-law of the Court of Justice. See the judgment in Case C-288/96 *Germany* v *Commission* (cited in footnote 41, paragraph 26, with further references).

69 — See the case-law cited in footnote 54.

(5) Failure to consider effects on intra-Community trade

(a) Arguments of the parties

178. Under this plea ACB and Falck object that the Court of First Instance — basing its views on the 1961 judgment in *Gezamenlijke Steenkolenmijnen*[70] — did not take into account the very limited effect the aid had had on intra-Community trade. It failed to recognise that more recent case-law[71] required the coherence of the Treaties to be preserved. In addition, the Court itself had ruled that not every aid measure was incompatible with the common market and that the prohibition of aid contained in Article 4(c) of the ECSC Treaty must be interpreted in conjunction with the objectives of the Treaty.[72]

179. The Italian Government adds that taking account of the effects of aid on competition and intra-Community trade is a general principle of the Treaties and therefore has a bearing in this case too.

180. The Commission, on the other hand, believes that, given the general prohibition of State aid in Article 4(c) of the ECSC Treaty, its effect on intra-Community trade does not matter. As the case-law of the Court of Justice showed, the EC Treaty was not, pursuant to Article 305 EC, applicable to ECSC products.[73] The judgment in *Busseni* had reached the limits of interpretation and had also remained an isolated instance.

(b) Appraisal

181. In its judgment in Joined Cases C-280/99 P, C-281/99 P and C-282/99 P *Moccia Irme and Others* v *Commission* the Court of Justice ruled:[74]

'... that, unlike in the case of Article 92(1) of the EC Treaty, for aid to be deemed incompatible with the common market under Article 4(c) of the ECSC Treaty, there is no requirement that it distorts or threatens to distort competition...'

70 — Judgment in Case 30/59 [1961] ECR 1, 41 (corresponds to p. 45 in the German version).

71 — Judgment in Case C-221/88 *Busseni* [1990] ECR I-495, paragraph 16.

72 — Judgment of the Court of First Instance in Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839, paragraph 62.

73 — The Commission refers to the judgments in Case 328/85 *Deutsche Babcock* [1987] ECR 5119, paragraph 10, and Case C-18/94 *Hopkins and Others* [1996] ECR I-2281, paragraph 14.

74 — Paragraphs 32 and 33 [2001] ECR I-4717; see also the Order in *Lech-Stahlwerke* v *Commission* (cited in footnote 34, paragraph 41).

182. As the Court of First Instance rightly stated in paragraph 82 of the contested judgment, Article 4(c) of the ECSC Treaty prohibits all aid without exception, the aim being to ensure the creation, maintenance and observance of normal conditions of competition, and aid is therefore 'deemed to be 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.'

183. Accordingly, the Court of First Instance was also right not to consider in the present case whether competition has been distorted or intra-Community trade adversely affected by the aid granted to ACB. This plea should consequently be rejected.

(6) Infringement of the rules on limitation periods and of the principle of legal certainty

(a) Arguments of the parties

184. The appellants object to the finding of the Court of First Instance [75] that the Commission had not infringed any time-limits. They argue that the Commission's commitment to a period within which it must exercise its powers stems from the general principle of legal certainty. This had been confirmed by the Court of Justice in particular in its judgment in the *Geigy* case. [76]

185. The appellants also cite various existing rules on limitation periods within the scope of the EC and ECSC Treaties in which the principle of legal certainty has materialised in positive law, viz. Article 43 of the EC Statute, [77] Commission Decision No 715/78/ECSC concerning limitation periods in proceedings and the enforcement of sanctions under the Treaty establishing the European Coal and Steel Community [78] and Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition. [79] On the other hand, they object to the Court's reference to Regulation No 659/1999 on the ground that it concerns only aid covered by the EC Treaty.

186. The Commission is of the opinion that, although the judgments cited by the appellants showed that time-limits were an expression of the principle of legal certainty, they had to be established by the

75 — Paragraph 69 of the contested judgment.

76 — Judgment in Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraphs 20 to 22.

77 — In the present case, however, a reference to Article 40 of the ECSC Statute — if any provision — would be more appropriate.

78 — OJ 1978 L 94, p. 22.

79 — OJ 1974 L 319, p. 1.

legislature ex ante and not by case-law ex post if they were to comply with this principle. The Commission also rejects the analogous application of Decision No 715/78/ECSC. It concerned the Commission's power to impose fines and penalties. This case did not, however, concern sanctions but the recovery of aid.

(b) Appraisal

187. Behind the issue generally discussed by the parties under the heading of 'limitation period' there are in fact concealed a number of wholly different legal concepts.

188. A limitation period in the context of the enforcement of sanctions, as provided for in Article 4 of Decision No 715/78/ECSC, for example, is the period within which a creditor must have an already conclusively identified claim enforced. In civil law limitation is a means that can be used to prevent the enforcement of an existing claim. A limitation period in proceedings [80] limits the period in which the Commission may impose sanctions for an infringement of the Treaty. Where sanctions are not involved, the term 'time-bar' is more appropriate. [81] All forms of limitation period or time-bar seek to give the principle of legal certainty precedence over substantive justice after a given period. They differ, however, particularly with regard to the circumstances triggering them and their duration.

189. The Court of Justice also derives from the principle of fair legal process, as expressed in Article 6(1) EHRC, certain time-limits for the conclusion of judicial procedures. [82] It has also ruled that, where the Commission has been remiss in its conduct during the administrative procedure, the recipient of aid can, in certain circumstances, legitimately expect the Commission no longer to order the recovery of the aid. [83] The conclusions to be drawn from the duration of the administrative procedure should therefore be considered separately in the context of the plea that concerns the infringement of the principle of the protection of legitimate expectations.

80 — See Article 1 of Decision No 715/78/ECSC.

81 — See the Opinion of Advocate General Alber of 27 January 2000 in Case C-260/98 *Commission* v *Greece* [2000] ECR I-6537, I-6539, paragraphs 73 and 74.

82 — Judgment in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 20 and 21.

83 — Judgment in Case 223/85 *RSV* v *Commission* [1987] ECR 4617, paragraph 17. The judgment of the Court of First Instance in Joined Cases T-194/97 and T-83/98 *Branco* v *Commission* [2000] ECR II-69, paragraph 91, cited by the appellants similarly concerns this situation.

190. If, then, the duration of the administrative procedure is left aside for the time being, it is at best a question of a time-bar. The period within which the Commission may order the recovery of aid falling within the scope of the EC Treaty is, pursuant to Article 15 of Regulation No 659/1999, ten years. There is no corresponding positive-law limitation of the Commission's powers in relation to ECSC aid.

191. The analogous application of Decision 715/78/ECSC must be ruled out. This decision concerns a completely different type of Commission power, the power to punish infringements of the conditions of competition with fines and penalties or to enforce them under pertinent decisions. [84]

192. It is questionable, however, whether such a restriction of the Commission's power can be deduced directly from the principle of legal certainty. Although Advocate General Roemer took the view in the *Lemmerz-Werke* case, which the appellants have cited, that there was no question of a decision of the High Authority being annulled several years after the grounds for its annulment had become known, [85] not only did the case concern an entirely different situation but, as the Commission emphasises, the Court of Justice did not endorse the Advocate General's view. [86]

193. In the *Geigy* case, which concerned the imposition of fines for an infringement of the conditions of competition, the Court of Justice stated that a limitation period must have been fixed by the legislature in advance if it was to perform its function. [87] None the less, the principle of legal certainty ruled out the possibility of the Commission delaying the imposition of a fine indefinitely. From the further comments made by the Court of Justice it can be seen that in this case there must be not only the mere passage of time but also special circumstances [88] that demand a restriction of the Commission's powers.

194. In the present case, circumstances that may also have led the appellants to expect the Commission not to order the recovery of the aid can be considered in this context. This argument should therefore be examined together with the plea regarding the protection of legitimate expectations.

84 — See judgment of the Court of First Instance in Joined Cases T-126/96 and C-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 48.

85 — Opinion in Case 111/63 *Lemmerz-Werke* v *High Authority* [1965] ECR 922, 938.

86 — Judgment in Case 111/63 *Lemmerz-Werke* v *High Authority* [1965] ECR 893, under I.3.

87 — Judgment in *Geigy* v *Commission* (cited in footnote 76, paragraphs 20 and 21).

88 — See also the Opinion in Case C-260/98 (cited in footnote 81, paragraph 75 et seq.).

(7) Infringement of the principle of the protection of legitimate expectations

(a) Arguments of the parties

195. The appellants — supported by the Italian Government — complain that the Court of First Instance ignored the principle of the protection of legitimate expectations by failing to take account of numerous circumstances giving rise to legitimate expectations.

196. The six measures referred to in the decision were based on Provincial Law No 25/81, and all dated back to the restructuring plan authorised by the Commission in 1983. It was therefore assumed that fresh notification was not necessary. [89] Bolzano had completed all the necessary formalities.

197. In ACB's view, the Commission had been aware of the measures since July 1988, when it carried out the procedure that culminated in the adoption of Decision 91/176. After the adoption of Decision 91/176, when all the aid had already been disbursed, ACB had assumed that the Commission had no objections to any of the measures except the one about which a complaint had been made.

198. The appellants also refer to the opinion of the Commission's Legal Service of 18 July 1990, which does not, however, need to be discussed further here following the comments in paragraph 147.

199. Finally, ACB claims that, given the time that had elapsed since the disbursement of the aid, it should have been possible to expect it no longer to be the subject of a complaint. On 26 July 1987 the Commission had opened the administrative procedure to prepare Decision 91/176. On 1 August 1995 the procedure preceding the contested decision had then been launched after initial information had been requested from the Italian Government on 21 December 1994. In ACB's view the Commission also infringed the principles of proportionality and sincere cooperation by not adopting the recovery decision until 156 months had elapsed since the grant of the first aid and 96 months since the grant of the second.

200. The appellants refer in particular to the judgment in *RSV* v *Commission*, [90] in

89 — The appellants refer to the judgment in Case C-44/93 *Namur* [1994] ECR I-3829, which is not, however, relevant since, unlike the present case, it concerned existing rather than new aid.

90 — Cited in footnote 83.

which the Court of Justice had recognised legitimate expectations worthy of protection after a mere 26 months.

201. The Commission recalls that the recipient of non-notified aid can rely on the protection of legitimate expectations only where extraordinary circumstances obtain, it normally being for the national courts to assess these circumstances. [91] As the prohibition of aid imposed by the ECSC Treaty is more general, even more stringent standards must be applied here than in the case of aid falling within the scope of the EC Treaty.

202. The appellants could not deduce from the authorisation of the restructuring programme in 1983, which had been amended again in 1986 without the Commission being notified, any legitimate expectations worthy of protection with regard to any of the aid granted at a later date. The diligence supposedly shown by ACB did not alter the fact that ACB had applied only to the Province of Bolzano and not to the Italian government agencies, which were responsible for notification.

203. The claim that the Commission was aware of all the circumstances as early as 1988 has already been dismissed by the Court of First Instance through its contrary finding of the facts, which cannot be reviewed during the appeal procedure.

(b) Appraisal

204. It must first be said that the appellants introduce the principles of sincere cooperation and proportionality without explaining how far they are affected. Their argument should therefore be considered only in terms of an infringement of the principle of the protection of legitimate expectations.

205. The appellants can rely on the protection of legitimate expectations not only in national courts but also before the Community judicature. Although the recovery of unlawful aid from the beneficiary is accomplished in accordance with national procedural law, the recipient of the aid may, in opposing the national authorities' decision to recover the aid, rely on the principle of the protection of legitimate expectations in the Member States' courts provided that the same requirements apply in this context as to

91 — The Commission refers in this context to the judgments in Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14 et seq., Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 18, and *Alcan* (cited in footnote 61).

the recovery of purely domestic payments and full account is taken of the Community's interests. [92]

206. Like the Court of First Instance in its judgment in *Siemens* v *Commission*, the Commission appears to infer from this that it is for the national courts alone to consider the protection of legitimate expectations. [93]

207. This view cannot be accepted, however. In its judgment in *RSV* v *Commission* [94] the Court of Justice annulled a decision of the Commission ordering the recovery of aid on grounds relating to the protection of legitimate expectations. The principle of the protection of legitimate expectations is, recognised not only in national law but also in Community law. [95] The Commission must take account of this principle when adopting its decisions just as the Court of Justice must do so when reviewing the lawfulness of such decisions.

208. The appellants do not criticise the correct ruling of the Court of First Instance that the beneficiary may in principle expect aid to be in order if the procedure provided for is observed when the aid is granted and that, where aid has been granted unlawfully, the protection of legitimate expectations can be relied on only in exceptional circumstances. [96] Contrary to the findings of the Court of First Instance, however, they believe that such extraordinary circumstances obtained.

209. Their argument that, in view of the original authorisation of the restructuring programme, ACB should have been able to expect the aid to be in order cannot succeed. The Commission took account of the uncertainty regarding the obligation to notify aid disbursed before 1 January 1986 and refrained from ordering the recovery of this aid. Under the Second Code, which formed the legal basis of the authorisation of the restructuring programme, all aid should have been disbursed by 31 December 1985. For this reason alone any expectation that aid disbursed at a later date was in order must be ruled out. Any plans not implemented by that date should in fact have been notified and authorised again under the following code.

210. Nor should the appellants have expected the aid disbursed after 31 December 1985 to be in order because Decision 91/176 complained about only one aid measure and required its effect to be eliminated in the future. This conclusion would be possible at best if the Commission had been aware of all the measures at the time it adopted its decision. In the

92 — Judgment in Joined Cases 205/82 to 215/82 *Deutsches Milchkontor and Others* v *Germany* [1983] ECR 2633, paragraph 33, and Case C-5/89 *Commission* v *Germany* (cited in footnote 91, paragraphs 13 to 16).

93 — Judgment in Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 105.

94 — Cited in footnote 83, paragraph 17.

95 — As was already the case in the judgment in *Milchkontor* (cited in footnote 91, paragraph 30).

96 — Paragraph 84 of the contested judgment, with further references.

statement of reasons for Decision 91/176 the Commission mentions only a subsidised loan of ITL 6 000 million granted in December 1987. In paragraph 94 of the contested judgment the Court of First Instance states that no evidence had been produced to prove that the Commission knew more when adopting Decision 91/176. The Court of Justice is bound by this finding. Consequently, (tacit) authorisation of the other aid granted after 31 December 1985 cannot be inferred from Decision 91/176.

211. As regards the statement made by ACB's Managing Director, Mr Morosetti, on 2 February 1999, the Court of First Instance found that it could not be inferred from the contacts with the Autonomous Province of Bolzano referred to in that statement that ACB had satisfied itself that the notification procedure had been complied with. [97]

212. This must be endorsed. ACB should not have relied on the vague and self-contradictory comments by representatives of the Autonomous Province of Bolzano referred to in the Managing Director's statement. Even if it is true that the Bolzano authorities had informed the Commission of all measures, it should have been clear to ACB that only the Italian Government could have ensured punctual and formal notification in accordance with the applicable code.

97 — Paragraph 93 of the contested judgment.

213. In view of the importance of the notification of major aid projects, it is also surprising that no correspondence between ACB or Falck and the Bolzano authorities or the Italian government agencies on this question was submitted. There would undoubtedly have been cause to believe that proper notification had been given if ACB had submitted copies of letters from the Italian Government to the Commission in which the aid had been notified. ACB should not, at any rate, have expected the aid to be in order merely because of the discussions with representatives of the Autonomous Province of Bolzano.

214. The final question to be clarified is whether the time elapsing between the grant of the aid and the adoption of the contested decision gives the appellants just cause to have legitimate expectations worthy of protection. The period of interest in this respect began on 14 December 1987, when the first of the aid whose recovery has been ordered was granted by Decision No 7673 of the Autonomous Province of Bolzano, and ended on 17 July 1996, the day on which the contested decision was adopted. It thus comprises some eight and a half years.

215. Given the absence of positive-law rules on limitation periods, the passage of time alone does not give rise to a legitimate expectation worthy of protection that the

aid may be retained. [98] Only if the Commission had remained inactive for a lengthy period even though it was aware of the circumstances might such expectations arise. [99]

216. There are no indications that, before its request of 21 December 1994 to the Italian Government for information and the latter's reply of 7 April 1995, the Commission was aware of the aid whose recovery was ordered by the contested decision. According to the findings by the Court of First Instance referred to above, [100] the Commission knew only of the aid granted in December 1987 when it adopted Decision 91/176. The Commission cannot therefore be criticised for having done nothing about the other measures until 21 December 1994.

217. From the first measure taken by the Commission to clarify the situation until it adopted the contested decision some 18 months elapsed. Obtaining comments from the Italian Government and the other interested parties accounted for some of this time. [101] Nor is there any sign of lengthy periods in which the Commission was inactive or delayed the procedure unnecessarily. Consequently, the duration of the administrative procedure was not such as to arouse in the appellants the expectation that the Commission would not order the recovery of the aid.

218. The plea concerning the infringement of the principle of the protection of legitimate expectations should therefore be rejected.

(8) Incorrect rates of interest on the sum to be recovered

(a) Arguments of the parties

219. The appellants consider the rate of interest on the sum to be recovered to be arbitrary and unpredictable. They cite various sources (communications from the Commission, judgments of the Court of Justice) in which they claim other standards were taken as the basis for the calculation of interest. The interest rate should not have been set by the Commission but by the Italian authorities. To restore the situation that would have obtained if the aid had not been paid, the Commission should in any event have taken Germany as the reference market rather than Italy because ACB had operated primarily in the German market.

98 — Judgment in *Geigy* v *Commission* (cited in footnote 76, paragraphs 20 and 21).

99 — See the judgment in *RSV* v *Commission* (cited in footnote 83, paragraph 17) and — with respect to the judicial procedure — the judgment in *Baustahlgewebe* v *Commission* (cited in footnote 82, especially paragraphs 20, 21 and 26 et seq.).

100 — See paragraph 210 above.

101 — The Commission did not, however, submit that Italy had been remiss in providing information. See, on the other hand, the judgment in Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraphs 40 to 44.

220. The Italian Government endorses this view and also emphasises that the contested decision and the judgment of the Court of First Instance were not sufficiently substantiated with respect to the setting of the interest rate.

221. The Commission cites a number of communications and letters revealing its normal practice when setting interest rates. The statement of reasons for the decision satisfied the requirements and should be seen in the context in which the decision was adopted. Nor had the Commission committed any errors in law in taking the Italian market as the reference market in the case of aid granted in Italian lire.

(b) Appraisal

222. As the Court of First Instance rightly states in paragraphs 148 to 152, referring to its judgment in *Siemens* v *Commission*, [102] interest needs to be collected on the sum to be recovered in order fully to restore the situation which would have obtained had the aid not been granted.

223. In principle, recovery must be accomplished in accordance with national procedural law. [103] However, just as the Commission is empowered to order the recovery of illegal aid to ensure the practical effectiveness of the prohibition of aid, it may also leave it to the Member State to charge interest on the sums to be recovered and to set the interest rate to be applied.

224. It is not clear why the Commission's reference to the interest rates applied in the context of regional aid to determine the net grant equivalent should be deemed to lack transparency or to be arbitrary. Although the decision does not refer to a specific interest rate, the applicable rate can be determined through the reference to regional aid systems. Paragraph 14 of the annex to the communication of 21 December 1978 on regional aid systems [104] provides for the average reference rate for interest rate subsidies granted to credit institutions by the central government to be used as the reference interest rate. The Commission has thus referred to an interest rate which must be regarded as the market rate in Italy.

225. Nor, in the absence of information from ACB to the contrary, can the Commission be criticised for using the interest

102 — Judgment in *Siemens* v *Commission* (cited in footnote 93).

103 — See the judgments in the *Tubemeuse* case (cited in footnote 41, paragraph 61) and Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 12.

104 — OJ 1979 C 31, p. 9.

rate applied in Italy as the reference rate in the case of aid granted in Italian lire to an undertaking registered in Italy.

226. However, the decision itself does nothing to explain the order concerning interest. As the Court of Justice has ruled, however, account must also be taken in the statement of reasons of the context in which the legal measure has been adopted. [105] Account may thus be taken of communications from the Commission that were published before the adoption of the decision, and especially the communication of 22 February 1995, [106] in which the Commission informs the Member States as follows:

'In the Commission's view, the financial benefits illegally accruing to the recipient of the aid are more appropriately calculated on the basis of the market interest rate [rather than the legal rate] with a view to restoring the status quo ante.

In future decisions requiring the repayment of aid which is inadmissible and incompatible with the common market it will take the rate used to calculate the grant equivalent of regional aid as the market interest rate'.

227. When this context is taken into account, the object and purpose of charging interest on the sums to be recovered are easy enough to understand.

228. Although not required by the law, however, there is something to be said for the Commission making a few brief comments on interest also in the statement of reasons for decisions requiring the recovery of aid. The Member States, to which the decision is addressed, may have the necessary experience to understand the importance of and background to these rules. Since, however, as they also affect third parties, it would certainly be appropriate for a number of points to be clarified. This is all the truer where — as in the present case — the communication which also has to be taken into account has not been published in the Official Journal.

229. At all events, the contested judgment does not lack a statement of reasons. In paragraphs 148 to 162 of the contested judgment the Court of First Instance explains at some length why the plea must be rejected.

230. This plea cannot therefore be upheld.

105 — See the case-law cited in footnote 63.

106 — Published in: Commission of the European Communities, *Wettbewerbsrecht in den Europäischen Gemeinschaften*, Vol. IIa (*Wettbewerbsregeln für staatliche Beihilfen*), 1999, p. 76.

(9) Prohibition of penalties and the principle of proportionality

(a) Arguments of the parties

231. The appellants take the view, finally, that the decision is in the nature of a penalty and incapable of achieving the only admissible goal, the elimination of the effect of the aid. In this connection they put forward a number of arguments, which have already been dismissed: that the Court of First Instance had not considered the substantive compatibility of the aid, that the decision partly concerned aid that had already been the subject of Decision 91/176 and that the interest had been set at an excessively high rate.

232. Furthermore, the decision was, in the appellants' view, in the nature of a sanction because Falck was in fact liable for the repayment of the aid although it was no longer operating in the steel industry. The decision was therefore incapable of eliminating any distortion of competition. The Court of First Instance had not discussed this point at all.

233. The Commission considers this complaint inadmissible because it was first made before the Court of Justice. It is also unsubstantiated. If the appellants were right, undertakings could avoid the repayment obligation aid simply by changing their holding ratios.

(b) Appraisal

234. The only element that still needs to be considered in greater depth is the fact that the decision has effects on Falck. As it has already been found that the other arguments are untenable, they cannot be advanced in support of the proposition that the decision is indeed in the nature of a sanction.

235. To the extent that it should still be considered here, there are doubts about the admissibility of the plea.

236. Pursuant to Article 113(2) of the Rules of Procedure, the subject-matter of the proceedings before the Court of First Instance may not be changed in the appeal. Although Falck explains in its application for leave to intervene how far it is affected by the decision, ACB points out in general terms in its application that the decision becomes punitive with the change of circumstances and no longer serves the pur-

pose of restoring the conditions of competition. [107] The Court of First Instance saw this primarily as a complaint about the infringement of the principle of proportionality and gave appropriate reasons for rejecting it in paragraph 92 of the contested judgment.

237. Neither of the appellants, however, asserted with sufficient clarity at first instance that, because of its effect on Falck, an undertaking no longer operating in the steel sector, the decision was legally defective. The Court of First Instance cannot therefore be accused of failing to take a position on this aspect. As, however, the appellants have, with this argument, merely expressed in more concrete terms the general complaint that because of the time that has elapsed and the change of circumstances it is no longer possible to restore the conditions of competition through the recovery of the aid, the subject-matter of the dispute has not changed. The complaint is admissible.

238. It is not, however, well founded. The appellants essentially object to an infringement of the principle of proportionality by maintaining that recovery is incapable of restoring competition. The decision itself does not specify from whom the Italian authorities are required to recover the aid. It must be assumed, however, that they will claim it from ACB, the direct beneficiary. ACB is still operating in the steel industry and profiting from the fact that the aid has strengthened its competitive position.

239. As the Court of Justice has ruled in the *Tubemeuse* case, [108] the recovery of illegal aid cannot, in principle, be regarded as a measure that is disproportionate to the objectives of the aid legislation. It thus rejected the argument that recovery would cause disadvantages for other creditors during the conciliation procedure in which the assets of the recipient of the aid were now involved.

240. From this it follows that the indirect financial effects which the recovery of the aid has on third parties do not represent an infringement of the principle of proportionality. They are no more than a minor consequence with no influence on the capacity of the measure to achieve the objective of eliminating the effect the aid has had. The repayment of illegal aid always has an impact on the operating result of the recipient and so possibly on the distribution of dividends to its shareholders. The fact that the losses in the present case have to be borne not by the current group parent company but, because of contractual agreements, by the former parent company is purely coincidental and does not prevent the aid from being recovered from the subsidiary company.

107 — Page 20 under IV(1)(e) of the application at first instance, reproduced in paragraph 78 of the contested judgment.

108 — Judgment in *Tubemeuse* (cited in footnote 41, paragraphs 65 and 66).

241. Thus this plea too should be rejected.

VIII — Costs

242. Under Article 122(1) of the Rules of Procedure, the Court of Justice decides on the costs when an appeal is dismissed.

243. Under Article 69(2) of the Rules of Procedure, which, pursuant to Article 118, is to be applied to appeals, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first sentence of Article 69(4) provides that Member States which intervene in the proceedings are to bear their own costs. The Commission has applied for the appellants to be ordered to pay the costs. As they are unsuccessful in their pleas, they should be ordered to pay the costs of the appeal with the exception of the costs of the Italian Republic, which should bear its own costs.

IX — Conclusion

243. In view of the above considerations it is proposed that judgment be given as follows:

(1) The appeal is dismissed.

(2) The appellants shall bear the costs of the proceedings with the exception of the costs of the Italian Republic.

(3) The Italian Republic shall bear its own costs.